

REITwise 2016 – REIT Taxes All Around Us
REIT Investments in Non-Controlled Partnerships

Sample Provision¹

ARTICLE I
REIT PROTECTION PROVISIONS.

Section 1.1 Generally.

The Members acknowledge and agree that the REIT Member is an Affiliate of REIT Parent and that REIT Parent is a real estate investment trust for U.S. federal income tax purposes (a “REIT”) and is therefore subject to the requirements set forth in Code Sections 856 through 859. Notwithstanding anything herein to the contrary, each Member acknowledges and agrees that, for so long as REIT Parent (which term also refers to any successor to REIT Parent, whether by merger or otherwise, that also is intended to qualify as a REIT) directly or indirectly owns interests in the Company, through REIT Member or otherwise, it is intended that the Company and each Subsidiary shall be operated in such a manner so that REIT Parent may continue to so qualify as a REIT and avoid U.S. federal income and excise tax liability to the extent permitted under the Code. The Company shall, promptly upon the request of REIT Member, make available to REIT Member all data and information in the possession of the Company which is determined by REIT Member to be necessary or helpful to (1) determine the tax treatment of REIT Parent, or (2) monitor REIT Parent’s compliance with the requirements relating to the status of REIT Parent as a REIT. In the event of any conflict or inconsistency between the terms of this Article I and any other provision of this Agreement, the terms of this Article I shall control.

Section 1.2 Covenants.

Notwithstanding anything in the Agreement to the contrary, the Members acknowledge and agree that neither the Company nor any Subsidiary shall, without the prior written consent of REIT Member:

(A) own assets other than interests in real property, furniture, fixtures, equipment and intangible property associated with such real property, cash, bank time deposits, interests in money market accounts or receivables which arise in the ordinary course of its rental business, such as for rent from occupancy of space;

(B) directly or indirectly acquire (whether by purchase, contribution, distribution, operation of law, or otherwise) or own any equity interest in any corporation, partnership, limited

¹ This provision may not be appropriate for any particular joint venture. The provision used for any joint venture should be drafted to address the specific circumstances.

liability company, trust, or other entity, except in the case of interests in money market accounts or in an entity that is either (1) disregarded as separate from the Company for U.S. federal income tax purposes or (2) with the prior written consent of REIT Member not to be unreasonably withheld, treated as a partnership for U.S. federal income tax purposes (subject to the condition that such disregarded entity or partnership shall have agreed to be bound by the entirety of this Article D);

(C) directly or indirectly acquire (whether by purchase, contribution, distribution, operation of law, or otherwise), own, or originate any loan or debt instrument, or consent to any modification, alteration, or amendment of any of the same; provided that this Section 1.2(C) shall not restrict the Company's ownership of bank time deposits or interests in money market accounts;

(D) directly or indirectly derive income in any taxable year other than rent from occupancy of real property and associated personal property, interest income from bank time deposits or money market accounts, or gain from sale of properties that satisfy the requirements of the prohibited transaction safe harbor set forth in Section 857(b)(6)(C) of the Code with respect to REIT Parent, [to the extent such income would exceed X percent (X%) of the total gross income of the Company for such year];

(E) enter into any lease of space for a term of less than thirty (30) days;

(F) directly or indirectly enter into any lease with a Person (A) that is a corporation for U.S. federal income tax purposes, if REIT Parent would be considered to own (x) ten percent (10%) or more of the total value of shares of all classes of stock of such Person or (y) stock of such Person possessing ten percent (10%) or more of the total combined voting power of all classes of stock of such Person entitled to vote, or (B) that is an entity that is not a corporation for U.S. federal income tax purposes, if REIT Parent would be considered to own an interest of ten percent (10%) or more in the assets or net profits of such Person, with ownership by REIT Parent in either case determined taking into account the rules for constructive ownership described in Section 318(a) of the Code, as modified by Section 856(d)(5) of the Code (a "Related Party Tenant");

(G) directly or indirectly enter into any lease which provides for rent based on any Person's net income or profits;

(H) directly or indirectly permit any sublease or license of any portion of any Property if either (A) the rent or other amounts to be paid by the proposed subtenant or licensee thereunder would be based, in whole or in part, on the income or profits derived by such proposed subtenant or licensee from the property, or (B) the sublessee or licensee, as the case may be, would be a Related Party Tenant;

(I) directly or indirectly permit any assignment of a lease (or sublease or license) of all or any portion of any Property if either (A) any amounts to be paid by the proposed assignee thereunder to the assignor would be based, in whole or in part, on the income or profits derived by such proposed subtenant or licensee from any property, or (B) the assignee would be a Related Party Tenant;

(J) enter into any lease which provides for the rental of personal property, except a lease which provides for the rental of both personal property and real property and in which the rent attributable to such personal property for the taxable year does not exceed [ten percent (10%)] of the total rent for the taxable year attributable to both the real and personal property leased under, or in connection with, such lease (as determined pursuant to Code Section 856(d)(1));

(K) directly or indirectly derive in any year, “impermissible tenant service income” (as defined under Code Section 856(d)(7)) with respect to any property, which exceeds [0.8%] of all income received or accrued during such taxable year from such property;

(L) provide services or amenities at any Property that are (i) not customarily provided to tenants of comparable properties in the same geographic area, unless such services or amenities are provided by an entity that is a “taxable REIT subsidiary” (as defined in Section 856(l) of the Code) with respect to REIT Parent (a “TRS”), or (ii) primarily for the convenience of the tenant, unless such services or amenities are provided either by an entity that (A) is a TRS or (B) qualifies as an “independent contractor” (within the meaning of Section 856(d)(3) of the Code) with respect to REIT Parent and from which REIT Parent does not directly or indirectly derive any income;

(M) fail to [use commercially reasonable efforts to] cause the Company to make distributions to Members so that the annual distributions paid to REIT Member are an amount equal to or greater than the amount of taxable income derived by REIT Member from the Company for each taxable year;

(N) elect to be taxed as, or take any other action or position the effect or import of which would be that the Company, any Subsidiary, or any of their subsidiaries is or would be treated as, other than a partnership or disregarded entity for U.S. federal income tax purposes;

(O) take any other action, if the Company or any Subsidiary is informed in writing by REIT Member in the exercise of REIT Member’s reasonable judgment, that such action could cause REIT Parent to lose its qualification as a REIT; or²

(P) commit to do any of the foregoing.

² Due to its uncertainty, the REIT may need to offer to indemnify the other partner for any losses associated with the use of this provision.