

# **REAL PROPERTY**

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### Scope

This chapter contains forms for use in security arrangements involving real property, together with pertinent legal principles and tax comments that should be considered when drafting such documents.

### Treated Elsewhere

Chapters that contain related text and form material are Sales (see Ch 1), Conveyances (see Ch 2), Mechanics' Liens (see Ch 13), Real Property (see Ch 16A), Personal Property (see Ch 16B), Consumer Credit (see Ch 17), Commercial Paper (see Ch 43), and Secured Transactions (see Ch 49).

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## I. GENERAL CONSIDERATIONS

### § 4:1 Introduction

Here is an unescaped Chinese character: 不 and one that is escaped: 不 testing....

The principal security device employed in real property transactions in Florida is the mortgage.<sup>1</sup>

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#### [Section 4:1]

<sup>1</sup>**Legal Encyclopedias:** For discussion of mortgages, generally, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 1 et seq.

While Florida statutes specifically provide for the giving of mortgages securing future advances,<sup>2</sup> a mortgage in most instances secures a present consideration, debt or obligation, which is generally evidenced by a note executed contemporaneously with the executory of the mortgage.

Two basic elements are essential to the existence of a mortgage, namely: (1) The mortgagor must hold, or by the transaction acquire, some estate or interest in land capable of being mortgaged,<sup>3</sup> and (2) there must be a valid obligation to be secured.<sup>4</sup> A mortgage has no effect until it is delivered to and accepted by a mortgagee.<sup>5</sup>

## II. MORTGAGES AND DEEDS OF TRUST

### A. GENERAL CONSIDERATIONS

#### § 4:1A Testing PAX character entities

Characters as of 11/30/15

AElig	Æ	capital AE diphthong (ligature)
ALPHA	α	small alpha, Greek
APOS	‘	apostrophe
Aacgr	Ā	capital Alpha, accent, Greek
Aacute	Á	capital A, acute accent
Abreve	Ă	capital A, breve
Acirc	Â	capital A, circumflex accent
Acy	Ӑ	capital A, Cyrillic
Agr	Ӑ	capital Alpha, Greek
Agrave	Ӑ	capital A, grave accent

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<sup>2</sup>See Fla. Stat. Ann. § 697.04.

<sup>3</sup>**Legal Encyclopedias:** For discussion of the property and interest subject to mortgage, generally, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 58 et seq.

<sup>4</sup>**Legal Encyclopedias:** For a discussion of the obligations that may be secured by a mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 68 et seq.

<sup>5</sup>**Legal Encyclopedias:** For a discussion of the requirements of delivery and acceptance, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 82.

Amacr	Ā	capital A, macron
Aogon	À	capital A, ogonek
Aring	Å	capital A, ring
Atilde	Ã	capital A, tilde
Auml	Ä	capital A, dieresis or umlaut mark
Barwed	&Barwed;	logical and, double bar above
Bcy	Б	capital BE, Cyrillic
Beta	Β	capital beta, Greek
Bgr	Β	capital Beta, Greek
CHcy	Ч	capital CHE, Cyrillic
Cacute	Ć	capital C, acute accent
Cap	&Cap;	double intersection
Ccaron	Č	capital C, caron
Ccedil	Ҫ	capital C, cedilla
Ccirc	&Ccirc;	capital C, circumflex accent
Cdot	߱	capital C, dot above
Cmacr	߳	capital C, macron
Cup	&Cup;	double union
DJcy	Ђ	capital DJE, Serbian
DScy	Ѕ	capital DSE, Macedonian
DZey	Џ	capital dze, Serbian
Dagger	‡	double dagger
Dcaron	߱	capital D, caron
Dcy	߳	capital DE, Cyrillic
Ddot	߲	capital D, dot above
Delta	߳	capital Delta, Greek
Dgr	߳	capital Delta, Greek
Dot	߷	dieresis or umlaut mark
DotDot	&DotDot;	four dots above
Dstrokr	߱	capital D, stroke
EEacgr	ߵ	capital Eta, accent, Greek
EEgr	ߵ	capital Eta, Greek
ENG	&ENG;	capital ENG, Lapp
ETH	߱	capital Eth, Icelandic
Eacgr	ߵ	capital Epsilon, accent, Greek

Eacute	É	capital E, acute accent
Ecaron	Ë	capital E, caron
Ecirc	Ê	capital E, circumflex accent
Ecy	Ӭ	capital E, Cyrillic
Edot	Ӭ	capital E, dot above
Egr	Ҽ	capital Epsilon, Greek
Egrave	Ҽ	capital E, grave accent
Emacr	Ӯ	capital E, macron
Egon	Ҽ	capital E, ogonek
Etilde	Ҽ	capital E, tilde
Euml	Ӭ	capital E, dieresis or umlaut mark
Fcy	Փ	capital EF, Cyrillic
Fvect	&Fvect;	F with arrow above
GJcy	&GJcy;	capital GJE Macedonian
Gamma	Г	capital Gamma, Greek
Gbreve	Ӯ	capital G, breve
Gcedil	Ӯ	capital G, cedilla
Gcirc	&Gcirc;	capital G, circumflex accent
Gcy	Ӯ	capital GHE, Cyrillic
Gdot	Ӯ	capital G, dot above
Gg	&Gg;	triple greater-than
Ggr	Ӯ	capital Gamma, Greek
Gt	»	double greater-than sign
HARDcy	҃	capital HARD sign, Cyrillic
Hcirc	&Hcirc;	capital H, circumflex accent
Hdotb		capital H, dot below
Hmacr	Ӯ	capital H, macron
Hstrok	&Hstrok;	capital H, stroke
IEcy	Ҽ	capital IE, Cyrillic
IJlig	Ĳ	capital IJ ligature
IOcy	Ӯ	capital IO, Russian
Iacgr	Ӯ	capital Iota, accent, Greek
Iacute	Ӯ	capital I, acute accent
Ibreve	&Ibreve;	capital I, breve
Icirc	Ӯ	capital I, circumflex accent
Icy	Ӥ	capital I, Cyrillic

Idigr	&Idigr;	capital Iota, dieresis, Greek
Idot	İ	capital I, dot above
Igr	İ	capital Iota, Greek
Igrave	İ	capital I, grave accent
Imacr	İ	capital I, macron
Logon	&Iogon;	capital I, ogonek
Itilde	İ	capital I, tilde
Iukcy	İ	capital I, Ukrainian
Iuml	İ	capital I, dieresis or umlaut mark
Jcirc	&Jcirc;	capital J, circumflex accent
Jcy	Ј	capital short I, Cyrillic
Jsercy	Ј	capital JE, Serbian
Jukcy	Є	capital JE, Ukrainian
KHcy	Ҳ	capital HA, Cyrillic
KHgr	Ҳ	capital Chi, Greek
KJcy	&KJcy;	capital KJE, Macedonian
Kcedil	Ҝ	capital K, cedilla
Kcy	ҝ	capital KA, Cyrillic
Key	不肯能輸輸贏贏	key logo
Kgr	Ҝ	capital Kappa, Greek
LJcy	Љ	capital LJE, Serbian
Lacute	Ł	capital L, acute accent
Lambda	Λ	capital Lambda, Greek
Larr	&Larr;	two-head left arrow
Lcaron	Ł	capital L, caron
Lcedil	Ծ	capital L, cedilla
Ley	Ӆ	capital EL, Cyrillic
Lgr	Ӆ	capital Lambda, Greek
Ll	&Ll;	triple less-than
Lmidot	Ӆ	capital L, middle dot
Lstrok	Ӆ	capital L, stroke
Lt	«	double less-than sign
Mey	Ӎ	capital EM, Cyrillic
Mgr	Ӎ	capital Mu, Greek
NJcy	Ҥ	capital NJE, Serbian
Nacute	Ӯ	capital N, acute accent

Ncaron	Њ	capital N, caron
Ncedil	Ǹ	capital N, cedilla
Ncy	Ҥ	capital EN, Cyrillic
Ngr	Ҥ	capital Nu, Greek
Nmacr	Ӯ	capital N, macron
Ntilde	Ӯ	capital N, tilde
OElig	Ӭ	capital OE ligature
OHacgr	&OHacgr;	capital Omega, accent, Greek
OHgr	Ӫ	capital Omega, Greek
Oacgr	ӫ	capital Omicron, accent, Greek
Oacute	Ӧ	capital O, acute accent
Ocirc	Ӯ	capital O, circumflex accent
Ocy	Ӧ	capital O, Cyrillic
Odblac	Ӯ	capital O, double acute accent
Ogr	Ӧ	capital Omicron, Greek
Ograve	Ӯ	capital O, grave accent
Omacr	Ӯ	capital O, macron
Omega	Ӫ	capital Omega, Greek
Oslash	Ӯ	capital O, slash
Otilde	Ӯ	capital O, tilde
Ouml	Ӯ	capital O, dieresis or umlaut mark
PHgr	Ӯ	capital Phi, Greek
PLUS	+	plus sign
PSgr	Ӯ	capital Psi, Greek
Pcy	Ӯ	capital PE, Cyrillic
Pgr	Ӯ	capital Pi, Greek
Phi	Ӯ	capital Phi, Greek
Pi	Ӯ	capital Pi, Greek
Prime	"	double prime or second
Psi	Ӯ	capital Psi, Greek
Qdot	Ӯ	capital Q, dot above
Racute	Ӯ	capital R, acute accent
Rarr	&Rarr;	two-head right arrow
Rcaron	Ӯ	capital R, caron

Rcedil	Ŗ	capital R, cedilla
Rcy	Ŗ	capital ER, Cyrillic
Rgr	Ŗ	capital Rho, Greek
Rmacr	Ŗ	capital R, macron
SHCHcy	Ӯ	capital SHCHA, Cyrillic
SHcy	Ӯ	capital SHA, Cyrillic
SOFTcy	Ӯ	capital SOFT sign, Cyrillic
Sacute	ܶ	capital S, acute accent
Scaron	ܷ	capital S, caron
Scedil	ܸ	capital S, cedilla
Scirc	ܹ	capital S, circumflex accent
Scy	ܻ	capital ES, Cyrillic
Sdot	ܺ	capital S, dot above
Sgr	ܼ	capital Sigma, Greek
Sigma	ܼ	capital Sigma, Greek
Smacr	ܽ	capital S, macron
Sub	ܾ	double subset
Sup	ܿ	double superset
THORN	ܾ	capital THORN, Icelandic
THgr	ܻ	capital Theta, Greek
TLRbilateral	ܵ	Bilateral (capital B in circle)
TLRoR	ܶ	capital R in circle
TLRpесос	ܶ	Peso sign, serif
TLRpесосs	ܶ	Peso sign, sans serif
TLRrhndf	ܶ	hand pointing right, filled
TLRsqtp	ܶ	square, filled, tipped on its side
TLRstarod	ܶ	Star of David
TSHcy	ܶ	capital TSHE, Serbian
TScy	ܶ	capital TSE, Cyrillic
Tcaron	ܶ	capital T, caron
Tcedil	ܶ	capital T, cedilla
Tcy	ܶ	capital TE, Cyrillic
Tgr	ܶ	capital Tau, Greek
Theta	ܻ	capital Theta, Greek
Tstrok	ܶ	capital T, stroke
Tvect	ܶ	T with arrow above

Uacgr	&Uacgr;	capital Upsilon, accent, Greek
Uacute	Ú	capital U, acute accent
Ubrcy	&Ubrcy;	capital U, Byelorussian
Ubreve	&Ubreve;	capital U, breve
Ucirc	Û	capital U, circumflex accent
Ucy	Ý	capital U, Cyrillic
Udblac	Ü	capital U, double acute accent
Udigr	&Udigr;	capital Upsilon, dieresis, Greek
Ugr	Ү	capital Upsilon, Greek
Ugrave	Ӯ	capital U, grave accent
Umacr	ӻ	capital U, macron
Uogon	&Uogon;	capital U, ogonek
Upsi		capital Upsilon, Greek
Uring	Ӯ	capital U, ring
Utilde	ӷ	capital U, tilde
Uuml	Ӹ	capital U, dieresis or umlaut mark
Vcy	B	capital VE, Cyrillic
Vdash	&Vdash;	double vertical, dash
Vdot	᠀	capital V, dot above
Verbar	&Verbar;	dbl vertical bar
Vmacr	᠀	capital V, macron
Vuml	&Vuml;	capital V, dieresis or umlaut mark
Vvdash	&Vvdash;	triple vertical, dash
Vvect	&Vvect;	V with arrow above
Wcirc	Ŵ	capital W, circumflex accent
Xgr	Ӭ	capital Xi, Greek
Xi	Ӭ	capital Xi, Greek
Xrharu	Ӯ	capital X, right harpoon-up
YAcy	Ѩ	capital YA, Cyrillic
YIcy	Ӥ	capital YI, Ukrainian
YUcy	Ѭ	capital YU, Cyrillic
Yacute	Ӯ	capital Y, acute accent

Ycirc	Ŷ	capital Y, circumflex accent
Ycy	Ӳ	capital YERU, Cyrillic
Yuml	Ӷ	capital Y, dieresis or umlaut mark
ZHcy	Ӵ	capital ZHE, Cyrillic
Zacute	҂	capital Z, acute accent
Zcaron	҃	capital Z, caron
Zcy	҄	capital ZE, Cyrillic
Zdot	҅	capital Z, dot above
Zdotb	҆	capital Z, dot below
Zgr	҇	capital Zeta, Greek
aacgr	܂	small alpha, accent, Greek
aacute	܂	small a, acute accent
aamacr	܂܂	small aa, macron
abreve	܂܂	small a, breve
acirc	܂܂	small a, circumflex accent
acrule	&acrule;	ascender rule
acute	'	acute accent
acy	܂	small a, Cyrillic
aelig	܂܂	small ae diphthong (ligature)
aellip	* * *	asterisk ellipses
agr	܂	small alpha, Greek
grave	܂	small a, grave accent
aleph	&aleph;	aleph, Hebrew
alpha	܂	small alpha, Greek
amacr	܂܂	small a, macron
amalg	&amalg;	amalgamation or coproduct
amp	&	ampersand
and	^	logical and
ang90	&ang90;	right (90 degree) angle
ang	∠	angle
angmsd	&angmsd;	angle-measured
angsph	ݏ	angle-spherical
angst	ݏ	capital A, ring
aogon	܂܂	small a, ogonek
ap	≈	approximate
ape	≈	approximate, equals

apos	'	apostrophe
aring	å	small a, ring
ast	*	asterisk
asymp		asymptotically equal to
atilde	ã	small a, tilde
auml	ä	small a, dieresis or umlaut mark
b.Delta	Δ	capital Delta, Greek
b.Gamma	Γ	capital Gamma, Greek
b.Lambda	Λ	capital Lambda, Greek
b.Omega	Ω	capital Omega, Greek
b.Phi	Φ	capital Phi, Greek
b.Pi	Π	capital Pi, Greek
b.Psi	Ψ	capital Psi, Greek
b.Sigma	Σ	capital Sigma, Greek
b.Theta	Θ	capital Theta, Greek
b.Upsi		capital Upsilon, Greek
b.Xi	Ξ	capital Xi, Greek
b.alpha	α	small alpha, Greek
b.beta	β	small beta, Greek
b.chi	χ	small chi, Greek
b.delta	δ	small delta, Greek
b.epsi	ε	small epsilon, Greek
b.epsis	ε	straight epsilon
b.epsiv	&b.epsiv;	varepsilon
b.eta	η	small eta, Greek
b.gamma	γ	small gamma, Greek
b.gammad	&b.gammad;	digamma
b.iota	ι	small iota, Greek
b.kappa	κ	small kappa, Greek
b.kappav	&b.kappav;	varkappa
b.lambda	λ	small lambda, Greek
b.mu	μ	small mu, Greek
b.nu	ν	small nu, Greek
b.omega	ω	small omega, Greek
b.phis	φ	straight phi
b.phiv		varphi - curly or open phi

b.pi	$\pi$	small pi, Greek
b.piv	$\Pi$	varpi
b.psi	$\Psi$	small psi, Greek
b.rho	$\rho$	small rho, Greek
b.rhov	&b.rhov;	varrho
b.sigma	$\sigma$	small sigma, Greek
b.sigmav	$\varsigma$	varsigma
b.tau	$\tau$	small tau, Greek
b.thetas	$\theta$	straight theta
b.thetav		vartheta - curly or open theta
b.upsi	$\upsilon$	small upsilon, Greek
b.xi	$\xi$	small xi, Greek
b.zeta	$\zeta$	small zeta, Greek
ballot	$\square$	empty ballot box
barwed	&barwed;	logical and, bar above
bcirc	$\circ$	small b, circumflex accent
bcong	&bcong;	reverse congruent
bcy	$\circ$	small be, Cyrillic
becaus	&becaus;	because
bepsi	&bepsi;	such that
bernow	&bernow;	Bernoulli function (script cap B)
beta	$\beta$	small beta, Greek
beth	&beth;	beth, Hebrew
bgr	$\beta$	small beta, Greek
blank	&blank;	significant blank symbol
blbar	&blbar;	baseline en dash
blk12	&blk12;	50% shaded block
blk14	&blk14;	25% shaded block
blk34	&blk34;	75% shaded block
block	&block;	full block
blrule	&blrule;	baseline rule
bottom	$\perp$	perpendicular
bowtie	&bowtie;	bowtie
boxDL	&boxDL;	lower left quadrant
boxDR	&boxDR;	lower right quadrant
boxDl	&boxDl;	lower left quadrant

boxDr	&boxDr;	lower right quadrant
boxH	&boxH;	horizontal line
boxHD	&boxHD;	lower left and right quadrants
boxHU	&boxHU;	upper left and right quadrants
boxHd	&boxHd;	lower left and right quadrants
boxHu	&boxHu;	upper left and right quadrants
boxUL	&boxUL;	upper left quadrant
boxUR	&boxUR;	upper right quadrant
boxUl	&boxUl;	upper left quadrant
boxUr	&boxUr;	upper right quadrant
boxV	&boxV;	vertical line
boxVH	&boxVH;	all four quadrants
boxVL	&boxVL;	upper and lower left quadrants
boxVR	&boxVR;	upper and lower right quadrants
boxVh	&boxVh;	all four quadrants
boxVi	&boxVi;	upper and lower left quadrants
boxVr	&boxVr;	upper and lower right quadrants
boxdL	&boxdL;	lower left quadrant
boxdR	&boxdR;	lower right quadrant
boxdl	&boxdl;	lower left quadrant
boxdr	&boxdr;	lower right quadrant
boxh	—	horizontal line
boxhD	&boxhD;	lower left and right quadrants
boxhU	&boxhU;	upper left and right quadrants
boxhd	&boxhd;	lower left and right quadrants
boxhu	&boxhu;	upper left and right quadrants
boxuL	&boxuL;	upper left quadrant

boxuR	&boxuR;	upper right quadrant
boxul	&boxul;	upper left quadrant
boxur	&boxur;	upper right quadrant
boxv		vertical line
boxvH	&boxvH;	all four quadrants
boxvL	&boxvL;	upper and lower left quadrants
boxvR	&boxvR;	upper and lower right quadrants
boxvh	□	all four quadrants
boxvl	&boxvl;	upper and lower left quadrants
boxvr	&boxvr;	upper and lower right quadrants
boxx	⊗	x in ballot box
bprime	՝	reverse prime
brace	}	used in pax tabular print only
breve	˘	breve
brvbar	⋮	broken (vertical) bar
bsim		reverse similar
bsime	&bsime;	reverse similar, equals
bsol	\	reverse solidus
bull2	•	bullet #2
bull3	•	bullet #3
bull4	●	bullet #4
bull	●	round bullet, filled
bump	&bump;	bumpy equals
bumpe	&bumpe;	bumpy equals, equals
cacute	ć	small c, acute accent
cap	&cap;	intersection
caret	^	caret (insertion mark)
caron	ˇ	caron
ccaron	č	small c, caron
ccedil	ȝ	small c, cedilla
ccirc	&ccirc;	small c, circumflex accent

cdicon	◎	compact disc icon (ONLY use within primary.manual.toc)
cdot	ċ	small c, dot above
cedil	,	cedilla
cent	¢	cent sign
chcy	Ч	small che, Cyrillic
check	✓	tick, check mark
chi	χ	small chi, Greek
cir	○	circle, open
circ	^	circumflex accent
cire	&cire;	circle, equals
ckbox	☒	check in ballot box
clubs	♣	club suit symbol
cmaer	̄c	small c, macron
colon	:	colon
colone	&colone;	colon, equals
comma	&comma;	comma
commat	@	commercial at
comp	&comp;	complement sign
compfn	&compfn;	composite function (small circle)
cong	&cong;	congruent with
conint	&conint;	contour integral operator
coprod	&coprod;	coproduct operator
copy	©	copyright sign
copyrsr	®	sound recording copyright sign
cross	□	ballot cross
ctilde	&ctilde;	small c, tilde
cuepr	&cuepr;	curly equals, precedes
cuesc	&cuesc;	curly equals, succeeds
cularr	&cularr;	left curved arrow
cup	&cup;	union or logical sum
cupre	&cupre;	precedes, curly equals
curarr	&curarr;	right curved arrow
curren	¤	general currency sign
cuvee	&cuvee;	curly logical or

cuwed	&cuwed;	curly logical and
dArr	&dArr;	down double arrow
dagger	†	dagger
daleth	&daleth;	daleth, Hebrew
darr2	&darr2;	two down arrows
darr	↓	downward arrow
dash	-	hyphen (true graphic)
dashl	&dashl;	dash leader (baseline dash)
dashv	&dashv;	dash, vertical
dblac	„	double acute accent
dblpara	¶¶	double pilcrow (paragraph sign)
dblsect	§§	double section sign
dcaron	đ	small d, caron
dcirc	â	small d, circumflex accent
dcrule	&dcrule;	descender rule
dcy	҃	small de, Cyrillic
deg	°	degree sign
delta	δ	small delta, Greek
dgr	δ	small delta, Greek
dharl	&dharl;	down harpoon-left
dharr	&dharr;	down harpoon-right
diam		open diamond
diams	◆	diamond suit symbol
die	..	dieresis
divide	÷	divide sign
divonx	&divonx;	division on times
djey	ђ	small dje, Serbian
dlarr	&dlarr;	downward left-pointing arrow (SW)
dlcorn	&dlcorn;	lower left corner
dlcrop	&dlcrop;	downward left crop mark
dmacr	đ	small d, macron
dollar	\$	dollar sign
dot	.	dot above
dotl	&dotl;	leader dot
drarr	&drarr;	downward right-pointing arrow (SE)

drcorn	&drcorn;	lower right corner
drcrop	&drcrop;	downward right crop mark
dscy	s	small dse, Macedonian
dstrok	ð	small d, stroke
dtri	▼	down triangle, open
dtrif	▼	dn tri, filled
dzcy	џ	small dze, Serbian
eDot	&eDot;	equals, even dots
eacgr	é	small epsilon, accent, Greek
eacute	é	small e, acute accent
ecaron	ě	small e, caron
ecir	&ecir;	circle on equals sign
ecirc	ê	small e, circumflex accent
ecolon	&ecolon;	equals, colon
ecy	Ѡ	small e, Cyrillic
edot	�	small e, dot above
eeacgr	�	small eta, accent, Greek
eegr	�	small eta, Greek
efDot	&efDot;	equals, falling dots
egr	�	small epsilon, Greek
egrave	�	small e, grave accent
egs	&egs;	equal-or-greater-than, slanted
ell	�	cursive small l
els	&els;	equal-or-less-than, slanted
emacr	�	small e, macron
empty	&empty;	small o, slash
emsp13	&emsp13;	1/3-em space
emsp14	&emsp14;	1/4-em space
emsp		em space
eng	&eng;	small eng, Lapp
ensp		en space (1/2-em)
eogon	�	small e, ogonek
epsi	�	small epsilon, Greek
epsis	�	straight epsilon
epsiv	&epsiv;	varepsilon
equals	=	equals sign

equiv	$\equiv$	identical with
equm	$\&equm;$	equal sign, one dot above
erDot	$\&erDot;$	equals, rising dots
esdot	$\&esdot;$	equals, single dot above
eta	$\eta$	small eta, Greek
eth	$\eth$	small eth, Icelandic
euml	$\ddot{e}$	small e, dieresis or umlaut mark
euro	$\text{\euro}$	euro currency symbol
excl	!	exclamation mark
exist	$\exists$	at least one exists
fcy	$\text{\phi}$	small ef, Cyrillic
female	$\text{\Omega}$	female symbol
fflig	$\&fflig;$	small ffi ligature
fflig	$\&fflig;$	small ff ligature
ffllig	$\&ffllig;$	small ffl ligature
filig	$\&filig;$	small fi ligature
fjlig	$\&fjlig;$	small fj ligature
flat	$\&flat;$	musical flat
fllig	$\&fllig;$	small fl ligature
florin	$f$	florin symbol
fnof	$f$	function of (italic small f)
forall	$\forall$	for all
fork	$\&fork;$	pitchfork
frac12	$\frac{1}{2}$	fraction one-half
frac13	$\frac{1}{3}$	fraction one-third
frac14	$\frac{1}{4}$	fraction one-quarter
frac15	$\frac{1}{5}$	fraction one-fifth
frac16	$\frac{1}{6}$	fraction one-sixth
frac18	$\frac{1}{8}$	fraction one-eighth
frac23	$\frac{2}{3}$	fraction two-thirds
frac25	$\frac{2}{5}$	fraction two-fifths
frac34	$\frac{3}{4}$	fraction three-quarters
frac35	$\frac{3}{5}$	fraction three-fifths
frac38	$\frac{3}{8}$	fraction three-eighths
frac45	$\frac{4}{5}$	fraction four-fifths
frac56	$\frac{5}{6}$	fraction five-sixths

frac58	$\frac{5}{8}$	fraction five-eighths
frac78	$\frac{7}{8}$	fraction seven-eighths
frown	&frown;	down curve
gE	&gE;	greater-than, double equals
gEl	&gEl;	greater-than, dbl equals, less-than
gacute	‘g	small g, acute accent
gamma	Г	small gamma, Greek
gammad	&gammad;	digamma
gap	&gap;	greater-than, approximate
gbreve	ѓ	small g, breve
gcirc	&gcirc;	small g, circumflex accent
gcy	ѓ	small ghe, Cyrillic
gdot	ѓ	small g, dot above
ge	≥	greater-than-or-equal
gel	&gel;	greater-than, equals, less- than
ges		greater-than-or-equal, slanted
ggr	Г	small gamma, Greek
gimel	&gimel;	gimel, Hebrew
gjcy	&gjcy;	small gje, Macedonian
gl	&gl;	greater-than, less-than
gnE	&gnE;	greater-than, not double equals
gnap	&gnap;	greater-than, not ap- proximate
gne	&gne;	greater-than, not equals
gnsim	&gnsim;	greater-than, not similar
grave	ˋ	grave accent
gsdot	&gsdot;	greater-than, single dot
gsm	&gsm;	greater-than, similar
gt	>	greater-than sign
gvnE	&gvnE;	greater-than, vertical, not dbl eq
hArr	&hArr;	left and right double arrow
hairsp		hair space
half	$\frac{1}{2}$	fraction one-half

hamilt	&hamilt;	Hamiltonian (script capital H)
hardcy	Ђ	small hard sign, Cyrillic
harr	↔	left and right arrow
harrw	&harrw;	left and right wavy arrow
hcaron	њ	small h, caron
hcirc	&hcirc;	small h, circumflex accent
hdotb		small h, dot below
hearts	♥	heart suit symbol
hellip4	. . . .	ellipsis (horizontal) 4 dots
hellip	. . .	ellipsis (horizontal) 3 dots
horbar	—	horizontal bar
hstrok	&hstrok;	small h, stroke
hybull	&hybull;	rectangle, filled (hyphen bullet)
hyphen	-	hyphen
iacgr	ї	small iota, accent, Greek
iacute	í	small i, acute accent
ibreve	&ibreve;	small i, breve
icaron	ї	small i, caron
icirc	î	small i, circumflex accent
icy	Ӯ	small i, Cyrillic
idiagr	&idiagr;	small iota, dieresis, accent, Greek
idigr	ї	small iota, dieresis, Greek
iecy	е	small ie, Cyrillic
iexcl	¡	inverted exclamation mark
iff	&iff;	if and only if
igr	ى	small iota, Greek
igrave	ѝ	small i, grave accent
ijlig	ij	small ij ligature
imacr	҆	small i, macron
image	&image;	imaginary
incare		in-care-of symbol
infin	∞	infinity
inodot	ı	small i, no dot
int	&int;	integral operator
intcal	&intcal;	intercal

iocy	ë	small io, Russian
iogon	&iogon;	small i, ogonek
iota	ι	small iota, Greek
iquest	՞	inverted question mark
isin	∈	set membership
itall	l	italic small l
italo	o	italic small o
itilde		small i, tilde
iukey	і	small i, Ukrainian
iuml	ї	small i, dieresis or umlaut mark
jcirc	&jcirc;	small j, circumflex accent
jcy	҃	small short i, Cyrillic
jnodot	&jnodot;	small j, no dot
jsercy	ј	small je, Serbian
jukcy	ě	small je, Ukrainian
kappa	κ	small kappa, Greek
kappav	&kappav;	varkappa
kcedil	ҝ	small k, cedilla
kcy	ҝ	small ka, Cyrillic
kdottb		small k, dot below
key	匙	key symbol
kgr	ҝ	small kappa, Greek
kgreen	&kgreen;	small k, Greenlandic
khcy	ҳ	small ha, Cyrillic
khgr	Ҳ	small chi, Greek
kjcy	&kjcy;	small kje Macedonian
lAarr	&lAarr;	left triple arrow
lArr	&lArr;	is implied by
lE	&lE;	less-than, double equals
lEg	&lEg;	less-than, dbl equals, greater-than
lacute	í	small l, acute accent
lagran	&lagran;	Lagrangian (script capital L)
lambda	λ	small lambda, Greek
lang	⟨	left angle bracket
lap	&lap;	less-than, approximate

laquo	«	angle quotation mark, left
larr2	&larr2;	two left arrows
larr	←	leftward arrow
larrhk	&larrhk;	left arrow, hooked
larrlp	&larrlp;	left arrow, looped
larrtl	&larrtl;	left arrow, tailed
lcaron	ł	small l, caron
lcedil	ł	small l, cedilla
lceil	&lceil;	left ceiling
lcub	{	left curly bracket
lcy	љ	small el, Cyrillic
ldot	l	less-than, with dot
ldquo	“	double quotation mark, left
ldquor	„	rising dbl quote, left (low)
le	≤	less-than-or-equal
leg	&leg;	less-than, equals, greater-than
les	&les;	less-than-or-equal, slanted
lfloor	&lfloor;	left floor
lg	&lg;	less-than, greater-than
lgr	λ	small lambda, Greek
lhard	&lhard;	left harpoon-down
lharu	&lharu;	left harpoon-up
lblk	&lblk;	lower half block
ljcy	љ	small lje, Serbian
lmidot	·	small l, middle dot
lnE	&lnE;	less-than, not double equals
lnap	&lnap;	less-than, not approximate
lne	&lne;	less-than, not equals
lnsim	&lnsim;	less-than, not similar
lolly	⋮	upside down lollipop
lomacr	&lomacr;	macron below accent
loring	&loring;	ring below accent
lowast	&lowast;	low asterisk
lowbar	—	low line
loz	&loz;	lozenge or total mark
lozf	&lozf;	lozenge, filled

lpar	(	left parenthesis
lparen2	(	2-line left parens
lparen3	&lparen3;	3-line left parens
lpargt	&lpargt;	left parenthesis, greater-than
lrarr2	&lrarr2;	left arrow over right arrow
lrhar2	&lrhar2;	left harpoon over right
lsh	&lsh;	left shift
lsim	&lsim;	less-than, similar
lsqb2	&lsqb2;	left eqn bracket, covering full frac
lsqb	[	left square bracket
lsquo	'	single quotation mark, left
lsquor	,	rising single quote, left (low)
lstrok	{	small l, stroke
lt	<	less-than sign
lthree	&lthree;	left-three-times
ltimes	&ltimes;	times sign, left closed
ltri	◀	l triangle, open
ltrie	&ltrie;	left triangle, equals
ltrif	◀	l tri, filled
lupsi	υ	small upsilon, Latin
lvnE	&lvnE;	less-than, vertical, not dbl equals
m3dash	&m3dash;	3-em dash
macr	-	macron
male	♂	male symbol
malt	‡	maltese cross
map	&map;	maps to
marker	&marker;	histogram marker
mcy	м	small em, Cyrillic
mdash	—	em dash
mgr	μ	small mu, Greek
micro	µ	micro sign
mid	&mid;	vertical line as a relation
middot	.	middle dot

minus	-	minus sign
minusb	&minusb;	minus sign in box
mldr	...	em leader
mlrule	&mlrule;	midline rule
mmacr	̄	small m, macron
mnplus	±	minus-or-plus sign
models	&models;	models
mu	μ	small mu, Greek
mumap	&mumap;	multimap
n2brsec1	&n2brsec1;	Brace vertical right top
n2brsec2	&n2brsec2;	Brace vertical straight
n2brsec3	&n2brsec3;	Brace vertical center right
n2brsec4	&n2brsec4;	Brace vertical right bottom
n2brsec5	&n2brsec5;	Brace vertical left top
n2brsec6	&n2brsec6;	Brace vertical center left
n2brsec7	&n2brsec7;	Brace vertical left bottom
n2brsec8	&n2brsec8;	Brace vertical top
n2brsec9	&n2brsec9;	Brace vertical bottom
nVDash	&nVDash;	not double vertical, double dash
nVdash	&nVdash;	not double vertical dash
nabla	&nabla;	del, Hamilton operator
nacute	ń	small n, acute accent
nap	&nap;	not approximate
napos	'n	small n, apostrophe
natur	&natur;	music natural
nbemsp		em space, nonbreaking
nbensp		en space, nonbreaking
nbsps		no break (required) space
nbthsp		thin space, nonbreaking
ncaron	ń	small n, caron
ncedil	њ	small n, cedilla
ncong	&ncong;	not congruent with
ncy	Ҥ	small en, Cyrillic
ndash	—	en dash
ne	≠	not equal
nearr	&nearr;	upward right-pointing arrow (NE)

nequiv	&nequiv;	not identical with
nexist	&nexist;	negated exists
ngE	&ngE;	not greater-than, double equals
nge	&nge;	not greater-than-or-equal
nges	&nges;	not greater-than-or-equals, slanted
ngr	v	small nu, Greek
ngt	&ngt;	not greater-than
nhArr	&nhArr;	not left and right double arrow
nharr	&nharr;	not left and right arrow
ni	&ni;	contains
njcy	њ	small nje, Serbian
nlArr	&nlArr;	not implied by
nLE	&nLE;	not less-than, double equals
nlarr	&nlarr;	not left arrow
nldr	..	double baseline dot (en leader)
nle	&nle;	not less-than-or-equal
nles	&nles;	not less-than-or-equals, slanted
nlt	&nlt;	not less-than
nltri	&nltri;	not left triangle
nltrie	&nltrie;	not left triangle, equals
nmacr	ń	small n, macron
nmid	&nmid;	not vertical line as a relation
not	¬	not sign
notin	&notin;	negated set membership
npar	&npar;	not parallel
npr	&npr;	not precedes
npre	&npre;	not precedes, equals
nrArr	&nrArr;	not implies
nrarr	&nrarr;	not right arrow
nrtri	&nrtri;	not right triangle
nrtrie	&nrtrie;	not right triangle, equals
nsc	&nsc;	not succeeds

nsce	&nsce;	not succeeds, equals
nsim	&nsim;	not similar
nsime	&nsime;	not similar, equals
nsmid	&nsmid;	not short vertical line relation
nspar	&nspar;	not short parallel
nsub	&nsub;	not subset
nsubE	&nsubE;	not subset, double equals
nsube	&nsube;	not subset, equals
nsup	&nsup;	not superset
nsupE	&nsupE;	not superset, double equals
nsupe	&nsupe;	not superset, equals
ntilde	ñ	small n, tilde
nu	v	small nu, Greek
num	#	number sign
numero	Nº	numero sign
numsp		digit space (width of a number)
nvDash	&nvDash;	not vertical, double dash
nvdash	&nvdash;	not vertical dash
nwarr	&nwarr;	upward left-pointing arrow (NW)
oA	Ⓐ	Capital A in circle
oAx	Ⓐx	Capital A lower case x in circle
oD	Ⓓ	capital D in circle
oH	Ⓗ	capital H in circle
oL	Ⓛ	capital L in circle
oM	Ⓜ	capital M in circle
oP	Ⓟ	capital P in circle
oS	Ⓢ	capital S in circle
oacgr	օ	small omicron, accent, Greek
oacute	ó	small o, acute accent
oast	&oast;	asterisk in circle
ocir	◎	open dot in circle
ocirc	ô	small o, circumflex accent
ocy	օ	small o, Cyrillic

odash	&odash;	hyphen in circle
odblac	ő	small o, double acute accent
odot	◊	middle dot in circle
oelig	œ	small oe ligature
ogon	&ogon;	ogonek
ogr	{o}	small omicron, Greek
ograve	{o}	small o, grave accent
ohacgr	ó	small omega, accent, Greek
ohgr	ó	small omega, Greek
ohm	&ohm;	ohm sign
olarr	&olarr;	left arrow in circle
om	(m)	lower case m in circle
omacr	ō	small o, macron
omega	ω	small omega, Greek
ominus	⊖	minus sign in circle
oplus	&oplus;	plus sign in circle
or	∨	logical or
orarr	&orarr;	right arrow in circle
order	&order;	order of (script small o)
ordf	a	ordinal indicator, feminine
ordm	º	ordinal indicator, masculine
oslash	ø	small o, slash
osol	&osol;	solidus in circle
otilde	õ	small o, tilde
otimes	⊗	multiply sign in circle
ouml	ö	small o, dieresis or umlaut mark
par		parallel
para	¶	pilcrow (paragraph sign)
part	&part;	partial differential
pcy	҃	small pe, Cyrillic
percent	%	percent sign
period	.	full stop, period
permil	‰	per thousand
perp	⊥	perpendicular
pgr	π	small pi, Greek

phgr	$\varphi$	small phi, Greek
phis	$\phi$	straight phi
phiv		curly or open phi
phmmat	&phmmat;	physics M-matrix (script capital M)
phone	$\pmb{\alpha}$	telephone symbol
pi0080	&pi0080;	pi character, font 500, cell hex 80
pi0081	&pi0081;	pi character, font 500, cell hex 81
pi0082	&pi0082;	pi character, font 500, cell hex 82
pi0083	&pi0083;	pi character, font 500, cell hex 83
pi0084	&pi0084;	pi character, font 500, cell hex 84
pi0085	&pi0085;	pi character, font 500, cell hex 85
pi0086	&pi0086;	pi character, font 500, cell hex 86
pi0087	&pi0087;	pi character, font 500, cell hex 87
pi0088	&pi0088;	pi character, font 500, cell hex 88
pi0089	&pi0089;	pi character, font 500, cell hex 89
pi008a	&pi008a;	pi character, font 500, cell hex 8a
pi008b	&pi008b;	pi character, font 500, cell hex 8b
pi008c	&pi008c;	pi character, font 500, cell hex 8c
pi008d	&pi008d;	pi character, font 500, cell hex 8d
pi008e	&pi008e;	pi character, font 500, cell hex 8e
pi008f	&pi008f;	pi character, font 500, cell hex 8f
pi0090	&pi0090;	pi character, font 500, cell hex 90

pi0091	&pi0091;	pi character, font 500, cell hex 91
pi0092	&pi0092;	pi character, font 500, cell hex 92
pi0093	&pi0093;	pi character, font 500, cell hex 93
pi0094	&pi0094;	pi character, font 500, cell hex 94
pi0095	&pi0095;	pi character, font 500, cell hex 95
pi0096	&pi0096;	pi character, font 500, cell hex 96
pi0097	&pi0097;	pi character, font 500, cell hex 97
pi0098	&pi0098;	pi character, font 500, cell hex 98
pi0099	&pi0099;	pi character, font 500, cell hex 99
pi009a	&pi009a;	pi character, font 500, cell hex 9a
pi009b	&pi009b;	pi character, font 500, cell hex 9b
pi009c	&pi009c;	pi character, font 500, cell hex 9c
pi009d	&pi009d;	pi character, font 500, cell hex 9d
pi009e	&pi009e;	pi character, font 500, cell hex 9e
pi009f	&pi009f;	pi character, font 500, cell hex 9f
pi00a0	&pi00a0;	pi character, font 500, cell hex a0
pi00a1	&pi00a1;	pi character, font 500, cell hex a1
pi00a2	&pi00a2;	pi character, font 500, cell hex a2
pi00a3	&pi00a3;	pi character, font 500, cell hex a3
pi00a4	&pi00a4;	pi character, font 500, cell hex a4

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pi00a8	&pi00a8;	pi character, font 500, cell hex a8
pi00a9	&pi00a9;	pi character, font 500, cell hex a9
pi00aa	&pi00aa;	pi character, font 500, cell hex aa
pi00ab	&pi00ab;	pi character, font 500, cell hex ab
pi00ac	&pi00ac;	pi character, font 500, cell hex ac
pi00ad	&pi00ad;	pi character, font 500, cell hex ad
pi00ae	&pi00ae;	pi character, font 500, cell hex ae
pi00af	&pi00af;	pi character, font 500, cell hex af
pi00b0	&pi00b0;	pi character, font 500, cell hex b0
pi00b1	○	pi character, font 500, cell hex b1
pi00b2	&pi00b2;	pi character, font 500, cell hex b2
pi00b3	&pi00b3;	pi character, font 500, cell hex b3
pi00b4	&pi00b4;	pi character, font 500, cell hex b4
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pi00c1	&pi00c1;	pi character, font 500, cell hex c1
pi00c2	&pi00c2;	pi character, font 500, cell hex c2
pi00c3	&pi00c3;	pi character, font 500, cell hex c3
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pi00c8	&pi00c8;	pi character, font 500, cell hex c8
pi00c9	&pi00c9;	pi character, font 500, cell hex c9
pi00ca	&pi00ca;	pi character, font 500, cell hex ca
pi00cb	&pi00cb;	pi character, font 500, cell hex cb
pi00cc	&pi00cc;	pi character, font 500, cell hex cc
pi00cd	&pi00cd;	pi character, font 500, cell hex cd
pi00ce	&pi00ce;	pi character, font 500, cell hex ce
pi00cf	&pi00cf;	pi character, font 500, cell hex cf

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pi00d4	&pi00d4;	pi character, font 500, cell hex d4
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pi00d8	&pi00d8;	pi character, font 500, cell hex d8
pi00d9	&pi00d9;	pi character, font 500, cell hex d9
pi00da	&pi00da;	pi character, font 500, cell hex da
pi00db	&pi00db;	pi character, font 500, cell hex db
pi00dc	&pi00dc;	pi character, font 500, cell hex dc
pi00dd	&pi00dd;	pi character, font 500, cell hex dd
pi00de	&pi00de;	pi character, font 500, cell hex de
pi00df	&pi00df;	pi character, font 500, cell hex df
pi00e0	&pi00e0;	pi character, font 500, cell hex e0
pi00e1	&pi00e1;	pi character, font 500, cell hex e1
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pi00e9	&pi00e9;	pi character, font 500, cell hex e9
pi00ea	&pi00ea;	pi character, font 500, cell hex ea
pi00eb	&pi00eb;	pi character, font 500, cell hex eb
pi00ec	&pi00ec;	pi character, font 500, cell hex ec
pi00ed	&pi00ed;	pi character, font 500, cell hex ed
pi00ef	&pi00ef;	pi character, font 500, cell hex ef
pi00f0	&pi00f0;	pi character, font 500, cell hex f0
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pi00fc	&pi00fc;	pi character, font 500, cell hex fc
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pi00fe	&pi00fe;	pi character, font 500, cell hex fe
pi00ff	&pi00ff;	pi character, font 500, cell hex ff
pi0181	&pi0181;	pi character, font 501, cell hex 81
pi0182	&pi0182;	pi character, font 501, cell hex 82
pi0183	&pi0183;	pi character, font 501, cell hex 83
pi0184	&pi0184;	pi character, font 501, cell hex 84
pi0185	&pi0185;	pi character, font 501, cell hex 85
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pi0187	&pi0187;	pi character, font 501, cell hex 87
pi0188	&pi0188;	pi character, font 501, cell hex 88
pi0189	&pi0189;	pi character, font 501, cell hex 89
pi018a	&pi018a;	pi character, font 501, cell hex 8a
pi018b	&pi018b;	pi character, font 501, cell hex 8b
pi018c	&pi018c;	pi character, font 501, cell hex 8c
pi018d	&pi018d;	pi character, font 501, cell hex 8d
pi0190	&pi0190;	pi character, font 501, cell hex 90
pi0191	&pi0191;	pi character, font 501, cell hex 91

pi0192	&pi0192;	pi character, font 501, cell hex 92
pi0194	&pi0194;	pi character, font 501, cell hex 94
pi0195	&pi0195;	pi character, font 501, cell hex 95
pi0196	&pi0196;	pi character, font 501, cell hex 96
pi0197	&pi0197;	pi character, font 501, cell hex 97
pi0198	&pi0198;	pi character, font 501, cell hex 98
pi0199	&pi0199;	pi character, font 501, cell hex 99
pi019a	&pi019a;	pi character, font 501, cell hex 9a
pi01a0	&pi01a0;	pi character, font 501, cell hex a0
pi01a1	&pi01a1;	pi character, font 501, cell hex a1
pi01a2	&pi01a2;	pi character, font 501, cell hex a2
pi01a3	&pi01a3;	pi character, font 501, cell hex a3
pi01a4	&pi01a4;	pi character, font 501, cell hex a4
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pi01a6	&pi01a6;	pi character, font 501, cell hex a6
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pi01a9	&pi01a9;	pi character, font 501, cell hex a9
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pi01ab	&pi01ab;	pi character, font 501, cell hex ab

pi01ac	&pi01ac;	pi character, font 501, cell hex ac
pi01ad	&pi01ad;	pi character, font 501, cell hex ad
pi01b0	&pi01b0;	pi character, font 501, cell hex b0
pi01b1	&pi01b1;	pi character, font 501, cell hex b1
pi01b2	&pi01b2;	pi character, font 501, cell hex b2
pi01b3	&pi01b3;	pi character, font 501, cell hex b3
pi01b4	&pi01b4;	pi character, font 501, cell hex b4
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pi01b6	&pi01b6;	pi character, font 501, cell hex b6
pi01b7	&pi01b7;	pi character, font 501, cell hex b7
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pi01c0	&pi01c0;	pi character, font 501, cell hex c0
pi01c1	&pi01c1;	pi character, font 501, cell hex c1
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pi01c3	&pi01c3;	pi character, font 501, cell hex c3
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pi01c5	&pi01c5;	pi character, font 501, cell hex c5
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pi01c8	&pi01c8;	pi character, font 501, cell hex c8

pi01c9	&pi01c9;	pi character, font 501, cell hex c9
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pi01cb	&pi01cb;	pi character, font 501, cell hex cb
pi01cc	&pi01cc;	pi character, font 501, cell hex cc
pi01cd	&pi01cd;	pi character, font 501, cell hex cd
pi01d0	&pi01d0;	pi character, font 501, cell hex d0
pi01d1	&pi01d1;	pi character, font 501, cell hex d1
pi01d2	&pi01d2;	pi character, font 501, cell hex d2
pi01d5	&pi01d5;	pi character, font 501, cell hex d5
pi01d8	&pi01d8;	pi character, font 501, cell hex d8
pi01d9	&pi01d9;	pi character, font 501, cell hex d9
pi01e2	&pi01e2;	pi character, font 501, cell hex e2
pi01e3	&pi01e3;	pi character, font 501, cell hex e3
pi01e4	&pi01e4;	pi character, font 501, cell hex e4
pi01e5	&pi01e5;	pi character, font 501, cell hex e5
pi01e6	&pi01e6;	pi character, font 501, cell hex e6
pi01e7	&pi01e7;	pi character, font 501, cell hex e7
pi01e8	&pi01e8;	pi character, font 501, cell hex e8
pi01e9	&pi01e9;	pi character, font 501, cell hex e9
pi01f0	&pi01f0;	pi character, font 501, cell hex f0

pi01f1	&pi01f1;	pi character, font 501, cell hex f1
pi01f3	&pi01f3;	pi character, font 501, cell hex f3
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pi01f9	&pi01f9;	pi character, font 501, cell hex f9
pi0281	&pi0281;	pi character, font 502, cell hex 81
pi0282	&pi0282;	pi character, font 502, cell hex 82
pi0283	&pi0283;	pi character, font 502, cell hex 83
pi0284	&pi0284;	pi character, font 502, cell hex 84
pi0291	&pi0291;	pi character, font 502, cell hex 91
pi0292	&pi0292;	pi character, font 502, cell hex 92
pi0293	&pi0293;	pi character, font 502, cell hex 93
pi029d	&pi029d;	pi character, font 502, cell hex 9d
pi029e	&pi029e;	pi character, font 502, cell hex 9e
pi029f	&pi029f;	pi character, font 502, cell hex 9f
pi02a2	&pi02a2;	pi character, font 502, cell hex a2
pi02ad	&pi02ad;	pi character, font 502, cell hex ad
pi02b0	&pi02b0;	pi character, font 502, cell hex b0

pi02c0	&pi02c0;	pi character, font 502, cell hex c0
pi02cd	&pi02cd;	pi character, font 502, cell hex cd
pi02ce	&pi02ce;	pi character, font 502, cell hex ce
pi02cf	&pi02cf;	pi character, font 502, cell hex cf
pi02e1	&pi02e1;	pi character, font 502, cell hex e1
pi02eb	&pi02eb;	pi character, font 502, cell hex eb
pi02ec	&pi02ec;	pi character, font 502, cell hex ec
pi02ed	&pi02ed;	pi character, font 502, cell hex ed
pi02ee	&pi02ee;	pi character, font 502, cell hex ee
pi02ef	&pi02ef;	pi character, font 502, cell hex ef
pi02fb	&pi02fb;	pi character, font 502, cell hex fb
pi02fc	&pi02fc;	pi character, font 502, cell hex fc
pi02fd	&pi02fd;	pi character, font 502, cell hex fd
pi02fe	&pi02fe;	pi character, font 502, cell hex fe
pi02ff	&pi02ff;	pi character, font 502, cell hex ff
pi0382	&pi0382;	pi character, font 503, cell hex 82
pi038c	&pi038c;	pi character, font 503, cell hex 8c
pi0391	&pi0391;	pi character, font 503, cell hex 91
pi0392	&pi0392;	pi character, font 503, cell hex 92
pi0393	&pi0393;	pi character, font 503, cell hex 93

pi0394	&pi0394;	pi character, font 503, cell hex 94
pi0395	&pi0395;	pi character, font 503, cell hex 95
pi0396	&pi0396;	pi character, font 503, cell hex 96
pi0397	&pi0397;	pi character, font 503, cell hex 97
pi0398	&pi0398;	pi character, font 503, cell hex 98
pi0399	&pi0399;	pi character, font 503, cell hex 99
pi039a	&pi039a;	pi character, font 503, cell hex 9a
pi039b	&pi039b;	pi character, font 503, cell hex 9b
pi039c	&pi039c;	pi character, font 503, cell hex 9c
pi03c0	&pi03c0;	pi character, font 503, cell hex c0
pi03c1	&pi03c1;	pi character, font 503, cell hex c1
pi03c2	&pi03c2;	pi character, font 503, cell hex c2
pi03c3	&pi03c3;	pi character, font 503, cell hex c3
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pi03e8	&pi03e8;	pi character, font 503, cell hex e8
pi0880	&pi0880;	pi character, font 508, cell hex 80
pi0881	&pi0881;	pi character, font 508, cell hex 81
pi0882	&pi0882;	pi character, font 508, cell hex 82
pi0883	&pi0883;	pi character, font 508, cell hex 83
pi0887	&pi0887;	pi character, font 508, cell hex 87
pi0888	&pi0888;	pi character, font 508, cell hex 88
pi0889	&pi0889;	pi character, font 508, cell hex 89
pi088a	&pi088a;	pi character, font 508, cell hex 8a
pi088b	&pi088b;	pi character, font 508, cell hex 8b
pi088c	&pi088c;	pi character, font 508, cell hex 8c
pi0890	&pi0890;	pi character, font 508, cell hex 90
pi0891	&pi0891;	pi character, font 508, cell hex 91
pi0893	&pi0893;	pi character, font 508, cell hex 93

pi0894	&pi0894;	pi character, font 508, cell hex 94
pi0895	&pi0895;	pi character, font 508, cell hex 95
pi0896	&pi0896;	pi character, font 508, cell hex 96
pi0897	&pi0897;	pi character, font 508, cell hex 97
pi0898	&pi0898;	pi character, font 508, cell hex 98
pi0899	&pi0899;	pi character, font 508, cell hex 99
pi08a2	&pi08a2;	pi character, font 508, cell hex a2
pi08a4	&pi08a4;	pi character, font 508, cell hex a4
pi08a5	&pi08a5;	pi character, font 508, cell hex a5
pi08a6	&pi08a6;	pi character, font 508, cell hex a6
pi08a7	&pi08a7;	pi character, font 508, cell hex a7
pi08a8	&pi08a8;	pi character, font 508, cell hex a8
pi08a9	&pi08a9;	pi character, font 508, cell hex a9
pi08b0	&pi08b0;	pi character, font 508, cell hex b0
pi08b1	&pi08b1;	pi character, font 508, cell hex b1
pi08b2	&pi08b2;	pi character, font 508, cell hex b2
pi08b3	&pi08b3;	pi character, font 508, cell hex b3
pi08b4	&pi08b4;	pi character, font 508, cell hex b4
pi08b5	&pi08b5;	pi character, font 508, cell hex b5
pi08b6	&pi08b6;	pi character, font 508, cell hex b6

pi08b7	&pi08b7;	pi character, font 508, cell hex b7
pi08b8	&pi08b8;	pi character, font 508, cell hex b8
pi08b9	&pi08b9;	pi character, font 508, cell hex b9
pi08c1	&pi08c1;	pi character, font 508, cell hex c1
pi08c2	&pi08c2;	pi character, font 508, cell hex c2
pi08c3	&pi08c3;	pi character, font 508, cell hex c3
pi08c4	&pi08c4;	pi character, font 508, cell hex c4
pi08c5	&pi08c5;	pi character, font 508, cell hex c5
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pi08c8	&pi08c8;	pi character, font 508, cell hex c8
pi08c9	&pi08c9;	pi character, font 508, cell hex c9
pi08cc	&pi08cc;	pi character, font 508, cell hex cc
pi08cd	α	pi character, font 508, cell hex cd
pi08d1	β	pi character, font 508, cell hex d1
pi08d2	&pi08d2;	pi character, font 508, cell hex d2
pi08d3	&pi08d3;	pi character, font 508, cell hex d3
pi08d4	&pi08d4;	pi character, font 508, cell hex d4
pi08d5	&pi08d5;	pi character, font 508, cell hex d5
pi08d6	&pi08d6;	pi character, font 508, cell hex d6

pi08d7	&pi08d7;	pi character, font 508, cell hex d7
pi08d8	&pi08d8;	pi character, font 508, cell hex d8
pi08d9	&pi08d9;	pi character, font 508, cell hex d9
pi08e1	&pi08e1;	pi character, font 508, cell hex e1
pi08e2	&pi08e2;	pi character, font 508, cell hex e2
pi08e3	&pi08e3;	pi character, font 508, cell hex e3
pi08e4	&pi08e4;	pi character, font 508, cell hex e4
pi08e5	&pi08e5;	pi character, font 508, cell hex e5
pi08e6	&pi08e6;	pi character, font 508, cell hex e6
pi08e7	&pi08e7;	pi character, font 508, cell hex e7
pi08e8	&pi08e8;	pi character, font 508, cell hex e8
pi08e9	&pi08e9;	pi character, font 508, cell hex e9
pi08f0	&pi08f0;	pi character, font 508, cell hex f0
pi08f1	&pi08f1;	pi character, font 508, cell hex f1
pi08f2	&pi08f2;	pi character, font 508, cell hex f2
pi08f3	&pi08f3;	pi character, font 508, cell hex f3
pi08f4	&pi08f4;	pi character, font 508, cell hex f4
pi08f6	&pi08f6;	pi character, font 508, cell hex f6
pi08f7	&pi08f7;	pi character, font 508, cell hex f7
pi10a2	&pi10a2;	pi character, font 510, cell hex a2

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pi10a7	&pi10a7;	pi character, font 510, cell hex a7
pi10a9	&pi10a9;	pi character, font 510, cell hex a9
pi10b0	&pi10b0;	pi character, font 510, cell hex b0
pi10b1	&pi10b1;	pi character, font 510, cell hex b1
pi10b2	&pi10b2;	pi character, font 510, cell hex b2
pi10b3	&pi10b3;	pi character, font 510, cell hex b3
pi10b4	&pi10b4;	pi character, font 510, cell hex b4
pi10b5	&pi10b5;	pi character, font 510, cell hex b5
pi10b6	&pi10b6;	pi character, font 510, cell hex b6
pi10b7	&pi10b7;	pi character, font 510, cell hex b7
pi10b8	&pi10b8;	pi character, font 510, cell hex b8
pi10b9	&pi10b9;	pi character, font 510, cell hex b9
pi10ba	&pi10ba;	pi character, font 510, cell hex ba
pi10bb	&pi10bb;	pi character, font 510, cell hex bb
pi10c0	&pi10c0;	pi character, font 510, cell hex c0
pi10c1	&pi10c1;	pi character, font 510, cell hex c1
pi10c2	&pi10c2;	pi character, font 510, cell hex c2
pi10c3	&pi10c3;	pi character, font 510, cell hex c3
pi10c4	&pi10c4;	pi character, font 510, cell hex c4

pi10c5	&pi10c5;	pi character, font 510, cell hex c5
pi10c6	&pi10c6;	pi character, font 510, cell hex c6
pi10c7	&pi10c7;	pi character, font 510, cell hex c7
pi10c8	&pi10c8;	pi character, font 510, cell hex c8
pi10c9	&pi10c9;	pi character, font 510, cell hex c9
pi10d1	&pi10d1;	pi character, font 510, cell hex d1
pi10d2	&pi10d2;	pi character, font 510, cell hex d2
pi10d3	&pi10d3;	pi character, font 510, cell hex d3
pi10d4	&pi10d4;	pi character, font 510, cell hex d4
pi10d5	&pi10d5;	pi character, font 510, cell hex d5
pi10d6	&pi10d6;	pi character, font 510, cell hex d6
pi10d7	&pi10d7;	pi character, font 510, cell hex d7
pi10d8	&pi10d8;	pi character, font 510, cell hex d8
pi	$\pi$	small pi, Greek
piv	$\pi$	varpi
planck	&planck;	Planck's over 2pi
plus	+	plus sign
plusb	&plusb;	plus sign in box
plusdo	&plusdo;	plus sign, dot above
plusmn	$\pm$	plus-or-minus sign
pmacr	$\bar{p}$	small p, macron
pound	$\text{£}$	pound sign
pr	&pr;	precedes
prap	&rap;	precedes, approximate
pre	&pre;	precedes, equals
prime	'	prime or minute

prnE	&prnE;	precedes, not double equals
prnap	&prnap;	precedes, not approx
prnsim	&prnsim;	precedes, not similar
prod	&prod;	product operator
prop	∞	is proportional to
prsim	&prsim;	precedes, similar
psgr	ψ	small psi, Greek
psi	Ψ	small psi, Greek
puncsp	&puncsp;	punctuation space (width of comma)
qmacr	̄q	small q, macron
quest	?	question mark
quot	“	quotation mark
rAarr	&rAarr;	right triple arrow
rArr	→	implies
racute	́r	small r, acute accent
radic	√	radical
rang	>	right angle bracket
raquo	»	angle quotation mark, right
rarr2	&rarr2;	two right arrows
rarr	→	rightward arrow
rarrhk	&rarrhk;	right arrow, hooked
rarrlp	&rarrlp;	right arrow, looped
rarrsl	&rarrsl;	left-shaded white rightwards arrow
rarrtl	&rarrtl;	right arrow, tailed
rarrw	&rarrw;	right arrow, wavy
rcaron	́r	small r, caron
rcedil	̄r	small r, cedilla
rceil	&rceil;	right ceiling
rcub	}	right curly bracket
rcy	҃	small er, Cyrillic
rdotb		small r, dot below
rdquo	”	double quotation mark, right
rdquor	”	rising dbl quote, right (high)
real	&real;	real

rect	&rect;	rectangle, open
reg	®	registered sign
rfloor	&rfloor;	right floor
rgr	ρ	small rho, Greek
rhard	&rhard;	right harpoon-down
rharu	&rharu;	right harpoon-up
rho	ρ	small rho, Greek
rhov	&rhov;	varrho
rhring	,	right half ring
ring	&ring;	ring
rlarr2	→	right arrow over left arrow
rlhar2	⇒	right harpoon over left
rpar	)	right parenthesis
rparen2	)	2-line right parens
rparen3	&rparen3;	3-line right parens
rpargt	&rpargt;	right parenthesis, greater-than
rsh	&rsh;	right shift
rsqb2	&rsqb2;	right eqn bracket, covering full frac
rsqb	]	right square bracket
rsquo	'	single quotation mark, right
rsquor	&rsquor;	rising single quote, right (high)
rthree	&rthree;	right-three-times
rtimes	&rtimes;	times sign, right closed
rtri	►	r triangle, open
rtrie	&rtrie;	right triangle, equals
rtrif	►	r tri, filled
rx	R	pharmaceutical prescription (Rx)
sacute	́	small s, acute accent
samalg	&samalg;	small amalgamation
sbsol	&sbsol;	short reverse solidus
sc	&sc;	succeeds
scap	&scap;	succeeds, approximate

scaron	ſ	small s, caron
sccue	&sccue;	succeeds, curly equals
sce	&sce;	succeeds, equals
scedil	ſ	small s, cedilla
schwa	ə	schwa
scirc	&scirc;	small s, circumflex accent
scnE	&scnE;	succeeds, not double equals
scsnap	&scsnap;	succeeds, not approximate
scnsim	&scnsim;	succeeds, not similar
scsim	&scsim;	succeeds, similar
scy	ć	small es, Cyrillic
sdot	.	small middle dot
sdotb		small dot in box
sdotbelow		small s, dot below
sect	§	section sign
semi	;	semicolon
service	<sup>SM</sup>	Service mark, raised from baseline
setaskeyeda	a	set as keyed a
setaskeyedb	b	set as keyed b
setaskeyedc	c	set as keyed c
setaskeyedd	d	set as keyed d
setaskeyede	e	set as keyed e
setaskeyedf	f	set as keyed f
setaskeyedg	g	set as keyed g
setaskeyedh	h	set as keyed h
setaskeyedi	i	set as keyed i
setaskeyedj	j	set as keyed j
setaskeyedk	k	set as keyed k
setaskeyedl	l	set as keyed l
setaskeyedm	m	set as keyed m
setaskeyedn	n	set as keyed n
setaskeyedo	o	set as keyed o
setaskeyedp	p	set as keyed p
setaskeyedq	q	set as keyed q
setaskeyedr	r	set as keyed r
setaskeyeds	s	set as keyed s

setaskeyedt	t	set as keyed t
setaskeyedu	u	set as keyed u
setaskeyedv	v	set as keyed v
setaskeyedw	w	set as keyed w
setaskeyedx	x	set as keyed x
setaskeyedy	y	set as keyed y
setaskeyedz	z	set as keyed z
setmn	\	reverse solidus
sext	*	sextile (6-pointed star)
sfgr	s	final small sigma, Greek
sfrown	&sfrown;	small down curve
sgr	σ	small sigma, Greek
sharp	&sharp;	musical sharp
shchcy	҃	small shcha, Cyrillic
shcy	҄	small sha, Cyrillic
shy		soft hyphen
sigma	σ	small sigma, Greek
sigmav	ς	varsigma
sim	~	similar
sime	&sime;	similar, equals
slaquo	&slaquo;	guillemot, single, open
smacr	ſ	small s, macron
smid	&smid;	short vertical line relation
smile	&smile;	up curve
softcy	҂	small soft sign, Cyrillic
sol	/	solidus
spades	♠	spades suit symbol
spar	&spar;	short parallel
sqcap	&sqcap;	square intersection
sqcup	&sqcup;	square union
sqsub	&sqsub;	square subset
sqsube	&sqsube;	square subset, equals
sqsup	&sqsup;	square superset
sqsupe	&sqsupe;	square superset, equals
squ66	□	square, open, 66% em
squ75	□	square, open, 75% em
squ	□	square, open

square	█	square
squf66	█	square, filled, 66% em
squf75	█	square, filled, 75% em
squf	█	sq bullet, filled
sraquo	&sraquo;	guillemot, single, close
ssetmn	&ssetmn;	small reverse solidus
ssmacr	ss̄	small ss, macron
ssmile	&ssmile;	small up curve
sstarf	&sstarf;	small star, filled
star	☆	star, open
starf	★	star, filled
sub	⊂	subset or is implied by
subE	&subE;	subset, double equals
sube	&sube;	subset, equals
subnE	&subnE;	subset, not double equals
subne	&subne;	subset, not equals
sum	Σ	summation operator
suml	&suml;	small s, dieresis or umlaut mark
sung	&sung;	music note (sung text sign)
sup1	¹	superscript one
sup2	²	superscript two
sup3	³	superscript three
sup	⊃	superset or implies
supE	&supE;	superset, double equals
supe	&supe;	superset, equals
supnE	&supnE;	superset, not double equals
supne	&supne;	superset, not equals
szlig	ß	small sharp s, German (sz ligature)
target	&target;	register mark or target
tau	τ	small tau, Greek
tcaron	ť	small t, caron
tcedil	ť	small t, cedilla
tcirc	&tcirc;	text circumflex
tcomma	'	turned comma
tcy	Т	small te, Cyrillic
tdot	...	three dots above

tdquo	"	quote, double, typewriter
telrec	&telrec;	telephone recorder symbol
tgr	τ	small tau, Greek
tgrave	&tgrave;	text grave
there4	∴	therefore
theta	θ	small theta, Greek
thetas	Θ	straight theta, Greek
thetav	θ̄	curly or open theta
thgr	θ̄	small theta, Greek
thinsp		thin space (1/6-em)
thkap	&thkap;	thick approximate
thksim	&thksim;	thick similar
thorn	þ	small thorn, Icelandic
tilde	~	tilde
times	×	multiply sign
timesb	⊗	multiply sign in box
top	&top;	inverted perpendicular
tprime	&tprime;	triple prime
trade	™	trade mark sign
trie	▲	triangle, equals
tscy	҃	small tse, Cyrillic
tshcy	Ћ	small tshe, Serbian
tsquo	'	quote, single, typewriter
tstrok	&tstrok;	small t, stroke
ttilde	&ttilde;	text tilde
twixt	&twixt;	between
uArr	&uArr;	up double arrow
uacgr	ú	small upsilon, accent, Greek
uacute	ú	small u, acute accent
uarr2	&uarr2;	two up arrows
uarr	↑	upward arrow
ubrcy	&ubrcy;	small u, Byelorussian
ubreve	&ubreve;	small u, breve
ucirc	û	small u, circumflex accent
ucy	Ӯ	small u, Cyrillic
udblac	ӻ	small u, double acute accent

udiagr	&udiagr;	small upsilon, dieresis, accent, Greek
udigr	&udigr;	small upsilon, dieresis, Greek
ugr	u	small upsilon, Greek
ugrave	ù	small u, grave accent
uharl	&uharl;	up harpoon-left
uharr	&uharr;	up harpoon-right
uhblk	&uhblk;	upper half block
ulcorn	&ulcorn;	upper left corner
ulcrop	&ulcrop;	upward left crop mark
umacr	ú	small u, macron
uml	„	umlaut mark
uogon	ゅ	small u, ogonek
uplus	&uplus;	plus sign in union
upsi	υ	small upsilon, Greek
upsipsili	ύ	small upsilon, psili, Greek
urcorn	&urcorn;	upper right corner
urcrop	&urcrop;	upward right crop mark
uring	՞	small u, ring
utilde	ñ	small u, tilde
utri		up triangle, open
utrif	▲	up tri, filled
uuml	ü	small u, dieresis or umlaut mark
vArr	&vArr;	up down double arrow
vDash	&vDash;	vertical, double dash
varr	&varr;	up and down arrow
vcy	Ѡ	small ve, Cyrillic
vdash		vertical, dash
vdot	՞	small v, dot above
veebar	&veebar;	logical or, bar below
vellip	&vellip;	vertical ellipsis
verbar		vertical bar
virgul	/	virgule (fraction slash)
vltri	&vltri;	left triangle, open, variant
vmacr	ጀ	small v, macron
vprime	'	prime, variant

vprop	&vprop;	proportional, variant
vrtri	&vrtri;	right triangle, open, variant
vsubnE	&vsubnE;	subset not double equals, variant
vsubne	&vsubne;	subset, not equals, variant
vsupnE	&vsupnE;	superset not double equals, variant
vsupne	&vsupne;	superset, not equals, variant
wbull	•	white bullet
wcirc	ŵ	small w, circumflex accent
wedgeq	&wedgeq;	corresponds to (wedge, equals)
weierp	&weierp;	Weierstrass p
wreath	&wreath;	wreath product
wum	ẁ	w with one dot above
xcirc	○	large circle
xcircumflex	᷇	small x, circumflex accent
xdtri	&xdtri;	big down triangle, open
xgr	᷃	small xi, Greek
xhArr	&xhArr;	long left and right double arrow
xharr	↔	long left and right arrow
xi	᷄	small xi, Greek
xlArr	&xlArr;	long left double arrow
xmacr	᷏	small x, macron
xrArr	&xrArr;	long right double arrow
xutri		big up triangle, open
yacute	᷊	small y, acute accent
yacy	᷉	small ya, Cyrillic
ycirc	᷋	small y, circumflex accent
ycy	᷌	small yeru, Cyrillic
yen	᷎	yen sign
yicy	᷎	small yi, Ukrainian
ymacr	᷏	small y, macron
yucy	᷍	small yu, Cyrillic
yum	᷈	y with one dot above

yuml	ÿ	small y, dieresis or umlaut mark
zacute	́z	small z, acute accent
zcaron	ˇz	small z, caron
zcy	ȝ	small ze, Cyrillic
zdot	ȝ	small z, dot above
zeta	ȝ	small zeta, Greek
zgr	ȝ	small zeta, Greek
zhcy	ȝ	small zhe, Cyrillic

## § 4:2 Definitions and nature

A mortgage is an executory contract made for the purpose of securing a debt or the performance of a duty either existing at the time of the execution or to be created or to arise in the future.<sup>1</sup>

In Florida, any conveyance, obligation conditioned or defeasible, bill of sale or other instrument of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument is from the debtor to the creditor or from the debtor to some third person in trust for the creditor, is deemed and held to be a mortgage, and is subject to the same rules of foreclosure and to the same regulations, restraints, and forms as are prescribed in relation to mortgages.<sup>2</sup>

A mortgage is a specific lien on the property therein described, and is not a conveyance of the legal title or of the right of possession of such property.<sup>3</sup> The holder of a mortgage lien cannot be deprived of due process.<sup>4</sup> It is a chose in action that creates a lien on the land, but not an

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### [Section 4:2]

<sup>1</sup>*Legal Encyclopedias*: Fla. Jur. 2d, Mortgages and Deeds of Trust § 1

<sup>2</sup>Fla. Stat. Ann. § 697.01(1).

No such conveyance shall be deemed or held to be a mortgage, as against a bona fide purchasers or mortgagee, for value without notice, holding under the grantee. Fla. Stat. Ann. § 697.01(2).

<sup>3</sup>See Fla. Stat. Ann. § 697.02.

<sup>4</sup>Seaboard All-Florida Ry. v. Leavitt, 105 Fla. 600, 141 So. 886 (1932).

interest in the land.<sup>5</sup> Hence it may not be subject to levy, or to the lien of an execution at law.<sup>6</sup>

### § 4:3 Kinds of mortgages

The types of mortgages recognized in Florida, in addition to the ordinary mortgage, include equitable mortgages, purchase-money mortgages, balloon mortgages, and deeds of trusts in the nature of mortgages.

An equitable mortgage is an instrument that is not effective at law as a mortgage, but is regarded as such in a court of chancery.<sup>1</sup>

A purchase-money mortgage is a mortgage on land to secure the purchase money, executed by a purchaser of the land contemporaneously with the acquisition of the legal title thereto.<sup>2</sup>

A balloon mortgage is one in which the final payment or the principal balance due and payable on maturity is greater than twice the amount of the regular monthly or periodic payments of the mortgage.<sup>3</sup>

A deed of trust or trust deed, is a species of deed that is in the nature of a mortgage, and is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance.<sup>4</sup> Although there is a formal difference between an ordinary mortgage and a deed of trust operating by way

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<sup>5</sup>Waldock v. Iba, 114 Fla. 786, 153 So. 915 (1934).

<sup>6</sup>Ratliff v. Nowery, 102 Fla. 1072, 136 So. 895 (1931).

**Legal Encyclopedias:** For discussion of definition and nature of mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 1.

#### [Section 4:3]

<sup>1</sup>**Legal Encyclopedias:** As to circumstances giving rise to equitable mortgages, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 7.

<sup>2</sup>A purchase-money mortgage may be taken in the name of a person other than the vendor. See Cheves v. First Nat. Bank of Gainesville, 79 Fla. 34, 83 So. 870 (1920).

**Legal Encyclopedias:** For discussion of purchase-money mortgages, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 8.

<sup>3</sup>Fla. Stat. Ann. § 697.05(2)(a)1.

As to requirement of balloon mortgage legend to be printed on mortgage, see Fla. Stat. Ann. § 697.05(2)(a)1.

<sup>4</sup>**Legal Encyclopedias:** For discussion of deeds of trust, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 10 to 16.

of security, in that the former is executed directly to the creditor to be secured whereas the latter is executed to a disinterested third person or trustee, a deed of trust is, in effect, a mortgage on property<sup>5</sup> by which the trustee acquires only the character of the estate or power that was adjudicated by the deed of trust.<sup>6</sup> Since a deed of trust to secure a debt is regarded as a mortgage, it is governed by the law applicable to mortgages.<sup>7</sup>

## B. FORM DRAFTING PRINCIPLES

### § 4:4 General requirements

The basic purpose of a real property mortgage is to create and regulate a security interest in real property. Essentially, a mortgage should identify the parties,<sup>1</sup> manifest the security nature of the instrument,<sup>2</sup> describe with reasonable certainty the real property to be subjected to the lien of the mortgage,<sup>3</sup> and set out the obligation to be secured.<sup>4</sup>

Generally, no precise form of words is necessary to constitute a mortgage.<sup>5</sup>

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<sup>5</sup>Marden v. Elks Club, 138 Fla. 707, 190 So. 40 (1939); Warner v. Watson, 35 Fla. 402, 17 So. 654 (1895).

<sup>6</sup>Christopher v. Mungen, 61 Fla. 513, 61 Fla. 534, 55 So. 273 (1911).

<sup>7</sup>An imperfect trust deed may be effective as an equitable mortgage. Holmes v. Dunning, 101 Fla. 55, 133 So. 557 (1931).

**Legal Encyclopedias:** See Fla. Jur. 2d, Mortgages and Deeds of Trust § 10.

#### [Section 4:4]

<sup>1</sup>**Legal Encyclopedias:** For discussion of parties to a mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 52 to 53.

<sup>2</sup>**Legal Encyclopedias:** As to necessity of obligation to be secured as an element of a mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 68.

<sup>3</sup>**Legal Encyclopedias:** For a discussion of property and interests subject to mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 58 to 67.

<sup>4</sup>**Legal Encyclopedias:** For a discussion of obligations to be secured by mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 68 to 80.

<sup>5</sup>Despite its form, an instrument will be deemed to be a mortgage if, taken alone or in connection with surrounding facts and circumstances, it appears to have been given for the purpose of securing the payment of money. First Mortg. Corp. of Stuart v. deGive, 177 So. 2d 741 (Fla. Dist. Ct. App. 2d Dist. 1965).

**§ 4:5 General requirements—Purchase-money mortgages**

No particular form or terminology is required to create a purchase-money mortgage, as the relationship of the parties determines whether a mortgage is a purchase-money mortgage or not.<sup>1</sup> However, it is recommended that a statement that it is a purchase-money mortgage be included on the face of the mortgage.

**§ 4:6 Parties**

In order that an instrument may operate as a mortgage, both a mortgagor and a mortgagee must exist as parties to the instrument.<sup>1</sup> The mortgagor and mortgagee must have capacity to execute or enter into a mortgage contract.<sup>2</sup> In addition, the person executing or taking a mortgage on behalf of a mortgagor or mortgagee must have authority to do so.<sup>3</sup> The fact that one advancing money for a loan causes the mortgage to be executed to a third person does not affect the validity of the mortgage.<sup>4</sup>

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**[Section 4:5]**

<sup>1</sup>As to what is a purchase-money mortgage, see § 4:3.

