

A Real Estate Practitioner's Guide To Delaware Series LLCs (With Form)

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Although a series LLC offers flexible planning opportunities, many legal and tax issues remain unresolved. So for real estate purposes, it may be prudent to just create separate LLCs instead of a series within the master LLC.

IN 1996, the Delaware Limited Liability Company Act (“DLLC Act”), DEL. CODE ANN. TIT. 6, §8-101, et seq., was amended to permit an LLC agreement to provide for the establishment of designated series of specified property or operations with separate business purposes or investment objectives, such that the debts, liabilities, and obligations relating to a particular series, would be enforceable only against the assets of such series and not against the assets of the LLC generally or the assets of any other series. *See* DEL. CODE ANN. TIT. 6, §18-215(a) and (b). Series LLCs have not been widely used to date, most likely because of the lack of case law interpreting the provisions of the applicable Delaware statute and the scope and validity of these types of entities, and concerns regarding tax, title, and other issues. These concerns will be addressed in this article.

FEATURES OF A DELAWARE SERIES LLC • Each series in a Delaware series LLC is essentially a separate “cell” or “mini-LLC” within the LLC itself, which may have separate members, managers, assets and liabilities, and business interests. The LLC and not the series will be treated as the legal entity under Delaware law. Theoretically, the LLC could avoid the debts of the LLC altogether by allocating all the LLC assets to the various series within the LLC.

Series Protection

The assets of a particular series are protected from enforcement action against the assets of the LLC or any other series under the DLLC Act if:

- The LLC agreement provides for the establishment of one or more series;
- Separate and distinct records are maintained for each series and its assets are accounted for separately from the other assets of the LLC or any other series (and the LLC agreement so provides); and
- Notice of such limitation of liability is set forth in the LLC’s certificate of formation.

See DEL. CODE ANN. TIT. 6, §18-215(b). However, a member or manager may agree to be obligated personally for any or all of the debts, obligations, and liabilities of one or more series. *See* DEL. CODE ANN. TIT. 6, §18-215(c). (Note: subsections (b), (f), (g), (i), (j), (k) and (m) create specific “default rules” that must be carefully reviewed when establishing a Delaware series LLC. *See* Robert R. Nix II and Ronald E. Reynolds, *Letting the Statute be the Deal: The Delaware Statutory LLC Default Rules*, 32 MICH. REAL. PROP. REV. 7 (2005)).

Business Objectives

Consistent with the general LLC goals of freedom of contract and flexibility, the LLC agreement can create numerous series within the LLC to accomplish diverse business objectives. The LLC agreement can provide for the future creation of additional classes or groups of members or managers not previously outstanding within a series, and also can provide for the taking of any action, including the amendment of the LLC agreement, without the vote or approval of any member or manager or class or group of members or managers. *See* DEL. CODE ANN. TIT. 6, §18-215(d).

Voting, Management, And Distributions

The LLC agreement may provide that with respect to a series, certain members may vote separately or with all or any class or group of the members or managers associated with the series, and such voting may be on a per capita, number, financial interest, class, group, or any other basis. *See* DEL. CODE ANN. TIT. 6, §18-215(e). Also, a series may have more than one manager and, except as otherwise may be provided in the LLC agreement, any event that causes a manager to cease to be a manager with respect to a series shall not, in itself, cause such manager to cease to be a manager of the LLC in any other series. *See* DEL. CODE ANN. TIT. 6, §18-215(f). Except as otherwise provided in the LLC agreement, members of a series LLC entitled to receive distributions have the same status and remedies available to creditors of the series. *See* DEL. CODE ANN. TIT. 6, §18-215(g). And an LLC may make a distribution with respect to a member of a series, but the amount that can be so distributed is determined based on the fair value of property of the series that is subject to liability for which the recourse of creditors is limited. *See* DEL. CODE ANN. TIT. 6, §18-215(h).

Continued Association

Furthermore, unless otherwise provided in the LLC agreement, any event that causes a member to cease to be associated with a series will not, in itself, cause such member to cease to be associated with any other series or terminate the member’s interest in the LLC, or cause the termination of the series even if the member was the last surviving member associated with the particular series. *See* DEL. CODE ANN. TIT. 6, §18-215(i).

Assignment

Unless otherwise provided in the LLC agreement, an assignment by a member of a series LLC interest does not, in itself, cause the member to cease to be a member of any other series or the LLC, or cause termination of the series even if the member was the last remaining member of the LLC. *See* DEL. CODE ANN. TIT. 6, §18-215(j). Also, unless otherwise provided in the LLC Agreement, the manager(s) or members approved by more than a 50 percent vote of the members of a series LLC may wind up the affairs of a series. And unless otherwise provided in the LLC agreement, an assignment by a member of a series LLC interest does not, in itself, cause the member to cease to be a member of any other series or the LLC, or cause termination of the series even if the member was the last remaining member of the LLC. *See* DEL. CODE ANN. TIT. 6, §18-215(k).

Termination

Upon application of a manager or member of a series, the Delaware Court of Chancery may decree the termination of the series “whenever it is not reasonably practicable to carry on the business of the series in conformity with a limited liability agreement.” *See* DEL. CODE ANN. TIT. 6, §18-215(l). The DLLC Act also permits a foreign LLC that is properly registered to do business in the State of Delaware to provide, in its LLC agreement, for the establishment of a designated series of members, managers or LLC interests (provided that the application for registration as a foreign LLC so states) and for the limitation of liability for the debts, liabilities, and obligations of a particular series to the assets of that series. *See* DEL. CODE ANN. TIT. 6, §18-215(m).

POTENTIAL BENEFITS • By establishing separate series LLCs to segregate real property (and other) assets and businesses within an LLC for asset-protection purposes, the costs and administrative inefficiencies of establishing separate, multiple LLCs for each property can be avoided. Each specific real property in a multi-state or multi-parcel transaction can be placed into a separate series with liability limited solely to that property. This also helps to minimize initial start-up and formation costs, filing expenses, and state franchise fees and other charges (as well as annual maintenance, administrative, compliance and tax costs) that otherwise would be incurred with respect to the establishment of distinct LLCs for each property and could amount to several thousand dollars.

The LLC operating agreement filed with the State could specifically provide for the establishment of various series with differing members, differing assets, and separate liabilities, with separate “sharing ratios” with respect to the percentages in which the members of a particular series participate and share in certain items, such as excess cash distributions. Separate functions customarily performed in connection with a commercial real estate, such as management and leasing services on the one hand and development activities on the other hand, could be segregated and performed by separate series within an LLC. The operating agreement also could provide that a member of a particular series may be a member of another series. It could further provide for the creation of additional LLC interests and the assignment or disposition of existing series LLC interests. But the operating agreement should make clear that each series will own separate assets, have separate rights and powers as set forth in the operating agreement, and have separate investment or business purposes.

POTENTIAL RISKS AND AREAS OF CONCERN • The statutory scheme created by §18-215 of the DLLC Act radically changes how an operating entity can protect its assets from creditors. Each of the series of assets in a series LLC can operate independently of the LLC in general and any other series, and avoid their liabilities. Assuming compliance with appropriate statutory and contractual requirements, the principals of an LLC should be able to freely transfer assets and ownership interests from one series to another. However, there are still potential risks—and uncertainty—with respect to such issues as tort-liability protection, fiduciary duties, avoidance of sales taxes and documentary transfer taxes, and property reassessments.

Unresolved Issues

The following constitute some of the unresolved issues raised by the creation of series within an LLC:

- May an asset or group of assets be used in connection with the business activities of two or more series within an LLC? Can an allocation of values and liabilities be established, and if so on what basis? (For example, what if the activities of several series are conducted from the same premises?)
- Must actual title to an asset or assets of a particular series be held in the name of the series or is it permissible simply to designate the particular series assets in the books and records of the LLC?

- Since the only required notice of limitation of liability of the series appears in the LLC's certificate of formation filed with the Delaware Secretary of State's office, creditors doing business with the LLC may have no actual knowledge of such limited liability unless they are so informed by members or managers of the LLC (at some level, such members and managers may have an affirmative duty not to deliberately conceal such liability limitations or mislead creditors; courts could also, under appropriate circumstances, "pierce the corporate veil" of a series LLC and hold other series of the master LLC liable for the actions of a series LLC or its members). Potential creditors must therefore carefully review the LLC's filed certificate of formation, and perhaps require that a specified manager or member (or managers or members) personally guarantee the series' debt to the creditor;
- The limitation-of-liability provisions of a series LLC may be challenged under the laws of a foreign jurisdiction if the LLC has operations outside Delaware (e.g., while a state without a series LLC statute may apply Delaware law regarding series LLCs with respect to internal matters among members, it may elect to apply its own laws as to creditors and other third parties who are not parties to the series LLC documentation and did not agree to be bound thereby or by Delaware law);
- Does the creation of more than one series within an LLC constitute a "partnership" for tax purposes? Based on separate allocations of sharing ratios and economic benefits and risks by two or more individuals or entities among separate series, the IRS may argue that there are "two tax partnerships" rather than a "single tax partnership";
- Series LLCs may be established in an attempt to avoid sales taxes, which may lead to challenges by state taxing authorities. For example, California imposes a tax on the gross receipts of an LLC (capped at \$11,790 per year). *See* CAL. REV. & T. CODE §17942. California also imposes an \$800 minimum income tax on each LLC. *See* CAL. REV. & T. CODE § 17941(a); CAL. REV. & T. CODE § 23153(d)(1);

- In connection with sales and purchases of property (including like-kind exchanges under § 1031 of the Internal Revenue Code), tax planners may attempt to avoid unfavorable income-tax, transfer-tax, and sales-tax consequences by transferring the property and the purchase price (or separate properties that otherwise do not meet the time or type-of-property constraints of IRC § 1031) to a single-member LLC. The LLC would then establish two series, one of which contains as its sole asset the property contributed by the seller (of which the buyer becomes the sole member or the holder of a 99 percent interest), and the other of which includes as its sole asset the purchase price or the otherwise non-complying “like-kind” property (of which the seller or exchanger becomes the sole member or the holder of a 99 percent interest). Although some tax planners may argue that such a transaction is merely a permissible contribution of assets to an LLC that should be taxable as a “single partnership” with special allocations, others may argue that the transaction is in substance a sale or exchange and is subject to applicable income and sales taxes. With respect to taxes on the sale or exchange of real property, many jurisdictions exempt transfers to a wholly owned LLC. However, state taxing authorities may seek to challenge such transfers (whether or not transfers to LLCs are statutorily permissible), or else act to legislatively close the perceived “loophole” by amending state statutes to tax transfers into and out of series LLCs. *See Terence Floyd Cuff, Series LLCs and the Abolition of the Tax System*, 2 BUS. ENTITIES 26 (Jan./Feb. 2000);

- Will the limited-liability provisions with respect to each series protect the series (or the LLC) with respect to environmental contamination of series or LLC property?