**[Section 4:6]**

<sup>1</sup>**Legal Encyclopedias:** Generally; Taking mortgage in name of third person, Fla. Jur. 2d, Mortgages and Deeds of Trust § 52.

<sup>2</sup>Lorenz v. Lorenz, 157 Fla. 402, 26 So. 2d 54 (1946); Sheppard v. Cherry, 118 Fla. 473, 159 So. 661 (1935).

**Legal Encyclopedias:** For discussion of parties to mortgages, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 52 to 53.

<sup>3</sup>Haimovitz v. Hawk, 80 Fla. 272, 85 So. 668 (1920).

<sup>4</sup>Cheves v. First Nat. Bank of Gainesville, 79 Fla. 34, 83 So. 870 (1920).

**Legal Encyclopedias:** For discussion of effect of taking mortgage in name of third person, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 52.

**§ 4:7 Consideration**

A mortgage, in order to be valid and binding, must be founded on a bona fide<sup>1</sup> and sufficient consideration.<sup>2</sup> The consideration must be legal.<sup>3</sup>

**§ 4:8 Property subject to lien**

It is essential to the existence of a mortgage which purports to cover present interests of the mortgagor that the mortgagor hold, or by the transaction acquire, some estate or interest in land capable of being mortgaged.<sup>1</sup> Personal property to be acquired in the future may be subject to the lien of a mortgage.<sup>2</sup> The courts regard as mortgageable interests both the interest of a vendor of land while the contract for the sale remains executory and no deed has

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**[Section 4:7]**

<sup>1</sup>Lovett v. Peoples First Nat. Bank of Quitman, 130 Fla. 142, 178 So. 124 (1937).

**Legal Encyclopedias:** For a discussion of consideration for mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 54 to 57.

<sup>2</sup>Gabel v. Drewrys Limited, U.S.A., Inc., 68 So. 2d 372, 39 A.L.R.2d 1083 (Fla. 1953); Kremser v. Tonokaboni, 356 So. 2d 1331 (Fla. Dist. Ct. App. 3d Dist. 1978).

<sup>3</sup>Young v. Victory, 112 Fla. 66, 150 So. 624 (1933).

**Legal Encyclopedias:** For a discussion of legality of consideration, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 55.

**[Section 4:8]**

<sup>1</sup>Houston v. Adams, 85 Fla. 291, 95 So. 859 (1923); King v. L & L Investors, Inc., 133 So. 2d 744 (Fla. Dist. Ct. App. 3d Dist. 1961).

**Legal Encyclopedias:** For discussion of property and interest subject to mortgage, generally, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 58 to 67.

<sup>2</sup>Marion Mortg. Co. v. Teate, 98 Fla. 713, 124 So. 172 (1929).

**Legal Encyclopedias:** For discussion of property to be acquired as subject to mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 60.

passed.<sup>3</sup> A mortgagor may pledge the rents and profits of real estate in a mortgage thereof.<sup>4</sup>

The lien of a mortgage covers only the property that is included in its description.<sup>5</sup> Generally, the rules as to descriptions of real estate in mortgages conform to those prevailing with respect to descriptions in deeds.<sup>6</sup> For the mortgage to be effective, the description must be sufficient to identify the subject property.<sup>7</sup> Reference may be made to some other instrument or document, such as a map or plat, by which the property may be identified.<sup>8</sup> The reference must be specific and must describe or particularize the other document so that it may be identified with certainty.<sup>9</sup>

If the mortgage lien is intended to cover fixtures or personal property located or to be located on the subject real property, the applicability and effect of Article 9 of the Uniform Commercial Code<sup>10</sup> should be considered. Conversely, if fixtures and personality attached to the mortgaged premises are not be included in the mortgage, this fact should be clearly set forth in the instrument.

If the mortgage contains full covenant of warranty, the

<sup>3</sup>Marion Mortg. Co. v. Grennan, 106 Fla. 913, 143 So. 761, 87 A.L.R. 1492 (1932).

**Legal Encyclopedias:** For discussion of interests of vendor and vendee as subject to mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 62.

<sup>4</sup>Pennock v. Caldwell, 116 Fla. 626, 156 So. 743 (1934).

**Legal Encyclopedias:** For discussion of rents and profits as subject to mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 63.

<sup>5</sup>Caples v. Taliaferro, 144 Fla. 1, 197 So. 861 (1940).

**Legal Encyclopedias:** For discussion of description of property subject to mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 64 to 67.

<sup>6</sup>Florida Bank & Trust Co. of West Palm Beach v. Ocean & Lake Realty Co., 118 Fla. 695, 160 So. 1 (1935).

<sup>7</sup>Fisher v. Villamil, 62 Fla. 472, 56 So. 559 (1911).

<sup>8</sup>Neves v. Flannery, 111 Fla. 608, 149 So. 618 (1933).

**Legal Encyclopedias:** For discussion of references to extraneous instruments in describing property subject to mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 65.

<sup>9</sup>Gradolph v. Ricou, 104 Fla. 237, 139 So. 579 (1932).

<sup>10</sup>Fla. Stat. §§ 679.1011 et seq.

For discussion of, and forms relating to Article 9 of the Uniform Commercial Code, see Secured Transactions (Ch 49).

mortgage will cover after-acquired real property.<sup>11</sup> However, this rule does not apply in the case of a purchase-money mortgage.<sup>12</sup>

#### § 4:9 Obligations secured

The dominant feature of a real estate mortgage is generally regarded as that of security for the debt, to which the mortgage is ancillary<sup>1</sup> or an accessory, and on which it is dependent.<sup>2</sup> A mortgage cannot be enforced on the basis of any other consideration than that on which it was given.<sup>3</sup> A mortgage may be executed to secure the obligation of a third person.<sup>4</sup> A mortgage may be given to secure the performance of future advances.<sup>5</sup> A mortgage may also be given to secure the payment of interest accruing on a debt.<sup>6</sup>

A mortgage must describe the debt intended to be secured, and an obligation is not secured by a mortgage unless it

<sup>11</sup>Sharp v. Hamilton, 520 So. 2d 9 (Fla. 1988); Florida Land Inv. Co. v. Williams, 98 Fla. 1258, 116 So. 642 (1928).

**Legal Encyclopedias:** For discussion of covenant of general warranty, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 61.

<sup>12</sup>Florida Land Inv. Co. v. Williams, 84 Fla. 157, 92 So. 876, 26 A.L.R. 171 (1922).

#### [Section 4:9]

<sup>1</sup>Scott v. Taylor, 63 Fla. 612, 58 So. 30 (1912).

**Legal Encyclopedias:** For general discussion of obligations secured by mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 68 to 80.

<sup>2</sup>Taylor v. American Nat. Bank of Pensacola, 63 Fla. 631, 57 So. 678 (1912).

<sup>3</sup>Sumner v. Osborne, 101 Fla. 742, 135 So. 513 (1931).

**Legal Encyclopedias:** For discussion of necessity of valid obligation to be secured by mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 68.

<sup>4</sup>Terwilligar v. Ballard, 64 Fla. 158, 59 So. 244 (1912); Lindsay v. Matthews, 17 Fla. 575, 1880 WL 3068 (1880).

**Legal Encyclopedias:** For discussion of obligations of third persons as secured by mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 69.

<sup>5</sup>Fla. Stat. Ann. § 697.04(1)(a).

**Legal Encyclopedias:** For discussion of mortgage to secure future advances, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 70 to 72.

<sup>6</sup>Miami Mortgage & Guaranty Co. v. Drawdy, 99 Fla. 1092, 127 So. 323 (1930); Ratner v. Miami Beach First Nat. Bank, 368 So. 2d 1326 (Fla. Dist. Ct. App. 3d Dist. 1979).

comes fairly within its terms.<sup>7</sup> As a general practice, a facsimile of the note secured by the mortgage is set forth within the body of the mortgage itself. If this is not done, the debt should be described adequately enough to advise subsequent purchasers or creditors of the extent of the obligation and to generally inform them of its terms. Language should be included in the mortgage referring to the existing note, and incorporating the full terms and conditions thereof by reference.<sup>8</sup>

A dragnet clause in a mortgage purports to use the real estate as security for all past, present and future debts between the parties. Dragnet clauses are strictly construed against the drafter of the instrument.<sup>9</sup> Preexisting obligations will not be included within the scope of a dragnet clause unless specifically identified by name in the mortgage.<sup>10</sup> Identifying preexisting obligations prevents mortgages from being extended to secure debts which are not contemplated by the debtor, and thus not within the intention of the parties, as well as providing notice of the extent of the indebted-

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**A.L.R. Library:** Construction and effect as to interest due of real estate mortgage clause authorizing mortgagor to prepay principal debt, 86 A.L.R. 3d 599.

**Legal Encyclopedias:** For discussion of mortgage to secure payment of interest and penalties, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 74 to 75.

**Law Reviews and Other Periodicals:** Scheuerman, Adjustable Rate Mortgages—Fundamental New Directions in Residential Mortgage Lending, 55 Fla. B.J. 649, 737 (1981).

<sup>7</sup>Newman v. Greene, 92 Fla. 684, 109 So. 582 (1926); Newman v. Greene, 92 Fla. 684, 109 So. 582 (1926); Tunno v. Robert, 16 Fla. 738, 1878 WL 2255 (1878).

**Legal Encyclopedias:** For discussion of description of mortgaged property, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 77 to 80.

<sup>8</sup>To avoid possible construction problems relating to the scope of the indebtedness secured by a mortgage, care should be taken to avoid the use of all-encompassing or “dragnet” clauses, such as “all liabilities,” to describe the mortgage debt. For forms of promissory notes, see Uniform Commercial Code, Commercial Paper (Ch 43).

<sup>9</sup>Boyette v. Carden, 347 So. 2d 759 (Fla. Dist. Ct. App. 1st Dist. 1977).

<sup>10</sup>United Nat. Bank v. Tellam, 644 So. 2d 97 (Fla. Dist. Ct. App. 3d Dist. 1994).

ness the mortgage secures to those who subsequently deal with the parties and the property.<sup>11</sup>

#### § 4:10 Formal requirements

A mortgage must be signed by the mortgagor.<sup>1</sup> Since a mortgage constitutes merely a specific lien on real estate rather than an interest in real estate, attestation is generally not required.<sup>2</sup> As a practical matter, however, it is recommended that the same formalities be observed in the execution of mortgages as are observed in the execution of conveyances generally.<sup>3</sup>

To entitle any instrument concerning real property to be recorded, the execution must be acknowledged.<sup>4</sup> Recordation is recommended, because it is *prima facie* evidence of delivery of a mortgage, and is required for effective notice to creditors and subsequent purchasers.<sup>5</sup>

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<sup>11</sup>United Nat. Bank v. Tellam, 644 So. 2d 97 (Fla. Dist. Ct. App. 3d Dist. 1994).

##### [Section 4:10]

<sup>1</sup>Teate v. Anderson, 122 Fla. 81, 164 So. 849 (1935).

**Legal Encyclopedias:** For discussion of necessity of signature of mortgagor to mortgage, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 53.

<sup>2</sup>Teate v. Anderson, 122 Fla. 81, 164 So. 849 (1935).

**Legal Encyclopedias:** For discussion of necessity of attestation in mortgages, see Fla. Jur. 2d, Mortgages and Deeds of Trust § 81.

<sup>3</sup>See Conveyances (Ch 2).

<sup>4</sup>See Fla. Stat. Ann. § 695.03.

For forms of acknowledgment, see Conveyances (Ch 2).

<sup>5</sup>Fla. Stat. Ann. § 695.01.

If a mortgage is to be recorded, the name and address of the person who prepared the instrument or under whose supervision it was prepared must be printed, typewritten, or stamped on the face of the instrument in a legible manner. Fla. Stat. Ann. § 695.26(1)(b).

The name and address of each party executing the instrument must be legibly printed, typed or stamped immediately below each signature and the name of each witness must be legibly printed, typed or stamped immediately below each of their signatures. Fla. Stat. Ann. § 695.26. The failure of the clerk of the circuit court to require compliance with the provisions of Fla. Stat. Ann. § 695.26 does not impair the validity of the recordation or of the constructive notice imparted thereby. Fla. Stat. Ann. § 695.26(4).

**§ 4:11 Formal requirements—Balloon mortgages**

In any balloon mortgage<sup>1</sup> covered by statute, a particular legend must appear at the top of the first page or face sheet of the mortgage and also immediately above the place for signature of the mortgagor, and must be conspicuously printed or stamped.<sup>2</sup> Failure of the mortgagee or creditor or a third party in trust for a mortgagee or creditor to comply with this requirement automatically extends the maturity date of such mortgage in the manner prescribed by statute.<sup>3</sup>

Fla. Stat. § 695.26 states that instruments which convey, assign, encumber or otherwise dispose of the title to or any interest in real property must contain the following information in order to be recorded:

- (a) the name of each person who executed the instrument must be legibly printed, typewritten or stamped immediately beneath the signature of the person;
- (b) the post office address of each person who executed the instrument must be legibly printed, typewritten or stamped on the instrument;
- (c) the name and post office address of the natural person who prepared the instrument or under whose supervision it was prepared must be legibly printed, typewritten or stamped on the instrument;
- (d) the name of each witness must be legibly printed, typewritten or stamped immediately beneath the signature of the witness;
- (e) the name of any notary public or other officer taking the acknowledgment must be legibly printed, typewritten or stamped immediately beneath his or her signature;
- (f) a 1  $\frac{1}{2}$ -inch square at the top right-hand corner must be reserved for use by the clerk of the court; and
- (g) the name and post office address of each grantee must be legibly printed, typewritten or stamped on any instru-

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**[Section 4:11]**

<sup>1</sup>As to what constitutes balloon mortgage, see § 4:3.

<sup>2</sup>Fla. Stat. Ann. § 697.05(2).

<sup>3</sup>Fla. Stat. Ann. § 697.05(3).

ment conveying an interest in real property other than a mortgage.<sup>4</sup>

### C. TAX ASPECTS

#### § 4:12 In general

A mortgage or deed of trust is normally employed as part of a financing. Though it may serve as a security device in almost any kind of transaction, most mortgages are given either with a loan or with an installment purchase of property. In all situations, the mortgage is merely a device to secure the creditor's position, not a separate taxable transaction. The tax consequences of the mortgage, if any, depend on the underlying transaction. In most situations, therefore, the basic tax law of mortgage is the same that governs loans or credit arrangements.<sup>1</sup>

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<sup>4</sup>There is a potential trap in that the Clerk of Court may reject a document presented for recording if the document does not comply with this new law, unless the document fits within one of the exemptions within the law (documents executed before July 1, 1991, documents executed outside Florida, etc.). The clerk's rejection of a document for recording could alter the order of recording documents, which could cause unintended results and loss of priority of mortgages and other instruments.

For example, it is customary to record a mortgage and notice of commencement at the same time and to direct the clerk to record the mortgage first so that it has priority over any construction liens. If neither the mortgage nor the notice contained the information required by Fla. Stat. § 695.26, the clerk could return the mortgage unrecorded and record the notice of commencement, which could result in construction liens having priority over the mortgage. Since the mortgage is an interest which encumbers real property, the mortgage must contain the information required by Fla. Stat. § 695.26 before it can be recorded. However, since the notice of commencement does not encumber real property (Fla. Stat. § 713.13(3)) the information would not be required by Fla. Stat. § 695.26.

The form of signature, witness and notary acknowledgment lines set forth in § 2:97 includes most of the information required by Fla. Stat. § 695.26 and Fla. Stat. § 695.25. Use of this or a similar form will assist lawyers in preparing real property documents that may be recorded by the clerk without problem.

#### [Section 4:12]

<sup>1</sup>An exception exists for purchase-money mortgages that are foreclosed. For tax purposes, that situation is treated like an adjustment to the original transaction, not like a separate financing arrangement.

A loan isn't income to the person receiving it, and it is therefore not a taxable transaction.<sup>2</sup> Though a person may appear richer after getting a loan, the loan must someday be repaid. The person's economic state is the same after the loan as before—at least for tax purposes. Similarly, repayment of the loan is without taxable consequences.

Since a mortgage is merely a security device for the loan (or other credit extension), its existence does not change that state of the law.<sup>3</sup> No tax consequence results when a mortgage is placed on property and no tax consequence results when the mortgage is satisfied or released.<sup>4</sup> This is true even if the mortgage (loan) exceeds the obligor's tax basis in the property. When property is sold, however, the purchaser's cost of the property for basis purposes includes the amount of mortgage liability he or she assumes in connection with the purchase.<sup>5</sup>

When mortgaged property is sold, both the buyer and seller must take the mortgage into consideration in figuring their respective tax positions. The seller is transferring the obligation for payment of the mortgage to the buyer. He or she has therefore been relieved of that obligation and is richer to that extent. The mortgage assumed by the buyer, or to which the property is subject, is additional consideration received by the seller.<sup>6</sup> As for the buyer, he or she must someday pay the mortgage; therefore the buyer's basis in the property is increased by the mortgage amount.<sup>7</sup>

Example: Seller has a tax basis of \$75,000 in property on which a \$50,000 mortgage is outstanding. He sells it for \$65,000 cash, with the buyer assuming (or taking the property subject to) the mortgage. Seller has received \$115,000 for the property, \$65,000 in cash and \$50,000 by being relieved of the mortgage, and has taxable gain of \$40,000.

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<sup>2</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 12002.

<sup>3</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 10075.

<sup>4</sup>That is not true if the mortgage (loan) is satisfied for less than the amount owed. As discussed below, that can result in taxable income to the debtor.

<sup>5</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 11428.

<sup>6</sup>**Legal Encyclopedias:** For tax purposes, no distinction exists between assuming a mortgage and taking property subject to mortgage. Am. Jur. 2d, Federal Taxation ¶ 11428.

<sup>7</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 11428.

Buyer's basis in the property is the \$65,000 paid plus the \$50,000 mortgage, for total of \$115,000.

These same principles also apply when property is given away. Assume real estate worth \$200,000 with a \$75,000 mortgage on it is given to the taxpayer's children. The donor's tax basis is \$50,000. Because of the gift, the donor has been relieved of a \$75,000 debt, \$25,000 more than his basis. That amount is taxable gain.<sup>8</sup> For gift purposes, a different calculation is made. The property is worth \$200,000, but subject to a \$75,000, encumbrance; a gift of \$125,000 is therefore made.

If the gift is made to an exempt organization, the bargain sale element of the transfer must be considered.<sup>9</sup> That requires that the basis be split between the sale portion of the transfer and the gift portion. Assume the property in the above example is given to an exempt hospital or church. The donor received \$75,000 in the transaction on property worth \$200,000. The ratio of those two numbers is three to eight. Three-eighths of the \$50,000 basis (\$18,750) is deducted from the \$75,000 received to figure the gain: \$56,250.<sup>10</sup> The amount of the gift is the same as above, \$125,000.

Inherited property is held at a basis equal to its fair market value.<sup>11</sup> A taxpayer who inherits property worth \$200,000, but with a mortgage of \$125,000, has a basis of \$200,000.

The same principles apply to a tax-free exchange of like-kind property under I.R.C. § 1031.

### **§ 4:13 Tax position of mortgagor**

As stated, neither placing a mortgage (or trust deed) on property nor repaying the mortgage is a taxable transaction to the mortgagor. The mortgagor's tax basis in the property is unaffected by the mortgage, even if funds in excess of the taxpayer's basis are received.

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<sup>8</sup>Simon v. C.I.R., 32 T.C. 935, 1959 WL 1225 (T.C. 1959), aff'd, 285 F.2d 422 (3d Cir. 1960).

<sup>9</sup>I.R.C. § 1011(b).

<sup>10</sup>These same rules apply to other tax-exempt transfers such as in a corporate organization under I.R.C. § 351 or to a partnership. I.R.C. §§ 357(c)(1)(A), 752(a).

<sup>11</sup>I.R.C. § 1014(a).

The tax basis of property purchased subject to a mortgage is equal to the consideration received plus the amount of the mortgage. If taxpayer buys a building with a \$25,000 cash payment and assumes (or takes subject to) a mortgage of \$75,000, the basis in the property is \$100,000.

When property is sold, any mortgage on it is additional consideration received by the seller. Assume, in the foregoing example, that buyer sells the property for \$125,000. The new buyer assumes the \$75,000 mortgage and pays cash of \$50,000. Seller has received \$125,000 in consideration, \$75,000 of which is relief from a debt of that amount. The taxpayer therefore has taxable gain of \$25,000. No difference results if the buyer does not assume the mortgage, but merely takes the property subject to it.

*Deductibility of expenses.* If a mortgage is incurred in business or in a profit-seeking enterprise, expenses of obtaining the mortgage are capitalized and recovered over the life of the loan or obligation.<sup>1</sup> That includes such costs as legal fees, points, and similar expenses.<sup>2</sup>

Expenses of obtaining a loan for personal purposes are neither deductible nor amortizable.<sup>3</sup> Instead, these become part of the basis for the property. An exception exists for points paid to obtain a mortgage if these are incurred as part of the purchase or improvement of the taxpayer's principal residence.<sup>4</sup> Payment of points must be usual in the area, the amount paid must be customary, and the residence must be security for the loan.

*Interest deductibility.* The mortgagor's right to deduct interest is subject to many rules. Briefly, these are as follows:

Most interest incurred in a business is deductible.<sup>5</sup> Interest incurred for investment purposes or for the production of

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[Section 4:13]

<sup>1</sup>I.R.C. § 461.

<sup>2</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 16114.

<sup>3</sup>I.R.C. § 262(a).

<sup>4</sup>I.R.C. § 461(g)(2).

<sup>5</sup>I.R.C. § 162(a).

income is also deductible.<sup>6</sup> Investment interest is deductible only to the extent of investment income, however.<sup>7</sup>

Interest incurred for personal purposes is not deductible.<sup>8</sup> An exception exists for “qualified residence interest.”<sup>9</sup> That is interest on a loan secured by a taxpayer’s primary or secondary residence. The loan cannot exceed \$1 million if incurred to buy or construct a residence and cannot exceed \$100,000 for any other purpose. Nor can the loan exceed the taxpayer’s basis in the property.<sup>10</sup>

For tax purposes, interest must be accounted for in separate categories: business,<sup>11</sup> investment,<sup>12</sup> passive,<sup>13</sup> and personal.<sup>14</sup> Each of these groups is subject to its own rules and limitations.

Many specific types of interest cannot be deducted, either because of a general disallowance or because the interest must be capitalized. Interest paid to buy or hold tax-exempt securities, for example, cannot be deducted.<sup>15</sup> Nor can interest paid for periods extending beyond the current year.<sup>16</sup> Certain interest must be capitalized if it enters into the cost of producing property.<sup>17</sup> Many other kinds of interest are also specifically denied deductibility.

*Refinancing of mortgage.* As with obtaining the original mortgage, a refinancing is not considered a sale or exchange upon which gain or loss is recognized. One major difference exists, however. Points paid to a lender are deductible if incurred to purchase a residence, but not if paid to refinance

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<sup>6</sup>I.R.C. § 212(1).

<sup>7</sup>I.R.C. § 163(d)(1). That rule does not apply to corporations, however.

<sup>8</sup>I.R.C. §§ 163(h)(1), 262(a).

<sup>9</sup>I.R.C. § 163(h)(3).

<sup>10</sup>An exception exists for interest on loans incurred for health or educational purposes.

<sup>11</sup>I.R.C. § 162.

<sup>12</sup>I.R.C. § 212.

<sup>13</sup>I.R.C. §§ 468(a)(1)(A), 469.

<sup>14</sup>I.R.C. § 163(h).

<sup>15</sup>I.R.C. § 265(a)(2).

<sup>16</sup>Rev. Rul. 68-643, 1968-2 C.B. 76.

<sup>17</sup>I.R.C. § 263A.

the mortgage. Recapitalization expenses must be capitalized and recovered over the term of the loan.<sup>18</sup>

*Discharge of mortgage debt.* If a mortgagor settles a debt for less than its unpaid balance, he or she has ordinary income in the amount of the difference.<sup>19</sup> If the mortgagor is insolvent, however, the debt discharged is included in income only to the extent the discharge makes the taxpayer solvent. Whatever discharged debt is not taxable must reduce the favorable tax attributes of the taxpayer's property.<sup>20</sup> A taxpayer who is in the business of farming is treated as insolvent if farm debt is discharged; the debt forgiven does not result in taxable income even if the farmer is solvent.<sup>21</sup>

#### § 4:14 Tax position of mortgagee

As with the mortgagor, a loan (or other obligation) is not a taxable event to the lender. Taking a mortgage as security for the obligation does not change that doctrine.<sup>1</sup> A receipt of principal payments is similarly without tax consequence since that is merely a return of the money lent.

Interest received by the mortgagee, however, is always taxable and is always ordinary income.<sup>2</sup> Included are not only those payments characterized as interest, but also points, bonuses, penalties, and all other payments received as part of the payment for the loan or obligation.<sup>3</sup>

Expenses incurred in making the loan—credit checks, appraisals, legal fees, etc.—are deductible if the loan or obligation is part of the business of the mortgagee.<sup>4</sup> Finder's fees and commissions paid by lenders for loans are a cost of acquiring the loan, however. These must be capitalized and

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<sup>18</sup>I.R.C. § 461(g)(1). That assumes they are deductible as business or investment expense. If incurred for personal purposes, they are not deductible in any way.

<sup>19</sup>I.R.C. § 61(a)(12).

<sup>20</sup>I.R.C. § 108(b).

<sup>21</sup>I.R.C. § 108(g).

#### [Section 4:14]

<sup>1</sup>*Legal Encyclopedias:* Am. Jur. 2d, Federal Taxation ¶ 12002.

<sup>2</sup>I.R.C. § 61(a)(4).

<sup>3</sup>Not included is any payment that represents a return of the principal of the loan or obligation.

<sup>4</sup>I.R.C. § 162.

amortized over the life of the loan.<sup>5</sup> If the mortgagee is not in the business of making loans or entering into obligations like that resulting in the mortgage, all expenses incurred in the transaction must be capitalized and amortized over the term of the obligation.<sup>6</sup>

Proposed regulations on when an organization is in the trade or business of lending money, and when that business is “significant” were released in June, 2002.<sup>7</sup> These regulations provide three safe harbors.

The first applies to organizations that did not have to report the prior year. They are excused if their previous year’s gross income from lending money is less than both 15% of total gross income and \$5 million.<sup>8</sup>

The second exempts organizations that did report the prior year, but whose current gross income from lending is less than both 10% of total gross income and \$3 million.<sup>9</sup>

The third exception is for newly formed corporations (other than those whose principal purpose is holding loans).<sup>10</sup>

The “previous year” test for these rules is the tax year that ends before July 1 of the previous calendar year.<sup>11</sup>

Also excepted from reporting are retailers—taxpayers whose principal trade or business is the sale of nonfinancial

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<sup>5</sup>Rev. Rul. 57-400, 1957-2 C.B. 520.

<sup>6</sup>Following the divergent opinions noted above, the Service announced that it would release new regulations on capitalization; in the meantime—since it expects those regulations will not require capitalization of employee compensation (other than bonuses and commissions paid with respect to the acquisition), fixed overhead, or de minimis costs (not exceeding \$5,000) relating to acquisition, creation, or enhancement of intangible assets—it will no longer litigate the issue of capitalization regarding those items.

GUIDANCE REGARDING DEDUCTION AND CAPITALIZATION OF EXPENDITURES, 2002-1 C.B. 536, 2002 WL 231419 (2002), corrected, 2002-1 C.B. 632, 2002 WL 401370 (2002) and corrected, 2002-1 C.B. 667, 2002 WL 443623 (2002).

<sup>7</sup>67 FR 40629-01, 2002 WL 1289510.

<sup>8</sup>Prop. Reg. § 1.6050P-2(b)(1), 67 FR 40629, 2002 WL 1289510.

<sup>9</sup>Prop. Reg. § 1.6050P-2(b)(2), 67 FR 40629, 2002 WL 1289510.

<sup>10</sup>Prop. Reg. § 1.6050P-2(b)(3), 67 FR 40629, 2002 WL 1289510.

<sup>11</sup>Prop. Reg. § 1.6050P-2(f), 67 FR 40629, 2002 WL 1289510.

goods or the provision of nonfinancial services.<sup>12</sup> Income from buying and holding loans is considered to be income from lending money.<sup>13</sup>

### § 4:15 Foreclosure of mortgages and deeds of trust

A tax difference exists between the foreclosure of a purchase-money mortgage and the foreclosure of any other kind of mortgage. A mortgage foreclosure brings into play the law of bad debts, losses, solvency, and similar tax doctrines.<sup>1</sup> These are not the governing doctrines when a purchase-money mortgage is foreclosed. In that situation an attempt is made to put the parties back in the position they held before the sale took place. With a purchase-money mortgage, the transaction is, in effect, rescinded; with other mortgages, the foreclosure is a sale of the property that leads to gain or loss.

*Purchase-money mortgages.* The general theory that applies to the foreclosure of a purchase-money mortgage is the same as applies to a recovery of property sold on the installment basis. In these situations, the seller (mortgagee) is getting back the property sold and should be placed as closely as possible in the position he or she was in before the sale, after taking into account the sale transaction.

Gain on foreclosure of a purchase-money mortgage is limited to the money and property received. It cannot exceed the gain on the original transaction, however.<sup>2</sup> The gain is measured by deducting the profit previously reported from the money and property received on the foreclosure.<sup>3</sup> No loss or bad debt deduction can ever be taken on such a foreclosure.

The basis of the property repossessed is the seller's basis in the purchase contract increased by any gain recognized on the repossession. The adjusted basis in the contract is the remaining amount due under the contract, minus the gain not previously reported. Expenses of the repossession are deducted.

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<sup>12</sup>Prop. Reg. § 1.6050P-1(e)(5), 67 FR 40629, 2002 WL 1289510.

<sup>13</sup>Prop. Reg. § 1.6050P-2(d), 67 FR 40629, 2002 WL 1289510.

#### [Section 4:15]

<sup>1</sup>See I.R.C. §§ 108, 1274.

<sup>2</sup>I.R.C. § 1038(b)(2).

<sup>3</sup>I.R.C. § 1038.

The character of the gain depends on the nature of the property. It may be ordinary, capital, or Section 1231. The transaction takes its character from the nature of the installment obligation.

These same rules apply to situations where the buyer-mortgagor voluntarily transfers the property back to the seller-mortgagee. A sale is considered to take place and any consideration received is considered to be a discharge of the mortgage debt, which can lead to gain or loss.<sup>4</sup>

These calculations can be complicated when a personal residence is sold and the provision permitting gain to be excluded from gross income is applicable.<sup>5</sup> This provision allows the exclusion of a gain of up to \$250,000 (up to \$500,000 in the case of a married couple filing jointly) from the sale or exchange of property if, during the five-year period ending on the date of the sale or exchange, the property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating two years or more.<sup>6</sup>

If the property repossessed is the personal residence of the seller and the sale comes under I.R.C. § 121 (relating to gain on the sale of a principal residence), special treatment applies when the property is resold within a year after the repossession.<sup>7</sup> In that situation the repossession is ignored. The second sale is considered to be part of the original sale.<sup>8</sup>

A reduction in the purchase price does not result in income to a solvent mortgagor.<sup>9</sup> This is treated as an adjustment to the selling price.

*Foreclosure of other mortgages: Mortgagor's position.* A mortgagor who loses property in a mortgage foreclosure usually incurs a loss. If the property is business or investment property, the loss is deductible, even if the taxpayer is not personally liable on the debt. No deduction may be taken on the loss of a personal residence, but any gain is taxable.<sup>10</sup>

The loss is the difference between the mortgagor's adjusted

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<sup>4</sup>26 C.F.R. § 1.1001-2(c), Example 7.

<sup>5</sup>I.R.C. § 121.

<sup>6</sup>I.R.C. § 121(a).

<sup>7</sup>I.R.C. § 1038(e).

<sup>8</sup>I.R.C. § 1038(a).

<sup>9</sup>I.R.C. § 108(e)(5).

<sup>10</sup>I.R.C. § 165(c).

tax basis in the property and what he or she receives from the foreclosure sale. The usual rules apply in calculating gain or loss on the foreclosure. A mortgagor may even incur gain on a foreclosure if the tax basis is less than the debt discharged plus the proceeds from the foreclosure sale.

The same tax effect results from a voluntary transfer of mortgaged property to the mortgagee. The mortgagor is considered to sell the property to the mortgagee in exchange for a discharge of the remaining mortgage debt. Either gain or loss may be incurred. Abandonment of the property leads to the same consequence.

Settling a mortgage debt for less than its unpaid balance results in ordinary income to the mortgagor. This is income from a discharge of indebtedness.<sup>11</sup> If the taxpayer is insolvent, he or she is not taxed on the debt to the extent the discharge does not make the taxpayer solvent. Amounts in excess of the solvency level are taxable. The amount of debt that is not taxed is applied to reduce the basis of the taxpayer's other assets.<sup>12</sup> These rules do not apply to farming debts, where the taxpayer is treated as if he or she were insolvent.<sup>13</sup>

*Foreclosure of other mortgages: Mortgagee's position.* A foreclosing mortgagee is treated like any other creditor. A bad debt deduction may be taken if the mortgagee can show the debt is either fully or partially uncollectible.<sup>14</sup> Foreclosure, by itself, does not lead to a deduction, however, if the mortgagor is personally liable on the debt. The mortgagee must also show that any deficiency resulting from the foreclosure is uncollectible.<sup>15</sup>

The bad debt deduction is the difference between the proceeds of the foreclosure and the debt, including any inter-

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<sup>11</sup>I.R.C. § 61(a)(12).

<sup>12</sup>I.R.C. § 108(a), (b).

<sup>13</sup>I.R.C. § 108(g)(2). Farming must be the principal occupation of the taxpayer.

<sup>14</sup>26 C.F.R. § 1.166-6.

<sup>15</sup>If the mortgagor is not personally liable on the debt, the deduction becomes available at the time of foreclosure. A right of redemption in the mortgagor does not change that.

est on which the mortgagee has been taxed.<sup>16</sup> The nature of the debt depends on the way the debt arose. It may be a business bad debt, deductible against ordinary income, or a nonbusiness bad debt, deductible as a short-term capital loss.<sup>17</sup>

The mortgagee's basis in property acquired in a foreclosure, or from a voluntary conveyance in lieu of foreclosure, is its fair market value.<sup>18</sup> That basis governs for both depreciation purposes and for purposes of gain or loss on a later sale.

#### D. CHECKLISTS

##### § 4:16 Checklist—Drafting a mortgage

1. Parties.
  - a. Names.
  - b. Addresses.
  - c. Marital status.
  - d. Legal status: individual, partnership, corporation, trust, etc.
2. Obligation secured.
  - a. Note.
  - b. Contract payments.
  - c. Amount.
  - d. Interest.
  - e. Installments and maturity.
  - f. Future advances.
  - g. Deposits for taxes, insurance premiums, other.
  - h. Description of mortgage as purchase-money mortgage.
3. Property securing obligation.
  - a. Legal description.
  - b. Common description.
  - c. Improvements, after-acquired improvements, fixtures, chattels, replacements, property on premises.
  - d. Rents and profits.

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<sup>16</sup>26 C.F.R. § 1.166-6(b).

<sup>17</sup>I.R.C. § 166.

<sup>18</sup>26 C.F.R. § 1.166-6(c).

4. Conveyance.
  - a. All of mortgagor's interest and after-acquired interest in property.
  - b. Waiver of homestead rights.
5. Mortgagor's duties.
  - a. Pay obligation in accordance with terms.
  - b. Comply with provisions of note and mortgage.
  - c. Make monthly deposits for insurance, taxes, and other charges.
  - d. Maintain premises in good order.
    - (1) Replace improvements damaged or destroyed.
    - (2) Not commit waste.
    - (3) Pay taxes, assessments, water and sewer charges.
      - (a) Display evidence of payment to mortgagee.
  - e. Comply with laws and ordinances in operations on property.
  - f. Not permit mechanics' or materialmen's lien to attach to property.
  - g. Maintain insurance on property.
    - (1) Types of insurance: fire and extended coverage, liability, title.
    - (2) In amounts to satisfy obligation in full.
    - (3) Carrier subject to approval by mortgagee.
    - (4) Mortgagee designated as additional insured.
      - (a) Carrier not cancel without notice to mortgagee.
  - h. Pay condemnation awards and insurance proceeds to mortgagee to extent of outstanding obligation.
  - i. Notify mortgagee of litigation involving property.
6. Release and discharge of mortgage.
  - a. Mortgagee to give release or satisfaction upon full payment of obligation.
7. Foreclosure.
  - a. Right of mortgagee to foreclose lien upon default of mortgagor.
    - (1) In terms of note, purchase agreement, or other document.
    - (2) In terms of mortgage.

- b. Costs of foreclosure added to mortgage obligation.
    - (1) Include legal and other fees.
  - c. Foreclosure proceeds applied to expenses of foreclosure, to interest on obligation, to principal of obligation, and remainder to mortgagor, in that order.
  - d. Mortgagee's right to make payments on senior liens and encumbrances.
    - (1) Amounts to be additional debt secured by mortgage.
  - e. Right of mortgagee to perform mortgagor's obligations under note or contract and mortgage.
  - f. Right to appoint receiver for property.
8. Miscellaneous.
- a. Entire agreement between parties.
  - b. Binding on successors, assigns, heirs, and executors of mortgagor.
  - c. Right of mortgagee to inspect property at any reasonable time.
  - d. Notices to parties.
    - (1) Addresses.
    - (2) Change of address by notice.
    - (3) Effective date of notices.
  - e. Closing.
    - (1) Date.
    - (2) Signatures.
    - (3) Attestations.
    - (4) Acknowledgments.
  - f. Name and address of person preparing mortgage.

**§ 4:17 Checklist—Drafting note for use with  
mortgage or trust deed**

- 1. Maker.
  - a. Name.
  - b. Address.
  - c. Recital of consideration received.
- 2. Payee.
  - a. Name and address.
  - b. Promise of maker to pay to order of payee.

3. Principal, interest, and payment of note.
  - a. Principal amount of note.
  - b. Interest.
    - (1) Yearly rate.
    - (2) Payment on unpaid balance.
  - c. Payment dates.
    - (1) Date of first payment.
  - d. Place of payment.
    - (1) Right of holder to change by notice to maker.
  - e. Prepayment.
    - (1) Maker's rights.
    - (2) Penalty or additional interest.
    - (3) Limitation on amount prepaid.
    - (4) Not affect amount of payments or payment schedule.
4. Acceleration of payment.
  - a. Defaults resulting in acceleration.
    - (1) Failure to make payments of principal and interest as required.
    - (2) Failure to comply with obligations on mortgage or trust deed securing payment of note.
    - (3) Involvement of maker in creditor's actions: bankruptcy, insolvency, failure to pay debts, assignment for benefit of creditors, others.
  - b. Notice to maker of acceleration upon default.
    - (1) Waiver of timeliness not constitute a continuing waiver.
5. Mortgage or trust deed.
  - a. Identification: title, date, parties, filing or recording data.
  - b. Secures payment of note.
  - c. Provisions of mortgage or trust deed to be terms of note for purposes of maker's compliance.
6. General.
  - a. Presentment for payment, demand, notice of protest, and notice of dishonor are all waived.
    - (1) By maker, surety, guarantor, or indorser.
  - b. Attorney's fees and costs involved in enforcing payment of note to be additional principal payable under note.

- c. Unpaid interest and principal to draw interest at stated increased rate from date payment due until paid.
- d. Guarantor's undertaking to be a principal obligation without necessity of recourse against maker.
  - (1) Guarantee to include principal, interest, attorney's fees, and costs of enforcement.
  - (2) Guarantor waives all defenses.
  - (3) Extensions and releases will not affect guarantor's obligation.
  - (a) All notices waived.

**§ 4:18 Checklist—Drafting wraparound agreement**

- 1. Description of existing mortgage.
  - a. Title.
  - b. Date.
  - c. Parties.
  - d. Principal outstanding and interest payable.
  - e. Mortgaged premises.
  - f. Recording data: office, number, book and page.
- 2. Description of new wraparound mortgage.
  - a. Principal amount.
    - (1) Including amount of existing mortgage.
  - b. Note: date, maker, payments.
    - (1) Includes payments due on existing mortgage.
    - (2) Payment schedule.
- 3. Conveyance to wraparound mortgagee.
  - a. To secure indebtedness of existing mortgage and wraparound mortgage.
- 4. Debtor's obligations.
  - a. Make payments on note as required by terms.
  - b. Make deposits of insurance and taxes to wraparound mortgagee.
    - (1) As required by existing mortgage.
    - (2) As required by wraparound mortgage.
  - c. Comply with all terms of existing mortgage and wraparound mortgage.
    - (1) Exception for payments and deposits payable under existing mortgage.
  - d. Insure property with existing mortgagee and

wraparound mortgagee shown as their respective interests may appear.

- (1) Carrier, amounts, terms subject to wrap-around mortgagee's approval.
- e. Give notice of any action that would cause default under either mortgage.
- f. Warrant that no default exists under existing mortgage.
- g. Any default under existing mortgage is a default under wraparound mortgage.
- h. Notify holder of existing mortgage of wraparound mortgage.
  - (1) Payments and deposits will come from wrap-around mortgagee.
  - (2) Request notice of default to be sent to wrap-around mortgagee.
    - (a) Permit wraparound mortgagee to cure defaults.
- 5. Wraparound mortgagee's obligations.
  - a. Make all payments required under existing mortgage and note.
    - (1) Submit evidence of payment to debtor.
  - b. Make all deposits and payments for insurance and taxes as required by both mortgages.
  - c. Give debtor notice of any action that would lead to default under the existing mortgage.
  - d. Give debtor the right to make payments and deposits under existing mortgage if not made by wraparound mortgagee.
- 6. Obligations of debtor and wraparound mortgagee regarding existing mortgage.
  - a. Neither party will amend or ask for or accept any extension of time or waiver.
  - b. Neither party will take any action that will cause any increased liability or obligation of other party under existing mortgage.
  - c. Debtor's right to prepay debt under existing mortgage continues, but no payment shall be made so as to increase wraparound mortgagee's liability.
    - (1) Prepaid amounts shall reduce principal of wraparound mortgage, but shall not affect size

or schedule of payments due on mortgage and note.

- (a) Similar application of insurance payments or condemnation awards.

#### **§ 4:19 Checklist—Drafting mortgage or trust deed subordination agreement**

1. Parties to subordination agreement.
  - a. Mortgagor: Name and address.
  - b. Mortgagee: Name and address.
  - c. Identification of mortgagor and mortgagee as parties to described mortgage.
  - d. Creditor: Name and address.
2. Identification of mortgage or trust deed.
  - a. Parties.
  - b. Present holder of note.
  - c. Amount of indebtedness outstanding.
  - d. Date of note and mortgage.
  - e. Legal description of property mortgaged.
  - f. Recording data: Office, recording number, book, and page of registry.
3. Purpose of subordination.
  - a. Proposed loan or other advance by creditor.
    - (1) Not made unless mortgagee's position subordinated to that of creditor.
  - b. Mortgagee's agreement to subordinate is an inducement for creditor's action.
4. Consideration for subordination.
  - a. Payment.
    - (1) Acknowledgment of receipt.
  - b. Benefit to mortgagee.
    - (1) Improve secured position through funds made available to mortgagor.
    - (2) Subordination made as an inducement to creditor to enter into agreement with mortgagor.
5. Mortgagee's subordination.
  - a. Mortgagee's approval of terms and conditions of agreement between mortgagor and mortgagee.

- b. Mortgage or trust deed for creditor's benefit to be senior to lien of mortgagee.
    - (1) Subordination supersedes all conflicting provisions of mortgagee's mortgage and note.
  - c. No right to amend mortgage or note between mortgagor and creditor without written approval of mortgagee.
    - (1) Exempt are matters that will not be a detriment to mortgagee's position.
  - d. Duty of creditor to give immediate written notice of any breach of agreement with mortgagor or any action by mortgagor that could work to detriment of mortgagee.
6. Miscellaneous.
- a. Date of agreement.
  - b. Entire agreement among parties relating to subordination.
  - c. Binding on heirs, beneficiaries, and assigns.
  - d. Signatures of parties.
  - e. Acknowledgments.

## E. COMPLETE INSTRUMENTS

### § 4:20 Mortgage—General form

This mortgage executed on [*date*], by [*name of mortgagor*], of [*address of mortgagor*], referred to below as "mortgagor," which term includes mortgagor's heirs, executors, administrators, successors, legal representatives and assigns, and shall denote the singular and/or plural and the masculine and/or feminine and natural and/or artificial persons whenever and wherever the context so requires, to [*name of corporation*], a corporation organized under the laws of the State of Florida, having its principal offices at [*address of corporation*], referred to below as "mortgagee."

For various good and valuable considerations, and also in consideration of the aggregate sum named in the promissory note of even date herewith, herein described, mortgagor does grant, bargain, sell, and convey to mortgagee, its successors and assigns, in fee simple, all the certain tract of land of which mortgagor is now the legal owner, and in actual possession, situated in the County of [*county*], State of Florida, described as follows: [*legal description of property*].

Together with all structures and improvements now and hereafter on the land and the fixtures attached thereto, together with all and singular the tenements, hereditaments, easements, and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues, and profits thereof, all the estate, right, title, interest, and all claims and demands whatsoever, in law and in equity, of mortgagor in and to the same, and every part and parcel thereof, and all fixtures now or hereafter attached to or used in connection with the premises herein described and in addition thereto the following-described household appliances, which are, and shall be deemed to be, fixtures and a part of the realty, and are a portion of the security for the indebtedness herein mentioned: *[describe household appliances]*.

To have and to hold the same, together with the tenements, hereditaments, and appurtenances unto mortgagee, and its successors and assigns, in fee simple.

Mortgagor covenants with mortgagee, its successors, legal representatives, and assigns, that mortgagor is indefeasibly seized of the land in fee simple; that mortgagor has full power and lawful right to convey the land in fee simple; that the land is free from all encumbrances; that mortgagor will make such further assurances to protect the fee simple title to the land in mortgagee, its successors, legal representatives, or assigns, as may reasonably be required; that mortgagor does fully warrant the title of the land and will defend the same against the lawful claims of all persons whomsoever.

Provided always, that if mortgagor shall pay to mortgagee, its successors, legal representatives, or assigns, that certain promissory note of which the following is a true and correct copy: *[set forth true copy of note]* and shall perform, comply with, and abide by each and every stipulation, agreement, condition, and covenant of the note and of this mortgage, and shall pay all taxes that may accrue on the property and all costs and expenses that mortgagee, its successors or assigns may be put to in collecting the note in foreclosure of this mortgage or otherwise, including reasonable attorney's fees, then this mortgage and the estate created shall cease and be null and void.

And mortgagor does covenant and agree:

1. To pay the principal and interest and other sums of

money payable by virtue of the promissory note and this mortgage, or either, promptly on the days respectively the same severally become due.

2. To pay the taxes, assessments, levies, liabilities, obligations, and encumbrances of every nature on the described property, and if the same are not promptly paid, mortgagee, its successors, legal representatives, or assigns may at any time pay the same without waiving or affecting the option to foreclose or any right hereunder, and every payment so made shall bear interest from the date thereof at the rate of *[percentage]*% per year.

3. To pay all the costs, charges, and expenses, including attorney's fees, reasonably incurred or paid at any time by mortgagee, its successors, legal representatives or assigns, because of failure by mortgagor to perform, comply with, and abide by each and every stipulation, agreement, condition and covenant of the promissory note and this mortgage, or either, and every such payment shall bear interest from date at the rate of *[percentage]*% per year.

4. To keep the buildings now or hereafter on the land insured in a sum equal to the highest insurable value, both fire and extended coverage, in a company or companies to be approved by mortgagee, and the policy or policies held by and payable to mortgagee, its successors, legal representatives, or assigns, and in the event any sum of money becomes payable under such policy or policies, mortgagee, its legal representatives or assigns shall have the option to receive and apply the same on account of the indebtedness secured or to permit mortgagor to receive and use it or any part thereof for other purposes, without waiving or impairing any equity, lien, or right under or by virtue of this mortgage, and may place and pay for such insurance or any part thereof without waiving or affecting the option to foreclose or any right hereunder, and each and every such payment shall bear interest from date at the rate of *[percentage]*% per year.

5. To permit, commit, or suffer no waste, impairment, or deterioration of the property or any part thereof, except reasonable wear and tear; and, in the event of the failure of mortgagor to keep the buildings on the premises and those to be erected thereon, or improvements thereon, in good repair, mortgagee may make such repairs as in its discretion it may deem necessary for the proper preservation thereof and the full amount of each and every such payment shall

be due and payable [*number*] days after demand, and shall be secured by the lien of this mortgage.

6. To perform, comply with, and abide by each of the stipulations, agreements, conditions, and covenants in the promissory note.

7. Mortgagee may, at any time pending a suit on this mortgage, apply to the court having jurisdiction thereof for the appointment of a receiver, and such court shall forthwith appoint a receiver of the premises covered, including all income, profits, issues, and revenues from whatever source derived, each and every of which, it being expressly understood, is mortgaged, as if specifically set forth and described in the granting and abandon clauses hereof. Such appointment shall be made by such court as an admitted equity and a matter of absolute right to mortgagee, and without reference to the adequacy or inadequacy of the value of the property mortgaged or to the solvency or insolvency of mortgagor or the defendants. Such rents, profits, income, issues, and revenues shall be applied by such receiver according to the lien of this mortgage and the practice of such court. In the event of any default on the part of mortgagor hereunder, mortgagor agrees to pay to mortgagee on demand as a reasonable monthly rental for the premises an amount at least equivalent to one-twelfth of the aggregate of the twelve monthly installments then payable in the current year plus the actual amount of the annual taxes, assessments, water rates, and insurance premiums for such year not covered by the above monthly payments.

8. If any of such sums of money are not promptly paid within [*number*] days next after the same severally become due and payable, or if each of the stipulations, agreements, conditions, and covenants of the promissory note and this mortgage, or either, are not fully performed, complied with, and abided by, the aggregate sum mentioned in the promissory note shall become due and payable forthwith or thereafter at the option of mortgagee, its successors, legal representatives, or assigns, as fully and completely as if the aggregate sum were originally stipulated to be paid on such day, anything in the promissory note or herein to the contrary notwithstanding.

9. The mailing of a written notice or demand addressed to the owner of record of the mortgaged premises or to such owner at the last address, actually furnished to mortgagee,

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or if none, directed to the owner at the mortgaged premises, and mailed by the United States mail, postage prepaid, shall be sufficient notice and demand in any case arising under this instrument and required by the provisions hereof or by law.

10. If foreclosure proceedings of any mortgage or lien of any kind superior or inferior to this mortgage are instituted, mortgagee hereunder may at its option, immediately or thereafter, declare this mortgage and the indebtedness secured due and payable.

Executed at *[place of execution]* on the day and year first above written.

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*[Signature of mortgagor]*

Executed in the presence of:

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*[Signature of witness 1]*

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*[Signature of witness 2]*

*[Acknowledgment]*

This instrument was prepared by:

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*[Name of preparer]*

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*[Signature of preparer]*

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*[Address of preparer]*

**NOTES TO FORM****Drafter's Notes**

For necessity of reflecting name and address of person by whom instrument is prepared in order to entitle mortgage to be recorded, see Fla. Stat. Ann. § 695.26.

For forms of acknowledgment, see Conveyances (Ch 2).

For forms of promissory notes, see Commercial Paper (Ch 43).

**Tax Notes**

Granting a mortgage on property to secure an obligation is normally an action that has no tax consequence. Am. Jur. 2d, Federal Taxation ¶ 10075. Most mortgages are given to secure repayment of a loan made to the mortgagor. A loan is not taxable transaction, since the amount borrowed must be repaid, and a mortgage is not a sale or exchange for tax purposes. Am. Jur. 2d, Federal Taxation ¶ 12002 No gain or loss is recognized on the transaction. This is true even if the borrower receives funds in excess of his or her tax basis in the property mortgaged.

The same principle applies to purchase-money mortgages, where the buyer pledges the property to secure payment of the purchase price. Though the sale transaction is a taxable event to the seller, the mortgage itself does not affect the tax results. The same tax consequences occur whether a mortgage is given or whether the obligation is unsecured.

For a discussion of the tax aspects of mortgages and deeds of trust, see §§ 4:12 to 4:15.

**Research References***Legal Encyclopedias*

Fla. Jur. 2d, For discussion of recording of instruments, see Records and Recording Acts §§ 155 et seq.

**Paragraph 2****Drafter's Notes**

It is primarily the duty of the titleholder to discharge the taxes legally assessed on the mortgaged premises. Spratt v. Price, 18 Fla. 289, 1881 WL 2970 (1881); Bie v. Hulet, 149 Fla. 227, 5 So. 2d 457 (1942).

**Research References***Legal Encyclopedias*

Fla. Jur. 2d, Duty of mortgagor to pay taxes. Mortgages and Deeds of Trust § 151.

**Paragraph 4****Research References***Legal Encyclopedias*

Fla. Jur. 2d, Obligation of mortgagor under agreement to procure insurance. Mortgages and Deeds of Trust §§ 142 et seq.

**Paragraph 5****Drafter's Notes**

A mortgagor may not damage the property or commit acts of waste impairing the sufficiency of the mortgagee's security. See Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987, 128 So. 241 (1930).

**Research References**

*Legal Encyclopedias*

Fla. Jur. 2d, Protection of property against damage or waste. Mortgages and Deeds of Trust §§ 157 et seq.

**Paragraph 8****Drafter's Notes**

A stipulation in a mortgage providing for acceleration of the debt on default by the mortgagor is a legal, valid, and enforceable stipulation. Clay v. Girdner, 103 Fla. 135, 138 So. 490 (1931).

**Research References**

*Legal Encyclopedias*

Fla. Jur. 2d, Acceleration clauses, generally. Mortgages and Deeds of Trust §§ 166 et seq.

**Paragraph 10****Drafter's Notes**

For statutory provisions relating to foreclosure, see Fla. Stat. Ann. §§ 702.01 et seq.

**Research References**

*Legal Encyclopedias*

Fla. Jur. 2d, Foreclosure proceedings, generally. Mortgages and Deeds of Trust §§ 232 to 383.

**§ 4:21 Mortgage—Wraparound****MORTGAGE**

This mortgage is made on [date], by [name of mortgagor], referred to below as "mortgagor," to [name of mortgagee], referred to below as "mortgagee."

This is a wraparound mortgage.

For good and valuable considerations and also in consideration of the aggregate sum named in the mortgage note described below, mortgagor grants, bargains, sells, aliens, remises, conveys and confirms to mortgagee real property (referred to below as the "premises") in [county] County, Florida: [describe real property].

Together with all structures and improvements now and

later on the premises, and fixtures attached to the premises, and all rents, issues, proceeds and profits accruing and to accrue from the premises, all of which are included within the above description and the habendum of it; also all gas, steam, electric, water and other heating, cooking, refrigerating, lighting, plumbing, ventilating, irrigating and power systems, machines, appliances, fixtures and appurtenances, which now are or may later pertain to, or be used with, in or on the premises, even though they be detached or detachable.

To have the same, with all the tenements, hereditaments and appurtenances to it belonging or in anyway appertaining, and the reversion and reversions, remainder or remainders, rents, issues and profits of it, and also all the estate, right, title, interest, property, possession, claim and demand, as well in law as in equity, of mortgagor in and to the same, and every part of it, to mortgagee in fee simple.

Mortgagor covenants and agrees with mortgagee as follows:

**FIRST:** That mortgagor is lawfully and indefeasibly seized of the premises in fee simple; that it has full power and lawful right to convey the premises in fee simple as stated above to mortgagee; that mortgagor does fully warrant the title to the premises in mortgagee and will defend the premises against the lawful claims of all persons.

**SECOND:** Mortgagor will pay the principal and interest and all other sums of money payable by virtue of the mortgage note and this mortgage promptly on the days they become due, and it will promptly perform and comply with every other covenant and agreement in the mortgage note and mortgage.

**THIRD:** Mortgagor will pay the taxes, assessments, levies, liabilities, obligations and encumbrances of every kind now on the premises, and that later may be imposed, levied or assessed on the premises, or that later may be levied or assessed on this mortgage or the indebtedness secured by it, when due and payable according to law, before they become delinquent, and before any interest attaches or any penalty is incurred; and insofar as any is of record the same shall be promptly satisfied and discharged of record and the original official document evidencing the satisfaction and discharge shall be placed in the hands of mortgagee within *[number of days]* days after payment.

FOURTH: Mortgagor will permit, commit, or suffer no waste, impairment or deterioration on the premises.

FIFTH: Mortgagor will pay all and singular the costs, charges and expenses, including reasonable attorney's fees, cost of abstracts of title and title searches incurred or paid at any time by mortgagee because of the mortgagor's failure to promptly and fully perform the agreements and covenants of the note and this mortgage, and the costs, charges and expenses shall be immediately due and payable and shall be secured by the lien of this mortgage, and the expenditures shall draw interest at the same rate as the mortgage note.

SIXTH: That: (a) if the mortgagor breaches or defaults on this mortgage; (b) if any of the sums of money referred to here are not promptly and fully paid without demand or notice; or (c) if the stipulations, agreements, conditions and covenants of the note and this mortgage are not duly, promptly and fully performed, then in any such event, the aggregate sum mentioned in the note then remaining unpaid, with interest accrued to that time, and all moneys secured by this mortgage, shall become due and payable immediately, or later, at the option of mortgagee, as fully and completely as if all of the sums of money were originally stipulated to be paid on that day, anything in the note or in this mortgage to the contrary notwithstanding; and on that happening or later, at the option of mortgagee, without notice or demand, suit at law or in equity may be prosecuted as if all moneys secured by this mortgage had matured prior to its institution.

SEVENTH: If mortgagor defaults in any of the covenants or agreements contained in this mortgage or in the note, then mortgagee may perform the same, and all such expenditures made by mortgagee, including a reasonable attorney's fee, in so doing shall draw interest at the same rate as the mortgage note, and shall be repayable immediately and without demand, and all such expenditures shall be secured by the lien of this mortgage.

EIGHTH– The covenants and agreements in this mortgage and in the mortgage note shall bind, and the benefits and advantages shall inure to, the respective heirs, legal representatives, grantees, successors and assigns of the parties. Whenever used, the singular number shall include the plural, the plural the singular, and the use of any gender

shall include all genders. This mortgage and the note evidencing the indebtedness secured by this mortgage shall be construed according to the laws of the State of Florida.

NINTH: On any sale, conveyance, transfer or other disposition of the premises, this mortgage shall become immediately due and payable in full and, if it is not paid in full, mortgagee shall have the right to exercise all the rights and remedies in this mortgage or by law reserved to mortgagee the same as in any event of default under this mortgage. Mortgagors agree that this provision is a material part of the contract by which mortgagee has sold the premises to mortgagors and that this provision applies whether or not the security is impaired by the sale, conveyance, transfer or other disposition.

NOTWITHSTANDING ANY LAW REGARDING IMPAIRMENT OF SECURITY PRIOR TO ACCELERATION ON ASSUMPTION, THE PARTIES SPECIFICALLY CONTRACT THAT THIS MORTGAGE SHALL BECOME DUE IN FULL ON THE CONDITIONS SPECIFIED ABOVE WITHOUT REGARD TO IMPAIRMENT.

TENTH: If foreclosure proceedings of any mortgage, trust deed, encumbrance or lien of any kind on the premises should be instituted, or if mortgagor defaults in the performance of any mortgage, trust deed, encumbrance or lien of any kind on the premises, then mortgagee may, at its option, immediately or later, declare this mortgage and the mortgage note due and payable in full.

ELEVENTH: If the premises or any part of them shall be condemned and taken for public use under the power of eminent domain, mortgagee shall have the right to demand that all damages awarded for the taking of or damages to the premises shall be paid to mortgagee, up to the amount then unpaid on this mortgage and the obligation secured by this mortgage.

TWELFTH: To keep the buildings now or later on the premises fully insured against fire, flood, and other casualties in a sum not less than the total of the sums secured by this mortgage, in a company or companies to be approved by mortgagee, which approval mortgagee shall not unreasonably withhold; and the policies shall include a loss payee clause in a form satisfactory to mortgagee and shall include a clause requiring the insuror to provide mortgagee at least

[number of days] days advance written notice of cancellation or lapse of coverage and a period of [number] days to cure nonpayment of premium or other cause for termination; and the policy or policies are to be held by and payable to mortgagee; and if any sum of money becomes payable under the policy or policies, mortgagee shall have the option to receive and apply the money on account of the indebtedness secured by this mortgage or to permit mortgagor to receive and use it, or any part of it, for other purposes, without waiving or impairing any equity lien or right under or by virtue of this mortgage; and mortgagee may place and pay for the insurance or any part of it, without waiving or affecting the option to foreclose on any right under this mortgage, and each and every such payment shall bear interest at the maximum contract rate of interest allowed by law and shall be secured by the lien of the mortgage and shall be immediately paid to mortgagee by mortgagor without demand.

THIRTEENTH: Mortgagor has executed and delivered a first mortgage on the premises to [name of mortgagee], in the original principal amount of *[\$/dollar amount]*. Whether or not the mortgage contains a future advance clause, and whether or not the mortgage secures future advances, mortgagor covenants and agrees that mortgagor shall not accept any future advances under the [existing] mortgage. Any such advance shall constitute a default of this mortgage, and this mortgage shall become immediately due and payable without demand. The parties intend that the existing mortgage be prior to this mortgage only to the extent of the original *[\$/dollar amount]* principal amount.

FOURTEENTH: The premises are also subject to a mortgage held by [name of existing mortgagee] in the original principal amount of *[\$/dollar amount]* from [date] to [date], with a principal balance on [date], of *[\$/dollar amount]*, recorded on [date], at O.R. Book [number], page [number], Public Records of [county] County, Florida, and dated [date], which is subject to assignments recorded at O.R. Book [number], page [number], and at O.R. Book [number], page [number], Public Records of [county] County, Florida, by which [name of existing mortgagee] holds this mortgage, referred to below as the "existing mortgage." Mortgagor and mortgagee agree as follows with respect to the existing mortgage:

(a) There exists no default or any event that would constitute a default under the existing mortgage, and the informa-

tion set forth above with respect to the existing mortgage is accurate in every respect.

(b) In consideration of the execution and delivery of the note secured by this mortgage, mortgagee agrees to pay the installments of principal and interest as the installments become due under the existing mortgage, but only from, and to the extent of, the payments of principal and interest received by mortgagee on the note secured by this mortgage. The above obligation shall in no event include in respect to the existing mortgage any penalty or premium, or any amounts required to be paid in addition to principal or interest or any installments of principal or interest which become due by acceleration, except any such penalty, premium or amounts required to be paid as a direct result of mortgagee's failure to perform its obligations under this mortgage. If mortgagee fails to pay when due any payment on the existing mortgage and if mortgagor has timely made its payment to mortgagee on this mortgage, then mortgagor may make the payment after written notice to mortgagee and may deduct the amount paid from the principal amount due on this mortgage.

(c) Mortgagor will render the performance to mortgagee as may be required of mortgagee by the terms of the existing mortgage.

(d) Mortgagor will not exercise any right or privilege of prepayment of principal or interest under the existing mortgage, and mortgagor will not enter into any agreement with holders of the existing mortgage modifying or amending any provisions of the existing mortgage without the prior written consent of mortgagee.

(e) If for any reason other than mortgagee's failure to make payments of principal or interest on the existing mortgage, the indebtedness secured by the existing mortgage is accelerated or the mortgaged property or any part of it is sold, or attempted to be sold, pursuant to the existing mortgage, or any remedial action or proceeding is taken or instituted in respect of the mortgaged property or any part of it under the existing mortgage, mortgagor will indemnify mortgagee against any loss, cost or expense incurred by mortgagee, including reasonable attorney's fees: (i) in contesting any such action taken or instituted or in attempting to reinstate the existing mortgage; or (ii) incurred by mortgagee on account of the acceleration of the existing

mortgage, the sale of the premises pursuant to it or mortgagor's purchase or payment of the existing mortgage.

(f) Mortgagor will pay directly to mortgagee, its successors and assigns, the installments of principal and interest required by this mortgage in accordance with the terms of the note secured by this mortgage, and will not make any payment directly to the holders of the existing mortgage or request any release, partial release, amendment or other modification of the existing mortgage without the prior written consent of mortgagee, its successors and assigns.

Provided always, that if mortgagor pays to mortgagee the sum of money mentioned in the mortgage note, the "mortgage note," "promissory note" or "note," a copy of which is attached to the mortgage as [*specify exhibit*], and any renewals or extensions of it, and any other indebtedness to mortgagee referred to here, in whatever form, and the interest on it as it becomes due, together with all costs, charges and expenses, including a reasonable attorney's fee, which mortgagee may incur in collecting these sums or in protecting the security of mortgagee, whether by suit or otherwise, and shall duly, promptly and fully perform, discharge, execute, effect, complete and comply with and abide by each and every one of the stipulations, agreements, conditions and covenants of the mortgage note and of this mortgage, then this mortgage and the estate created by this mortgage shall cease and be null and void; otherwise the same shall remain of binding force and effect.

In witness of the above, mortgagor has executed and delivered this mortgage on the date first written above.

Witnesses:

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[Signature of witness 1]

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[Printed name of witness 1]

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[Signature of witness 2]

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[Printed name of witness 2]

Mortgagor:

---

[Signature of mortgagor]

---

[Printed name of mortgagor]

---

[Address of mortgagor]

The State of Florida                            }  
County of \_\_\_\_\_                                }

The above instrument was acknowledged before me on  
[date], by [name of morgagor].

Notary Public—State of Florida:

\_\_\_\_\_  
[Signature of notary public]

\_\_\_\_\_  
[Printed name of notary public]

Personally known \_\_\_\_\_; or produced identification

\_\_\_\_\_  
Type of identification produced: [specify]

Affix seal below:

[Seal]

#### NOTES TO FORM

##### Research References

###### *A.L.R. Library*

Validity and effect of “wraparound” mortgages whereby purchaser incorporates into agreed payments to grantor latter’s obligation on initial mortgage, 36 A.L.R. 4th 144.

#### § 4:22 Mortgage—Balloon

THIS IS A BALLOON MORTGAGE AND THE FINAL PAYMENT OR THE PRINCIPAL BALANCE DUE ON MATURITY IS \$/[dollar amount], TOGETHER WITH ACCRUED INTEREST, IF ANY, AND ALL ADVANCEMENTS MADE BY MORTGAGEE UNDER THE TERMS OF THIS MORTGAGE.

This mortgage deed (the “mortgage”), dated as of [date], by and between [name of mortgagor], referred to below as “mortgagor,” and [name of mortgagee], having an office at [address of mortgagee], referred to below as “mortgagee.”

In consideration of the premises and in order to secure the payment of both the principal of the note, and interest and any other sums payable on the note (as defined below) or this mortgage and the performance and observance of all of

the provisions of this mortgage and of the note, mortgagor grants, sells, warrants, conveys, assigns, transfers, mortgages and sets over and confirms to mortgagee, all of mortgagor's estate, right, title and interest in, to and under real property in [county] County, Florida, more particularly described in the attached [specify exhibit].

Together with all improvements now or later located on the real property and all fixtures, appliances, apparatus, equipment, furnishings, heating and air conditioning equipment, machinery and articles of personal property and replacement of it (other than those owned by lessees of the real property) now or later affixed to, attached to, placed on, or used in any way in connection with the complete and comfortable use, occupancy, or operation of the real property, all licenses and permits used or required in connection with the use of the real property, all leases of the real property now or later entered into and all right, title and interest of mortgagor under it, including without limitation, cash or securities deposited under it pursuant to the leases, and all rents, issues, proceeds, and profits accruing from the real property and together with all proceeds of the conversion, voluntary or involuntary of any of the above into cash or liquidated claims, including without limitation, proceeds of insurance and condemnation awards (the above real property, tangible and intangible personal property referred to collectively below as the mortgaged property). Mortgagor grants to mortgagee a security interest in the above described tangible and intangible personal property.

To hold the mortgaged property, together with all the tene-ments, hereditaments and appurtenances belonging to or in anyway appertaining and the reversion and reversions of it and all the estate, right, title, interest, homestead, dower and right of dower, separate estate, possession, claim and demand whatsoever, as well in law as in equity, of mortgagor and to the same, and every part of it, with the appurtenances of mortgagor in and to the same, and every part and parcel of it to mortgagee.

Mortgagor warrants that mortgagor has a good and marketable title to an indefeasible fee estate in the real property comprising the mortgaged property subject to no lien, charge or encumbrance except as mortgagee has agreed to accept in writing. Mortgagor covenants that this mortgage is and will remain a valid and enforceable mortgage on the mortgaged

property subject only to the exceptions provided in this mortgage. Mortgagor has full power and lawful authority to mortgage the mortgaged property in the manner and form used here whether intended now or intended to be done later. Mortgagor will preserve the title and will forever warrant and defend it to mortgagee and will forever warrant and defend the validity and priority of the lien against the claims of all persons and parties.

Mortgagor will, at the cost of mortgagor, and without expense to mortgagee, do any acts and execute, acknowledge and deliver all deeds, conveyances, mortgages, assignments, notices of assignments, transfers and assurances as mortgagee shall from time to time require to preserve the priority of the lien of this mortgage or to facilitate the performance of the terms of it.

Provided, however, that if mortgagor pays to mortgagee the indebtedness in the principal sum of *[\$/dollar amount]* as evidenced by a promissory note (the “note”), of even date with this mortgage, or any renewal or replacement of the note, executed by mortgagor and payable to order of mortgagee, with interest and on the terms as provided in it, and together with all other sums advanced by mortgagee to or on behalf of mortgagor pursuant to the note or this mortgage, the final maturity date of the note and this mortgage as specified in the note and shall perform all other covenants and conditions of the note, all of the terms of which are incorporated by reference as though set forth fully here, and of any renewal, extension or modification, of it and of this mortgage, then this mortgage and the estate created by it shall cease and terminate.

Mortgagor further agrees with mortgagee as follows:

1. To pay all sums, including interest secured, when due, as provided for in the note and any renewal, extension or modification of it and in this mortgage, all sums to be payable in lawful money of the United States of America at mortgagee’s principal office mentioned above, or at any other place as mortgagee may designate in writing.

2. To pay when due, and without requiring any notice from mortgagee, all taxes, assessments of any type or nature and other charges levied or assessed against the mortgaged property or this mortgage and produce receipts for it on demand. To immediately pay and discharge any claim, lien

or encumbrance against the mortgaged property which may be or become superior to this mortgage and to permit no default or delinquency on any other lien, encumbrance or charge against the mortgaged property.

3. If required by mortgagee, to also make monthly deposits with mortgagee, in a noninterest bearing account, together with and in addition to interest and principal, of a sum equal to *[specify, such as: one-twelfth]* of the yearly taxes and assessments which may be levied against the mortgaged property, and (if so required) *[specify, such as: one-twelfth]* of the yearly premiums for insurance on it. The amount of the taxes, assessments and premiums, when unknown, shall be estimated by mortgagee. The deposits shall be used by mortgagee to pay the taxes, assessments and premiums when due. Any insufficiency of an account to pay the charges when due shall be paid by mortgagor to mortgagee on demand. If, by reason of any default by mortgagor under any provision of this mortgage, mortgagee declares all sums secured by this mortgage to be due and payable, mortgagee may then apply any funds in the account against the entire indebtedness secured by this mortgage. The enforceability of the covenants relating to taxes, assessments and insurance premiums otherwise provided in this mortgage shall not be affected except insofar as those obligations have been met by compliance with this paragraph. Mortgagee may from time to time at its option waive, and after any such waiver reinstate, any or all provisions requiring the deposits, by notice to mortgagor in writing. While any such waiver is in effect, mortgagor shall pay taxes, assessments and insurance premiums as provided elsewhere in this mortgage.

4. To promptly pay all taxes and assessments assessed or levied under and by virtue of any state, federal or municipal law or regulation passed later, against mortgagee on this mortgage or the debt secured by this mortgage, or on its interest under this mortgage, provided however, that the total amount paid for any taxes pursuant to this paragraph together with the interest payable on the indebtedness shall not exceed the highest lawful rate of interest in Florida. In the event of the passage of any such law or regulation imposing a tax or assessment against mortgagee on this mortgage or the debt secured by it, the entire indebtedness secured by this mortgage shall become immediately due and payable at the option of mortgagee.

5. To keep the mortgaged property insured against loss or damage by fire, and all perils insured against by an extended coverage endorsement, and any other risks and perils as mortgagee in its discretion may require. The policy or policies of insurance shall be in the form in general use from time to time in the locality in which the mortgaged property is situated, shall be in an amount as mortgagee may reasonably require, shall be issued by a company or companies approved by mortgagee, and shall contain a standard mortgagee clause with loss payable to mortgagee. Whenever required by mortgagee, the policies shall be delivered immediately to and held by mortgagee. Any and all amounts received by mortgagee under any of the policies may be applied by mortgagee on the indebtedness secured by this mortgage in a manner as mortgagee may, in its sole discretion, elect. At the option of mortgagee, the entire amount so received or any part of it may be released. Neither the application nor the release of any such amounts shall cure or waive any default. On exercise of the power of sale given in this mortgage or other acquisition of the mortgaged property or any part of it by mortgagee, the policies shall become the absolute property of mortgagee.

6. To first obtain the written consent of mortgagee, the consent to be granted or withheld at the sole discretion of mortgagee, before:

- (a) removing or demolishing any building now or erected later on the premises;
- (b) altering the arrangement, design or structural character of it;
- (c) making any repairs which involve the removal of structural parts or the exposure of the interior of the building to the elements;
- (d) cutting or removing or permitting the cutting and removal of any trees or timber on the mortgaged property;
- (e) removing or exchanging any tangible personal property which is part of the mortgaged property; or
- (f) entering into or modifying any leases of the mortgaged property.

7. To maintain the mortgaged property in good condition and repair, including but not limited to the making of any repairs as mortgagee may from time to time determine to be necessary for the preservation of the mortgaged property and to not commit or permit any waste. Mortgagee shall

have the right to inspect the mortgaged property on reasonable notice to mortgagor.

8. To comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the mortgaged property, and not to cause or permit any violation of them.

9. If mortgagor fails to pay any claim, lien or encumbrance which is superior to this mortgage, or when due, any tax or assessment of insurance premium, or to keep the mortgaged property in repair, or commits or permits waste, or if there is commenced any action or proceeding affecting the mortgaged property or the title to it, or the interest of mortgagee in it, including, but not limited to, eminent domain and bankruptcy or reorganization proceedings, then mortgagee, at its option, may pay the claim, lien, encumbrance, tax, assessment or premium, with right of subrogation. In addition, mortgagee may make the repairs and take any steps as it deems advisable to prevent or cure the waste, and may appear in any such action or proceeding and retain counsel, and take any action as mortgagee deems advisable. For any of these purposes mortgagee may advance any sums of money, including all costs, reasonable attorney's fees and other items of expense as it deems necessary. Mortgagee shall be the sole judge of the legality, validity and priority of any such claim, lien, encumbrance, tax, assessment and premium and of the amount necessary to be paid in satisfaction of it. Mortgagee shall not be held accountable for any delay in making any such payment, which may result in any additional interest, costs, charges, expenses or otherwise.

10. Mortgagor will pay to mortgagee, immediately and without demand, all sums of money advanced by mortgagee to protect the security pursuant to this mortgage, including all costs, reasonable attorney's fees and other items of expense, together with interest on each advancement at the highest lawful rate of interest per year allowed by the law of the State of Florida. All such sums and interest shall be secured by this mortgage.

11. All sums of money secured here shall be payable without any relief from any valuation or appraisement laws.

12. If default is made in payment of any installment of principal or interest of the note or any part of it when due, or in payment, when due, or any other sum secured by this mortgage, or in performance of any of mortgagor's obligations, covenants or agreements under this mortgage, all of

the indebtedness secured by it shall become and be immediately due and payable at the option of mortgagee, without notice or demand, which are expressly waived. In this event, mortgagee may avail itself of all rights and remedies, at law or in equity, and this mortgage may be foreclosed with all rights and remedies afforded by the laws of Florida and mortgagor shall pay all costs, charges and expenses, including a reasonable attorney's fee, including all costs, expenses and attorney's fees, for any retrial, rehearing or appeals. The indebtedness secured by this mortgage shall bear interest at the highest lawful rate of interest per year allowed by the law of the State of Florida from and after the date of any default of mortgagor. If the note provides for installment payments, mortgagee may, at its option, collect a late charge as may be provided for in the note, to reimburse mortgagee for expenses in collecting and servicing the installment payments.

13. If default is made in payment, when due, of any indebtedness secured by this mortgage, or in performance of any of mortgagor's obligations, covenants or agreements contained here:

(a) Mortgagee is authorized at any time, without notice, in its sole discretion to enter on and take possession of the mortgaged property or any part of it, to perform any acts mortgagee deems necessary or proper to conserve the security and to collect and receive all rents, issues and profits of it, including those past due and those accruing later; and

(b) Mortgagee shall be entitled, as a matter of strict right, without notice and ex parte, and without regard to the value or occupancy of the security, or the solvency of mortgagor, or the adequacy of the mortgaged property as security for the note, to have a receiver appointed to enter on and take possession of the mortgaged property, collect the rents and profits from it and apply them as the court may direct, the receiver to have all the rights and powers permitted under the laws of Florida.

In either case, mortgagee or the receiver may also take possession of, and for these purposes use, any and all personal property which is a part of the mortgaged property and used by mortgagor in the rental or leasing of the mortgaged property or any part of it. The expense (including receiver's fees, counsel fees, costs and agent's compensation)

incurred pursuant to the powers contained in this mortgage shall be secured by this mortgage. Mortgagee shall (after payment of all costs and expenses incurred) apply any rents, issues and profits received by it on the indebtedness secured here in the order that mortgagee determines. The right to enter and take possession of the mortgaged property, to manage and operate it, and to collect the rents, issues and profits of it, whether by a receiver or otherwise, shall be cumulative to any other right or remedy described here or afforded by law, and may be exercised concurrently or independently. Mortgagee shall be liable to account only for the rents, issues and profits actually received by mortgagee.

14. If the indebtedness secured in this mortgage is now or later further secured by chattel mortgages, security interest, financing statements, pledges, contracts of guaranty, assignments of leases, or other securities, or if the mortgaged property encumbered consists of more than one parcel of real property, mortgagee may at its option exhaust any one or more of the securities and security under this mortgage, or any parcels of the security under this mortgage, either concurrently or independently, and in such an order as it may determine.

15. This mortgage shall secure not only existing indebtedness, but also any future advances, whether the advances are obligatory or to be made at the option of mortgagee, or otherwise, as are made within *[specify, such as: 20]* years from the date of this mortgage, to the same extent as if the future advances were made on the date of the execution of this mortgage, but the secured indebtedness shall not exceed at any time the maximum principal amount of *[specify, such as two times]* the amount of the note, plus interest on it, and any disbursements made for the payment of taxes, levies, or insurance, on the mortgaged property, with interest on the disbursements. Any future advances, whether obligatory or to be made at the option of mortgagee, or otherwise, may be made either before or after the due date of the note or any other notes secured by this mortgage. This mortgage is given for the specific purpose of securing any and all indebtedness by mortgagor to mortgagee (but in no event shall the secured indebtedness exceed at any time the maximum principal amount set forth in this paragraph) in whatever manner this indebtedness may be evidenced or represented, until this mortgage is satisfied of record. All covenants and agree-

ments contained in this mortgage shall be applicable to all further advances made by mortgagee to mortgagor under this future advance clause.

16. No delay by mortgagee in exercising any right or remedy described here, or otherwise afforded by law, shall operate as a waiver of that right or remedy or preclude the exercise of it during the continuance of any default under this mortgage. No waiver by mortgagee of any default shall constitute a waiver of or consent to subsequent defaults. No failure of mortgagee to exercise any option given to accelerate maturity of the debt secured by this mortgage, no forbearance by mortgagee before or after the exercise of the option and no withdrawal or abandonment of foreclosure proceeding by mortgagee shall be taken or construed as a waiver of its right to exercise the option or to accelerate the maturity of the debt secured by this mortgage by reason of any past, present or future default on the part of mortgagor. Similarly, neither the procurement of insurance nor the payment of taxes or other liens or charges by mortgagee shall be taken or construed as a waiver of its right to accelerate the maturity of the debt secured in this mortgage.

17. Without affecting the liability of mortgagor or any other person (except any person expressly released in writing) for payment of any indebtedness secured by this mortgage or for performance of any obligation contained in it, and without affecting the rights of mortgagee with respect to any security not expressly released in writing, mortgagee may, at any time and from time to time, either before or after the maturity of the note, and without notice or consent:

- (a) release any person liable for payment of all or any part of the indebtedness or for performance of any obligation;
- (b) make any agreement extending the time or otherwise altering the terms of payment of all or any part of the indebtedness, or modifying or waiving any obligation, or subordinating, modifying or otherwise dealing with the lien or charge here;
- (c) exercise or refrain from exercising or waive any right mortgagee may have;
- (d) accept additional security of any kind; and
- (e) release or otherwise deal with any property, real or personal, securing the indebtedness, including all or any part of the mortgaged property.

18. Any agreement made later by mortgagor and mortgagee pursuant to this mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance.

19. Mortgagor waives all right of homestead exemption, if any, in the mortgaged property.

20. In the event of condemnation proceedings of the mortgaged property, the award or compensation payable is assigned to and shall be paid to mortgagee. Mortgagee shall be under no obligation to question the amount of any such award or compensation and may accept it in the amount in which it shall be paid. In any such condemnation proceedings, mortgagee may be represented by counsel selected by mortgagee. The proceeds of any award or compensation received, at the option of mortgagee, will either be applied to the prepayment of the note and at the rate of interest provided in it, regardless of the rate of interest payable on the award by the condemning authority, or at the option of mortgagee, the award shall be paid over to mortgagor for restoration of the mortgaged property.

21. If mortgagee, pursuant to a construction loan agreement or loan commitment made by mortgagee with mortgagor, agrees to make construction loan advances up to the principal amount of the note, then mortgagor covenants that it will comply with all of the terms, provisions and covenants of the construction loan agreement or loan commitment, will diligently construct the improvements to be built pursuant to the terms of the construction loan agreement or loan commitment, all of the terms of which are incorporated in this mortgage by reference as though set forth fully and will permit no defaults to occur and if a default shall occur, it shall constitute a default under this mortgage and the note.

22. At the option of mortgagee, mortgagor shall provide mortgagee with periodic certified audited statements of the operations of and the financial condition of mortgagor.

23. The loan represented by this mortgage and the note is personal to mortgagor, and mortgagee made the loan to the mortgagor based on the credit of mortgagor and mortgagee's judgement of the ability of mortgagor to repay all sums due under this mortgage. Therefore this mortgage may not be assumed by any subsequent holder of an interest in the mortgaged property. If all or any part of the mortgaged property, or any interest in it, is sold, conveyed, transferred (including a transfer by agreement for deed or land contract)

or further encumbered by mortgagor without mortgagee's prior written consent excluding the grant of any leasehold interest in the mortgaged property not containing an option to purchase, which is made in the ordinary course of mortgagor's business, then mortgagee may declare all sums secured by this mortgage immediately due and payable.

24. Mortgagor represents and warrants that if it is a corporation, it is duly organized and validly existing, in good standing under the laws of the state of its incorporation, has stock outstanding which has been duly and validly issued, and is qualified to do business and is in good standing in the State of Florida, with full power and authority to consummate the loan contemplated here. If mortgagor is a partnership, it represents and warrants that it is duly formed and validly existing, and is fully qualified to do business in the State of Florida, with full power and authority to consummate the loan contemplated here.

25. If any one or more of the provisions contained in this mortgage or in the note is for any reason held to be invalid, illegal or unenforceable in any respect, the invalidity, illegality or unenforceability shall, at the option of mortgagee, not affect any other provisions of this mortgage, but this mortgage shall be construed as if the invalid, illegal or unenforceable provision had never been contained in this mortgage. The total interest payable pursuant to the note or this mortgage shall not in any one year exceed the highest lawful rate of interest permitted in the State of Florida.

26. The covenants and agreements contained here shall bind and the benefits and advantages shall inure to the respective heirs, executors, administrators, successors, and assigns of the parties. Wherever used, the singular number includes the plural, the plural includes the singular, and the use of any gender applies to all genders. All covenants, agreements and undertakings shall be joint and several. If additional numbered covenants or paragraphs are for convenience inserted in this mortgage, the additional covenants shall be read and given effect as though following this covenant in consecutive order.

In witness of the above, mortgagor has duly executed this mortgage as of the date first above written.

THIS IS A BALLOON MORTGAGE AND THE FINAL PRINCIPAL PAYMENT OR THE PRINCIPAL BALANCE

DUE ON MATURITY IS *[\$dollar amount]*, TOGETHER WITH ACCRUED INTEREST, IF ANY, AND ALL ADVANCEMENTS MADE BY MORTGAGEE UNDER THE TERMS OF THIS MORTGAGE.

Witnesses:

*[Signature of witness 1]*

*[Printed name of witness 1]*

*[Signature of witness 2]*

*[Printed name of witness 2]*

Mortgagor:

*[Signature of mortgagor]*

*[Printed name of mortgagor]*

*[Address of mortgagor]*

The State of Florida  
County of \_\_\_\_\_

}

The above instrument was acknowledged before me on  
*[date]*, by *[name of mortgagor]*.

Notary Public—State of Florida:

*[Signature of notary public]*

*[Printed name]*

Personally known \_\_\_\_\_; or produced identification

Type of identification produced: *[specify]*

Affix seal below:

*[Seal]*

#### NOTES TO FORM

##### Drafter's Notes

Fla. Stat. § 697.05 requires that the balloon mortgage clause appear in caps. It is placed at the top of the first page and again directly above the signature lines. The clause is required when the final payment or principal balance due at maturity is greater than twice the

amount of the regular monthly or periodic payment. A different statutory clause is applied when the note has a variable or adjustable interest rate. Failure to include the clause may result in an automatic extension of the maturity date of the mortgage. Exceptions to the statute include certain first mortgages, certain mortgages having a term of five years or more, mortgages that are payable interest only with the entire principal due on maturity, and mortgages on credit extensions over \$500,000.

**§ 4:23 Mortgage—Securing note and indemnification agreement**

**MORTGAGE**

This indenture is made on *[date]*, between *[name of mortgagor]*, a Florida corporation, referred to below as “mortgagor,” and *[name of mortgagee]*, of *[address of mortgagee]*, referred to below as “mortgagee.”

**Amount of Lien (“Note”)**

Mortgagor is justly indebted to mortgagee in the sum of *[\$/dollar amount]* and has agreed to pay the sum, with interest, according to the terms of a note (the “note”) given by mortgagor to mortgagee, dated of even date with this mortgage, a true copy of the note being attached here as *[specify exhibit]* and by reference made a part of this mortgage;

Mortgagor has agreed to indemnify, defend and hold mortgagee harmless in accordance with the indemnification clarification agreement dated of even date with this mortgage between mortgagor and mortgagee and others, which is referred to here as the “indemnification agreement.”

**Description of Property Subject to Lien (“Premises”)**

Now, therefore, in consideration of the premises and the sum set forth above, mortgagor has granted, bargained, sold and conveyed, and by this mortgage grants, bargains, sells and conveys to mortgagee the following property in *[county]* County, Florida: *[describe property]*.

Together with all buildings, structures and other improvements now or later located on, above or below the surface of the property described above, or any part of it; and

Together with all rights, title and interest of mortgagor in and to the minerals, soil, flowers, shrubs, crops, trees, timber and other emblements now or later on the property or under or above it or any part of it; and

Together with all the tenements, hereditaments, easements, riparian and littoral rights, and appurtenances belonging or appertaining to the property, whether now owned or later acquired by mortgagor, and including all rights of ingress and egress to and from adjoining property (whether the rights now exist or subsequently arise) together with the reversions, remainder and remainders, rents, issues and profits a prendre of it; and all the estate, right, title, interest, claim and demand of mortgagor of, in and to the same and of, in and to every part of it; and

Together with all proceeds, additions and accessions to the property and replacements of it (mortgagor agreeing with respect to all additions and replacements to execute and deliver from time to time the further instruments as may be requested by mortgagee to confirm the conveyance, transfer and assignment of any of the above); and

Together with all of the water, sanitary and storm sewer systems now or later owned by mortgagor which are now or later located by, over, and on the property described above, or any part of it, and includes all water mains, service laterals, hydrants, valves and appurtenances, and includes all sanitary sewer lines, including mains, laterals, manholes and appurtenances; and

Together with all paving for streets, roads, walkways or entrance ways now or later owned by mortgagor and which are now or later located on the property described above or any part of it; and

Together with mortgagor's interest as lessor in and to all leases of the property described above, or any part of it, made and entered into, and in and to all leases made later and entered into by mortgagor during the life of this mortgage or any extension or renewal of it, including all present and future security deposits and advance rentals reserving to mortgagor its equity of redemption rights in it, provided that in case of a foreclosure sale, the lessor's interest in any such leases then in force shall, on expiration of mortgagor's right of redemption, pass to the purchaser at the sale as a part of the mortgaged property, subject to election by the purchaser to terminate or enforce any leases made later; and

Together with any and all awards or payments, including interest, and the right to receive them, as a result of the

exercise of the right of eminent domain, to the extent of all amounts which may be secured by this mortgage at the date of receipt of any such award or payment by mortgagee and of the reasonable attorney's fees, costs and disbursements incurred by mortgagee in connection with the collection of the award or payment; and

Together with all the right, title and interest of mortgagor in and to all unearned premiums accrued, accruing or to accrue under any and all insurance policies now or provided later pursuant to the terms of this mortgage, and all proceeds or sums payable for the loss of or damage to any property encumbered by this mortgage; and

Together with all of mortgagor's interest in all utility security deposits or bonds of the property described above or any part or parcel of it.

All items encumbered by this mortgage are collectively referred to in this mortgage as the "premises."

To hold the premises granted here to the use, benefit and behalf of mortgagee, forever.

#### Equity of Redemption

This mortgage will remain in full force and effect until the mortgagor does all of the following, at which time this mortgage will become void:

(1) pay or cause to be paid to mortgagee, at its office and principal place of business in [*county*] County, Florida, or at any other place which may later be designated in writing by mortgagee, its or their successors or assigns, with interest the principal sum of *[\$/dollar amount]* with final maturity, if not sooner paid, as stated in the note, unless amended or extended according to the terms of the note executed by mortgagor and payable to mortgagee; and

(2) fully perform the indemnification agreement; provided however, that since the indemnification agreement is a continuing obligation without definite term, it is agreed that this mortgage shall cease to be security for the indemnification agreement [*number*] years after the date of this mortgage unless a claim is made against mortgagee or any other indemnitee which is a valid claim under the indemnification agreement and a written notice of the claim is either received by mortgagor within [*number*]

years from the date of this mortgage or is recorded in the public records of *[county]* County, Florida, and mailed to mortgagor at the address set forth in Paragraph 15 below within *[number of years]* years from the date of this mortgage. It is further agreed that if such a claim is made under the indemnification agreement within the *[number]*-year period, then this mortgage shall continue to be security for the indemnification agreement only as to that claim and any claims arising out of or through that claim until they are finally resolved. The phrase "finally resolved" shall include, but not be limited to, a dismissal with prejudice of the claim by a court of competent jurisdiction, a voluntary dismissal of the claim with prejudice, a release of liability for the claim, or a judgment in favor of mortgagee by a court of competent jurisdiction, as long as, in each of the above types of resolutions, the resolution is final and all rehearing and appellate rights have expired; and

(3) pay all other sums, indebtedness, obligations, and liabilities for which this instrument is security, and fully perform all the covenants, conditions, and terms of this mortgage.

#### Substitute Security; No Move Before One Year

Notwithstanding anything to the contrary in this mortgage, mortgagor shall be entitled to a release of the lien of this mortgage in full if, at any time during the term of this mortgage or any extension of it, but after the note has been paid in full, mortgagor provides to mortgagee a perfected first security interest and lien on any cash, bank account, or certificate of deposit (or any combination of the above) in the total principal amount of *[\$/dollar amount]* as substitute security (referred to below as "substitute security") for the secured indebtedness. In that event, the lien of this mortgage shall be deemed to have been transferred to that substitute security, which shall then serve as the sole collateral for the secured indebtedness. Any interest payable on any of the substitute security shall inure to the benefit of mortgagor and may be withdrawn by mortgagor at any time. If that substitute security is provided by mortgagor, mortgagee agrees to immediately execute and deliver to mortgagor a release of mortgage in recordable form and agrees to provide all affidavits and other documents reasonably necessary to

evidence that release and the authority of mortgagee to release the lien of this mortgage. Mortgagor agrees to execute all documents necessary for mortgagee to perfect a first lien and security interest in any such substitute security, the terms of which shall be as similar to this mortgage as possible, and shall be reasonably acceptable to mortgagee. This paragraph shall inure to the benefit of mortgagor and its successors and assigns, and shall be binding on mortgagee and mortgagee's successors, assigns, heirs, successor trustees, and personal representatives.

Mortgagor further agrees that, until the note is paid in full, mortgagor shall not move its business operations away from the premises and shall not remove from the premises any equipment, tools, or other tangible personal property (other than inventory sold in the ordinary course of business). A violation of this provision is a default of this mortgage.

#### Warranties

Mortgagor warrants that mortgagor has good, absolute and marketable title to the premises, and is lawfully seized and possessed of the premises and every part of them, and has the right and authority to mortgage and give security on all the premises; that the premises are unencumbered and unrestricted by any act of mortgagor and that mortgagor shall not further mortgage or encumber the premises as long as this mortgage remains unsatisfied; and that mortgagor will forever warrant and defend the title to the premises to mortgagee against the claims of all persons. This mortgage is, however, subject to the matters listed in the warranty deed from mortgagee to mortgagor dated of even date with this mortgage.

#### “Secured Indebtedness”

This mortgage on the premises is given as security for payment of the note, and as security for performance of the indemnification agreement as to all claims made under it within *[number]* years after the date of this mortgage (see subparagraph B under Equity of Redemption above), and all renewals, modifications or extensions of the above, all of which are collectively referred to here as the “secured indebtedness.”

#### MORTGAGOR FURTHER COVENANTS AND AGREES WITH MORTGAGEE AS FOLLOWS:

1. Payment and Performance. Mortgagor shall pay to

mortgagee the secured indebtedness with interest on it as provided in the note, this mortgage, and the indemnification agreement (see subparagraph B under Equity of Redemption above), and mortgagor shall fully perform the note, this mortgage, and the indemnification agreement.

2. Taxes and Insurance Premiums. Mortgagor shall pay, when due and payable: (a) all taxes, assessments, general or special, and other charges, levied on or assessed against the premises (excluding any of mortgagee's income tax); and (b) premiums on policies of fire and other hazard insurance covering the premises, as required in this mortgage. Mortgagor shall promptly deliver to mortgagee receipts showing payment in full of all of the above items.

3. Insurance.

A. Types of Coverage; Loss Payee; Assignment; Application of Funds. Mortgagor shall keep the premises insured for the benefit of mortgagee against loss or damage by fire, lightning, windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles, and smoke, all in amounts approved by mortgagee not exceeding 100% of the full insurable value. All insurance provided for here shall be in form and companies approved by mortgagee. Regardless of the types or amounts of insurance required and approved by mortgagee, mortgagor shall deliver to mortgagee all policies of insurance which insure against any loss or damage to the premises, with loss payee endorsement to mortgagee, without contribution by mortgagee. The delivery of the insurance policies shall constitute an assignment, as further security, of all unearned premiums existing from time to time on them. If mortgagee, by reason of the insurance, receives any money for loss or damage, the amount shall be first applied by mortgagee for the repair or replacement of the premises (but mortgagee shall not be obligated to see to the proper application of any amount paid over to mortgagor) and any remaining sums shall then be applied toward payment of principal amounts unpaid on the secured indebtedness.

B. Public Liability Insurance. Mortgagor shall at all times maintain public liability insurance insuring against all claims for personal or bodily injury, death or property damage occurring on, in, or about the premises

in amounts not less than [*specify, such as: \$500,000*] for injury or damage to [*specify, such as: any one person*] and [*specify, such as: \$1,000,000*] for injury or damage from [*specify, such as: any one accident*] and [*specify, such as: \$50,000*] for property damage. The insurance coverage shall be in form and with companies approved by mortgagee. Mortgagor shall furnish to mortgagee evidence that the insurance is in effect, on request, at no cost to mortgagee.

C. Flood Insurance. Insurance under the Federal Flood Insurance program shall be maintained at all times within the minimum requirements and amounts required under the program for federally financed or assisted loans under the Flood Disaster Protection Act of 1973, as amended, unless specifically waived in writing by mortgagee.

D. Minimum Insurance Coverage. In the absence of written direction from mortgagee, the insurance amount required in this mortgage shall not be less than that which may be required to prevent mortgagor from becoming co-insurer under the terms of any applicable policy, or the amount of the secured indebtedness, whichever is greater, but not to exceed full insurable value.

E. Renewal. Mortgagor shall deliver to mortgagee a renewal policy or policies on receipt by mortgagor and shall deliver to mortgagee proof of payment of premiums as they are paid.

F. Foreclosure; Successor in Interest. In the event of a foreclosure of this mortgage, the purchaser of the premises shall succeed to all the rights of mortgagor, including any right to unearned premiums, in and to all policies of insurance delivered to mortgagee, with respect to all property encumbered in this mortgage.

4. Maintenance, Waste and Removal Restrictions. No part of the premises may be moved, removed, abandoned, demolished or materially altered without the prior written consent of mortgagee. Mortgagor shall maintain the premises in good condition and repair and shall not commit or suffer any waste to the premises. Mortgagor shall promptly repair, restore, replace or rebuild any part of the premises, now or encumbered later by this mortgage which

may be affected by any casualty or which may otherwise become damaged, destroyed, lost or unsuitable for use. If the premises or any part of them, is damaged or destroyed by fire or other casualty, mortgagor shall immediately notify mortgagee, in writing, of the damage or destruction. Mortgagor shall not cause or permit anything to be done which would or could result in the cancellation of any insurance policy carried with respect to the premises. No top soil, sand, sod, loam, clay or gravel shall be mined, stripped or removed from the premises without the written consent of mortgagee. Mortgagor shall not initiate, join in or consent to any change in any private restrictive covenant, zoning ordinance or other public or private restrictions limiting or defining the uses which may be made of the premises or any part of them.

5. Compliance with Law. Mortgagor shall keep and maintain the premises in compliance with, and shall not cause or permit the premises to be in violation of, any federal, state or local environmental laws or regulations that impose liability on mortgagee, except as to any conditions existing on the date of this mortgage. Mortgagor warrants, covenants and agrees to indemnify and hold mortgagee harmless from and against any and all claims, losses, damages, liabilities, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, remedial action requirements, enforcement actions of any kind, and all costs and expenses incurred in connection with them (including but not limited to expenses and attorney's fees and legal assistant's fees including fees and expenses in any appellate proceeding), arising from any failure of mortgagor, its employees or agents to comply with any such laws or regulations. Mortgagor shall have no obligation under this paragraph to indemnify mortgagee for, or to hold mortgagee harmless from, any such claims, losses, damages, liabilities, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, remedial action requirements, enforcement actions of any kind, or any costs or expenses incurred in connection with them (including but not limited to expenses and attorney's fees and legal assistant's fees including fees and expenses in any appellate proceeding) which arise out of any property conditions existing on the date of this mortgage. Nothing in this paragraph will impair mortgag-

ee's rights under [specify, such as: paragraph 29 [Indemnification] of the lease agreement for realty dated [date], as amended], between mortgagor and mortgagee, and the [specify, such as: indemnification clarification agreement dated of even date with this mortgage].

6. Inspection. After reasonable notice to mortgagor, mortgagee and any persons authorized by mortgagee shall have the right to enter and inspect the premises at all reasonable times, and access to the premises shall be permitted for that purpose.

7. Condemnation; Eminent Domain; Awards After Foreclosure. Notwithstanding any taking of the premises or any part of them by eminent domain by any public or quasi-public authority or corporation, mortgagor shall continue to pay principal and interest on the secured indebtedness. Any reduction in the secured indebtedness resulting from the application by mortgagee of any award or payment for the taking, alterations, injury or decrease in value of the premises, as set forth below, shall be deemed to take effect only on the date of the receipt. The award or payment shall first be applied by mortgagee for the purpose of altering, restoring or rebuilding any part of the premises which may have been altered, damaged or destroyed as a result of any such taking (but mortgagee shall not be obligated to see to the application of any amount paid over to mortgagor), and any remaining sums shall then be applied toward payment of principal unpaid on the secured indebtedness. If, prior to the receipt by mortgagee of the award or payment, the premises shall have been sold on foreclosure of this mortgage, mortgagee shall have the right to receive the award or payment to the extent of any deficiency found by a court of competent jurisdiction to be due on the sale, with legal interest on it, and of the reasonable counsel fees, costs and disbursements incurred by mortgagee in connection with the collection of the award or payment if mortgagor does not collect the award for mortgagee. Mortgagor, immediately on obtaining knowledge of the institution, or the proposed, contemplated or threatened institution, of any proceedings for the taking of the premises, or any part of them, by condemnation or eminent domain, will notify mortgagee of the pendency of the proceedings. Mortgagee shall have the right to intervene at its own expense and participate in

any proceedings for and in connection with any taking referred to in this paragraph. Mortgagor from time to time shall deliver to mortgagee all instruments requested by mortgagee to permit mortgagee's participation. However, if the intervention is not permissible or permitted by the court having jurisdiction, mortgagor shall, at its expense, consult with mortgagee, its attorneys and experts and make all reasonable efforts to cooperate with them in any defense of the proceedings.

8. Conveyance of Title. If mortgagor sells, conveys, exchanges, or otherwise disposes of the real property and improvements on it which are a part of the premises, or any part of them, without the written consent of mortgagee, mortgagee may, at its election, declare the entire secured indebtedness to be immediately due and payable, without notice to mortgagor (which notice mortgagor expressly waives here). On such a declaration, the entire secured indebtedness shall be immediately due and payable in full, and if not immediately paid then mortgagee shall have the option to foreclose this mortgage in addition to the other remedies provided for here in case of default.

9. Event of Default. The occurrence of any one of the following events shall constitute an "event of default" if not cured within [*specify, such as: 15*] days after mortgagor's receipt of notice from mortgagee specifying the event; time is of the essence here:

A. Mortgagor fails to pay the secured indebtedness, or any part of it, or fails to pay any tax, insurance premium or other charge on the premises when and as they shall become due and payable, including but not limited to failure to pay in full on acceleration in case of failure to pay any installment payment;

B. Mortgagor fails to perform an obligation contained in the note, this mortgage, or the indemnification agreement;

C. any warranty, agreement or covenant of mortgagor contained in this mortgage, or contained in any instrument, document, transfer, conveyance, assignment or agreement given with respect to the secured indebtedness, proves untrue or misleading in any material respect;

D. the premises are subject to actual or threatened

waste, or any part of the premises is removed, demolished or materially altered, without adequate provision being made for replacement or repair, so that the value of the premises is diminished except as allowed in this mortgage;

E. any federal or state tax lien or claim of lien for labor or material is filed of record against mortgagor or the premises and not removed by payment, bond or order of court within *[specify, such as: 30]* days from date of recording;

F. Mortgagor or any of the guarantors of the secured indebtedness makes any assignment for the benefit of creditors or any preferential payment or fraudulent transfer pursuant to Florida law, the Federal Bankruptcy Act, or other applicable law; or a receiver, liquidator or trustee of mortgagor or any of the guarantors or of any of mortgagor's property is appointed; or any petition for the bankruptcy, reorganization or arrangement of mortgagor or any of the guarantors, pursuant to the Federal Bankruptcy Act or any similar statute, is filed; or mortgagor or any of the guarantors is adjudicated a bankrupt or insolvent; or mortgagor or any of the guarantors is liquidated or dissolved or partitioned;

G. Mortgagor sells, conveys, exchanges, or encumbers the premises, or otherwise disposes of the premises, or any part of them; or

H. any conveyance of the premises (as used in this mortgage, "conveyance" shall include, without limitation, execution of an agreement for deed).

10. Options of Mortgagee on Event of Default. On the occurrence of any event of default (i.e., the occurrence of any of the events listed in the subparagraphs of the previous paragraph if not cured within *[specify, such as: 15]* days after mortgagor's receipt of notice from mortgagee specifying the event), mortgagee may immediately do any one or more of the following:

A. declare the entire secured indebtedness, including but not limited to all principal, interest, costs, attorney's fees, and payments for taxes, assessments, insurance premiums, liens, and expenses, to be due, payable and collectible in full immediately and at once, without notice to mortgagor (the notice being expressly waived);

B. pay any sums in any form or manner deemed expedient by mortgagee to protect the security of this instrument or to cure any event of default other than payment of interest or principal on secured indebtedness; make any payment authorized to be made according to any bill, statement or estimate furnished or procured from the appropriate public officer or the party claiming payment without inquiry into the accuracy or validity of it, and the receipt of the public officer or party in the hands of mortgagee shall be conclusive evidence of the validity and amount of items paid, in which event the amounts paid, with interest from the date of the payment at the maximum contract rate of interest permitted by law, shall be added to and become a part of the secured indebtedness and be immediately due and payable to mortgagee; and mortgagee shall be subrogated to any encumbrance, lien, claim or demand, and to all the rights and securities for the payment of it, paid or discharged with the principal sum secured by this mortgage or by mortgagee under the provisions of this mortgage, and the subrogation rights shall be additional and cumulative security to this instrument;

C. surrender any or all of the insurance policies maintained pursuant to this mortgage, and receive and apply the unearned premiums as a credit on the secured indebtedness, and, in that event, mortgagor appoints mortgagee as the agent and attorney-in-fact for mortgagor to collect the premiums; and

D. to foreclose this mortgage in accordance with Florida law and to exercise any and all other rights and remedies under Florida law.

11. Appointment of Receiver.

A. Appointment. If there is waste or a lack of equity in the premises, then at the time of or after the institution of suit to collect the indebtedness or to enforce this mortgage, mortgagee shall have the right to the appointment of a receiver to take charge of, manage, preserve, protect and operate the premises, to collect the rents, issues, profits and income, to make all necessary and needed repairs, to complete the construction of any improvements which has been undertaken but not completed, and to pay all taxes and assessments against the premises and insurance premiums for insurance on

the premises and after the payment of the expenses of the receivership, including reasonable attorney's fees to mortgagee's attorney, and after compensation for management of the property, to apply the net proceeds in reduction of the indebtedness secured by this mortgage or in such a manner as the court shall direct. All of these expenses shall be secured by the lien of this mortgage until paid.

B. Entry and Possession. The receiver or its agents shall be entitled to enter on and take possession of the premises.

C. Duration. The receivership shall continue until the earlier of the full payment of all sums secured by this mortgage, or until title to the property passes by foreclosure sale under this mortgage, or until any such suit is finally dismissed or judgment entered against mortgagee, or the grounds for the receivership no longer exist.

12. Waiver of Homestead Exemption. Each individual mortgagor, for himself, herself and his or her family and heirs, waives and renounces any and all homestead exemption rights provided for by the Constitution and Laws of the United States or the State of Florida in and to the premises as against the collection of the secured indebtedness, or any part of it.

13. Mortgagee's Rights to Sue. Mortgagee shall have the right from time to time to sue for any sums, whether interest, principal or any installment of either or both, taxes, penalties, or any other sums within the secured indebtedness required to be paid or performed, as they become due, regardless of whether all of the secured indebtedness shall be due on demand, and without prejudice to the right of mortgagee later to enforce any appropriate remedy against mortgagor, including an action of foreclosure, or any other action, for a default or defaults by mortgagor existing when the earlier action was commenced.

14. Mortgagee's Rights Separate, Distinct and Cumulative; Election of Remedies. The rights of mortgagee and its successors and assigns which are granted and arise under the clauses and covenants contained in this mortgage or any other document relating to the secured indebtedness shall be separate, distinct and cumulative of other powers

and rights granted and all other rights which mortgagee may have in law or equity, and none of them shall be in exclusion of the others, and all of them are cumulative to the remedies for collection of indebtedness, enforcement of rights under mortgages, and preservation of security as provided at law. No act of mortgagee or its successors or assigns shall be construed as an election to proceed under any one provision to the exclusion of any other provision, or an election of remedies to the bar of any other remedy allowed at law or in equity, anything in this mortgage or otherwise to the contrary notwithstanding.

15. Notice, Demand and Request. Every provision for notice and demand or request shall be deemed fulfilled by written notice and demand or request personally served on mortgagor or mailed by certified mail by depositing it in any post office station or letter box, enclosed in a postpaid envelope addressed to mortgagor at [county] County, Florida, or any other address that mortgagor may designate in writing to mortgagee, with a copy to mortgagor's counsel at [address of counsel].

16. Modification or Waiver. Any indulgence or departure at any time by mortgagee, its successors or assigns from any of the provisions of this mortgage, or of any obligation secured by it, shall not modify it or relate to the future or waive future compliance with it by mortgagor. No act of omission or commission of mortgagee, including but not limited to any failure to exercise any right, remedy or recourse, shall be deemed to be a waiver, release or modification of it, the waiver, release or modification to be effected only through a written document executed by mortgagee and then only to the extent specifically recited in it.

17. Mortgagee's Rights at Any Time, With or Without Consent. Without affecting the liability of mortgagor or any other person (except any person expressly released in writing) for payment of any indebtedness secured by this mortgage or for performance of any obligation contained in it, and without affecting the rights of mortgagee with respect to any security not expressly released in writing, mortgagee may, at any time and from time to time, either before or after the maturity of the secured indebtedness, and without notice or consent:

- (a) release in writing any person liable for payment of all or any part of the indebtedness or for performance of any obligation;

- (b) make any agreement in writing extending the time or otherwise altering the terms of payment of all or any part of the indebtedness, or modifying or waiving any obligation, or subordinating, modifying or otherwise dealing with the lien or charge in this mortgage;
- (c) exercise or refrain from exercising or waive any right mortgagee may have;
- (d) accept additional security of any kind; and
- (e) release in writing or otherwise deal with any property, real or personal, securing the indebtedness, including all or any part of the property mortgaged here.

18. Mortgagee's Subrogation Rights. Mortgagee shall be subrogated to the lien of any and all prior encumbrances, liens or charges paid and discharged from the proceeds of the secured indebtedness. Even though the prior liens may have been released of record, the repayment of the secured indebtedness shall be secured by the liens on the portions of the premises affected by it to the extent of the payments, respectively.

19. Severability. If any provision of this mortgage or the application of it is, for any reason and to any extent, invalid and unenforceable, neither the remainder of the instrument in which the provision is contained, nor the application of the provision to other persons, entities or circumstances, nor any other instrument referred to above shall be affected by it, but instead it shall be enforced to the maximum extent permitted by law.

20. Florida Law. This mortgage is executed and delivered in, and its terms and provisions are to be governed by, the laws of the State of Florida.

21. Descriptive Headings. The descriptive headings used in this mortgage are for convenience in reference only, and they are not intended to have any effect in determining the rights or obligations of mortgagor or mortgagee.

22. Construction. This mortgage shall not be construed more strongly against any party regardless of who was more responsible for its preparation.

23. Attorney's Fees. As used in this mortgage, attorney's fees shall include, but not be limited to, fees incurred in all matters of collection and enforcement, construction and

interpretation, before, during and after suit, trial, proceedings and appeals, as well as appearances in and connected with bankruptcy proceedings, or creditors' reorganization or arrangement proceedings.

24. Time of Essence. Mortgagor agrees that where, by the terms of the conveyance or the note secured by this mortgage, a day is named or a time fixed for payment of any sum of money or the performance of any agreement, the time stated enters into the consideration and is of the essence of the whole contract.

In witness, mortgagor has caused this instrument to be executed by its duly authorized officers and its corporate seal to be affixed to it as of the day and year first written above.

Witnesses:

*[Signature of witness 1]*

*[Printed name of witness 1]*

*[Signature of witness 2]*

*[Printed name of witness 2]*

Mortgagor:

*[Signature of mortgagor]*

*[Printed name of mortgagor]*

*[Address of mortgagor]*

The State of Florida  
County of \_\_\_\_\_

}

The above instrument was acknowledged before me on  
*[date]*, by *[name of mortgagor]*.

Notary Public—State of Florida:

*[Signature of notary public]*

*[Printed name of notary public]*

Personally known \_\_\_\_\_; or produced identification

Type of identification produced: *[specify]*

Affix seal below:

*[Seal]*

#### NOTES TO FORM

##### Drafter's Notes

A mortgage usually acts as security for payment of a promissory note, but it can secure any other legal obligation. This mortgage form secures both a promissory note and an indemnification agreement. Copies of the promissory note and indemnification agreement should be attached to the form.

#### § 4:24 Mortgage—Short form

This mortgage made on *[date]*, by *[name of mortgagor]*, of *[address of mortgagor]*, referred to below as mortgagor, to *[name of mortgagee]*, of *[address of mortgagee]*, referred to below as mortgagee.

Mortgagor, for and in consideration of the sum of *[\$/dollar amount]* paid by mortgagee, the receipt of which is acknowledged, has granted, bargained and sold to mortgagee, mortgagee's heirs and assigns forever, the following described land, situated in the County of *[county]*, State of Florida: *[legal description of property]*. Mortgagor does fully warrant the title to the land, and will defend the same against the lawful claims of all persons whomsoever.

Provided always, that if mortgagor, his or her heirs, legal representatives or assigns, pays to mortgagee, his or her legal representatives or assigns, a certain promissory note dated *[date]*, for the sum of *[\$/dollar amount]*, payable *[date]* with interest at *[percentage]%* per year from date and shall pay all sums payable thereunder, and perform, comply with, and abide by all the stipulations, agreements, conditions, and covenants of the promissory note and this mortgage, and shall duly pay all taxes, all insurance premiums reasonably required, all costs and expenses including reasonable attorney's fees that mortgagee may incur in collecting money secured by this mortgage, and also in enforcing this mortgage by suit or otherwise, then this mortgage and the estate created shall cease and be null and void.

Executed at *[place of execution]* on the day and year first above written.

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*[Signature of mortgagor]*

Executed in the presence of:

---

*[Signature of witness 1]*

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*[Signature of witness 2]*

*[Acknowledgment]*

This instrument was prepared by:

---

*[Name of preparer]*

---

*[Signature of preparer]*

---

*[Address of preparer]*

#### NOTES TO FORM

##### Tax Notes

For forms of acknowledgments, see Conveyances (Ch 2).

As to form and requisites of mortgages, generally, see §§ 4:2 to 4:11.  
See Tax Notes following § 4:20.

#### § 4:25 Mortgage—Without defeasance clause

This mortgage entered into on *[date]*, by *[name of mortgagor]*, of *[address of mortgagor]*, referred to below as “mortgagor,” to *[name of mortgagee]*, of *[address of mortgagee]*, referred to below as “mortgagee.”

Mortgagor, in consideration of the principal sum specified in the promissory note hereinafter described, received from mortgagee, mortgages and encumbers in favor of mortgagee

the real property situated in the County of [county], State of Florida, described as follows: [set forth legal description of property], as security for the payment of the promissory note of which the following is a true copy: [insert copy of note].

Mortgagor covenants with mortgagee that mortgagor is indefeasibly seized of the land in fee simple and has the full power and lawful right to mortgage and encumber the same, that the land is free from all encumbrances except as above noted, and that mortgagor except as above noted fully warrants the title to the land and will warrant and defend the same against the lawful claims of all persons whomsoever.

Mortgagor further agrees as follows:

- (1) to make promptly all payments required by the above described note and this mortgage as such payments become due;
- (2) to pay promptly when due all taxes, assessments, liens, and encumbrances on the land;
- (3) to keep the buildings now or hereafter on the land insured against damage by fire, lightning, windstorm, or other casualty in a sum not less than the sum secured by this mortgage, in a company or companies satisfactory to mortgagee, such policy to be held by and payable to mortgagee to the extent of the indebtedness remaining at the time of the loss. If any sum becomes payable under such insurance policy, mortgagee may either apply it to the indebtedness secured by this mortgage, or permit mortgagor to use it for other purposes, without impairing the lien of this mortgage;
- (4) to permit or commit no waste, impairment or deterioration of the mortgaged property;
- (5) to pay all expenses reasonably incurred by mortgagee because of failure of mortgagor to comply with the agreements in the note or this mortgage, including reasonable attorney's fees;
- (6) that if any payments provided for in the note of this mortgage are not promptly paid by mortgagor, if the buildings are not kept insured as provided, or if mortgagor defaults in any of the other covenants, stipulations or agreements, mortgagee, without waiving or affecting the option to foreclose, may pay any and all such payments or obligations, may insure the buildings, or may otherwise perform any of the covenants or agreements

on behalf of mortgagor, and any and all such sums or expenses paid or incurred, with interest thereon from the date of payment at the rate of interest prescribed in the note secured by this mortgage, shall also be secured by this mortgage;

- (7) that this mortgage lien shall extend to and include all rents and profits of the mortgaged property. In the event of foreclosure the court is authorized to appoint a receiver of the mortgaged property and to apply such rents or profits to the indebtedness secured, regardless of the solvency of mortgagor or the adequacy of the security;
- (8) that if any payment provided for in the note or this mortgage is not paid within thirty days after it becomes due, or if any agreement of this mortgage other than for the payment of money is breached, then the unpaid principal balance, not including unearned interest, shall immediately become due and payable at the option of mortgagee, and mortgagee may foreclose this mortgage in accordance with procedures established by law, and have the property sold to satisfy or apply on the indebtedness secured; and
- (9) that the agreements and promises of the note secured and of this mortgage are intended to be covenants running with the land or of any interest therein, to be binding on the respective promisors, their heirs, legal representatives and assigns, and to inure to the benefit of the respective promisees, their heirs, legal representatives and assigns.

Executed at *[place of execution]* on the day and year first above written.

---

*[Signature of mortgagor]*

Executed in the presence of:

---

*[Signature of witness 1]*

---

*[Signature of witness 2]*

[*Acknowledgment*]

This instrument was prepared by:

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[*Name of preparer*]

---

[*Signature of preparer*]

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[*Address of preparer*]

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 4:20.

##### Tax Notes

See Tax Notes following § 4:20.

#### § 4:26 Mortgage—Ground lease

This mortgage made on [*date*], by [*name of mortgagor*], a corporation organized under the laws of the State of [*state*], having an office at [*address of mortgagor*], referred to below as "mortgagor," to [*name of mortgagee*], a corporation organized under the laws of the State of [*state*], having an office at [*address of mortgagee*], referred to below as "mortgagee."

Mortgagor is justly indebted to mortgagee in the principal sum of *[\$dollar amount]* as evidenced by a certain promissory note of even date herewith, of which the following is a true copy: [*insert copy of note*].

To secure payment of the promissory note and performance of the covenants and agreements herein contained, and also to secure the payment of any and all other indebtedness, direct or contingent, that may now or hereafter become owing hereunder from mortgagor to mortgagee, mortgagor does by these presents grant, mortgage, and warrant to mortgagee all that leasehold estate, and related interests including any extensions thereof, except the last day of the leased term or

the last day of the extended term as the case may be, created by, and all of the right, title and interest of mortgagor as lessee in, to, and under a lease dated *[date]*, between *[name of lessor]*, as lessor, and *[name of lessee]*, as lessee, which lease was recorded on *[date]*, at *[supply recording information]*, (herein called the ground lease), leasing to mortgagor for a term of *[number]* years ending on *[date]*, the following described real property situated in the County of *[county]*, State of Florida: *[legal description of property]*, which, together with all the following rights, titles and interests, is collectively referred to as the "premises":

1. All rents, issues, proceeds, and profits thereof;
2. All buildings and improvements that are or shall be erected or placed thereon and all materials intended for construction, reconstruction, alteration and repairs of such improvements, all of which materials shall be deemed to be included within the premises immediately on the delivery thereof to the premises, and all fixtures now or hereafter owned by mortgagor and attached to or contained in and used in connection with the premises including but not limited to *[specify]*; all items of furniture, furnishings, equipment and personal property used in the operation of the premises; and all renewals or replacements thereof or articles in substitution therefor, whether or not the same are or shall be attached to the building or buildings in any manner.

As to any of the above property which is not considered by law as real estate and is therefore not covered by this mortgage, this mortgage is also deemed to be a security agreement under the provisions of the Uniform Commercial Code for the purpose of creating a security interest in such property, which is granted to mortgagee as secured party, securing the indebtedness and obligations.

Provided, however, that if mortgagor shall pay the principal and all interest as provided in the note, and shall pay all other sums hereinafter provided for, or secured, and shall well and truly keep and perform all of the covenants contained herein, then this mortgage shall be released at the cost of mortgagor; otherwise it shall remain in full force and effect.

To protect the security of this mortgage, mortgagor agrees as follows:

1. Mortgagor shall pay the principal and interest on the indebtedness at the time and in the manner provided herein and in the note.

2. Mortgagor shall pay before any penalty attaches thereto all taxes, special taxes, special assessments, water charges, sewer service charges, and other charges against the premises, and shall furnish to mortgagee duplicate receipt therefor within thirty days after payment of such charges.

3. Mortgagor shall maintain on the improvements now or hereafter on the premises insurance against damage by fire, windstorm and such other hazards or liability as may reasonably be required by mortgagee, and shall pay promptly, when due, any premiums on such insurance. All such insurance shall be in form and content as approved by mortgagee, and the policies and renewals, or certificated evidencing the same, marked paid, shall be delivered to mortgagee at least [number] days before the expiration of the old policies and shall have attached thereto standard noncontributing mortgage clauses in favor of and entitling mortgagee to collect any and all of the proceeds payable under all such insurance, as well as standard waiver of subrogation endorsement, all to be in form and content acceptable to mortgagee.

In the event of a change in ownership or of occupancy of the premises, immediate written notice thereof shall be delivered to all insurers. In the event of loss, mortgagor will give immediate written notice to mortgagee. Mortgagor authorizes mortgagee, at mortgagee's option, to adjust and compromise any losses under any of the above insurance, and after deducting costs of collection to apply the proceeds at its option, as follows: (a) as a credit on any portion of the indebtedness secured; (b) to restoring the improvements, in which event mortgagee shall not be obligated to see to the proper application thereof nor shall the amount so released or used be deemed a payment on the indebtedness secured; or (c) to deliver same to mortgagor.

4. No building or other improvement on the premises shall be altered, removed, or demolished nor shall any fixtures or appliances on, in or about the buildings or improvements be severed, removed, sold, or mortgaged, without the consent of mortgagee. In the event of the demolition or destruction in whole or in part of any of the fixtures, or articles of personal property covered, the same shall be

replaced promptly by similar fixtures, and articles of personal property at least equal in quality and condition to those replaced, free from any security interest therein, encumbrance thereon, or reservation of title thereto.

5. Mortgagor shall permit or commit no waste, impairment, or deterioration of the property or any part thereof; shall keep and maintain the premises and every part thereof in good repair and condition; shall effect such repairs as mortgagee may reasonably require; shall comply with all requirements of law with respect to the mortgaged premises and the use thereof; and shall observe and comply with all conditions and requirements necessary to preserve and extend any and all rights, licenses, privileges, franchises and concessions that are applicable to the premises or have been granted to or contracted for by mortgagor in connection with any existing or presently contemplated use of the premises.

6. Mortgagor will not create or permit to be created or filed against the premises any mortgage lien or other lien superior to the lien of this mortgage. Mortgagor may contest any lien claim arising from any work performed, material furnished, or obligation incurred by mortgagor upon furnishing mortgagee indemnification satisfactory to mortgagee for the final payment and discharge thereof. Mortgagor will give immediate written notice to mortgagee of any conveyance, transfer, or change of ownership or occupancy of the premises.

7. If mortgagor defaults in the payment of any of the above taxes, assessments, rates, charges, mortgages and liens, or in procuring and maintaining insurance as covenanted above, mortgagee may, at its option, pay such taxes, assessments, rates, charges, mortgages, or liens, and effect and maintain such insurance, and the sum so paid shall be repaid by mortgagor to mortgagee on demand, and until so repaid, shall bear interest at the rate of *[percentage]*% per annum and shall be a further lien on the premises as so much additional indebtedness secured.

8. Any award of damages in connection with any condemnation for public use of or injury to the premises or any part thereof is assigned and shall be paid to mortgagee. Mortgagee may apply or release such money received by it in the same manner and with the same effect as above provided for disposition of proceeds of hazard insurance.

9. Mortgagor, within *[number]* days after mortgagee's

request, will furnish a written statement, [*duly acknowledged*], of the amount due on this mortgage, stating whether any alleged offsets or defenses exist against the indebtedness secured by this mortgage.

10. All right, title and interest of mortgagor in and to all present and future leases affecting the premises, together with all rents, income, receipts, revenues, issues, and profits from or due or arising out of the premises, have been transferred and assigned to mortgagee simultaneously herewith as further security for the payment of the indebtedness. Such assignment of rents, of even date herewith, has been executed by mortgagor and shall be recorded simultaneously herewith, and the terms, covenants and conditions thereof are expressly incorporated herein by reference and made a part hereof. All leases affecting the premises shall be submitted by mortgagor to mortgagee for its approval prior to the execution thereof. All approved and executed leases shall be specifically assigned to mortgagee by instrument in form satisfactory to mortgagee. All or any such leases shall, at the option of mortgagee, be paramount or subordinate to this mortgage.

11. Simultaneously with the execution of this mortgage, mortgagor has, as additional security for payment of the indebtedness secured, assigned and transferred to mortgagee all of mortgagor's interest in certain leases demising all or a portion of the premises. Such assignment has been made by instrument of even date herewith, entitled "Assignment of Lessor's Interest in Leases," the terms and conditions of which are expressly incorporated herein by reference and made a part hereof.

Mortgagor expressly agrees that if it, as lessor thereunder, fails to perform and fulfill any term, covenant, condition, or provision in the leases, which failure results in a termination of one or more of the leases, or if it permits any breach or default under the provisions of the above assignment to occur, then, at the option of mortgagee and without notice to mortgagor, such breach or default shall constitute a default hereunder.

12. At the option of mortgagee, this mortgage shall become subject to and subordinate, in whole or in part (but not with respect to priority or entitlement to insurance proceeds or any award in condemnation) to any and all leases of all or any part of the premises on the execution by

mortgagee and recording thereof, at any time hereafter, in the office of the clerk of the circuit court in and for the county wherein the premises are situated, of a unilateral declaration to that effect.

13. Mortgagor may make prepayments on the principal of the note in accordance with the terms and conditions set forth in the note, so long as mortgagor is not in default under such note or this mortgage at the times of such prepayment.

14. Mortgagee, without notice, and without regard to the consideration, if any, paid therefor, and notwithstanding the existence at that time of any inferior liens thereon, may release any part of the premises or any person liable for any indebtedness secured without in any way affecting the liability of any party to the mortgage and note and without in any way affecting the priority of the lien of this mortgage, to the full extent of the indebtedness remaining unpaid hereunder, on any part of the security not expressly released, and may agree with any party obligated on such indebtedness or having any interest in the security described herein to extend the time for payment of any part or all of the indebtedness secured. Such agreement shall not in any way release or impair the lien hereof, but shall extend the lien hereof as against the title of all parties having any interest in the security which interest is subject to such lien.

In the event that mortgagee:

- (a) releases any part of the security described herein or any person liable for any indebtedness secured;
- (b) grants an extension of time for any payments of the debt secured;
- (c) takes other or additional security for the payment thereof; or
- (d) waives or fails to exercise any right granted herein or in the note;

such act or omission shall not release mortgagor, subsequent purchasers of the premises or any part thereof, or makers or sureties of this mortgage or of the note, or endorsers or guarantors thereof under any covenant of this mortgage or of the note, nor preclude mortgagee from exercising any right, power, or privilege herein or intended to be granted in the event of any other default then made or any subsequent default.

15. Mortgagor represents, covenants, and warrants:
  - (a) that the ground lease is in full force and effect and unmodified;
  - (b) that all rents reserved in the ground lease have been paid to the extent they were payable prior to the date hereof;
  - (c) to defend the leasehold estate created under the ground lease against any person lawfully claiming, or who may claim the same or any part thereof; and
  - (d) that there is no existing default under the provisions of the ground lease or in the performance of any of the terms, covenants, conditions or warranties thereof to be observed and performed on the part of the lessee.

16. Mortgagor will pay or cause to be paid when due any and all charges mentioned in and made payable by the ground lease, and will cause the lessor thereunder to pay any portion of the taxes, assessment, rates, charges and impositions to be borne by the lessor that might become liens on the premises or its leasehold estate within *[number]* days of the date when due. Mortgagor will obtain a proper receipt for any such item so paid and will deliver the same to mortgagee within *[number]* days after the time of such payment.

17. Mortgagor further covenants:

(a) Mortgagor will at all times promptly and faithfully keep and perform, or cause to be kept and performed, all its covenants and conditions contained in the ground lease and in all respects conform to and comply with the terms and conditions of the ground lease. Mortgagor will not do or permit anything to be done or refrain from doing anything which will impair or tend to impair the security of this mortgage or will be grounds for declaring a forfeiture of the ground lease.

(b) Mortgagor will not surrender, terminate, or cancel the ground lease, and will not without the express written consent of mortgagee modify, change, supplement, alter or amend the ground lease. Any attempt by mortgagor to terminate, cancel, modify, change, supplement, alter, or amend the ground lease without first obtaining the written consent of mortgagee thereto shall constitute a default under the terms hereof, and the entire indebtedness

secured shall, at the option of mortgagee, become immediately due and payable.

As further security to mortgagee, mortgagor deposits with mortgagee its lessee's original of the ground lease and all amendments thereto or certified copy thereof, to be retained by mortgagee until all indebtedness secured is fully paid.

(c) Mortgagor shall permit mortgagee or its representative at all reasonable times to make investigation or examination concerning performance by mortgagor of mortgagor's covenants under the ground lease.

(d) In the event of any failure by mortgagor to perform any covenant on the part of the lessee to be observed and performed under the ground lease, the performance by mortgagee in behalf of mortgagor of the ground lease covenant shall not remove or waive, as between mortgagor and mortgagee, the corresponding default under the terms hereof, and any amount so advanced by mortgagee or any costs incurred in connection therewith, with interest thereon at *[percentage]*% per year, shall be repayable by mortgagor without demand and secured.

18. Unless mortgagee shall otherwise expressly consent in writing, the fee title to the property demised by the ground lease and the leasehold estate shall not merge, but shall always remain separate and distinct, notwithstanding the union of such estates either in the lessor or in the lessee, or in a third party by purchase or otherwise.

19. In the event any action or proceeding is commenced, except an action to foreclose this mortgage or to collect the obligation secured, in which it becomes necessary to defend or assert the lien of this mortgage, whether or not mortgagee is made or becomes a party to such action or proceeding, all expenses of mortgagee incurred in any such action or proceeding to prosecute or defend the rights and lien created by this mortgage, including reasonable counsel fees, shall be paid by mortgagor. If not so paid promptly on request, such expenses shall be added to the debt secured and become a lien on the mortgaged premises, and shall be deemed to be fully secured by this mortgage and to be prior and paramount to any right, title, interest, or claim to or on the premises accruing or attaching subsequent to the lien of this mortgage, and shall bear interest at the rate provided for the obligation secured. This covenant shall not govern or affect any ac-

tion or proceeding to foreclose this mortgage or to recover or to collect the debt secured, which action or proceeding shall be governed by the provisions of law and rules of court respecting the recovery of costs, disbursements, and allowances in foreclosure actions.

20. In case of any default hereunder, mortgagee may, at its option, make any payment or perform any act required of mortgagor herein. All money so paid by mortgagee and all expenses incurred in connection therewith, including attorney's fees, shall be an additional indebtedness secured, and shall become immediately due and payable without notice and shall bear interest until payment by mortgagor at the rate of [percentage] per year.

21. *[Insert desired provision for acceleration of maturity.]*

22. If foreclosure proceedings are instituted hereunder on account of any breach or violation of the covenants herein contained, mortgagee shall have the right, without notice to mortgagor, to make application for and to have a receiver appointed to take possession of and manage and control the property pending foreclosure proceedings, for the purpose of preserving or protecting the same, and applying the net income therefrom to the preservation of the premises and to the payment of the mortgage indebtedness in such manner as the court may direct.

23. In case of any foreclosure sale of the premises, the same may be sold in one or more parcels.

24. Any notice that either party may desire or be required to give to the other party shall be in writing. The mailing thereof by certified mail addressed to mortgagor or mortgagee at the respective addresses set forth above, or at such other place as either party may designate in writing, shall constitute service of notice hereunder.

25. The realty herein mortgaged being located in the State of Florida, and the place of contract and payment also being located in Florida, the mortgage and the rights and indebtedness secured shall be construed and enforced according to the laws of that state.

26. Each right, power, and remedy herein conferred on mortgagee is cumulative of every other right or remedy of mortgagee, whether herein or by law conferred, and may be enforced concurrently therewith. No waiver by mortgagee of performance of any covenant herein or in the obligation

contained shall thereafter in any manner affect the right of mortgagee to require or enforce performance of the same or any other of the covenants. Wherever the context requires, the singular number shall include the plural and all rights and obligations under this mortgage shall extend to and be binding on all persons claiming under or through mortgagor and successors and assigns of mortgagee. The powers herein contained may be exercised as often as the occasion therefor arises.

In witness, mortgagor has caused its corporate seal to be affixed hereunto and this mortgage to be signed by its *[title of officer]* and attested by its Secretary on the day and year first above written, pursuant to authority given by resolutions duly passed by its Board of Directors.

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*[Name of corporation]*

By: \_\_\_\_\_

*[Signature of authorized person]*

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*[Title of authorized person]*

*[Corporate seal]*

ATTEST: *[name of secretary]*

---

Secretary

*[Acknowledgment]*

This instrument was prepared by:

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*[Name of preparer]*

---

*[Signature of preparer]*

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*[Address of preparer]*

**NOTES TO FORM****Drafter's Notes**

For forms of security agreements, see Secured Transactions (Ch 49).

**Tax Notes**

The mortgagor under this form is pledging: (i) the leasehold under which the property is held; and (ii) the leases the mortgagor, as lessor, has made to others. Since the interest transferred in both sets of property is for security purposes only, no tax consequences result from the mortgage. Nor does the tax position of the mortgagor under either the ground lease or under the leases on which the mortgagor is lessor change as a result of the mortgage. The rent received by the mortgagor will continue to be income under I.R.C. § 61(a)(5) and the expenses of those leases will continue to be deductions under I.R.C. § 162(a) or I.R.C. § 212. Similarly, the expenses of the ground lease, including the rent payable under it will continue to be deductible as a cost of doing business or of engaging in a profit-seeking venture.

No sale or exchange of the property has taken place for tax purposes and therefore no tax consequences result from the mortgage.

See Tax Notes following § 4:20.

**Research References***Legal Encyclopedias*

Fla. Jur. 2d, Validity of mortgage of a leasehold estate, Mortgages and Deeds of Trust § 59.

**Paragraph 10****Drafter's Notes**

A mortgagor may pledge the rents and profits of real estate in a mortgage thereof, even though the mortgage provides for the retention of the premises by the mortgagor. *Pennock v. Caldwell*, 116 Fla. 626, 156 So. 743 (1934); *Carolina Portland Cement Co. v. Baumgartner*, 99 Fla. 987, 128 So. 241 (1930), distinguished in *Smith v. Du Puis*, 117 Fla. 222, 157 So. 491 (1934).

**Research References***Legal Encyclopedias*

Fla. Jur. 2d, Rents and profits in mortgage, Mortgages and Deeds of Trust § 63.

**Paragraph 15****Drafter's Notes**

For a form of partial release, see § 4:79.

**Paragraph 22****Drafter's Notes**

For forms of acceleration provisions, see §§ 4:39, 4:40.

**§ 4:27 Mortgage—With security agreement****MORTGAGE AND SECURITY AGREEMENT**

THIS MORTGAGE AND SECURITY AGREEMENT (the “Mortgage”) is made and entered into on [date], by [name of mortgagor], (the “Mortgagor”), whose address is [address of mortgagor], and [name of mortgagee], (the “Mortgagee”), having offices at [address of mortgagee].

**WITNESS:**

WHEREAS, Mortgagor, is justly and lawfully indebted to Mortgagee in the sum of *[\$/dollar amount]* (the “Loan”), as evidenced by a promissory note payable to the order of Mortgagee (the “Note”), executed by Mortgagor, bearing the same date as this Mortgage, to be paid according to its terms;

NOW, THEREFORE, to secure the payment of the Loan and such additional advances as may be made by Mortgagee, at its option and for any purpose, to Mortgagor or Mortgagor’s permitted successor(s) in title, and to secure the full and faithful performance of Mortgagor’s covenants and agreements contained in the note, this Mortgage and all other instruments and documents executed in connection with the Loan by Mortgagor (the “Loan Documents”), Mortgagor grants, bargains, sells, conveys, assigns, transfers, mortgages, pledges, delivers, sets over, warrants and confirms to Mortgagee and Mortgagor covenants:

That parcel of land lying and being in [address of property], (the “Property”), together with the building and improvements now or thereafter situated thereon, the land being legally described as follows: *[legal description of property]*.

TOGETHER WITH all and singular the tenements, hereditaments, easements, riparian rights and other rights now or hereafter belonging or appurtenant to the Property, and the rights (if any) in all adjacent roads, ways, streams, alleys, strips and gores, and the reversion or reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand whatsoever of Mortgagor of, in and to the same and every part and parcel thereof; and

TOGETHER WITH all fixtures, furniture, furnishings, and articles of personal property of every kind and nature

whatsoever hereinafter collectively called “Personalty” now or hereafter owned by Mortgagor and Located in, upon or under the Property or any improvements on the Property (whether actually or constructively attached thereto) and used or usable in connection with any present or future occupation of the property or such improvements, whether of a temporary or permanent nature; and

TOGETHER WITH all of Mortgagor’s rights further to encumber the Property for debt. Mortgagor represents as a special inducement to Mortgagee to make this loan, that as of the date hereof there are no encumbrances to secure debt junior to this Mortgage and Mortgagor covenants that there are to be none as of the date hereof or the date when this Mortgage is recorded, except in the case of encumbrances having the prior written approval of Mortgagee, which approval shall not be unreasonably withheld.

TO HAVE AND TO HOLD the above-described and granted Property, appurtenances and rights (referred to collectively in this Mortgage as the “Premises”) unto Mortgagee in fee simple forever.

PROVIDED, HOWEVER, that these presents are on the condition that if Mortgagor:

- (a) shall pay or cause to be paid to Mortgagee the Principal and all interest and contingent equity participation payments payable in respect to the Loan and any future advances made under this Mortgage and any other sums in the Note or this Mortgage or any other Loan documents, all without any deduction or credit for taxes or other similar charges paid by Mortgagee;
- (b) shall punctually perform, keep, and observe all and singular the covenants and promises in the Note and any future advance agreement(s), in any renewals, extensions, or modifications thereof and in this Mortgage or any other Loan Documents expressed to be performed and observed by and on the part of Mortgagor; and
- (c) shall not permit or suffer to occur any default under this Mortgage or any other Loan Document;

then this Mortgage and all the interest and rights granted, bargained, sold, conveyed, assigned, transferred, mortgaged, lodged, delivered, set over, warranted, and confirmed shall

cease, terminate, and be void, but shall otherwise remain in full force and effect.

Mortgagor covenants with and warrants to Mortgagee:

- (a) that Mortgagor has good and marketable title to the Property, is lawfully seized and possessed of the Property in fee simple, and has good right to sell and convey the same;
- (b) that the Property is unencumbered, except as previously disclosed to the Mortgagee, and except for those items set forth in *[specify schedule]*, effective date: *[date]*; and
- (c) that Mortgagor shall forever warrant and defend the Property unto Mortgagee against the lawful claims and demands of all persons whomsoever, and shall make such further assurances to perfect fee simple title to the Property in Mortgagee as Mortgagee may reasonably require.

Mortgagor further covenants and agrees with Mortgagee as follows:

1. Payment and Performance. Mortgagor shall pay all sums due Mortgagee at the time and in the manner provided in the Note, and Maker shall otherwise perform, comply with and aide by each and every one of the stipulations, agreements, conditions and covenants contained in the Note, this Mortgage or any other Loan Document. The term of this Mortgage shall be commensurate with the term of the Note, a copy of which is attached hereto as *[specify exhibit]* and made a part hereof.

2. Taxes, Assessments, and Charges. Mortgagor shall pay when due all taxes, assessments (whether general or special) and other charges whatsoever levied, assessed, placed or made against all or any part of the Property or any interest of Mortgagor therein, or against the Note, this Mortgage, shall make such payment in full obligation thereunder, Mortgagor shall make such payment in full (and shall deliver to Mortgagee and paid receipts) not later than *[number]* days before the last day on which the same may be paid without the imposition of interest (except interest on special assessments payable by law in installments, in which case Mortgagor shall pay each such installment when due) or other late charge or penalty. If

Mortgagor shall fail, neglect or refuse to pay any such taxes, assessments other charges as aforesaid, then Mortgagee at its option may pay the same, and any funds so advanced by Mortgagee shall bear interest, shall be paid and shall be secured as provided in [*specify paragraph*]. Mortgagee shall not be required to pay any such taxes, assessments or other charges in order to accelerate the maturity of the Loan because of Mortgagor's failure to pay the same.

3. Insurance.

(a) Mortgagor shall obtain and carry general comprehensive liability insurance with a reputable and highly rated insurance company or companies licensed in and reasonably acceptable to Mortgagee. Mortgagor will keep the buildings on the property and all furnishings, fixtures and equipment therein insured by policies of insurance issued by a reputable and highly rated insurance company or companies licensed in [*state*] and reasonably acceptable to Mortgagee against loss or damage by fire, lightning, wind storm, hail, explosion, collapse, vehicles, sink holes, flood. Said policies shall name both Mortgagor and Mortgagee as insured, with initial limits of not less than the amount of the Loan on such terms, in such form and for such periods as Mortgagee shall approve from time to time.

(b) In the event of a foreclosure of the mortgage, the purchaser of the Property shall succeed to all the rights of Mortgagor, including any right to unearned premiums, in and to all policies of insurance required under this Mortgage.

(c) Not less than [*number*] days prior to the expiration date of each policy required under this Mortgage, Mortgagor shall deliver to Mortgagee a renewal policy or policies marked "premium paid" or accompanied by other evidence of payment satisfactory to Mortgagee.

(d) Each policy of insurance required under this Mortgage shall be noncancelable without at least [*number*] days written notice to Mortgagee.

4. Waste. Mortgagor shall not commit or suffer any waste, impairment, abandonment or deterioration of the Property, shall promptly pay all utility fees for services provided to the Property, if any, and shall comply with (or

cause compliance with) all applicable restrictive covenants and all statutes, ordinances and requirements of any governmental authorities having jurisdiction over the Property or the use thereof.

5. Assignment of Leases. As further security for the repayment of the Loan, Mortgagor assigns and transfers to Mortgagee all leases, rents, issues and profits of the Property and all rights, title, and interest of Mortgagor in and under all leases (and any extensions and renewals thereof) now or hereafter affecting the Property. Although Mortgagor and Mortgagee intend that this instrument shall be a present assignment, it is expressly understood and agreed that so long as no default shall exist under the Note, this Mortgage or any other Loan Document, Mortgagor may collect assigned rents and profits for not more than [number] months in advance of the accrual thereof, but on the occurrence of any such default, or at any time during its continuance, all rights of Mortgagor to collect or receive rents or profits shall wholly terminate upon notice from Mortgagee.

6. Further Encumbrances. Mortgagor shall not grant any other lien or mortgage on all or any part of the Property or any interest therein, nor make any further assignment of the leases and rentals of the Property, without the prior written consent of Mortgagee, which mortgagee may grant or withhold in its sole discretion: any such entitlement Mortgagee to accelerate the maturity of the Loan and foreclose this Mortgage. Any such other permitted lien or mortgage or assignment shall be junior to this Mortgage and to all permitted tenancies now or thereafter affecting the Property or any portion thereof and shall be subject to all renewals, extensions, modifications, releases, interest rate increases, changes or exchanges permitted by this Mortgage, all without the joinder or consent of such junior lienholder or mortgagee or assignee and without any obligation on Mortgagee's part to give notice of any kind thereto.

7. Prohibited Transfers. Mortgagor shall not cause or permit or suffer to occur any of the following events without the prior written consent of Mortgagee, which Mortgagee may grant or withhold in its sole discretion, and if any of the same shall occur without such consent, the Mortgagee shall have the right to accelerate the authority of the Loan and foreclose this Mortgage:

(a) if all or any portion of the legal or equitable title to all or any portion of the Property or any interest therein shall in any manner whatsoever be sold, conveyed or transferred whether voluntarily or by operation of law; and

(b) if Mortgagor shall enter into any lease or other arrangement with any third party regarding the possession by such third party of all or any portion of the Property (regardless of whether the lease or arrangement includes an option to purchase) without the prior consent of the Mortgagee.

8. Further Instruments. Mortgagor shall execute and deliver to Mortgagee, from time to time and on demand, any further instruments (and the costs of preparation and recording thereof), including but not limited to mortgages, security agreements, financing statements, assignments and renewals and substitution notes, reasonably necessary to reaffirm, to correct and to perfect the evidence of the obligations secured and the security interest of Mortgagee in all the property intended to be mortgaged, whether now mortgaged, later substituted for other collateral, or acquired subsequent to the date of this Mortgage.

9. Estoppel Letters and Information. On request made either personally or by mail, Mortgagor shall certify, by a duly acknowledged writing, to Mortgagee or to any proposed assignee of this Mortgage, the amount of principal and interest and other sums then owing on the Loan and whether any offsets or defenses exist against the payment of the Loan. Mortgagor shall provide such estoppel certificate within *[number]* days in the case of a personal request and within *[number]* days after Mortgagor's receipt of a mailed request. Mortgagor shall promptly furnish to Mortgagee any financial or other information regarding Mortgagor or the Property required by any Loan Document or which Mortgagee may reasonably request from time to time.

10. Notices. Whenever Mortgagor or Mortgagee are obliged to give notice to the other, such notice shall be in writing and shall be given personally or by prepaid certified mail (return receipt requested), in which latter case notice shall be deemed effectively made when the receipt is signed or when the attempted initial delivery is refused

or cannot be made because of a change of address of which the sending party has not been notified. Any notice to Mortgagee shall be addressed to the attention of a vice-president or higher officer. Until the designated addresses are changed by notice given in accordance with this paragraph, notice to either party shall be sent to the respective address set forth on the first page of this Mortgage.

11. Default. At Mortgagee's option, all of the principal and interest and other sums secured by this Mortgage shall immediately or at any time thereafter become due and payable without notice to Mortgagor, and Mortgagee shall immediately have all rights accorded mortgagee by law and hereunder to foreclose this mortgage or otherwise to enforce this Mortgage, the Note and any other Loan Document, upon the occurrence of any of the applicable cure periods as described herein or in the Note or Loan Document:

- (a) failure to pay any sum due under the Note and the expiration of the grace period (if any) provided in the Note for such payment;
- (b) failure to repay any sum paid or advanced by Mortgagee under the terms of this Mortgage or any other Loan Document (with interest thereon), as provided herein;
- (c) failure to pay any tax, assessment, utility charge, or other charge against the Property or any part thereof as and when required by this Mortgage;
- (d) failure to obtain, assign, deliver or keep in force the policies of insurance required by this Mortgage or any other Loan Document;
- (e) any sale, transfer, (whether voluntary or by operation of law), pledge, hypothecation or further encumbrances of all or any part of the Property or any interest therein, or the additional assignment of all or any part of the rents, income or profits arising therefrom, in either case without the prior written consent of Mortgagee, which Mortgagee may grant or withhold in its sole discretion;
- (f) Mortgagor's failure to remove any involuntary lien on the Property or any part thereof within [number] days after its filing, or the filing of any suit against the Property upon any claim or lien other than this Mortgage

(whether superior or inferior to this Mortgage);

(g) Mortgagor's failure to comply within *[number]* days with a requirement, order or notice of violation of a law, ordinance, or regulation issued or promulgated by any political subdivision or governmental department claiming jurisdiction over the Property or any operation conducted on the Property (or, if the order or notice provides time period for compliance, Mortgagor's failure to comply within the period), or, in the case of a curable noncompliance requiring longer than the applicable time period for its cure, Mortgagor's failure to commence to comply with said order notice within said period or failure thereafter to pursue such cure diligently to completion;

(h) the taking by the United States of America or any instrumentality thereof in any court of competent jurisdiction under the power of eminent domain any estate less than an estate in fee simple in the entire Property, or the recording by the state of, any instrumentality thereof or any other person with eminent domain powers of a notice of taking of any estate less than an estate in fee simple in the entire Property;

(i) any representation, warranty, affidavit, certificate or statement made or delivered to Lender by or on behalf of Mortgagor from time to time in connection with the Loan or this Mortgage or any other Loan Document shall prove false, incorrect or misleading in any respect deemed material by Mortgagee;

(j) if Mortgagor shall make an assignment for the benefit of creditors, file a petition in bankruptcy, apply to or petition any tribunal for the appointment of a custodian, receiver, intervenor or trustee for any of them or a substantial part of their respective assets, or if any of them shall commence any proceedings under any bankruptcy, arrangement, readjustment of debt, dissolution or liquidation law or statute of any jurisdiction, whether now or hereafter in effect, or if any of them shall by act or omission approve, consent to or acquiesce in the filing of any such petition or application against any of them or the appointment of any such custodian, receiver, intervenor or trustee or the commencement of any such proceeding against any of them or the entry of any order for relief with respect to any of them, or if any such pe-

riod of or application shall have been filed or proceeding commenced against any of them which remains pending and not dismissed for [number] days or more or in which an order for relief is entered, or if any of them shall suffer any such appointment of a custodian, receiver, intervenor or trustee to continue undischarged for [number] days or more;

(k) if Mortgagor shall default under any subordinate mortgage encumbering the Property or the promissory note or notes secured thereby;

(l) if Mortgagor shall deem itself insecure based on Mortgagees reasonable analysis of the status of the Loan; or

(m) any default in the observance or performance of any other covenant or agreement of Mortgagor in this Mortgage or any other Loan Document, the occurrence of any other event prohibited by the terms of this Mortgage or any other Loan Document, or the violation of any other provision of this Mortgage or any other Loan Document.

12. Payment of Obligation. No consent or waiver expressed or implied by Mortgagee with respect to any default by Mortgagor under this Mortgage shall be construed as a consent or waiver with respect to any further default of the same or a different nature; and no consent or waiver shall be deemed or construed to exist by reason of any curative action initiated by Mortgagee or any other course of conduct or in any other manner whatsoever except by a writing duly executed by Mortgagee, and then only for the single occasion to which such writing is addressed. In order to accelerate the maturity of the Loan because of Mortgagor's failure to pay any tax, assessment, premium, charge, liability, obligation, or encumbrance upon the Property because of any other default by Mortgagor, Mortgagee shall not be required to pay the same or to advance funds to cure the default, notwithstanding Mortgagee's option under this Mortgage or any other Loan Document to do so. No such payment or advance by Mortgagee shall be deemed or construed a waiver of Mortgagee's right to accelerate the Maturity of the Loan on account of such failure to other default. Notwithstanding the foregoing, in the event of any default in the perfor-

mance of any of the mortgagor's covenants or agreements herein (including without limitation, the payment of any taxes, assessments, premiums, charges, liens, or encumbrances required hereunder), the Mortgagee may, at the option of the Mortgage and without thereby waiving any remedy otherwise available to Mortgagee and without thereby waiving any remedy otherwise available to Mortgagee, perform the same, and the cost thereof, with interest at the highest lawful rate, shall immediately be due from the Mortgagor to the Mortgagee and shall be secured by this Mortgage. The foregoing shall not be deemed to obligate the Mortgagee to perform or discharge any obligation or duty of Mortgagor under this Mortgage or with respect to the Property, and this provision shall not be deemed to place any responsibility (or derivative responsibility) for such performance on the Mortgagee.

13. Advances Hereunder. In the event of any default in the performance of any of Mortgagor's covenants or agreements contained in this Mortgage or any other Loan Document or the violation of any term thereof, Mortgagee shall have the right (but in no event the obligation) at its option to cure the default or take any other action Mortgagee deems necessary or desirable to protect its security (including without limitation the payment of any taxes, assessments, premiums, charges, liens, or encumbrances required of Mortgagor under this Mortgage), without waiving any rights or remedies otherwise available to Mortgagee or Mortgagee shall elect to advance at any time any sum(s) for the protection of its security or for any other reason permitted or provided by any of the terms of this Mortgage or any other Loan Document, then such sum(s) shall be deemed Loan funds, shall be secured by this Mortgage and shall bear interest until paid at the "Default Rate" provided in the Note commencing on the date they are advanced by Mortgagee. If advanced by Mortgagee before the (natural or accelerated) maturity date of the Loan, such sum(s) shall be due and payable to Mortgagor on such maturity date or [number] days following Mortgagor's receipt of demand therefor, whichever is earlier, but if advanced after the (natural or accelerated) maturity date, such sum(s) shall be due and payable immediately without demand. Mortgagee's lien on the Property for such advances shall be superior to any right or title to, interest in,

or claim upon all or any portion of the Property junior to the lien of this Mortgage.

14. Inspections by Mortgagee. Mortgagee and any persons authorized by the mortgagee shall have the right to enter and inspect the Property at all reasonable times; and that if, at any time after default by the Mortgagor in the performance of any of the terms, covenants or provisions of this mortgage or the Note, the management or maintenance of the Property shall be determined by the Mortgagee in the exercise of reasonable business judgment to be unsatisfactory, the Mortgagor shall employ, for the duration of such default and at Mortgagor's sole expense, as managing agent of the Property, any person from time to time designated by the Mortgagee.