- The interplay between the federal Bankruptcy Code and Delaware corporate and LLC law may create some interesting issues. For example, will a series be eligible (apart from the LLC) to file (or have filed against it) a bankruptcy petition? Will LLC series be subject to separate claims classification or entitled to vote separately on plan confirmation? Will a bankruptcy court substantively consolidate an insolvent series LLC with one or more other series LLCs (especially if they share all or some of the same members or do not observe the requirement of separate assets and/or books and records) or with the master LLC? Will fraudulent-conveyance issues arise with respect to inter-series guarantees? Will section 1111(b) of the Bankruptcy Code (which allows a secured creditor with a nonrecourse loan to elect to treat its claim as being with recourse against the debtor) apply to creditors whose recourse is limited to the assets of a particular series? Will multiple committees (and consultants and professionals) be required for LLCs with more than one series? Will separate counsel be required for each series (as opposed to the LLC’s counsel) to protect the separate interests of each series?

Just Create Separate LLCs?

Although the use of a series LLC appears to offer unlimited planning opportunities, many legal and tax issues remain unresolved. In light of the foregoing unresolved issues, unless there is some overriding business purpose or cost justification, it may be prudent to just create separate LLCs instead of separate series within the master LLC for real-estate ownership purposes.

There is not as yet an established body of case law regarding these issues, and the attorneys, consultants, and investors who establish series LLCs should proceed cautiously and conservatively. The principals of the LLC should obtain expert tax and legal advice when forming one or more series within the LLC as provided in the DLLC Act. With respect to real estate investments, the segregation of assets may be problematical when the LLC is the sole title-holder of record. Although separate mortgages with respect to each series could be recorded, title would necessarily remain in the LLC as the recognized legal entity. Perhaps the loan documents could limit recourse with respect to a particular property to a particular series. However, with respect to “carveouts” to nonrecourse provisions in the loan documents as to specific “bad acts” of the LLC borrower or a particular series, the lender should require that the LLC agreement be amended to specifically provide for the personal liability of a designated member or manager (or members or managers) for such carveouts.

REAL ESTATE TAX AND INCOME TAX ISSUES • As one commentator has noted, “[a] significant benefit of the series LLC is the ability to transfer members, change membership ownership interests and transfer assets without resorting to external transfers, conversions, and mergers. Such internal transfers would avoid...transfer, conversion and merger issues...including transfer tax and real property tax reassessments. The series LLC is an intriguing device and its evolution should be carefully monitored for application to real estate investments.” Robert R. Nix II, *Capturing the Benefits of the Limited Liability Company—Use of Transfers, Conversions, Mergers and Legislated Enhancements*, the ACREL Papers, The American College of Real Estate Lawyers (2000), available at www.acrel.org/Documents/Seminars/a002165._pdf. Craig A. Gerson, in his article entitled *Memorandum: Taxing Series LLCs*, 45 TAX MGMT. MEM. 75 (Mar. 8, 2004) states that “one might expect to see the corporate landscape dotted with innumerable new series LLCs. Yet, they remain relatively uncommon. One likely explanation for this apparent incongruity is the lack of certainty on how series LLCs will be treated from a U.S. federal income tax perspective.” Mr. Gerson also notes that “[t]he lack of a clear standard federal tax treatment for series LLCs with multiple members has hindered the adoption of this useful business form. Treating each series as a separate entity appears to be appropriate under the entity classification regulations. However, such treatment is less clear where a series does not function as a standalone business. Also, complications arise when the multi-member series LLC is viewed in conjunction with the basic rules of Subchapter K.” See also Steven Frost, *Musings on Series LLCs*, Passthrough Finance Techniques Corner, JOURNAL OF PASSTHROUGH ENTITIES, May-June 2007 (CCH), at 13 (describing series LLCs in Delaware and Illinois, and analyzing possible tax consequences and treatment of series LLCs).

TITLE INSURANCE ISSUES • A separate series within an LLC cannot hold title in its own name because it is not a separate legal entity for ownership purposes under the Delaware statute, i.e., the statutory language regarding series LLCs does not speak in terms of “separate ownership” but rather in terms of segregating assets and liabilities (and management) within the LLC. (See DEL. CODE ANN. TIT. 6, §18-215(a), which provides that separate series may be established with respect to “*specified property or obligations of the limited liability company*” (emphasis added)). See *GxG Management, LLC v. Young Bros. and Co., Inc.*, Slip Copy, 2007 WL 17028782 (D. Me. June 11, 2007), at *2 (court clarified prior judgment, based on findings of fact and conclusions of law, entered February 22, 2007 (Docket Nos. 71 & 72), by acknowledging that it had misspoken when it referred to a series of a Delaware LLC as a separate entity; stating that “I do not find that Series B was an entity at all, but merely a ‘series interest’ of GxG Management LLC . . . GxG Management is the appropriate party to pursue the claims raised in this case, both tort and contract”).

Separate Charging Of Liabilities

This provides for separate “charging” of liabilities within specific series if the operating agreement and certificate of formation for the “master” LLC so provide, separate records are kept, and separate accounts are maintained for each series. Theoretically, all the assets of an LLC could be put into one (or more) series, and all the liabilities of an LLC into another series (or more than one series). However, there is no case law yet in Delaware on series LLCs, and there could be a “substantive consolidation” claim made, or the court could undo the arrangement if there is no valid business reason. Also, because it is unclear as to if (and to the extent) other states will uphold the validity of the Delaware series structure, it would be prudent to be conservative on title issues involving series LLCs. The structure also may be used in an attempt to avoid real property transfer taxes, by simply shifting ownership of LLC assets to separate series within the LLCs, which have different members and management. But the efficacy of this strategy may be problematic, because the Delaware transfer-tax statute applies to any transfer of more than 75 percent of the beneficial interests in an entity. (Note: The transfer-tax statutes of other states that permit series LLCs (see below) should also be consulted, as several states now tax certain types of equity or related transfers.) Another unresolved issue is whether state judgment liens, federal tax liens, and other involuntary liens affecting the property of a particular series can attach to the property or assets of another series or the “master” LLC.

Master LLC Should Be The Title Holder

The Delaware LLC operating agreement would establish the authority of the manager (or designated member(s)) of a particular series to bind the master LLC (subject to applicable series liability limitations) and execute documents (including deeds, mortgages, and the like) on its behalf. But the “master” LLC should be the title holder (or mortgagor), perhaps with the designation, “held as property of _____, a series of _____ LLC,” or “held for the benefit of _____, a series of _____ LLC,” or “____ LLC with respect to its Series No. ____.” (See discussion below regarding recent amendments to § 18-215 of the DLLC Act.) Of course, when dealing with the Delaware series LLC structure, careful attention must be paid to the certificate of formation and the operating agreement, and the ability to shift assets and liabilities among different series. A form of series LLC operating agreement is attached hereto as the Appendix to this article. (This form would be used by a development company to give individual employees “pieces” of deals through use of a single LLC rather than multiple project-specific LLCs.)

ADOPTION OF SERIES LLC STATUTES IN OTHER STATES • Other states have become interested in enacting (or already have enacted) legislation to amend their statutes to permit the formation of series within the LLC. For example, in Illinois the Secretary of State’s Business Law Advisory Committee studied the concept of series LLCs for three years, and a draft bill amending the Illinois LLC Act to permit formation of series LLCs was submitted to the 2005 session of the Illinois General Assembly. The bill, S.B. 0504 (2005), which was enacted into law on August 16, 2005, amends the Illinois Limited Liability Company Act, 805 ILCS 180/1-1 et seq., by adding a new section, 805 ILCS 180/37-40 . This new section provides that an LLC’s operating agreement may establish a designated series of members, managers or LLC interests having separate rights, powers, or duties with respect to specified property or obligations of the LLC or profits and losses associated with specified property or obligations, and to the extent provided in the operating agreement, any such series may have a separate business purpose or investment objective. It also establishes the procedures for management, operation, and dissolution of a series, and further specifies the applicable fees for filing articles of organization, annual reports, and certificates of designation for a series of a limited liability company. The Illinois legislation, though similar in most respects to the series LLC provisions in the DLLC Act, differs somewhat in that unlike Delaware, which does not require the umbrella LLC to file any document with the Secretary of State whenever it chooses to add a new series, it requires the umbrella LLC to file a separate “certificate of designation” to establish the existence of an individual series within the company. (The initial notice of the limitation on liabilities of a series in the LLC’s certificate of formation is “sufficient for all purposes” whether or not the LLC has established any series at the time the certificate is filed. *See* DEL. CODE ANN. TIT. 6, §18-215(b)). The same certificate of designation could also be used to terminate the series; thus the public would know if they were dealing with a series as opposed to the umbrella LLC and the Secretary of State’s office would always have current documents revealing the ownership of the series. *See* Lin Hanson, *What Series LLCs Can Do For You*, 92 ILL B.J. 648 (Dec. 2004). (Note: the Delaware Division of Corporations has developed new procedures and data-entry fields to identify series LLCs and distinguish them from other LLC filings, which makes it possible, with respect to filings after July 19, 2005, to request and obtain a certificate of good standing for a specific series LLC, as well as a certified copy of a conversion to a series LLC or the filing history for a specific series LLC). The new Illinois legislation also provides that each series shall (to the extent set forth in the articles of organization) be treated as a separate entity and “may, in its own name, contract, hold title to assets, grant security interests, sue and be sued and otherwise conduct business and exercise the powers of a limited liability company under this Act.” *Id.* at sec. 37/40(B). The new Illinois legislation states, however, that “[t]he name of the series with limited liability must contain the entire name of the limited liability company and be distinguishable from the names of the other series set forth in the articles of organization.” *Id.* at sec. 37/40(C). Based on this provision, it would appear that while a Delaware series would hold title in the name of the “master” LLC with the following type of designation: “held [as property of] [for the benefit of]

_____, a series of _____ LLC,” or “_____ LLC with respect to its Series No. _____,” in Illinois the series perhaps could hold title in its own name with the following type of designation: “as series _____ of the _____ LLC.” See Lin Hanson, *What Series LLCs Can Do For You*, 92 ILL. B.J. 648 (Dec. 2004).