15. Receiver. In any action to foreclose this Mortgage, or upon the actual or threatened waste to any part of the Property, Mortgagee shall have the right to apply without notice for the appointment of a receiver of the Property and the rents and profits thereof, and Mortgagee shall be entitled to the appointment of such a receiver as a matter of right, without consideration of the value of the Property as security for the amounts due Mortgagee or the solvency of any person liable for the payment of such amounts. To the extent permitted by law, Mortgagor waives any right to object to the appointment of receiver as aforesaid and expressly consents that such appointment shall be made as an admitted equity and as a matter of absolute right to Mortgagee.

16. Remedies. The rights of Mortgagee arising hereunder, under the Note or under any other Loan Document, and the rights allowed or permitted Mortgagee by law or equity, shall be separate, distinct and cumulative, and the selection of one remedy shall not preclude the selection of another or other remedies until Mortgagee shall have recovered all sums due Mortgagee, together with appropriate interest thereon and all costs of collection, including attorney's fees and appellate attorney's fees, with interest thereon. In case of any foreclosure sale, the Property may be sold in on parcel and as an entirety or in such parcels, manner or order as Mortgagee may elect.

17. Partial Payments. The acceptance by the Mortgagee of any payment which is less than full payment of all

amounts due and payable at the time of such payment, even if made by one other than the Mortgagor, shall not constitute a waiver of the Mortgagee's right to exercise its option to declare the whole of the principal sum then remaining unpaid, together with all accrued interest thereon, immediately due and payable without notice, or any other rights of the Mortgagee except and as to the extent otherwise provided by law.

18. Renewals, Extensions, Etc. Mortgagor consents to any and all renewals and extensions in the time of payment of the secured indebtedness, and agrees that, at any time and from time to time without notice to any person, the terms of payment provided for in the Note may be modified or the security described in this Mortgage (or any other collateral which may be held by Mortgagee) may be released (in whole or in part) or increased, changed or exchanged by agreement between the Mortgagee and any owner of the Property affected by this Mortgage without in anywise affecting the liability of any party to the Note, or any person liable or to become liable with respect to the secured indebtedness. Mortgagor agrees that no sale of the Property, no forbearance on the part of the Mortgagee and no extensions, whether oral or in writing, of the time for the payment of the whole or any part of the obligations secured (or any other collateral which may be held by the Mortgagee), or any other indulgence given by Mortgagee, whether with or without consideration, shall operate to relieve or, in any manner, affect the original liability of the Mortgagor or the priority of this Mortgagee, and notice of any such extension, indulgence and forbearance being likewise waived by Mortgagor (or by any Guarantor, endorser, or other person liable or who may be secured) and all those claiming by, through and under the Mortgagor. It is expressly agreed that any release or releases may be made by the Mortgagee without the consent or approval of any other person or persons whomsoever.

19. Fees and Expenses. Mortgagor shall pay any and all costs, expenses and attorney's fees incurred by Mortgagee (regardless of whether in connection with any action, proceeding or appeal) to sustain the lien of this Mortgage or its priority, to protect or enforce any of Mortgagee's rights under this Mortgage or under any other Loan Docu-

ment, to recover any indebtedness secured, to contest or collect any award or payment in connection with the taking or condemnation of all or any part of the Property, or for any title examination or abstract preparation or title insurance policy relating to the Property, and all such sums shall bear interest, shall be paid and shall be secured as provided in [*specify paragraph*].

20. Public Takings. Notwithstanding any taking by eminent domain, any alteration of the grade of any street, or any other injury to or decrease in value of the Property or any portion thereof caused by any public or quasi-public authority or person. Mortgagor shall continue to pay interest on the Loan and all other sum(s) secured until Mortgagee shall have actually received the award to payment for such taking or alteration or injury and shall have applied the same against the Loan. Mortgagee at its option may retain any such award or payment and apply all or part of the same toward payment of the Loan (in any order of priority), or Mortgagor for the purpose of altering, restoring or rebuilding any part of the Property which may have been altered, damaged or destroyed as a result of any such taking or alteration or injury, or for any other purpose or object satisfactory to Mortgagee in its sole discretion.

21. Documentary Stamps and Intangible Taxes. If at any time the State of [*state*] shall determine that the intangible tax paid in connection with this Mortgage is insufficient, and that documentary stamps affixed hereto are insufficient, and that additional intangible tax should be paid or that additional stamps should be affixed, Mortgagor shall pay for the same, together with any interest or penalties imposed in connection with such determination, and Mortgagor indemnifies and holds mortgagee harmless therefrom. If any such sums shall be advanced by Mortgagee, they shall bear interest, shall be paid and shall be secured as provided in [*specify paragraph*].

22. Governing Law. This Mortgage shall be governed by, and construed and enforced in accordance with, the laws of the State of [*state*], excepting only that federal law shall govern to the extent it may permit Mortgagee to charge, from time to time, interest on the loan at a rate higher than may be permissible under applicable [*state*] law.

23. No Usury. Mortgagor acknowledges and agrees that all sums payable to Mortgagee in connection with the loan (other than the repayment of principal thereunder) constitute “fines, interest or premiums” within the meaning of *[specify statutory section]* on the Statutes, and that because this Mortgage is a first lien on the Property, no such sums shall be deemed usurious. In no event shall any agreed to or actual exaction charged, reserved or taken as an advance or forbearance by Mortgagee as consideration for the Loan exceed the limits (if any) imposed or provided by the law applicable from time to time to the Loan for the use of detention of money or for forbearance in seeking its collection; Mortgagee waives any right to demand any such excess. In the event that the interest provisions of the Note of any exaction provided for in the Note, this Mortgage or any other loan document shall result at any time or for any reason in an effective rate of interest that transcends the maximum interest rate permitted by applicable law (if any), then without further agreement or notice the obligation to be fulfilled shall automatically be reduced to such limited and all sums received by Mortgagee in excess of those lawfully collectible as interest shall be applied against the principal of the Loan immediately upon Mortgagee’s receipt thereof, with the same force and effect as though the payor has specifically designated such extra sums to be so applied to principal and Mortgagee had agreed to accept such extra payment(s) as a Premium free prepayment or prepayments.

24. Truth in Lending. The undersigned Mortgagor represents and certifies that the extension of credit secured by this Mortgage is exempt from any and all provisions of the Federal Consumers Credit Protection Act (Truth-in Lending Act) and Regulation Z of the Board of Governors of the Federal Reserve System; because the loan or credit represented by “this Mortgage and the Note secured is only for business or commercial purposes of the Mortgagor other than agricultural purposes and the proceeds of the loan are not being used for personal, family, household or agricultural purposes. Mortgagor waives all right of homestead exemption (if any) in the Property.

25. Hazardous Waste. Notwithstanding anything to the contrary which may be contained herein, Mortgagor covenants and agrees to comply strictly and in all respects

with the requirements of the Federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and [specify statutory provision] and any other federal or state statutes or regulations in connection with hazardous materials and/or gamma radiation exposure resulting from soil gases as the same may be amended from time to time and to notify the Mortgagee promptly in the event of the release or discharge of hazardous materials upon the Property, or the presence of gamma radiation exposure in excess of statutorily permitted amounts, or any other violations of the foregoing statutes or regulations. Mortgagor covenants and agrees that they are not and will not become involved in operations at the Property or at other locations which could lead to the imposition of liability under the foregoing statutes regulations. In the event that the Mortgagor fails to comply with the requirements of said statutes or regulations, the Mortgagee may at its last election, but without the obligation to do so, give such notices or cause such work to be performed at the Property, or take any and all other actions as the Mortgagee deems necessary, as shall cure said failure of compliance, and any amounts paid as a result thereof, together with interest thereon at the rate of interest set forth in the Promissory Note which is secured by the Mortgage per annum from the date of payment, shall be immediately due and payable by the Mortgagor, and until paid shall be added to and become a part of the Mortgage principal debt secured, and the same may be collected as part of said principal debt in any assessment, claim or charge, may, if it sees fit, be thereby subrogated to the rights of any governmental body, but no such advance shall be deemed to relieve the Mortgagor from any default hereunder or impair any right or remedy consequent thereon.

In addition, Mortgagor represents and covenants that there has not been and there does not now exist, and that it has not and will not permit, commit or suffer gamma radiation exposure in excess of the standard provided by law nor any hazardous and/or toxic waste affecting the Property. In the event Mortgagee has reason to suspect that there is any such gamma radiation exposure or hazardous and/or toxic waste affecting the mortgaged Property, the Mortgagee shall have the right to obtain at

Mortgagor's expense an environmental engineer or testing service selected by Mortgagee to inspect the Property. In the further event that there is found to exist any such gamma radiation exposure or hazardous and/or toxic waste affecting the Property, Mortgagor covenants and agrees at its expense to clean up all such hazardous and/or toxic waste, to restore and repair the Property and to indemnify and hold Mortgagee harmless from any costs incurred and from any damage, direct or indirect, sustained by Mortgagee as a result of such gamma radiation exposure or hazardous and/or toxic waste. Mortgagor does, for its legal representatives, heirs, successors and assigns, hold Mortgagee harmless from any and all liabilities, assessments, suits, damages, costs and expenses or attorney fees as a result of any gamma radiation exposure or hazardous and/or toxic wastes affecting the Property which existed and/or arose prior to or during the term of this Mortgage, and the undersigned further indemnifies and holds harmless Mortgagee and its assigns, successors and grantees from any and all infractions and liens arising from any liability or indebtedness to any governmental body pursuant to such statutes and regulations or the assertion of any liens under such statutes taking priority over the lien or Mortgagee's Mortgage.

26. Severability. Any provision of this Mortgage which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction only, be ineffective only to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof or affecting the validity and enforceability of such provision in any other jurisdiction.

27. Indemnity. In the event Mortgagee shall be named as a party to any lawsuit brought at any time against Mortgagor or with respect to the Property of this Mortgage or the Loan, when regardless of the merits of such lawsuit Mortgagor shall defend Mortgagee and indemnify and hold Mortgagee fully harmless from any and all claims, demands, damages, liabilities, judgments, losses, costs, expenses and attorney's fees arising out of or resulting from any such lawsuit or any appeal in connection therewith.

28. Interpretation. Whenever the context of any provision of this Mortgage shall so require, words in the singular shall include the plural, words in the plural shall

include the singular, and pronouns of any gender shall include the other genders. Captions and headings in this Mortgage are for convenience only and shall not affect its intersection. Any references in this Mortgage to exhibits, schedules, paragraphs and subparagraphs refer to the respective subdivisions of this Mortgage, unless the reference expressly identifies another document. Wherever used in this Mortgage, unless the context clearly indicates a contrary intention or unless this Mortgage specifically provides otherwise:

- (a) the terms "Mortgagor" shall mean "Mortgagor or any subsequent owner or owners of the Property";
- (b) the term "Mortgagee" shall mean "Mortgagee or any subsequent holder(s) of this Mortgage";
- (c) the term "Note" shall mean "the Note and any renewal notes hereafter to be issued and secured by this Mortgage pursuant to the future advance provision hereof";
- (d) the term "Loan" shall mean "the Loan and any additional advances made by Mortgagee from time to time for any reason permitted or provided by the terms of this Mortgage or another Loan Document"; and
- (e) the term "person" shall mean "an individual, corporation, partnership, limited partnership, unincorporated association, joint stock corporation, joint venture or other legal entity."

29. Personality. This Mortgage shall also be construed to be a Security Agreement under the laws of the State of [*state*], and Mortgagor grants to Mortgagee a security interest in and to any of the Property which is, or may ultimately be deemed to be, personal property or fixtures as additional security for the repayment of the indebtedness secured by this Mortgage and Mortgagor agrees to execute and deliver to Mortgagee and all financing statements, and any and all amendments thereto or continuations thereof as Mortgagee may request from time to time. Provided, however, that the rights and remedies of the Mortgagee under the [*specify statutory provision*] shall be cumulative and in addition to all other rights and remedies of Mortgagee arising under the common law, or any other laws, of the State of [*state*] or any other jurisdiction.

30. Miscellaneous. Time is of the essence of all provi-

sions of this Mortgage. Mortgagor waives all right of homestead exemption (if any) in the Premises. If Mortgagor consists of more than one person, the obligations and liability of each such person hereunder shall be joint and several, and wherever the term "Mortgagor" is used it shall be deemed to refer to such persons jointly and severally for the covenants, agreements, undertakings and obligations of Mortgagor in connection with the Loan, notwithstanding any contrary provision of the partnership Laws of the State of [*state*]. This Mortgage shall be binding upon the parties hereto and their respective heirs, personal representatives, successors and assigns and to the benefit of Mortgagor and Mortgagor's heirs, personal representatives and permitted successors and assigns. This Mortgage may be executed in any Number of counterparts, each of which shall be deemed an original, but all of which, together, shall constitute but one instrument. This Mortgage cannot be changed except by an agreement in writing, signed by the party against whom enforcement of the change is sought.

IN WITNESS, this Agreement has been executed as of the day and year first above written.

Signed, sealed, and delivered in the presence of:

---

[*Name of witness 1*]

---

[*Signature of witness 1*]

---

[*Name of witness 2*]

---

[*Signature of witness 2*]

The State of Florida  
County of \_\_\_\_\_ }

I CERTIFY that on [*date*], before me, an officer duly authorized in the county and state aforesaid to take acknowl-

edgments, personally appeared [*name of mortgagor*]. [*He / She*] is personally known to me or has produced [*specify identification shown*] as identification and did take an oath.

---

[*Signature of notary public*]

My commission expires: \_\_\_\_\_.

**§ 4:28 Mortgage—On building built on land leased from mortgagee—Including land lease and promissory note**

Building Mortgage and Security Agreement

This instrument prepared by and return to:

Name: [*name of preparer*]

Address: [*address of preparer*]

This building mortgage is made on [*date*] between [*name of mortgagor*], a Florida corporation, referred to here as “mortgagor,” and [*name of mortgagee*], referred to here as “mortgagee.”

Witness that mortgagor, for and in consideration of the loan made to it by mortgagee as evidenced by the promissory note, a copy of which is attached to this agreement, and to secure the payment of the debt evidenced by that promissory note, has granted, bargained and sold to mortgagee and their heirs and assigns forever the following-described real property in [*county*] County, Florida:

That certain buildings (referred to here as the “building real property”), together with any equipment, machinery, tools, apparatus, furnishings, goods, accessories and other personal property as is now or subsequently located in the building real property and owned by mortgagor and all proceeds, additions and accessions to that personal property (referred to here as the “personal property”), which are located on the following-described land which is owned by mortgagee and leased to mortgagor:

[*Insert legal description here.*]

Note: This Building Mortgage and Security Agreement encumbers only the buildings and not the underlying land. The buildings are owned by mortgagor and were built by

mortgagor on land leased by mortgagor from mortgagee under a lease agreement for realty dated *[date]*, using funds borrowed by mortgagor from a bank which bank loan was paid off by mortgagor with funds lent to it by mortgagee which latter loan is secured by this Building Mortgage and Security Agreement. (See Parker v. Hertz Corp., 544 So. 2d 249 (Fla. Dist. Ct. App. 2d Dist. 1989)).

And the mortgagor does fully warrant the title to the building real property and will defend the same against the lawful claims of all persons claiming through mortgagor.

It is agreed that this Building Mortgage and Security Agreement also constitutes a security agreement under the Florida Uniform Commercial Code with respect to the personal property, and, if allowed under Florida law, it will also constitute a financing statement. Mortgagor agrees to join with mortgagee in the execution of any financing statements and to execute any other instruments that may be required for the perfection or renewal of the security interest under the Florida Uniform Commercial Code. Mortgagor authorizes mortgagee to file a financing statement signed only by mortgagee describing the collateral in the same manner it is described here. Mortgagee may file a photocopy of this Building Mortgage and Security Agreement as a financing statement.

Provided always, that if mortgagor, its heirs, legal representatives or assigns pay to mortgagee, its heirs, legal representatives or assigns, that certain promissory note of the same date as this Building Mortgage and Security Agreement from mortgagor to mortgagee, a copy of which promissory note is attached, in the original principal amount of *[\$dollar amount]*, and pay all sums payable under this Building Mortgage and Security Agreement, and perform, comply with and abide by each of the covenants contained in this Building Mortgage and Security Agreement and in the promissory note, and pay all ad valorem real property taxes on the building real property, and pay reasonable insurance premiums for insurance on the building real property, and pay the reasonable costs and expenses, including reasonable attorney's fees, incurred by mortgagee in collecting money secured by this Building Mortgage and Security Agreement or in enforcing this Building Mortgage and Security Agreement by suit or otherwise, then this Building Mortgage and Security Agreement and the estate created by this agreement will cease and be null and void.

SECURITY ARRANGEMENTS

§ 4:28

In witness, mortgagor has signed this agreement on the date first above written.

\_\_\_\_\_  
*[Name of mortgagor],  
a Florida corporation*

By: \_\_\_\_\_  
*[Signature of authorized person]*

\_\_\_\_\_  
*[Title of authorized person, such as: president]*

\_\_\_\_\_  
*[Address of mortgagor]*

*[Corporate seal]*

Witnesses:

\_\_\_\_\_  
*[Signature of witness 1]*

\_\_\_\_\_  
*[Printed name of witness 1]*

\_\_\_\_\_  
*[Signature of witness 2]*

\_\_\_\_\_  
*[Printed name of witness 2]*

The State of Florida  
County of \_\_\_\_\_      }

The above instrument was acknowledged before me on [date] by [name of authorized person], as [title of authorized person, such as: president or secretary] of [name of mortgagor], a Florida corporation.

Notary Public—State of Florida:

\_\_\_\_\_  
*[Signature of notary public]*

*[Printed name of notary public]*

Personally known: \_\_\_\_\_

Or Produced identification: \_\_\_\_\_

Type of identification produced: \_\_\_\_\_ [specify]

Affix Seal Below:

*[Seal]*

#### PROMISSORY NOTE

\$[dollar amount]

Date: [date]

[County] County, Florida

For value received, the undersigned, *[name of borrower]*, Inc., a Florida corporation, referred to here as the “borrower,” promises to pay to the order of *[name of borrowee]*, in legal tender of the United States of America, the principal sum of \$[dollar amount], together with interest at the rate of *[percentage]*% per annum on the unpaid principal balance remaining from time to time. Payments must be made at *[street address where payments are to be made]*, *[city]*, Florida, or any other place or places as the holder of this note specifies to the borrower in writing from time to time.

Installment Payments. Principal will be payable in *[number]* equal annual installments beginning *[number]* year(s) after the date of this note. Accrued interest must be paid annually on the anniversary date of this note. A final payment of all remaining unpaid principal and accrued interest will be due and payable in full *[number]* year(s) after the date of this note.

Security. This note is secured by a Building Mortgage and Security Agreement executed by the undersigned in favor of the payee listed in this note, which is a lien on certain real property described there located in *[county]* County, Florida. This note is not assumable. This note will become immediately due and payable in full on the sale or transfer of the collateral securing this note.

Time. Time is of the essence of this note.

Prepayment. Borrower has the option and privilege of prepaying all or any part of the outstanding principal balance evidenced by this note without premium, penalty or charge. Partial prepayments will not alter the amount or

due date of payments under this note until all indebtedness is paid in full.

**Events of Default.** The happening of any of the following events will constitute a default of this note: (a) failure to pay a principal or interest payment when due under this note; or (b) a default occurs under the Building Mortgage and Security Agreement dated the same date as this note.

**Acceleration and Other Effects of Default.** If there is a default of this note and the borrower has not cured the default within *[specify number, such as: 15]* days after written notice of such default is given by the holder to the borrower, then at the option of the holder of this note the entire principal sum then remaining unpaid will immediately become due and payable without notice or demand, and the principal will bear interest from such date at the rate of *[percentage]%* per annum. Failure to exercise any of the above options will not constitute a waiver of the right to exercise the same in the event of any subsequent default.

**Attorney's Fees.** All parties liable for the payment of this note agree to pay the holder reasonable attorney's fees and costs, whether or not an action be brought, for the services of attorneys employed after maturity or default to collect this note or any principal or interest due hereunder, or to protect the security, if any, including but not limited to costs and attorney's fees on any appeal and in any proceedings under the bankruptcy laws or in any post-judgment proceedings.

**Interest Limitation.** Notwithstanding any other provision of this note or of any instrument securing this note or any other instrument executed in connection with the obligation evidenced hereby, it is expressly agreed that the amounts payable under this note, or under the other instruments mentioned above, for the payment of interest or any other payment in the nature of or which would be considered as interest, or other charge for the use or loan of money, will not exceed the highest rate allowed by law, from time to time, to be charged by the holder of this note. In the event the provisions regarding the payment of interest or other payments in the nature of or which would be considered as interest or other charge for the use or loan of money operate to produce a rate that exceeds such limitation, then the excess over that limitation will not be payable and the amount otherwise agreed to be paid will be reduced by the

excess so that the limitation will not be exceeded, and if any payment actually made results in such limitation being exceeded, the amount of the excess will constitute and be treated as a payment on the principal hereof and will operate to reduce the principal by the amount of the excess, or if in excess of the principal indebtedness, the excess will be refunded.

Consent and Waiver. Borrower does:

- (a) consent to any forbearance or extension of the time or manner of payment of this note, to the release of all or any part of any security held by the holder of this note to secure payment of this note, and to the subordination of the lien of the Building Mortgage and Security Agreement and any other instrument of security securing this note as to all or any part of the property encumbered by it, all without notice to or consent of the borrower, but this does not obligate the holder to do any of the above;
- (b) agree that no course of dealing or delay or omission or forbearance on the part of the holder of this note in exercising or enforcing any of its rights or remedies under this note or under any instrument securing this note shall impair or be prejudicial to any of the holder's rights and remedies under this note or to the enforcement of this note and that the holder may extend, modify or postpone the time and manner of payment and performance of this note and any instrument securing this note, may grant forbearance, and may release, wholly or partially, any security held by the holder as security for this note, all with notice to or consent by the borrower and without releasing, discharging or diminishing its rights and remedies, but this does not obligate the holder to do any of the above;
- (c) waive notice of acceptance of this note; and
- (d) waive presentment, demand, protest, notice of dishonor and notice of protest.

Florida Law. This note is executed under seal in the State of Florida and constitutes a contract under the laws of the State of Florida and will be enforceable in a court of competent jurisdiction in *[county]* County, Florida. The undersigned agree that Florida law will govern and control this instrument.

Headings. The headings of the paragraphs contained in this note are for convenience of reference only and do not form a part of this note and in no way modify, interpret or construe the meaning of the provisions of this note.

Documentary Stamps. Documentary stamps in the amount of *[\$/dollar amount]* have been purchased and affixed to the Building Mortgage and Security Agreement, dated of the same date as this note, on certain real property in *[county]* County, Florida, which mortgage secures this note and is recorded in the Public Records of *[county]* County, Florida.

*[Name of borrower]*, a Florida corporation  
By: \_\_\_\_\_  
*[Signature of authorized person]*

*[Title of authorized person, such as: president]*

\_\_\_\_\_  
*[Address of borrower]*  
*[Corporate seal]*

#### LEASE AGREEMENT FOR REALTY

Date: *[date]*

“Landlord”: *[name of landlord]*

“Tenant”: *[name of tenant]*, a Florida corporation

Premises: The following-described land located at *[address of property]*:

*[Insert legal description.]*

Commencement Date: *[date]*

Term: *[number] Years*

Monthly Rent Installment: *[\$/dollar amount]*, plus Florida sales tax

Permitted Use: *[specify]*

In consideration of their mutual promises made here, the parties agree as follows:

1. Premises. Landlord leases to tenant, and tenant leases from landlord, the premises described above which

are outlined or shaded in the site plan attached to this lease as *[specify exhibit]* The site plan is attached only to provide a visual guide to the location of the premises.

2. Term. The term of this lease will commence on the commencement date set forth above and will be for the term set forth above, unless sooner terminated as set forth here. This lease will automatically renew from calendar month to calendar month until either party gives notice to the other party at least 30 days before the expiration of any monthly term of its intention that the lease not renew.

3. Rent. The tenant agrees to pay to landlord as rent for the term of this lease the monthly rent installment set forth above for every month during the term of this lease, in advance on the first day of each month. In addition, tenant shall pay all applicable sales taxes on all rent and other amounts on which sales tax may be due.

4. Use of premises. The premises are leased to tenant solely for the use set forth above as permitted use. No other use may be made of the premises, and no other use may be allowed on the premises, without landlord's prior written consent.

5. Utilities. Tenant must provide and pay for, or reimburse landlord for tenant's share of the cost of, the usual and reasonable water, sewer and trash collection services which are provided by *[city]* or *[county]* County or both; and landlord will not be responsible for providing or paying for those municipal services. Tenant must also provide and pay for all other utilities to the premises, including but not limited to air conditioning, heat, hot water, fuel oil, electricity, light, power and telephone. If tenant fails to pay any such utility charge before it becomes delinquent, landlord may (but is not required to) pay the utility charge, in which case tenant must immediately reimburse landlord for the payment and must pay interest on the amount paid at the rate of *[percentage]%* per annum.

6. Observance of Laws and Ordinances. Landlord will not be responsible for observing, complying with, or executing any laws, rules, requirements, orders, directives, codes, ordinances or regulations of governmental authorities or agencies or of insurance carriers, which relate to the premises or to tenant's use or occupancy of the premises. Tenant must obtain the proper city and county

occupational licenses and certificates of occupancy prior to taking possession of the premises.

7. No Assignment or Subletting. Tenant must not assign or transfer this lease without landlord's prior written consent. Any attempt to do so, whether in writing or not, will be invalid and will be a material default of this lease.

8. Alterations and Improvements. Landlord is not responsible or obligated to make any alterations, modifications or improvements to the premises, unless expressly stated in this lease or in an addendum signed by landlord. Tenant must not make any alterations, modifications or improvements to the premises without the prior written consent of landlord, and tenant must not paint or alter the appearance of the premises without landlord's prior written consent. Any alterations, modifications or additions to the premises will become the property of landlord on the expiration or termination of this lease, no matter which party made or paid for them. The restrictions of this paragraph will not prevent tenant from undertaking the normal maintenance of the premises. (Landlord consents to tenant constructing a building on the premises, as long as tenant pays for all labor, material, designs, plans and services relating to the same, and tenant will be solely responsible for making and paying for all improvements to the premises.)

9. Risk of Loss. All personal property placed or moved into the premises shall be at the sole risk of tenant or other owner of the personal property. Landlord will not be responsible or liable to tenant or anyone else for any loss or damage that may be occasioned by or through the acts or omissions of landlord, its agents, servants or employees or of persons occupying adjoining premises or any part of the premises adjacent to or connected with the premises leased here or any part of the land which the premises are a part of for any injury, loss or damage (including but not limited to loss or damage resulting to tenant or its property from bursting, stopped-up or leaking water or sewer pipes).

10. Right of Entry. Landlord and its agents may enter the premises during all reasonable hours for any reasonable purpose, including but not limited to inspection, examination, or showing for sale or rent. This paragraph

does not obligate landlord to examine, inspect, or show the premises.

11. Acceptance; Condition. Tenant accepts the premises in the condition they are in at the beginning of this lease. Tenant agrees to pay landlord immediately on demand for any damage to the premises or other property of landlord caused by any act or neglect of tenant or tenant's employee, agent, servant, invitee, or guest.

12. Repairs and Maintenance. Tenant must maintain the premises during the term of this lease. If landlord incurs any expense for repairs or maintenance that are the duty of tenant to perform, landlord may demand repayment of same from tenant, and tenant shall make payment within *[specify, such as: 10]* days after the demand.

13. Hazard Insurance. Tenant must provide and pay for, or reimburse landlord for tenant's share of the cost of, fire and extended coverage insurance covering the premises in companies and through brokers approved by landlord, adequate to protect against casualties, hazards and accidents occurring in or around the premises, in an amount acceptable to landlord. The insurance policies must provide coverage for landlord as well as tenant. Tenant agrees that if the insurance is not kept in force during the term of this lease landlord may procure the insurance and pay the premium for it, and that tenant must repay the premium to landlord immediately on demand as additional rent.

14. Liability Insurance. Tenant covenants and agrees to provide and pay for, or to reimburse landlord for tenant's share of the cost of, liability insurance acceptable to landlord.

15. Real Estate Taxes. Tenant must reimburse landlord for the real estate taxes on the premises.

16. Destruction. If the premises are destroyed, in whole or in part, or rendered otherwise untenantable because of fire or other casualty, the rent under this lease will abate during that period which is required to restore the premises to its prior condition. If the premises cannot be restored to its prior condition within *[specify, such as: 90]* days after the casualty, either party may terminate this lease by giving notice to the other party in writing within *[specify, such as: 30]* days after the date of the damage to the premises.

17. Subordination. This lease and the rights of tenant under this lease are made subject and subordinate to all bona fide mortgages now or subsequently placed on the premises by the landlord. The tenant further agrees to execute any instrument of subordination which might be required by any mortgagee of the premises.

18. Default; Remedies.

(a) Tenant covenants that, if default shall be made in the payment of rent (time being of the essence of this lease) or if tenant violates any of the provisions or covenants of this lease, then landlord may, at its option:

(1) terminate this lease and tenant will become tenant at sufferance, waiving all right of notice, and landlord will be entitled immediately to re-enter and re-take possession of the leased property and to collect damages from tenant; and

(2) landlord may avail itself of any other remedy provided by law or equity, or available under the following subparagraph as if the premises were vacated.

(b) If the premises are deserted or vacated, landlord will have the right and authority:

(1) to re-enter the premises, either by force or otherwise, without being liable for any prosecution or claim therefore, and to hold or re-let the premises as if this lease had not been made, and, on re-entry, the estate created by this lease will be at an end;

(2) at landlord's option, to be exercised by written notice to tenant, landlord may re-enter the premises as tenant's agent, either by force or otherwise, without being liable to any prosecution or claim therefore, and may relet the premises as tenant's agent and receive the rent for the premises and apply the same to the payment of the rent due under this lease, holding tenant liable for any deficiency; or

(3) landlord may, at its option, terminate this lease by giving tenant written notice and the term of this lease will absolutely expire and terminate immediately, but tenant will nevertheless and subsequently be liable to landlord for any deficiency between the rent due under this lease for the balance of the term of this lease and the fair rental value of the premises for the balance of the term.

(c) Landlord, at its option, may also terminate this lease under the procedure set forth in subparagraph (a) above on the occurrence of any of the following events, each of which will be a default of this lease: an assignment by tenant or any guarantor for the benefit of creditors; or the filing of a voluntary or involuntary petition by or against tenant or any guarantor under any law for the purpose of adjudicating tenant bankrupt or for reorganization, dissolution, or arrangement on account of or to prevent bankruptcy or insolvency; or the appointment of a receiver of the assets of tenant or any guarantor; or the bankruptcy of tenant or any guarantor.

(d) Landlord will be entitled to recover its reasonable attorney's fees and costs from tenant which are incurred before, during and after all proceedings, trials and appeals, including but not limited to bankruptcy court proceedings.

19. Subrogation. Landlord and tenant mutually release and discharge the other of and from all suits, claims or demands whatsoever, for loss or damage to the leased property of the other, arising from fire or the perils insured against under extended coverage insurance policies caused by or occurring through or as a result of any acts or omissions, whether negligent or otherwise, of the parties, their agents, servants or employees, and each of the parties further agrees that each will cause its policies of insurance for fire and extended coverage to be so endorsed as to waive any rights of subrogation which would be otherwise available to the insurance carriers, by reason of any loss or damage of that kind. Landlord's release of tenant must not apply to the extent, if any, that landlord may not be mutually released or subrogated as to any other tenant or person injured or damaged by a peril. Nothing contained in this lease agreement may in any way be considered or construed as a waiver or release by landlord of any of the other covenants and conditions contained in this lease to be performed by tenant.

20. Estoppel Letter. Tenant agrees to execute estoppel letters in favor of lenders and buyers from landlord verifying the standing of this lease, the lease terms and all amounts paid under the lease and such other matters as may be reasonably requested by landlord.

21. Indemnification. Tenant will indemnify and hold

landlord harmless from and against all claims, demands, damages, liabilities, judgments, attorney's fees, expenses and losses incurred by landlord which relate or arise, in whole or in part, out of the premises, or out of tenant's use or occupancy of the premises, or out of the acts or omissions of tenant or its agents, employees, invitees or guests. This right of landlord to be indemnified by tenant will apply to, but will not be limited to, the following:

- (a) tenant's failure to perform any provision, term, covenant or agreement required to be performed by tenant under this lease;
- (b) any occurrence, injury or personal or property damage which happens in or about the premises or apertures resulting from the condition, maintenance, construction on or of the operation of the premises or resulting from the act or omission of tenant or its agents, employees, invitees or guests;
- (c) failure by tenant or its agents to comply with any requirements of any governmental authority or insurance company insuring the premises or its contents;
- (d) any security agreement, conditional bill of sale or chattel mortgage or mechanics' lien connected with tenant, its obligations or operations, filed against the premises, any fixtures, equipment or personality in the premises as a result of any act of tenant or its agents or the failure to act by tenant or its agents; and
- (e) any construction, work, alterations or improvements by tenant or its agents, employees, invitees or guests on the premises.

The indemnification will include, but not be limited to, reasonable attorney's fees and costs which are incurred before, during and after all proceedings, trials and appeals, including but not limited to bankruptcy court proceedings. This indemnification provisions will survive the expiration or termination of this lease and any transfer or assignment of all or any portion of the premises or of any interest in this lease. The provisions of this indemnification paragraph are in addition to the other indemnification provisions of this lease, and these provisions will not limit or restrict indemnification under any other provision.

22. Quiet Enjoyment. Landlord covenants and agrees

with tenant that as long as tenant pays the rent on time and performs all of the covenants and conditions required to be performed by tenant under this lease, tenant may peaceably and quietly have, hold and enjoy the leased premises for the lease term, subject however, to any mortgages that landlord may now or subsequently place against the property.

23. No Mechanics' Liens. Tenant shall have no power or authority to permit construction, mechanics' or materialmen's liens to be placed on the leased property in connection with maintenance, alterations, modifications or otherwise. The interest of landlord shall not be subject to liens for improvements made by tenant. Landlord shall not be liable for any work, labor or materials furnished to the premises by or through tenant or anyone claiming through tenant. No construction or mechanics' liens or other liens for any such work, labor or materials shall attach or affect the interest of landlord in and to the premises. Landlord intends to record a notice as set forth in Fla. Stat. § 713.10. This lease itself shall not be recorded in the public records.

24. Not To Be Recorded. Landlord and tenant agree that neither this lease nor any notice or memorandum of this lease shall be recorded in the public records, except for the mechanics' lien notice described above.

25. Environmental Matters. The following provisions shall apply in addition to all other provisions of this lease and shall survive the expiration and termination of this lease:

(a) Definitions. "Toxic or hazardous substances" shall be interpreted broadly to include, but not be limited to, any material or substance that is defined or classified under federal, state or local laws as:

- (i) a "hazardous substance" pursuant to Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9601(14), Section 311 of the Federal Water Pollution Control Act, 33 U.S.C.A. § 1321, as now or subsequently amended;
- (ii) a "hazardous waste" pursuant to Section 1004 or Section 3001 of the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6903, 42 U.S.C.A. § 6921, as now or subsequently amended;
- (iii) a toxic pollutant under Section 307(1)(a) of the

Federal Water Pollution Control Act, 33 U.S.C.A. § 1317(1)(a);

- (iv) a "hazardous air pollutant" under Section 112 of the Clean Air Act, 42 U.S.C.A. § 7412, as now or subsequently amended;
- (v) a "hazardous material" under the Hazardous Material Transportation Act, 49 U.S.C.A. § 5102, as now or subsequently amended;
- (vi) toxic or hazardous pursuant to regulations promulgated now or subsequently under the aforementioned laws; or
- (vii) presenting a risk to human health or the environment under other applicable federal, state or local laws, ordinances, or regulations, as now or as may be passed or promulgated in the future.

"Toxic or hazardous substances" shall also mean any substance that after release into the environment and on exposure, ingestion, inhalation or assimilation, either directly from the environment or directly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavior abnormalities, cancer or genetic abnormalities. "Toxic or hazardous substances" specifically includes, but is not limited to, asbestos, polychlorinated biphenyls (PCBs), petroleum and petroleum based derivatives, and urea formaldehyde.

(b) Use Restrictions/Compliance with Applicable Laws. Tenant and its agents, employees, contractors and invitees shall not use the premises in a manner that violates any applicable federal, state or local law, regulation or ordinance, including, but not limited to, any such law, regulation or ordinance pertaining to air or water quality, the handling, transportation, storage, treatment, usage or disposal of toxic or hazardous substances, air emissions, other environmental matters, zoning or other land use matters. Tenant shall not cause or permit the release or disposal of any toxic or hazardous substances on or from the premises.

(c) Indemnification. Tenant agrees to indemnify, defend (with counsel satisfactory to landlord) and hold landlord and landlord's officers, directors, trustees, employees, successors, assigns, contractors and agents harmless from any and all claims, demands, judgments, damages, penalties, fines, expenses, attorney's fees, liabilities and losses

arising during or after the lease term out of or in any way relating to the presence, release or disposal of toxic or hazardous substances on or from the premises or to a breach of any representation, warranty or covenant made by tenant under this lease. The indemnity shall include, but not be limited to, costs incurred in connection with the following:

- (i) toxic or hazardous substances first present or suspected to be first present in the soil, groundwater or soil vapor on or under the premises after the commencement date;
- (ii) toxic or hazardous substances that migrate, flow, percolate, diffuse, or in any way move onto or under the premises after the commencement date; or
- (iii) toxic or hazardous substances present on or under the premises as a result of any discharge, dumping, or spilling (accidental or otherwise) onto the premises during or after the commencement date by any person, corporation, partnership, or entity other than landlord.

The indemnification provided by this section shall also specifically cover, but not be limited to, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision or other third party because of the presence or suspected presence of toxic or hazardous substances in the soil, groundwater, or soil vapor on or under the premises after the commencement date. These costs include, but are not limited to, diminution in the value of the premises, damages for the loss or restriction on use of rentable or usable space or of any amenity of the premises, sums paid in settlements of claims, attorney's fees, consultant's fees, and expert fees. The above environmental indemnity shall survive the expiration or termination of this lease and any transfer or assignment of all or any portion of the premises or of any interest in this lease. It shall be governed by the laws of the State of Florida.

The provisions of this indemnification provisions are in addition to the other indemnification provisions of this lease, and these provisions shall not limit or restrict indemnification under any other provision.

(d) Inspection Rights. Landlord and landlord's officers,

directors, trustees, employees, successors, assigns, contractors and agents shall have the right, but not the duty, to inspect the premises and tenant's relevant environmental and land use documents at any time and from time to time and to perform such tests on the premises as landlord desires. Landlord shall also have the right to establish test wells in or near the premises to monitor whether any chemical levels are increasing on or near the premises because of the activities of tenant, other tenants or neighboring landowners. Tenant shall be responsible for paying for any testing that is conducted if tenant is not in compliance with the lease. If tenant is not in compliance with this lease, landlord, without waiving or releasing any right or remedy it may have with respect to such noncompliance, shall have the right, but not the duty, to immediately enter on the premises to remedy any contamination caused by tenant's failure to comply notwithstanding any other provision of this lease. Landlord shall use reasonable efforts to minimize interference with tenant's business but shall not be liable for any interference caused thereby.

(e) Corrective Action. If landlord or its consultant determines that any investigation, site monitoring, containment, cleanup, removal, restoration or other remedial work ("remedial work") of any kind is necessary under any applicable federal, state or local laws, regulations or ordinances, or is required by any governmental entity or other third person because of or in connection with the presence or suspected presence of toxic or hazardous substances on or under the premises, tenant shall be responsible for all the remedial work and shall promptly commence and then diligently prosecute to completion all the remedial work. Tenant shall pay for all costs and expenses of the remedial work, including but not limited to landlord's reasonable attorney's fees, consultant's fees, and other costs incurred in connection with monitoring or review of the remedial work. If tenant fails to timely commence, or cause to be commenced, or fail to diligently prosecute to completion, the remedial work, landlord may, but shall not be required to, cause the remedial work to be performed, and all costs and expenses of the remedial work or incurred in connection with it shall become immediately due and payable as additional rent to landlord from tenant.

(f) Default Provisions. Any default of tenant under the provisions of this paragraph (Environmental Matters) shall be a material default enabling landlord to exercise any of the remedies set forth in this lease and, in addition to these remedies, the following remedies: (i) terminating the lease and collecting damages, including but not limited to costs resulting from any remedial work; and (ii) shutting down tenant's operation and requiring tenant to perform any necessary remedial work.

26. Miscellaneous.

(a) Landlord shall have the unrestricted right of assigning this lease at any time, and in the event of an assignment, landlord shall be relieved of all liabilities under this lease.

(b) This lease shall bind landlord and its successors and assigns and tenant and its successor and assigns. This subparagraph does not authorize tenant to assign the lease or any part of it without landlord's prior written approval.

(c) It is understood and agreed between the parties that time is of the essence of this lease and all terms and conditions contained in this lease.

(d) It is understood and agreed between the parties that written notice mailed to, delivered to or posted on the premises leased by this lease agreement shall constitute sufficient notice to tenant.

(e) The rights of landlord under this lease shall be cumulative, and failure on the part of landlord to exercise promptly any rights given here shall not operate to forfeit or waive any of those rights.

(f) The parties agree that the liability of landlord is limited to the premises. In case of any liability of landlord to tenant or anyone claiming by or through tenant, that liability shall not be the personal obligation of landlord but shall be an obligation which may be recovered only out of the premises leased here. This subparagraph does not encumber or grant any rights in the premises to tenant; it restricts any recovery by tenant to the value of the premises.

In witness, the parties have signed this agreement on the year first written above.

LANDLORD:

By: \_\_\_\_\_  
*[Signature of landlord]*

TENANT:

By: \_\_\_\_\_  
*[Signature of authorized representative of tenant]*

**§ 4:29 Mortgage—Residential property**  
Mortgage

This instrument prepared by and return to: *[name of preparer]*

This mortgage is made on *[date]* by *[name of mortgagor]* (“mortgagor”) to *[name of mortgagee]* (“mortgagee”).

For good and valuable considerations and also in consideration of the aggregate sum named in the mortgage note described below, mortgagor grants, bargains, sells, aliens, remises, conveys and confirms to mortgagee all that certain real property (the “premises”) in *[county]* County, Florida, legally described as follows: *[legal description of property]*.

Together with all structures and improvements now and subsequently on the premises, and fixtures attached to the premises, and all rents, issues, proceeds and profits accruing and to accrue from the premises, all of which are included in the above description and the habendum of it; also all gas, steam, electric, water and other heating, cooking, refrigerating, lighting, plumbing, ventilating, irrigating and power systems, machines, appliances, fixtures and appurtenances, which now are or may subsequently pertain to, or be used with, in or on the premises, even though they are detached or detachable.

To have and to hold the same, together with all the tenements, hereditaments and appurtenances belonging to or in any way pertaining to the premises, and the reversion and reversions, remainder or remainders, rents, issues and profits of the premises, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of mortgagor in and to the premises, and every part of the premises, to mortgagee in fee simple.

And mortgagor covenants and agrees with mortgagee as follows:

**FIRST:** That mortgagor is lawfully and indefeasibly seized of the premises in fee simple; that it has full power and lawful right to convey the same in fee simple to mortgagee as stated above; that it shall be lawful for mortgagee at all times peaceably and quietly to enter on, hold, occupy and enjoy the premises, and every part of the premises; that the premises will remain free from all additional encumbrances; that the mortgagor will make further assurances to perfect the fee simple title to the premises in mortgagee as may be reasonably required, and that the mortgagor fully warrants the title to the premises in mortgagee and will defend the title against the lawful claims of all persons.

**SECOND:** Mortgagor will pay the principal and interest and all other sums of money payable by virtue of the mortgage note and this mortgage promptly on the days the same become due and it will promptly perform and comply with every other covenant and agreement in the mortgage note and mortgage.

**THIRD:** Mortgagor will pay the taxes, assessments, levies, liabilities, obligations, and encumbrances of every kind now on the premises, and that subsequently may be imposed, suffered, placed, levied or assessed on the premises, or that subsequently may be levied or assessed on this mortgage or the indebtedness secured by this mortgage, when due and payable according to law, before they become delinquent, and before any interest attaches or any penalty is incurred; and insofar as any thereof is of record the same shall be promptly satisfied and discharged of record and the original official document evidencing such satisfaction and discharge shall be placed in the hands of the mortgagee within *[specify number, such as: ten] days next after payment.*

**FOURTH:** Mortgagor will permit, commit or suffer no waste, impairment, or deterioration on the premises or any part of the premises.

**FIFTH:** Mortgagor will pay to mortgagee, immediately and without demand, all sums of money advanced by mortgagee to protect the security of this mortgage and of the property, including but not limited to all costs, charges, reasonable attorney's fees and other expenses, together with interest on each advancement at the highest lawful rate of interest per annum allowed by the laws of the State of Florida, and all the sums and interest on the sums will be secured by this mortgage.

SIXTH: That: (a) in the event of any breach of this mortgage or default on the part of mortgagor; or (b) in the event any of the sums of money referred to here are not promptly and fully paid without demand or notice; or (c) in the event the stipulations, agreements, conditions and covenants of the note and this mortgage are not duly, promptly and fully performed, then in any such event, the aggregate sum mentioned in the note then remaining unpaid, with interest accrued to that time, and all moneys secured by this mortgage, shall become due and payable immediately, or subsequently, at mortgagee's option, as fully and completely as if all of the sums of money were originally stipulated to be paid on that day, anything in the note or in this mortgage to the contrary notwithstanding; and immediately or subsequently, at mortgagee's option, without notice or demand, suit at law or in equity may be prosecuted as if all moneys secured by this mortgage had matured prior to its institution.

SEVENTH: Mortgagee may, at any time while a suit is pending to foreclose or to reform this mortgage, or to enforce any claims arising under this mortgage, apply to the court having jurisdiction over the mortgage for the appointment of a receiver, and that court shall, without delay, appoint a receiver of the premises and all other property covered by this mortgage, including all and singular the income, profits, rents, issues and revenues from whatever source derived, and the receiver shall have all the broad and effective functions and powers in any way entrusted by a court to a receiver, and the appointment shall be made by that court as an admitted equity and a matter of absolute right to mortgagee, and without reference to the adequacy or inadequacy of the value of the property mortgaged or to the solvency or insolvency of mortgagor or the defendants, and the income, profits, rents, issues and revenues shall be applied by the receiver according to the lien of this mortgage and the practice of that court.

EIGHTH: If mortgagor defaults in any of the covenants or agreements contained in this mortgage or in the note, then mortgagee may perform the same, and all the expenditures made by mortgagee, including a reasonable attorney's fee, in so doing shall draw interest at the same rate as the mortgage note, and shall be repayable immediately and without demand, and all the expenditures shall be secured by the lien of this mortgage.

NINTH: The covenants and agreements in this mortgage and in the mortgage note shall bind, and the benefits and advantages shall inure to, the respective heirs, legal representatives, grantees, successors, and assigns of the parties to this mortgage. Whenever used, the singular number shall include the plural, the plural shall include the singular, and the use of any gender shall include all genders. This mortgage and the note evidencing the indebtedness secured by this mortgage shall be construed according to the laws of the State of Florida.

TENTH: On any sale, transfer or conveyance of the premises to any person, firm or corporation not previously approved in writing by the holder of this mortgage, mortgagee or holder shall have the right to accelerate the maturity of this mortgage as though it were due and payable on the day of that transfer and to demand payment in full of the mortgage amount or any unpaid balance of the mortgage amount, and to exercise all the rights and remedies in this mortgage or by law reserved to mortgagee the same as in any event of default under this mortgage, anything in the mortgage note or in this mortgage to the contrary notwithstanding.

ELEVENTH: If foreclosure proceedings of any mortgage, trust deed, encumbrance or lien of any kind on the premises should be instituted, or if mortgagor defaults in the performance of any mortgage, trust deed, encumbrance or lien of any kind on the premises, then mortgagee may, at its option, immediately or subsequently, declare this mortgage and the mortgage note due and payable.

TWELFTH: If the premises or any part of the premises are condemned and taken for public use under the power of eminent domain, mortgagee shall have the right to demand that all damages awarded for the taking of or damages to the premises shall be paid to mortgagee, up to the amount then unpaid on this mortgage and the obligation secured by this mortgage.

THIRTEENTH: To keep the buildings now or hereafter on the premises insured in a sum not less than the total of the sums secured by all mortgages on the premises, in a company or companies to be approved by mortgagee, and the policy or policies are to be held by and payable to mortgagee, and if any sum of money becomes payable under such policy or

policies, mortgagee shall have the option to receive and apply the same on account of the indebtedness by this mortgage secured or to permit mortgagor to receive and use it, or any part of it, for other purposes, without thereby waiving or impairing any equity lien or right under or by virtue of this mortgage; and mortgagee may place and pay for that insurance or any part of it, without waiving or affecting the option to foreclose or any right under this mortgage, and every such payment shall bear interest at the maximum contract rate of interest allowed by law and shall be secured by the lien of the mortgage and shall be immediately paid to mortgagee by mortgagor without demand.

Provided always, that if mortgagor shall pay to mortgagee the sum of money mentioned in that certain mortgage note, referred to here as the "mortgage note," "promissory note" or "note," a conformed copy of which is attached to this mortgage as Exhibit "A" and any renewals or extensions of it, and any other indebtedness to mortgagee referred to here, in whatever form, and the interest on it as it becomes due, together with all costs, charges and expenses, including a reasonable attorney's fee, which mortgagee may incur in collecting these sums or in protecting the security of mortgagee, whether by suit or otherwise, and shall duly, promptly and fully perform, discharge, execute, effect, complete and comply with and abide by each of the stipulations, agreements, conditions and covenants of the mortgage note and of this mortgage, then this mortgage and the estate created by this mortgage shall cease and be null and void; otherwise the same shall remain of binding force and effect.

In witness, mortgagor has made, executed, sealed and delivered this mortgage on the day and year first above written.

---

[Seal]

*[Signature of mortgagor]*

---

*[Printed name of mortgagor]*

---

*[Address of mortgagor]*

Witnesses:

*[Signature of witness 1]*

*[Printed name of witness 1]*

*[Signature of witness 2]*

*[Printed name of witness 2]*

The State of Florida  
County of \_\_\_\_\_ {

The above instrument was acknowledged before me on  
[date] by [name of mortgagor].

Notary Public—State of Florida:

*[Signature of notary public]*

*[Printed name of notary public]*

Personally known \_\_\_\_\_

Or Produced identification \_\_\_\_\_

Type of identification produced: \_\_\_\_\_ [specify]

Affix Seal Below:

*[Seal]*

**§ 4:30 Mortgage and security agreement—In lieu of  
foreclosure—Subject property purchased from  
and leased back to mortgagor**

**MORTGAGE AND SECURITY AGREEMENT**

THIS MORTGAGE AND SECURITY AGREEMENT is made on [date] by [name of mortgagor], a corporation organized under the laws of [state], having an address of [address of mortgagor] (referred to here as “Mortgagor”), and

delivered to *[name of mortgagee]*, a corporation organized under the laws of *[state]*, having an address of *[address of mortgagee]* (referred to here as "Mortgagee").

RECITALS:

A. Mortgagor is the holder of certain foreclosure judgments ("Judgments") against Mortgagee.

B. Rather than exercising its right of foreclosure, Mortgagor has on this date entered into a Purchase and Sale Agreement (the "Purchase Agreement") pursuant to which it has acquired the Mortgage Property, as defined below, from Mortgagee.

C. As consideration therefor, Mortgagor has cancelled the Judgments and executed and delivered to Mortgagee a promissory note in the principal sum of *[\$/dollar amount]* as evidenced by that certain Promissory Note ("Note") of the same date as this Mortgage, made by Mortgagor payable to the order of Mortgagee, in the original principal amount of *[\$/dollar amount]*, maturing on *[date]*, which Note, together with any and all renewals, replacements, extensions, modifications, substitutions, consolidations, and any and all other certificates or evidences of the indebtedness evidenced by the Note, are collectively referred to here as "the Note."

D. Mortgagor's payment of the Note is secured by this Mortgage.

1. DEBT.

In addition, Mortgagor, as Landlord, and Mortgagee, as Tenant, have entered into a Lease of the same date as this Mortgage (the "Lease"), pursuant to which Mortgagor has leased the Mortgage Property to Mortgagee. The obligations secured by this Mortgage are as follows (jointly and severally, the "Indebtedness"):

(a) NOTE. Payment of all sums from time to time evidenced by the Note;

(b) ADVANCES. Any sums properly advanced by Mortgagee in the manner provided in, or for the protection of the security of, this Mortgage, including all sums advanced pursuant to Paragraphs 7 or 8 of this Mortgage; and

(c) COSTS. All costs, expenses, losses, and damages sustained or incurred by Mortgagee because of any default in payment or performance as the case may be, of any provi-

sion contained in the Note, or in realizing on, protecting, perfecting, defending, or enforcing, or any combination, the security of this Mortgage, including reasonable Attorney's Fees in connection with enforcement of this Mortgage or in response to any request for any action on the part of Mortgagee by Mortgagor regardless of whether a lawsuit is brought, and for all administrative, trial, and appellate proceedings, if any. As used in this Mortgage, the term "this Mortgage" includes any and all amendments, modifications, extensions, renewals, replacements, substitutions, and consolidations of this Mortgage. Mortgagor will pay the Indebtedness and perform other covenants, as the case may be, in accordance with the terms and provisions of this Mortgage, the Note, and the Lease executed between Mortgagor and Mortgagee, all executed on the same date as this Mortgage.

## 2. SECURITY.

In consideration of the indebtedness evidenced by the Note and other valuable considerations, the receipt and sufficiency of which are jointly and severally acknowledged, Mortgagor does grant, bargain, sell, alien, remise, release, convey, assign, and confirm to Mortgagee and its successors and assigns, and does grant to Mortgagee and its successors and assigns, the benefit of a lien on, and a security interest in, Mortgagor's fee simple ownership interests in all of the following property, whether real or personal or mixed, tangible or intangible, and whether now or later existing, to the extent and on the terms and conditions set forth in this Mortgage:

(a) LAND. The Land referred to in this Mortgage and Security Agreement described as follows: *[legal description of land]*.

(b) IMPROVEMENTS. All buildings, structures, betterments, and other improvements owned by Mortgagor of any nature now or subsequently situated in whole or in part on the Land, regardless of whether physically affixed to the Land or severed or capable of severance from the Land (the "Improvements").

(c) APPURTENANCES. The benefit of all easements, tenements, hereditaments, and appurtenances and other rights of any nature whatsoever in the Land or the Improvements or both, including the benefit of all rights of way, streets, al-

leys, passages, railroad sidings, drainage rights, sewer rights, and rights of ingress and egress to the Land and all adjoining property, whether now existing or subsequently arising, together with the reversion or reversions, remainder or remainders, rents, issues, incomes, and profits of any of the foregoing.

(d) TANGIBLE PROPERTY. All of Mortgagor's right, title, and interest in and to all fixtures, equipment, and tangible personal property of any nature whatsoever owned by Mortgagor that is hereafter: (i) attached or affixed to the Land, the Improvements, or both; (ii) situated on or about the Land, the Improvements, or both, regardless of whether physically affixed to the Land, severed, or capable of severance from the Land; or (iii) used, usable, and intended to be used in connection with any present or future use or operation of or on the Land, regardless of where situated. The foregoing includes without limitation all signs and displays; all machinery and equipment used by Mortgagor or any affiliate and/or subsidiary in the operation of the Mortgagor's business; all heating, air conditioning, lifting, incinerating, and power equipment; all engines, compressors, pipes, pumps, tanks, motors, conduits, wiring, and switchboards; all plumbing, lighting, cleaning, fire prevention, fire extinguishing, refrigerating, ventilating, and communications apparatus; all boilers, furnaces, oil burners, vacuum cleaning systems, elevators, and escalators; all stoves, ovens, ranges, disposal units, dishwashers, water heaters, exhaust systems, refrigerators, cabinets, and partitions; all rugs, draperies, and carpets; all laundry equipment; all building materials; all furniture, furnishings, office equipment, and office supplies (including stationery, letterheads, bill heads, and items of a similar nature); and all additions, accessions, renewals, replacements, and substitutions of any or all of the foregoing. The items of property encumbered by this subparagraph are individually and collectively referred to as the "Tangible Property."

(e) PROCEEDS. Subject to the provisions of Paragraphs 11 and 12 of this Mortgage, all proceeds of the conversion, voluntary or involuntary, of any of the property encumbered by this Mortgage into cash or other liquidated claims, or that are otherwise payable for injury to, or the taking or requisitioning of, any such property, including all insurance and condemnation proceeds as provided in this Mortgage.

(f) CONTRACT RIGHTS AND ACCOUNTS. All of Mortgagor's right, title and interest in and to any and all assignable contracts, written or oral, express or implied, now existing or subsequently entered into or arising in any manner related to the improvement, use, operation, sale, conversion, or other disposition of any interest in the Land, Improvements, Tangible Property, or any combination, including any and all deposits, prepaid items, and payments due and to become due thereunder, and including construction contracts, service contracts, advertising contracts, purchase orders, and equipment leases; but reserving to Mortgagor the use and benefit of all such contracts, deposits, prepaid items, payments, and proceeds, unless and until Mortgagor defaults under this Mortgage. Notwithstanding the foregoing, Mortgagee will not be bound by any of Mortgagor's obligations under any of the foregoing contracts unless and until Mortgagee elects to assume them in writing.

(g) OTHER INTANGIBLES. All contract rights, accounts, instruments, and general intangibles, as such terms from time to time are defined in the Uniform Commercial Code as adopted in Florida, in any manner related to the use, operation, sale, conversion, or other disposition of the Land, Improvements, Tangible Property, including all permits, licenses, insurance policies, rights of action, and other choses in action. The Land, Appurtenances, Improvements, and Tangible Property are jointly and severally called the "Mortgage Property" in this Mortgage. The portion of the property encumbered by this Mortgage that from time to time consists of intangible personal property, is referred to as the "Intangible Collateral." All such Mortgage Property, Intangible Collateral, and all other security described in this section are sometimes referred to below and in the Note as the "Security." Wherever used in this Mortgage, the use of the terms "Security," "Mortgage Property," and "Intangible Collateral" means and includes all or any portion thereof that may be or is applicable in the context in which such term is used.

### 3. SECURITY AGREEMENT.

To the extent any of the property encumbered by this Mortgage from time to time constitutes personal property subject to the provisions of the Uniform Commercial Code as adopted in Florida, this Mortgage constitutes a "Security"

Agreement" for all purposes under the Code. Without limitation, Mortgagee, at its election, on any Event of Default under this Mortgage, will have all rights, powers, privileges, and remedies from time to time available to a secured party under the provisions of the Code with respect to such property. Notwithstanding any provision of this Mortgage to the contrary, Mortgagor may remove, dispose of, or both remove and dispose of, in any manner, any portion of the Tangible Property and have and retain the proceeds from any such disposition to Mortgagor's exclusive use and benefit, as long as:

- (a) such removal and/or disposition will not materially and adversely affect the operation of the Mortgage Property for its intended purposes;
- (b) Mortgagor immediately furnishes Mortgagee with substitute collateral of equal or better quality and value;
- (c) an Event of Default has not occurred under this Mortgage;
- (d) any and all damage to the Land, Improvements, and other Tangible Property resulting from such removal and/or substitution, is promptly repaired at Mortgagor's cost;
- (e) such disposition is not as security for the performance of an obligation; and
- (f) Mortgagee's prior written consent is obtained for any removal that requires any structural alterations or repairs to the Land, the Improvements, or both, or any removal of any Tangible Property that, singly or in the aggregate, has a replacement cost of more than *[\$/dollar amount]* or *[\$/dollar amount]* in the aggregate except in connection with direct substitutions or replacements requiring no structural alterations or repairs.

3.1. SECURITY. Notwithstanding the foregoing or any other provision of this Mortgage to the contrary, Mortgagor and Mortgagee intend and agree that, unless and until Mortgagee affirmatively elects otherwise, all right, title, and interest of Mortgagor in and to the Security (excepting only furniture, furnishings, office equipment, and office supplies) constitutes an interest in real property for all purposes, regardless of whether:

- (a) any or all such property is physically attached to the Land or Improvements;

- (b) serial numbers are used to identify certain items; or
- (c) such items are referred to, generally or specifically, in any financing statement filed or recorded at any time.

Without limitation, the parties intend and agree that the inclusion of the Security or any rights in the Security or proceeds of the Security in any such financing statement will not operate to alter any of Mortgagee's rights as determined by this Mortgage or otherwise available at law or in equity, or to impair the priority of the lien or security interest granted by this Mortgage. The parties instead intend and agree that, unless and until Mortgagee affirmatively elects otherwise, the inclusion of any or all such items in any such financing statement is for the sole purpose of Mortgagee's protection only if, as, and when it is or may be determined that notice of Mortgagee's priority of interest in any or all such property, to be effective against a particular class of persons (including the federal government and any subdivisions or entity of the federal government), must be perfected in the manner required by the Uniform Commercial Code as adopted in Florida.

#### 4. AFTER-ACQUIRED PROPERTY.

Without the necessity of any further act of Mortgagor or Mortgagee, the lien of, and security interest created by, this Mortgage automatically will extend to and include: (a) any and all renewals, replacements, substitutions, accessions, proceeds, products, or additions of or to the Security; and (b) any and all money and other property that from time to time, either by delivery to Mortgagee or by any instrument (including this Mortgage), may be subjected to such lien and security interest by Mortgagor, or by anyone on behalf of Mortgagor, or with the consent of Mortgagor, or that otherwise may come into the possession or otherwise be subject to the control of Mortgagee pursuant to this Mortgage.

#### 5. TITLE WARRANTIES.

Mortgagor covenants with Mortgagee and its successors and assigns (including any person who acquires all or any portion of the Security by foreclosure of the lien of this Mortgage or by deed or other proceeding in lieu of foreclosure) that:

- (a) Mortgagor has good and marketable title to the Security,

- and is indefeasibly seized of the Improvements and such of the Tangible Property as constitutes, or is or may be determined to be, fixtures or equipment, in fee simple;
- (b) Mortgagor has full power, lawful right, and authority to convey such estate and title as set forth in this Mortgage and to encumber the same with the lien of this Mortgage;
  - (c) Mortgagor has the full power, lawful right, and full authority to grant Mortgagee a prior perfected security interest in all portions of the property described in this Mortgage that may constitute property subject to the provisions of the Uniform Commercial Code as adopted in Florida; and
  - (d) other than those liens, encumbrances, and security interests of record or otherwise previously disclosed to Mortgagee the Security is free and clear of all liens, encumbrances, and security interests of any nature except for the lien of taxes and assessments not yet due and payable.

#### 6. LIENS.

Other than those liens, encumbrances, and security interests of record or created by Mortgagee, or otherwise previously disclosed to Mortgagee, Mortgagor will not create, or permit to be created or remain, without Mortgagee's prior written consent, and will promptly discharge, any and all liens or encumbrances on, or security interests in, the Security or any combination or part of the Security created by Mortgagor, whether consensual, common law, statutory, voluntary, involuntary, or arising by operation of law. Notwithstanding the foregoing, Mortgagor may contest the amount, validity, and enforceability of any involuntary or nonconsensual lien, encumbrance, or security interest, including those arising by operation of law, in the manner provided in Paragraph 10, with the exception of such liens that are in existence as of the date of this Mortgage or are created by the action or inaction of Mortgagee.

#### 7. FURTHER ASSURANCES.

Mortgagor from time to time will execute, acknowledge, subscribe, and deliver to or at the direction of Mortgagee such further assurances as Mortgagee may require for the purpose of evidencing, perfecting, or confirming the lien and security interest created by this Mortgage. Without limita-

tion of the foregoing, Mortgagor will defend, indemnify, and hold Mortgagee harmless with respect to any lawsuit or proceeding in which the validity, enforceability, or priority of the lien or security interest or both, created by this Mortgage is endangered or attacked, directly or indirectly. If Mortgagor fails to undertake the defense of any such claim in a timely manner, or fails to furnish Mortgagee with reasonable security for such defense, or, in Mortgagee's sole determination, fails to prosecute such defense with due diligence and by appropriate proceedings, Mortgagee is authorized to take, at the expense of Mortgagor, all necessary and proper action in defense of any such claim, including the retention of legal counsel, the prosecution or defense of litigation, and the compromise or discharge of claims, including payment of all costs and reasonable attorney's and legal assistant's fees. Any costs, expenses, and losses so incurred by Mortgagee, including reasonable attorney's fees and legal assistant's fees, regardless of whether a lawsuit is brought, and for all administrative trial and appellate proceedings, if any, will constitute advances by Mortgagee as provided in the following paragraph.

#### 8. REMEDIAL ADVANCES.

If Mortgagor defaults in the observance or performance of any of the provisions of this Mortgage, Mortgagee, without waiving or otherwise impairing any other right or remedy of Mortgagee, at its sole option but without obligation to do so, and without demand on Mortgagor, may make such payment or take such action as Mortgagee deems necessary or appropriate to correct such default or to protect the security of this Mortgage. All payments so made, together with all costs and expenses so incurred, will be added to the principal amount due under the Note and subsequently will bear interest at the rate then payable as provided for in the Note, and will be secured by the lien and security interest granted by this Mortgage. For the foregoing purposes, Mortgagee is authorized to enter onto the Mortgage Property; to appear in and defend any action or proceeding purporting to affect the security of this Mortgage, or of Mortgagee's rights or powers under this Mortgage; to pay, purchase, contest, or compromise any encumbrance, charge, or lien that in the reasonable judgment of Mortgagee appears to adversely affect the Security; and to take whatever other action Mortgagee in its

discretion deems necessary or appropriate in exercising any such rights. Mortgagor immediately and without demand will pay all sums so expended by Mortgagee, with interest from the date of each such expenditure at the rate then payable as provided in the Note.

#### 9. IMPOSITIONS.

Mortgagee will pay or cause to be paid when due:

- (a) all property taxes, assessments, water, sewer, utility, and other rents, rates, and charges, including all excises, taxes, levies, license fees, permit fees, and other fees and charges, whether general or special, ordinary or extraordinary, foreseen or unforeseen, that may be assessed, levied, or imposed on the Security, or any combination, or otherwise arising with respect to the occupancy, use, possession, or disposition thereof, whether or not the failure to pay the same might result in the creation of a lien on the Security;
- (b) all franchise, excise, and other taxes, fees, and charges assessed, levied, or imposed with respect to Mortgagor's right to do business on or from the Mortgage Property;
- (c) all taxes and fees (except for state and federal income taxes and state intangible taxes on the Indebtedness levied by any state other than Florida, unless any such tax is in lieu of, or a credit against, any other tax payable by Mortgagor) that may be levied by the United States or any state or political subdivision of the United States on Mortgagee in connection with or on this Mortgage, or the Indebtedness, or its payment, or collection, or any combination; and
- (d) all lawful claims and demands of mechanics, laborers, material suppliers, and others that, if unpaid, might result in the creation of a lien on the Security.

The items payable under this paragraph are individually and collectively called "Impositions." Except as provided below, nothing contained in this paragraph will require the payment of any Imposition as long as the amount, validity, or enforceability thereof is contested by appropriate proceedings, as provided in the following paragraph. Mortgagee will pay the state and local real and tangible personal property taxes.

#### 10. CONTESTS.

Mortgagee may contest, by any and all appropriate

administrative, trial, or appellate proceedings, or any combination, and in Mortgagor's name, if required by law, the amount, validity, enforceability, or application of any Imposition, legal requirement, or other obligation that Mortgagor is required to pay or perform to any person or entity other than Mortgagee by any provision of this Mortgage if and only for as long as:

- (a) such contest suspends the collection or enforcement of the items contested;
- (b) no part of the Security will be subject to loss, sale, or forfeiture before final determination of any such contest;
- (c) neither Mortgagor nor Mortgagee will be subject to any criminal liability;
- (d) Mortgagor furnishes such security as may be required by law in connection with each such contest;
- (e) the value, usefulness, and marketability of the Mortgage Property will not be adversely impaired by any such contest;
- (f) Mortgagor otherwise continues to pay or perform, as the case may be, the Indebtedness as required by this Mortgage;
- (g) Mortgagor otherwise is not in default under any provision of this Mortgage;
- (h) each such contest is continuously prosecuted diligently to final determination;
- (i) Mortgagor pays, or causes to be paid, and defends, indemnifies, and holds Mortgagee harmless against and from, any and all losses, judgments, decrees, and costs (including all reasonable attorney's fees) incurred in connection with each such contest;
- (j) Mortgagor, promptly following final determination of each such contest, fully pays and discharges all amounts that may be levied, assessed, charged, imposed, or otherwise determined to be payable, together with all penalties, fines, interest, costs, and expenses, and otherwise complies with such final determination at Mortgagor's sole cost and expense; and
- (k) if Mortgagor has failed to comply with the requirements of clause (d) of this paragraph, or if Mortgagor is not required by law to furnish security pursuant to clause (d) of this paragraph, Mortgagor furnishes Mortgagee with such security as Mortgagee reasonably may require

to ensure Mortgagor's compliance with all of the foregoing requirements.

As long as Mortgagor complies with the foregoing and Mortgagee is promptly reimbursed for all costs and expenses incurred, Mortgagee will cooperate with Mortgagor in connection with any such contest.

#### 11. CONDEMNATION.

If all or any part of the Security or any interest in or right accruing to it, or any combination, is taken as a result of, or in lieu or in anticipation of, the exercise of the right of condemnation or eminent domain, or by reason of the temporary requisition of the use or occupancy of the Mortgage Property, in any event by any governmental or quasi-governmental authority, civil or military, or any other party entitled to exercise such powers by law, general or special, or if it is devalued or otherwise adversely affected by any of the foregoing actions, all proceeds payable with respect to any such action shall be disbursed in accordance with the schedule set forth in the Note.

#### 12. PROCEEDS.

All proceeds payable with respect to any casualty loss or condemnation involving the Mortgage Property, as provided in the preceding two paragraphs, or for any private trespass or other injury to, or devaluation of, the Security or any combination, shall be disbursed in accordance with the schedule set forth in the Note.

#### 13. DEFAULT.

The occurrence of any of the following (time being of the essence as to this Mortgage and all of its provisions) constitutes a default by Mortgagor under this Mortgage:

(a) Scheduled Payment. Mortgagor's failure to make any payment required by the Note within [number] days of the date such payment is due, without notice or demand.

(b) Monetary Default. Mortgagor's failure to make any other payment required by this Mortgage within [number] days after demand.

(c) Other. Mortgagor's continued failure to perform any other obligation imposed on Mortgagor by this Mortgage, or the occurrence or nonoccurrence of any other event that expressly constitutes a default under any provision of this Mortgage, except those specified in the following sub-

paragraphs, for a period of *[number]* days after demand; provided: (i) if Mortgagor reasonably cannot perform within the *[number]*-day period, and Mortgagee's security reasonably will not be impaired, Mortgagor may have such additional time to perform as Mortgagor reasonably may require, provided and for so long as Mortgagor proceeds with due diligence; and (ii) if Mortgagee's security reasonably will be materially impaired if Mortgagor does not perform in less than *[number]* days, Mortgagor will have only that period following demand in which to perform as Mortgagee reasonably may specify.

(d) Representation. If any representation or warranty of Mortgagor or Guarantor (as defined below) contained in this Mortgage, or in any certificate delivered pursuant hereto or thereto, or in any other instrument or statement furnished in connection with the Loan, proves to be incorrect or misleading in any material respect as of the time when the same shall have been made, including, without limitation, any and all financial statements furnished by Mortgagor to Mortgagee as an inducement to Mortgagee's making the loan evidenced by the Note or subsequently furnished pursuant to any provision of this Mortgage or the Loan Agreement.

(e) Bankruptcy. If Mortgagor or any guarantor of the Indebtedness (referred to here as "Guarantor") files a voluntary petition in bankruptcy or for reorganization or an arrangement pursuant to the Federal Bankruptcy Code or any similar law, federal or state, now or subsequently in effect, or makes an assignment for the benefit of creditors, or admits in writing its inability to pay its debts as they become due, or suspends payment of its obligations, or takes any action in furtherance of the foregoing; or if Mortgagor or Guarantor consents to the appointment of a receiver, trustee, liquidator, or other similar representative of Mortgagor or Guarantor or of the Mortgage Property, or any of them; or if a petition or an answer proposing an adjudication of the Mortgagor or Guarantor as a debtor, or proposing Mortgagor's or Guarantor's reorganization pursuant to the Federal Bankruptcy Code or any similar law, federal or state, now or subsequently in effect, is filed in and approved by any court of competent jurisdiction and the order approving it is not vacated or stayed within *[number]* days from entry; or if Mortgagor or Guarantor consents to the filing of any such petition or answer, or fails to deny the material allegations of the same in a timely manner.

(f) Judgments. With the exception of judgments on liens against the Mortgage Property existing of record as of the date of this Mortgage, if: (i) final judgment, other than a final in connection with any condemnation, and including any judgment or other final determination of any contest permitted by Paragraph 10 of this Mortgage, is entered against Mortgagor that in the sole opinion of Mortgagee adversely affects the value, use, or operation of the Security, or adversely affects, or reasonably may tend to adversely affect, the validity, enforceability, or priority of the lien or security interest created by this Mortgage; or (ii) execution or other final process issues thereon with respect to Security; and (iii) Mortgagor does not discharge the same or provide for its discharge in accordance with its terms or procure a stay of execution thereon, in any event, within [number] days from entry of execution, or shall not within such period, or such longer period during which execution on the judgment shall have been stayed, appeal therefrom or from the order, decree, or process on or pursuant to which the judgment shall have been entered and cause its execution to be stayed during such appeal, or if on appeal such order, decree, or process shall be affirmed and Mortgagor shall not discharge such judgment or provide for its discharge in accordance with its terms within [number] days after the entry of the order or decree of affirmation, or if any stay of execution on appeal is released or otherwise discharged.

(g) Liens. Other than liens of record as of the date of this Mortgage, if any federal, state, or local tax lien or any claim of lien for labor or materials, or any other lien or encumbrance of any nature whatsoever is recorded against Mortgagor or the Security, and is not removed by payment or transferred to substitute security in the manner provided by law within [number] days by Mortgagee, or contested by Mortgagor in the manner provided by Paragraph 10 of this Mortgage.

#### 14. REMEDIES.

Upon the occurrence of any default under this Mortgage, as provided in the preceding paragraph, and continuation of the default beyond any applicable curative period (an “Event of Default”), but not before, Mortgagee without notice may, subject to the provisions of the Note and Lease, exercise any one or more of the following rights and remedies, in addition

to all other rights and remedies otherwise available at law or in equity, including statutes enacted after the effective date of this Mortgage:

- (a) Acceleration. Declare the entire unpaid amount of the Indebtedness immediately due and payable.
- (b) Foreclosure. Foreclose the lien of this Mortgage or obtain possession of the Mortgage Property or both, by any lawful procedure.
- (c) Uniform Commercial Code Rights. Exercise any right or remedy available to Mortgagee as a secured party under the Uniform Commercial Code as it is from time to time in force and effect in Florida, with respect to any portion of the Security then constituting property subject to the provisions of such Code; or, at Mortgagee's option, treat the Security or any combination as real property or an interest therein for remedial purposes.
- (d) Other Security. Proceed to realize on any and all other security for the Indebtedness in such order as Mortgagee may elect; and no such action, lawsuit, proceeding, judgment, levy, execution, or other process will constitute an election of remedies by Mortgagee, or will in any manner alter, diminish, or impair the lien and security interest created by this Mortgage.
- (e) Advances. Advance the money and take the other action that is authorized by Paragraphs 7 and 8.

#### 15. WAIVER OF CERTAIN RIGHTS.

To the extent permitted by law, Mortgagor agrees that it will not at any time insist on, plead, or in any manner whatever claim or take any benefit or advantage of, any applicable present or future stay, extension, or moratorium law that may affect Mortgagor's performance of the provisions of this Mortgage, or any of Mortgagee's rights or remedies. Mortgagor will not claim, take, or insist on any benefit or advantage of any present or future law providing for the valuation or appraisal of the Security, or any portion of it, before any sale or sales that may be made under or by virtue of this Mortgage. To the extent permitted by law Mortgagor expressly waives all benefit or advantage of any such law or laws, and agrees not to hinder, delay, or impede the exercise of any right or remedy permitted to be executed by Mortgagee but to suffer and permit the exercise of every such right or remedy as though no such law or laws were in effect.

Mortgagor, for itself and all who may claim under it, waives, to the extent permitted by law, all rights to have the Security, and any other security for the Indebtedness, marshalled upon any foreclosure or otherwise.

#### 16. OTHER RIGHTS.

No right or remedy conferred on or reserved to Mortgagee by this Mortgage is intended to be exclusive of any other right or remedy; each and every right and remedy is cumulative and in addition to any other right or remedy otherwise available. Every right, power, privilege, and remedy granted to Mortgagee under this Mortgage, or otherwise available at law or in equity, may be exercised by Mortgagee from time to time as often as Mortgagee deems expedient until the Indebtedness is paid in full. Mortgagee's failure to insist at any time on the strict observance or performance by Mortgagor of any of the provisions of this Mortgage, or to exercise any right or remedy provided for in this Mortgage, will not impair any such right or remedy, nor be construed as a waiver or relinquishment of the right or remedy for the future, unless agreed otherwise by Mortgagee in writing. Receipt by Mortgagee of any payment required to be made pursuant to this Mortgage, with knowledge of the breach of any provision of this Mortgage, will not constitute a waiver of the breach unless Mortgagee agrees otherwise in writing. In addition to all other remedies provided in this Mortgage, Mortgagee will be entitled, to the extent permitted by applicable law, to injunctive relief in the case of a violation, or attempted or threatened violation, of any of the provisions of this Mortgage, or to an order coercing performance of any of the provisions of any of the foregoing.

#### 17. RELEASE BY MORTGAGEE.

Mortgagee from time to time without notice to any person and without affecting the liability of Mortgagor or of any other person (other than any person expressly released by Mortgagee in writing) for the payment of any of the indebtedness, and without affecting the priority or extent of the lien and security interest of this Mortgage (except as to property specifically released by the Mortgagee in writing), may do any or all of the following:

- (a) release in whole or in part any person liable for payment of any or all of the Indebtedness;
- (b) extend the time for payment of the Indebtedness, in whole or in part;

- (c) accept additional or substitute security of any kind;
- (d) consent to the creation of any easement in, on, or over the Security or any covenant restricting the use or occupancy of the Security; or
- (e) release or otherwise deal with the Security.

#### 18. ESTOPPEL LETTERS.

As Mortgagee requests, from time to time, Mortgagor will execute and deliver, or cause to be executed and delivered, to Mortgagee or at the direction of Mortgagee, estoppel letters, certifying the matters relating to this Mortgage, as Mortgagee may require. As Mortgagor requests, from time to time, Mortgagee will execute and deliver, or cause to be executed and delivered, to Mortgagor or at the direction of Mortgagor, estoppel letters, certifying the matters relating to this Mortgage, as Mortgagor may require

#### 19. SATISFACTION.

The lien and security interest provided by this Mortgage will continue unimpaired and in full force and effect unless and until the Indebtedness is paid in full, or the Security has been fully released by Mortgagee, at which time the lien and security interest will be without further force or effect.

#### 20. ATTORNEY-IN-FACT.

Mortgagor irrevocably appoints Mortgagee and its successors and assigns, as its attorney-in-fact, which agency is coupled with an interest:

- (a) to execute and/or record any notices of completion, cessation of labor, or any other notices that Mortgagee deems appropriate under the terms of this Mortgage, the Note, and the Lease, to protect Mortgagee's interest, if Mortgagor shall fail to do so within *[number]* days after written request by Mortgagee;
- (b) upon the issuance of a deed pursuant to the foreclosure of this Mortgage or the delivery of a deed in lieu of foreclosure, to execute all instruments of assignment, conveyance or further assurance with respect to the Leases, Personality, Fixtures, Plans and Property Agreements in favor of the grantee of any such deed and as may be necessary or desirable for such purpose;
- (c) to prepare, execute, and file or record financing statements, continuation statements, applications for regis-

- tion and like papers necessary to create, perfect or preserve Mortgagee's security interests and rights in or to any of Security; and
- (d) while any Event of Default exists, to perform any obligation of Mortgagor under this Mortgage; however:
- (i) Mortgagee shall not under any circumstances be obligated to perform any obligation of Mortgagor;
  - (ii) any sums advanced by Mortgagee in such performance shall be added to and included in the Indebtedness and shall bear interest at the Default Rate;
  - (iii) Mortgagee, as such attorney-in-fact, shall only be accountable for funds that are actually received by Mortgagee; and
  - (iv) Mortgagee shall not be liable to Mortgagor or any other person or entity for any failure to take any action which it is empowered to take under this Section.

#### 21. MISCELLANEOUS.

- (a) Time of the Essence. Time is of the essence with respect to this Mortgage and Security Agreement.
- (b) Successors and Assigns. This Mortgage and Security Agreement shall be binding upon and inure to the benefit of Mortgagor and Mortgagee and their respective successors and assigns, provided that Mortgagor shall not assign any rights, duties or obligation under this Mortgage.
- (c) Singular and Plural. Words used in this Mortgage in the singular, where the context so permits, shall be deemed to include the plural and vice versa. The definitions of words in the singular in this Mortgage shall apply to such words when used in the plural where the context so permits and vice versa.
- (d) Phrases. Except as otherwise expressly provided in this Mortgage, when used in this Mortgage, the phrase "including" shall mean "including, but not limited to"; the phrase "satisfactory to Mortgagee" shall mean "in form and substance satisfactory to Mortgagee in all respects"; the phrase "with Mortgagee's consent" or "with Mortgagee's approval" shall mean "such consent or approval at Mortgagee's sole discretion"; and the phrase "acceptable to Mortgagee" shall mean "acceptable to Mortgagee at Mortgagee's sole discretion."
- (e) Exhibits and Schedules. The exhibits and schedules

attached to this Mortgage and Security Agreement are incorporated and made part of this Mortgage and Security Agreement for the purposes stated in this Mortgage.

(f) Titles of Articles, Sections and Subsections. All titles or headings to articles, sections, subsections or other divisions of this Mortgage, are only for the convenience of the parties and shall not be construed to have any effect or meaning with respect to the other content of such articles, sections, subsections or other divisions, such other content being controlling as to the agreement between the parties to this Mortgage.

(g) Governing Law. This Mortgage shall be governed by and construed in accordance with the laws of the State of Florida and the applicable laws of the United States.

(h) Entire Agreement. This Mortgage, together with the Note, Lease and Purchase and Sale Agreement executed on the same date as this Mortgage, embody the entire agreement and understanding between Mortgagor and Mortgagor and supersede all prior agreements and understandings between the parties relating to the subject matter of this Mortgage. Accordingly, this Mortgage may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

IN WITNESS OF THE ABOVE, Mortgagor has executed and delivered this Mortgage on the date stated above.

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*[Signature of mortgagor]*

Executed in the presence of:

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*[Signature of witness 1]*

---

*[Signature of witness 2]*

*[Acknowledgment]*

This instrument was prepared by:

---

[Name of preparer]

---

[Signature of preparer]

---

[Address of preparer]

**§ 4:31 Purchase-money note and mortgage**

This mortgage made on [date], by [name of mortgagor], of [address of mortgagor], mortgagor, to [name of mortgagee], of [address of mortgagee], mortgagee.

For and in consideration of the sum of \$/[dollar amount], mortgagor grants, bargains, sells and conveys to mortgagee an undivided [specify fractional interest conveyed] interest in the property situated in the County of [county], State of Florida, described as follows: [legal description of property], together with all the hereditaments and appurtenances belonging thereto. This instrument is given to secure the payment of the purchase price of the above property, which price is to be paid pursuant to a promissory note of even date herewith, a true copy of which note is set out: [insert copy of note].

The condition of this mortgage is such that if mortgagor pays the above promissory note according to this mortgage at maturity, principal and interest, then this mortgage shall be null and void; otherwise it shall remain in full force and effect.

Executed at [place of execution], on the date first written above.

---

[Signature of mortgagor]

Executed in the presence of

---

[Name of witness 1]

---

*[Name of witness 2]*

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---

*[Signatures of witnesses]*

---

*[Acknowledgment]*

This instrument was prepared by:

---

*[Name of preparer]*

---

---

*[Signature of preparer]*

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---

*[Address of preparer]*

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#### NOTES TO FORM

##### Drafter's Notes

For requisites of purchase money mortgages, see § 4:5.  
For forms of acknowledgments, see Conveyances (Ch 2).  
For forms of promissory notes, see Commercial Paper (Ch 43).

##### Tax Notes

Taxpayers who either deduct or report qualified residence interest under I.R.C. § 163 resulting from a seller-financed transaction must include the name, address, and taxpayer identification number of the other party to the transaction in their respective tax returns. I.R.C. § 6109(h). Both parties to these transactions must furnish the necessary information to the other so it may be reported. A seller-financed transaction is any indebtedness incurred in acquiring a residence if the person to whom the indebtedness is owed is the person who sold it.

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, Purchase-money mortgages, Mortgages and Deeds of Trust § 8.

#### § 4:32 Purchase-money note and mortgage—Partial release of portions of mortgaged property

This mortgage executed on *[date]*, by *[name of mortgagor]*,

a corporation duly organized and existing under the laws of the State of Florida, having its principal office at [*address of mortgagor*], referred to below as "mortgagor," to [*name of mortgagee*], a corporation duly organized and existing under the laws of the State of Florida, having its principal office at [*address of mortgagee*], referred to below as "mortgagee."

For good and valuable consideration, and also in consideration of the sum named in the promissory note of even date herewith, a copy of which is attached as Exhibit A, mortgagor grants and conveys to mortgagee, in fee simple, all those certain tracts of land owned by mortgagor situated in the County of [*county*], State of Florida, hereinafter called the "property," described as follows: [*legal description of property*] to have and to hold the same together with the tenements, hereditaments, and appurtenances to mortgagee in fee simple.

There is excluded from this purchase money mortgage the following described premises which are part of the property conveyed by mortgagee to mortgagor, which, according to the agreement of the parties, was to be conveyed free and clear and not to be encumbered by the lien of this purchase money mortgage. [*legal description of premises*].

Mortgagor warrants to mortgagee that mortgagor is indefeasibly seized of the property in fee simple; that mortgagor has full power and lawful right to convey the property in fee simple; that it shall be lawful for mortgagee at all times peaceably and quietly to enter upon, hold, occupy, and enjoy the property; that the property is free from all encumbrances; and that mortgagor will make such further assurance to perfect the fee simple title in the property in mortgagee as may reasonably be required.

If mortgagor pays to mortgagee the promissory note attached as Exhibit A and performs, complies with, and abides by all the stipulations, agreements, conditions, and covenants of such promissory note and of this instrument, then this instrument and the estate thereby created shall cease and be null and void.

1. *Covenants of mortgagor.* Mortgagor covenants with mortgagee as follows:

(a) to pay all sums payable by virtue of promissory note and this instrument promptly when such sums become due;

(b) to pay the taxes, assessments, levies, liabilities, obligations, and encumbrances of every nature on the property. If the same are not promptly paid, mortgagee may at any time pay the same without waiving any of mortgagee's rights hereunder, and every such payment so made shall bear interest from the date thereof at the rate of [percentage]% per year;

(c) to pay the costs, charges, and expenses, including attorney's fees, reasonably incurred or paid at any time by mortgagee because of the failure of mortgagor to perform, comply with, and abide by the stipulations, agreements, conditions, and covenants of the promissory note in this instrument, and every such payment by mortgagee shall bear interest from the date of such payment at the rate of [percentage]% per year;

(d) to keep the buildings now or hereafter on the property insured against damage by fire and windstorm with an insurance company authorized to do business as such in the State of Florida, in sums sufficient to prevent the parties in interest from being or becoming co-insurers of any part of the risk, and to cause such policies to contain a standard mortgagee form clause naming mortgagee as insured, as mortgagee's interest may appear. If mortgagor fails to keep the buildings so insured, mortgagor may place and pay such insurance or any part thereof without waiving any of mortgagee's rights hereunder, and every such payment shall bear interest from its date at the rate of [percentage]% per year;

(e) to commit or allow no waste, impairment, or deterioration of the property. [*The building of either or both of the following by mortgagor will not constitute waste, impairment, or deterioration of the property: (1) the excavation and digging of canals and the creation of artificial lakes or waterways, or (2) the removal and transfer of soil, rock, or muck from the bona fide extension or development of the canal, lake, and drainage system of property from one area originally encumbered by this mortgage;]*] and

(f) to perform, comply with, and abide by the stipulations of agreements, conditions, and covenants in the promissory note and in this instrument.

2. *Acceleration of amount due.* If any of the sums of money herein referred to are not promptly paid within [number] days after the same become severally due and payable, or if

any of the stipulations, agreements, conditions, and covenants of the promissory note and this instrument, or either, are not duly performed, complied with, and abided by, the sum mentioned in the promissory note shall become due and payable forthwith or thereafter at the option of mortgagee, as fully and completely as if such sum was originally stipulated to be paid on such day, anything in the promissory note or herein to the contrary notwithstanding.

3. *Joinder in platting.* This mortgage is given and accepted in contemplation of the fact that mortgagor may desire to have the property subdivided and platted with the plats recorded in the public records of [county] County, State of Florida. Mortgagor is authorized to have such plat or plats prepared, and as each such plat is prepared, mortgagee will join with mortgagor in the execution or dedication contained in such plat. At the time of such joinder, a competent surveyor or engineer shall ascertain the amount of acreage contained in and covered by each such plat. Nothing contained herein shall be construed as making it obligatory on mortgagor to effect a platting.

4. *Partial releases.* Mortgagee will, at the demand of mortgagor, effect, execute, and deliver to mortgagor instruments of release releasing from the lien of this mortgage such portions of the property encumbered as mortgagor may require. To be entitled to the execution of each such release, mortgagor shall pay to mortgagee, simultaneously with the receipt of each such release, an amount equal to *[\$/dollar amount]* multiplied by the number of acres to be released. Regardless of whether mortgagor prepays any part of the principal of the mortgage debt, partial release shall be granted at the rate of one acre for every timely payment of *[\$/dollar amount]* of the principal of the mortgage debt. If mortgagor sells a lot or lots, or a portion or portions of the property encumbered, and gives written notice of such fact to mortgagee, mortgagee will be deemed to have agreed that mortgagee will execute a partial release of such property from the lien of this mortgage whenever the release amount computed as specified above is paid to mortgagee. Mortgagor may give such notice to mortgagee at any time before there is a final decree of foreclosure foreclosing this mortgage. For the purposes of this paragraph, a sale will be deemed to have been made when mortgagor executes a deed of conveyance to purchaser or enters into a valid and binding contract

to sell and deliver to a purchaser. Any moneys paid to and received by mortgagor for the execution of releases pursuant to the terms of this paragraph shall not, if paid after foreclosure has been instituted, waive the rights of mortgagee to continue the foreclosure action, nor shall they have any effect on the exercise by mortgagee of the acceleration privilege contained in this mortgage, nor shall they have any effect on the pendency of the foreclosure proceedings, except to entitle the person effecting such payment to the release of the property for which the release amount was paid, and, insofar as mortgagee is concerned, to constitute a credit against the mortgage debt.

Mortgagee acknowledges that the ability of mortgagor to procure releases promptly is of the utmost importance. Therefore, mortgagee will at all times maintain at its principal place of business a person who is authorized to execute such releases on behalf of mortgagee, and such releases will be executed and delivered, when sought in compliance with the provisions contained herein, not later than [number] days after written demand for such release has been made on mortgagee.

5. *Subordination to construction loan mortgages.* This mortgage is given and accepted in contemplation of the fact that mortgagor may decide to develop the property by building or causing to be built houses or other improvements thereon, and that in connection with any such building it will be necessary for this mortgage to be subordinated to mortgages which evidence and secure temporary financing. Therefore, mortgagee shall, at the request of mortgagor, and subject to the provisions hereof, subordinate the lien of this mortgage to temporary construction loan mortgages and shall execute appropriate instruments evidencing such subordination without payment of release amounts by mortgagor.

Mortgagor will not be entitled to require subordination of this mortgage to a temporary construction loan mortgage unless, at the time of requesting such subordination, mortgagor gives to mortgagee evidence of the fact that mortgagor has a commitment for a permanent mortgage loan against the lot or lots covered by the temporary construction loan mortgage to which mortgagor is then requesting mortgagee to subordinate the lien of this mortgage. The commitment must show that the lender has agreed to make the

loan and close the mortgage loan transaction when the building on the property has been completed and the sale of it to a purchaser has been consummated and closed.

Mortgagee shall be required to subordinate the lien of this mortgage to temporary construction loan mortgages only if both the temporary construction mortgagee and the permanent mortgagee are institutional lenders. An institutional lender means a bank, a trust company, a federal savings and loan association, an insurance company, or any other institution that is engaged in whole or in part in the business of making mortgage loans on real property.

When a construction loan is paid off and a lot is released from the lien of the construction loan mortgage, then, simultaneously with the closing of the permanent mortgage loan, mortgagee will release the lot from the lien of this mortgage on payment of the release amount computed in accordance with the terms of this mortgage.

Mortgagee shall subordinate the lien of this mortgage to easements for public utilities that mortgagor may execute or grant to public or quasi-public service companies in connection with the use or development of the property.

6. *General provisions.* The following additional provisions shall be applicable.

(a) The rights of mortgagee under this mortgage are limited to the property this mortgage encumbers. No personal or deficiency judgment may ever be brought or obtained against mortgagor.

(b) All benefits and obligations contained herein shall accrue to and be binding on the respective parties hereto and their respective successors or assigns.

(c) The debt which this mortgage secures may be prepaid in whole or in part in advance of its maturity without penalty or premium for such prepayment.

(d) Mortgagee will at all times specify in writing the place to which notice shall be given by mortgagor when requiring partial releases or the execution of instruments of subordination. Such place shall also be the place for the delivery of such instruments. Until written notice of change is given by mortgagee to mortgagor, the place for the application for and the delivery of such instruments is [address where notices sent to mortgagor].

(e) Inasmuch as this mortgage imposes certain obliga-

tions on mortgagee, mortgagee has joined in the execution of this mortgage to evidence that mortgagee has in fact agreed to those provisions which impose such duties on mortgagee.

Executed at [*place of execution*], on the date first above written.

*[Name of mortgagor corporation]*  
By \_\_\_\_\_  
*[Signature of authorized person]*

*[Title of authorized person]*

*[Corporate seal]*

ATTEST: *[name of secretary1]*

\_\_\_\_\_  
Secretary

*[Acknowledgments]*

*[Name of mortgagee corporation]*  
By \_\_\_\_\_  
*[Signature of authorized individual]*

*[Title of authorized individual]*

*[Corporate seal]*

ATTEST: *[name of secretary2]*

\_\_\_\_\_  
Secretary

*[Acknowledgments]*

This instrument was prepared by:

---

*[Name of preparer]*

---

*[Signature of preparer]*

---

*[Address of preparer]*

EXHIBIT A  
PROMISSORY NOTE

\$*[Dollar amount]*

*[Date]*

The State of Florida                            }  
County of \_\_\_\_\_

After date, for value received, we promise to pay to the order of *[name of payee]*, \$*[dollar amount]* payable in *[specify frequency, such as annual]* installments of \$*[dollar amount]* each, beginning on *[date]*, and on the same day of each *[specify, such as: year]* thereafter until paid, together with interest on the within note from and after the date hereof at the rate of *[percentage]*% per year with interest payable *[specify frequency, such as: annually]* from and after the date hereof and with interest computed always on the diminishing and unpaid principal balances of the debt evidenced. All sums of principal and interest due hereunder shall be payable at *[place of payment]*, or at such other place as payee or holder may specify in writing.

The failure of maker to pay any installment of principal and interest as and when it matures, with such failure continuing uncured for *[number]* days after such maturity date, shall confer on payee or holder the privilege or option, then or thereafter to be exercised while such default continues uncured, to accelerate and call due the entire amount of principal and interest evidenced which is unpaid, anything in the within note to the contrary notwithstanding.

The indebtedness evidenced may be prepaid in whole or in part at any time without penalty or premium for such prepayment.

This note is secured by the mortgage given under even date herewith; and all persons to whom this instrument may come are referred to such mortgage for its effect on the within note and the application of the amounts paid pursuant to the mortgage, for the procuring of releases of property from its lien on the indebtedness evidenced. Specifically, reference is made to the fact that the rights of mortgagee are left to the property the mortgage encumbers and that there is no personal liability on and no personal judgment may be sought or obtained by reason of this note and its execution.

Maker waives demand, presentment for payment, protest, and notice of nonpayment and of dishonor. Maker agrees to pay a reasonable attorney's fee, including reasonable appellate court fees, if any, if this note is placed in the hands of an attorney for collection after default.

*[Name of payor corporation]*

By \_\_\_\_\_

*[Signature of authorized representative]*

*[Title of authorized representative]*

*[Corporate seal]*

ATTEST: *[name of secretary3]*

\_\_\_\_\_  
Secretary

### § 4:33 Deed of trust

This indenture made on *[date]*, between *[name of trustor]*, of *[address of trustor]*, referred to below as "trustor," and *[name of trustee]*, of *[address of trustee]*, referred to below as "trustee," and *[name of beneficiary]*, of *[address of beneficiary]*, referred to below as "beneficiary."

#### RECITALS

A. Trustor is justly indebted to beneficiary, and as evidence thereof has made, executed, and delivered to beneficiary a certain note of even date herewith, of which the following is a true copy: *[attach copy of note]*.

B. Trustor desires to secure the payment of the indebtedness.

In consideration of the premises, trustor has granted, bargained, sold, and conveyed, and does grant, bargain, sell, and convey to trustee, and its successors in trust, the following real estate situated in the County of *[county]*, State of Florida: *[legal description of real estate]*, together with the hereditaments and appurtenances belonging thereto, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of mortgagor, either in law or in equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances.

Trustor, for *[himself/herself]*, *[his/her]* heirs, legal representatives and assigns, covenants as follows:

1. Trustor is indefeasibly seized of the premises in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, convey, and encumber the same in the manner and form described above and that the premises are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and encumbrances of whatsoever kind and nature, except *[list encumbrances]*, and trustor shall forever warrant and defend the same to trustee and its successors in trust against the lawful claims and demands of all persons, except as stated in this paragraph.

2. Trustor will pay promptly when due the indebtedness evidenced and the interest thereon.

3. Trustor will pay promptly when due all indebtedness, principal, and interest, secured by any and all prior and superior mortgages, if any; all taxes and assessments, rent, and charges; and all laborers', mechanics', or materialmen's or other liens of every name and nature which may be levied or imposed on the premises, on or on account of this indenture or the indebtedness secured, or on the interest or estate in the property represented in this deed of trust, whether levied or assessed or imposed against trustor or otherwise.

4. Trustor will keep all destructible property described herein or situated on the land described herein, insured against loss and damage by fire and such other risks

and hazards as trustee may specify, all in responsible insurance companies approved by trustee, in an amount not less than the amount of the indebtedness secured with loss payable by any insurer to trustee as its interests created may appear, and will pay promptly the premiums therefor, and will deliver the policies as soon as issued to trustee.

5. Trustor will keep all buildings and improvements on the premises in good and substantial repair, and will make no alterations therein, except to keep them in good repair, without the written consent of trustee, and will commit no waste on the premises. If trustor neglects to do so, trustee may, at its discretion, enter upon the premises and repair and keep in repair the buildings and improvements without thereby becoming liable as a mortgagee in possession. The expense of so doing shall be repaid by trustor on demand, with interest at the rate of *[percentage]*% per year, and, until so repaid, shall be so much additional indebtedness secured.

6. Trustee may at any time it deems necessary incur expense in procuring and/or continuing an abstract of title to the premises, or other showing of the title, and any expense so incurred shall be repaid by trustor, with interest at the rate of *[percentage]*% per year, and, until so repaid, shall be so much additional indebtedness secured.

7. If trustor defaults in the payment of any of the above taxes, assessments, rates, charges, mortgages, and liens, or in procuring and maintaining insurance as covenanted above, trustee or beneficiary may, at its option, pay such taxes, assessments, rates, charges, mortgages, or liens, and effect and maintain such insurance, and the sum so paid shall be repaid by trustor to trustee or beneficiary on demand, and, until so repaid, shall bear interest at the rate of *[percentage]*% per year and shall be a further lien on the property and premises as so much additional indebtedness secured.

8. In case of the breach or default in the performance by trustor of any covenant herein contained, all of the indebtedness secured, whether the same is due and payable according to the tenor and effect of any promissory note secured or not, and anything herein to the contrary

notwithstanding, shall, at the option of trustee or beneficiary, immediately become and be due and payable without notice to trustor.

9. In case of any suit or proceeding at law or in equity or in any probate or administration proceeding wherein trustee or beneficiary becomes a party by reason of being interested in the premises as trustee or as beneficiary, or for any purpose other than for the collection of the indebtedness secured or the foreclosure of this indenture, there shall accrue hereunder and be paid by trustor all reasonable costs, charges, and attorney's fees thereby occasioned, and the same shall be a further charge and lien on the premises secured and shall draw interest at the rate of *[percentage]*% per year from the date of the accrual until paid.

10. Trustor will pay to trustee any attorney's fees incurred whenever any application to any court is made to compel payment of the indebtedness secured, or any part thereof, or to realize on the security created, whether by foreclosure or otherwise, and whether the proceeding, suit, or action is instituted in the first instance by trustee, by beneficiary, or otherwise, and the amount of the attorney's fees shall be so much additional indebtedness likewise secured.

11. Whenever any application to any court is made to compel payment of the indebtedness secured, or any part thereof, or to realize on the security created, whether by foreclosure or otherwise, and whether the proceeding, suit, or action is instituted in the first instance by trustee, or by beneficiary, or otherwise, trustee and those for whose benefit this security is held shall be entitled, without notice to trustor, to apply for the appointment of a receiver to take possession and control of the premises, and collect, receive, and apply the rents, issues, and profits thereof sending foreclosure, under direction of the court appointing such receiver. All such rents, issues, and profits as may accrue during the term of this instrument are specifically assigned and pledged as additional security for the payment of the indebtedness secured, with the understanding, however, that so long as trustor is not in default of performance of any covenant herein contained, *[he/she]* may collect, use, and enjoy the rents and profits.

12. If trustor, his legal representatives, and assigns shall well and truly keep and perform all of the covenants herein contained, this indenture shall become void and of no effect; otherwise it shall remain in full force and effect.

13. If trustor defaults in the payment of the indebtedness secured or in the performance of any of the covenants contained herein or in the above-mentioned note, the whole principal sum and interest then accrued on such note shall become immediately due and payable at the election of trustee, anything herein to the contrary notwithstanding.

14. In case of the resignation, refusal, failure, or inability of trustee at any time to act, beneficiary may appoint a substitute trustee to execute the trust created, and when any such substitution has been filed for record in the county in which the property herein described is situated, it shall be conclusive evidence of the appointment of such trustee, and such new trustee shall succeed to all of the powers and duties of the trustee named herein.

15. The term beneficiary as used herein shall include the beneficiary mentioned above and his or her or its successors and assigns. The covenants and agreements herein contained shall bind and inure to the benefit of, respectively, the heirs, legal representatives, and assigns of trustor, and the successor in trust of trustee, and the indorsees, transferees, assigns, successors, or legal representatives of beneficiary.

Executed at [*place of execution*], on the date first written above.

---

[Signature of trustor]

Executed in the presence of \_\_\_\_\_  
[Name of witness 1]

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[Name of witness 2]

---

[Signatures of witnesses]

[Acknowledgment]

This instrument was prepared by \_\_\_\_\_  
[Name of preparer]

---

[Signature of preparer]

---

[Address of preparer]

#### NOTES TO FORM

##### Drafter's Notes

The chief use and purpose of a trust deed in a single debtor-creditor situation today is that it provides a convenient method of foreclosing the trustor's interest in the real property by means of a power of sale. Due to the fact that foreclosure by sale pursuant to a power contained in a trust deed is not available in Florida for the enforcement of a mortgage [Willy-Gabbett Co. v. Williams, 53 Fla. 872, 42 So. 910 (1907)], the desirability of using such a trust deed is limited.

See Drafter's Notes following § 4:20.

##### Tax Notes

Because a deed of trust (or trust deed) is merely a different form of mortgage, for tax purposes it is treated the same as a mortgage.

See discussion of the tax aspects of mortgages at §§ 4:12 to 4:15.

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, A deed of trust or a trust deed is a species of deed that is in the nature of a mortgage, and is a conveyance in trust for the purpose of securing a debt. See Mortgages and Deeds of Trust §§ 10 to 16.

#### § 4:34 Promissory note

#### PROMISSORY NOTE

FOR VALUE RECEIVED, the undersigned, *[name of maker]* having an address at *[address of maker]*, promises to pay without set-off, deduction or counterclaim of any kind or

nature to [*name of payee*], as Payee, or order having an address at [*address of payee*] or at such other place as may be designated in writing by the holder hereof, the principal sum of [*dollar amount*] together with interest thereon at a rate equal to [*percentage*]% per year. The principal and interest to be paid in lawful money of the United States as follows:

Payments of interest only, based upon a [*number*] year amortization, shall be due and payable on [*date*], and the [*ordinal number*] day of each month thereafter, until [*date of maturity*], (“Maturity Date”) at which time the entire unpaid principal balance together with all accrued and unpaid interest shall balloon and shall be due and payable.

Installments not paid within [*number*] days after the same are due, shall be subject to, and it is agreed the Payee or holder shall collect thereon, a “late charge” in the amount of [*percentage*]% of the delinquent monthly payment on each such delinquent installment. Upon the exercise of the acceleration of maturity by the Payee or holder, both principal and accrued interest shall bear interest at the highest legal maximum rate.

In the event that any payment of principal or interest is not made within [*number*] days after the due date, the entire remaining unpaid principal and all accrued interest shall become immediately due and payable at the option of the holder hereof. This Note shall also become immediately due and payable at the option of the holder hereof upon the happening of any default or event by which, under the terms of the Mortgage and/or other Security Instruments securing the Note hereinafter referred to, this Note may or shall become due and payable.

Larger sums may be paid at any time if there is not a default hereunder or under the Security Instruments securing this Note, but the payment of any such larger sums in addition to the payments herein required shall not relieve the Maker at the time of payment of the periodic installments herein provided for, unless it is specifically stipulated by the Maker at the time of payment that such larger sums are to be applied to the advance payment of the periodic installments next maturing in the order of their dates. All payments made upon this Note shall be applied first to the payment of accrued interest and secondly upon the principal.

The Make and all endorsers now or hereafter becoming

parties hereto jointly and severally waive presentment and demand for payment, notice of dishonor, protest and notice of protest of this note.

This Note is secured by a Mortgage of even date herewith made of some or all of the parties comprising Maker and/or other parties in favor of Payee and encumbering real property located in [*address of real property*]. This note may also be secured by a security agreement, and/or other security instruments in favor of the Payee and the Mortgage and any all such other security instruments are herein collectively called the "Security Instruments." Maker acknowledges that the loan evidenced by this Note and secured by the Security Instruments is made in reliance on the financial strength of the Maker as well as on the strength of the property mortgaged and pledged by the Security Instruments. Accordingly, Maker specifically acknowledges that, in the event of foreclosure under the above referenced Mortgage and/or realization of the other interests, the Payee shall be entitled to the entry of a deficiency judgment to the extent of any deficiency against the Maker.

The Maker agrees to pay all costs and expenses of collection incurred by the holder of this Note, in or out of court, and including, court related costs and expenses and reasonable attorney's fees and disbursements (and including such costs, fees and disbursements incurred on appeal of any litigation). No extension of time for payment of this note, and no alteration, amendment or waiver of any provisions of this Note or of the Security Instruments made by agreement between the holder hereof and any person or party shall release, discharge, modify, change or affect the liability of Maker under this Note.

No delay by the holder in enforcing any covenant or right hereunder shall be deemed a waiver of such covenant or right and no waiver by the holder of any particular provision hereof shall be deemed a waiver of any other provision or a continuing waiver of such particular provision, and except as so expressly waived, all provisions hereof shall continue in full force and effect.

This Note may be prepaid at any time in whole or in part without penalty. Prepayment shall not entitle Maker to a refund of all or any part of interest, points, fees, or other expenses of closing. This Note shall be governed by and

construed and enforced in accordance with the laws of the State of [*state*]. All agreements between the Maker and the Payee contained or incorporated herein and expressly limited so that in no contingency or event whatsoever, whether by reason of deferment in accordance with this Note or any agreement, or advancement of the loan proceeds, acceleration of maturity of the loan, prepayment or otherwise, shall the amount paid or agreed to be paid to the holder hereof for the loan, use, forbearance or detention of the money to be loaned hereunder exceed the maximum legal rate permitted by applicable [*state*] or Federal law, whichever is greater. If, from any circumstance whatsoever, fulfillment of any provision hereof, or of the Security Instruments or any other agreement between the parties, at the time performance of such provision shall be due, the limit of validity prescribed by law shall be transcended, then, ipso facto, the obligation to be fulfilled shall be reduced to the limit of such validity. This provision shall never be superseded or waived and shall control every other provision of all Agreements between the undersigned and the holder. In the event an amount above the limit of validity prescribed by law is ever paid by the Maker or received by the holder such amount shall be applied to reduce principal and no prepayment penalty shall be assessed for any amounts so prepaid.

To the extent permitted by law, Maker waives all benefit that might accrue to Maker by virtue of any present or future laws exempting the Mortgaged Property, or any other property, real or personal, or any part of the proceeds arising from any sale of any such Property, from attachment, levy or sale under execution, or providing for any stay of execution, exemption from civil process or extension of time, and agrees that such Property may be sold to satisfy any judgment entered on this Note, the Mortgage, or any other [*describe*], in whole or in part and in any order as may be desired by Payee.

In the event that for any reason one or more of the provisions of this Note or their application to any person or circumstance shall be held to be invalid, illegal or unenforceable in any respect or to any extent, such provisions shall, to such extent, be held for naught as though not herein contained but shall nevertheless remain valid, legal and unenforceable in all such other respects and to such extent as may be permissible. In addition, any other provisions of

this Note, but this Note shall be construed as if such invalid, illegal or unenforceable provisions had never been contained herein.

Payee shall in no event be construed for any purpose to be partner, joint venturer or associated of Maker or of any lessee, operator, concessionaire or licensee of Maker in the conduct of their respective businesses. This Note may not be changed or terminated orally.

**§ 4:35 Mortgage demand note for relocation loan in excess of \$10,000**

*[Date]*

I, *[name of maker]*, residing at *[address of maker]* (Maker), for value received, promise to pay to the order of *[name of payee]*, with principal offices at *[address of payee]* (Payee), Payee's successors or assigns, at Payee's principal place of business or any other place as may be designated in writing by the holder of this Note, the sum of *[\$/dollar amount]* with interest computed from the date of this Note at the rate of *[percentage]%* per annum no later than *[number]* days following written demand for it from Payee or the holder of this Note. Maker has the privilege of preparing all or any part of the outstanding principal amount of the loan and all or any part of the interest accrued on it prior to any demand for payment by Payee or holder of this Note without notice to Payee or holder of this Note and without penalty.

The loan evidenced by this Note has been made by Payee to Maker to purchase a principal residence at *[address of residence]* in accordance with the provisions of 26 U.S.C.A. § 7872 and 26 C.F.R. § 1.7872-5T(b) thereto and is secured by a mortgage on the premises. Should Maker use all or any part of the proceeds of the loan for a purpose other than that of purchasing the principal residence, the principal amount of the loan and all interest accrued on it shall become immediately due and payable without demand by Payee or holder of this Note or any other notice to Maker.

Presentment for payment, notice of dishonor, and protest and notice of protest are waived by Maker and Maker's personal representatives, heirs, and assigns.

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*[Signature of Maker]*

**F. OPTIONAL PROVISIONS**

## 1. Duties and Options of Mortgagee

**§ 4:36 Covenant to subordinate purchase-money mortgage to construction loan mortgage**

Provided this mortgage is not in default, mortgagee covenants that it will subordinate this mortgage to a bona fide construction loan mortgage not exceeding the principal sum of *[\$/dollar amount]*, or a larger amount if approved by mortgagee in its sole and exclusive discretion.

**§ 4:37 Surrender of mortgage on payment**

On full payment of the obligations secured, mortgagee shall surrender this mortgage and note or any other evidence of the obligation for which this mortgage is given as security, to mortgagor, or such other person as is entitled thereto, and shall execute and deliver to mortgagor or other person entitled thereto a full and sufficient satisfaction piece or assignment, as mortgagor or other person entitled thereto may request.

**NOTES TO FORM****Drafter's Notes**

For discussion and forms pertaining to payment and satisfaction of mortgages, see §§ 4:73 to 4:79.

**§ 4:38 Option to make future advances**

The foregoing conveyance is also intended to be and is a mortgage to secure payment of any and all future or additional advances made by mortgagee at its option to mortgagor, or his or her successor in title, for any purpose. All such advances are to be made within 20 years from the date of this mortgage, or within such lesser period of time as may be provided hereafter by law as a prerequisite for the sufficiency of actual notice or record notice of the option of future or additional advances as against the rights of creditors or subsequent purchasers for valuable consideration. The total amount of indebtedness secured by this mortgage may decrease or increase from time to time, but the total unpaid balance so secured at any one time shall not exceed the maximum principal amount of *[\$/dollar amount]* plus interest, and any disbursements made for the payment of

taxes, levies, or insurance on the property covered by the lien of this mortgage, with interest on those disbursements.

#### NOTES TO FORM

##### Drafter's Notes

Mortgages for future advances are specifically provided for by statute. Fla. Stat. Ann. § 697.04.

##### Research References

###### *A.L.R. Library*

Debts included in provision of mortgage purporting to cover all future and existing debts (Dragnet Clause)—modern status, 3 A.L.R. 4th 690.

###### *Legal Encyclopedias*

Fla. Jur. 2d, Future obligations secured by mortgage, Mortgages and Deeds of Trust §§ 70 to 72.

### § 4:39 Contingencies resulting in acceleration of maturity

The principal sum secured shall, at the option of the holder of this mortgage, immediately become due and payable without notice if:

- (1) Mortgagor suffers or permits any waste on the premises.
- (2) Mortgagor fails to repair or replace any buildings or improvements damaged by fire or other casualty to the satisfaction of mortgagee or fails to maintain the premises and property in a rentable and tenantable condition and state of repair.
- (3) Mortgagor assigns the rents, issues, or profits of the mortgaged premises and property or any part thereof without the written consent thereto of the holder of this mortgage.
- (4) Mortgagor fails to comply promptly with all applicable requirements of the federal, state, and municipal governments, or of any departments, officials, or bureaus thereof having jurisdiction, or uses the mortgaged premises or property in any way that violates any federal, state, or local law, ordinance, rule, regulation, or requirement, or any restrictive covenants on the use of the mortgaged premises.
- (5) Mortgagor violates any other term, covenant, provision or condition of this mortgage.
- (6) After application by any holder of this mortgage to

two or more fire insurance companies lawfully doing business in the State of Florida and issuing policies of fire insurance on buildings situated in the place where the mortgaged premises are situated, the companies to which such application has been made refuse to issue such policies.

(7) Mortgagor or any subsequent owner of the mortgaged premises makes a second mortgage or otherwise creates a lien of any nature on the mortgaged premises without the prior written consent of mortgagee.

(8) A transfer of title to the premises by sale or otherwise is made while this mortgage remains a lien thereon without mortgagee's written consent.

(9) A petition in bankruptcy, or for debtor's extension of time, or assigns for the benefit of creditors, or any other relief under the Bankruptcy Act or any other state or federal insolvency law, as now existing or as hereafter amended, is filed by mortgagor or by the then owner of the premises, or if any of such persons shall be adjudicated bankrupt, or if any petition filed against any of such persons under any provision of the Bankruptcy Act shall be approved, or if a general assignment for the benefit of creditors is made by any of such persons.

#### NOTES TO FORM

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, Provisions for acceleration for nonperformance of obligations other than payments of principal and interest, Mortgages and Deeds of Trust § 175.

#### § 4:40 Contingencies resulting in acceleration of maturity—Acceleration of prior mortgage

In the event that mortgagor defaults in any payment or condition stipulated in any prior mortgage for a period of sixty days, or in the event of any default in a prior mortgage so as to cause such prior mortgage to be accelerated and become due and payable during the continuance of this mortgage, then the entire sums less any unearned interest secured by this mortgage shall become due and payable at the option of mortgagee.

**NOTES TO FORM****Research References***Legal Encyclopedias*

Fla. Jur. 2d, Acceleration of maturity, generally, Mortgages and Deeds of Trust §§ 166 et seq.

**§ 4:41 Contingencies resulting in acceleration of maturity—Default in payment**

All makers and indorsers who now or hereafter become parties to this agreement, jointly and severally waive demand, notice of nonpayment and protest, and agree that in the event of default on the payment of any installment due under this agreement, the whole of the indebtedness shall at the option of the holder, become immediately due and payable.

**NOTES TO FORM****Drafter's Notes**

A mortgagor may be allowed to enforce both a default acceleration clause such as this and a prepayment penalty clause if the mortgagee defaults intentionally. Thus the mortgagee may not avoid the prepayment penalty by defaulting and causing an acceleration. Florida Nat. Bank of Miami v. Bankatlantic, 589 So. 2d 255 (Fla. 1991); General Mortg. Associates, Inc. v. Campolo Realty & Mortg. Corp., 678 So. 2d 431 (Fla. Dist. Ct. App. 3d Dist. 1996).

See notes following §§ 4:39, 4:40.

2. Duties and Options of Mortgagor

**§ 4:42 Prepayment—Entire principal balance and interest**

Mortgagor may, at his or her option, at any time pay the principal balance and accrued interest in full, on giving to the holder of this mortgage and of the accompanying note not less than [number] days' prior written notice by certified or registered mail of his or her intention so to do [*and by paying in addition to interest then accrued a sum equivalent to [number] months' additional interest*].

**NOTES TO FORM****Drafter's Notes**

Any note which is silent as to the right of the obligor to prepay the note in advance of the stated maturity date may be prepaid in full by the obligor or the obligor's successor in interest without penalty. Fla. Stat. Ann. § 697.06.

**Research References***A.L.R. Library*

Excess of payment for one period as applicable to subsequent period under contract or mortgage providing for periodic payments, 89 A.L.R. 3d 947.

Construction and effect as to interest due of real estate mortgage clause authorizing mortgagor to prepay principal debt, 86 A.L.R. 3d 599.

*Legal Encyclopedias*

Fla. Jur. 2d, Payment Satisfaction and Discharge, Mortgages and Deeds of Trust §§ 185 et seq.

**§ 4:43 Prepayment—Multiples less than entire balance**

Mortgagor shall have the privilege of reducing the principal indebtedness by paying portions thereof in multiples of \$[dollar amount] at any time after [specify, such as: one year] from the date hereof on giving to the holder hereof and of the accompanying note not less than [number] days' prior written notice by certified or registered mail, and interest on any portion so prepaid shall cease from the date of payment. *[No such prepayment shall be substituted for or considered on account of the periodic amortization of principal as provided above, and amortization payments shall continue to be due and payable following and irrespective of any such prepayment until the mortgage debt is paid in full].*

**§ 4:44 Prepayment—Penalty on excess prepayment**

In addition to the regular monthly installments provided for in this agreement, the debtor may, without penalty of any kind, make prepayments of the principal aggregating, in any loan year, 20 percent or less of the principal amount of this note. Debtor may also prepay greater principal amounts than the 20 percent in any loan year, on payment of 12 months interest on the amount by which the prepayments shall cause, in the loan year, an excess above the maximum free prepayments established in this clause.

**NOTES TO FORM****Drafter's Notes**

The mortgagee may not avoid prepayment penalties by defaulting to allow acceleration of the mortgage. Florida Nat. Bank of Miami v. Bankatlantic, 589 So. 2d 255 (Fla. 1991).

See Drafter's Note following § 4:42.

**§ 4:45 Mortgagor's care and use of property**

A. Mortgagor represents and warrants to Mortgagee as follows:

1. All authorizations, licenses and operating permits required to allow the improvements to be operated by the Mortgagor for the Mortgagor's use of the property have been obtained, paid for and are in full force and effect.
2. To the best of Mortgagor's knowledge, except as previously disclosed in writing to Mortgagee, the improvements and their use by Mortgagor comply with all laws, ordinances, orders, covenants, conditions and restrictions and other requirements relating to land and building design and construction, use and maintenance, that may now or hereafter pertain to or affect the property or any part of the property or the Mortgagor's use of the property, including, without limitation, planning, zoning, subdivision, environmental, air quality, flood hazard, fire safety, handicapped facilities, building, health, fire, traffic, safety, wetlands, coastal and other governmental or regulatory rules, laws, ordinances, statutes, codes and requirements applicable to the property, including permits, licenses and/or certificates that may be necessary from time to time to comply with any of the these requirements (referred to here collectively as "Requirements"). To the best of Mortgagor's knowledge, no notices of violation have been received in connection with these Requirements. Mortgagor shall at all times comply with all present or future Requirements affecting or relating to the property and/or the Mortgagor's use of the property. Mortgagor shall furnish Mortgagee, on request, reasonable evidence of continuing compliance with the Requirements if there is a material change in the improvements or in Mortgagor's use of the property after the execution of this Mortgage. Mortgagor shall not use or permit the use of the property, or any part of the property, for any illegal purpose.
3. To the best of Mortgagor's knowledge, except as previously disclosed in writing to Mortgagee, Mortgagor has complied with (and no notices of violation have been received in connection with) all requirements of all instruments and agreements affecting the property, whether or not of record, including without limitation all covenants

and agreements by and between Mortgagor and any governmental or regulatory agency pertaining to the development, use or operation of the property. Mortgagor, at its sole cost and expense, shall keep the property in good order, condition, and repair, and make all necessary structural and nonstructural, ordinary and extraordinary repairs to the property and the improvements.

4. Mortgagor shall abstain from, and not permit, the commission of waste to the property and shall not remove or alter in any substantial manner, the structure or character of any improvements without the prior written consent of Mortgagee.

5. The zoning approval for the property is not dependent upon the ownership or use of any property which is not encumbered by this Mortgage.

6. Construction of the Improvements on the property is complete other than normal interior tenant improvements in the ordinary course of leasing the property.

7. As of the date of the execution of this mortgage, the property is in good repair and condition, free of any material damage.

B. Mortgagee shall have the right, at any time and from time to time during normal business hours, and upon notice to the Mortgagor and accompanied by a representative of Mortgagor, to enter the property in order to ascertain Mortgagor's compliance with the loan documents, to examine the condition of the property, to perform an appraisal, to undertake surveying or engineering work, and to inspect premises occupied by tenants. Mortgagor shall cooperate with Mortgagee performing these inspections.

C. Mortgagor shall use, or cause to be used, the property continuously for *[specify mortgagor's intended use of the property]*, subject only to periodic tenant vacancies in the ordinary course of Mortgagor's business and interruption of use during periods of restoration due to casualty or condemnation. Mortgagor shall not use the property, or permit the use of the property, for any other use other than the above described use without the prior written consent of Mortgagee.

D. Without the prior written consent of Mortgagee, Mortgagor shall not: (i) initiate or acquiesce in a change in the zoning classification of and/or restrictive covenants affecting the property or seek any variance under existing zon-

ing ordinances; (ii) use the property, or permit the use of the property, in a manner which may cause the Mortgagor's use of the property to become a nonconforming use under applicable zoning or land use ordinances; or (iii) subject the property to restrictive covenants.

#### § 4:46 Statement of tenancies, rentals, and sale

Mortgagor, on [*number*] days' written request but not more than at [*specify, such as: yearly*] intervals, will furnish to the holder of this mortgage a written statement containing the names of all tenants occupying the premises, the terms of their respective tenancies, and the arrearages in their respective accounts, if any; and, in the event of a sale of the premises, will furnish to the holder, without prior request, a written statement setting forth the name of the purchaser, the selling price, and the terms of the sale.

#### NOTES TO FORM

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, For discussion of right of mortgagor to lease mortgaged property, generally, see Mortgages and Deeds of Trust § 95.

#### § 4:47 Mortgagor to provide monthly operating statements

Mortgagor shall maintain accurate records of Mortgagor's income and expenses in connection with the operation of the premises and shall promptly furnish to Mortgagee on or before the [*ordinal number*] day of each month monthly statements for the previous month, certified by Mortgagor, itemizing all material information with respect to the operation of the premises, including, but not limited to, sources of income, expenses, occupancy, list of tenants, gross sales of tenants, if any, on percentage lease, and balance sheets of the premises for the previous month. If a default occurs under this mortgage, and while the default continues, Mortgagor agrees to permit Mortgagee, on demand, to inspect the books and accounts of Mortgagor relating to the premises. Failure to furnish the monthly statements or permit inspection of books shall constitute a default by Mortgagor of the terms of this mortgage.

**§ 4:48 Due on sale or further encumbrance clause**

In determining whether or not to make the loan secured by this mortgage, Mortgagee examined the creditworthiness of Mortgagor, found it acceptable and relied and continues to rely upon Mortgagor's creditworthiness as the means of repayment of the loan. Mortgagee also evaluated the background and experience of Mortgagor in owning and operating property such as the premises, found it acceptable and relied and continues to rely upon Mortgagor's background and experience as the means of maintaining the value of the premises which is Mortgagee's security for the loan. Mortgagor is a business person or entity well-experienced in borrowing money and owning and operating premises such as the premises that are the subject of this mortgage, was ably represented by a licensed attorney at law in the negotiation and documentation of the loan secured by this mortgage, and Mortgagee bargained at arm's length and without duress of any kind for all of the terms and conditions of the loan, including this provision. Mortgagor recognizes that Mortgagee is entitled to keep its loan portfolio at current interest rates by either making new loans at such rates or collecting assumption fees and/or increasing the interest rate on a loan, the security for which is purchased by a party other than the original Mortgagor. Mortgagor further recognizes that any secondary or junior financing placed upon the premises:

- (a) may divert funds which would otherwise be used to pay the Note secured by this mortgage;
- (b) could result in acceleration and foreclosure by any such junior encumbrances which would force Mortgagee to take measures and incur expenses to protect its security;
- (c) would detract from the value of the premises should Mortgagee come into possession of the premises with the intention of selling same; and
- (d) impair Mortgagee's right to accept a deed in lieu of foreclosure, as a foreclosure by Mortgagee would be necessary to clear the title to the premises.

In accordance with the foregoing and for the purposes of:  
(i) protecting Mortgagee's security both of repayment by Mortgagor and of value of the premises; (ii) giving Mortgagee the full benefit of its bargain and contract with Mortgagor; (iii) allowing Mortgagee to raise the interest rate and/or col-

lect assumption fees; and (iv) keeping the premises free of subordinate financing liens, Mortgagor agrees that if this paragraph be deemed a restraint on alienation, that it is a reasonable one and that any sale, conveyance, assignment, further encumbrance or other transfer of title to the premises or any interest in the premises (whether voluntarily or by operation of law) without Mortgagee's prior written consent, which may be withheld for any reason, shall be an event of default under the terms of this mortgage. For the purpose of, and without limiting the generality of, the preceding sentence, the occurrence at any time of any of the following events shall be deemed to be an unpermitted transfer of title to the premises and therefore an event of default under the terms of this mortgage:

- (a) any sale, conveyance, assignment, or other transfer of or the grant of a security interest in, all or any part of the title to the premises;
- (b) any sale, conveyance, assignment, or other transfer of, or the grant of a security interest in, any partnership interest in Mortgagor (except such change as would occur by death); however, limited partners may transfer their interests solely for bona fide estate planning purposes as long as Mortgagor provides Mortgagee with copies of all assignment documents at least *[number of days]* days before the actual transfer takes place;
- (c) any sale, conveyance, assignment, or other transfer of, or the grant of a security interest in, any share of stock of any corporation directly or indirectly controlling Mortgagor, including but not limited to Mortgagor's general partner, except such change as would occur by death); and
- (d) any new or additional liabilities without the prior written consent of Mortgagee.

Any consent by Mortgagee, or any waiver of an event of default, under this Paragraph shall not constitute a consent to, or waiver of any right, remedy or power of Mortgagee upon a subsequent event of default under this Paragraph.

#### **§ 4:49 Waiver of statutory rights**

Mortgagor shall not apply for or avail itself of any appraisalment, valuation, redemption, stay, extension, or exemption laws, or any so-called "moratorium laws," now

existing or subsequently enacted, in order to prevent or hinder the enforcement or foreclosure of this mortgage, and mortgagor now waives the benefit of those laws. Mortgagor, for itself and all who may claim through or under it, waives any and all rights to have the property and estates comprising the property marshaled upon any foreclosure of the lien of this mortgage, and agrees that any court having jurisdiction to foreclose such lien may order the property sold in its entirety. Mortgagor further waives any and all rights of redemption from foreclosure and from sale under any order or decree of foreclosure of the lien created by this mortgage, for itself and on behalf of:

- (i) any trust estate of which the premises are a part;
- (ii) all beneficially interested persons;
- (iii) each and every person acquiring any interest in the property or title to the premises subsequent to the date of this mortgage; and
- (iv) all other persons to the extent permitted by the provisions of laws of the State in which the premises are located.

**§ 4:50 Covenant for notice of litigation affecting mortgaged property**

Mortgagor shall advise mortgagee in writing within *[number]* days after the service on him or her of any summons or other process or notice issued in any action, suit, proceeding, or matter affecting, or in which any judgment, decree, order, or determination may affect or result in any lien or charge upon, the premises herein mortgaged.

**§ 4:51 Environmental and hazardous materials clause**

Mortgagor shall keep and maintain the property in compliance with, and shall not cause or permit the property to be in violation of any federal, state or local laws, regulations, guidelines, codes and ordinances relating to zoning, land use, health, asbestos usage, industrial hygiene or environmental conditions in, on, under or surrounding the property including, but not limited to, soil and ground water conditions. Mortgagor shall not use, generate, manufacture, store, release or dispose of in, on, under or surrounding the property or transport to or from the property any flammable

explosives, radioactive materials, asbestos, hazardous wastes, toxic substances or related materials, including without limitation any substances defined as or included in the definition of "asbestos" or "asbestos products," "radon" or "radon gas," "hazardous substances," "hazardous wastes," "hazardous materials," "wastes," "solid waste," "contaminant" or "toxic substances" under any applicable federal, state or local laws, regulations, guidelines, codes and ordinances (collectively referred to below as "hazardous materials"). Mortgagor represents and warrants that, to the best of mortgagor's knowledge, no hazardous materials have been used in the construction of the property, or generated, stored, buried, handled, released or disposed of on, in, under or surrounding the property or a location that will adversely affect the property and there are no facts, conditions or circumstances which could result in an investigation or inquiry by any federal, state or local governmental authority with regard to the above. Mortgagor further warrants, covenants and agrees not to allow the property to be used as a site for generating, manufacturing, storing, releasing or disposing of hazardous materials (without the prior written consent of mortgagee and unless all required permits, bonds and insurance have been obtained and are maintained).

Mortgagor further warrants, covenants and agrees to provide mortgagee with prompt written notice of:

- (1) any proposed or actual investigation or inquiry of mortgagor or the property with regard to hazardous materials by any federal, state or local governmental authority;
- (2) mortgagor's obtaining knowledge of any discovery of or release of any hazardous material in, on, under or from the property or any other site owned, occupied or operated by mortgagor or by any person for whose conduct mortgagor is responsible or whose liability may result in a lien on the property;
- (3) mortgagor's receipt of any notice to that effect regarding (1) or (2) or notice to obtain a permit from any federal, state or local governmental authority; and
- (4) mortgagor's obtaining knowledge of the incurring of any expense or loss by the governmental authority in connection with the assessment, containment or removal of any hazardous materials for which expense or loss mortgagor may be liable or for which expense a lien may be imposed on the property.

Mortgagor warrants, covenants and agrees at all times to comply fully and in a timely manner with, and to cause all employees, agents, contractors and subcontractors of mortgagor and any other persons occupying or present on the property to so comply with, all applicable federal, state and local laws, regulations, guidelines, codes and ordinances regarding and hazardous materials.

Mortgagor warrants, covenants and agrees to indemnify and hold mortgagee harmless from and against, and immediately pay, any and all claims, losses, damages, liabilities, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, remedial action requirements, enforcement actions of any kind, and all costs and expenses incurred in connection therewith (including but not limited to expenses and attorney's fees and legal assistant's fees including fees and expenses in any appellate proceeding), arising directly or indirectly, in whole or in part, from any past, present or future failure of mortgagor, its employees, agents, contractors, subcontractors or other such persons to comply with any laws, regulations, guidelines, codes or ordinances or the provisions of this paragraph. If mortgagee incurs any losses, damages, claims, costs, fees, penalties, charges, assessments, taxes, fines or expenses, including reasonable attorney's fees and legal assistant's fees, in connection with detection of, monitoring of, cleaning up, removing, disposal of or otherwise eliminating any hazardous materials from the property, the losses, damages, claims, costs, fees, penalties, charges, assessments, taxes, fines or expenses, including reasonable attorney's fees and legal assistant's fees, shall constitute remedial advances by mortgagee which shall be secured by the lien of this mortgage. The provisions of this paragraph will survive the satisfaction or foreclosure of this mortgage and any deed in lieu of foreclosure delivered to mortgagee or mortgagor.

**§ 4:52 Environmental site assessment**

Mortgagee shall have the right, at any time and from time to time, to undertake an environmental site assessment on the property, including any testing that Mortgagee may determine, in its sole discretion, is necessary or desirable to ascertain the environmental condition of the property and the compliance of the property with requirements of environmental laws. Mortgagor shall cooperate fully with Mortgagee

and its consultants performing such assessments and tests. If Mortgagee undertakes such assessments because Mortgagee reasonably believes contamination has occurred, or if the assessment reveals contamination not previously known to Mortgagee, the expense of such assessment shall be paid by the Mortgagor. Otherwise, any such assessment shall be at Mortgagee's expense.

**§ 4:53 Environmental indemnity**

As between Mortgagor and Mortgagee, all risk of loss associated with noncompliance with environmental laws, or with the presence of any hazardous material at, on, within, contiguous to or otherwise affecting the property, shall lie solely with Mortgagor. Accordingly, Mortgagor shall bear all risks and costs associated with any loss (including any loss in value attributable to hazardous materials), damage or liability therefrom, including all costs of removal of hazardous materials or other remediation required by Mortgagee or by law. Mortgagor shall indemnify, defend and hold Mortgagee harmless from and against all loss, liabilities, damages, claims, costs and expenses arising out of or associated, in any way, with the non-compliance with environmental laws, or the existence of hazardous materials in, on, or about the property, or a breach of any representation, warranty or covenant contained in *[mortgage clause relating to compliance with environmental laws]* of this mortgage, whether based in contract, tort, implied or express warranty, strict liability, criminal or civil statute or common law, including those arising from the negligence of Mortgagee; however, Mortgagor shall not be liable under such indemnification to the extent such loss, liability, damage, claim, cost, or expense results solely from Mortgagee's gross negligence or willful misconduct. Mortgagor's obligations under this paragraph shall arise upon the discovery of the presence of any hazardous material, whether or not any governmental authority has taken or threatened any action in connection with the presence of any hazardous material, and whether or not the existence of any such hazardous material or potential liability on account of any such hazardous material is disclosed in any site assessment and shall continue notwithstanding the repayment of the note or any transfer or sale of any right, title and interest in the property (by foreclosure, deed in lieu of foreclosure or otherwise). *[If applicable: On*

*the same date as the execution of this mortgage, Mortgagor and other persons or entities shall execute and deliver a certain Environmental Indemnity Agreement in favor of the Mortgagee incorporating the environmental indemnities set forth here as well as additional provisions and requirements with respect to environmental matters.]*

### 3. Other Provisions

#### § 4:54 Balloon mortgage legend

THIS IS A BALLOON MORTGAGE AND THE FINAL PRINCIPAL PAYMENT OR THE PRINCIPAL BALANCE DUE ON MATURITY IS *[\$dollar amount]*, TOGETHER WITH ACCRUED INTEREST, IF ANY, AND ALL ADVANCEMENTS MADE BY THE MORTGAGEE UNDER THE TERMS OF THIS MORTGAGE.

#### NOTES TO FORM

##### Drafter's Notes

Requirements as to when this legend must be used and how it must be displayed are set forth in Fla. Stat. Ann. § 697.05(2)(a)1.

See § 4:11.

#### § 4:55 Balloon mortgage legend—Variable, adjustable, or renegotiable rate mortgage

THIS IS A BALLOON MORTGAGE SECURING A *[VARIABLE/ADJUSTABLE/RENEGOTIABLE]* RATE OBLIGATION. ASSUMING THAT THE INITIAL RATE OF INTEREST WERE TO APPLY FOR THE ENTIRE TERM OF THE MORTGAGE, THE FINAL PRINCIPAL PAYMENT OR THE PRINCIPAL BALANCE DUE ON MATURITY WOULD BE APPROXIMATELY *[\$dollar amount]*, TOGETHER WITH ACCRUED INTEREST, IF ANY, AND ALL ADVANCEMENTS MADE BY THE MORTGAGEE UNDER THE TERMS OF THIS MORTGAGE. THE ACTUAL BALANCE DUE ON MATURITY MAY VARY DEPENDING ON CHANGES IN THE RATE OF INTEREST.

#### NOTES TO FORM

##### Drafter's Notes

Requirements as to when this legend must be used and how it must be displayed are set forth in Fla. Stat. Ann. § 697.05(2)(a)2c.

#### § 4:56 Release upon payment of obligation

Upon payment of all sums secured by this mortgage,

mortgagee shall release the security of this mortgage without charge to mortgagor. Mortgagor, however, shall pay any costs for recording such release.

#### § 4:57 Prepayment—Without penalty

Mortgagor may at any time prepay, without having to pay any premium or penalty on account of such prepayment, the whole or any part of the principal indebtedness secured by this mortgage, with accrued interest, on [number] days' prior written notice by certified or registered mail to mortgagee of mortgagor's intention to do so.

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 4:42.

#### § 4:58 Prepayment—With penalty

Mortgagor may at any time pay the principal balance and accrued interest in full, thereby satisfying and discharging the lien of this mortgage and the indebtedness secured thereby, on giving to the mortgagee not less than [number] days' prior written notice by certified or registered mail of mortgagor's intention to do so, and [*state prepayment penalty, such as: by paying in addition to interest then accrued a sum equivalent to [number] months' additional interest, or as the case may be.*]

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 4:42.

#### § 4:59 Agreements with respect to first mortgage in wraparound mortgage

The mortgaged property is subject to a certain mortgage, referred to below as the "first mortgage," held by [name of first mortgagee], referred to below as "first mortgagee," having an unpaid principal balance as of [date], of \$[dollar amount], payable as follows: [specify].

With respect to the first mortgage, mortgagor and wrap-around mortgagee agree as follows:

1. There exists no default or any event that would consti-

tute a default under the first mortgage, and the information set forth above with respect to the first mortgage is accurate in every respect.

2. Mortgagor will pay directly to mortgagee, its successors and assigns, the installments of principal and interest required by the first mortgage in accordance with the terms of the note secured, and will not make any payment directly to first mortgagee or request any release, partial release, amendment, or other modification of the first mortgage without the prior written consent of wraparound mortgagee, its successors and assigns.

3. Mortgagor will do all things necessary and proper to advise first mortgagee that payments of principal and interest and other items required by the first mortgage will be furnished by wraparound mortgagee, its successors and assigns, and that copies of all notices and correspondence concerning the first mortgage be directed to wraparound mortgagee.

4. Mortgagor will render such performance to wraparound mortgagee as may be required of mortgagor by the terms of the first mortgage.

5. Mortgagor will not exercise any right or privilege of prepayment of principal or interest under the first mortgage, and mortgagor will not enter into any agreement with first mortgagee modifying or amending any provisions of the first mortgage without the prior written consent of wraparound mortgagee.

6. If an event of default occurs hereunder or under the first mortgage, wraparound mortgagee at its option may make any payment or perform any act required under the first mortgage, in any form and manner deemed expedient by wraparound mortgagee, and may make full or partial payments of principal or interest on the first mortgage, and purchase, discharge, compromise, or settle the first mortgage. In the event wraparound mortgagee makes any such payments to first mortgagee, wraparound mortgagee shall be subrogated to the rights of first mortgagee against mortgagor and the property that is subject to the first mortgage.

7. If for any reason other than wraparound mortgagee's failure to make payments of installments of principal or interest on the first mortgage, the indebtedness secured by the first mortgage is accelerated or the mortgaged property or any part thereof is sold, or attempted to be sold, pursuant

to such first mortgage, or any remedial action or proceeding is taken or instituted in respect of the mortgaged property or any part thereof under the first mortgage, mortgagor will indemnify wraparound mortgagee against any loss, cost, or expense incurred by wraparound mortgagee, including reasonable attorney's fees: (a) in contesting any such action taken or instituted or in attempting to reinstate such first mortgage; or (b) incurred by wraparound mortgagee on account of the acceleration of the first mortgage, the sale of the mortgaged property pursuant thereto or wraparound mortgagee's purchase or payment of the first mortgage.

8. In consideration of the execution and delivery of the note secured by this mortgage, wraparound mortgagee agrees to pay the installments of principal and interest as the same become due under the first mortgage, but only from, and to the extent of, the payments of principal and interest received by wraparound mortgagee on the note secured. The foregoing obligation shall in no event include in respect to the first mortgage any penalty or premium, or any amounts required to be paid in addition to principal or interest or any installments of principal or interest which become due by acceleration, except any such penalty, premium, or amounts required to be paid as a direct result of wraparound mortgagee's failure to perform its obligations hereunder.

9. Wraparound mortgagee will, at the time it makes each payment to first mortgagee, send to mortgagor an advice that each such payment has been made.

10. Notwithstanding any other provisions in this mortgage, if, pursuant to the first mortgage, insurance proceeds in respect of any damage or destruction or any award or payment applicable to a taking by eminent domain are applied against the note secured by the first mortgage, wraparound mortgagee may declare the note secured due and payable at any time thereafter unless the mortgaged property remaining after any such taking or damage or destruction is sufficient in wraparound mortgagee's sole judgment to adequately secure the payment of the note secured.

11. The references contained in this mortgage to the obligations of mortgagor or wraparound mortgagee to pay any sum owing on the first mortgage shall not constitute an assumption of personal liability for any such payment and shall not in any way modify the obligations of mortgagor to first mortgagee beyond the obligations of mortgagor under any existing agreement with first mortgagee.

**NOTES TO FORM****Drafter's Notes**

The wraparound mortgage is a junior mortgage that is ordinarily made when mortgaged property will support additional financing, and the mortgagor does not want to prepay a favorable existing mortgage but needs additional cash, or where the existing mortgage precludes prepayment or contains an excessive prepayment penalty. In such a mortgage, the wraparound mortgagee charges interest on the entire amount of the wraparound loan and agrees to make the principal and interest payments on the existing prior mortgage as he collects principal and interest payments from the wraparound mortgagor.

The wraparound mortgage should always specify that the wrap-around mortgagee will be excluded from any of the terms or conditions of the prior mortgage, and that the wraparound mortgagee's obligation to pay the prior mortgage is limited to funds received from the wraparound mortgagor.

**Tax Notes**

The original position of the I.R.S. was that the buyer nevertheless took the property subject to the indebtedness, even if title had not passed and even if the seller remained liable for payment on the wrapped indebtedness. The Tax Court disagreed with that position and the Service acquiesced. See *Professional Equities, Inc. v. Commissioner of Internal Revenue*, 89 T.C. 165, 1987 WL 42463 (1987), recommendation regarding acquiescence, AOD-1988-23, 1988 WL 570759 (I.R.S. AOD 1988) and acq., 1988-2 C.B. 1. The issue is normally important only if the contract is not fulfilled and the property returns to the seller. In that situation the transaction is taxed under the installment sale provisions. The seller is treated as if he or she had not been relieved of the mortgage obligation.

Under a wraparound mortgage, the buyer does not assume—and purportedly does not take—the property subject to the mortgage already on it. (That debt is commonly called the “wrapped indebtedness.”) The buyer issues an installment obligation to the seller with the wrapped indebtedness included in the amount and seller uses the payments received from the buyer to service the wrapped indebtedness. Title to the property typically remains with the seller. See Mertens Law of Federal Income Taxation Ch 15.

**Research References***A.L.R. Library*

Validity and effect of “wraparound” mortgages whereby purchaser incorporates into agreed payments to grantor latter's obligation on initial mortgage, 36 A.L.R. 4th 144.

*Law Reviews and Other Periodicals*

Zumpano and Morrison, Is the Wrap Back? Renewed Interest in the Wraparound Mortgage in Installment Sales, 18 Real Estate L.J. 343 (1990).

**§ 4:60 Consent to subordinate mortgage**

[Name of first mortgagee], “First Mortgagee,” is the owner

and holder of record of a loan in the amount of *[\$/dollar amount]*, “Loan,” secured by a (consolidated) first mortgage, “Mortgage,” more particularly described in Exhibit “A,” encumbering premises located in *[city]*, County of *[county]* and State of Florida, commonly known as *[name of premises]*, “Premises.”

*[Name of borrower]*, “Borrower,” has requested that First Mortgagee consent to Borrower further encumbering the Premises with a Second Mortgage, as defined below, notwithstanding the express limitation on further encumbrances contained in the Mortgage.

Subject to the terms and conditions of this consent, First Mortgagee consents to Borrower encumbering the Premises with a second mortgage, “Second Mortgage,” on the terms specified below to an institutional lender, “Second Mortgagee,” provided:

- (a) the Second Mortgage and all rights of the Second Mortgagee are subordinate to the Mortgage, the rights of First Mortgagee and its successors and assigns and all advances permitted;
- (b) the Second Mortgage shall at all times be held by an Institutional Mortgagee, as defined below, except as otherwise consented to by First Mortgagee;
- (c) the Second Mortgage shall be without recourse to the Borrower; and
- (d) no default exists under the Mortgage or any other documents evidencing or securing the Loan referred to as the “Loan Documents.”

Second Mortgagee: *[name of second mortgagee]*

Original Principal Amount: *[\$/dollar amount]*

Interest Rate: *[percentage]%* (currently payable in full)

Annual Debt Service: *[\$/dollar amount]*, applied first to interest at the above rate

Maturity: *[date]*

This consent is limited to the Second Mortgage described above and shall not be deemed to:

- (a) be a consent to any future encumbrances or to any modification, renewal, extension, or increase of the Second Mortgage;
- (b) be a waiver of the limitation on further encumbrances contained in the Mortgage;

- (c) be a consent to or waiver of any other term or condition of the Mortgage or of any of the other Loan Documents; or
- (d) prejudice any right or rights which First Mortgagee may now or in the future have under or in connection with the Mortgage or any of the other Loan Documents.

This consent shall not become effective unless and until each of the following conditions have been satisfied:

- (a) Prior to the execution of the Second Mortgage, the proposed form of the Second Mortgage and all other documents executed in connection with the Second Mortgage shall be submitted to, and approved by, First Mortgagee and its counsel, which approval shall not unreasonably be withheld; and
- (b) The Second Mortgagee shall, at the option of the First Mortgagee, incorporate into the Second Mortgage, or shall enter into an intercreditor agreement with First Mortgagee (in recordable form) which contains, among other things, the express first mortgagee protection provisions set forth in Exhibit "B," which provisions shall be binding on and inure to the benefit of the successors and assigns of the Second Mortgagee and First Mortgagee.

The term "Institutional Mortgagee" shall mean any of the following entities holding the Second Mortgage for its own account, and not for the account of any other entity:

- (a) a federal or state chartered commercial bank or trust company or federal or state chartered savings bank or savings and loan association or insurance company organized and existing under the laws of the United States, or any state;
- (b) a foreign bank or a branch office of a foreign bank;
- (c) a foreign pension fund not subject to ERISA;
- (d) a foundation, college, or university; or
- (e) a nationally recognized commercial credit corporation.

Any such Institutional Mortgagee shall:

- (a) have a net worth in excess of \$200,000,000;
- (b) not be a parent, subsidiary, or affiliate of or an entity owned or controlled, in whole or in part, directly or indirectly, by the Borrower;
- (c) be experienced in making commercial real estate loans on property of the size and character of the Premises; and

(d) agree in writing to be subject to all of the terms, conditions, and obligations under the Second Mortgage and all other documents executed in connection with the Second Mortgage.

Except as expressly modified, all of the terms and provisions of the Mortgage shall continue unchanged and remain in full force and effect.

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[Name of First Mortgagee]

By: \_\_\_\_\_  
[Name of authorized person]

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[Title of authorized person]

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[Name of Second Mortgagee]

By: \_\_\_\_\_  
[Name of authorized individual]

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[Title of authorized individual]

**§ 4:61 Clause in relocation mortgage—Setting out purpose of loan**

Mortgagor is employed by Mortgagee. Mortgagor has recently relocated from [*original address of mortgagor*] to [*new address of mortgagor*] at Mortgagee's request to assume the position of Mortgagee's [*title of new position*]. Mortgagor has purchased a new principal residence for the sum of *[\$/dollar amount]*. Mortgagee has loaned the sum of *[\$/dollar amount]* to Mortgagor toward the purchase price of the residence at interest that is below the market rate in compliance with the provisions of 26 U.S.C.A. § 7872 and 26 C.F.R. § 1.7872-5T(b) thereto.

**§ 4:62 Clause in mortgage—Use of proceeds**

Should Mortgagor use all or any part of the proceeds of

the loan secured by this Mortgage for any purpose other than to purchase the mortgaged premises, the whole of the loan secured by this Mortgage together with all interest accrued on it shall become immediately due and payable without any demand or other notice by Mortgagee to Mortgagor and Mortgagee may commence foreclosure of the mortgaged premises without delay.

**§ 4:63 Clause in mortgage—Sale or other conveyance of mortgaged property**

If Mortgagor sells or otherwise conveys all or any part of the mortgaged premises to another, the unpaid principal amount of the loan together with all interest accrued on it shall be immediately due and payable without notice to Mortgagor and Mortgagee may commence foreclosure of the mortgaged premises without delay.

**§ 4:64 Clause in mortgage—Termination of employment**

If Mortgagor's employment by Mortgagee ends for any reason, *[the unpaid principal amount of the loan together with all interest accrued on it shall become immediately due and payable without notice to Mortgagor and Mortgagee may commence foreclosure of the mortgaged premises without delay/ the interest rate provided in the note secured by this Mortgage shall increase immediately and without notice to Mortgagor to the Applicable Federal Rate, as that term is defined by 26 U.S.C.A. § 1274(d), in effect at that time].*

**§ 4:65 Clause in relocation term mortgage—Sale or other conveyance of mortgaged property**

*Sale or Other Conveyance of Property.* If Borrower sells or otherwise conveys all or any part of Residence to a third party, the unpaid principal amount of the loan together with all interest accrued on it shall be immediately due and payable without notice from Lender to Borrower, and Lender may use all available means, including foreclosure, to recover the loan and all accrued interest.

**NOTES TO FORM**

**Drafter's Notes**

See §§ 20:165 and 20:166 for related forms.

**§ 4:66 Clause in relocation term mortgage—Loan agreement regarding termination of employment**

*Termination of Employment.* If Borrower's employment by Lender ends for any reason, the unpaid principal amount of the loan together with all interest accrued on it shall become immediately due and payable without notice from Lender to Borrower, and Lender may use all available means, including foreclosure of the above-mentioned mortgage, to recover the loan and all accrued interest.

*[Alternative Paragraph]*

*Termination of Employment.* If Borrower's employment by Lender ends for any reason, the interest rate set out above shall increase immediately and without notice from Lender to Borrower to the Applicable Federal Rate, as that term is defined by 26 U.S.C.A. § 1274(d), in effect at that time.

**NOTES TO FORM****Drafter's Notes**

See §§ 20:165 and 20:166 for related forms.

**§ 4:67 Exemption of mortgagor from personal liability**

Nothing contained in this mortgage, or in the note setting out the obligations secured, shall obligate mortgagor further than to bind the right, title, and interest of mortgagor in the mortgaged premises, and on default hereunder no deficiency or other personal judgment shall be demanded or entered against mortgagor.

**NOTES TO FORM****Research References***Legal Encyclopedias*

Fla. Jur. 2d, Personal liability of the obligor to the mortgagee is not an essential element of a mortgage. See Mortgages and Deeds of Trust § 69.

**§ 4:68 Identification of first mortgage in second mortgage**

This is a second mortgage and is inferior to a first mortgage executed [*this day/on [date]*] by mortgagor herein

in favor of [*name of first mortgagee*], of [*address of first mortgagee*], and recorded on [*date*], at [*place of recording*] in the principal amount of [\$*dollar amount*].

#### NOTES TO FORM

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, As a general rule, mortgages rank in the priority of their acquisition, the first in order of time standing first in order of rank. Mortgages and Deeds of Trust §§ 130 et seq.

#### § 4:69 Assignment of rents and profits

Mortgagor assigns to mortgagee the rents, issues, and profits of the premises as further security for the payment of the obligation secured, and grants to mortgagee the right to enter upon the premises for the purpose of collecting the same, and to let the premises or any part thereof, and to apply the moneys received therefrom, after payment of all necessary charges and expenses, to the obligations secured by this mortgage, on default under any of the covenants, conditions, or agreements contained in this mortgage. Mortgagor further promises and agrees, in the event of any such default, to pay to mortgagee, or to any receiver appointed to collect the rents, issues, and profits of the premises, the fair and reasonable rental value for the use and occupation of the same or of such part thereof as may be in the possession of mortgagor; and on default in payment of such rental, to vacate and surrender possession of the premises, or that portion thereof occupied by mortgagor, to mortgagee or the receiver theretofore appointed.