At least five other states -- Iowa, Nevada, Oklahoma, Tennessee, and Utah -- have enacted revisions to their respective LLC statutes to specifically authorize the formation of series LLCs. See IOWA CODE § 490A. 305; NEV. REV. STAT. § 86.296; OKLA. STAT. TIT. 18, §2054.4; TCA § 48-249-309; and UCA 1953 § 48-2c-606. These statutes contain language similar to the series LLC provisions of the DLLC Act and the proposed Illinois statutory revisions described above (except for the “certificate of designation” requirement in the proposed Illinois legislation), and permit a foreign LLC that provides for the designation of series to register to do business in the state (subject to full disclosure of such fact in the application for registration as a foreign LLC). At least three other states, Minnesota, North Dakota and Wisconsin, provide for or mention a “series” of ownership interests in their LLC statutes but do not provide for the special characteristics of series LLCs set forth in the Delaware or Illinois statutes (or in the other five state statutes described above). See MINN. STAT. ANN. §322 B.03, subd. 44; N.D.C.C. §10-32-02.55; and WIS. STAT. § 183.0504.

In 2007 the Delaware legislature amended the DLLC Act (“2007 Act”). The 2007 Act was approved by the Delaware Senate and the Delaware House of Representatives on July 10, 2007 (2007 Delaware Laws Ch. 105 (S.B. 96)), and became effective on August 1, 2007. The Act contains certain provisions relating to series of LLCs. For example, it redesignates existing subsections and adds a new subsection (c) to §18-215 of the DLLC Act, so as to confirm the broad purposes and powers permitted of a series established under § 18-215(b). Section 18-215(b) of the DLLC Act now states (in relevant part) that “Assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise,” and §18-215(c) of the DLLC Act now states that “Unless otherwise provided in a limited liability company agreement, a series established in accordance with subsection (b) of this section shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.” But the author has been advised that, because a series of an LLC is not a separate legal entity under Delaware law, experienced Delaware counsel are still recommending to their clients that contracts and other documents be executed by the “master” LLC with respect to that series, e.g., “ABC LLC with respect to its Series No. 1.”

CONCLUSION • As noted above, significant benefits of a Delaware series LLC include the following:

- The ability to freely transfer membership interests among series;

- The ability to transfer assets without resorting to external transfers, conversions and mergers;
- The ability to segregate particular classes of assets; and
- The ability to limit liability to third parties to the assets of particular series.

Such internal transfers may avoid the payment of real property transfer taxes and reassessment of the real property titled in the LLC for property tax purposes, but this is far from certain. Case law with respect to series LLCs is very limited, and most states (i.e., those other than Delaware, Illinois, Iowa, Nevada, Oklahoma, Tennessee and Utah) are still wrestling with the question of whether they should enact their own legislation to define, describe, and regulate series LLCs. It is also virtually certain that the applicable taxing authorities will not allow transfers of assets (real property or otherwise) within and among series LLCs to remain untaxed without a challenge. Somewhat surprisingly, series LLCs (as adopted in Delaware and the six other states mentioned above) have not been widely utilized in real estate transactions, most likely because of the legal uncertainties that still exist—especially in connection with multi-state transactions—and the existence of alternative forms of real estate ownership and transfer that, in many types of transactions, accomplish the same basic goals. Real estate practitioners should carefully monitor the developing case and statutory law in this area, which will largely determine whether this form of LLC becomes more prevalent.

APPENDIX

LIMITED LIABILITY COMPANY AGREEMENT OF

_____, LLC

This Limited Liability Company Agreement, as amended from time to time, and including all Supplements (as defined below) (this “**Agreement**”) is entered into as of _____, by _____, (“**Development**”) as a member and the Company Manager, _____ (“**Management**”) as a Member and the initial Management Series Manager, and _____ (“_____”) and _____ (“_____”) as Members.

ARTICLE 1

DEFINITIONS

Section 1.1 **Definitions.** As used in this Agreement, the following terms shall have the following meanings:

“**Accounting Policies and Procedures**” means the policies and procedures adopted from time to time by the Company Manager for preparation of Company financial statements, financial projections and other accounting reports.

“**Act**” means the Delaware Limited Liability Company Act, as it may be amended from time to time.

“**Adverse Consequences**” means all actions, suits, proceedings, hearings, investigations, charges, complaints, demands, injunctions, judgments, orders, decrees, rulings, damages, dues, penalties, fines, costs, amounts paid in settlement, liabilities, obligations, liens, losses, expenses, and fees, including court costs and reasonable attorney’s fees and expenses.

“**Affiliate**” means, with respect to a Person, another Person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Person in question. The term “**control**” as used in the preceding sentence means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of the controlled Person.

“**Business Day**” means any day other than Saturday, Sunday, or other day on which commercial banks in _____ are authorized or required to close under the laws of the State of _____.

“**Capital Contribution**” means, with respect to each Member, the amount of cash and the initial Gross Asset Value of any property (net of liabilities assumed by the Company resulting from such contribution and liabilities to which the property is subject) contributed to the Company by that Member.

“**Cause**” means, in connection with the retirement of a Member, any of the following reasons: (i) the Member’s disregard of his duties hereunder (as Member, Manager, or as an Officer) of a material nature; (ii) the Member’s violation (as Member, Manager, or an Officer) of any material covenant under this Agreement; (iii) the engagement by the Member in dishonesty of a material nature that relates to the Company, an Investment Entity, or their respective Affiliates; or (iv) the engagement by the Member in criminal conduct, other than minor infractions and traffic violations; provided that, in the cases described in clauses (i) and (ii) preceding, the matter is not cured to the Company Manager’s reasonable satisfaction within ten (10) days after the Company Manager shall have notified such Member thereof; provided, however, if the matter cannot be cured within ten (10) days, the Member shall have a reasonable period of time to cure the matter, not to exceed thirty (30) days, if the Member commences to cure the matter within the initial ten (10) day period and diligently pursues the cure to completion.

“**Company**” means _____, LLC, a Delaware limited liability company.

“**Company Manager**” means Development, and each Person herein designated as “Company Manager” in accordance with this Agreement, in such Person’s capacity as a “manager” of the Company within the meaning of the Act, until such Person ceases to be Company Manager.

“**Fiscal Year**” means the date hereof through December 31, 200____, and each calendar year thereafter.

“**Incapacity**” means, with respect to a Member that is an individual, (i) that as a result of the physical or mental disability of such Member, such Member is unable to direct its affairs for a period in excess of six (6) consecutive calendar months, as reasonably determined by the Company Manager (which determination shall be based on the advice and opinion of a competent independent physician), or (ii) a final judgment by a court of competent jurisdiction has been rendered adjudicating such Member incompetent to manage such Member’s estate or property.

“**including**” means including, without limitation.

“**Investment**” means any debt or equity (or debt with equity or any convertible or exchangeable instrument) investment made by (i) an Investment Entity or (ii) the Company or a Series, and shall include any “carried” or “promote” interest or rights to income, gain, or profits granted to the Company, to a particular Series, or to an Investment Entity, directly or indirectly, in a Person, regardless of whether the Company, the Series, or the Investment Entity (as the case may be) is required to contribute equity or loan proceeds to such Person.

“**Investment Entity**” means any Person in which the Company or a Series has an Investment.

“**Management Series**” means the Series established as herein provided to pursue management activities in the Region.

“Management Series Manager” means Management and each Person hereafter designated as a Management Series Manager in accordance with this Agreement, until such Person ceases to be a Management Series Manager.

“Manager” means the Company Manager, the Management Series Manager, the Regional Development Series Manager, each Project Development Series Manager, and each Person hereafter designated as such a Manager in accordance with this Agreement, until such Person ceases to be such a Manager of the Company.

“Members” means Development, Management, _____, _____, and each Person from time to time admitted as a member of the Company in accordance with this Agreement in such Person’s capacity as a member of the Company within the meaning of the Act, until such Person ceases to be a member of the Company. Each Member may be a member with respect to one or more Series as hereafter provided.

“Membership Interests” means all of the rights and interests of whatsoever nature of the Members in the Company, including the right to participate in management to the extent herein expressly provided, to receive distributions of funds, and to receive allocations of income, gain, loss, deduction, and credit. A Membership Interest may be associated with a particular Series of the Company as hereafter provided.

“Person” means an individual or entity.

“Preferred Return” means an amount that accrues at a per annum rate of ___ percent (___%) on all of a Member’s Capital Contributions. The Preferred Return shall accrue on all Capital Contributions from the date such contributions are made until they are returned to the contributing Member. The Preferred Return shall be cumulative and shall compound annually.

“Project Development Series” means a Series established as hereinafter provided to pursue development of a discrete real estate project in the Region.