#### NOTES TO FORM

##### Drafter's Notes

As a general rule, the mortgagor is entitled to the earnings, rents, and profits of the mortgaged property. *Pasco v. Gamble*, 15 Fla. 562, 1876 WL 2506 (1876).

A mortgage does not operate per se as a pledge of the rents and profits. *Carolina Portland Cement Co. v. Baumgartner*, 99 Fla. 987, 128 So. 241 (1930).

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, Right to rents and profits of mortgaged property, Mortgages and Deeds of Trust §§ 98 et seq.

**§ 4:70 Assignment of rents and profits—With covenants and representations regarding leases**

*Assignment of Rents and Revenues.* To further secure the secured obligations, mortgagor now sells, assigns and transfers to mortgagee:

- (a) all rental and tenancy agreements now or subsequently affecting the property (“leases”);
- (b) all rents, common area charges, tax payments, insurance premiums and any other payments due to landlord as a consequence of the use of the property, now due or which may subsequently become due under or by virtue of any leases;
- (c) all income; and
- (d) any and all future leases, whether written or oral, with all security for them, including all guaranties of them, now or subsequently affecting the possession, use and enjoyment of the property (collectively “rents and revenues”).

Mortgagor now appoints irrevocably mortgagee its true and lawful attorney in its name and stead, with or without taking possession of the property, to rent, lease or let any improvements located on the property on the occurrence of, and during the continuation of, a default, and on the terms that mortgagee shall determine, and to collect all rents and revenues arising from or accruing at any time after, and all now due or that may subsequently become due under all of the leases, or other agreements, written or verbal, or which may subsequently exist on the property, on the condition that mortgagee grants to mortgagor a license to collect and retain the rents and revenues prior to the occurrence of any event of default under the loan documents. Mortgagor expressly covenants to apply the rents and revenues received, after application for operating expenses permitted under this mortgage, to payment of the secured obligations as and when the payments become due and in compliance with the loan documents. Such license shall be revocable by mortgagee on written notice to mortgagor at any time after a default under the loan documents, and immediately on any such revocation, mortgagee shall be entitled to receive, and mortgagor shall deliver to mortgagee, all rents and revenues previously collected by mortgagor that remain in mortgagor’s

possession or control and all leases, and other such agreements. In addition (and not as an election of remedies), at any time after a default, mortgagee may exercise all rights permitted under Florida Statutes, § 697.07, including applying for a court order requiring mortgagor to deposit all rents in the court registry, and mortgagor consents to the entry of such an order on the sworn ex parte motion of mortgagee that a default has occurred under this mortgage. Mortgagor intends to create and grant, and mortgagee intends to create and receive, a present and absolute assignment of all the leases, similar agreements, rents and revenues now due or which may become due, but it is agreed that mortgagee's right to collect the rents and revenues is conditioned on the existence of a default under the loan documents. Failure of mortgagee at any time or from time to time to enforce its rights under this [*specify article*] shall not in any manner prevent its subsequent enforcement, and mortgagee is not obligated to collect anything under this agreement, but is accountable only for sums collected. Nothing contained here shall be construed as constituting mortgagee a mortgagee in possession in the absence of the taking of actual possession of the property by mortgagee pursuant to [*list section regarding mortgagee's right of possession in case of default*] of this mortgage. In the exercise of the powers here granted to mortgagee, no liability shall be asserted or enforced against mortgagee, all such liability being expressly waived and released by mortgagor.

*Covenants Regarding Leases.* Mortgagor agrees:

- (a) not to execute any leases that affect the property except on the form approved by mortgagee, without the prior written consent of mortgagee;
- (b) not to execute any other assignments of the leases or any interest in the leases or any of the rents and revenues under the leases;
- (c) that notwithstanding any variation of the terms of mortgage or any extension of time for payment the mortgage or any release of part or parts of the property, the leases, rents and revenues here assigned, insofar as they relate to the unreleased property, shall continue as additional security in accordance with the terms of this mortgage;
- (d) to hold and account for all security deposits in the manner provided for under any state or local laws or ordi-

- nances applicable to the property or under the loan documents; and
- (e) to perform all of mortgagor's covenants and agreements under the leases and not to suffer or permit to occur any release of liability of the lessees except in the exercise of its business judgment as a prudent landlord.

*Representations Regarding Leases.* Mortgagor represents and warrants:

- (a) that the leases, if any, are in full force and effect;
- (b) that the leases and the rents and revenues under this mortgage have not been previously sold, assigned, transferred, or set over by mortgagor or by any person or persons whatsoever;
- (c) that no material default exists on the part of the lessees under the mortgage, or mortgagor as lessor;
- (d) that the payment of none of the rents have been or, except to the extent otherwise prudent under customary commercial standards exercised in the ordinary course of business will be waived, released, reduced, discounted or otherwise discharged or compromised by mortgagor directly or indirectly by assuming any lessee's obligations with respect to other premises;
- (e) mortgagor has good right to sell, assign, transfer, and set over the same and to grant to and confer on mortgagee the rights, interests, powers, and authorities granted and conferred here.

*Further Assignments.* Mortgagor shall give mortgagee at any time on demand any further or additional forms of assignment of transfer of rents and revenues, leases, and security as may be reasonably requested by mortgagee, and shall deliver to mortgagee executed copies of all those leases and security.

### III. RELEASES, TRANSFERS, AND EXTENSIONS

#### A. RELEASES

##### § 4:73 Form drafting principles

Since a valid debt or other obligation to be secured is essential to the existence of a mortgage, the mortgage itself being incidental to the obligation, it follows that a mortgage

lien is extinguished or discharged by payment of the mortgage debt,<sup>1</sup> or a release or cancellation of such debt.<sup>2</sup>

Whenever the amount of money due on any mortgage is fully paid, the mortgagee or assignee must, within 60 days thereafter, cancel the same in the manner provided by law.<sup>3</sup> Whenever the amount of money due on any mortgage, lien, or judgment is fully paid to the person or party entitled to the payment thereof, the mortgagee, creditor, or assignee to whom such permit has been made, must execute in writing an instrument acknowledging satisfaction of such mortgage, and have the same acknowledged, or proven, and duly entered of record in the book provided by law for such purposes in the proper county.<sup>4</sup> Within 60 days of the date of receipt of the full payment of the mortgage, lien, or judgment, the person required to acknowledge satisfaction of the mortgage or lien must send or cause to be sent the recorded satisfaction to the person who has made the full payment.<sup>5</sup>

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**[Section 4:73]**

<sup>1</sup>Terwilligar v. Ballard, 64 Fla. 158, 59 So. 244 (1912).

This state follows the majority view that a tender of payment of a mortgage debt after maturity and before foreclosure releases the mortgage. Holman v. Hollis, 94 Fla. 614, 114 So. 254 (1927).

**Legal Encyclopedias:** Payment of debt as extinguishing mortgage, Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 185 et seq.

Effect of tender of payment on mortgage debt, Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 196 et seq.

<sup>2</sup>A.L.R. Library: Construction of provision in real-estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made, 41 A.L.R. 3d 7.

**Legal Encyclopedias:** Release or cancellation; Generally, Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 206 et seq.

<sup>3</sup>Fla. Stat. Ann. § 701.03.

**Legal Encyclopedias:** Release or cancellation of mortgage, Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 206 et seq.

<sup>4</sup>Fla. Stat. Ann. § 701.04(1). As to mortgage release certificates by title insurers, see § 701.041, Fla. Stat.

<sup>5</sup>Fla. Stat. Ann. § 701.04.

In a civil case arising out of the provisions of Fla. Stat. Ann. § 701.04, the prevailing party is entitled to attorney's fees and costs. Fla. Stat. Ann. § 701.04(1).

When a writ of execution has been issued and the judgment finally paid, the payee is responsible for requesting from the sheriff a return of the writ, as fully satisfied. Fla. Stat. Ann. § 701.04(2).

**§ 4:74 Checklist—Drafting release of mortgage or deed of trust**

1. Identification of mortgage or trust deed.
  - a. Title of document.
  - b. Parties.
  - c. Date.
  - d. Recording information.
    - (1) Filing office.
    - (2) County and state.
    - (3) Recording number.
    - (4) Book and page number.
    - (5) Date recorded.
2. Release of mortgage or trust deed.
  - a. Debt satisfied.
  - b. Cancellation of note or obligation.
  - c. Partial release.
    - (1) Property covered.
    - (2) Debt and lien remaining.
  - d. Reconveyance of property under trust deed.
3. Identification of party giving release.
  - a. Name and address.
  - b. Original mortgagee.
  - c. Assignee.
  - d. Note holder.
4. Formalities.
  - a. Date.
  - b. Signature(s).
  - c. Title.
  - d. Attestation.
  - e. Acknowledgment.
  - f. Name and address of person preparing release.

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**A.L.R. Library:** Damages recoverable for real-estate mortgagee's refusal to discharge mortgage or give partial release therefrom, 8 A.L.R. 4th 853.

**NOTES****Drafter's Notes**

It is recommended that an agreement for the release, extension, or transfer of a mortgage should be signed by both parties to the agreement and that it be recorded.

**Research References***Legal Encyclopedias*

Fla. Jur. 2d, For discussion of extension of time for payment of indebtedness secured by mortgage, see Mortgages and Deeds of Trust §§ 164 et seq.; For discussion of release or cancellation of mortgage, see Mortgages and Deeds of Trust §§ 206 et seq.; For discussion of transfers of interest of mortgagor or mortgagee, see Mortgages and Deeds of Trust §§ 406 et seq.

**§ 4:75 Satisfaction of mortgage**

The State of Florida  
County of \_\_\_\_\_ }

**SATISFACTION OF MORTGAGE**

I, the undersigned owner of a mortgage, and of the indebtedness secured by it, made by [name of mortgagor] to [name of mortgagee] for \$[dollar amount] on [date], and recorded in Book [number], Page [number] of the Public Records of the above county, do acknowledge that the above-described indebtedness has been paid, and by this instrument do cancel the above-described mortgage.

Dated: [date].

---

[Signature of mortgagee]

[Acknowledgment]

**NOTES TO FORM****Drafter's Notes**

For forms of acknowledgments, see Conveyances (Ch 2).

**§ 4:76 Satisfaction of mortgage—Statutory form****SATISFACTION OF MORTGAGE**

This document is signed by [name of mortgagee] (“Mort-

gagee”), who is the owner and holder of, and has not transferred, assigned, pledged, or otherwise encumbered any interest in, the following described mortgage (“Mortgage”):

Mortgage dated [date], from [name of mortgagor] (“Mortgagor”) to [name of mortgagee] securing a promissory note (“Note”) in the original principal amount of \$[dollar amount] which mortgage is recorded in Official Records Book [number], Page [number], Public Records of [county] County, Florida, encumbering certain property situated in [county] County, Florida, as more particularly described in the Mortgage (“Property”); and

That Mortgagee acknowledges full payment and satisfaction of the Note and Mortgage, does surrender the Note and Mortgage as canceled, releases the Property from the lien of the Mortgage, and directs the Clerk of the Circuit Court in and for [county] County to cancel the same of record.

IN WITNESS, the Mortgagee has executed these presents [date].

Signed, Sealed, and Delivered in Presence of:

---

[Signatures]

SWORN TO and subscribed before me this [date].

---

[Signature of notary public]  
Notary Public

My commission expires: \_\_\_\_\_

#### NOTES TO FORM

##### Drafter's Notes

This form is based on the form approved by the Supreme Court of Florida published at The Florida Bar re Approval of Forms Pursuant to Rule 10-1.1(b) of the Rules Regulating the Florida Bar, 591 So. 2d 594, 606 (Fla. 1991).

#### § 4:77 Satisfaction of mortgage—By corporation

#### SATISFACTION OF MORTGAGE BY CORPORATION

[Name of corporation], a Corporation organized and exist-

ing under the laws of the State of [state], and having its principal place of business at [address of corporation], owner and holder of the note evidencing the debt secured by mortgage executed by [name of mortgagor] to [name of mortgagee] dated [date], and recorded on [date] in Official Records Book [number] at page [number] of the Public Records of [county] County, Florida, for value received, does release in full from the lien and effect of said mortgage the following real property therein described, to wit: [legal description of property].

[If mortgage was assigned, insert here recording data re: assignment.]

In Witness, these presents have been duly executed under the seal of said Corporation, pursuant to due authority, this [date].

---

[Name of Corporation]

ATTEST: \_\_\_\_\_  
[Name of secretary]  
Secretary

By: \_\_\_\_\_  
[Signature of authorized person]

---

[Name of authorized person]

---

[Title of authorized person]

[Acknowledgment]

The State of Florida  
County of \_\_\_\_\_

}

The foregoing instrument was acknowledged before me this [date] by [name of authorized person], [title of authorized person], of [name of corporation], a [state] corporation, on behalf of the corporation. [He/She] [is personally known to me/has produced [type of identification] as identification].

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*[Signature of person taking acknowledgment]*

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*[Name typed, printed or stamped]*

---

*[Title of rank]*

---

*[Serial number, if any]*

This instrument was prepared by:

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*[Name of preparer]*

---

*[Signature of preparer]*

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*[Address of preparer]*

**§ 4:78 Satisfaction of mortgage—By corporation  
Alternate form**

Name: *[name]*

CORPORATION BY: *[name of authorized person]*

Address: *[address of corporation]*

This Instrument Prepared by: *[name of preparer]*

Address: *[address of preparer]*

Property Appraisers Parcel Identification (Folio)

Number(s): *[numbers]*

Satisfaction of Mortgage

*[Name of corporation]*, a corporation existing under the laws of the State of *[state]*, the owner and holder of a certain mortgage deed executed by *[name of mortgagor]* on *[date]*, recorded in Official Records Book *[number]*, page *[number]*, in the office of the Clerk of the Circuit Court of *[county]* County,

State of [*state*], securing certain note in the principal sum of *\$[dollar amount]*, and certain promises and obligations set forth in the mortgage deed, on the property situate in the State and County described as follows, to wit: [*specify*].

[*Name of corporation*] acknowledges full payment and, satisfaction of the note and mortgage deed, and surrenders the same as canceled, and directs the Clerk of the Circuit Court to cancel the same of record.

[*Corporate Seal*]

IN WITNESS, The corporation has caused these presents to be executed in its name, and its name, and its corporate seal to be hereunto affixed, by its proper officers thereunto duly authorized, this [*date*].

ATTEST: \_\_\_\_\_

[*Name of secretary*]  
Secretary

\_\_\_\_\_  
[*Signature of president of corporation*]  
President

Signed, sealed, and delivered in the presence of:

\_\_\_\_\_  
[*Signature of witness 1*]

\_\_\_\_\_  
[*Name of witness 1*]

\_\_\_\_\_  
[*Signature of witness 2*]

\_\_\_\_\_  
[*Name of witness 2*]

The State of Florida  
County of \_\_\_\_\_      }

I certify that on this day, before me, an officer duly authorized to administer oaths and take acknowledgments, personally appeared [*name of president*] known to me to be the [*name of corporation*] President of [*name of corporation*],

the corporation in whose name the foregoing instrument was executed, and that *[name of president]* severally acknowledged executing the same for the corporation, freely and voluntarily, under authority duly vested in them by the corporation, and that the seal affixed thereto is the true corporate seal of the corporation, that I relied on the following form of identification of the above-named person and that an oath *[was/was not]* taken.

*[Notary rubber stamp seal]*

Witness my hand and official seal in the County and State last aforesaid this *[date]*.

---

*[Signature of Notary Public]*

My commission expires: \_\_\_\_\_

#### § 4:79 Release of part of mortgaged premises

This indenture made on *[date]*, by *[name of mortgagee]*, of *[address of mortgagee]*, referred to below as "mortgagee," to *[name of mortgagor]*, of *[address of mortgagor]*, referred to below as "mortgagor."

##### RECITALS

1. Mortgagor, by instrument dated *[date]*, recorded in Book *[number]*, Page *[number]* of the Public Records of the County of *[county]*, State of Florida, for the consideration therein mentioned, and to secure the payment of the money therein specified, did mortgage to mortgagee certain lands and tenements of which the property herein described is a part.

2. Mortgagee, at the request of mortgagor, has agreed to give up and surrender the lands hereinafter described to mortgagor.

Mortgagee, in pursuance of the above-mentioned agreement, and in consideration of *[\$dollar amount]* paid by mortgagor, does grant, release, and quitclaim to mortgagor all of that portion of the mortgaged lands described as follows: *[legal description of lands]*.

Together with the hereditaments and appurtenances thereunto belonging, and all the right, title, and interest of mortgagee of, in, and to the same, with the intent that

the lands released may be discharged from such mortgage, and that the remainder of the land specified in such mortgage may remain mortgaged to mortgagee.

Executed at *[place of execution]* on the date first above written.

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*[Signature of mortgagee]*

Executed in the presence of \_\_\_\_\_  
*[Signature of witness 1]*

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*[Signature of witness 2]*

*[Acknowledgment]*

#### NOTES TO FORM

##### Drafter's Notes

Covenants for partial release are frequently inserted in blanket mortgages of platted property to facilitate the sale of the individual lots, in that they may be sold free of that mortgage.

For forms of acknowledgments, see Conveyances (Ch 2).

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, Partial releases, generally, Mortgages and Deeds of Trust §§ 209 et seq.

## B. TRANSFERS

### § 4:80 Introduction

A mortgagor retains his or her right to transfer the mortgaged property until he or she has been divested of his or her interest therein by a foreclosure and sale.<sup>1</sup> Where the mortgagor conveys the mortgaged premises to a person who assumes the mortgage as between the grantor and the

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**[Section 4:80]**

<sup>1</sup>Fisher v. Villamil, 62 Fla. 472, 56 So. 559 (1911); Berlack v. Halle, 22 Fla. 236, 1886 WL 1201 (1886).

**Legal Encyclopedias:** Nature of interest of mortgagor, Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 86 et seq.

grantee, the purchaser is the principal debtor, and the mortgagor or grantor is in the position of a surety.<sup>2</sup> A mortgagor may not, by arrangement or transaction made subsequent to the execution of the mortgage, relieve himself or herself of liability to the mortgagee without the mortgagee's acquiescence or participation.<sup>3</sup>

In Florida, it is expressly provided by statute that any mortgagee may assign and transfer any mortgage made to him or her, and the person to whom any mortgage may be assigned or transferred may also assign and transfer it, and he or she, or his or her assigns or subsequent assignees, may lawfully have, take, and pursue the same means and remedies which the mortgagee may lawfully have, take, or pursue for the foreclosure of the mortgage and for the recovery of the money secured thereby.<sup>4</sup> An assignment of a mortgage lien is not a conveyance or transfer of any interest in land governed by the mortgage. It is only an assignment or transfer of the lien created by the mortgage.<sup>5</sup> The assignment of the mortgage and note secured by it does not release from liability the mortgagor or others that are primarily liable for the payment of the debt.<sup>6</sup>

#### § 4:81 Form drafting principles—Transfer of mortgagor's interests

The grantee of property already encumbered by a mortgage may assume the payment of that mortgage by executing a

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<sup>2</sup>Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61, 91 A.L.R. 139 (1933); Brownson v. Hannah, 93 Fla. 223, 111 So. 731, 51 A.L.R. 976 (1927).

**Legal Encyclopedias:** Transfer of interests of mortgager, Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 406 et seq.

<sup>3</sup>Weills v. City of Vero Beach, 96 Fla. 818, 119 So. 330 (1928).

**Legal Encyclopedias:** Transfer of interest of mortgagor, generally, Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 406 et seq.

<sup>4</sup>Fla. Stat. Ann. § 701.01.

<sup>5</sup>Chandler v. Davis, 139 Fla. 469, 190 So. 873 (1939); Garrett v. Fernald, 63 Fla. 434, 57 So. 671 (1912).

**Legal Encyclopedias:** Operation and effect of assignment of mortgage, Fla. Jur. 2d, Mortgages and Deeds of Trust § 489.

Transfer of interests of mortgagee, generally, Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 487 et seq.

<sup>6</sup>Proctor v. Hearne, 100 Fla. 1180, 131 So. 173 (1930).

separate assumption agreement, or by accepting a deed reciting the fact that he or she has assumed and agreed to pay the mortgage. No particular language is required to constitute a contract for such assumption. However, the stipulation or agreement relied on must with sufficient clearness import both an intention by the grantor to create a personal obligation to pay the mortgage debt, and an intention by the grantee to assume such obligation.<sup>1</sup>

An equity of redemption may be conveyed by any of the ordinary modes of transfer, such as quitclaim deed.<sup>2</sup>

#### § 4:82 Form drafting principles—Transfer of mortgagee's interest

The instrument of assignment by a mortgagee should recite that the assignor is the owner of the mortgage and the indebtedness secured by it, and that both the mortgage and the indebtedness secured by it are being assigned and transferred.<sup>1</sup> Consideration is essential to the transfer of a mortgagee's interest,<sup>2</sup> and, of course, the instrument should describe with accuracy the mortgage being assigned.

If the indebtedness secured by the mortgage is evidenced

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##### [Section 4:81]

<sup>1</sup>Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61, 91 A.L.R. 139 (1933).

There is a distinction between a transaction where the grantee accepts a deed with a recital that it is "subject to a mortgage" and one where there is a recitation that the grantee "assumes the debt." A statement in a deed that it is subject to a mortgage does not suffice to make the grantee personally liable for the payment of the mortgage debt but binds him only to the extent of the property. Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61, 91 A.L.R. 139 (1933); Brownson v. Hannah, 93 Fla. 223, 111 So. 731, 51 A.L.R. 976 (1927).

**Legal Encyclopedias:** Form of assumption of mortgage debt, Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 419, 422.

<sup>2</sup>Legal Encyclopedias: Fla. Jur. 2d, Mortgages and Deeds of Trust § 439.

##### [Section 4:82]

<sup>1</sup>An assignment simply of the mortgage or of the mortgagee's interest in the land, without the debt, is deemed a nullity. Jordan v. Sayre, 24 Fla. 1, 3 So. 329 (1888).

**Legal Encyclopedias:** For discussion of transfer of interest of mortgagee, see Fla. Jur. 2d, Mortgages and Deeds of Trust §§ 487 et seq.

<sup>2</sup>Beck v. Hamilton, 128 Fla. 332, 174 So. 588 (1937).

by a promissory note, the note should be endorsed payable to the order of the assignee.

The assignment should be executed with the same formalities prescribed for the execution of mortgages.<sup>3</sup>

An assignment of the mortgage by the mortgagee may be effected by means of a quitclaim deed,<sup>4</sup> or by means other than deed.<sup>5</sup>

#### § 4:83 Checklist—Agreement for assumption of mortgage or trust deed

1. Parties to assumption agreement.
  - a. Debtor (seller, mortgagor): name and address.
  - b. Assuming party (purchaser): name and address.
  - c. Creditor (mortgagee, lender): name and address.
2. Identification of security instrument (mortgage or trust deed).
  - a. Title of instrument.
  - b. Parties to instrument.
  - c. Recording data.
    - (1) Office in which recorded.
    - (2) Date of recording.
    - (3) Recording number.
    - (4) Recording book and page number.
  - d. Note issued for debt.
    - (1) Date.
    - (2) Debtor.
    - (3) Face amount.
    - (4) Amount still owing on debt.
3. Agreement to assume.
  - a. Assuming party (buyer) assumes obligations of mortgage or trust deed and collateral note.
    - (1) Make payments of principal and interest when due.

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**Legal Encyclopedias:** Necessity of consideration in assignment of mortgage, Fla. Jur. 2d, Mortgages and Deeds of Trust § 498.

<sup>3</sup>See § 4:10.

**Legal Encyclopedias:** Fla. Jur. 2d, Mortgages and Deeds of Trust § 494.

**5Legal Encyclopedias:** Fla. Jur. 2d, Mortgages and Deeds of Trust § 495.

- (a) Includes all penalties.
- (2) Make deposits when due for insurance, taxes, and other funds required by instrument or note.
- (3) Comply with all other requirements of instrument and note.
  - (b) Assuming party to be bound by terms of instrument and note as if he or she were the original maker.
  - (c) Assuming party will indemnify and hold debtor harmless from loss or damage under mortgage.
- (4) Consideration for assumption if assumption is not part of a purchase of the property.
- (5) Debtor's warranties.
  - (a) Amount due on the note.
  - (b) No default has taken place under note or instrument.
  - (c) Creditor has no right to accelerate payments or declare default under note or instrument.
- (6) Creditor's agreement to release debtor-seller from mortgage.
  - (a) Creditor will look solely to party assuming mortgage for payment and performance.
- (7) General.
  - (a) Entire agreement between parties.
  - (b) Alternatively, agreement is part of purchase agreement for property, which two agreements are the sole undertakings between the parties.
  - (c) No amendment except in writing signed by parties.
- (8) Signatures to agreement.
  - (a) Date.
  - (b) Signatures of parties.
    - (i) Spouse's signature.
  - (c) Witnesses.
  - (d) Acknowledgments.
  - (e) Creditor's signature if debtor-seller is released from mortgage.

**§ 4:84 Assumption of mortgage by recital in deed**

This property is subject to a mortgage to *[name of mortgagee]*, dated and filed *[date]*, in Book *[number]*, Page *[number]*, Public Records of the County of *[county]*, State of Florida, in the sum of *[\$/dollar amount]*, which sum *[name of grantee]* expressly assumes and agrees to pay.

**NOTES TO FORM****Drafter's Notes**

For forms of deeds, see Conveyances (Ch 2).

**§ 4:85 Assumption agreement**

THIS ASSUMPTION AGREEMENT, made *[date]* among *[name of mortgagor]*, a *[specify entity]*, referred to as "Mortgagor," whose address is *[address of mortgagor]*, and The Company, a *[state]* corporation, referred to as "Mortgagee," whose address is *[address of mortgagee]*, and *[name of assuming party]*, a *[specify entity]*, referred to as "Assuming Party," whose address is *[address of assuming party]*.

**RECITALS**

A. Mortgagee has made a mortgage loan, referred to as "Mortgage Loan" to Mortgagor in the amount of *[\$/dollar amount]*, which Mortgage Loan was evidenced by a note dated *[date]*, referred to as "Note."

B. The Note is secured by a Mortgage Security Agreement and Fixture Financing Statement of even date with the Note, recorded as Document No. *[number]* in the office of the County Recorder, *[county]* County, Florida, referred to as "Mortgage" on certain real property and improvements located in *[name of county]* County, Florida, and legally described on *[specify exhibit]* attached and made a part of this agreement, referred to as "Mortgaged Premises."

C. The Note is further secured by an Assignment of Rents, Issues and Profits dated *[date]*, recorded in the Office of the County Recorder, *[county]* County, Florida, as Document No. *[number]*, referred to as "Assignment."

D. On or about *[date]*, Mortgagor sold, conveyed, and transferred its entire right, title and interest in and to the Mortgaged Premises to Assuming Party.

E. Assuming Party is willing to assume the obligation

to pay the Indebtedness evidenced by the Note and otherwise perform all of the terms, conditions and covenants of the Note, the Mortgage, the Assignment, and all other security documents securing the Note.

F. The Mortgage prohibits any sale, conveyance or transfer of the Mortgaged Premises without the prior written consent of Mortgagee, but Mortgagee, at the request of Mortgagor and Assuming Party, has agreed to grant its consent to the sale, conveyance and transfer of the Mortgaged Premises referenced above in Recital D, on the terms and conditions contained in this document.

Therefore, in consideration of these premises, the covenants contained in it and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties covenant and agree as follows:

1. Mortgagee consents to the sale, conveyance and transfer of the Mortgaged Premises from Mortgagor to Assuming Party referenced above in Recital D.

2. Assuming Party expressly assumes, as of the date of the sale, transfer and conveyance of the Mortgaged Premises from Mortgagor to Assuming Party referenced above in Recital D, the obligation to pay the indebtedness evidenced by the Note and to otherwise be bound by all of the covenants, agreements and obligations of the Note, Mortgage, Assignment and all other security documents securing the Note, and accepts the Mortgaged Premises subject to the debts, duties, covenants, agreements and obligations of the Note, Mortgage, Assignment and all other security documents securing the Note, and agrees to keep, observe and perform the same and to be bound by the same in accordance with their respective terms and conditions.

3. Assuming Party agrees that its assumption of liability shall constitute a direct and primary liability on the Note, Mortgage, Assignment and all other security documents securing the Note and shall not be conditioned upon any obligation of Mortgagee to first resort to enforcement of any remedies against Mortgagor or any security given.

4. Nothing contained in this document shall be deemed a waiver, substitution, or release of the unconditional, absolute, and personal obligation of Mortgagor or

any guarantor(s) for payment and performance on the Note, Mortgage, Assignment or any other security documents securing the Note.

5. The consent of Mortgagee to the sale, conveyance and transfer of the Mortgaged Premises referenced above in Recital D is expressly limited solely to that sale and transfer, and to the particular parties referenced, and shall not be or be deemed to be, a consent or agreement by Mortgagee to any future sale, conveyance, mortgage, encumbrance, assignment or transfer of the Mortgaged Premises or any related interest, whether legal, equitable, beneficial or otherwise, or of any interest in Mortgagor or Assuming Party (and the "due on sale" provision contained in the Mortgage shall continue in full force and effect).

6. No right or remedy conferred upon or reserved to Mortgagee by this document is intended to be exclusive of any other right or remedy available pursuant to the Note, Mortgage, Assignment and all other security documents securing the Note, but each and every right and remedy shall be cumulative and shall be in addition to every other right and remedy given under the above mentioned instruments and otherwise available by law. No waiver, amendment, release, extension or modification of this Assumption Agreement shall be established by conduct, custom or course of dealing, but only by an instrument in writing duly executed by Mortgagee.

7. No delay or omission on the part of Mortgagee in exercising any right or remedy under this agreement shall operate as a waiver of such right or remedy under this Assumption Agreement or the Note, Mortgage, Assignment or any other security documents securing the Note. A waiver on any one occasion shall not be construed as a bar to or waiver of any such right or remedy on any future occasion.

8. This Assumption Agreement is delivered in and made, and shall in all respects be construed, according to the laws of the State of Florida.

9. This Assumption Agreement and each and every provision shall be binding upon the parties and upon their respective heirs, administrators, representatives, executors, successors and assigns, and shall inure to the

benefit of each and every future holder of the Note including the heirs, administrators, representatives, executors, successors and assigns of Mortgagee.

10. Any notices which any party may deem necessary or desirable to give pursuant to the terms of this Assumption Agreement or the Note, Mortgage, Assignment or any of the other security documents securing the Note shall be deemed duly given if given in writing and mailed by certified mail to the parties at the respective addresses set forth above or to such other address as any party may designate by notice in writing as its address for future notice purposes.

11. Mortgagor and Assuming Party, respectively, each acknowledge that it has thoroughly read and reviewed the terms and provisions of this Assumption Agreement and is familiar with same, that the terms and provisions contained in this Assumption Agreement are clearly understood by it and have been fully and unconditionally consented to by it, and that Mortgagor and Assuming Party, respectively, have each had full benefit and advice of counsel of its own selection, or the opportunity to obtain the benefit and advice of counsel of its own selection, in regard to understanding the terms, meaning and effect of this Assumption Agreement, and that the execution of this Assumption Agreement by Mortgagor and Assuming Party, respectively, is done freely, voluntarily, with full knowledge, and relying on no other representations either written or oral, express or implied, made to Mortgagor or Assuming Party, respectively, by any other party, and that the consideration received by Mortgagor and Assuming Party, respectively, has been actual and adequate.

12. Within 10 days after the execution of this Assumption Agreement, Assuming Party shall furnish to Mortgagee a copy of the deed as recorded by which Assuming Party acquired title to the Mortgaged Premises encumbered by the Mortgage.

13. Mortgagor and Assuming Party agree to execute and deliver any and all additional instruments and documents necessary to further evidence and perfect the terms, covenants, conditions, agreements and obligations of this Assumption Agreement and the transac-

tions contemplated by this agreement, including, without limitation, amendments to existing U.C.C. financing statements and/or new financing statements, and any documents or instruments required by the title insurance company to be executed in connection with the endorsement to the existing mortgagee's policy of title insurance described in Paragraph 18 of this Assumption Agreement, if such endorsement is requested by Mortgagee.

14. Mortgagor has agreed to pay, and Mortgagee acknowledges receipt of, an assumption fee in the amount of *[\$/dollar amount]*, which Mortgagee shall retain as its own property, with no obligation to make any refund of all or any portion or apply such assumption fee, or any portion, to the outstanding Mortgage Loan indebtedness.

15. As additional consideration for the consent of Mortgagee to the sale and transfer of the Mortgaged Premises referenced above in Recital D, Mortgagor and Assuming Party each releases and forever discharges Mortgagee, its agents, servants, employees, directors, officers, attorneys, branches, affiliates, subsidiaries, successors and assigns and all persons, firms, corporations, and organizations in its behalf of and from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever which either Mortgagor or Assuming Party may now have or claim to have against Mortgagee as of the effective date of this Assumption Agreement, and whether presently known or unknown, and of every nature and extent on account of or in any way touching, concerning, arising out of or founded upon this Assumption Agreement, the Note, Mortgage, Assignment, or any other security documents securing the Note, including but not limited to, all such loss or damage of any kind sustained, or that may arise as a consequence of the dealings between the parties up to the effective date of this Assumption Agreement. This agreement and covenant on the part of Mortgagor and Assuming Party, respectively, is contractual, and not a mere recital, and the parties acknowledge and agree that no liability is admitted on the part of any party, except the outstanding indebtedness owed to Mortgagee under the Note, Mortgage, Assignment and all other se-

curity documents securing the Note, and that all agreements and understandings between Mortgagor, Assuming Party and Mortgagee are expressed and embodied in this Assumption Agreement, the Note, Mortgage, Assignment, and all other security documents securing the Note.

16. Mortgagor, Assuming Party and Mortgagee mutually covenant and agree that the Note, Mortgage, Assignment, and all other security documents securing the Note shall remain in full force and effect, and all of the terms of the Note, Mortgage, Assignment and other security documents securing the Note are ratified and confirmed, and this Assumption Agreement shall not be construed as a subordination to any lien or obligation occurring subsequent to the date of recordation of the Mortgage, including, without limitation, the liens or obligations, if any, arising out of the transaction consummating the sale, conveyance and transfer of the Mortgaged Premises referenced above in Recital D and consented to by Mortgagee.

17. Mortgagor and Assuming Party, and the individuals signing this Assumption Agreement on behalf of each of them, represent and warrant that all of the information and materials furnished to Mortgagee by either of them or their employees, agents or representatives, in the course of obtaining Travelers' consent to the sale and transfer of the Mortgaged Premises referenced above in Recital D are true, correct and complete and that the individuals signing this Assumption Agreement each have full power and authority to execute and deliver this Assumption Agreement on behalf of Mortgagor and Assuming Party, respectively, as well as all other instruments and documents as may be required later pursuant to this Assumption Agreement or the Note, Mortgage, Assignment and all other security documents securing the Note.

18. Mortgagee shall have the right, at its expense, to obtain an endorsement to the existing mortgagee's policy of title insurance in effect with respect to the Mortgage Loan, which endorsement shall extend the effective date of such policy through the date of recording this Assumption Agreement and shall name Mortgagee as the insured, insure Mortgagee as the holder of a first lien on

the Mortgaged Premises subject only to the lien of general real property taxes for [year], and include no new exceptions unless same are acceptable to Mortgagee. Such endorsement to the title insurance policy shall indemnify and hold Mortgagee harmless from any and all expenses and damages incurred and sustained by Mortgagee caused by or related to assertions of claims or rights of lienholders whose liens have arisen or shall arise subsequent to the date of recordation of the Mortgage. Mortgagor and Assuming Party each agrees to take such actions and execute such documents as shall be reasonably required by the title insurance company to permit Mortgagee to obtain such endorsement.

In Witness, the parties have caused this Assumption agreement to be executed as of the date first written above.

MORTGAGOR:

[Name of mortgagor]  
By: \_\_\_\_\_  
[Signature of authorized individual 1]

[Title of authorized individual 1]

MORTGAGEE:

The \_\_\_\_\_ Company, a \_\_\_\_\_ [specify entity] corporation  
By: \_\_\_\_\_  
[Signature of authorized individual 2]

[Title of authorized individual 2]

ASSUMING PARTY:

[Name of assuming party]  
By: \_\_\_\_\_  
[Signature of authorized individual 3]

[Title of authorized individual 3]

**§ 4:86 Assumption of liability and modification  
agreement—Original borrower remains liable**

THIS ASSUMPTION OF LIABILITY AND MODIFICATION AGREEMENT, referred to as the Agreement, made [date], by and between [name of mortgagee], a [state] corporation, with an office at [address of mortgagee], referred to as the Mortgagee, [name of mortgagor] whose address is [address of mortgagor], referred to as the Mortgagor, and [name of borrower] whose address is [address of borrower], referred to as the Borrower.

**WITNESS**

A. Borrower executed and delivered to Mortgagee its Promissory Note dated [date], in the principal amount of \$[dollar amount], referred to as the “Note,” and secured the payment by granting to Mortgagee among other things a [Deed of Trust/Mortgage], referred to as the “Mortgage,” of even date with the Note, covering certain improved real property situated in the County of [county], State of Florida, which Mortgage was recorded on [date] in the [county] County Records, covering the property described on [specify exhibit] attached and made a part this agreement, referred to as the “Mortgaged Premises”;

B. On [date], Mortgagee executed a certain Partial Release Agreement and subsequently delivered it to Borrower and/or Mortgagor, where Mortgagee released a portion of the real property described in the Mortgage from the lien of the Mortgage, and the excepted portion of the real estate is described on Exhibit “A” attached;

C. The outstanding principal balance of the Note as of [date], is \$[dollar amount];

D. Mortgagor, through conveyances, has succeeded to the entire right, title and interest of Borrower in the Mortgaged Premises and is the present fee owner;

E. Borrower desires to sell and convey to Mortgagor all of the Mortgaged Premises and both Mortgagor and Borrower have requested Mortgagee to consent to Mortgagor’s assumption of the Mortgage and to enter into this Agreement;

F. In consideration of the execution of this Agreement by Mortgagee, Mortgagor is willing to assume the payment of the Mortgage indebtedness due and owing from Borrower to Mortgagee;

G. Borrower and Mortgagor represent to Mortgagee that there is no second mortgage or other subsequent lien now outstanding against the Mortgaged Premises (unless disclosed to Mortgagee and the subsequent lienholder has agreed to consent to this Agreement and subordinate its lien to the lien of the Mortgage, as modified, which Consent and Subordination is attached as *[specify exhibit]*), held by Mortgagee, and that the lien of the Mortgage is a valid, first and subsisting lien on the Mortgaged Premises;

H. Borrower, Mortgagor and Mortgagee have agreed that certain modifications be made in the Note and Mortgage.

Therefore, in consideration of the premises and of the mutual agreements contained in this agreement, and upon the express conditions that the lien of the Mortgage held by Mortgagee is a valid, first and subsisting lien on the Mortgaged Premises and that the execution of this Agreement will not impair the lien of the Mortgage and that there is no existing second mortgage or other lien subsequent to the lien of the Mortgage held by Mortgagee (for breach of which conditions, or any of them, this Agreement shall not take effect and shall be void), Mortgagor, Borrower and Mortgagee agree that the Note and Mortgage are modified as follows:

1. Mortgagee consents to the sale and conveyance of the Mortgaged Premises by Borrower to Mortgagor; and Mortgagor's assumption of the Mortgage in accordance with the terms of this Agreement.

2. Mortgagee's consent contained in this agreement is expressly limited solely to the sale and conveyance, described in this agreement, and that such consent shall not waive or render unnecessary Mortgagee's consent or approval of any subsequent sale, conveyance, transfer, mortgage or encumbrance of the Mortgaged Premises or any interest in the Mortgaged Premises, whether legal, equitable, beneficial or otherwise, (and the "due on sale" provision of the Note and Mortgage, as modified, shall continue in full force and effect.)

3. In the event the Mortgaged Premises, or any part of the Mortgaged Premises, or any interest in the Mortgaged Premises, whether legal, equitable or beneficial, are sold, conveyed, alienated, mortgaged, encum-

bered, or otherwise disposed of, in any manner, whether voluntarily or involuntarily (or in the event of any merger, consolidation or dissolution affecting a corporate Mortgagor or any sale, conveyance, assignment, or other transfer of, or the grant of a security interest in, any general partnership interest of a partnership Mortgagor), without the prior written consent of Mortgagee, the entire balance of the indebtedness shall become immediately due and payable at the option of Mortgagee.

4. Mortgagee, Borrower and Mortgagor mutually covenant and agree that, except as expressly modified, the Note and Mortgage shall remain in full force and effect, and all of the remaining terms and provisions of the Note and Mortgage and other loan documents are ratified and confirmed.

5. Mortgagor and Borrower mutually covenant and agree:

(A) (i) to pay the Note at the times, in the manner and in all respects as provided in the Note; (ii) to perform each and all of the covenants, agreements, and obligations in the Mortgage to be performed by the Mortgagor, at the time, in the manner, and in all respects as provided in the Mortgage; and (iii) to be bound by each and all of the terms and provisions of the Note and Mortgage as though the Note and Mortgage had originally been made, executed and delivered by Mortgagor. This Agreement recognizing, however, the reduction, if any, of the principal amount of the Note and the payment of interest to the extent of payments made by Borrower and/or Mortgagor prior to the date of execution of this Agreement; and

(B) that all of the Mortgaged Premises shall remain in all respects subject to the lien, charge or encumbrance of the Mortgage, as modified, or conveyance of title effected thereby, and nothing contained in this agreement, and nothing done pursuant to this agreement, shall affect or be construed to affect the lien, charge or encumbrance of, or warranty of title in, or conveyance affected by the Mortgage, as modified, or the priority over other liens, charges, encumbrances or conveyances, or, except as expressly provided, to release or affect the liability of any party or parties who may now or later be liable under or on account of

the Note and/or Mortgage; nor shall anything contained in this agreement or done in pursuance of this agreement affect or be construed to affect any other security or instrument, if any, held by Mortgagee as security or evidence of the indebtedness.

6. If any term, covenant, restriction or provision of this Agreement is determined to be void, invalid or unenforceable, the remainder of the terms, covenants, restrictions or provisions of this Agreement shall remain in full force and effect, and the provisions of the Note and Mortgage, as amended or modified by the void, invalid or unenforceable part, shall be reaffirmed and enforceable to the same extent as if this Agreement had not been executed.

Mortgagor acknowledges that it has thoroughly read and reviewed the terms and provisions of this Agreement and is familiar with this Agreement, that the terms and provisions contained in it are clearly understood by it and have been fully and unconditionally consented to by it, and that Mortgagor has had full benefit and advice of counsel of its own selection, or the opportunity to obtain the benefit and advice of counsel of its own selection, in regard to understanding the terms, meaning and effect of this Agreement, and that Mortgagor's execution of this Agreement is done freely, voluntarily, with full knowledge, and without duress, and that in executing this Agreement Mortgagor is relying on no other representations either written or oral, express or implied, made to Mortgagor by any other party, and that the consideration received by Mortgagor has been actual and adequate.

As additional consideration of the modification of the terms of the Note and Mortgage by Mortgagee, as set forth above, Mortgagor releases and forever discharges Mortgagee, its agents, servants, employees, directors, officers, attorneys, branches, affiliates, subsidiaries, successors and assigns and all persons, firms, corporations, and organizations in its behalf of and from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action which Mortgagor may now have or claim to have against Mortgagee as of the effective date of this Agreement, and whether presently known or unknown, and of every nature and extent on account of or in any way touching, concerning, arising out of or founded upon the Note

and Mortgage, as modified, including but not limited to, all such loss or damage of any kind sustained, or that may arise as a consequence of the dealings between the parties up to the effective date of this Agreement. This Agreement and covenant on the part of Mortgagor is contractual, and not a mere recital, and the parties acknowledge and agree that no liability is admitted on the part of any party, except Mortgagor's indebtedness to Mortgagee under the Note and Mortgage, as modified, and that all agreements and understandings between Mortgagor and Mortgagee are expressed and embodied in the Note and Mortgage, as modified.

In Witness, this instrument has been executed by the parties in manner and form sufficient to bind them, as of the date first written above.

ATTEST:

By: \_\_\_\_\_  
*[Name of secretary]*  
Secretary

MORTGAGEE:

\_\_\_\_\_  
*[Name of mortgagee]*  
By: \_\_\_\_\_  
*[Name of authorized person]*

MORTGAGOR:

\_\_\_\_\_  
*[Title of authorized person]*

\_\_\_\_\_  
*[Name of mortgagor]*

BORROWER:

\_\_\_\_\_  
*[Signature of mortgagor]*

\_\_\_\_\_  
*[Name of borrower]*

\_\_\_\_\_  
*[Signature of borrower]*

SECURITY ARRANGEMENTS

§ 4:87

WITNESS/ATTEST:

*[Name of witness 1]*

*[Signature of witness 1]*

*[Name of witness 2]*

*[Signature of witness 2]*

*[Notarization]*

**§ 4:87 Assignment of mortgage**

The State of Florida                                    }  
County of \_\_\_\_\_

ASSIGNMENT OF MORTGAGE

I, the undersigned, owner of a mortgage, and of the indebtedness secured by it, made by *[name of mortgagee]* to *[name of mortgagor]* for \$*[dollar amount]*, on *[date]*, and recorded in Mortgage Book *[number]*, Page *[number]* of the Public Records of the above county, for valuable consideration do assign and transfer the above-described mortgage and indebtedness to *[name of assignee]*.

Dated: *[date]*.

*[Signature of mortgagee]*

Executed in the presence of \_\_\_\_\_  
*[Name of witness 1]*

*[Name of witness 2]*

---

*[Signatures of witnesses]*

*[Acknowledgment]*

This instrument was prepared by \_\_\_\_\_  
*[Name of preparer]*

---

*[Signature of preparer]*

---

*[Address of preparer]*

#### NOTES TO FORM

##### Drafter's Notes

For forms of acknowledgments, see Conveyances (Ch 2).

For additional forms and materials concerning assignments, generally, see Assignments (Ch 23).

##### Research References

*Legal Encyclopedias*

Fla. Jur. 2d, Transfer of interests of mortgagor, Mortgages and Deeds of Trust §§ 406 et seq.

#### § 4:88 Assignment of leases—Rents and profits

##### ASSIGNMENT OF LEASES, RENTS, AND PROFITS

THIS ASSIGNMENT, made on *[date]*, by *[name of assignor]* a *[specify entity]*, referred to below as "Assignor" in favor of *[name of assignee]*, a *[specify entity]*, referred to below as "Assignee".

##### WITNESS:

FOR VALUE RECEIVED, Assignor does SELL, ASSIGN, TRANSFER, SET OVER and DELIVER to Assignee, its successors and assigns all leases written or oral, and all agreements for use or occupancy of any portion of the premises together with buildings and improvements thereof, hereinafter called "the premises" situated at *[address of premises]*, and more particularly described in *[specify exhibit]* attached hereto and by this reference made a part hereof.

TOGETHER, with any and all extensions and renewals thereof and any and all further leases, lettings or agreements (including subleases thereof and tenancies following attornment) upon or covering use or occupancy of all or any part of the premises (all such leases, agreements, subleases and tenancies heretofore mentioned are hereinafter collectively included in the designation “the leases”).

TOGETHER, with any and all guarantees of lessee’s performance under any of the leases, and

TOGETHER, with the immediate and continuing right to collect and receive all of the rents, income, receipts, revenues, issues and profits now due or which may become due or to which Assignor may now or shall hereafter (including the period of redemption, if any) become entitled or may demand or claim, arising or issuing from or out of the leases or from or out of the premises or any part thereof, including but not by way of limitation:

- (a) minimum rents, additional rents, percentage rents, parking maintenance, tax and insurance contributions, deficiency rents and liquidated damages following default, the premium payable by any lessee upon the exercise of a cancellation privilege originally provided in any the lease, and any rights and claims of any kind which Assignor may have against any lessee under such leases or any subtenants or occupants of the premises (sometimes hereinafter collectively referred to as “rents”);
- (b) payment for loss or damage, and rebate, refund or return of any premium, now or hereafter paid or payable under any police of insurance covering the whole or any part of the premises (sometimes hereinafter referred to as “losses or rebates”);
- (c) sum or sums now due or hereafter to become due by reason of any taking of the whole or any part of the premises for public purposes, by right of eminent domain against any and all parties whomsoever for compensation for real or alleged harm or damage done to or in connection with the premises (sometimes hereinafter referred to as “damages”); and
- (d) abatement, rebate, refund or return, whether now or hereafter payable, of the whole or any part of any tax,

assessment or other charge levied or assessed upon the whole or any part of the premises or furnishings whether heretofore or hereafter to levied or assessed or that has been or hereafter is paid (sometimes hereinafter referred to as “abatements”).

SUBJECT, however to a license granted by Assignee to Assignor, but limited as hereinafter provided, to collect and receive all of the rents.

TO HAVE AND TO HOLD the same unto Assignee, its successors and assigns forever, or for such shorter period as hereinafter may be indicated.

FOR THE PURPOSE OF SECURING the payment of the indebtedness evidenced by that certain Note dated *[date]*, in the principal sum of \$*[dollar amount]* made by Assignor payable to the order of *[name of assignee]*, a *[specify entity]*, and presently held by Assignee, including any extensions and renewals thereof any note or notes supplemental thereto, as well as the payment, observance, performance and discharge of all other obligations, covenants, conditions and warranties contained in all instruments securing repayment of said Note and bearing even date therewith, and in any extensions, supplements and consolidations thereof, covering the said premises and securing the said Note (hereinafter collectively called “Loan Documents”).

Assignor irrevocably constitutes and appoints Assignee as its lawful attorney in its name and stead:

- (a) to collect any and all of the rents, leases or rebates, damages and/or abatements;
- (b) to use such measures, legal or equitable, as in its discretion may be deemed necessary or appropriate to enforce the payment of the rents, losses or rebates, damages, abatements and/or any security given in connection therewith;
- (c) to secure and maintain the use and/or possession of the premises and/or any part of either;
- (d) to fill any and all vacancies and to rent, lease and/or let the premises and/or any part thereof at its discretion;
- (e) to order, purchase, cancel, modify, amend, and/or in any and all ways control and deal with any and all

policies of insurance of any and all kinds now or hereafter or in connection with the whole or any part of the premises at its discretion and to adjust any loss or damage thereunder and/or to bring suit at law or in equity therefore and to execute and/or render any and all instruments deemed by Assignee to be necessary or appropriate in connection therewith;

- (f) to adjust, bring suit at law or in equity for, settle or otherwise deal with any taking of any or all of the premises for public purposes as aforesaid or any claim for real or alleged harm or damage as aforesaid and to execute and/or render any and all instruments deemed by Assignee to be necessary or appropriate in connection therewith; and
- (g) to adjust, settle, or otherwise deal with any abatements and to execute and/or render any and all instruments deemed by Assignee to be necessary or appropriate in connection therewith;

granting full power and authority to Assignee to use and apply said rents, losses or rebates, damages and/or abatements to the payment of any taxes, assessments, and charges of any nature whatsoever that may be levied or assessed in connection with the premises, to the payment of premiums on such policies of insurance on or in connection with the whole or any part of the premises as may be deemed advisable by Assignee, to the payment of any and all indebtedness, liability or interest of the undersigned and/or those secured by the Loan Documents, whether now existing or hereafter to exist, to the payment of all expenses in the care and management of the premises, including such repairs, alterations, additions and/or improvements to the premises or any part thereof, as may be deemed necessary or advisable by Assignee, to the payment of attorney's fees, court costs, labor, charge and/or expenses incurred in connection with any and all things which Assignee may do or cause to be done by virtue hereof, and to the payment of such interest on the indebtedness or on any of the foregoing, if any, as may be deemed necessary or advisable by Assignee; also granting to Assignee full power and authority to make contracts for the care and management of the whole or any part of the premises in such form and providing for such compensation as may be deemed advisable by Assignee, and

for the performance or execution of any or all of these presents, to constitute, appoint, authorize and in its place and stead put and substitute one attorney or attorneys, and/or the same at its pleasure again to revoke, and to do, execute, perform and finish for Assignor and in Assignor's name all and singular those things which shall be necessary or advisable in and about, for, touching about, or concerning these presents or the premises as thoroughly, and apply and fully as Assignor could do concerning the same, being personally present, and whatsoever; Assignor's said attorney or its substitute or substitutes shall do or cause to be done in, about or concerning these presents or the premises or furnishings or any part of any of them Assignor ratifies and confirms; and also granting to Assignee full power and authority to exercise at any and all times each and every right, privilege and power herein granted, without notice to Assignor.

TO PROTECT THE SECURITY OF THIS ASSIGNMENT,  
IT IS COVENANTED AND AGREED THAT:

1. Assignor represents and warrants: That Assignor is the owner in fee simple absolute of the said premises and has good title to the leases and rents assigned and good right to assign the same, and that no other person, firm or corporation has any right, title or interest therein; that Assignor has duly and punctually performed all and singular the terms, covenants, and warranties of the existing leases on Assignor's part to be kept, observed and performed; the Assignor has not previously sold, assigned, transferred, mortgaged or pledged the said rents from said premises, whether now due or hereafter to become due; that any of said rents due and issuing from said premises or from any part thereof for any period subsequent to the date hereof have not been collected and that payment of any of same has not otherwise been anticipated, waived, released, discounted, set off or any of same has not otherwise been anticipated, waived, released, discounted, set off or otherwise discharged or compromised; that Assignor has not received any funds or deposits from any lessee in excess of [number] months' rent for which credit has not already been made on account of accrued rents; and that the lessee under any existing lease is not in default of any of the terms thereof.

2. The terms of the aforesaid leases will not be altered, modified or changed, nor will said leases be surrendered or canceled, nor will any proceedings for the dispossession or eviction of any lessee under said leases be instituted, without the prior written consent of Assignee.

3. No request will be made of any lessee to pay any rent, and no rent will be accepted, in advance of the dates upon which such rent becomes due and payable under the terms of the above-mentioned leases, it being agreed between Assignor and leases that rent shall be paid as provided in said leases and not otherwise.

4. Assignee grants to Assignor a license to collect and retain the rents under the said leases and the right to enforce the collection thereof by appropriate action or proceedings unless and until there is a default in the performance or observance of the terms or conditions of the leases; Assignee reserves the right to enforce the collection thereof by any appropriate action or proceeding brought in the name of Assignor after such default.

5. Upon default under the terms of the leases or of this Assignment, or at any time after such default, Assignee, its successors or assigns, at its or their option and without further consent thereto by Assignor or any subsequent owner of said premises, may enter in and upon said premises and take possession thereof, and collect the rents and profits thereof, and do every act and thing that such Assignor or any subsequent owner of said premises and take possession thereof, and collect the rents and profits thereof, and do every act and thing that such Assignor or any subsequent owner of said premises might or could do.

6. Upon curing all defaults Assignor, its successors or assigns, shall again be entitled to collect and retain the rents under the aforesaid lease or leases.

7. Upon payment of all indebtedness evidenced and secured by the leases this assignment shall be rendered null and void and the lease or leases shall be reassigned to the then owner in free of the premises or to such person or persons as said owner may direct by written notice.

8. Assignee shall not be responsible for the control, care or management of the premises, not for carrying out any of the terms and conditions of the leases, not for any waste committed or permitted on the premises by any lessee nor

shall the Assignee liable by reason of any dangerous or defective condition.

9. Assignee shall not in any way be responsible for failure to do any or all of the things for which rights, interests, power and/or authority are herein granted it; and Assignee shall be liable only for such cash as it actually receives under the terms hereof, provided, however, that failure of Assignee to do any of the things or exercise any of the rights, interests, powers and/or authorities hereunder shall be construed to be a waiver of any of the rights, interests, powers or authorities assigned and granted to Assignee.

10. Assignor will execute upon the request of Assignee any and all instruments requested by Assignee to carry these presents into effect or to accomplish any other purpose deemed by Assignee to be necessary or appropriate in connection with these presents or the premises.

11. These presents shall in no way operate to prevent Assignee from pursuing any remedy which it now or hereafter may have because of any present or future breach of the terms or conditions of the leases or any extension thereof.

12. Assignor does further specifically authorize and instruct each and every present and future lessee of the whole or any part of the premises to pay all unpaid rental agreed upon in each tenancy to Assignee upon receipt of demand from Assignee to so pay the same.

13. The terms, covenants, conditions and warranties contained herein and the powers granted shall run with the land, shall inure to the benefit of and bind all parties hereto and their respective heirs, executors, administrators, successors and assigns, and all lessees, subtenants and assigns of same, and all occupants and subsequent owners of the said premises, and all subsequent holders of the leases.

IN WITNESS, the Assignor has caused these presents to be executed under seal as of the day and year first above set forth.

Signed, sealed, and delivered in the presence of:

---

*[Signature of witness 1]*

[Signature of witness 2]

By: \_\_\_\_\_

[Signature of assignor]

The State of Florida  
County of \_\_\_\_\_

I CERTIFY that on this day, before me, a notary public authorized to administer oaths and take acknowledgments, came *[name of assignor]*, to me well known to be the person described in and who executed the foregoing instrument, and *[he/she]* acknowledged before me that *[he/she]* executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this [date].

[Signature of Notary Public]

My commission expires: \_\_\_\_\_

## C. EXTENSIONS

## § 4:89 Form drafting principles

A mortgage may be modified as to time of payment of the principal and interest of the debt secured by it.<sup>1</sup> Generally, consideration is necessary to support an extension of time for payment.<sup>2</sup> An extension agreement, in order to be binding, should be clear and definite, otherwise it will be unenforceable or ineffectual. Therefore, an agreement extending time for payment should be in writing, clearly reflecting the intent of the parties.

[Section 4:89]

<sup>1</sup>**Legal Encyclopedias:** Fla. Jur. 2d, Mortgages and Deeds of Trust § 164.

<sup>2</sup>Huheey v. Poole, 117 Fla. 325, 157 So. 889 (1934); Stoneman Co. v. Briggs & Warr, 110 Fla. 104, 148 So. 556 (1933).

An extension should be recorded<sup>3</sup> and the extension agreement should be executed with the same formalities prescribed for the execution of mortgages.<sup>4</sup>

#### § 4:90 Checklist—Drafting extension of mortgage or deed of trust

1. Parties.
  - a. Names.
  - b. Addresses.
  - c. Identification as party holding note or beneficiary of contract obligation.
  - d. Identification as party owning property upon which mortgage or trust deed is an encumbrance.
2. Description of mortgage or trust deed.
  - a. Title of document.
  - b. Parties.
  - c. Date.
  - d. Recording information.
    - (1) Filing office.
    - (2) County and state.
    - (3) Recording number.
    - (4) Book and page number.
    - (5) Date recorded.
  - e. Note or contract.
    - (1) Title.
    - (2) Date.
    - (3) Parties.
    - (4) General description.
  - f. Outstanding balance.
    - (1) Amount.
    - (2) Payment schedule.
    - (3) Date of next payment.
3. Extension agreement.
  - a. Changes in mortgage and note or contract.
    - (1) Payment schedule.
    - (2) Size of payments.

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<sup>3</sup>Irwin v. Grogan-Cole, 590 So. 2d 1102 (Fla. Dist. Ct. App. 5th Dist. 1991).

<sup>4</sup>See § 4:10.

- (3) Interest.
  - (4) Maturity date.
  - (5) Deposits.
  - (6) Other.
- b. Remaining terms of note and mortgage to stay the same.
  - c. Mortgagor's covenant to comply with all terms of amended obligation.
  - d. New obligations of mortgagor.
- 4. Formalities.
    - a. Date.
    - b. Signature(s).
    - c. Title.
    - d. Attestation.
    - e. Acknowledgment.
    - f. Name and address of person preparing release.

#### **§ 4:91 Mortgage consolidation and extension agreement**

Agreement made on *[date]*, between *[name of mortgagee]*, of *[address of mortgagee]*, referred to below as "mortgagee," and *[name of mortgagor]*, of *[address of mortgagor]*, referred to below as "mortgagor."

#### **RECITALS**

A. Mortgagee is the owner and holder of a certain note made by mortgagor to *[name of original holder of note 1]* secured by a mortgage bearing even date therewith and recorded in Book *[number]*, Page *[number]* of the Public Records of the County of *[county]*, State of Florida, on *[date]* which mortgage is now a lien on the premises situated in the City of *[city]*, and being known as and by *[street address of premises]*, County of *[county]*, State of Florida, and more particularly described in such mortgage, and on which note there is now due the principal sum of *[\$dollar amount]*.

B. Mortgagee is also the owner and holder of another note made by mortgagor to *[name of original holder of note 2]*, dated *[date]*, secured by a mortgage bearing even date therewith and recorded in the Public Records of the County of *[county]* on *[date]*, in Book *[number]*, Page *[number]*, which mortgage is also now a lien on the premises and on which note there is now due the principal sum of *[\$dollar amount]*.

C. The parties hereto desire to coordinate, modify, consolidate, and combine the two mortgages so that they shall form a single coordinate and equal lien of *[\$/dollar amount]* and interest on the premises, and to extend the time of payment of the principal indebtedness secured by the notes and mortgages as so coordinated, modified, consolidated, and combined as hereinafter provided. In consideration of *[\$/dollar amount]* paid by *[name of mortgagee]*, the receipt of which is acknowledged, and other valuable consideration, it is mutually agreed by and between the parties as follows:

1. The two mortgages be and the same are coordinated, modified, consolidated and combined so that the mortgages together shall form a single coordinate and equal lien of *[\$/dollar amount]* and interest on the premises in the same manner and to the same effect as though mortgagee held a single note and a single mortgage for *[\$/dollar amount]* and interest, and the two notes taken together are herein-after described as the note and the two mortgages taken together are herein-after described as the mortgage.

2. Mortgagee does extend the time of payment of the principal indebtedness of *[\$/dollar amount]* secured by the note to *[date]*, provided mortgagor meanwhile pays interest on the amount owing on the note and mortgage at the rate of *[percentage]%* per year from *[date]*, on the *[original number]* day of *[month]* and *[month]* in each year, and also complies with all the terms of the note and mortgage as coordinated, modified, consolidated, and combined and extended. And mortgagor agrees to pay the principal sum and interest as above set forth and not before the maturity thereof as the same is extended, and to comply with the other terms of the note and mortgage.

3. Mortgagor further covenants with mortgagee as follows:

- (a) that mortgagor will pay the indebtedness as herein provided;
- (b) that mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of mortgagee;
- (c) that no building on the premises shall be removed or demolished without the consent of mortgagee;
- (d) that the whole of the principal sum shall become due after default in the payment of any installment of principal or of interest for *[number]* days or after

- default in the payment of any tax or assessment for [number] days after notice and demand;
- (e) that the holder of the mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver;
  - (f) that mortgagor will pay all taxes and assessments, and in default thereof, mortgagee may pay the same;
  - (g) that notice and demand or request may be in writing, and may be served in person or by mail;
  - (h) that mortgagor warrants the title to the premises;
  - (i) that the whole of the principal sum shall become due at the option of mortgagee after default for [number] days after notice and demand for the payment of any installment of any assessment for local improvements heretofore or hereafter paid which is or may become payable in annual installments, and which has affected, now affects, or hereafter may affect the premises, notwithstanding that such installments be not due and payable at the time of such notice and demand;
  - (j) that the whole of the principal sum shall immediately become due at the option of mortgagee if mortgagor assigns the rents or any part of the rents of the mortgaged premises without first obtaining the written consent of mortgagee to such assignment, or on the actual or threatened demolition or removal of any building erected or to be erected on the premises;
  - (k) that mortgagor is the owner and holder of the premises on which the mortgage is a valid first lien for the sum of  $\$[dollar\ amount]$  principal, with interest thereon at the rate of [percentage]/% per year payable as above set forth and that there are no defenses or offsets to the mortgage or to the debt which it secures;
  - (l) that in the event of any default in paying the principal or interest, the rents and profits of the mortgaged premises are assigned to the holder of the mortgage as further security for the payment of the indebtedness; and
  - (m) mortgagor further covenants that the principal and interest agreed to be paid shall be a lien on the mortgaged premises and be secured by the note and mortgage, and that when the terms and provisions

contained in the note and mortgage in any way conflict with the terms and provisions herein contained in this agreement, the terms and provisions herein contained shall prevail, and that as modified by this agreement the note and mortgage is ratified and confirmed.

Executed at [*place of execution*] on the day and year first above written.

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[Signatures]

[Acknowledgments]

#### NOTES TO FORM

##### Drafter's Notes

For forms of acknowledgments, see Conveyances (Ch 2).

##### Research References

*Legal Encyclopedias*

Fla. Jur. 2d, Extension of maturity, Mortgages and Deeds of Trust  
§§ 164, 440 to 442.

### § 4:92 Extension and modification agreement— Changing loan terms and extending maturity

THIS EXTENSION AND MODIFICATION AGREEMENT made [*date*], by and between [*name of mortgagor*], whose address is [*address of mortgagor*], referred to as “Mortgagor,” and [*name of mortgagee*], a [*state*] corporation, having an office at [*address of mortgagee*], referred to as the “Mortgagee.”

#### WITNESS

A. Mortgagor executed and delivered to Mortgagee its note dated [*date*], in the principal sum of *[\$dollar amount]*, referred to as the “Note,” the Note being secured by a [*Mortgage/Deed of Trust*], referred to as the “Mortgage” of even date with the Note, which Mortgage was recorded in [*county*] County Records on [*date*] covering certain improved real property situated in the County of [*county*], State of Florida, more particularly described on [*specify exhibit*] attached and made a part of this Agreement, referred to as the “Mortgaged Premises”;

B. On *[date]*, Mortgagee executed a Partial Release Agreement and subsequently delivered it to Mortgagor, where Mortgagee released a portion of the real property described in the Mortgage from the lien of the Mortgage, and the excepted portion of the real estate is described on *[specify exhibit]* attached;

C. As of *[date]*, the outstanding principal balance is *[\$dollar amount]*;

D. The Note matured on *[date]*, in accordance with its terms;

E. Mortgagee has been requested to extend the time of payment of the indebtedness represented by the Note and Mortgage upon the terms and conditions set forth below, which it has agreed to do in consideration of the agreements contained in this Agreement on the part of Mortgagor;

F. Mortgagee, upon request of Mortgagor, has agreed to the following modification of the terms of the Note and Mortgage, effective as of *[date]*:

1. The maturity date of *[date]*, as set forth in the Note and Mortgage is changed to *[date]*, and the principal payment of *[\$dollar amount]*, due *[date]*, is extended and due on *[date]*.

2. Effective *[date]*, the interest rate of the Note is changed from *[percentage]%* per year to *[percentage]%* per year, payable commencing with the *[date]*, payment.

G. Mortgagor represents to Mortgagee that there is no second mortgage or other subsequent lien now outstanding against the Mortgaged Premises (unless disclosed to Mortgagee, and any subsequent lienholder has agreed to consent to this Extension and Modification Agreement and subordinate its lien to the lien of the Mortgage, as modified, which Consent and Subordination is attached as *[specify exhibit]* and that the lien of the Mortgage, as modified, is a valid, first and subsisting lien on the Mortgaged Premises.

Therefore, in consideration of the modification of the terms of the Note and Mortgage by Mortgagee, as set forth above, Mortgagor covenants and agrees to pay the balance of the indebtedness evidenced by the Note and secured by the Mortgage, as modified, and to perform the covenants contained in the Mortgage, and further agrees that the

prepayment privilege now in effect shall remain in full force and effect.

Mortgagor acknowledges that it has thoroughly read and reviewed the terms and provisions of this Agreement and is familiar with this Agreement, that the terms and provisions contained in this Agreement are clearly understood by it and have been fully and unconditionally consented to by it, and that Mortgagor has had full benefit and advice of counsel of its own selection, or the opportunity to obtain the benefit and advice of counsel of its own selection, in regard to understanding the terms, meaning and effect of this Agreement, and that Mortgagor's execution of this Agreement is done freely, voluntarily, with full knowledge, and without duress, and that in executing this Agreement Mortgagor is relying on no other representations either written or oral, express or implied, made to Mortgagor by any other party, and that the consideration received by Mortgagor has been actual and adequate.

As additional consideration of the modification of the terms of the Note and Mortgage by Mortgagee, as set forth above, Mortgagor releases and forever discharges Mortgagee, its agents, servants, employees, directors, officers, attorneys, branches, affiliates, subsidiaries, successors and assigns and all persons, firms, corporations, and organizations in its behalf of and from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action which Mortgagor may now have or claim to have against Mortgagee as of the effective date of this Agreement, and whether presently known or unknown, and of every nature and extent on account of or in any way touching, concerning, arising out of or founded upon the Note and Mortgage, as modified, including but not limited to, all such loss or damage of any kind sustained, or that may arise as a consequence of the dealings between the parties up to the effective date of this Agreement. This agreement and covenant on the part of Mortgagor is contractual, and not a mere recital, and the parties acknowledge and agree that no liability is admitted on the part of any party, except Mortgagor's indebtedness to Mortgagee under the Note and Mortgage, as modified, and that all agreements and understandings between Mortgagor and Mortgagee are expressed and embodied in the Note and Mortgage, as modified.

Nothing contained in this Agreement shall in any manner impair the Note and Mortgage, as modified, or the first lien created or any other documents executed by Mortgagor in connection with the Note and Mortgage, or alter, waive, vary or affect any promise, agreement, covenant or condition recited in any of the above-mentioned documents, except as expressly modified by this Agreement, nor affect or impair any rights, powers, or remedies of Mortgagee under any of the above-mentioned documents. Except as otherwise provided in this Agreement, all terms and provisions of the Note, Mortgage and other instruments and documents executed in connection with the subject mortgage loan, shall remain in full force and effect and shall be binding upon the parties, their successors and assigns.

In Witness, this instrument has been executed by the parties in a manner and form sufficient to bind them as of the date first written above.

ATTEST:

By: \_\_\_\_\_  
*[Name of secretary]*  
Secretary

MORTGAGEE:

\_\_\_\_\_  
*[Name of mortgagee]*  
By: \_\_\_\_\_  
*[Name of authorized person]*

MORTGAGOR:

\_\_\_\_\_  
*[Title of authorized person]*

\_\_\_\_\_  
*[Name of mortgagor]*

WITNESS/ATTEST:

\_\_\_\_\_  
*[Signature of mortgagor]*

\_\_\_\_\_  
*[Name of witness 1]*

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*[Signature of witness 1]*

WITNESS/ATTEST:

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*[Name of witness 2]*

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*[Signature of witness 2]*

*[Notarization]*

**§ 4:93 Modification of wrap around mortgage**

MODIFICATION OF WRAP AROUND MORTGAGE NOTE  
AND WRAP AROUND MORTGAGE DEED AND  
SECURITY AGREEMENT

THIS MODIFICATION OF WRAP AROUND MORTGAGE NOTE AND WRAP AROUND MORTGAGE DEED AND SECURITY AGREEMENT (referred to below as the “Modification”) is made and executed on *[date]*, by *[name of mortgagor]*, a *[specify entity]* (referred to below as “Mortgagor”), to and in favor of *[name of mortgagee]*, a *[specify entity]* having its local office at *[address of mortgagee]* (referred to below as “Mortgagee”).

**RECITALS**

A. In connection with Mortgagor’s purchase of the Property, Mortgagor executed a Wrap Around Mortgage Deed and Security Agreement dated *[date]*, and recorded *[date]*, in Official Records Book *[number]*, at Page *[number]*, in the Public Records of *[county]* County, Florida (referred to below as the “Wrap Mortgage”) securing a Wrap Around Mortgage Note dated *[date]*, in the original principal sum of *[\$/dollar amount]* (the “Wrap Note”); and

B. *[Specify paragraphs]* basically require Mortgagor pay to mortgagee certain sums due by Mortgagor to *[name of bank]* (“Bank”) under a certain Mortgage in favor of Bank dated *[date]*, and recorded in Official Records Book *[number]*, at Page *[number]* in the public records of *[county]* County, Florida (the “First Mortgage”);

C. In connection with Mortgagee’s request for renewal

of certain loans by Bank, the Bank has requested that Mortgagor make payments under the First Mortgage directly to the Bank and Mortgagee has consented to such requirement;

NOW, THEREFORE, in consideration of the premises stated below and of other good and valuable consideration, the receipt and sufficiency of which is acknowledged, Mortgagor and Mortgagee agree as follows:

1. *[Specify paragraph]* of the Wrap Mortgage is modified to read as follows:

(a) Mortgagor shall comply with all of the terms and conditions of the First Mortgage.

2. *[Specify paragraph]* of the Wrap Mortgage is modified to read as follows:

(b) That in the event Mortgagor shall fail to so comply with all of the terms, provisions and conditions of the First Mortgage so as to result in a default under it, such failure on the part of Mortgagor shall constitute a default under this Mortgage and shall entitle Mortgagee, at its option, to exercise any and all rights and remedies given Mortgagee in the event of a default hereunder.

3. *[Specify paragraph]* of the Wrap Mortgage is deleted and replaced by the following:

That on the first day of each and every month, Mortgagor shall pay to Mortgagee the sum of *[\$/dollar amount]* minus the amount of monthly principal and interest due directly to the First Mortgage Holder on that day. For example, if the monthly principal and interest payment due the First Mortgage Holder is *[\$/dollar amount]*, then Mortgagor shall pay Mortgagee the sum of *[\$/dollar amount]*.

In the event the funds due for the monthly principal and interest to the First Mortgage Holder are greater than *[\$/dollar amount]*, Mortgagee agrees to reimburse Mortgagor for that portion of the First Mortgage monthly principal and interest payment that exceeds *[\$/dollar amount]*. For example, if the monthly principal and interest payment under the First Mortgage is *[\$/dollar amount]*, then Mortgagee will reimburse Mortgagor *[\$/dollar amount]* on the date payment is made by Mortgagor to the First Mortgage Holder.

Mortgagor shall provide Mortgagee with proof of payment on the First Mortgage in a form acceptable to Mortgagee in order to receive reimbursement from Mortgagee.

4. *[Specify paragraphs]* of the Wrap Mortgage are deleted.

5. Any amendments set forth in this Modification shall amend like provisions in the Wrap Note provided, however, all other terms, conditions and covenants of the Wrap Note and the Wrap Mortgage, as modified, shall remain in full force and effect.

6. This Modification shall be binding upon and shall inure to the benefit of the heirs, personal representatives and assigns of the parties to this Modification.

IN WITNESS, Mortgagor and Mortgagee have caused these presents to be executed as of the day and year first above written.

MORTGAGEE

By: \_\_\_\_\_  
*[Signature of authorized person]*

\_\_\_\_\_  
*[Printed name of authorized person]*

\_\_\_\_\_  
*[Title of authorized person]*

MORTGAGOR

\_\_\_\_\_  
*[Signature of mortgagor]*

\_\_\_\_\_  
*[Name of mortgagor]*

WITNESSES:

\_\_\_\_\_  
*[Signature of witness 1]*

\_\_\_\_\_  
*[Name of witness 1]*

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[Signature of witness 2]

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[Name of witness 2]

[Seal]

The State of Florida  
County of \_\_\_\_\_ }

The foregoing Modification of Wrap Around Mortgage Note and Wrap Around Mortgage Deed and Security Agreement was executed before me on this [date], by [name of authorized person] as [title of authorized person] of [name of mortgagor], a [specify entity] corporation, on behalf of the corporation.

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[Signature of Notary Public]

My commission expires: \_\_\_\_\_

This instrument was prepared by \_\_\_\_\_  
[Signature of preparer]

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[Name of preparer]

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[Address of preparer]

#### IV. FEDERAL TRUTH IN LENDING ACT—REAL ESTATE TRANSACTIONS

##### § 4:94 Introduction

In considering the applicability of the Federal Truth in Lending Act<sup>1</sup> and the regulations thereto<sup>2</sup> it must be noted that, generally, the provisions thereof must be complied with

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[Section 4:94]

<sup>1</sup>15 U.S.C.A. §§ 1601 et seq.

in any case where: (1) credit is offered or extended to a natural person, and the money, property, or service that is the subject of the transaction is primarily for personal, family, or household purposes and for which a finance charge is or may be imposed or which, pursuant to a written agreement, is or may be payable in more than four installments;<sup>3</sup> and (2) the credit is offered or extended by an individual who, or a business which, in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.<sup>4</sup>

The application of the Federal Truth in Lending Act to a particular real property transaction is not dependent on the amount involved in the transaction; where applicable, the act applies regardless of the amount.<sup>5</sup>

#### **§ 4:95 Checklist—Form drafting principles—Federal Truth in Lending Act—Transactions covered**

1. In general, transactions covered by the act are those in which credit is extended for personal, family, or household purposes.
  - a. Act primarily affects financial institutions, credit card companies, companies regularly extending credit for services and goods, and other creditors that regularly extend credit to consumers.
  - b. Basic requirement is that those creditors covered by the act must make certain disclosures regarding the credit extended to those to whom credit is offered.
2. Creditors subject to act are those that offer or extend credit if four conditions are met:
  - a. The offer or extension is regularly made.  
(1) “Regularly made” is defined as more than 25

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**A.L.R. Library:** Propriety, under Rule 23 of the Federal Rules of Civil Procedure, of class action for violation of Truth in Lending Act (15 U.S.C.A. §§ 1601 et seq.), 61 A.L.R. Fed. 603.