“Project Development Series Manager” means each Person hereafter designated as a Manager of a particular Project Development Series in accordance with this Agreement, until such Person ceases to be such a Project Development Series Manager.

“Region” shall mean _____. Company Manager shall consult regularly with the other Members as to geographic matters such as potential overlaps or the addition of additional cities or areas to the Region.

“Regional Development Series” means the Series established as herein provided to oversee, and participate in, development activities in the Region. [It is contemplated that the Regional Development Series shall be a Member of each Project Development Series.]

“Regional Development Series Manager” means _____, and each Person hereafter designated as the Regional Development Series Manager in accordance with this Agreement, until such Person ceases to be a Regional Development Series Manager.

“**Reserve Amount**” means the amount from time to time established by the Company Manager as a reserve to meet the reasonably anticipated working capital needs of the Company and the Series.

“**Series**” means each separate series of limited liability company interests in the Company established as provided in Articles 2 and 3 of this Agreement and in accordance with Section 18-215 of the Act. The Company may establish various Series with differing Members, differing assets, and separate liabilities as more specifically provided in Article 3.

“**Series Manager**” means the Management Series Manager, the Regional Development Series Manager, or a Project Development Series Manager, as applicable.

“**Series Member**” means a Member with respect to a particular Series established as herein provided.

“**Sharing Ratios**” means the percentages in which the Members participate in, and bear, certain items. Sharing Ratios shall be established separately for each Series and for each Member therein, with each Series Member having the Series Sharing Ratio with respect to such Series as established herein or in the Supplement establishing such Series.

The initial Management Series Sharing Ratios (and the initial Members with respect to the Management Series) are as follows:

Management	_____ %
_____	_____ %
	<u>100%</u>

The initial Regional Development Series Sharing Ratios (and the initial Members with respect to the Regional Development Series) are as follows:

Development	_____ %
_____	_____ %
	<u>100%</u>

“**Supplement**” means a supplement to this Agreement establishing a Series, substantially in the form attached as Schedule 3.1, executed by the Company Manager and, where required hereunder, the Series Members of the applicable Series. Schedule 3.1 is the general form for establishment of Project Development Series hereunder, and is subject to modification as approved by the Company Manager to establish Project Development Series or other types of Series, to admit new Members to a Series, or to modify the provisions pertaining to an existing Series. Each Supplement is hereby incorporated into, and made a part of, this Agreement.

ARTICLE 2

ORGANIZATIONAL MATTERS; PURPOSE; TERM

Section 2.1 **Formation of Company.** The Company has been organized as a Delaware limited liability company by the filing of a certificate of formation (the “**Certificate**”) in the office of Delaware Secretary of State by _____, as an “authorized person” within the meaning of the Act.

Section 2.2 **Name.** The name of the Company shall be _____, LLC, and all Company business must be conducted in that name or such other name as the Company Manager may approve.

Section 2.3 **Registered Office; Registered Agent; Principal Office.** The registered office and the registered agent of the Company in the State of Delaware shall be as specified in the Certificate or as designated by the Company Manager. The principal office of the Company shall be at _____, or at such other location as the Company Manager may approve.

Section 2.4 **Foreign Qualification.** Before the Company conducts business in any jurisdiction other than Delaware, the President shall cause the Company to comply with all requirements necessary to qualify the Company as a foreign limited liability company in that jurisdiction. At the request of the President, each Member shall execute, acknowledge, swear to, and deliver all certificates and other instruments conforming with this Agreement that are necessary or appropriate to qualify, continue, or terminate the Company as a foreign limited liability company in all jurisdictions in which the Company may conduct business. The President shall also cause the Company to make such filings in connection with the foregoing so as to assure, to the maximum extent possible, the separateness of each Series (including the separateness of the liabilities associated with each Series) as herein contemplated.

Section 2.5 **Purpose and Character of Business.** The Company shall have the power (whether conducted directly or indirectly through any type of Investment in any type of Person or through Series) to engage in any activity permitted by law related or complementary to the following activities and approved by the Company Manager: acquiring, owning, holding, maintaining, improving, constructing, developing, operating, managing, leasing, selling, exchanging and otherwise dealing with real property; the provision of management, leasing, brokerage, development, construction, construction management or other consulting services in respect of real estate; any other business or activity approved by the Company Manager, and the financing of any of the foregoing activities. Without limiting the generality of the foregoing, (a) Investments may take the form of acquisitions of interests in general partnerships, limited partnerships, joint ventures, corporations, syndicates, associations, business trusts, limited liability companies, undivided interests in real property or co-tenancies in real property, sale-leaseback transactions, or the direct acquisition of investment assets; (b) the Company may acquire interests in property subject to, or by assuming, the liens, encumbrances and other title exceptions which affect the property; and (c) the Company may guarantee debts or obligations of any other Person, pledge, mortgage, encumber and grant security interests in Company property, and buy, sell, lease and deal in services, personal property and real property.

Section 2.6 **Term.** The Company shall commence on the effective date of the Certificate and shall have perpetual existence, unless sooner dissolved as herein provided.

Section 2.7 **No State Law Partnership.** The Company shall not be a partnership or joint venture under any state or federal law, and no Member or Manager shall be a partner or joint venturer of any other Member or Manager for any purposes, other than under the Code and other applicable tax laws, and this Agreement may not be construed otherwise.

Section 2.8 **Series of Members and Membership Interests.**

(a) The Company, with the Company Manager's approval, may establish separate Series, as contemplated by Section 18-215 of the Act. The Members currently contemplate that the Company's business shall include (i) the provision of management and leasing services in the Region, which activity shall be conducted through the Management Series, and (ii) the pursuit and undertaking of development activities in the Region, which shall be conducted through the Regional Development Series and through separate Project Development Series established for each particular development, unless the Company Manager otherwise approves. [The Members currently contemplate that the Regional Development Series will, in turn, be a Member of each Project Development Series.] Each Series may have separate Members, and each Series (i) will own separate assets, (ii) will have the separate rights and powers as herein provided, and (iii) may have separate investment or business purposes. The debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing from time to time with respect to a particular Series shall be enforceable against the assets of such Series only, and not against the assets of any other Series or of the Company generally, and, unless the Company Manager agrees otherwise, none of the debts, liabilities, obligations and expenses incurred, contracted for, or otherwise existing with respect to the Company generally or any other Series shall be enforceable against the assets of such Series. The Company shall file a certificate complying with the Act so limiting the liability of each Series as provided above.

(b) Upon admission to the Company, each Member may be designated as a Series Member of a particular Series. A Member may be a member of more than one Series. Each Member shall have the rights, duties and powers as herein provided with respect to each Series of which it is a member. Members of a Series will be designated by the Company Manager. No Member shall have any right to vote on any matter pertaining to a particular Series, or with respect to the Company generally, except as herein expressly provided.

(c) The Company shall be generally managed by the Company Manager and, as provided in Article 4, the President, and each Series shall be managed by the Series Manager therefor, who shall have, with respect to the particular Series in question, the powers herein provided to the President. Each Series Manager shall at all times, however, be subject to the direction of the Company Manager and the President.

ARTICLE 3

MEMBERSHIP SERIES; DISPOSITIONS OF INTERESTS

Section 3.1 Membership Series.

(a) The Company may from time to time, with the Company Manager's prior approval, establish Series and admit to such Series as Series Members such Persons as the Company Manager approves. No other Member shall have any right to vote on the establishment of any new Series or the admission of any Person as a Series Member of any new Series.

(a) **General Restriction.** A Member may not make an assignment, transfer, or other disposition (voluntarily, involuntarily, or by operation of law) (a “**Transfer**”) of all or any portion of its Membership Interest, nor pledge, mortgage, hypothecate, grant a security interest in, or otherwise encumber (an “**Encumbrance**”) all or any portion of its Membership Interest, except with the consent of the Company Manager, which it may grant or withhold in its sole and absolute discretion. Any attempted Transfer of all or any portion of a Membership Interest, other than in strict accordance with this Section 3.2, shall be void. A Person to whom a Membership Interest is Transferred may be admitted to the Company as a Member only as provided in this Section 3.2 with the consent of the Company Manager, which may be given or withheld in its sole and absolute discretion. In connection with any Transfer of a Membership Interest or any portion thereof and any admission of an assignee as a Member, the Member making such Transfer and the assignee shall furnish the Company Manager with such documents regarding the Transfer as it may request (in form and substance satisfactory to the Company Manager), including a copy of the Transfer instrument, a ratification by the assignee of this Agreement (if the assignee is to be admitted as a Member), and a legal opinion that the Transfer complies with applicable federal and state securities laws and will not cause the Company to be terminated under Section 708 of the Code.

(b) **Permitted Transfers.** [specify exceptions to 3.2(a)]

Section 3.3 **Conflicts of Interest.** [insert restrictions on other activities]

Section 3.4 **Resignation and Removal; Vesting and Conversion of Certain Membership Interests.** [insert provisions on withdrawal, removal and vesting of membership interests]

Section 3.5 **Creation of Additional Membership Interests.** In addition to the establishment of Series pursuant to Section 3.1, additional Membership Interests may be created and issued to existing Members or to other Persons, and such other Persons may be admitted to the Company as Members in one or more classes, with the approval of the Company Manager on such terms and conditions as the Company Manager may approve at the time of admission. The creation of new Membership Interests, the admission of any new Members, or the creation of any new class or group of Members in accordance with this Agreement may (i) result in the dilution of the Sharing Ratios of existing Members, and (ii) be reflected as an amendment to this Agreement or a Supplement which shall be valid if executed by the Company Manager and the new Member. Any such new Member that is a married individual shall also, as a condition to becoming a Member, cause his or her spouse to execute a Consent.

Section 3.6 **Information.** In addition to the other rights specifically set forth in this Agreement, each Member is entitled to the following information under the circumstances and conditions set forth in the Act: (1) true and full information regarding the status of the business and financial condition of each Series of which it is a Series Member; (2) promptly after becoming available, a copy of the Company's federal, state and local income tax returns for each year applicable to each Series of which it is a Series Member; (3) a current list of the name and last known business, residence or mailing address of each Member and Manager; (4) a copy of this Agreement and only those Supplements applicable to each Series of which it is a Series Member, the Company's certificate of formation, and all amendments to such documents; (5) true and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each Member and which each Member has agreed to contribute in the future, and the date on which each became a Member, to the extent applicable to each Series of which it is a Series Member; and (6) other information regarding the affairs of the Company to which that Member is entitled pursuant to Section 18-305 of the Act (including all Company books and records) to the extent applicable to each Series of which it is a Series Member. To the maximum extent permitted by law, neither the Company nor any Manager shall be obligated to provide any information to any Member regarding a Series of which it is not a Series Member, and each Member waives any rights it may have to such information.

Section 3.7 **Liability to Third Parties.** Except as required by the Act, no Member, solely by reason of being a member, shall be liable for the debts, obligations, or liabilities of the Company.

Section 3.8 **Waiver of Fiduciary Duties.** To the maximum extent permitted by law, each Member absolutely and irrevocably waives any and all claims, actions, causes of action, loss, damage and expense including any and all attorneys' fees and other costs of enforcement arising out of or in connection with any breach of any fiduciary duty by any other Member or Manager or any of its Affiliates in the nature of actions taken or omitted by any such other Persons, which actions or omissions would otherwise constitute the breach of any fiduciary duty owed to the Members (or any of them), except a breach of any specific term of this Agreement. It is the express intent of the Members that each Member and Manager and each and all of their Affiliates shall be and hereby are relieved of any and all fiduciary duties which might otherwise arise out of or in connection with this Agreement to the Members or any of them.

ARTICLE 4

MANAGEMENT OF COMPANY AND SERIES

Section 4.1 **Management of Company and Series.**

(a) The Company Manager shall have complete and exclusive authority to manage the affairs of the Company and to make all decisions with regard thereto, but the day-to-day affairs of the Company shall be directed by the President who shall be fully empowered and authorized to implement the terms and provisions of each approved Business Plan and Annual Budget on behalf of the Company, subject to the limitations set forth in Section 4.1(d). The Members shall have no authority to bind the Company.

(b) The day to day affairs of each Series shall be directed by the Series Manager therefor, but each Series Manager shall be subject to the overriding authority of the President and Company Manager to direct the management of the affairs of each Series.

(c) Not later than November 1 of each year, the President shall deliver to the Company Manager a detailed proposed business plan (the “**Business Plan**”) for the Company’s next succeeding fiscal year, which shall include the proposed budget for such year (the “**Annual Budget**”). The Business Plan and Annual Budget shall contain such other information as the President wishes to include and shall contain such information as the Company Manager may request. The Company Manager will review the proposed Annual Budget and Business Plan, and subject to required revisions, approve the same for the next succeeding fiscal year no later than December 31 of each year. The Business Plan and Annual Budget shall include projected revenues, expenses for the year in question, projected investment activities and such other matters as the President or the Company Manager may deem appropriate. If the Annual Budget provides for a contingency or similar line item, then unless otherwise specifically provided to the contrary therein, the President shall be empowered to expend the amount set forth in such line item for Company obligations. If the Business Plan is not approved by the date set forth above, then: (i) any items or portions thereof that have been approved will become operative immediately; and (ii) with respect to the Annual Budget, the President may expend, in respect of noncapital or recurring expenses in any quarter of the then current calendar year, an amount equal to the budget amount for the corresponding quarter of the immediately preceding calendar year, as set forth on the last approved Annual Budget after giving effect to any material changes to the Company or its properties during the prior year; however, if any contract approved as a part of any prior approved Annual Budget or Business Plan provides for automatic increases in costs thereunder after the beginning of the then current calendar year, then the President may expend the amount of that increase.

(d) Following approval of the Business Plan and Annual Budget, the President shall be authorized to take the actions, incur obligations and make the expenditures therein expressly set forth. The President shall not have any authority or power to take any action on behalf of the Company that would constitute a Major Decision (as defined below), unless the same is specifically contemplated by an approved Business Plan or Annual Budget, or has otherwise been expressly approved in writing by the Company Manager. As used herein, the term “**Major Decision**” shall include the following:

- (1) causing the Company or a Series to enter into any agreement which would subject the Company or a Series or its assets to any recourse liability for borrowings, or for capital contributions to any Person;
- (2) causing the Company or a Series to grant any interests in the assets, profit, and income of the Company or a Series;
- (3) causing a dissolution of the Company or any Series;
- (4) regarding Company and Series assets, any sale, transfer, exchange, mortgage, financing, hypothecation or encumbrance of all or any part thereof, or any modification of the terms of the foregoing;
- (5) regarding Company and Series financial affairs, (A) determination of major accounting policies including selection of accounting methods and making various decisions regarding treatment and allocation of transactions for federal and state income, franchise or other tax purposes (B) determination of the terms and conditions of all borrowings of the Company or a Series and the identity of the lender thereof, and (C) the making of any expenditure or incurrence of any obligation by or for the Company or a Series in excess of the lesser of (i) ___ percent (___%) in excess of, or (ii) \$_____ in excess of, the amount set forth on the applicable Approved Budget therefor;
- (6) regarding any Capital Contributions;
- (7) regarding Company and Series operations, approval of insurance coverages, the underwriters thereof and claims related thereto, the settlement of any litigation that is not fully covered by insurance involving more than \$_____, entering into any contract which obligates the Company or a Series for more than \$_____ (except to the extent expressly set forth in an approved Annual Budget) or which cannot be cancelled without payment of a cancellation fee or other premium on not more than 30 days prior notice; and entering in any lease for office space;
- (8) filing of any petition or consenting to the filing of any petition that would subject the Company or a Series to a bankruptcy or similar proceeding;
- (9) any other action which, considered before the taking thereof, could reasonably be expected to have a material effect upon the business or affairs of the Company or a Series.

(e) Each Manager shall discharge its duties in a good and proper manner as provided for in this Agreement. Each Manager, on behalf of the Company or Series, as applicable, shall enforce agreements entered into by the Company or the applicable Series, and conduct or cause to be conducted the ordinary business and affairs of the Company or Series in accordance with good industry practice and the provisions of this Agreement. No Manager shall be required to devote a particular amount of time to the Company's or Series' business, but shall devote sufficient time to perform its duties hereunder.

Section 4.2 **Reliance by Third Parties.** Any third party doing business with the Company, or any Series, may rely upon any action taken or document executed by the applicable Manager or any Officer without duty of further inquiry, and may assume that such Manager or Officer has the requisite power and authority to take the action or execute the document in question.

Section 4.3 **Compensation of Members.** Except as otherwise specifically provided herein, no compensatory payment shall be made by the Company to any Member for the services to the Company of such Member or any member or employee of such Member.

Section 4.4 **Officers.** The Company Manager shall appoint a President and may, from time to time, designate one or more Persons to be other officers of the Company or a Series (an "**Officer**"). No Officer need be a resident of the State of Delaware or a Member. Any Officer so designated shall have such title and authority and perform such duties as the Company Manager may, from time to time, designate. Unless the Company Manager decides otherwise, if the title is one commonly used for officers of a business corporation, the assignment of such title shall constitute the delegation to such Officer of the authority and duties that are normally associated with that office, subject to any specific delegation of authority and duties made to such Officer by the Company Manager. Each Officer shall hold office until his successor shall be duly designated and shall qualify or until his death or until he shall resign or shall have been removed. The salaries or other compensation, if any, of the Officers and agents of the Company shall be fixed from time to time by the Company Manager. Any Officer may resign as such at any time. Any Officer may be removed as such, with or without Cause, by the Company Manager at any time unless otherwise designated at the time of hiring an Officer. Designation of an Officer shall not, in and of itself, create contract rights. The initial Officers of the Company are: _____, President; and _____, Vice President.

Section 4.5 **Indemnification; Reimbursement of Expenses; Insurance.** To the fullest extent permitted by law, and subject to the limitations set forth in this Section 4.5, and with, in each case, the Company Manager's prior approval: (a) the Company shall indemnify each Manager, Officer and Member for the entirety of any Adverse Consequences that a Manager, Officer or Member may suffer including, but not limited to, any Manager, Officer, or Member who was, is or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding ("**Proceeding**"), any appeal therein, or any inquiry or investigation preliminary thereto, solely by reason of the fact that he or she is or was a Manager, Officer or Member and was acting within scope of duties or under the authority of the Members; (b) the Company shall pay, and advance or if the foregoing is not practicable, reimburse a Manager, Officer or Member for expenses incurred by him or her (1) in advance of any disposition of a Proceeding to which such Manager, Officer or Member was, is or is threatened to be made a party, and (2) in connection with his or her appearance as a witness or other participation in any Proceeding. Such indemnification shall also include counsel fees. The Company may indemnify and advance expenses to an employee or agent of the Company to the same extent and subject to the same conditions under which it may indemnify and advance expenses to the Manager, Officers and Members under the preceding sentence. The provisions of this Section 4.5 shall not be exclusive of any other right under any law, provision of the Certificate or this Agreement, or otherwise. Notwithstanding the foregoing, this indemnity shall not apply to actions constituting gross negligence, willful misconduct or bad faith, or involving a material breach of this Agreement or the duties set forth herein, which breach, in Company Manager's reasonable opinion, causes a substantial loss to the Company, but shall apply to actions constituting simple negligence. The Company may purchase and maintain insurance to protect itself and any Manager, Officer, employee or agent of the Company, whether or not the Company would have the power to indemnify such Person under this Section 4.5. This indemnification obligation shall be limited to the assets of Company, and no Member shall be required to make a Capital Contribution in respect thereof.