<sup>3</sup>12 C.F.R. §§ 226.1 et seq.

For disclosure statement promulgated under Regulation Z of the Federal Truth and Lending Act, see § 4:98.

<sup>4</sup>15 U.S.C.A. § 1602(h); 12 C.F.R. § 226.1(c).

<sup>4</sup>15 U.S.C.A. § 1602(f); 12 C.F.R. § 226.1(c).

<sup>5</sup>15 U.S.C.A. § 1603(3).

- credit extensions during the previous or current year.
- (2) For loans secured by a dwelling, however, only 5 extensions are needed for this condition to be met.
- (a) A dwelling is residential structure of one to four units.
- b. The credit is primarily for personal, family, or household purposes.
- c. The offer or extension of credit is made to consumers, defined as other than those using the credit for business or commercial purposes.
- d. The credit is subject to a finance charge or is payable in more than four installments.
- (1) A finance charge includes interest, points, service charges, credit fees, and similar items.
3. Not covered by the act (and therefore not subject to the disclosure requirements) are semi-credit transactions such as insurance premium plans, layaway plans, and loans against insurance or pension accounts where the debtor is not obligated to pay. If the debtor must repay, the transaction is covered by the disclosure requirements. Also not covered are tax liens, tax assessments, option contracts, investment plans, and other quasi-credit situations.
4. In addition, there are three major and two minor types of transactions that are exempt under the act.
- a. Credit extended to borrowers other than natural persons primarily for a business, commercial, or agricultural purpose.
- (1) Included are corporations, partnerships, associations, churches, unions, and fraternal organizations.
- (2) Agricultural purpose includes all aspects of raising, propagating, or manufacturing food or beverages, plant life, animals, poultry, fish, etc.
- b. Various factors enter into determination whether transaction is for business (or commercial) purposes.
- (1) Examples of business-purpose credit: to expand a business or to add an office onto a residence.

- (2) Examples of consumer-purpose credit: to pay school tuition for debtor's child or to buy home furnishings.
5. Certain transactions are subject to specific provisions under the act or regulations.
  - a. Credit to acquire, improve, or maintain rental property that is not owner-occupied is for business purposes.
  - b. Credit to acquire rental property that is owner-occupied is for business purposes if it contains more than two housing units. Credit for improving or maintaining rental property is for business purposes if there are more than four units.
  - c. Loans of more than \$25,000 are exempt if they are not secured by real property or personal property that is a principal dwelling.
  - d. Transactions in securities or commodities where a registered broker extends credit are exempt.
  - e. Certain credit is exempt if extended without a finance charge for public utility services under a filed tariff.

#### § 4:96 Disclosure requirements—In general

All disclosures required to be made by the Federal Truth in Lending Act and the regulations thereto must be made clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures must be grouped together, segregated from everything else, and must not contain any information not directly related to the required disclosures. The itemization of the amount financed must be separate from the other disclosures. When required to be disclosed with a corresponding amount or percentage rate, the terms "finance charge" and "annual percentage rate" must be more conspicuous than any other disclosure except the creditor's identity.<sup>1</sup>

The creditor must make the required disclosures before consummation of the transaction, except in the case of certain residential mortgage transactions, certain variable-

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[Section 4:96]

<sup>1</sup>12 C.F.R. § 226.17(a).

rate transactions, and certain transactions involving mail or telephone orders or a series of sales.<sup>2</sup>

In a real property transaction, other than a rescindable transaction, in which there is more than one consumer, the creditor need only furnish a disclosure statement to any consumer who is primarily liable on the obligation.<sup>3</sup> If the transaction is rescindable, however, the disclosures must be made to each consumer who has the right to rescind.<sup>4</sup>

The regulations implementing the Truth in Lending Act contain special provisions concerning the definition and treatment of state law requirements that are inconsistent with the federal disclosure requirement. State law is considered to be inconsistent with federally required disclosures if it requires a creditor to make disclosures or take actions that contradict the requirements of federal law. A state law is contradictory if it requires the use of the same term to represent a different amount or a different meaning than the federal law, or if it requires the use of a term different from that required in the federal law to describe the same item. State law requirements are also inconsistent with federal law if they provide rights, responsibilities, or procedures for consumers or creditors that are different from those required by federal law. Such inconsistent provisions are preempted to the extent of their inconsistency. State law requirements are also inconsistent and preempted if the creditor cannot comply with state law without violating federal law.<sup>5</sup>

A creditor who elects to do so may make disclosures required by state law but which are inconsistent with the Federal Truth in Lending Act provided the inconsistent state disclosures are made on the same side of a page as the feder-

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<sup>2</sup>15 U.S.C.A. § 1638(b); 12 C.F.R. § 226.17(b).

In a residential mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C.A. §§ 2601 et seq.) the creditor must make good faith estimates of the required disclosures before the credit is extended, or must deliver or place them in the mail not later than three business days after the creditor receives the consumer's written application, whichever is earlier. 15 U.S.C.A. § 1638(b)(2); 12 C.F.R. § 226.19(a).

<sup>3</sup>12 C.F.R. § 226.17(d).

<sup>4</sup>12 C.F.R. § 226.17(d).

As to when a transaction is rescindable, see 12 C.F.R. § 226.23.

<sup>5</sup>12 C.F.R. § 226.28.

ally required disclosures and the state disclosures must appear under a demarcation line below the federal disclosures which must be identified by a heading that indicates that they are made in compliance with federal law.<sup>6</sup>

The application of the Federal Truth in Lending Act to a particular real property transaction is not dependent on the amount involved in the transaction; where applicable, the Act applies regardless of the amount.<sup>7</sup>

**§ 4:97 Checklist—Form drafting principles—  
Disclosure requirements—For closed-end  
extensions of credit**

For a consumer credit transaction (closed-end), the creditor must disclose the following items:

1. Creditor. The identity of the creditor making the disclosures.
2. Amount financed. The “amount financed,” using that term, and a brief description such as “the amount of credit provided to you or on your behalf.” The amount financed is calculated by:
  - a. Determining the principal loan amount or the cash price (subtracting any down payment);
  - b. Adding any other amounts that are financed by the creditor and are not part of the finance charge; and
  - c. Subtracting any prepaid finance charge.
3. Itemization of amount financed.
  - a. A separate written itemization of the amount financed, including:
    - (1) The amount of any proceeds distributed directly to the consumer.
    - (2) The amount credited to the consumer’s account with the creditor.
    - (3) Any amounts paid to other persons by the creditor on the consumer’s behalf. The creditor must identify those persons.
    - (4) The prepaid finance charge.
  - b. The creditor need not comply with paragraph 3a

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<sup>6</sup>12 C.F.R. § 226.28(a)(2)(i).

<sup>7</sup>15 U.S.C.A. § 1603(3); 12 C.F.R. § 226.3(b).

of this section if the creditor provides a statement that the consumer has the right to receive a written itemization of the amount financed, together with a space for the consumer to indicate whether it is desired, and the consumer does not request it.

4. Finance charge. The “finance charge,” using that term, and a brief description such as “the dollar amount the credit will cost you.”
5. Annual percentage rate. The “annual percentage rate,” using that term, and a brief description such as “the cost of your credit as a yearly rate.”
6. Variable rate.
  - a. If the annual percentage rate may increase after consummation, the following disclosures:
    - (1) The circumstances under which the rate may increase.
    - (2) Any limitations on the increase.
    - (3) The effect of an increase.
    - (4) An example of the payment terms that would result from an increase.
7. Payment schedule.
  - a. The number, amounts, and timing of payments scheduled to repay the obligation.
    - (1) In a demand obligation with no alternate maturity date, the creditor may comply with this paragraph by disclosing the due dates or payment periods of any scheduled interest payments for the first year.
    - (2) In a transaction in which a series of payments varies because a finance charge is applied to the unpaid principal balance, the creditor may comply with this paragraph by disclosing the following information:
      - (a) The dollar amounts of the largest and smallest payments in the series.
      - (b) A reference to the variations in the other payments in the series.
8. Total of payments. The “total of payments,” using that term, and a descriptive explanation such as “the amount you will have paid when you have made all scheduled payments.”
9. Demand feature. If the obligation has a demand

feature, that fact shall be disclosed. When the disclosures are based on an assumed maturity of one year that fact shall also be disclosed.

10. Total sale price. In a credit sale, the “total sale price,” using that term, and a descriptive explanation (including the amount of any down payment) such as “the total price of your purchase on credit, including your down payment of *[\$/dollar amount]*.” The total sale price is the sum of the cash price, the items described in paragraph 2b, and the finance charge disclosed under paragraph 4 of this section.
11. Prepayment.
  - a. When an obligation includes a finance charge computed from time to time by application of a rate to the unpaid principal balance, a statement indicating whether or not a penalty may be imposed if the obligation is prepaid in full.
  - b. When an obligation includes a finance charge other than the finance charge described in paragraph 11a of this section, a statement indicating whether or not the consumer is entitled to a rebate of any finance charge if the obligation is prepaid in full.
12. Late payment. Any dollar or percentage charge that may be imposed before maturity due to a late payment, other than a deferral or extension charge.
13. Security interest. The fact that the creditor has or will acquire a security interest in the property purchased as part of the transaction, or in other property identified by item or type.
14. Insurance. Premiums for credit, life, accident, health, or loss-of-income insurance may be excluded from the finance charge if disclosure is made that the coverage is not required; or the premium for the initial term is disclosed; or the consumer signs or initials an affirmative request for the insurance. Premiums for loss, damage, or liability insurance may be excluded from the finance charge if disclosure is made that the insurance may be obtained from other sources, or the premium for the initial term is disclosed.
15. Certain security interest charges. Charges for taxes and filing fees to perfect the security interest and the

- premium for insurance in lieu of the security interest may be excluded from the finance charge if disclosed.
16. Contract reference. A statement that the consumer should refer to the appropriate contract document for information about nonpayment, default, the right to accelerate the maturity of the obligation, and prepayment rebates and penalties. At the creditor's option, the statement may also include a reference to the contract for further information about security interests and, in a residential mortgage transaction, about the creditor's policy regarding assumption of the obligation.
  17. Assumption policy. In a residential mortgage transaction, a statement whether or not a subsequent purchaser of the dwelling from the consumer may be permitted to assume the remaining obligation on its original terms.
  18. Required deposit. If the creditor requires the consumer to maintain a deposit as a condition of the specific transaction, a statement that the annual percentage rate does not reflect the effect of the required deposit.
  19. Residential mortgage disclosures. If a mortgage transaction is subject to the Real Estate Settlement Procedures Act, the creditor shall make good faith estimates of the matters to be disclosed and deliver them before consummation of the transaction.

#### NOTES

##### Drafter's Notes

For regulatory provisions relating to content of disclosures of closed-end credit, see 12 C.F.R. § 226.18.

A "closed-end credit" means consumer credit other than "open-end credit" as defined in 12 C.F.R. § 226.2(a)(20). 12 C.F.R. § 226.2(a)(10).

An "open-end credit" means consumer credit extended by a creditor in which (a) the creditor reasonably contemplates repeated transactions; (b) the creditor may impose a finance charge from time to time on an outstanding unpaid balance; and (c) the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid. 12 C.F.R. § 226.2(a)(20).

Disclosures required to be made by the Federal Truth in Lending Act (15 U.S.C.A. §§ 1601 et seq.) and the regulations thereto (12 C.F.R. §§ 226.1 et seq.), must be made at the time and in the terminology prescribed. (12 C.F.R. § 226.17). Generally, the required disclosures must be made before consummation of the transaction. 12 C.F.R. § 226.17(b).

**Item 2****Drafter's Notes**

“Credit” means the right to defer payment of debt or to incur debt and defer its payment. 12 C.F.R. § 226.2(a)(14).

**Item 2a****Drafter's Notes**

“Cash price” means the price at which a creditor in the ordinary course of business, offers to sell for cash the property or service that is the subject of the transaction. At the creditor’s option, the term may include the price of accessories, services related to the sale, service contracts and taxes and fees for license, title, and registration. The term does not include any finance charge. 12 C.F.R. § 226.2(a)(9).

**Item 2b****Drafter's Notes**

The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction. 12 C.F.R. § 226.4(a).

**Item 9****Drafter's Notes**

If an obligation is payable on demand, the creditor must make the disclosures based on an assumed maturity of one year. If an alternate maturity date is stated in the legal obligation between the parties, the disclosures must be based on that date. 12 C.F.R. § 226.17(c)(5).

**Item 14****Drafter's Notes**

For conditions required to exclude premiums for credit life, accident, health, or loss-of-income insurance from finance charge, see 12 C.F.R. § 226.4(d).

**Item 15****Drafter's Notes**

For particular charges that may be excluded from the finance charge, see 12 C.F.R. § 226.4(e).

**§ 4:98 Disclosure statement—Loan secured by real property****DISCLOSURES REQUIRED BY THE FEDERAL TRUTH IN LENDING ACT**

Loan or Contract No. \_\_\_\_\_ [number]  
Date \_\_\_\_\_ [date]

Borrower: \_\_\_\_\_ [name of borrower]  
 \_\_\_\_\_ [address of  
 borrower]  
 Lender: \_\_\_\_\_ [name of lender]  
 \_\_\_\_\_ [address of lender]

1.	Amount of Loan	[\$dollar amount]
2.	Other Charges [ <i>itemize</i> ] a. [specify] b. [specify] c. [specify]	[\$dollar amount] [\$dollar amount] [\$dollar amount]
	Total of Other Charges	[\$dollar amount]
3.	Amount Financed	[\$dollar amount]

The borrower has the right to receive at this time an itemization of the amount financed.

4.	FINANCE CHARGE	[\$dollar amount]
5.	Total of Payments	[\$dollar amount]
6.	ANNUAL PERCENT- AGE RATE	[percentage]%

*[Include statement regarding the fact that the annual percentage rate is subject to increase, the circumstances under which rate may increase, the limitations on the increase and the effect of an increase with an example of the payment terms resulting therefrom.]*

The annual percentage rate does not reflect the effect of a deposit required as a condition of this transaction.

7.	TOTAL SALE PRICE	[\$dollar amount]
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8. Payment Terms: The loan is payable in [number] monthly installments of [\$dollar amount], final payment to be [\$dollar amount], the first installment being payable [date], and all subsequent installments on the same day of each consecutive month until paid in full.

The finance charge applies from [date].

9. Insurance. PROPERTY INSURANCE, if written in connection with this loan, may be obtained by borrower through any person of his or her choice. If borrower desires property insurance to be obtained through the lender, the cost will be *[\$/dollar amount]* for the term of the credit.

CREDIT LIFE AND DISABILITY INSURANCE is not required to obtain this loan. No charge is made for credit insurance and no credit insurance is provided unless the borrower signs the appropriate statement below.

(a) The cost of Credit Life Insurance alone will be *[\$/dollar amount]* for the term of the credit.

(b) The cost for Credit Life and Disability Insurance will be *[\$/dollar amount]* for the term of the credit.

I desire Credit Life and Disability Insurance:

Dated: *[date]*.

---

*[Signature of borrower]*

I desire Credit Life Insurance only:

Dated: *[date]*.

---

*[Signature of borrower]*

I DO NOT want Credit Life or Disability Insurance:

Dated: *[date]*.

---

*[Signature of borrower]*

10. Delinquency Charges: If any installment, or portion thereof, continues unpaid for more than *[number]* days following the date such payment is due, borrower shall pay to lender additional interest in an amount not to exceed *[percentage]%* of each installment or *[\$/dollar amount]*, whichever is less.

11. Acceleration on Default: On nonpayment of any installment when due, lender at *[his/her/its]* option may declare all remaining installments immediately due and payable.

12. Prepayment of Unpaid Balance: If the borrower prepays at any time any unpaid balance of the amount owed, the borrower *[will/will not]* have to pay a penalty. On

prepayment, the borrower [*will/will not*] be entitled to a rebate of the unearned finance charge if the obligation is prepaid in full. [*If applicable add: Amount of penalty \$[dollar amount].*]

13. Late Charge: If a payment is late, I will be charged *\$[dollar amount]* or *[percentage]%* of the payment.

14. Security Interest: The loan is secured by a real estate mortgage on property located at *[address of property]*, more particularly described in the mortgage and the note secured thereby, dated *[date]*, executed by borrower in favor of the lender.

See your contract documents for any additional information about nonpayment, default, the right to accelerate the maturity of the obligation, and prepayment refunds and penalties.

**THE BORROWER ACKNOWLEDGES RECEIPT OF A  
COPY OF THIS STATEMENT.**

Witness:

---

*[Signature of witness]*

Borrower:

---

*[Signature of borrower]*

**NOTES TO FORM**

**Drafter's Notes**

For effect of acknowledgment of receipt of a copy of the disclosure statement in any action or proceeding by or against any subsequent assignee of the original creditor, see 15 U.S.C.A. § 1641.

This form was drafted to comply with Regulation Z of the Federal Truth in Lending Act.

**§ 4:99 Disclosure statement—Credit sale secured by  
real property**

**DISCLOSURES REQUIRED BY THE FEDERAL TRUTH  
IN LENDING ACT**

Contract No.: \_\_\_\_\_ *[number]*

Dated: \_\_\_\_\_ *[date]*

Buyer's Name: \_\_\_\_\_ *[name of buyer]*

Buyer's Address: \_\_\_\_\_ [address of buyer]  
 Seller's Name: \_\_\_\_\_ [name of seller]  
 Seller's Business Address: \_\_\_\_\_ [address of seller]

*A. Subject of Transaction.*

1. Property, Goods, or Service:

Quantity	Description (show make, model, serial no., service)	Amount
[number]	[specify]	[\$dollar amount]
[number]	[specify]	[\$dollar amount]
	Total:	[\$dollar amount]

2. Accessories:

Quantity	Description	Amount
[number]	[specify]	[\$dollar amount]
[number]	[specify]	[\$dollar amount]
	Total:	[\$dollar amount]

3. Related Charges:

Description (specify delivery, installation, alteration, modification, or improvement charges)	Amount	
[specify]	[\$dollar amount]	
[specify]	[\$dollar amount]	
	Total:	[\$dollar amount]

4. Taxes:

Description (specify sales or other tax imposed on cash sale)	Amount
[specify]	[\$dollar amount]
[specify]	[\$dollar amount]

Description (specify sales or other tax imposed on cash sale)	Amount
	Total:    \$[dollar amount]

<i>[Total of Items 1, 2, 3, and 4]</i> Description of Trade-in: <i>[specify]</i>	<i>\$[dollar amount]</i>
--	--------------------------

*B. Cost and Credit Terms.*

1.	CASH PRICE	\$[dollar amount]
2.	Less: CASH DOWNPAYMENT	\$[dollar amount]
3.	TRADE-IN \$[dollar amount]	\$[dollar amount]
4.	TOTAL DOWNPAYMENT	\$[dollar amount]
5.	UNPAID BALANCE OF CASH PRICE	\$[dollar amount]
6.	OTHER CHARGES	
	(a) Official Fees	\$[dollar amount]
	(b) <i>[specify]</i>	\$[dollar amount]
	(c) <i>[specify]</i>	\$[dollar amount]
	<b>TOTAL OF OTHER CHARGES</b>	<b>\$[dollar amount]</b>
7.	UNPAID BALANCE and AMOUNT FINANCED	\$[dollar amount]
8.	<b>FINANCE CHARGE</b>	\$[dollar amount]
9.	<b>TOTAL OF PAYMENTS</b>	<b>\$[dollar amount]</b>
10.	<b>DEFERRED PAYMENT PRICE</b>	
	(1 plus 6 plus 8)	\$[dollar amount]
11.	<b>TOTAL SALE PRICE</b>	<b>\$[dollar amount]</b>
12.	<b>ANNUAL PERCENTAGE RATE</b>	<i>[percentage]%</i>

The annual percentage rate does not reflect the effect of a deposit required as a condition of this transaction [*Include statement regarding the fact that the annual percentage rate is subject to increase, the circumstances under which rate may increase, the limitations on the increase and the effect of an increase with an example of the payment terms resulting therefrom.*]

The “TOTAL OF PAYMENT” shown above is payable in [number] monthly installments of \$[dollar amount], final payment to be \$[dollar amount], the first installment being payable [date], and all subsequent installments on the same day of each consecutive month until paid in full. The finance charge applies from [date].

C. *Insurance.*

The purchase of insurance coverage is voluntary and not required for credit [*type of insurance*] insurance coverage is available at a cost of \$[dollar amount] for the term of credit.

I desire insurance coverage.

Signed: *[signature of buyer]*; Dated [date].

I DO NOT desire insurance coverage.

Signed: *[signature of buyer]*; Dated [date].

D. *Security Interest.*

The “TOTAL OF PAYMENT” is secured by a [*specify, such as: real estate mortgage or mechanic’s lien*] on property located at [address of property], and more particularly described in the [*designate security instrument*], dated [date], executed by the buyer in favor of the seller.

E. *Delinquency Charges.*

If any installment, or portion thereof, continues unpaid for more than [number] days following the date such payment is due, the buyer shall pay to seller additional interest in an amount not to exceed [percentage]% of each installment or \$[dollar amount], whichever is less.

F. *Acceleration on Default.*

On nonpayment of any installment when due seller at [his/her/its] option may declare all remaining installments immediately due and payable.

G. *Prepayment of Unpaid Balance.*

If the buyer prepays at any time any unpaid balance the

buyer [*will/will not*] pay a penalty. On prepayment in full, the buyer [*will/will not*] be entitled to a rebate of the unearned finance charge. [*if applicable: amount of penalty \$[dollar amount]*].

See your contract documents for any additional information about nonpayment, default, the right to accelerate the maturity of the obligation, and prepayment refunds and penalties.

**THE BUYER ACKNOWLEDGES RECEIPT OF A COPY  
OF THIS STATEMENT.**

Witness:

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*[Signature of witness]*

Buyer:

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*[Signature of buyer]*

**NOTES TO FORM**

**Drafter's Notes**

See Drafter's Notes following § 4:98.

**§ 4:100 Notice of right of rescission**

*[Insert identification of transaction].*

**NOTICE OF RIGHT TO CANCEL**

**Your Right to Cancel**

You are entering into a transaction that will result in a [*mortgage/lien/security interest*] [*on/in*] your home. You have a legal right under federal law to cancel this transaction without cost, within three business days from whichever of the following events occurs last:

- (1) the date of the transaction, which is [*date*];
- (2) the date you received your Truth in Lending disclosures; or
- (3) the date you received this notice of your right to cancel.

If you cancel the transaction, the [*mortgage/lien/security interest*] is also canceled. Within 20 calendar days after we

receive your notice, we must take the steps necessary to reflect the fact that the [*mortgage/lien/security interest*] [*on/in*] your home has been canceled, and we must return to you any money or property you have given to us or anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

#### HOW TO CANCEL

If you decide to cancel this transaction, you may do so by notifying us in writing, at: [*name and business address of creditor*].

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of [*date*] (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

#### I WISH TO CANCEL

---

[Signature of Consumer]

Dated: \_\_\_\_\_

#### NOTES TO FORM

##### Drafter's Notes

This form is based on Rescission Model Form H-8 in 12 C.F.R. Part 226, App H.

For regulatory provisions relating to right of rescission, see 12 C.F.R. § 226.23.

**§ 4:101 Notice of right of rescission—Refinancing**

*[Insert identification of transaction]*

**NOTICE OF RIGHT TO CANCEL****Your Right to Cancel**

You are entering into a new transaction to increase the amount of credit previously provided to you. We acquired a *[mortgage/lien/security interest]* *[on/in]* your home under the original transaction and will retain that *[mortgage/lien/security interest]* in the new transaction. You have a legal right under federal law to cancel the new transaction without cost, within three business days from whichever of the following events occurs last:

- (1) The date of the new transaction, which is *[date]*;
- (2) The date you received your new Truth in Lending disclosures; or
- (3) The date you received this notice of your right to cancel.

If you cancel the new transaction, your cancellation will apply only to the increase in the amount of credit. It will not affect the amount that you presently owe or the *[mortgage/lien/security interest]* we already have *[on/in]* your home. If you cancel, the *[mortgage/lien/security interest]* as it applies to the increased amount is also canceled. Within 20 calendar days after we receive your notice of cancellation of the new transaction, we must take the steps necessary to reflect the fact that our *[mortgage/lien/security interest]* *[on/in]* your home no longer applies to the increase of credit. We must also return any money you have given to us or anyone else in connection with the new transaction.

You may keep any money we have given you in the new transaction until we have done the things mentioned above, but you must then offer to return the money at the address below. If we do not take possession of the money within 20 calendar days of your offer, you may keep it without further obligation.

**HOW TO CANCEL**

If you decide to cancel the new transaction, you may do so by notifying us in writing, at: *[name and business address of creditor]*.

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights!

If you cancel by mail or telegram, you must send the notice no later than midnight of *[date]* (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

---

*[Signature of Consumer]*

Dated: \_\_\_\_\_

**NOTES TO FORM**

**Drafter's Notes**

This form is based on Rescission Model Form H-9 in 12 C.F.R. Part 226, App H.

See Drafter's Notes following § 4:100.

# Chapter 5

## Easements, Licenses, and Profits

### I. CREATION OF EASEMENT OR LICENSE

#### A. GENERAL CONSIDERATIONS

§ 5:1 Introduction

#### B. GRANTS

- § 5:2 Form drafting principles
- § 5:3 Tax aspects
- § 5:4 Checklist—Drafting a deed conveying an easement
- § 5:5 Deed—Granting easement
  - Private right of way
  - Stormwater drainage easement
  - Sewer easement
  - Pipeline easement
  - High voltage power line—Erection and maintenance
  - Construction, operation, and maintenance
- § 5:12 Declaration of cross-easements—By owner of adjacent premises—Authorization to use common facilities upon severance of any portions of the premises
- § 5:13 Agreement to grant and convey driveway easement
- § 5:14 Agreement to grant solar easement
- § 5:14.50 Provision for solar easement—Grantee to bear expense of maintaining easement
- § 5:15 Agreement to grant drainage rights
- § 5:16 Grant of right to hunt and fish
- § 5:17 Grant of right to use land for playing ball games
- § 5:18 Grant of temporary easement—Use of adjacent land during building construction on land of permanent easement

**FLORIDA JUR FORMS—LEGAL AND BUSINESS**

- § 5:18.50 Grant of mineral exploration license—With mineral purchase option and lease
- § 5:19 Provision—Water rights in grantor's land
- § 5:20 —Right of way over existing farm road
- § 5:21 —Construction and maintenance of gas pipeline
- § 5:22 —Construction and maintenance of pipeline—Rural land
- § 5:23 —Wind energy development and transmission of wind energy
- § 5:24 —Temporary easement—Access to real property for purpose of construction
- § 5:25 —Grant of antenna license
- § 5:26 Agreement by landlord and tenant for license of parking spaces

**C. RESERVATIONS**

- § 5:27 Form drafting principles
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- § 5:29 Reservation of use for public utilities
- § 5:30 Reservation of right of way
- § 5:31 Reservation of right to lay pipe
- § 5:32 Reservation of use of well

**D. OPTIONAL PROVISIONS**

- § 5:33 Exclusive easement rights
- § 5:34 Permitted uses of easement—Grantee's right to construct and maintain improvements and facilities
- § 5:35 Easement subject to rights and privileges of third parties
- § 5:36 Waiver of setback requirements
- § 5:37 Assignment by grantee permitted
- § 5:38 Grantor's right to relocate easement
- § 5:39 Surrender of property upon termination of easement

**II. MAINTENANCE AND REPAIR**

- § 5:40 Introduction
- § 5:41 Agreement by co-owners—To share cost of maintenance and repair of right of way
- § 5:42 Agreement for maintenance and repair of right of way—Provision concerning multiple grantees

## EASEMENTS, LICENSES, AND PROFITS

- § 5:46 Provision—Contribution of costs of maintenance of common easement
- § 5:47 Agreement for maintenance—Municipality

## III. TERMINATION OF EASEMENT

- § 5:48 Introduction
- § 5:49 Quitclaim deed terminating easement
- § 5:50 Termination of easement by general release

## IV. PROFITS A PRENDRE

- § 5:51 Introduction
- § 5:52 Conveyance of timber rights
- § 5:53 Grant of hunting and fishing rights
- § 5:54 Lease—Grant of hunting and fishing privileges

## V. PROFITS A PRENDRE

- § 5:55 Introduction

## VI. PROFITS A PRENDRE

- § 5:56 Introduction

## VII. PROFITS A PRENDRE

- § 5:57 Introduction

## VIII. PROFITS A PRENDRE

- § 5:59 Introduction

## IX. PROFITS A PRENDRE

- § 5:60 Introduction

### Scope

This chapter contains forms for use in transactions involving easements, licenses, and profits, together with pertinent legal principles and tax comments that should be considered in drafting particular documents.

### Treated Elsewhere

Chapters containing related form and text material are Sales (see Ch 1), Conveyances (see Ch 2), and Adjoining Landowners (see Ch 12).

**Research References**

The material cited below is generally applicable to conveyances and acknowledgments. Material that is applicable to particular aspects of the topic is cited in footnotes throughout the chapter and in Drafter's Notes following particular forms.

*West's Key Number Digest*

Easements 141

*A.L.R. Library*

What Constitutes, and Remedies for, Misuse of Easement, 111  
A.L.R. 5th 313

Loss of private easement by nonuse, 62 A.L.R. 5th 219

Unjust enrichment of landowner based on adjoining landowner's construction, improvement, or repair of commonly used highway, street, or bridge, 22 A.L.R. 5th 800

Easement, servitude, or covenant as affected by sale for taxes, 7  
A.L.R. 5th 187

Eminent domain: compensability of loss of visibility of owner's property, 7 A.L.R. 5th 113

Scope of prescriptive easement for access (easement of way), 79  
A.L.R. 4th 604

Construction and application of restrictive covenants to the use of signs, 61 A.L.R. 4th 1028

Change in type of activity of nonconforming use as violation of zoning ordinance, 61 A.L.R. 4th 902

Extinguishment by prescription of natural servitude for drainage of surface waters, 42 A.L.R. 4th 462

Locating easement of way created by necessity, 36 A.L.R. 4th 769

Location of easement of way created by grant which does not specify location, 24 A.L.R. 4th 1053

Implied acceptance, by public use, of dedication of beach or shoreline adjoining public waters, 24 A.L.R. 4th 294

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23  
A.L.R. 4th 631

Way of necessity where only part of land is inaccessible, 10 A.L.R.  
4th 500

Way of necessity over another's land, where a means of access does exist, but is claimed to be inadequate, inconvenient, difficult, or costly, 10 A.L.R. 4th 447

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97  
A.L.R. 3d 587

What constitutes unity of title or ownership sufficient for creation of an easement by implication or way of necessity, 94 A.L.R. 3d 502

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- Conveyance of “right of way,” in connection with conveyance of another tract, as passing fee or easement, 89 A.L.R. 3d 767  
Tacking as applied to prescriptive easements, 72 A.L.R. 3d 648  
Right to maintain gate or fence across right of way, 52 A.L.R. 3d 9  
Comment Note.—Who may enforce restrictive covenant or agreement as to use of real property, 51 A.L.R. 3d 556  
Liability of one maintaining pipeline for transportation of gas or other dangerous substances for injury or property damage sustained by one using surface, 30 A.L.R. 3d 685  
Right of servient owner to maintain, improve, or repair easement of way at expense of dominant owner, 20 A.L.R. 3d 1026  
Deed to railroad company as conveying fee or easement, 6 A.L.R. 3d 973  
Extent and reasonableness of use of private way in exercise of easement granted in general terms, 3 A.L.R. 3d 1256  
Validity and construction of provision of Cable Communications Policy Act (47 U.S.C.A. § 541(a)) allowing cable companies access to utility easements on private property, 113 A.L.R. Fed. 523  
“Compliance with state standards” as requirement to granting right-of-way over federal public lands under § 505(a)(iv) of the Federal Land Policy and Management Act of 1976 (43 U.S.C.A. § 1765(a)(iv), 60 A.L.R. Fed. 386

### *Legal Encyclopedias*

- Fla. Jur. 2d, Easements and Licenses in Real Property  
Am. Jur. 2d, Easements and Licenses in Real Property; Vendor and Purchaser

### *Trial Strategy*

- Permissive Possession or Use of Land, as Defeating Claim of Adverse Possession or Prescriptive Easement, 68 Am. Jur. Proof of Facts 3d 239  
Real-Estate Broker’s Breach of Fiduciary Duty to Seller-Principal by Failing to Disclose Material Facts About or Certain Dealings With Purchaser, 65 Am. Jur. Proof of Facts 3d 109  
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Real Estate Purchaser’s Rights and Remedies Where Seller is Unable to Convey Marketable Title, 52 Am. Jur. Proof of Facts 3d 429  
Recovery of Damages for Loss of View or Visibility Resulting From Construction of Highway or Other Public Improvement, 45 Am. Jur. Proof of Facts 3d 519

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Landowner's Right to Maintain Nonconforming Use Under Zoning  
Ordinance, 62 Am. Jur. Trials 1  
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*Forms*

Federal Tax Guide To Legal Forms, Agriculture and Natural  
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Law. 35 (2003)

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. CREATION OF EASEMENT OR LICENSE

### A. GENERAL CONSIDERATIONS

#### § 5:1 Introduction

An “easement” has been defined as a privilege without profit which the owner of one tenement has a right to enjoy in respect to his or her tenement in or over the tenement of another person, whereby the latter is obliged to suffer or refrain from doing something on his or her own tenement for the advantage of the former.<sup>1</sup>

A license in real property may be defined as a personal, and ordinarily revocable, unassignable privilege conferred either orally or by writing to do one or more acts on land without possessing any interest in the land; in other words, a license in real property is a mere permit to do something on the land of another, but it does not imply an interest in the land of the other person.<sup>2</sup> Because a license does not convey any interest in land, a license generally may not be assigned or conveyed; instead, a license is personal privilege and is automatically extinguished upon the sale or conveyance of the servient property.<sup>3</sup>

The right to profits, denominated “profit à prendre,” consists of a right to take a part of the soil or produce of the land, and, therefore, it is distinguishable from an easement, since one of the features of an easement is the absence of all

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#### [Section 5:1]

<sup>1</sup>Burdine v. Sewell, 92 Fla. 375, 109 So. 648 (1926); J. C. Vereen & Sons v. Houser, 123 Fla. 641, 167 So. 45 (1936).

**Legal Encyclopedias:** Generally; easements, Fla. Jur. 2d, Easements and Licenses in Real Property § 1.

<sup>2</sup>**Legal Encyclopedias:** Licenses in real property, Fla. Jur. 2d, Easements and Licenses in Real Property § 2.

<sup>3</sup>Brown v. Rice, 716 So.2d 807 (Fla. Dist. Ct. App. 5th Dist., 1998).

right to participate in the profits of the soil charged with the easement.<sup>4</sup>

Easements have been divided into two broad classes: (1) easements appurtenant and in gross; and (2) easements affirmative or negative.<sup>5</sup>

The essential elements or qualities of easements appurtenant include the following: they are incorporeal; they are imposed upon corporeal property; they confer no right to a participation in the profits arising from the property; they are imposed for the benefit of corporeal property; and there must be two distinct tenements, the dominant, to which the right belongs, and the servient, upon which the burden lies.<sup>6</sup> An easement in gross is a mere personal interest in the real estate of another; it is not supported by a dominant estate.<sup>7</sup>

An affirmative easement is one that authorizes the doing of acts which, if no easement existed, would give rise to a right of action; a negative easement is one which curtails the owner of the servient tenement in the exercise of some of his or her rights in respect to his or her estate in favor of the dominant owner.<sup>8</sup>

An easement may be created by express grant, by implication, or by prescription.<sup>9</sup> The term grant includes not only the creation of easements by deed directly, but also by reservation in a deed and by covenant or agreement.<sup>10</sup>

It is essential that the person creating the grant, as well as the grantee, have legal capacity. Further, the person

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<sup>4</sup>**Legal Encyclopedias:** Easements and Profits à Prendre, Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

<sup>5</sup>**Legal Encyclopedias:** In general; Classification, Fla. Jur. 2d, Easements and Licenses in Real Property § 6.

<sup>6</sup>**Legal Encyclopedias:** Easements appurtenant, Fla. Jur. 2d, Easements and Licenses in Real Property § 7.

<sup>7</sup>**Legal Encyclopedias:** In general; Classification, Fla. Jur. 2d, Easements and Licenses in Real Property § 6.

<sup>8</sup>**Legal Encyclopedias:** In general; Classification, Fla. Jur. 2d, Easements and Licenses in Real Property § 6.

<sup>9</sup>**Legal Encyclopedias:** Creation and location; in general, Fla. Jur. 2d, Easements and Licenses in Real Property § 12.

<sup>10</sup>**Legal Encyclopedias:** By express grant, covenant, reservation, or exception, Fla. Jur. 2d, Easements and Licenses in Real Property § 16.

creating the easement must have some estate in the servient tenement.<sup>11</sup>

A covenant or agreement may operate as a grant of an easement if it is necessary to give it that effect in order to carry out the manifest intention of the parties.<sup>12</sup>

A reservation is the creation on behalf of the grantor in a deed of a new right issuing out of the thing granted, while an exception operates to withdraw some part of the thing granted that would otherwise have passed to the grantee under the general description of the deed. An easement may be the subject of a reservation, and an easement may also be created through an exception of an existing way or other use of the premises.<sup>13</sup>

A conservation easement is a perpetual, undivided right or interest in real property which is appropriate to retaining land or water areas predominantly in their natural, scenic, open, agricultural, or wooded condition; retaining such areas as suitable habitat for fish, plants, or wildlife; retaining the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance; or maintaining existing land uses, and which prohibits or limits certain activities, such as construction of buildings or roads, dumping of soil or trash, removal of trees, or excavation.<sup>14</sup> A conservation easement may be created or stated in the form of a restriction, easement, covenant, or condition in any deed, will, or other instrument executed by or on behalf of the owner of the property, or in any order of taking.<sup>15</sup>

Solar easements, as provided for by statute, are for the purpose of maintaining exposure of a solar energy device, and must be created in writing and are subject to being re-

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<sup>11</sup>**Legal Encyclopedias:** Who may create, Fla. Jur. 2d, Easements and Licenses in Real Property § 13.

<sup>12</sup>**Legal Encyclopedias:** Covenant or agreement, Fla. Jur. 2d, Easements and Licenses in Real Property § 20.

<sup>13</sup>**Legal Encyclopedias:** Reservation or exception, Fla. Jur. 2d, Easements and Licenses in Real Property § 21.

<sup>14</sup>**Legal Encyclopedias:** Conservation easements, Fla. Jur. 2d, Easements and Licenses in Real Property § 10.

<sup>15</sup>Fla. Stat. Ann. § 704.06(2).

**Legal Encyclopedias:** Conservation easements, Fla. Jur. 2d, Easements and Licenses in Real Property § 22.

corded and indexed in the same manner as any other instrument affecting title to real property.<sup>16</sup>

## B. GRANTS

### § 5:2 Form drafting principles

An express grant of an easement must be in writing.<sup>1</sup> No set form or particular words are necessary to grant an easement, and any words clearly showing the intention of the grantor to create an easement on a sufficiently identifiable estate are generally sufficient.<sup>2</sup> While common law requires that a grant of an easement contain words of inheritance to make such easement a perpetual interest, the Florida Statute dispensing with the requisite words of inheritance to vest a fee simple title in the grantees in a conveyance of any real estate would appear to apply to the creation of easements by grant.<sup>3</sup>

An instrument conveying land to another may be so drafted as to reserve to the grantor, from the conveyance, an easement over the land conveyed. While, strictly speaking, an easement cannot ordinarily be created by words of exception rather than reservation, there has been a tendency on the part of the courts to disregard the technical distinction between reservations and exceptions and to construe the language employed so as to reflect the intention of the parties.<sup>4</sup>

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<sup>16</sup>See Fla. Stat. Ann. § 704.07(1).

**Legal Encyclopedias:** Solar easements, Fla. Jur. 2d, Easements and Licenses in Real Property §§ 11, 23.

#### [Section 5:2]

<sup>1</sup>See Fla. Stat. Ann. § 725.01.

<sup>2</sup>Citgo Petroleum Corp. v. Florida East Coast Ry. Co., 706 So.2d 383 (Fla. Dist. Ct. App. 4th Dist., 1998).

**Legal Encyclopedias:** Formalities, Fla. Jur. 2d, Easements and Licenses in Real Property § 17.

<sup>3</sup>See Fla. Stat. Ann. § 689.10.

<sup>4</sup>**Legal Encyclopedias:** Reservation or exception, Fla. Jur. 2d, Easements and Licenses in Real Property § 21.

Generally, in describing an easement, all that is required is a statement identifying the land that is the subject of the easement and expressing the intention of the parties.<sup>5</sup>

Where an easement is described in general terms, the original grantor has the right to designate the location of the easement, but, upon his or her failure to do so, the owner of the easement may select its location. The owner's selection is limited by the rule that the location must be reasonable as to both the dominant and servient estates, and must not unreasonably interfere with the enjoyment of the servient estate.<sup>6</sup>

The duration of an easement may depend on the terms and conditions of the instrument creating it. An express easement may be permanent or perpetual, or it may be limited to a specific period.<sup>7</sup>

An easement created by grant may generally be extinguished or terminated in several ways, including agreement or release, lapse of the time period established for the easement, breach or nonperformance of a condition stated in the instrument creating it,<sup>8</sup> and merger of the dominant and servient estates. Reversion clauses providing for the termination of an interest in real property upon discontinuance of the use of such property for specified purposes are not

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<sup>5</sup>**Legal Encyclopedias:** Description, Fla. Jur. 2d, Easements and Licenses in Real Property § 18.

<sup>6</sup>Florida Power Corp. v. Hicks, 156 So. 2d 408 (Fla. Dist. Ct. App. 2d Dist. 1963).

<sup>7</sup>**Legal Encyclopedias:** Duration, termination, and revival; in general, Fla. Jur. 2d, Easements and Licenses in Real Property § 54.

<sup>8</sup>Easements that end upon the happening of a clearly defined condition have been recognized. Sears, Roebuck & Co. v. Franchise Finance Corp. of America., 711 So. 2d 1189 (Fla. Dist. Ct. App. 2d Dist., 1998), citing Dotson v. Wolfe, 391 So.2d 757 (Fla. Dist. Ct. App. 5th Dist., 1980).

A grant of easement, which provided that the easement could be terminated if the grantee failed to sweep the parking lot containing the parcel that was subject to the easement, was not governed by the statute providing that a reverter or forfeiture provision in a deed conveying any interest in real estate is not valid for more than 21 years from the date of the deed (Fla. Stat. § 689.18). Sears, Roebuck & Co. v. Franchise Finance Corp. of America., 711 So. 2d 1189 (Fla. Dist. Ct. App. 2d Dist., 1998).

favored in the law and will be strictly construed against the grantor.<sup>9</sup>

A common method of terminating an easement is by a deed of release or ordinary quitclaim deed executed by the easement holder and delivered to the owner of the servient estate.<sup>10</sup>

Since an easement is an interest in land, the grant of an easement should be drawn and executed with the same formality as a deed conveying real estate.<sup>11</sup> Further, the grant should be acknowledged<sup>12</sup> and recorded.<sup>13</sup>

### § 5:3 Tax aspects

An easement is normally treated as an estate in property, while a license is treated as a permit or temporary right. The tax law follows that distinction. A three-year right to mine property was considered a license,<sup>1</sup> while a right to flood property in perpetuity was treated as an easement.<sup>2</sup>

Since the grant of a license is not considered a sale of property, income received from the license is taxed as ordinary income—a license fee.<sup>3</sup> The grant of an easement, on the other hand, is a transfer of an interest in real

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<sup>9</sup>Florida Power Corp. v. Lynn, 594 So. 2d 789 (Fla. Dist. Ct. App. 2d Dist. 1992).

**Legal Encyclopedias:** Duration, termination, and revival; in general, Fla. Jur. 2d, Easements and Licenses in Real Property §§ 54, 57, 59.

<sup>10</sup>Legal Encyclopedias: Agreement or release; Cancellation, Fla. Jur. 2d, Easements and Licenses in Real Property § 58.

<sup>11</sup>Legal Encyclopedias: Formalities, Fla. Jur. 2d, Easements and Licenses in Real Property § 17.

<sup>12</sup>Any instrument “concerning” real property must be acknowledged if it is to be recorded. See Fla. Stat. Ann. § 695.03.

For forms of acknowledgments, see Conveyances (Ch 2).

<sup>13</sup>Recordation is recommended, as it is required for effective notice to creditors and subsequent purchasers. See Fla. Stat. Ann. § 695.01.

For a more detailed discussion of the formalities required in execution, as well as the prerequisites to recordation, see Conveyances (Ch 2).

#### [Section 5:3]

<sup>1</sup>Nay v. C.I.R., 19 T.C. 114, 1952 WL 68 (T.C. 1952).

<sup>2</sup>Rev. Rul. 70-510, 1970-2 C.B. 157.

<sup>3</sup>I.R.C. § 61(a).

property.<sup>4</sup> If the taxpayer is paid for an easement on the taxpayer's property (whether he or she grants it voluntarily or it is taken by the government), the tax treatment depends on whether the taxpayer is permanently deprived of the use of all or part of the property. If the taxpayer is deprived of all of his or her property, the easement is considered a sale of the property affected. Gain or loss is measured by the difference between the proceeds and his or her basis in the property affected.<sup>5</sup> If the easement doesn't significantly deprive the taxpayer of the use of his or her land, then the easement isn't considered a sale, and any payments are treated as a return of capital. Payments in excess of basis are taxable gain.<sup>6</sup>

A sale of an easement under threat of condemnation is subject to the special Code provision<sup>7</sup> that allows gain to go unrecognized if the property is replaced with like-kind property within three years.<sup>8</sup>

Donation of an easement to a charitable or government organization permits the donor to take a charitable deduction in the value of the easement. The grant must be for charitable purposes and without benefit, except incidentally, to the grantor. The amount of the deduction depends on the difference in value of the property before and after the granting of the easement.<sup>9</sup>

Though the Code prohibits a charitable deduction for most donations of partial interests in property, an exception exists for conservation easements. These are easements to preserve outdoor areas for recreational or educational purposes, to preserve a natural habitat, to preserve open space with a scenic easement, or to preserve historically important land or structures.<sup>10</sup> The easement must be perpetual.

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<sup>4</sup>*Legal Encyclopedias*: Am. Jur. 2d, Federal Taxation ¶ 10088.

<sup>5</sup>Rev. Rul. 54-575, 1954-2 C.B. 145.

*Legal Encyclopedias*: Am. Jur. 2d, Federal Taxation ¶ 10088.

<sup>6</sup>Rev. Rul. 68-291, 1968-1 C.B. 351.

*Legal Encyclopedias*: Am. Jur. 2d, Federal Taxation ¶ 10088.

<sup>7</sup>I.R.C. § 1033.

<sup>8</sup>Rev. Rul. 76-69, 1976-1 C.B. 219.

<sup>9</sup>26 C.F.R. § 1.170-1(c).

<sup>10</sup>I.R.C. § 170(h).

**§ 5:4 Checklist—Drafting a deed conveying an easement**

1. Identification of property.
  - a. Servient property.
    - (1) Legal description.
    - (2) Physical or legal relationship to dominant property.
      - (a) Legal documents relating to property.
        - (i) Title.
        - (ii) Date.
        - (iii) Parties.
        - (iv) Recording date.
    - b. Dominant property.
      - (1) Legal description.
      - (2) Historical connection to servient property.
      - (3) Legal documents relating to property.
        - (a) Title.
        - (b) Date.
        - (c) Parties.
        - (d) Recording date.
  2. Parties.
    - a. Grantor of easement: name and address.
    - b. Grantee: name and address.
    - c. Interest of parties in servient and dominant estates, respectively.
  3. Grant of easement.
    - a. Consideration.
    - b. Description of easement.
      - (1) Location.
        - (a) Legal description.
        - (b) Plat.
      - (2) Specific use.
    - c. Duration.
    - d. Grant runs with land.
      - (1) Benefits dominant property.
      - (2) Binding on heirs and assigns of servient property.
    - e. Cause for termination of easement.
    - f. Grantor's reservation of rights in easement.

4. Limitations on grant.
  - a. Specifications for use of easement.
  - b. Geographical, volume, or time use of easement.
    - (1) Limitations.
    - (2) Right to grant licenses or subeasements to others.
  - c. Right to construct improvements.
    - (1) Right to enter onto servient property.
      - (a) Limitations on entry.
  - d. Right to close easement temporarily for repairs and maintenance.
    - (1) Time limitation.
  - e. Maintenance of easement.
    - (1) Snow removal, cutting of weeds or grass, repairs, other.
    - (2) Parties responsible for maintenance.
    - (3) Sharing of costs.
  - f. Termination of easement.
    - (1) Contingency.
    - (2) Reversion to grantor or heirs.
5. Miscellaneous.
  - a. Date.
  - b. Signatures.
  - c. Acknowledgment.
  - d. Attestation.
  - e. Name and address of person preparing document.

**NOTES****Drafter's Notes**

For a checklist that may be used in connection with drafting a deed, generally, see Conveyances (Ch 2).

**§ 5:5 Deed—Granting easement****Deed**

The State of Florida                                      }  
County of \_\_\_\_\_

I, [name of grantor], of [street address], City of [name of city], County of [name of county], State of Florida, owner of

land described as [*description of land*], in consideration of *[\$dollar amount]*, receipt of which is acknowledged, grant, bargain, sell, and convey to [*name of grantee*] of [*street address*], City of [*name of city*], County of [*name of county*], State of Florida, grantee, the following: [*description of easement granted, including use permitted, limitations, location, width, and the like*].

This easement is for the benefit of and appurtenant to that land, or any portion of it, in the County of [*name of county*], State of Florida, described as follows: [*description of easement*].

Witness my hand this [*ordinal number*] day of [*month*], [*year*].

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[Signature]

Executed in the presence of: \_\_\_\_\_  
\_\_\_\_\_

[Acknowledgment]

This instrument was prepared by [*name of preparer*], [*address of preparer*]. [If appropriate, add: Send subsequent tax bills to: [*name of grantee*] at [*address of grantee*]].

#### NOTES TO FORM

##### Drafter's Notes

For discussion of execution, acknowledgment, delivery, and recordation requirements for a conveyance see Conveyances (Ch 2).

#### § 5:6 Deed—Private right of way

The State of Florida                            }  
County of \_\_\_\_\_                                }

I, [*name of grantor*], of [*street address of grantor*], in the City of [*name of city*], County of [*name of county*], State of Florida, in consideration of *[\$dollar amount]* and other good and valuable consideration, receipt of which is acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, to [*name of grantee*], of [*street address of grantee*], in the City of [*name of*

*city], County of [name of county], State of Florida, and [his/her] heirs or assigns, for the purpose of [description of use permitted, with any specific limitations], a private right of way over [description of location, width, and length of right of way and area over which right of way extends] for the benefit of and as an easement appurtenant to that land in the [specify], County of [name of county], State of Florida, described as [description of dominant tenement], or any portion of it.*

Witness my hand this [ordinal number] day of [month], [year].

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[Signature]

Executed in the presence of: \_\_\_\_\_

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*[Acknowledgment]*

This instrument was prepared by [name of preparer], [address of preparer]. [If appropriate, add: Send subsequent tax bills to: [name of grantee] at [address of grantee]].

**NOTES TO FORM**

**Drafter's Notes**

The rights and interests in land that are subject to being extinguished by marketable record title, pursuant to Fla. Stat. Ann. § 712.04, include rights of entry or of an easement, given or reserved in any conveyance or devise of realty, when given or reserved for the purpose of mining, drilling, exploring, or developing for oil, gas, minerals, or fissionable materials, unless those rights of entry or easement are excepted or not affected by the provisions of Fla. Stat. Ann. § 712.03 or § 712.04. However, the provisions of Fla. Stat. Ann. § 704.05 do not apply to interests reserved or otherwise held by the state or by any of its agencies, boards, or departments. Fla. Stat. Ann. § 704.04.

Any person claiming a right of entry or easement may preserve and protect it from extinguishment by the operation of Fla. Stat. Ann. § 704.05 in relation to Fla. Stat. Ann. §§ 712.04 et seq. by filing a notice in the form and in accordance with the procedures in Fla. Stat. Ann. § 712.05 and § 712.06. Fla. Stat. Ann. § 704.05.

**Research References**

*Legal Encyclopedias*

Fla. Jur. 2d, A grant or reservation of a right of way in general terms will ordinarily be construed as creating a general right of way

capable of use for all reasonable purposes. “Reasonable use” includes not only the use required at the time of the grant or reservation, but also the right to use the way for any purposes connected with the use to which the dominant tenement may naturally and reasonably be devoted. The legal extent of a right of way created by grant must be ascertained from the intention of the parties at the time it was created. See Easements and Licenses in Real Property § 43.

### § 5:7 Deed—Stormwater drainage easement

Prepared under the supervision of: *[identify preparer]*  
*[PARCEL NO.]*  
*[SECTION]*  
*[STATE ROAD]*  
*[COUNTY]*

#### STORMWATER DRAINAGE EASEMENT

This stormwater drainage easement, made and executed on *[date of easement execution]*, by *[name of grantor]*, as Grantor, to the State of Florida Department of Transportation, its successors, and assigns, as Grantee.

WITNESS: That Grantor, for and in consideration of the sum of *[\$/dollar amount]* and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, grants to Grantee, its successors, and assigns, a non-exclusive perpetual Stormwater Drainage Easement for the purpose of clearing, excavating, constructing, and maintaining a maintenance road and storm drains, with all the fills, cuts, drains, ditches, and other incidents which Grantee may deem necessary or convenient in connection therewith, over, under, on, and through the following described real property located in *[address of real property]*, to wit: *[description of property]*.

This Stormwater Drainage Easement shall be subject to the right of Grantor, its successors, and assigns, to design, construct, and cover this Stormwater Drainage Easement with concrete, asphalt, or other similar surface pavements or materials for the purpose of providing parking and allowing ingress and egress across, over, upon, and through this Stormwater Drainage Easement. Such rights to make surface improvements to the subject property shall not interfere with the rights granted to Grantee, pursuant to this instrument.

TO HAVE AND TO HOLD the same to Grantee, its successors, and assigns forever, and Grantor will defend the title to said lands against all persons claiming by, through, or under Grantor.

IN WITNESS, Grantor has executed this instrument on the day and year first written above.

By: \_\_\_\_\_  
as President of [*name of corporation*]

WITNESSES:

\_\_\_\_\_ [*Witness*]

\_\_\_\_\_ [*Printed Name of Witness*]

\_\_\_\_\_ [*Witness*]

\_\_\_\_\_ [*Printed Name of Witness*]

The State of Florida  
County of \_\_\_\_\_      }

The foregoing instrument was acknowledged personally before me on [*date of acknowledgment*], by [*name of president of corporation*], as President of [*name of corporation*], a [*name of state*] corporation, on behalf of the corporation, who is personally known to me or has produced [*name of documentation*] as identification, and who did take an oath that [*he/she*] is authorized to execute the foregoing instrument on behalf of [*name of corporation*], a [*name of state*] corporation.

\_\_\_\_\_ [*Notary Public*]

My commission expires: \_\_\_\_\_

**§ 5:8 Deed—Sewer easement**

The State of Florida                            }  
County of \_\_\_\_\_                                }

I [*name of grantor*], of [*name of city*], State of Florida, as grantor, in consideration of *[\$/dollar amount]* and other good and valuable consideration, the receipt of which is acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, to the City of [*name of city*], located in the County of [*name of county*], State of Florida, as grantees, the right to construct, alter, and maintain a sewer line and all necessary laterals to it across the property described as: [*description of servient estate and, if possible, the course of the easement strip*], together with the free right to enter and depart over and across the property, insofar as the right to enter and depart is necessary to the proper use of any other right granted in this easement, upon the conditions that the grantees at all times will [*specify desired conditions*].

Dated [*date*].

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[Signature]

Executed in the presence of: \_\_\_\_\_

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[Signatures]

[Acknowledgment]

This instrument was prepared by [*name of preparer*], [*address of preparer*].

**NOTES TO FORM****Drafter's Notes**

See notes following § 5:5.

**Research References**

*Legal Encyclopedias*

Fla. Jur. 2d, Maintenance and repair of easements, Easements and Licenses in Real Property § 48.

**§ 5:9 Deed—Pipeline easement**

The State of Florida  
County of \_\_\_\_\_ }

I [*name of grantor*], of [*street address*], [*name of county*], State of Florida, as grantor, in consideration of *[\$/dollar amount]*, the receipt of which is acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, to [*name of grantees*] of [*street address of grantees*], County of [*name of county*], State of Florida, as grantees, and its successors and assigns, a right of way and easement for the purpose of laying, maintaining, and operating pipelines to be used for transporting any and all substances capable of being transported through the pipelines. The right of way and easement will be [*number of feet*] feet in width on and through the grantor's land located in [*name of county*] County, State of Florida, and described as follows: [*description of land and, if possible, set forth exact location of easement strip*].

Accompanying this right is the further right in grantees, and its successors and assigns, to enter and depart over and upon that portion of grantor's land described as follows: [*description of area within which right to enter and depart may be exercised*], to effect the purposes of the easement. These rights are conditioned on the reasonable exercise of it for the benefit of the dominant tenement, and, in the event of excessive use, or use for nondominant purposes, or use by means otherwise injurious to the servient tenement, grantor will have the right to extinguish the easement.

Dated [*date*].

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[Signature]

Executed in the presence of: \_\_\_\_\_

---

[Signatures]

[Acknowledgment]

This instrument was prepared by [*name of preparer*], [*address of preparer*].

**NOTES TO FORM****Drafter's Notes**

See notes following § 5:5.

**Research References***A.L.R. Library*

Liability of one maintaining pipeline for transportation of gas or other dangerous substances for injury or property damage sustained by one using surface, 30 A.L.R. 3d 685.

**§ 5:10 Deed—High voltage power line—Erection and maintenance**

I, [name of grantor], of [street address of grantor], City of [name of city], County of [name of county], Florida, as grantor, in consideration of \$[dollar amount], paid by [name of corporation], a corporation organized and incorporated under the laws of Florida, as grantees, the receipt of which is acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, to grantees the right to erect, construct, reconstruct, replace, remove, maintain, and use a line of towers with the wires and cables as grantees will from time to time suspend therefrom for the transmission of electrical energy, and for communication purposes, and all necessary and proper foundations, footings, crossarms, and other appliances and fixtures for use in connection with the towers, wires, and cables, together with a right of way, on, along, and in all of the described strip of those lands located in [name of county] County, State of Florida, and described as follows: [description of land and, if possible, set forth exact location of easement strip].

Accompanying this right is the further right in grantees to enter and depart over and on that portion of grantor's land described as follows: [description of area within which right to enter and depart may be exercised], to effect the purposes of the easement granted here. The right will be exercised over routes as will occasion the least practicable damage and inconvenience to grantor. The right is conditioned on the reasonable exercise of it for the benefit of the dominant tenement, and in the event of excessive use, or use for nondominant purposes, or use by means otherwise injurious to the servient tenement, grantor will have the right to extinguish the right.

Grantor will have the right to use the strip described in this deed for purposes not inconsistent with grantee's full enjoyment of the rights granted, provided that grantor will not erect or construct any building or other structure, or drill or operate any well, within the strip.

Grantee will have the further right to install, maintain, and use gates and all fences which now cross or will in the future cross the strip. Grantee will also have the right from time to time to trim and to cut down and clear away any and all trees and brush now or in the future on the strip and will have the further right from time to time to trim and cut down and clear away any trees on either side of the strip which now or in the future, in the opinion of grantee, may be a hazard to the towers, wires, or cables, by reason of the danger of falling thereon, provided, however, that all trees that grantee is authorized to cut and remove, if valuable for timber or wood, will continue to be the property of grantor, but all tops, lops, brush, and refuse wood will be burned or removed by grantee.

Grantee will also have the right to mark the location of the strip by suitable markers set in the ground or on the towers, but the markers, when set in the ground, will be placed in fences or other locations which will not interfere with any reasonable use grantor will make of the strip.

Grantee will repair any damage caused by grantee to grantor's private roads or lanes on the lands, and will indemnify grantor against any loss and damage that will be caused by the exercise of grantee's right to enter and depart, or by any wrongful or negligent act or omission of grantee or of its agents or employees in the course of their employment.

The provisions of this deed will inure to the benefit of and bind the heirs, successors, and assigns of the respective parties to it.

Dated [date].

---

[Signature]

Executed in the presence of: \_\_\_\_\_

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[Signatures]

*[Acknowledgment]*

This instrument was prepared by *[name of preparer]*, *[address of preparer]*.

**NOTES TO FORM****Drafter's Notes**

See notes following § 5:5.

**§ 5:11 Deed—Construction, operation, and maintenance****EASEMENT**

DATED: *[date]*.

In consideration of the payment to *[name of grantor]*, grantor, of \$*[dollar amount]* and other good and valuable consideration which grantor has received, grantor, and those holding through grantor, grant and give to *[name of grantee]* and its successors and assigns an easement for the construction, operation, and maintenance of *[description of construction]* to be installed from time to time; with the right to reconstruct, improve, add to, change the size of, or remove the facilities or any of them; to permit the attachment of *[identify any attachments]*; also, to cut, trim, and keep clear all trees, brush, and undergrowth or other obstructions that might endanger or interfere with the facilities, on, over, on, under, and across grantor's property described as follows: *[description of property]*.

This easement is subject to the following conditions: *[description of easement conditions]*.

In the presence of:

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*[Signatures]*

By: \_\_\_\_\_

President

ATTEST: \_\_\_\_\_

Secretary

*[Corporate Seal]*

The State of Florida                      }  
County of \_\_\_\_\_                      }

I CERTIFY that before me, personally appeared [*name of president*] and [*name of secretary*], respectively, President and Secretary of [*name of corporation*], a Corporation organized under the Laws of the State of [*name of corporation*], to me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged the execution of it to be their free act and deed as such officers, for the uses and purposes therein mentioned; and that they affixed thereto the official seal of the corporation and that the instrument is the act and deed of the corporation.

WITNESS my hand and official seal in the County and State this [*ordinal number*] day of [*month*], [*year*].

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[*Notary Public*]

My commission expires: \_\_\_\_\_

**§ 5:12 Declaration of cross-easements—By owner of adjacent premises—Authorization to use common facilities upon severance of any portions of the premises**

[*Name of grantor*] is the owner of certain premises located at [*street address*], in the City of [*name of city*], County of [*name of county*], State of Florida, referred to below as the premises, described as Lots Nos. [*identification of lot numbers*] [*description of lot numbers*] on Exhibit [*identification of exhibit*], attached and incorporated in this declaration by reference, and having acquired the above-mentioned premises from [*name of former owner*] on [*date of previous purchase*], by deed filed in the [*name of recorder's office*] in the City of [*name of city*], County of [*name of county*], State of Florida, in [*name of deed book*] on page [*number of page*], on [*date*], declares in respect to the premises as follows:

**SECTION I. DEFINITION OF “PREMISES”**

The term the “premises,” as used in this declaration, means the entire lot or piece of ground, or lots or pieces of

ground as the case may be, consisting of Lots Nos. [*identification of lot numbers*] as described on Exhibit [*identification of exhibit*] attached and incorporated in this declaration by reference.

#### SECTION II. CREATION OF CROSS EASEMENT

If at any time in the future, any one or more of the separate lots constituting the premises will be severed from the other lots, then, in such a case, the owner will, from time to time, in future of each and every one of the parcels, have access to and the right to use in common with the owners and occupants of each of the other lots, any [*name of common facility*] and associated facilities that may at any time in the future be constructed on Lot No. [*number of lot*]. This applies to the extent so authorized by the owner, and the occupants of any dwelling constructed at any time on any of the lots.

The previously mentioned right is conditioned on the owner of the lot or lots claiming this right paying that proportional part of the cost of maintenance, use, and operation of the [*name of common facility*] and associated facilities as the total number of dwelling units erected on the lot whose owner claims a right under the easement bears to the total number of dwelling units constructed on all lots whose owners claim a right to use, or otherwise use, the [*name of common facility*] or associated facilities.

#### SECTION III. RIGHTS CONCERNING SEWERS

The owners of each of the lots described as Lots [*description of lot numbers*] will have the right for all time after that to connect to and use any and all sewers that may at any time be constructed on any one or more of the lots, to the extent that any such sewer to which the owner seeks to connect is designed for and intended to serve a building or the portion of premises sought to be connected to the sewer. Each owner who will connect to any such sewer will be responsible for a reasonable proportion of any costs of maintenance or upkeep, to the extent the sewer is not the responsibility of any public authority.

#### SECTION IV. BINDING EFFECT

This declaration will be binding upon and will inure to the benefit of [*name of grantor*], [*his/her*] successors, and assigns, and any person or other entity which at any time in

the future will become the owner of any one or more of the lots or any portion of it described in Exhibit *[identification of exhibit]*.

Witness our hands this *[ordinal number]* day of *[month]*, *[year]*.

---

*[Signature]*

Executed in the presence of: \_\_\_\_\_

---

*[Signatures]*

*[Acknowledgment]*

This instrument was prepared by *[name of preparer]*, *[address of preparer]*.

### **§ 5:13 Agreement to grant and convey driveway easement**

This agreement, made this *[date of agreement]*, by and between *[name of first party 1]* and *[name of first party 2]*, husband and wife, of *[address of first party]*, in the City of *[name of city]*, State of Florida, referred to below as first party, and *[name of second party]*, a *[state]* corporation, with its principal place of business in the City of *[name of city]*, State of Florida, referred to below as second party, establishes that:

1. First party agrees to grant and convey, for a period of *[number of years]* years from the date of the conveyance, to

second party, its successors, and assigns, an easement for driveway purposes over and across the following described property: *[description of property]*. Driveway purposes as used in this agreement mean *[residential/commercial]* driveway.

2. The previously mentioned driveway will be constructed and maintained in good repair by the second party at its sole cost and expense. The driveway will be constructed and maintained of the following material: *[asphalt/concrete]*.

3. The driveway easement will be constructed within the limits of the following described areas: *[identification of areas]*.

4. Second party agrees to pay first party the sum *[\$/dollar amount]* for this easement on or before *[date]*. Receipt of second party's valid check will constitute sufficient payment. On proper payment, first party will grant and convey by warranty deed the driveway easement on or before the *[number]* day following payment. The obligation of second party to pay first party the agreed amount of money is conditioned on the first party having the legal right, in the opinion of second party's attorneys, to grant the easement to the second party.

5. First party agrees to furnish second party, on or before *[date]*, an abstract of title showing marketable title up to the date of this agreement.

6. This grant of easement will run with the land and will be binding on and will inure to the benefit of the parties to it, their heirs, successors, and assigns.

7. The obligation of second party to complete this agreement and to pay the first party the sum of *[\$/dollar amount]* is further conditioned on second party's acquiring title to *[identification of adjoining property]* on or before *[date]*.

8. This agreement will be null and void unless executed by second party and the executed counterpart hereof delivered to the first party within *[number of days]* days from the date of this agreement.

9. Delivery of a copy of this agreement, or any notice provided for in it, will be deemed to be complete if and when deposited in the United States mail, properly stamped and addressed to second party at its above-stated address, or when personally delivered to *[name of addressee]*.

Witness our hands this *[date]*.

---

*[Signature]*

Executed in the presence of: \_\_\_\_\_

---

*[Signatures]*

*[Acknowledgment]*

This instrument was prepared by *[name of preparer]*, *[address of preparer]*.

**NOTES TO FORM****Drafter's Notes**

See notes following § 5:5.

**§ 5:14 Agreement to grant solar easement**

Agreement made between [name of grantor] of [street address], City of [name of city], County of [name of county], State of Florida, referred to below as grantor, and [name of grantee], of [street address], City of [name of city], County of [name of county], State of Florida, referred to below as grantee.

**RECITALS**

1. Grantor is the owner of certain real property commonly known as [street address], City of [name of city], County of [name of county], State of Florida, referred to here as the servient estate, and more particularly described as follows: [legal description].
2. Grantee is the owner of certain real property commonly known as [street address], City of [name of city], County of [name of county], State of Florida, referred to here as the dominant estate, and more particularly described as follows: [legal description].
3. Grantee desires to acquire certain rights in the servient estate.

Now, therefore, for and in consideration of the foregoing premises, the parties agree as follows:

1. Grant of easement. In consideration of the payment of \$[dollar amount] from grantee, receipt of which is acknowledged, grantor grants to grantee an easement as hereafter described.
2. Character of the easement. The easement granted in this instrument is appurtenant to the dominant estate.
3. Description of easement. The easement granted in this instrument is a right of receiving sunlight across the servient estate for a solar energy system located on the dominant estate.
4. Location of easement. The solar easement is located as follows: [description of dimensions of easement expressed in measurable terms and/or hours of day on specified days during which direct sunlight to specified surface of solar energy system may not be obstructed; for example: that air-

*space located above a horizontal plane, which is located 30 feet above the entire property of grantor. For purposes of determining that plane, the zero-foot elevation point shall be the stretch of sidewalk of [name of street] Street that currently runs along the southern boundary of servient estate].*

The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the easement are: *[description of angles in degrees]*.

The location of the easement on the servient estate in relation to existing boundaries and various setbacks established by local zoning authority is as follows: *[description of easement location]*.

The point on the dominant estate from where the angles describing the easement are to be measured is as follows: *[description of point]*.

The location of the easement is also described in the diagram attached as Exhibit A and made a part of this agreement.

5. Restraints imposed by the easement. The solar easement granted above imposes the following restrictions on the future use and enjoyment of the servient estate to prevent the impairment or destruction of the passage of sunlight through the easement: *[description of restraints on vegetation, structures, and other objects]*.

6. Effect of interference with the easement. In the event of interference with the enjoyment of the easement, as a result of the acts or omissions of the owner of the servient estate, the owner of the dominant estate shall be entitled to compensation from the owner of the servient estate as follows: *[description of amount of compensation per day]*.

7. Compensation of servient estate for maintenance of the easement. The owner of the servient estate shall be entitled to compensation from the owner of the dominant estate for all expenses incurred in maintaining the easement.

8. Termination. The easement, rights, and privileges granted under this instrument shall cease and terminate upon any substantial and permanent change of condition in the dominant estate, whereby the solar energy system is no longer required or used for producing energy, or such

system is permanently dismantled, removed, or abandoned by grantee.

9. Entire agreement. This instrument contains the entire agreement between the parties relating to the rights granted and the obligations assumed pursuant to this instrument. Any oral representations or modifications concerning this instrument shall be of no force and effect, excepting a subsequent modification reduced to writing, signed by the party to be charged therewith.

10. Attorney's fees. In the event of any controversy, claim, or dispute relating to this instrument or the breach of it, the prevailing party shall be entitled to recover reasonable expenses, attorney's fees, and costs.

11. Binding effect. This agreement shall bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the parties.

In witness, the parties have executed this agreement on [date of execution], at [place of execution].

---

[Signature]

Executed in the presence of: \_\_\_\_\_

---

[Signatures]

*[Acknowledgment]*

This instrument was prepared by [name of preparer], [address of preparer].

#### NOTES TO FORM

##### Drafter's Notes

For statutory provisions relating to solar easements, see Fla. Stat. Ann. § 704.07.

##### Research References

*Law Reviews and Other Periodicals*

Potis, Solar Access Rights in Florida: Is There a Right to Sunlight in the Sunshine State? 10 Nova L.J. 125 (1985).

**§ 5:14.50 Provision for solar easement—Grantee to bear expense of maintaining easement****SOLAR EASEMENT**

*[Describe parties by name and address and identify them as Grantor and Grantee; state the consideration for the agreement; and include any other relevant introductory material]*

**PURPOSE**

This Solar Easement is granted for the purpose of assuring the Grantee the right to receive sunlight across the Grantors property for the Grantees use to operate a solar energy system on the Grantees Property.

**DESCRIPTION OF AFFECTED PROPERTIES**

The Solar Easement is located on that portion of the Grantors property located in the Town of *[name of town]*, County of *[name of county]*, State of *[name of state]*, which is described on the attached Schedule A and incorporated in this Solar Easement as if fully set forth herein. The Solar Easement is also as described on a map and diagram attached hereto as Schedule B and incorporated in this Solar Easement as if fully set forth herein.

**RIGHTS GRANTED; VIOLATIONS; DAMAGES AND COSTS OF REMOVAL**

(A) **RIGHT TO SUNLIGHT:** This Solar Easement grants to Grantee the right to receive sunlight across the Easement Corridor on Grantors Property for the use and operation of a solar energy system located on the Grantees Property, as those terms are defined in Schedule A.

(B) **RESTRICTIONS ON MAINTENANCE, USE AND ENJOYMENT BY GRANTOR:** The Solar Easement imposes the following restrictions on the future use and enjoyment of the Grantors Property, which restrictions shall run with the land:

(1) There shall be no prevention, impairment, or destruction of the passage of sunlight through the Easement Corridor to the Grantees Property.

(2) No trees, vines, vegetation, buildings, structures, or other things or objects will be allowed to encroach into the Easement Corridor, except as follows: *[list any exceptions, such as an existing tree or building]*.

(C) EFFECT OF INTENTIONAL VIOLATION: In the event that any of the foregoing restrictions are violated with the specific intent or knowledge that the action will constitute a violation of the terms of this Solar Easement, then the parties agree as follows:

(1) The Grantee will notify Grantor of the encroachment and of the intended actions to be taken to remove the encroaching item; such notice will be given no later than *[number of days]* days before commencing action to remove the encroaching item.

(2) The Grantee, or his or her agent, employee, or contractor, is authorized to enter onto Grantors Property during the hours of 8am to 6pm of any day for the purpose of removing the encroaching item from the Easement Corridor. Grantor agrees that the Grantor is solely responsible for the reasonable costs and expenses of removing the encroaching item, and for the costs and expenses of the Grantee in gaining access to the Easement Corridor for the purpose of effecting such removal. Grantee agrees that it will repair any damage to any part of the Grantors Property which is caused by the removal of the encroaching item.

(3) In the event that the Grantor fails or refuses to permit Grantee access to the Easement Corridor for the purpose of removing encroaching items from the Easement Corridor in accordance with the foregoing provisions, then the Grantor agrees to pay to the Grantee liquidated damages in the amount of *[\$/dollar amount]* per day during the period that the encroachment remains in the Easement Corridor, such amount representing the parties agreement as to the cost and expense to the Grantee of obtaining alternate sources of energy or electricity for the Grantees Property during any period of continued violation of the agreement. The Grantor also agrees that he or she shall be responsible for all costs and expenses of the Grantee, including reasonable attorneys fees and court costs, to enforce the Grantees rights against the Grantor under this Solar Easement and to collect any sums due under this Solar Easement.

(D) EFFECT OF NONINTENTIONAL VIOLATION: In the event that any of the foregoing restrictions are violated without the specific intent to violate this Solar Easement, then the parties agree as follows:

(1) If the violation is not the result of intentional action by the Grantor to cause or effect an encroachment into the Easement Corridor, the Grantee, at his or her sole cost and expense, will notify Grantor of the encroachment and of the intended actions to be taken to remove the encroaching item; such notice will be given no later than *[number of days]* days before commencing action to remove the encroaching item.

(2) During the period after notice has been given under subsection (D)(1) above, but before any action has been taken by the Grantee to remove the encroachment under subsection (D)(3) below, the Grantor may notify the Grantee that he or she will remove or cause the encroachment to be removed at the Grantors sole cost and expense, and will effect such removal.

(3) If the violation is not the result of intentional action by the Grantor to cause or effect an encroachment into the Easement Corridor, then at the expiration of the notice period specified in subparagraph (D)(1) above, Grantee, or his or her agent, employee, or contractor, is authorized to enter onto Grantors Property during the hours of 8am to 6pm of any day for the purpose of removing the encroaching item from the Easement Corridor. Grantee agrees that the Grantee is solely responsible for the reasonable costs and expenses of removing the encroaching item, and for the costs and expenses of the Grantee in gaining access to the Easement Corridor for the purpose of effecting such removal. Grantee agrees that it will repair any damage to any part of the Grantors Property which is caused by the removal of the encroaching item.

(4) In the event that the Grantor fails or refuses to permit Grantee access to the Easement Corridor for the purpose of removing encroaching items from the Easement Corridor in accordance with the foregoing provisions, then the Grantor agrees to pay to the Grantee liquidated damages in the amount of *[\$/dollar amount]* per day during the period that the encroachment remains in the Easement Corridor, such amount representing the parties agreement of the cost and expense to the Grantee of obtaining alternate sources of energy or electricity for the Grantees Property during any period of continued violation of the agreement. The Grantor also agrees that

he or she shall be responsible for all costs and expenses of the Grantee, including reasonable attorneys fees and court costs, to enforce the Grantees rights against the Grantor under this Solar Easement and to collect any sums due under this Solar Easement.