Section 4.6 **Removal and Appointment of Managers.** Development may resign as Company Manager at any time, so long as it appoints a new Company Manager, which new Company Manager shall agree in writing to be bound by this Agreement. Any Series Manager may be removed by the Company Manager at any time, with or without Cause, and the Company Manager shall have the sole right to appoint a new Person to be the replacement Series Manager.

ARTICLE 5

ACCOUNTING AND REPORTING

Section 5.1 **Accounts, Reports.**

(a) The books of account of the Company, at Company expense, shall be kept and maintained by the Company on an accrual basis in accordance with generally accepted accounting principles applied on a consistent basis applicable to commercial real estate or on a cash basis as selected by the Company Manager, and, in all events, shall conform with the Accounting Policies and Procedures. The Company shall prepare a reconciliation of such books and records to cash receipts and disbursements. The books of account shall be kept at the principal place of business of the Company.

(b) The Company shall keep separate and distinct records for each Series and all Series Investments and other assets, Series Members, Series Sharing Ratios, and the Membership Interests attributable to each Series in accordance with the provisions of the Act. The separate books and records kept for each Series shall be maintained in accordance with the provisions set forth in Section 5.1(a).

(c) Each Member, at its expense and under the circumstances and conditions set forth in the Act, may at all reasonable times during usual business hours audit, examine, and make copies of or extracts from the books of account records, files, and bank statements of the Company applicable to each Series of which it is a Series Member. Such right may be exercised by any Member or by its designated agents or employees.

Section 5.2 **Bank Accounts**. The Company shall open and maintain (in the name of the Company) special accounts in a bank or savings and loan association, in which shall be deposited all funds of the Company and each Series. Withdrawals therefrom shall be made upon the signatures of such Persons as the President shall designate.

ARTICLE 6

CAPITAL CONTRIBUTIONS AND FINANCE

Section 6.1 **Capital Contributions**. The Company Manager shall determine if, as, and when Capital Contributions shall be required to enable the Company or a Series to invest in any Investment Entity or to operate its business. Development or Management shall make all Capital Contributions to the Company or a Series. Accordingly, no Member, other than Development or Management, shall have any obligation or right to make any Capital Contribution. Notwithstanding the foregoing, either Development or Management, in their sole and absolute discretion, may at any time elect to not fund further Capital Contributions with respect to the Company or any Investment, Investment Entity, or Series without any liability whatsoever to the Company or any Member, even if such failure to contribute results in the loss of any opportunity or the forfeiture of any Investment or interest in any Investment Entity, or results in any other penalty or liability.

Section 6.2 **Return of Contributions**. Except as expressly provided herein, no Member shall be entitled to the return of any part of its Capital Contributions, to be paid interest in respect of either its Capital Account or any Capital Contribution made by it or paid for the fair market value of its Membership Interest upon withdrawal or otherwise. Unrepaid Capital Contributions shall not be a liability of the Company, any Series or of any Member. No Member shall be required to contribute or lend any cash or property to the Company or any Series to enable the Company or Series to return any Member's Capital Contributions.

Section 6.3 **Member Guaranties**. No Member shall undertake to guarantee or otherwise become liable for any obligation of the Company, or any obligation in respect of a Series or an Investment Entity, without the prior approval of the Company Manager.

ARTICLE 7 **INVESTMENTS**

Section 7.1 **Investments**. All Investments by the Company or any Series shall be made on such terms and conditions as the Company Manager may determine.

ARTICLE 8 **DISTRIBUTIONS**

Section 8.1 **Distributions in General**. From time to time, but not less often than semi-annually, the Company Manager shall determine (i) the amount, if any, by which the Company's funds then on hand exceed the Reserve Amount (such excess being referred to herein as "**Excess Funds**"), and (ii) the Series from which such Excess Funds have been derived. Excess Funds shall be distributed to the Members as provided in Section 8.2 and Section 8.3.

Section 8.2 **Temporary Distributions to Development and Management**. If the Company Manager determines that there are Excess Funds subject to distribution but that additional Capital Contributions will be required on the part of Development or Management for future Company or Series needs within the next twelve (12) month calendar month period, then the Company Manager may elect to make temporary distributions of such Excess Funds to Development or Management (or both) which distributions shall have the effect of reducing the amount of Capital Contributions outstanding on the part of Development or Management, as applicable (which, in turn, means that such amounts shall no longer accrue the Preferred Return). If any such distributions have not been returned by Management or Development, as applicable, by way of making Capital Contributions to the Company within 12 full calendar months following the date of such distribution (or, if sooner, upon the dissolution, liquidation, and termination of the Company), then Development and/or Management, as applicable, shall return the amount so distributed to them pursuant to this Section 8.2 as Capital Contributions.

Section 8.3 **Distributions to Members.**

(a) Not later than _____ of each calendar year, the Excess Funds derived from the business and operations of each Series (the “**Source Series**”) shall be distributed as follows:

- (1) First, to Development and Management in payment of any Preferred Return on their Capital Contributions made to the Source Series, in proportion to the unpaid balances thereof;

- (2) Next, to Development and Management in return of their unreturned Capital Contributions made to the Source Series, in proportion to the unpaid balances thereof;

- (3) Next, subject to Section 8.3(b), to Development and Management in payment of their Preferred Return on their Capital Contributions made to any Series other than the Source Series (the “**Receiving Series**”), in proportion to the unpaid balances thereof;

- (4) Next, subject to Section 8.3(b), to Management and Development in return of their unreturned Capital Contributions made to any Receiving Series, in proportion to the unpaid balances thereof;

- (5) Next, if the Source Series has previously benefited by distributions of funds derived from another Series in payment of the unpaid Preferred Return and/or unreturned Capital Contributions attributable to the Source Series by way of distributions made on its behalf pursuant to Section 8.3(a)(3) or Section 8.3(a)(4), then to the Series which made such distributions on behalf of the Source Series in repayment of the distributions so made, together with a return thereon at the rate of 10% per annum from the date such Series made such distributions until the same have been repaid; and

- (6) Thereafter to the Series Members of the Source Series in accordance with their Sharing Ratios therein.

(b) All distributions made to Series Members pursuant to Section 8.3(a)(5) shall be made to the applicable Participating Source Members thereof in accordance with their Sharing Ratios in the Series in question. For the purposes of this Section 8.3, if a Series receives distributions of funds pursuant to Section 8.3(a)(5), then the Series receiving such distribution shall be a “Source Series” for the purposes of determining the further distribution thereof.

Section 8.4 **Withholding**. The Company may withhold distributions or portions thereof if it is required to do so by any applicable rule, regulation, or law, and each Member hereby authorizes the Company to withhold from or pay on behalf of or with respect to such Member any amount of federal, state, local or foreign taxes that the Company Manager reasonably determines that the Company is required to withhold or pay with respect to any amount distributable or allocable to such Member pursuant to this Agreement. Any amounts so paid or withheld with respect to a Member pursuant to this Section 8.4 shall be treated as having been distributed to such Member and shall reduce any amounts otherwise distributable to such Member (either currently or in the future) pursuant to Section 8.3 or Article 10.

ARTICLE 9

CAPITAL ACCOUNTS, ALLOCATIONS, AND TAX MATTERS

Section 9.1 **Federal Tax Items**. Items of income, gain, deduction, loss, credit and all other federal tax items shall be allocated to the Members as provided in Schedule 9 or in any applicable Supplement.

ARTICLE 10

WITHDRAWAL, DISSOLUTION, LIQUIDATION, AND TERMINATION

Section 10.1 **Dissolution, Liquidation, and Termination Generally**.

(a) The Company shall be dissolved upon the first to occur of any of the following:

- (1) The sale or disposition of all of the assets of the Company and the receipt, in cash, of all consideration therefor, and the determination of the Company Manager not to continue the business of the Company directly or through an Investment Entity;
- (2) The determination of the Company Manager to dissolve the Company; and
- (3) The occurrence of any event which, as a matter of law, requires that the Company be dissolved.

(b) Any Series of the Company shall be dissolved upon the first to occur of any of the following:

- (1) The sale or disposition of all of the assets of the Series and the receipt, in cash, of all consideration therefor, and the determination of the Company Manager not to continue the business of the Series directly or through an Investment Entity;
- (2) The determination of the Company Manager to dissolve the Series; and
- (3) The occurrence of any event which as a matter of law requires that the Series be dissolved.

Section 10.2 **Liquidation and Termination.** Upon dissolution of the Company or a Series such Person as the Company Manager may designate shall act as liquidator. The liquidator shall proceed diligently to wind up the affairs of the Company or Series and make final distributions as provided herein. The costs of liquidation shall be a Company or Series expense, as applicable. Until final distribution, the liquidator shall continue to operate the Company or Series with all of the power and authority of the Company Manager hereunder. The steps to be accomplished by the liquidator are as follows:

(a) as promptly as possible after dissolution and again after final liquidation, the liquidator shall cause a proper accounting to be made by a firm of certified public accountants acceptable to the Company Manager of the Company's or Series' assets, liabilities, and operations through the last day of the calendar month in which the dissolution shall occur or the final liquidation shall be completed, as applicable;

(b) the liquidator shall cause the Company or Series to satisfy all of the debts and liabilities of the Company or (whether by payment or the making of reasonable provision for payment thereof); and

(c) all remaining assets of the Company or Series shall be distributed to the Members or applicable Series Members as follows:

- (1) the liquidator may sell any or all Company or Series property and the sum of (A) any resulting gain or loss from each sale plus (B) the fair market value of such property that has not been sold shall be determined and (notwithstanding the provisions of Article 9) income, gain, loss, and deduction inherent in such property (that has not been reflected in the Capital Accounts previously) shall be allocated among the Members to the extent possible to cause the Capital Account balance of each Member to equal the amount distributable to such Member under Section 10.2(c)(2); and

- (2) Company or Series property shall be distributed to the Members as provided in Section 8.3.

Section 10.3 **Deficit Capital Accounts.** No Member shall be required to pay to the Company, to any other Member or to any third party any deficit balance which may exist from time to time in the Member's Capital Account.

Section 10.4 **Cancellation of Certificate.** In the case of the dissolution, liquidation and termination of the Company, on completion of the distribution of Company assets, the Company Manager (or such other person as the Act may require or permit) shall file a Certificate of Cancellation with the Secretary of State of Delaware, cancel any other filings made pursuant to Section 2.5, and take such other actions as may be necessary to terminate the existence of the Company. In the case of the dissolution, liquidation and termination of a Series, the Company Manager shall file such certificates as may be required by the Act or other law in respect thereof.

ARTICLE 11
MISCELLANEOUS PROVISIONS

Section 11.1 **Notices**. All notices provided for or permitted to be given pursuant to this Agreement must be in writing and shall be given or served by (a) depositing the same in the United States mail addressed to the party to be notified, postpaid and certified with return receipt requested, (b) by delivering such notice in person to such party, or (c) by facsimile. All notices are to be sent to or made at the addresses set forth on the signature pages hereto. All notices given in accordance with this Agreement shall be effective upon delivery at the address of the addressee. By giving written notice thereof, each Member shall have the right from time to time to change its address pursuant hereto.

Section 11.2 **Governing Law**. This Agreement and the obligations of the Members hereunder shall be construed and enforced in accordance with the laws of the State of Delaware, excluding any conflicts of law rule or principle which might refer such construction to the laws of another state or country.

Section 11.3 **Entireties; Amendments**. This Agreement and its exhibits constitute the entire agreement between the Members relative to the formation of the Company. Except as otherwise provided herein, no amendments to this Agreement shall be binding upon any Member unless set forth in a document duly executed by such Member.

Section 11.4 **Waiver**. No consent or waiver, express or implied, by any Member of any breach or default by any other Member in the performance by the other Member of its obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other Member of the same or any other obligation hereunder. Failure on the part of any Member to complain of any act or to declare any other Member in default, irrespective of how long such failure continues, shall not constitute a waiver of rights hereunder.

Section 11.5 **Severability**. If any provision of this Agreement or the application thereof to any Person or circumstances shall be invalid or unenforceable to any extent, and such invalidity or unenforceability does not destroy the basis of the bargain between the parties, then the remainder of this Agreement and the application of such provisions to other Persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

Section 11.6 **Ownership of Property and Right of Partition**. A Member's interest in the Company shall be personal property for all purposes. No Member shall have any right to partition the property owned by the Company.

Section 11.7 **Captions, References.** Pronouns, wherever used herein, and of whatever gender, shall include natural persons and corporations and associations of every kind and character, and the singular shall include the plural wherever and as often as may be appropriate. Article and section headings are for convenience of reference and shall not affect the construction or interpretation of this Agreement. Whenever the terms “hereof,” “hereby,” “herein,” or words of similar import are used in this Agreement they shall be construed as referring to this Agreement in its entirety rather than to a particular section or provision, unless the context specifically indicates to the contrary. Any reference to a particular “Article” or a “Section” shall be construed as referring to the indicated article or section of this Agreement unless the context indicates to the contrary.

Section 11.8 **Involvement of Members in Certain Proceedings.** Should any Member become involved in legal proceedings unrelated to the Company’s business in which the Company is required to provide books, records, an accounting, or other information, then such Member shall indemnify the Company from all expenses incurred in conjunction therewith.

Section 11.9 **Interest.** No amount charged as interest on loans hereunder shall exceed the maximum rate from time to time allowed by applicable law.

ARTICLE 12
PURCHASE OPTION

[as agreed]

Executed effective as of the date above written.

MEMBERS:

By: _____

By: _____

Name: _____

Title: _____

Charleston, SC 29401

SCHEDULE 3.1

FORM OF SUPPLEMENT FOR ESTABLISHING SERIES

Supplement for _____, LLC

This Supplement (this “**Supplement**”) is entered into by the undersigned to create a Series under the Limited Liability Company Agreement of _____, LLC dated _____, as amended and supplemented from time to time (the “**LLC Agreement**”). Unless otherwise specified herein, all capitalized terms used herein shall have the meanings assigned to them in the LLC Agreement. The *[Project Development]* Series created hereby and the rights and obligations of the Members shall be governed by the LLC Agreement as supplemented hereby.

Name of Series: _____, LLC — *[Project Development]* Series _____

Purpose: The _____ purpose of this Series is to _____.

Series Members and Series Sharing Ratios:

<u>Name</u>	<u>Series Sharing Ratio</u>
<i>[Regional Development Series]</i>	____%
_____	____%

Note: The percentages stated above are subject to change if additional Members are admitted to the Series, either at formation or subsequently; see Section 3.1 of the LLC Agreement.

Distributions: _____ -Distributable funds shall be distributed in accordance with Series Sharing Ratios.

Member Vesting Provisions: [as agreed upon]

Special Tax Provisions (if any): See attached Tax Schedule

Other Provisions Pertaining to Series:

SERIES MANAGER: _____

By: _____

Name: _____

MEMBERS:

SCHEDULE 9
CAPITAL ACCOUNTS, ALLOCATIONS, AND TAX MATTERS

Section 1. **Definitions.** The following terms shall have the following meanings:

(a) **“Adjusted Capital Account”** means, with respect to a Member, such Member’s Capital Account as of the end of each fiscal year, as the same is specially computed to reflect the adjustments required or permitted to be taken into account in applying Regulations Section 1.704-1(b)(2)(ii)(d) (including adjustments for Partnership Minimum Gain and Partner Nonrecourse Debt Minimum Gain).

(b) **“Adjusted Capital Account Deficit”** means, for each Member, the deficit balance, if any, in that Member’s Adjusted Capital Account.

(c) **“Capital Account”** shall have the meaning set forth in Section 2.

(d) **“Code”** means the Internal Revenue Code of 1986, as amended from time to time, and any corresponding provisions of succeeding law.

(e) **“Depreciation”** means, for each taxable year or other period, an amount equal to the depreciation, amortization or other cost recovery deduction allowable with respect to an asset for the year or other period, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of the year or other period, Depreciation will be an amount which bears the same ratio to the beginning Gross Asset Value as the federal income tax depreciation, amortization or other cost recovery deduction for the year or other period bears to the beginning adjusted tax basis, provided that if the federal income tax depreciation, amortization, or other cost recovery deduction for the year or other period is zero, Depreciation will be determined with reference to the beginning Gross Asset Value using any reasonable method selected by the Manager .

(f) **“Gross Asset Value”** has the meaning assigned to it in Section 3.

(g) **“Partner Nonrecourse Debt”** has the meaning assigned to it in Regulations Sections 1.704-2(b)(4) and 1.752-2.

(h) **“Partner Nonrecourse Debt Minimum Gain”** has the meaning assigned to it in Regulations Section 1.704-2(i)(3).

(i) **“Partner Nonrecourse Deductions”** has the meaning assigned to it in Regulations Section 1.704-2(i)(2).

(j) **“Partnership Minimum Gain”** has the meaning assigned to it in Regulations Section 1.704-2(d).

(k) “**Profits**” and “**Losses**” mean, for each taxable year or other period, an amount equal to the Company’s (including all Series’) taxable income or loss for the year or other period determined in accordance with Section 703(a) of the Code (including all items of income, gain, loss or deduction required to be stated separately under Section 703(a)(1) of the Code), with the following adjustments:

- (1) Any income that is exempt from federal income tax and not otherwise taken into account in computing Profits or Losses will be added to taxable income or loss;

- (2) Any expenditures described in Code Section 705(a)(2)(B) or treated as Section 705(a)(2)(B) expenditures under Regulations Section 1.704-1(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses, will be subtracted from taxable income or loss;

- (3) Gain or loss resulting from any disposition of property with respect to which gain or loss is recognized for federal income tax purposes will be computed by reference to the Gross Asset Value of the property, notwithstanding that the adjusted tax basis of the property differs from its Gross Asset Value;

- (4) In lieu of depreciation, amortization and other cost recovery deductions taken into account in computing taxable income or loss, there will be taken into account Depreciation for the taxable year or other period;

- (5) Any items which are specially allocated under Sections 4(b), 4(c) or 4(d) will not affect calculations of Profits or Losses; and

- (6) If the Gross Asset Value of any asset is adjusted under Sections 3(b) or 3(c), the adjustment will be taken into account as gain or loss from disposition of the asset for purposes of computing Profits or Losses.

(l) “**Regulations**” means the regulations promulgated by the United States Department of the Treasury pursuant to and in respect of provisions of the Code. All references herein to sections of the Regulations shall include any corresponding provisions of succeeding, similar, substitute proposed or final Regulations.

(m) “**Regulatory Allocations**” has the meaning assigned to it in Section 4(c).

Section 2. **Capital Accounts**.

(a) **Establishment and Maintenance**. A separate capital account will be maintained for each Member (each capital account maintained for a Member is herein called a “**Capital Account”**). The Capital Accounts of each Member will be determined and adjusted (with all calculations being made on an individual basis) as follows:

- (1) Each Member’s Capital Account will be credited with the Member’s Capital Contributions, the Member’s distributive share of Profits, any items in the nature of income or gain that are specially allocated to the Member under Sections 4(b) or 4(c), and the amount of any Company liabilities that are assumed by the Member or secured by any Company property distributed to the Member;

- (2) Each Member's Capital Account will be debited with the amount of cash and the Gross Asset Value of any Company property distributed to the Member under any provision of this Agreement, the Member's distributive share of Losses, any items in the nature of deduction or loss that are specially allocated to the Member under Section 4(b) or 4(c), and the amount of any liabilities of the Member assumed by the Company or which are secured by any property contributed by the Member to the Company;

- (3) If any interest in the Company is transferred in accordance with the terms of this Agreement, the transferee will succeed to the Capital Account of the transferor to the extent it relates to the transferred interest.

(b) **Modifications by Manager.** The provisions of this Section 2 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Section 704(b) of the Code and the Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The Company Manager may modify the manner in which the Capital Accounts are maintained under this Section 2 to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions; however, without the unanimous consent of all Members, the Company Manager may not make any modification to the way Capital Accounts are maintained if such modification would have the effect of changing the amount of distributions to which any Member would be entitled during the operation, or upon the liquidation, of the Company.

Section 3. **Adjustment of Gross Asset Value.** "**Gross Asset Value**", with respect to any asset, is the adjusted basis of that asset for federal income tax purposes, except as follows:

(a) The initial Gross Asset Value of any asset contributed (or deemed contributed under Code Sections 704(b) and 752 and the Regulations promulgated thereunder) by a Member to the Company will be the fair market value of the asset on the date of the contribution, as determined by the Manager;

(b) The Gross Asset Values of all Company assets will be adjusted to equal the respective fair market values of the assets, as determined by the Manager, as of (1) the acquisition of an additional interest in the Company by any new or existing Member in exchange for more than a de minimis capital contribution, (2) the distribution by the Company to a Member of more than a de minimis amount of Company property as consideration for an interest in the Company if an adjustment is necessary or appropriate to reflect the relative economic interests of the Members in the Company, and (3) the liquidation of the Company within the meaning of Regulations Section 1.704-1(b)(2)(ii)(g);

(c) The Gross Asset Value of any Company asset distributed to any Member will be the gross fair market value of the asset on the date of distribution;

(d) The Gross Asset Values of Company assets will be increased or decreased to reflect any adjustment to the adjusted basis of the assets under Code Section 734(b) or 743(b), but only to the extent that the adjustment is taken into account in determining Capital Accounts under Regulations Section 1.704-1(b)(2)(iv)(m), provided that Gross Asset Values will not be adjusted under this Section 3 to the extent that the Manager determines that an adjustment under Section 3.(b) is necessary or appropriate in connection with a transaction that would otherwise result in an adjustment under this Section 3.(d);

(e) After the Gross Asset Value of any asset has been determined or adjusted under Sections 3.(a), 3.(b) or 3.(d), Gross Asset Value will be adjusted by the Depreciation taken into account with respect to the asset for purposes of computing Profits or Losses.

Section 4. **Profits, Losses and Distributive Shares of Tax Items.**

(a) **Allocations of Profits and Losses.** Except as otherwise provided in this Agreement, and after taking into account any allocations under Sections 4.(b) and 4.(c), Profits and Losses of the Company (including all Series) shall be allocated among the Members in a manner such that the Capital Account of each Member, immediately after making such allocation, is, as nearly as possible, equal (proportionately) to (i) the distributions that would be made to such Member pursuant to Section 8.3 if the Company were dissolved, its affairs wound up and its assets (including all Series assets) sold for cash equal to their Gross Asset Value, all Company liabilities (including all Series liabilities) were satisfied (limited with respect to each nonrecourse liability to the Gross Asset Value of the assets securing such liability), and the net assets of the Company (and all Series) were distributed in accordance with Section 8.3 and to the Members immediately after making such allocation, minus (ii) such Member's share of Partnership Minimum Gain and Partner Nonrecourse Debt Minimum Gain, computed immediately prior to the hypothetical sale of assets.

(b) **Special Allocations.** The following special allocations will be made in the following order and priority before the allocations of Profits and Losses under Section 4.(a):

- (1) **Partnership Minimum Gain Chargeback.** If there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, before any other allocation under this Agreement, each Member will be specially allocated items of Company income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to such Member's share of the net decrease in Partnership Minimum Gain during such year determined in accordance with Regulations Section 1.704-2(g)(2). The items to be allocated will be determined in accordance with Regulations Section 1.704-2(g). This Section 4.(b)(1) is intended to comply with the Partnership Minimum Gain chargeback requirements of the Regulations, will be interpreted consistently with the Regulations and will be subject to all exceptions provided therein.

- (2) **Partner Nonrecourse Debt Minimum Gain Chargeback.** Notwithstanding any other provision of this Section 4 (other than Section 4.(b)(1) which shall be applied first), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Member with a share of such Partner Nonrecourse Debt Minimum Gain (determined under Regulations Section 1.704-2(i)(5)) as of the beginning of the year will be specially allocated items of Company income and gain for that period (and, if necessary, subsequent periods) in an amount equal to such Member's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during such year determined in accordance with Regulations Section 1.704-2(g)(2). The items to be so allocated will be determined in accordance with Regulations Section 1.704-2(g). This Section 4.(b)(2) is intended to comply with the Partner Nonrecourse Debt Minimum Gain chargeback requirements of the Regulations, will be interpreted consistently with the Regulations and will be subject to all exceptions provided therein.

- (3) **Qualified Income Offset.** A Member who unexpectedly receives any adjustment, allocation or distribution described in Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) or (6) will be specially allocated items of Company income and gain in an amount and manner sufficient to eliminate, to the extent required by the Regulations, the Adjusted Capital Account Deficit of the Member as quickly as possible.

- (4) **Nonrecourse Deductions.** Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated among the Members in proportion to their respective Series Sharing Ratios for the Series obligated on the nonrecourse liabilities giving rise to the Nonrecourse Deductions.

- (5) **Partner Nonrecourse Deductions.** Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Member who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Regulations Section 1.704-2(i).

- (6) **Code Section 754 Adjustments.** To the extent an adjustment to the adjusted tax basis of any Company asset under Code Sections 734(b) or 743(b) is required to be taken into account in determining Capital Accounts under Regulations Section 1.704-1(b)(2)(iv)(m), the amount of the adjustment to the Capital Accounts will be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis), and the gain or loss will be specially allocated to the Members in a manner consistent with the manner in which their Capital Accounts are required to be adjusted under Regulations Section 1.704-1(b)(2)(iv)(m).

(c) **Curative Allocations.** The allocations set forth in Section 4.(b) (the “**Regulatory Allocations**”) are intended to comply with certain requirements of Regulations Sections 1.704-1(b) and 1.704-2. The Regulatory Allocations may effect results which would be inconsistent with the manner in which the Members intend to divide Company distributions. Accordingly, the Manager is authorized to divide other allocations of Profits, Losses, and other items among the Members, to the extent that they exist, so that the net amount of the Regulatory Allocations and the special allocations to each Member is zero. The Manager will have discretion to accomplish this result in any reasonable manner that is consistent with Code Section 704 and the related Regulations.

(d) **Tax Allocations—Code Section 704(c).** For federal, state and local income tax purposes, Company income, gain, loss, deduction or expense (or any item thereof) for each fiscal year shall be allocated to and among the Members to reflect the allocations made pursuant to the provisions of this Section 4 for such fiscal year. In accordance with Code Section 704(c) and the related Regulations, income, gain, loss and deduction with respect to any property contributed to the capital of the Company, solely for tax purposes, will be allocated among the Members so as to take account of any variation between the adjusted basis to the Company of the property for federal income tax purposes and the initial Gross Asset Value of the property (computed in accordance with Section 3). If the Gross Asset Value of any Company asset is adjusted under Section 3(b), subsequent allocations of income, gain, loss and deduction with respect to that asset will take account of any variation between the adjusted basis of the asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code Section 704(c) and the related Regulations. Any elections or other decisions relating to allocations under this Section 4.(d) will be made in any manner that the Manager determines reasonably reflects the purpose and intention of this Agreement. Allocations under this Section 4.(d) are solely for purposes of federal, state and local taxes and will not affect, or in any way be taken into account in computing, any Member’s Capital Account or share of Profits, Losses or other items or distributions under any provision of this Agreement.

(e) **Members Bound.** Members shall be bound by the provisions of this Section 4 in reporting their shares of Company income and loss for income tax purposes.

Section 5. **Tax Returns.** The Manager shall cause to be prepared and filed all necessary federal and state income tax returns for the Company, including making the elections described in Section 6. Each Member shall furnish to the Manager all pertinent information in its possession relating to Company operations that is necessary to enable such income tax returns to be prepared and filed.

Section 6. **Tax Elections.** The following elections shall be made on the appropriate returns of the Company:

- (a) to adopt the calendar year as the Company’s fiscal year;
- (b) to keep the Company’s books and records on the income-tax method;

(c) if there is a distribution of Company property as described in section 734 of the Code or if there is a transfer of a Company interest as described in section 743 of the Code, upon written request of any Member, to elect, pursuant to section 754 of the Code, to adjust the basis of Company properties; and

(d) to elect to amortize the organizational expenses of the Company ratably over a period of 60 months as permitted by section 709(b) of the Code.

No election shall be made by the Company or any Member to be excluded from the application of the provisions of subchapter K of chapter 1 of subtitle A of the Code or any similar provisions of applicable state laws.

Section 7. **Tax Matters Member.** The Company Manager shall be the “**tax matters partner**” of the Company pursuant to section 6231(a)(7) of the Code. As tax matters partner, such Member shall take such action as may be necessary to cause each other Member to become a “**notice partner**” within the meaning of section 6223 of the Code. Such Member shall inform each other Member of all significant matters that may come to its attention in its capacity as tax matters partner by giving notice thereof within ten days after becoming aware thereof and, within such time, shall forward to each other Member copies of all significant written communications it may receive in such capacity. Such Member shall not take any action contemplated by sections 6222 through 6232 of the Code without the consent of the Company Manager. This provision is not intended to authorize such Member to take any action left to the determination of an individual Member under sections 6222 through 6232 of the Code.

Section 8. **Allocations on Transfer of Interests.** The Company income, gain, loss or deduction allocable to any Member in respect of any interest in the Company which may have been transferred shall be allocated during such year based upon an interim closing of the Company’s books as described in the first sentence of Treasury Regulations § 1.706-1(c)(2)(ii), taking into account the actual results of Company operations during the portion of the year in which such Member was the owner thereof, and the date, amount and recipient of any distribution which may have been made with respect to such interest.