#### DURATION OF EASEMENT

This Solar Easement shall run with the land, and is binding upon the Grantor, his or her successors, assigns, heirs, distributees, and grantees.

This Solar Easement shall terminate in the event that the Grantee, his or her successors, assigns, heirs, distributees, and grantees shall cease to maintain and operate a solar energy system on the Grantees Property for a period exceeding *[description of period, such as 12 consecutive months]*.

*[Include other relevant provisions, including notice provisions]*

*[Date]*

---

*[Name(s) of Grantor(s)]*

*[Acknowledgement(s)]*

*[Describe the easement location, defining the terms Grantors Property, Grantees Property, and Easement Corridor.] An illustrative description is set forth below:*

The Solar Easement is located as follows:

The Grantor is the fee owner of all of that real property located in the town or city of *[name of city]*, County of *[name of county]*, State of *[name of state]* which is described in a deed to the Grantor dated *[date]* and recorded in the Office of the *[name of recording office]* in Book of Deeds *[identification of book]* at page *[page number]* on *[date of recording]* (herein referred to as the Grantors Property).

The Grantee is the owner or occupant of real property which is adjoining to the Grantors Property and has a common border with the Grantors Property described as follows: *[description of common border, including beginning and ending point]. Such adjoining property owned or occupied by the Grantee is herein referred to as the Grantees Property. Such common boundary line is referred to as the Boundary Line.*

The Solar Easement extends over such portion of Grantors Property as extends from the Boundary Line into the Grantors Property a distance of [number of feet] feet to form a corridor on the Grantors Property parallel to the Boundary Line which is [number of feet] feet deep, and includes all of the airspace located above a horizontal plane, which plane is located 30 feet above such corridor on the Grantors Property (herein referred to as the Easement Corridor). For the purposes of determining the location of the horizontal plane, the zero foot elevation point shall be [*description of particular location along the boundary or a street level or other relevant and discernible feature from which to measure*]. This corridor and horizontal plane, and the Easement Corridor are depicted more fully on a map and diagram attached to this Solar Easement as Schedule B and are incorporated herein as if fully set forth.

#### SCHEDULE B

*[Include a graphic representation of the areas of Grantors Property affected by the easement, including a diagram and/or map of the Easement Corridor, common boundary line, height of the easement, and depth of the easement]*

#### § 5:15 Agreement to grant drainage rights

##### AGREEMENT

THIS AGREEMENT is made on [*date of agreement*], between [*name of grantor*] (referred to below as “grantor”), whose address is [*address of grantor*], and [*name of grantee*], (referred to below as “grantee”), whose address is [*address of grantee*].

##### W I T N E S S

WHEREAS, [*name of grantor*] is the owner of that certain real property located in [*location of property*], to wit: [*description of property*].

WHEREAS, [*name of grantor*] has executed a quitclaim deed, conveying any and all rights, title, interest, claim, and demand which [*name of grantee*], and their heirs, legal representatives, and assigns may have in the property; and,

WHEREAS, the parties recognize that grantor has certain rights under law to the unimpeded drainage of his or her property; and

WHEREAS, grantor recognizes grantee's rights to the drainage of his or her abutting property, as set forth by law, without intending in this agreement to establish any greater rights; and,

WHEREAS, grantor, granting the limited privilege to grantee to enter on the grantor's property, for the purposes of *[description of purpose]*, and restoring and correcting the drainage of his or her property would be in the best interests of both grantor and grantee; and

WHEREAS, grantee wishes to obtain a license to continue to access the grantor's property for sewer, electric power, and telephone lines.

NOW THEREFORE, in consideration of the sum of \$[*dollar amount*] and other good and valuable consideration, as described here, the receipt and sufficiency of which is mutually acknowledged, grantor and grantee agree as follows:

1. All the foregoing statements are true and correct, and are incorporated in this agreement as if set forth at length.
2. Grantor grants to grantee the privilege and right to enter on the grantor's property, for the sole purpose of opening up any drainage ways, in order to allow adequate and satisfactory drainage of grantee's property, as allowed and limited by law.
3. Unless otherwise specifically provided, any costs due to the maintenance or other work performed on either the grantor or grantee's property, as described, shall be divided evenly between the parties to this agreement, the total not to exceed \$[*dollar amount*].
4. *[Grantor/Grantee]* shall, at his or her expense, have the responsibility to obtain any and all permits (referred below to as the "Permits"), if any, required by the appropriate local, state, and federal governmental entities to allow completion of the work referred to in this agreement.
5. Grantee shall indemnify and hold grantor harmless from any and all liability, loss, or damage, whether monetary or otherwise, including reasonable attorney's fees, should litigation arise, which grantor should suffer as a result of any claims, demands, costs, or judgments against and arising out of any of the activities referred to

under the terms of this agreement, including any damage sustained to land or otherwise, pursuant to work on either the grantor's or grantee's property, as described in this agreement, by grantee or [*his/her*] agents, personnel, or assigns, as well as to any other lands immediately adjacent to the properties described in this agreement.

6. Both parties agree that grantor shall be notified by and through its agent, [*name of agent*], of the initiation and cessation of the work and that grantor shall further have the right to approve the work.

7. Grantor grants to grantee a license to access grantor's property, in order to periodically "clean out" and otherwise maintain any drainage ways, which are the subject of this agreement, to the extent allowed by law. Grantor shall be notified by and through its agent, [*name of agent*], whenever grantee intends to exercise the rights granted within this paragraph.

8. Both parties agree that grantee may, at any time, and for any reason, alter the location of any drainage passage on grantor's property at its own expense, except that any such alteration may not adversely affect any drainage rights, which grantor may have under the law.

9. Grantor grants to grantee a license to continue to utilize the grantor's property for sewer, existing power, and telephone lines, which service the [*specify*] property.

10. Both parties agree that grantee may, at any time and for any reason, relocate the existing electric power and telephone lines, at its own expense.

11. Both parties agree that, on the construction of lines along [*specify*], to which [*specify*] can connect for the purpose of obtaining electric power and telephone services to [*his/her*] property, [*specify*] shall connect to same.

12. It is the express intent of all parties that the access rights recognized in this agreement are never to be construed to grant or be used to obtain any greater rights than those granted by the express terms of this agreement, or allowed by law.

IN WITNESS, the parties have executed this Agreement on the date and year of the last signature below.

By: \_\_\_\_\_

By: \_\_\_\_\_

Secretary/Treasurer  
Date: \_\_\_\_\_

Date: \_\_\_\_\_

**§ 5:16 Grant of right to hunt and fish**

Agreement made on [*date of agreement*], between [*name of licensor*], of [*street address*], City of [*name of city*], County of [*name of county*], State of Florida, referred to below as licensor, and [*name of licensee*], of [*street address*], City of [*name of city*], County of [*name of county*], State of Florida, referred to below as licensee.

Licensor grants to licensee, and licensee's heirs, successors, assigns, and permittees, the right, privilege, and permission to hunt and fish in and on a certain tract of land owned by licensor, more fully described as follows: [*insert description*].

The permission is given to licensee as an accommodation with no monetary consideration, and is revocable at any time by licensor. Licensee acknowledges the legal title of licensor to the above-described property and agrees never to deny such title or to claim title in licensee's name. Licensee will exercise the privilege granted herein at licensee's own risk, and agrees that licensee will never claim any damages against lessor for any injuries or damages suffered on account of the exercise of such privilege, regardless of the fault or negligence of the licensor, and licensee will indemnify licensor against all liability for damages and expenses resulting from, arising out of, or in any way connected with the exercise of the privilege by licensee, and licensee's assignees, permittees, or other persons entering the property at the invitation of licensee.

In witness, the parties have executed this agreement at [*designate place of execution*] the day and year first above written.

---

[Signature]

Executed in the presence of: \_\_\_\_\_

---

[Signatures]

*[Acknowledgment]*

This instrument was prepared by [name of preparer], [address of preparer].

**NOTES TO FORM****Research References***Legal Encyclopedias*

Fla. Jur. 2d, For discussion of licenses in real property, see Easements and Licenses in Real Property §§ 84 et seq.

**§ 5:17 Grant of right to use land for playing ball games**

Agreement made on [date of agreement], between [name of licensor], of [street address], City of [name of city], County of [name of county], State of Florida, referred to as licensor, and [name of licensee], of [street address], City of [name of city], County of [name of county], State of Florida, referred to as licensee.

Licensor grants to licensee, and licensee's members, guests, and invitees, the right, privilege, and permission to enter into and upon a certain tract of land owned by licensor, more fully described as follows: [insert description].

The entry is for the purpose of playing and practicing to play [name of game] and to set up and establish bases, goals, or such other equipment as may be necessary for playing and practicing the above-mentioned games. Licensee agrees to cut and mow the grass growing on the land and to do all things that may be necessary or incidental to enable the licensee and licensee's members, guests, and invitees to play and practice to play the above-mentioned games, provided that no trees or shrubs shall be cut down or destroyed without the prior written consent of the licensor. The privilege granted in this agreement is without any consideration and is merely an accommodation to licensee and is revocable at any time by licensor, provided licensor gives at least [number of days] days written notice prior to the date that the revocation becomes effective.

In consideration of the privilege herein granted, licensee will not claim any damages from licensor in connection with or on account of any injuries or damages arising in or on the above-described property while being used by licensee and

licensee's members, guests, or invitees, and licensee further agrees to indemnify and save harmless licensor from all claims or damages in connection with the use of the property by licensee and licensee's members, guests, or invitees.

Licensee agrees not to erect or to cause or permit to be erected on the above-described property any buildings or structures, whether permanent or temporary, including, but not limited to, stadiums, shelters, sheds, or other things attached to or placed on the property.

In witness, the parties have signed this agreement at [*designate place of execution*], the date and year first above written.

---

[Signature]

Executed in the presence of: \_\_\_\_\_

---

[Signatures]

[Acknowledgment]

This instrument was prepared by [*name of preparer*], [*address of preparer*].

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 5:14.

#### § 5:18 Grant of temporary easement—Use of adjacent land during building construction on land of permanent easement

We, [*names of grantors*], grantors, of [*street address*], City of [*name of city*], County of [*name of county*], State of Florida, record owners of the real property described here, for and in consideration of the sum of \$[*dollar amount*] duly paid, the receipt of which is acknowledged, and in further consideration of the performance of the covenants and agreements by the grantee, as set out here and expressed, do grant, remise, and relinquish to [*name of grantee*], of [*street address*], City of [*name of city*], County of [*name of county*],

State of Florida, and [*his/her/its*] successors and assigns, the right, privilege, and easement to use and occupy temporarily, during the initial construction of [*type of structure*], and appurtenances to it belonging, for the accommodation of construction equipment, materials, and excavated earth, over and across [*insert description of property involved*].

As a further consideration of this grant, grantee agrees as follows:

I.

Immediately following the initial construction referred to above, grantee will cause to be removed from the property described above all debris, surplus material, and construction equipment and leave the premises in a neat and presentable condition. Surplus excavated earth will be mounded neatly over the trench to a depth not exceeding [*identify depth*] inches, or used for filling and leveling on the premises, or hauled away at the option of the grantors.

II.

In the event that fences, driveways, or permanent buildings of the grantors are removed or damaged by the grantee's agents during the initial construction, grantee will cause the improvements on the property herein described to be repaired and restored to a condition fully equal to that existing before construction operations were commenced.

III.

Following completion of construction, grantee will cause the prompt restoration to smooth surface contours and neat condition any portion of the trench that may have settled.

IV.

The right, privilege, and easement herein granted for temporary construction use of those portions of the property as may lie outside the boundaries of the previously mentioned permanent easement will cease and terminate immediately following the completion of construction and final inspection of the [*type of building*] mentioned in this agreement, and the performance by grantee of the conditions and covenants herein set out.

This instrument and the covenants and agreements contained in it will inure to the benefit of, and be binding and obligatory upon, the heirs, executors, administrators, successors, and assigns of the respective parties.

In witness, the parties have executed this agreement at [designate place of execution] on [date].

---

[Signature]

Executed in the presence of: \_\_\_\_\_

---

[Signatures]

[Acknowledgment]

This instrument was prepared by [name of preparer], [address of preparer].

#### **NOTES TO FORM**

##### **Drafter's Notes**

See Drafter's Notes following § 5:14.

For complete forms of deeds, see Conveyances (Ch 2).

##### **Tax Notes**

Though called an easement, for tax purposes this will be considered a license. Only a temporary right to use the property is granted and, by its terms, no real property interest is conveyed that would result in a sale or exchange. The consideration received for the easement is therefore ordinary income under I.R.C. § 61(a).

Whether the consideration is deductible by the grantee depends on the use of the property. If the construction is for personal purposes—the grantee's personal residence, for example—the cost of the easement/license is part of the tax basis for the property and is recovered only upon a sale or other disposition of the property. I.R.C. § 262. If the construction is related to a business or a profit-seeking venture, the easement cost is capitalized and recovered as depreciation over the life of the property. I.R.C. §§ 162(a), 212.

#### **§ 5:18.50 Grant of mineral exploration license—With mineral purchase option and lease**

This Exploration License, Mineral Purchase Option And Lease Agreement is made on [date] by and between \_\_\_\_\_ ("Owner") and \_\_\_\_\_, a Florida corporation ("Licensee").

**RECITALS:**

A. Owner owns and possesses Mineral Property (as defined below) in *[name of county]* County, Florida, as shown on Exhibit "A" which is attached to and incorporated in this Agreement.

B. "Mineral Property" shall be defined as and include all ores, minerals, mineral rights, and the right to explore for, mine, remove the ores and minerals, and as much of the water that will be required or with the right to drill a water well, with ingress and egress over adjoining lands now owned by Owner.

C. The "Surface" shall be defined as and include oil and gas, and the remainder of the surface, water rights and improvements, easements, licenses, rights-of-way and other interests appurtenant thereto.

D. The parties now wish to enter into an agreement giving Licensee an exclusive license to explore the Mineral Property, along with the exclusive option to purchase the Mineral Property on the terms and conditions set forth below.

THEREFORE, the parties have agreed as follows:

**1. EXPLORATION LICENSE.**

(a) Grant of Exploration License. Owner grants to Licensee the exclusive right and option to enter on and explore the Mineral Property (the "Exploration License"). The Exploration License shall have a term of \_\_\_\_\_ years commencing on the execution of this agreement by both parties (the "Effective Date"). During the term of the license, Licensee shall have the right to: (i) undertake geological, geophysical, and geochemical examinations of the Mineral Property; (ii) sample the Mineral Property by means of pits, trenches, and drilling by any means; and (iii) take samples from the Mineral Property for the purpose of conducting mineralogical tests and other such tests. However, Licensee shall not commence mining activities on the Mineral Property unless and until it exercises its option to purchase set forth in Section 2 below.

(b) Payments For Exploration License. In consideration of this Exploration License, Licensee shall pay Owner the sum of \$\_\_\_\_\_ upon execution of this agreement with annual payments of \$\_\_\_\_\_ on or before the anniver-

sary of the Effective Date for the duration of the Exploration License.

(c) Delivery of Data. Following the execution of this Agreement, Owner shall allow Licensee to review and copy all data and reports, if any, in the possession of Owner. All reviewing and copying of the data and reports shall be at Licensee's sole expense.

(d) Termination of Exploration License. This Exploration License shall terminate \_\_\_\_\_ years from the Effective Date, unless the parties mutually agree to extend it. Licensee shall have the right to terminate the Exploration License at any time by delivering to Owner a written notice of termination at least \_\_\_\_\_ days prior to the date of termination. Licensee shall be relieved of all further obligations after the termination date.

(e) No Work Commitment. Licensee shall have no obligation to explore, develop, or mine the Mineral Property.

(f) Environmental Liabilities. Owner shall remain solely liable and responsible for all environmental conditions and reclamation responsibilities which arose prior to the execution of this Agreement. Licensee shall be solely liable and responsible for all environmental conditions and reclamation responsibilities arising from Licensee's activities on the Surface after execution of this Agreement.

## 2. OPTION TO PURCHASE MINERAL INTERESTS AND LEASE SURFACE.

(a) Grant of Option. In consideration of the payments made to Owner for the Exploration License, Owner grants to Licensee the exclusive right and option to purchase Owner's ownership interest, in and to all mineral interests, as defined in the above Recitals, and to lease as much of the Surface that is needed or required for the sum of \$ \_\_\_\_\_ per acre to be paid according to the schedule set forth below. The option shall have a term of \_\_\_\_\_ years unless sooner terminated or canceled as provided below, and the Surface Lease shall run for \_\_\_\_\_ years or so long after the end of such term as there is production from the Mineral Property. The Lease shall commence on the date Licensee gives Owner's notice of execution of the Option to Purchase and makes an initial payment to Owner of \$ \_\_\_\_\_ per acre. In order to maintain the option in

effect, Licensee shall make the following annual option payments to Owner:

Anniversary Date	Option Payment
_____	\$ _____
_____	\$ _____
_____	\$ _____

(b) **Exercise of Option.** Licensee shall elect (i) to terminate this Agreement and relinquish the Mineral Property and Surface to Owner in accordance with Section 6(a) below; or (ii) to exercise its option and purchase the Mineral Property for the price set forth above and lease so much of the Surface as is needed or required. During the term of the \_\_\_\_\_-year option, if Licensee elects to purchase the Mineral Property, the parties shall open an escrow account and proceed to complete the sales transaction within \_\_\_\_\_ days following Licensee's election. Owner shall deposit a Warranty Deed into the escrow account conveying the Mineral Property to Licensee, and Licensee shall deposit the purchase price into the escrow account. Upon deposit of both the deed and purchase price, the deed shall be released and recorded, and the initial payment shall be delivered to Owner. Licensee shall bear all of the escrow and recording costs. The parties acknowledge that Licensee shall have the right to terminate the option at any time in accordance with Section 6 below.

(c) **Production Royalty.** If the Premises are placed into commercial production, Licensee agrees to pay to Owner a production royalty of \_\_\_\_\_% of the Net Returns, as defined in this Section, from the proceeds received from commercial production from the Mineral Property, where Owner holds 100% of all minerals and there is no outstanding royalty. Licensee agrees to pay the Owner a royalty reduced proportionately to the Owner's actual Mineral Property ownership percentage. If the Mineral Property contains outstanding royalties, Licensee agrees to pay Owner \_\_\_\_\_% royalty minus the outstanding royalty amount, and no royalty will be paid to Owner if the outstanding royalty on Mineral Property equals or exceeds \_\_\_\_\_. Payments of the production royalty from the proceeds received from commercial production shall be

determined at the end of each calendar quarter after the effective date. Payments of the production royalty shall be made within \_\_\_\_\_ days after the end of each calendar quarter. For the purpose of this Agreement, "Net Returns" shall mean for any period the amount of earned revenues actually paid to and received by Licensee by any refinery or other purchaser of metals, ores, minerals or mineral substances, or concentrates produced therefrom for products mined from the Property, less all of the following: (i) treatment charges and penalties, including, but without being limited to, penalties for impurities and charges for refining, selling, and transportation to refinery and from refinery to market; and (ii) production taxes, net proceeds of mine taxes, severance taxes and sales, privileges and other taxes levied on product or on the production of the product. Net Returns for product treated at a refinery owned, operated or controlled by Licensee, shall be computed in the above manner, with deductions for all charges and items of cost equivalent to the deductions described above.

(d) Quitclaim of Mineral Rights. Upon completion of mining operations, the Mineral Property ownership will be quitclaimed to Owner, at the sole discretion of Licensee.

### 3. CONDUCT OF OPERATIONS

(a) Right to Explore. Following the execution of this Agreement, Licensee shall have the right to make geological investigations and surveys, to drill on the Surface by any means, and to have all the rights and privileges incident to Owner's ownership of the Mineral Property. However, Licensee shall not commence development or mining operations on the Mineral Property unless it has executed the option to purchase the Mineral Property in accordance with Section 2 above.

(b) Conduct of Work. Licensee shall perform its activities on the Mineral Property in accordance with good mining practices, shall comply with the applicable laws and regulations relating to the performance of exploration operations on the Mineral Property, and shall comply with the applicable worker's compensation laws of the State of Florida.

(c) Indemnification. During the term of the Agreement, Licensee shall indemnify and hold Owner harmless from

any claims, demands, liabilities or liens arising out of Licensee's activities on the Mineral Property.

(d) **Liens.** Licensee shall keep the Mineral Property free and clear from any and all mechanics' or laborers' liens arising from labor performed on, or material furnished to, the Mineral Property at Licensee's request.

(e) **Installation of Equipment.** during the term of this Agreement, Licensee may install, maintain, replace, and remove any and all machinery, equipment, tools, and facilities which it may desire to use in connection with its exploration activities on the Mineral Property. Upon termination of this Agreement for any reason, Licensee shall have a period of \_\_\_\_\_ days following such termination during which it may remove all or part of the above items at its sole cost and expense. Any equipment remaining on the Mineral Property after the \_\_\_\_\_-day period shall become property of Owner and Licensee shall forfeit all rights in and to the property.

(f) **Acquisition of Permits.** Licensee shall acquire all federal, state and county permits required for its operations. In the event that Licensee is required to post a reclamation bond, the bond will revert to Licensee upon satisfactory completion of the reclamation program.

**4. INSPECTION BY OWNER.** During the term of this Agreement, Owner, or Owner's duly authorized agents or representatives, shall be permitted to enter upon the Mineral Property for the purpose of inspection. Owner and Owner's agents and representatives shall enter upon the Mineral Property at their own risk and so not to unreasonably hinder the operations of Licensee. Owner shall indemnify and hold Licensee harmless from any damage, claim, or demand by reason of injury to Owner or Owner's agents or representatives on the Mineral Property.

**5. TAXES.** Licensee shall pay all taxes levied or assessed upon any improvements placed on the Mineral Property by Licensee. Upon termination of this Agreement for any reason, taxes shall be paid by Licensee for the remaining portion of the calendar year. However, Owner shall not be liable for taxes on any tools, equipment, machinery, facilities, or improvements placed upon the Surface unless Licensee fails to remove them within the time provided by this Agreement.

**6. TERMINATION AND DEFAULT.**

(a) Termination. Licensee shall have the right to terminate this Agreement at its sole discretion at any time upon written notice to Owner. Upon termination, Owner shall retain all payments previously made as liquidated damages and this Agreement shall cease and terminate. Licensee will also deliver a Quitclaim Deed to Owner.

(b) Default. If Licensee fails to perform its obligations under this Agreement and in particular fails to make any payment due to Owner under this Agreement, then Owner may declare Licensee in default by giving Licensee written notice of default which specifies the obligation or obligations that Licensee has failed to perform. If Licensee fails to remedy or satisfactorily respond to a notice of default within \_\_\_\_\_ days, Owner may terminate this Agreement and Licensee shall peaceably surrender possession of the Mineral Property to Owner. Notice of termination shall be in writing and served in accordance with this Agreement.

(c) Obligations Following Termination. In the event of voluntary or involuntary termination, Licensee shall surrender possession of the Mineral Property to the Owner and shall have no further liability or obligation under this Agreement except for its obligations to: (i) pay its apportioned share of taxes, as provided for in Section 5, (ii) pay the cost of removal of all equipment, (iii) fulfill its reclamation responsibility, (iv) satisfy any accrued obligations or liabilities, and (v) satisfy any other obligation imposed by this agreement or by law. Upon termination of this Agreement, except termination upon Licensee's exercise of the Option, Licensee will provide a copy of all drilling logs, assays, maps and other factual data which Licensee has prepared in connection with its exploration and development of the Mineral Property under this Agreement.

7. NOTICES AND PAYMENTS. All notices to Licensee or Owner, and all payments made by Licensee to Owner, and other communications provided for under this Agreement shall be in writing and sent:

if to Owner:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

if to Licensee:

\_\_\_\_\_  
\_\_\_\_\_

or to such other address as shall be designated by either party in a written notice to the other party. All such notices shall be deemed given (i) if sent by certified or registered mail, three days after being postmarked; (ii) if sent by overnight delivery service, when received at the above stated addresses or when delivery is refused; and (iii) if sent by facsimile transmission, when receipt of the transmission is acknowledged. Notice of any change in address shall be given in the same manner.

8. ASSIGNMENT. Licensee may assign this Agreement at any time, in whole or in part, only with prior written approval of Owner. Owner, prior to conveying his or her royalty interest under this Agreement to any other party, shall first offer Licensee a \_\_\_\_\_-day opportunity to acquire Owner's interests on the same terms and conditions offered by a third party.

9. WARRANTY OF TITLE.

(a) Warranty. Owner represents that he or she is the owner of the Mineral Property and Surface as described, that Owner has created no liens or encumbrances affecting the Mineral Property, and that Owner has and will continue to have the right to commit the Mineral Property and Surface to this Agreement.

(b) Examination of Title Documents. Promptly after execution of the Option to Purchase section of this Agreement, Owner shall deliver to Licensee available copies of all documents bearing upon Owner's title, interest, and ownership in the Mineral Property. Licensee may then undertake such further investigation of the title and status as Licensee shall deem necessary. If that investigation should reveal defects in the title, Owner agrees to proceed immediately to cure the title defects to Licensee's satisfaction.

10. BINDING EFFECT. This Agreement shall inure to the benefit of and be binding on the parties to this Agreement and their respective heirs, executors, administrators, successors, and assigns.

11. APPLICABLE LAW. The terms and provisions of this

Agreement shall be interpreted in accordance with the laws of the State of Florida.

12. ENTIRE AGREEMENT. This Agreement terminates and replaces all prior agreements, either written, oral or implied, between the parties, and this Agreement constitutes the entire agreement between the parties.

13. VOID OR INVALID PROVISIONS. If any term, provision, covenant or condition of this Agreement, or any application thereof, is held by a court of competent jurisdiction to be invalid, void or unenforceable, all provisions, covenants and conditions of this Agreement, and all applications thereof not held invalid, void or unenforceable, shall continue in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

14. TIME OF THE ESSENCE. Time is of the essence of this Agreement and each and every part of this Agreement.

15. CONFIDENTIALITY. All reports and data provided by Licensee to Owner shall be held in strictest confidence, and Owner shall not disclose such information without Licensee's prior written consent.

16. WATER WELL DEVELOPMENT. In the event that Licensee should encounter productive groundwater during the course of the exploration drilling, the Owner will be notified and Licensee agrees to install, to the best of their ability, water well casing to be provided by Owner, into exploration drill hole, upon the request of the Owner. Water well casing will be installed using drill rig before removing from drill site.

IN WITNESS OF THE ABOVE, the parties have executed this Agreement on the day and year first above written.

OWNER:

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*[Printed Name]*

By: \_\_\_\_\_  
*[Signature]*

---

*[Print Name]*

---

*[Title]*Address:  

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LICENSEE:

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*[Printed Name]*By: \_\_\_\_\_  
*[Signature]*

---

*[Print Name]*

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*[Title]*Address:  

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*[Acknowledgements]*

## EXHIBIT A — LEGAL DESCRIPTION

**§ 5:19 Provision—Water rights in grantor's land**

Grantor further grants, bargains, and sells to grantee, grantee's heirs, and assigns an easement and right to take and use water for domestic purposes in common with all other persons who now have the right to take or use water from a well on the following described property owned by the grantor: *[description of property]*.

Accompanying this right is the further right in grantee, grantee's heirs, and assigns to enter and depart over and upon that portion of the grantor's land described as follows:

*[description of area within which right to enter and depart may be exercised]* to effect the purposes of such easement. This right is conditioned upon the reasonable exercise of it for the benefit of the dominant tenement, and in the event of excessive use, or use for nondominant purposes, or use by means otherwise injurious to the servient tenement, the grantor will have the right to extinguish the easement. *[If appropriate, add: Unless otherwise extinguished, the easement will remain in full force and effect for a period of [designate period]].*

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 5:14.

### § 5:20 Provision—Right of way over existing farm road

Grantor grants to grantee the right to use as means of entering onto and departing from grantee's land the present farm road located on the above-described land leading from *[identification of location 1]* to *[identification of location 2]*.

### § 5:21 Provision—Construction and maintenance of gas pipeline

Grantor grants to grantee the right to excavate for, install, replace, maintain, and use such pipelines as grantee will from time to time elect for conveying gas, with necessary and proper valves and other appliances and fittings, and devices for controlling electrolysis for use in connection with such pipelines, together with adequate protection therefor, and also a right of way, within the strip described as follows: *[describe strip]*.

Grantor further grants to grantee:

- (1) the right to grade the strip of land for the full width thereof and to extend the cuts and fills for such grading into and on the land along and outside of the strip to such extent as grantee may find reasonably necessary;
- (2) the right to support the pipelines across ravines and watercourses with such structures as grantee will deem necessary;
- (3) the right to enter onto and depart from the strip over and across the land by means of roads and lanes thereon,

if such exist, otherwise by such route or routes as will cause the least practicable damage and inconvenience to grantor. The right to enter and depart must not extend to any portion of the land which is isolated from the strip by any public road or highway now crossing or later crossing the land. Further, if any portion of the land is subdivided and dedicated roads or highways on that portion extend to the strip, the right to enter onto and depart from the portion must be confined to the dedicated roads and highways;

- (4) the right of grading for, constructing, maintaining, and using the roads on and across the lands as grantee may deem necessary in the exercise of the right to enter and depart to provide access to property adjacent to the land;
- (5) the right from time to time to trim and to cut down and clear away any and all trees and brush now or later on the strip and to trim and to cut down and clear away any trees on either side of the strip which now or later in the opinion of grantee may be a hazard to the pipelines, valves, appliances, or fittings, by reason of the danger of falling thereon, or may interfere with the exercise of grantee's rights under this agreement. However, all trees which grantee is authorized to cut and remove, if valuable for timber or wood, will continue to be the property of grantor. All tops, lops, brush, and refuse wood will be burned or removed by grantee;
- (6) the right to install, maintain, and use gates in all fences which now cross or will later cross the strip; and
- (7) the right to mark the location of the strip by suitable markers set in the ground, provided that such markers will be placed in fences or other locations which will not interfere with any reasonable use grantor will make of the strip.

Grantee covenants and agrees that:

- (1) grantee will not fence the strip;
- (2) grantee will promptly backfill any trench made by grantee on the strip and repair any damage grantee may do to grantor's private roads or lanes on the lands; and
- (3) grantee will indemnify against any loss and damage that will be caused by the exercise of the right to enter onto and depart from the strip or by any wrongful or negligent act or omission of grantee or of its agents or employees in the course of their employment.

Grantor reserves the right to use the strip for purposes that will not interfere with grantee's full enjoyment of the rights granted. Grantor, however, must not erect or construct any building or other structure, or drill or operate any well, or construct any reservoir or other obstruction on the strip, or diminish or substantially add to the ground cover over the pipelines.

#### NOTES TO FORM

##### Drafter's Notes

See notes following § 5:9.

#### § 5:22 Provision—Construction and maintenance of pipeline—Rural land

Grantor grants to grantee the perpetual right to enter on the real estate described in this agreement, at any time that it may see fit, and construct, maintain, and repair underground pipelines for the purpose of conveying various liquid substances over, across, through, and under the lands described in this agreement, together with the right to excavate and refill ditches and trenches for the location of such pipelines and mains, and the further right to remove trees, bushes, undergrowth, and other obstructions interfering with the location, construction, and maintenance of the pipelines.

The land affected by the grant of this easement and right of way is located in the County of *[name of county]*, State of Florida, and is more fully described as follows: *[description of land]*.

The easement and right of way granted covers a strip of land *[number of feet]* feet in width over and across the above-described land, and is more fully described as follows: *[description of easement]*.

#### NOTES TO FORM

##### Drafter's Notes

See notes following § 5:9.

#### § 5:23 Provision—Wind energy development and transmission of wind energy

1. *Grant of easement.* Subject to the terms and provisions of this easement agreement, grantor now grants and conveys

to grantee an exclusive easement in gross on, over, and across the lands described on Exhibit "A" (the "property"), attached to and incorporated in this easement agreement, for a term of [*number of months or years*] to begin on the date of the execution of this agreement, and to terminate on [*date*], for wind resource evaluation, wind energy development, and transmission of wind energy produced from the property, as described below.

2. *Permitted use of the property by grantee.* Subject to the terms and provisions of this easement agreement, the exclusive easements described above shall permit grantee to conduct the following activities on the property:

(a) *Wind and weather monitoring equipment.* Grantee may erect, relocate, maintain, and operate wind and weather monitoring equipment, steel towers, concrete slabs, fences, and buildings to properly operate, house, protect, and otherwise facilitate grantee's wind and weather monitoring activities. The exact location of this equipment and related facilities shall be determined by grantee in its sole discretion.

(b) *Equipment and improvements.* Grantee may erect, relocate, maintain, and operate all equipment and improvements necessary or useful for the conversion of wind energy into electricity, including but not limited to: wind turbine generators, steel towers, foundations and concrete pads, footings, guy wires, anchors, fences, gates, and other fixtures and facilities, maintenance, security, storage, office, and facilities, staging areas for the assembly of equipment, required lines and substation facilities, energy storage devices, and other power production equipment of any type and in any quantity.

(c) *Transmission facilities and roads.* Grantee and its contractors or agents may erect, relocate, maintain, and operate power transmission lines, poles, anchors, support structures, underground cables, substations and interconnection facilities, and associated roads for access and for installation and maintenance that grantee, in its reasonable and sole discretion, deems to be necessary or appropriate to transmit power and transport employees, tools, material, equipment, and other necessary items across the property. Grantee shall design, construct, and maintain all such facilities in a manner that will prevent or mitigate erosion and other such environmental damage.

Grantor agrees that the erection or installation of the turbines, roads, transmission lines, whether overhead or buried, and foundations shall be deemed not to cause unreasonable damage to the property.

**§ 5:24 Provision—Temporary easement—Access to real property for purpose of construction**

Grantor grants a temporary easement to grantee, its agents, and employees, with necessary equipment, to enter on and have access to the real property owned by grantor. This temporary easement is for the express purpose of construction work, of which the location is described on Exhibit [*identification of exhibit*], attached and incorporated by reference.

This grant of temporary easement will terminate [*number of days*] days after filing of the notice of completion of construction or [*number of months or years*] from the date of acceptance of this agreement, whichever occurs first. On termination, grantee will return the property as nearly as practicable to its original condition, taking into consideration the nature of the work being performed.

**§ 5:25 Provision—Grant of antenna license**

**ANTENNA LICENSE AGREEMENT**

This Agreement is made on [*date of agreement*], by and between [*name of licensor*], a [*state of incorporation*] corporation referred to as Licensor, and [*name of licensee*], a [*state of incorporation*] corporation, referred to as Licensee.

**RECITALS**

1. Licensor, in consideration of the payments set forth below and the covenants and agreements made by Licensee, grants to the Licensee a nonexclusive license to utilize space in the building located at [*location of building*], referred to as the Building, for the purpose of installing and using the Antenna described on Exhibit "A," attached and incorporated by reference, referred to as the Antenna, to be attached to the roof of the Building for a term commencing [*date*], and ending [*date*], unless extended or terminated sooner as provided in this Agreement.

2. Licensee shall make payments to Licensor, at the of-

fice of the Building, or elsewhere as designated from time to time by notice in writing to Licensee, in monthly installments as follows: *[description of monthly payments]*.

3. The size, location, and placement as well as the manner and method of installation and removal of the Antenna and related equipment shall be subject to the prior written approval of Lessor. If Lessor elects to hire structural, mechanical, roofing, and/or other engineers or consultants to review the plans and specifications, Licensee shall reimburse Lessor for the reasonable costs of the review, whether or not Lessor grants approval.

4. In addition to the monthly rental, Licensee shall pay for all utilities consumed to install, maintain, operate, and remove its Antenna and equipment, as well as the reasonable costs of any engineers or consultants employed by Lessor to review or monitor same.

5. Prior to the installation of the Antenna and equipment, Licensee shall secure and shall at all times afterwards maintain all required approvals and permits of the United States Federal Communications Commission and all other governmental bodies having jurisdiction over its business, including its communications, operations, and facilities. Licensee shall at all times comply with all laws and ordinances and all rules and regulations of municipal, state, and federal governmental authorities relating to the installation, maintenance, height, location, use, operation, and removal of the Antenna and equipment and shall fully indemnify Lessor against any loss, cost, or expense which may be sustained or incurred by it as a result of the installation, maintenance, operation, or removal of the Antenna and equipment. Lessor makes no representation that applicable laws, ordinances, or regulations permit the installation or operation of antennas on the subject real estate.

6. Lessor grants to Licensee the right, to be exercised as set forth here, to enter upon the roof of the Building for the sole purpose of gaining access to Licensee's installation. In addition, Lessor grants Licensee the right, to be exercised as set forth here, to install such equipment, conduits, cables, and materials, referred to as the Connecting Equipment, in shafts, ducts, conduits, chases, utility closets, and other facilities of the Building designated

by Lessor as are reasonably necessary to connect Licensee's Antenna to Licensee's other machinery and equipment in other parts of the Building, subject to the requirements of any permits and the codes, regulations, and rules of any governmental body, agency, or authority. Lessor further grants to Licensee the right of access to the areas where the Connecting Equipment is located for the purposes of maintaining, repairing, testing, and replacing the connecting equipment; provided, however, Licensee shall notify Lessor each time Licensee requires such access, and provided further that such access and installations do not cause damage to or interfere with the operation or maintenance of any part of the Building or with any other tenant's operation.

7. Anything here to the contrary notwithstanding, Licensee shall notify Lessor each time Licensee desires to enter upon the roof of the Building or the areas outside Licensee's Premises where Licensee's related equipment is located, and Licensee shall enter upon the roof only at such times, in such manner, and under such circumstances as shall not cause damage or endangerment of life or limb. Licensee shall promptly reimburse Lessor for the costs of repairs of any damage to the Building directly or indirectly caused by Licensee's installations or the operation, maintenance, or removal of the installations or operation.

8. Licensee, at its expense, shall be solely responsible for and shall maintain its Antenna and related equipment in a safe, structural, sound, clean, and sightly condition and shall indemnify and save harmless Lessor against all liens and claims of mechanics and materialmen furnishing labor and materials in the construction and maintenance of same.

9. Licensee agrees to defend, indemnify, and save harmless Lessor and to assume all liability for death or injury to any persons and all liability for loss, damage, or injury to any property incurred or sustained by Licensee arising from, growing out of, or resulting from Licensee's installation or its use of the roof of the Building or any other areas in the Building where Licensee's related equipment is located, including costs, attorney's fees, and other expenses incurred by Lessor in defending any such claim unless such loss, damage, or injury is due to the negligence of Lessor, its employees, agents, or invitees.

10. Licensee waives and releases all claims against Lessor, its officers, directors, agents, employees, and servants, and agrees that they shall not be liable for injury to person or damage to property sustained by Licensee or by any occupant of the Building or any other person occurring in or about the Building resulting directly or indirectly from any existing or future condition, defect, matter, or thing in the Building or any part of it or from equipment or appurtenance which becomes out of repair, or from any occurrence, act, or from the negligence or omission of any tenant or occupant of the Building or of any other person; except for the negligence or omission by Lessor, its officers, directors, agents, employees, and servants.

11. The license granted to Licensee shall not be deemed to give to Licensee the exclusive right to use the roof or tower of the Building and shall not preclude Lessor from granting a license or licenses to others. The rights of other licensees shall be exercised without causing unreasonable interference with the activities being carried on by Licensee in accordance with this license. Similarly, the rights of Licensee under this Agreement shall be exercised without causing interference with the activities being carried on by other licensees in accordance with their respective licenses. Licensee shall not change or materially alter the Antenna or related equipment without the prior written consent of Lessor.

12. If any lease made by Licensee for any space in the Building shall be terminated or terminable after the making of this License, because of any default by Licensee under the lease, this fact shall empower Lessor, at Lessor's sole option, to terminate this License by notice to Licensee.

13. No notice or demand related to or required by this Agreement shall be effective unless the notice or demand is in writing and is either delivered personally to the party for whom it is intended, or to an officer of the party if a corporation, or sent by United States registered or certified mail, return receipt requested. If sent to Licensee, the notice or demand must be sent to its office in the Building, or if Licensee is not in possession of that office, then to Licensee's last known address. If the notice or demand is sent to Lessor, it must be sent to *[address of lessor]*. Either party may, however, by notice to the other, from

time to time designate another address in the United States to which notices mailed more than 10 days afterwards shall be addressed. Notices mailed as described above shall be effectively given as of the date of mailing.

14. Lessor shall have the right to terminate this License upon written notice to Licensee, in the event that:

- (a) Licensee shall default in the performance of any of the obligations imposed on it under this License and shall not, after being notified by Lessor of the existence of default, immediately take all reasonable steps to cure the same;
- (b) it shall be determined that the installation or use materially interferes with the operation of machinery and apparatus of the Building, such as the elevators;
- (c) it is found by public authority having jurisdiction over the Building that the installation and use constitute a nuisance or hazard to the public or to the occupants of the Building;
- (d) the use of the antenna interferes with the use of any tenant's equipment or data processing machines in the Building; or
- (e) Licensee's lease of space in the Building shall expire or be terminated.

Lessor and Licensee shall each have the right to terminate this Agreement upon written notice to each other [*number of days*] days prior to the desired termination date.

15. At the termination of this license by lapse of time or otherwise, the Antenna and the related equipment installed under the terms of this license shall be removed by Licensee and the area of the Building where they were installed shall be restored by Licensee to as good condition as existed immediately prior to installation of the Antenna and related equipment.

16. This Agreement shall be binding upon the successors and assigns of the parties, provided that Licensee shall not assign or transfer this License to anyone else without Lessor's prior written consent, which may be withheld at its sole discretion.

---

Lessor

ATTEST:

By: _____	By: _____
Its: _____	Its: _____

  

By: _____	By: _____
Its: _____	Its: _____

Licensee  
ATTEST:

**§ 5:26 Agreement by landlord and tenant for license  
of parking spaces**

**PARKING LICENSE AGREEMENT BETWEEN**

**LANDLORD AND TENANT**

This Agreement is made as of [*date of agreement*], by and between [*name of landlord*], a [*state of incorporation*] corporation, referred to as Landlord, and [*name of tenant*], a [*state of incorporation*] corporation, referred to as Tenant.

**RECITALS**

Tenant has previously entered into a Lease dated [*date of lease*] for certain premises located at [*address of premises*], referred to as the Lease, a project consisting of [*description of the property*] and the parking spaces in the parking lot appurtenant to the project, together with common ingress and egress serving the entire parking lot. These improvements and the land upon which they are located are operated as a unit and are referred to as the “Project.”

For good and valuable consideration, receipt of which is here acknowledged, the parties agree as follows:

1. Landlord here licenses to Tenant, and Tenant here licenses from Landlord, those certain parking spaces numbered as shown on Exhibit “A,” attached and referred to as the “Parking Spaces.” This License reserves the right for passenger automobile parking only.

2. The term of this License shall commence with the date of this license agreement and end the last day of December of the current calendar year. This License shall be automatically renewed each year for a one-year period, unless Landlord or Tenant received written notice from each to the other by December 1st of any year.

3. The monthly license fee for the initial term of this License shall be *[\$dollar amount]*. The monthly license fee for each renewal period shall be set by Landlord no later than November 30th of the calendar year preceding renewal.

4. The monthly license fee shall be paid in advance on or before the first day of each calendar month under this Agreement, together with the monthly installments of rent paid pursuant to the above-described Lease.

5. Tenant acknowledges that Landlord has licensed other reserved parking spaces to other tenants in the Project and that all of the parking (including the Parking Spaces) is licensed on a self-parking basis. Landlord agrees to identify the Parking Spaces as being reserved for Tenant, but Tenant agrees that Landlord shall have no obligation, liability, or responsibility to Tenant should the Parking Spaces be occupied at any time or times by persons not so authorized or directed by Landlord.

6. This License may not be assigned by Tenant nor the Parking Spaces sublet in whole or in part, without in each case the prior written consent of Landlord (which consent may be given or withheld in Landlord's sole discretion).

7. This Agreement is one of licensing in property and is not a bailment. Tenant shall assume full responsibility for its vehicles and those of its employees, agents, and invitees, and the contents of the vehicles. Tenant, as a material part of the consideration to be rendered to Landlord under this License, to the extent permitted by law, here waives all claims against Landlord, its agents, servants, or employees for loss, theft, or damage to property and for injuries to persons in, on, or about the Parking Spaces, and Tenant shall indemnify, defend, and hold Landlord, its agents, servants, and employees exempt and harmless from and on account of any damage or injury to any person, or to the property, goods, wares, and merchandise of any person, arising from the use of the Parking Spaces by Tenant, its agents, servants, employees, contractors, invitees, or licensees.

8. Particularly, but not in limitation of the foregoing paragraph, all property belonging to Tenant or any user of the Parking Spaces that is in the Project or the Parking Spaces shall be there at the risk of Tenant or such other

person only, and except for the deliberate act of Landlord or its agents or employees, Landlord, its agents, or employees shall not be liable for injury to persons or damage to or theft of or misappropriation of such property by any means whatsoever. Tenant shall give prompt notice to Landlord in case of any such injury, damage, theft, or misappropriation. In case any action or proceeding should be brought against Landlord by reason of any obligation on Tenant's part to be performed under the terms of this License or arising from any act or negligence of the Tenant, or of its agents or employees, Tenant upon notice from Landlord shall defend the same at Tenant's expense by counsel reasonably satisfactory to Landlord.

9. The Parking Spaces shall be used by Tenant, its employees, agents, and invitees, pursuant to such rules and regulations as Landlord shall from time to time promulgate. If for any reason the Lease or Tenant's right to possession under the Lease shall be terminated, this License may at the option of Landlord be terminated at any time following by written notice to Tenant.

10. In the event of any default by Tenant under this License continuing to 10 days after written notice of default, Landlord shall have all rights and remedies as provided in the Lease for default.

11. This License and the rights of Tenant under it shall be and are here made subject and subordinate to any Ground Lease, to the lien of any mortgage, mortgages, or deeds of trust now or hereafter existing against the Project, or any part or parts of it, and to all renewals, modification, consolidation, replacements, and extensions and to all advances made or hereafter to be made upon the security.

12. In the event of a sale or conveyance by Landlord of its interest in the Project, the same shall operate to release Landlord from any future liability upon any covenants or conditions, express or implied, herein contained in favor of Tenant, and in such event, Tenant agrees to look solely to the responsibility of the successor in interest of Landlord in and to this License. Tenant agrees to attorn to the purchaser or assignee.

13. In the event of any litigation between Tenant and Landlord to enforce any provision of this License or any

right to either party, the Tenant shall pay upon demand all Landlord's costs, charges, and expenses, including reasonable fees of counsel, agents, and other retained by Landlord, incurred in enforcing Tenant's obligations under this Agreement or incurred by Landlord in any litigation, negotiation, or transaction in which Tenant causes Landlord, without Landlord's fault, to become involved.

14. Tenant agrees promptly to furnish estoppel certificates pertaining to this License if required by Landlord, which certificates shall be in the form provided to be furnished in the Lease.

15. The covenants and conditions here contained shall apply to and bind the respective heirs, successors, executors, administrators, and assigns of the parties. The terms "Landlords" and "Tenant" shall include the successors and assigns of either party, whether immediate or remote.

The parties have executed this License as of the date first written above.

TENANT:

[Signature]

By: \_\_\_\_\_

Its: \_\_\_\_\_

LANDLORD:

[Signature]

By: \_\_\_\_\_

Its: \_\_\_\_\_

## C. RESERVATIONS

### § 5:27 Form drafting principles

A reservation is the creation on behalf of the grantor in a deed of a new right issuing out of the thing granted. An easement may be the subject of a reservation.<sup>1</sup> Adhering to strict rules, however, an easement cannot ordinarily be created by way of exception because it is a new right not existing before the grant.<sup>2</sup> But it has been held that an easement may be created through an exception of an existing way or other use of the premises. It seems to be the tendency to dis-

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[Section 5:27]

<sup>1</sup>Kotick v. Durrant, 143 Fla. 386, 196 So. 802 (1940).

**Legal Encyclopedias:** Reservation or exception, Fla. Jur. 2d, Easements and Licenses in Real Property § 21.

<sup>2</sup>City of Jacksonville v. Shaffer, 107 Fla. 367, 144 So. 888 (1932).

regard any technical distinction between a reservation and an exception and to construe the language employed so as to effectuate the intention of the parties.<sup>3</sup>

#### § 5:28 Reservation of light, air, and unobstructed view

Grantor reserves, however, to grantor, grantor's heirs, successors, and assigns, as and for an appurtenance to the real property described and designated as Parcel [*number of parcel*], and for any part of the property, a perpetual easement of right to receive light, air, and unobstructed view over that portion of the real property described above, to the extent that light, air, and view will be received and enjoyed by limiting any structure, fence, trees, or shrubs on the property described above, or any part of it, to a height not extending above a horizontal plane [*number of feet*] feet above the level of the sidewalk of [*name of street*], as the sidewalk level now exists at the junction of the [*northern/southern*] and [*eastern/western*] boundary lines of the property described above. Any obstruction of the view above the horizontal plane, except [*specify existing obstructions and other desired exceptions, including any exceptions to be allowed for radio and television receiving devices, power and telephone poles and lines other than those required to be buried, and required flues or vents, as well as fixtures required under any building regulations*], will be considered an unauthorized interference with the right or easement and will be removed on demand at the expense of [*name of grantee*], and [*his/her/its*] heirs, successors, and assigns in the ownership of that real property described above or any part of the real property.

Parcel [*number of parcel*], to which the perpetual easement of right to receive light, air, and unobstructed view is an appurtenance, is described as follows: [*description of parcel*].

#### § 5:29 Reservation of use for public utilities

Grantor reserves to grantor, grantor's successors, heirs, or assigns, as an appurtenance to the land described below, designated Parcel [*number of parcel*], or to any part of the

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<sup>3</sup>**Legal Encyclopedias:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 21.

land, the right to use the land conveyed and described above for water, sewer, and gas pipes, telephone and power lines and poles, and conduits for any other public utility.

Parcel [*number of parcel*], to which the right of use is an appurtenance, is described as follows: [*description of parcel*].

### § 5:30 Reservation of right of way

Grantor reserves to [*himself/herself/itself*], and to [*his/her/its*] successors, heirs, or assigns, as an appurtenance to the land described below, designated “Parcel [*number of parcel*]”, the right to use the passageway now in existence across the real property described, located [*description of location and course of passageway*].

Parcel [*number of parcel*], to which the right of way is an appurtenance, is described as follows: [*description of parcel*].

### § 5:31 Reservation of right to lay pipe

Grantor reserves to [*himself/herself/itself*], and to [*his/her/its*] successors, heirs, or assigns, as an appurtenance to the land described below, designated “Parcel [*number of parcel*]”, the right at any time to lay, construct, and maintain drains, sewers, and water pipes in and on the real property above granted.

Parcel [*number of parcel*], to which the right of use is an appurtenance, is described as follows: [*description of parcel*].

### § 5:32 Reservation of use of well

Grantor reserves to [*himself/herself/itself*], and to [*his/her/its*] successors, heirs, or assigns, for all times after that, the sole and exclusive right to use for domestic purposes the water from the existing well located in the [*indicate the specific location*] on the above-described real property, with the additional right to enter on the real property to repair and maintain the well and the pipes leading from it, whenever any repair and maintenance is necessary.

Grantor, and [*his/her/its*] successors, heirs, or assigns, will fully compensate the grantee, and [*his/her/its*] heirs, successors, or assigns, for any damage done to the surface of the real property by reason of the repair and maintenance to the well.

**D. OPTIONAL PROVISIONS****§ 5:33 Exclusive easement rights**

Grantor agrees that the grant of easement to grantee in subject property shall be exclusive. Grantor will not execute any other agreements with third parties, nor will grantor cause any use on the property other than that which is the subject of this easement agreement [*if applicable: except existing rights held by third parties prior to the date of this easement agreement, specifically [describe existing rights of third parties]*]. Should grantor desire to execute any agreement with any third party, or cause any use by any third party, grantor shall notify grantee, in writing, [*number of days*] days prior to execution of any agreement, whether oral or written, with any third party. Grantee shall not withhold third-party agreement consent unreasonably, unless, in grantee's sole discretion, the third party agreement would interfere with the grantee's use of the property in any way, including but not limited to the creation of unsafe conditions, loss of revenues, interference with grantee's business operations, increase of insurance liability, or any other unforeseen interference or impact.

**§ 5:34 Permitted uses of easement—Grantee's right to construct and maintain improvements and facilities**

Subject to the provisions of applicable laws (including applicable environmental laws), the easement granted by this easement agreement shall include the right to construct, install, maintain, repair, and replace any and all pipes, conduits, poles, wires, and cables to transport electricity, telephone, telegraph, and other electronic signals, water, coolant, waste water, and fuel to and from the property of grantor as well as for storm and sanitary sewer purposes; and the right to maintain fences, walls, gates, and security equipment and alarms; such scope is not intended to be all inclusive but to set forth examples of the types of utilities, services, and rights which are permitted within the easement and right of way; provided, that, except with the prior consent of the grantor, the grantee shall not relocate or expand the easement. It is intended that there shall be included within this grant and definition easement and right of way needed for the construction, operation, maintenance,

repair, alteration, and renovation of the grantee's facilities in the easement area.

### **§ 5:35 Easement subject to rights and privileges of third parties**

The parties to this easement agreement acknowledge that [name of third party] of [name of city], [name of state] has a right to [description of activity 1] upon the property, which right is terminable at will by Grantor. The parties also acknowledge that [name of another third party] of [name of city], [name of state] has a right to [description of activity 2] upon the property, which right shall terminate on [date]. The parties also acknowledge that other third parties may have rights and privileges on or about the property. Grantee's use of the property is subject to the rights (express and implied) of all those third parties if and to the extent that the third parties and their respective rights are either identified in one or more documents recorded in the official records of [name of county], Florida as of the date of this easement agreement or specifically listed in a writing provided by Grantor to Grantee prior to the date of this easement agreement. Grantor agrees to use reasonable efforts to obtain the cooperation of those third parties in using their rights in a manner that minimizes interference by those parties with the activities of Grantee and its contractors or agents under this easement agreement. [If applicable: Grantor had provided a copy of the easement memorandum agreement dated [date of easement memorandum] by and between Grantor and [name of third party], which is expressly agreed not to materially affect the feasibility of Grantee's use of the property as a [description of purpose of easement].]

### **§ 5:36 Waiver of setback requirements**

Grantor consents to grantee's location of [description of equipment or facilities to be erected or installed] at any location on the property, including at or near the property lines. In the event that any private agreements or restrictions or any laws, rules, or ordinances of any governmental agency impose setback requirements or otherwise restrict the location of any element of any of grantee's [description of equipment or facilities] to be placed on the property or any adjacent properties along or near property lines, grantor

shall cooperate with and assist grantee in obtaining waivers or variances from those requirements and shall execute all reasonable and further documents evidencing grantor's agreement to the elimination of the setback requirements.

**§ 5:37 Assignment by grantee permitted**

Grantee shall at all times have the right to sell, assign, encumber, or transfer all or an undivided interest in all of its rights and interests under this easement agreement to any of its affiliates without grantor's consent; provided, however, that the term of any such transfer shall not extend beyond the term of this easement agreement and that any and all such transfers shall be expressly made subject to all of the terms, covenants, and conditions of this easement agreement. Grantee shall give grantor written notice of the assignment or transfer of any of its rights under this easement agreement within *[number of days]* days after any such assignment or transfer. The burdens of the easements and rights contained in this easement agreement shall run with and against the property and shall be a burden on the property for the duration of this easement agreement and shall be binding upon and against, and shall inure to the benefit of, grantor and grantee and their respective successors, assigns, permittees, licensees, lessees, employees, and agents.

**§ 5:38 Grantor's right to relocate easement**

Notwithstanding any other provisions in this easement agreement to the contrary, the grantor shall have the right to relocate the easement and/or right-of-way on its property provided that: (1) the easement and/or right-of-way as so relocated will serve the same purpose as that of the easement and/or right-of-way immediately prior to the relocation and will allow the extent and manner of utilization available to the grantee immediately prior to the relocation; (2) the proposed relocation would not materially interfere with, or materially increase the cost of the operation and maintenance of, the property benefited by the easement and/or right-of-way; and (3) the relocation shall be done at the sole expense of the grantor.

**§ 5:39 Surrender of property upon termination of easement**

On the termination of this easement agreement, grantee

shall peaceably and quietly leave, surrender, and return the property to grantor. Grantee shall have [*number of months*] months from the date of termination to commence reasonable removal any and all equipment, improvements, fixtures, and other property owned or installed by grantee or its agents or employees. Failure to remove any items within [*number of months or years*] [*months/years*] from the date of termination shall be deemed to be an abandonment of those items to grantor. In that event, grantor shall have the right to remove, or to cause removal of, any property deemed to be abandoned by grantee, and grantee shall reimburse grantor for the actual and reasonable cost of such removal, and grantor shall be entitled to the salvage value of any such items removed. Grantee shall, upon surrendering property to grantor, provide grantor with a quitclaim deed to the property, by which grantee reconveys to grantor any and all rights actually acquired or claimed by grantee.

## II. MAINTENANCE AND REPAIR

### § 5:40 Introduction

Generally, the duty to maintain an easement in a safe condition to prevent injuries to third parties rests on the owner of the dominant estate, unless: (1) there is an agreement requiring the servient owner either solely or concurrently to maintain and control the easement; or (2) the evidence indicates that the servient owner affirmatively and voluntarily assumes responsibility for maintaining the easement in a safe condition as to persons with the same status as the injured third parties.<sup>1</sup> The owner of a right of way generally may prepare, improve, maintain, or repair the right of way to facilitate its use.<sup>2</sup>

An easement holder has the right to do what is reasonably necessary for full enjoyment of the easement, but the right

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#### [Section 5:40]

<sup>1</sup>Collom v. Holton, 449 So 2d 1003 (Fla. Dist. Ct. App. 2d Dist. 1984).

**A.L.R. Library:** Right of servient owner to maintain, improve, or repair easement of way at expense of dominant owner, 20 A.L.R. 3d 1026.

**Legal Encyclopedias:** Maintenance and repair of easements; in general, Fla. Jur. 2d, Easements and Licenses in Real Property § 48.

<sup>2</sup>Parlato v. Secret Oaks Owners Ass'n, 689 So. 2d 320 (Fla. Dist. Ct. App. 5th Dist. 1997).

must not be increased to any greater extent than reasonably necessary and contemplated at the time the easement was created.<sup>3</sup>

#### Cases

Quasi-judicial immunity has been extended to protect public defenders, court-appointed guardians ad litem, therapists, and arbitrators. VanGelder v. Johnson, 827 N.W.2d 430 (Minn. Ct. App. 2012), review denied, (Jan. 15, 2013).

### § 5:41 Agreement by co-owners—To share cost of maintenance and repair of right of way

The parties to this agreement, [name of owner 1] and [name of owner 2], are co-owners of an easement in the nature of a private right of way, approximately [number of feet] feet in width and extending approximately [number of feet or miles] [feet/miles] in a [compass direction] direction from [description of starting point] to [description of termination point] through [name of city], County of [name of county], State of Florida, as shown on the attached plat, made a part of this agreement.

The parties to this agreement agree to share the costs and expenses of maintaining the easement in repair for the period commencing [date of commencement], and ending [date of termination], as follows:

#### SECTION 1. MAINTENANCE AND REPAIRS DEFINED

The repairs and maintenance to be undertaken and performed under this agreement will include the following and only the following: [description of maintenance and repairs]. Any additional repairs or maintenance deemed necessary or advisable, but not included within the maintenance and repair specified above, will not be undertaken under this agreement except with the express written consent of each of the parties and an assumption by each in

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Under the language of an owners' agreement and the recorded easement burdening a lot near a river, which granted other lot owners in a subdivision the rights of pedestrian access to the river and to "any dock now or hereafter located thereon," the owners' association was legally entitled to improve, maintain, or repair the easement in order to facilitate its use. Secret Oaks Owner's Ass'n, Inc. v. Department of Environmental Protection, 704 So.2d 702 (Fla. Dist. Ct. App. 5th Dist., 1998).

<sup>3</sup>Florida Power Corp. v. Silver Lake Homeowners Ass'n, 727 So.2d 1149 (Fla. Dist. Ct. App. 5th Dist., 1999).

writing of their proportionate share of financial liability for the cost of the additional repairs or maintenance.

#### SECTION 2. LIMITS OF LIABILITY

The parties to this agreement agree to bear the costs and expenses of repairs and maintenance authorized pursuant to and during the term of this agreement for the easement as follows:

*[Name of party]* agrees to bear *[percentage]*% of the costs and expenses, but not exceeding during the term of this agreement a total of *[\$dollar amount]*. *[Name of party]* agrees to bear the remaining *[percentage]*% of the costs and expenses, but not exceeding during the term of this agreement a total of *[\$dollar amount]*.

#### SECTION 3. DESIGNATION OF AGENT

*[Name of agent]*, whose address is *[address of agent]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, is designated as the agent of the parties to contract for and oversee the repairs and maintenance authorized under this agreement. Agent, on acceptance of the agency, will be personally liable for any and all debts contracted by *[him/her]* on behalf of the parties to this agreement for repairs and maintenance of the easement during the term of this agreement in excess of the parties' total agreed liability of *[\$dollar amount]*, except the debts contracted after obtaining the parties' written consent to be liable for them.

#### SECTION 4. COMPENSATION OF AGENT

The total compensation of agent for acting as such under this agreement will be *[\$dollar amount]*, payable *[description of amount and intervals of payment]*. The compensation of agent is to be *[included in/in addition to]* the parties' total liability, previously specified.

#### SECTION 5. ADVANCEMENT OF COSTS AND EXPENSES

On the execution of this agreement by the parties and the acceptance by *[name of agent]* of *[his/her]* appointment as agent under this agreement, each party will advance his or her percentage share, as set forth in Paragraph *[number of paragraph]*, of *[\$dollar amount]* and deposit the amount in agent's trustee account to be carried in the *[name of bank]*,

for use by agent in paying the costs and expenses authorized and incurred under this agreement.

As agent requires additional funds from time to time to pay the costs and expenses authorized and incurred under this agreement, each party will deposit his or her percentage share of the sums required, subject to the limits of liability under this agreement, in agent's trustee account on receipt of notice from agent that the funds are required.

#### SECTION 6. ACCOUNTING BY AGENT

Agent will furnish to the parties written reports of maintenance and repairs undertaken, costs and expenses incurred, and receipts for the payment of the costs and expenses on or before the [*ordinal number*] day of each month or other interval of time].

#### SECTION 7. BOND OF AGENT

When sufficient funds are involved, provide for furnishing of a faithful performance bond by agent, specifying amount of bond, name of surety, and whether premiums will constitute a portion of the parties' total agreed liability under the agreement or whether they will be advanced separately.

#### SECTION 8. NOTICES

Any notice or report required under this agreement will be sent to the parties and the agent under this agreement at the address given after the signature of each, unless the address is changed by written notice to each person concerned, in which event the change of address given will be used for the sending of the notice or report. Any required notice will be made by [*regular/registered/certified*] mail, properly addressed and postage prepaid.

#### SECTION 9. PERSONAL INJURY AND PROPERTY DAMAGE LIABILITY

Any liability of the parties for personal injury to the agent under this agreement, or to any worker employed to make repairs under this agreement, or to third persons, as well as any liability of the parties for damage to the property of the agent, or any worker, or of any third persons, as a result of or arising out of repairs and maintenance under this agreement, will be borne, as between the parties, in the same percentages as they bear the costs and expenses of the repairs and maintenance. [*Specify amount of insurance,*

*insurer, and provide for advancement of premiums if it is desired that a special policy be carried to cover such liability.] [Each party will be responsible for and maintain his or her own insurance, if any.]*

#### SECTION 10. INDEMNITY

Each of the parties indemnifies and holds the other harmless from any and all liability for injury to himself or herself or damage to his or her property when the injury or damage results from, arises out of, or is attributable to any maintenance or repair undertaken pursuant to this agreement.

Executed at [*address of execution*], in the County of [*name of county*], State of Florida, this [*ordinal number*] day of [*month*], [*year*].

[*Signatures and addresses of parties*]

[*Acknowledgments*]

#### ACCEPTANCE OF AGENCY

The undersigned, [*name of agent*], acknowledges and accepts [*his/her*] appointment as agent of [*name of owner 1*] and [*name of owner 2*] to contract for and oversee the maintenance and repair authorized for the easement described in the preceding agreement and agrees to be bound by the provisions of the agreement.

Executed at [*address of execution*], in the County of [*name of county*], State of Florida, this [*ordinal number*] day of [*month*], [*year*].

[*Signature and address of agent*]

[*Acknowledgments*]

#### NOTES TO FORM

##### Tax Notes

The deductibility of repairs depends on hurdling two tax obstacles. The first prohibits a deduction for personal expenses. I.R.C. § 262(a). Repairs to a personal residence, for example, may not be deducted under any circumstances. Nor may they be capitalized and recovered at a later time when the property is sold.

Repair expenses are therefore deductible only for work on business property or on property used for the production of income. I.R.C.

§§ 162, 212. For repairs on this kind of property, a second obstacle must be overcome before expenses are deductible. Since repair expenses are a current expense, expenditures that improve the value of the property or prolong its life are not deductible, but must be capitalized and recovered through depreciation. Am. Jur. 2d, Federal Taxation ¶ 16401. The primary distinction between a capital expenditure and a deductible expense is that the benefit of a capital expenditure is expected to last for longer than one year. 26 C.F.R. § 1.162-4. Only the expense of repairs and maintenance is therefore deductible, with the burden on the taxpayer to show that the expense is not in the nature of an improvement to the property.

### **Section 9**

#### **Drafter's Notes**

The parties' liability for personal injury and property damage attributable to a cause other than the repairs and maintenance undertaken would properly be the subject of another agreement. Reference should be made to the other agreement to clarify the parties' intent. When there is no such other agreement, a further clause should be added stating that the parties do not intend, by this agreement, to provide for the sharing of liability with respect to personal injury or property damage other than that attributable to the repairs and maintenance undertaken under this agreement.

#### **Cases**

Quasi-judicial immunity has been extended to protect public defenders, court-appointed guardians ad litem, therapists, and arbitrators. *VanGelder v. Johnson*, 827 N.W.2d 430 (Minn. Ct. App. 2012), review denied, (Jan. 15, 2013).

### **§ 5:42 Agreement for maintenance and repair of right of way—Provision concerning multiple grantees**

For the benefit of all grantees, their heirs, successors, and assigns, grantor will, for a period of [*number of years*] from the date of the first conveyance, at [*his/her*] own cost and expense, repair and maintain and keep repaired and maintained in the same manner as is now constituted, the private road or right of way leading from [*description of point 1*] to [*indicate direction*] and terminating at [*description of point 2*].

Grantees agree that, at the expiration of the previously mentioned [*number of years*] period, grantor will be relieved of all responsibility to repair and maintain such private road or right of way. Thereafter each grantee is required and agrees to repair and maintain the road or right of way contributing [*his/her*] proportionate share of [*specify a frac-*

*tion]* of the total cost thereof in order to maintain accessibility to all plots bordering the private road or right of way.

This duty to repair and maintain will continue until such time as, if, and when such private road or right of way is taken over by *[name of county]* as a county road. The duty of the grantees to repair and maintain the private road or right of way also applies to the removal of snow.

#### **NOTES TO FORM**

##### **Tax Notes**

See Tax Notes following § 5:41.

#### **§ 5:46 Provision—Contribution of costs of maintenance of common easement**

The grantees named above will contribute ratably with the adjoining property owners using the *[name of common easement]* to the cost of any materials and labor used in the repair and maintenance of it.

#### **NOTES TO FORM**

##### **Tax Notes**

See Tax Notes following § 5:41.

#### **§ 5:47 Agreement for maintenance—Municipality**

Return to: *[specify]*

City Clerk

City of *[name of city]*

Prepared by: *[name of preparer]*

#### **MAINTENANCE AGREEMENT**

This indenture is executed on *[date of execution]*, by *[name of grantor]*, a *[specify]*, whose address is *[address of grantor]*, grantor, to the City of *[name of city]*, a municipal corporation under the laws of the State of Florida, whose address is *[address of city]*, grantee.

#### **W I T N E S S**

Grantor, for and in consideration of the sum of *[\$/dollar amount]*, and other good and valuable consideration, the receipt and sufficiency of which being acknowledged, does grant, convey, bargain, sell, release, and quitclaim to

grantee, its successors, and assigns, a permanent easement for the perpetual right to enter on the premises described below to dredge, dig, seed, mulch, stabilize, and otherwise maintain the [*description of easement object*].

The land subject to the easement is located in [*description of location*], and is more particularly described on Exhibit [*identification of exhibit*], attached to and made a part of this agreement.

To have and to hold the same to grantee and its successors and assigns, together with the right to enter on the lands and to maintain the lands, with all such fills, cuts, drains, ditches, and other incidents which grantee may deem necessary or convenient in connection with the lands, except that no structures or buildings shall be erected on the property.

This easement is not an exclusive easement and, to the extent that any and all additional uses shall not unreasonably interfere with the purpose of the easement created by this instrument, grantor shall be free to convey any additional easements and/or licenses as grantor deems appropriate.

If, for any reason, grantor decides to relocate that portion of the [*specify*], lying on the land described in this agreement, grantor reserves the right to relocate the easement, pursuant to it.

It is expressly understood and agreed that the terms, covenants, and conditions of this easement shall be and constitute covenants running with and binding on the premises described above and shall constitute an obligation on the premises regardless of title or ownership and regardless of any future change that may take place.

This Easement is subject to all other easements of record.

In Witness, grantor has caused this Easement to be executed in its name the day and year written above.

GRANTOR:

By: \_\_\_\_\_  
President

WITNESSES:

\_\_\_\_\_  
[Witness 1]

[Printed or Typed Name of Witness 1]

[Witness 2]

[Printed or Typed Name of Witness 2]

[Witness 3]

[Printed or Typed Name of Witness 3]

[Seal]

The State of Florida                      }  
County of \_\_\_\_\_                      }

The foregoing instrument was acknowledged before me  
this [date of acknowledgment], by [name of president], President of [name of corporation], a [state of incorporation]  
corporation, on behalf of the corporation. [He/She] is personally known to me or has produced [description of identification supplied] as identification.

[Signature of person taking acknowledgment]

[Typed, printed or stamped name]

[Title or rank]

[Serial number, if any]

### III. TERMINATION OF EASEMENT

#### § 5:48 Introduction

An easement may be extinguished by an express release

executed by the owner of the dominant estate. However, in order for a release to be effectual in itself it must be executed with the same formalities as are generally required in making transfer of interest in land.<sup>1</sup>

It is generally recognized that an easement cannot be extinguished by an unexecuted oral agreement. However, notwithstanding the inefficacy of an executory oral agreement for the surrender of an easement, it is recognized that if the oral agreement is executed by the parties or by the servient owner, extinguishment of the easement will result.<sup>2</sup>

An easement is not extinguished by the conveyance of the dominant estate. One who purchases land with knowledge or with notice that it is burdened with an easement generally takes the estate subject to the easement, and of course it follows that the easement is not extinguished by such a conveyance. However, a bona fide purchaser of land without knowledge or notice of the existence of an easement in such land takes title free from the burden of the easement, and naturally in such cases the easement is extinguished.<sup>3</sup>

#### § 5:49 Quitclaim deed terminating easement

Deed made on [*date of deed*], between [*name of grantor*], of [*street address*], City of [*name of city*], County of [*name of county*], State of Florida, grantor, and [*name of granteel*], of [*street address*], City of [*name of city*], County of [*name of county*], State of Florida, grantees.

Grantor, in consideration of *[\$dollar amount]*, paid by grantee, does release and forever quitclaim to grantee all the right, title, interest, estate, claim, and demand, both at law and in equity, of grantor, of, in, and to all that real property situated in the County of [*name of county*], State of Florida, more particularly described as follows: [*insert legal description*], together with all the improvements, ways, easements, rights, privileges, and appurtenances held or owned by or of grantor in the above-described real property.

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#### [Section 5:48]

<sup>1</sup>**Legal Encyclopedias:** Ways of necessity, Fla. Jur. 2d, Easements and Licenses in Real Property § 55.

<sup>2</sup>**Legal Encyclopedias:** Agreement or release; Cancellation, Fla. Jur. 2d, Easements and Licenses in Real Property § 58.

<sup>3</sup>**Legal Encyclopedias:** Sale or conveyance of dominant or servient estate, Fla. Jur. 2d, Easements and Licenses in Real Property § 60.

In witness, grantor has executed this deed on *[date of execution]*, at *[location of deed execution]*.

---

*[Signature]*

Executed in the presence of: \_\_\_\_\_

---

*[Signatures]*

*[Acknowledgment]*

This instrument was prepared by *[name of preparer]*, *[address of preparer]*.

#### **NOTES TO FORM**

##### **Research References**

###### *Legal Encyclopedias*

Fla. Jur. 2d, An easement may be extinguished by an agreement between the dominant and servient owners or by an express release executed by the owner of the dominant tenement. A quitclaim deed may operate as a release by transferring to the grantee whatever interest the owner of the easement may have in the property quitclaimed. Agreement or release; Cancellation, Easements and Licenses in Real Property § 58.

#### **§ 5:50 Termination of easement by general release**

Release given by *[name of owner of easement]*, of *[street address]*, City of *[name of city]*, County of *[name of county]*, State of Florida, to *[name of owner of servient tenement]*, of *[street address]*, City of *[name of city]*, County of *[name of county]*, State of Florida.

On *[date]*, *[name of owner of easement]* granted to *[name of owner of servient tenement]* an easement for *[description of nature and scope of easement]*, on real property described as follows: *[insert legal description]*.

In consideration of the payment of *[\$[dollar amount]]*, receipt of which is acknowledged, *[name of owner of easement]* releases to *[name of owner of servient tenement]* the easement described above, it being the intention of the parties to terminate the easement.

In witness, *[name of owner of easement]* has executed this release on *[date of execution]*, at *[designate place of execution]*.

---

[Signature]

Executed in the presence of: \_\_\_\_\_

---

[Signatures]

[Acknowledgment]

This instrument was prepared by [name of preparer], [address of preparer].

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 5:49.

### IV. PROFITS A PRENDRE

#### § 5:51 Introduction

The right to profits, denominated “profits a prendre,” consists of a privilege to acquire, by severance or removal from another’s land, some thing or things previously constituting part of the land or pertaining to the land.<sup>1</sup> It is distinguishable from an easement, since one of the features of an easement is the absence of all right to participate in the profits of the soil charged with such easement.<sup>2</sup>

#### § 5:52 Conveyance of timber rights

##### Deed of Timber Rights

The State of Florida                                    }  
County of \_\_\_\_\_

I, [name of grantor], of [address of grantor], State of Flor-

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[Section 5:51]

<sup>1</sup>**Legal Encyclopedias:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

<sup>2</sup>**Legal Encyclopedias:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

ida, as grantor, in consideration of *[\$/dollar amount]* and other good and valuable consideration, the receipt of which is acknowledged, have granted and conveyed, and by these presents do grant and convey, to *[name of grantee]*, of *[address of grantee]*, State of Florida, *[forever/for twenty years]* any and all timber rights, including the rights to timber now standing or growing or fallen, as well as any and all new growth of timber maturing after the date of this deed, on land in *[name of county]* County, State of Florida, described as *[description of land]*, together with the following rights: necessary rights to enter onto and depart from land to cut and remove timber from the lands; the right to construct, maintain, and use roads, paths, or trails necessary or convenient to the cutting and removing of timber from the lands, provided that the roads, paths, and trails will be maintained and used only in connection with the exercise of timber rights granted in this deed, and only for so long as may be necessary to the exercise of the timber rights; and the right to use so much of the surface of the land as may be necessary or convenient for logging camps and structures erected for use in connection therewith, provided that the logging camps and the structures will be used and maintained only in connection with the exercise of timber rights granted in this deed and only for so long as the camps and the structures will be required for the exercise of the timber rights.

Witness my hand this *[ordinal number]* day of *[month]*, *[year]*.

---

*[Signature]*

Executed in the presence of: \_\_\_\_\_

---

*[Signatures]*

*[Acknowledgment]*

This instrument was prepared by *[name of preparer]*, *[address of preparer]*.

**NOTES TO FORM****Drafter's Notes**

To avoid misunderstanding between the parties, counsel may wish to define the meaning of "timber rights."

**Tax Notes**

This document primarily reflects the sale of timber rights. The easement is only incidental to that sale. Special Code provisions apply to timber operations and make the cutting of timber a capital transaction, even when entered into by a dealer in timber and even when done by a lessee, licensee, or anyone else holding an economic interest in the timber. I.R.C. § 631. Timber is treated as Section 1231 property and the cutting as a sale or exchange of that kind of property.

No separate consideration should be applied to the incidental easement granted in this deed since these rights are merely in aid of the timber removal and terminate when the cutting ends. The full consideration should be allocated to the timber rights.

From the terms of the deed, it is obvious that the grantee plans either to sell the timber or to use it in the grantee's operations. Therefore, the cost of the rights is a deductible expense against the timber sold. The cost must first be capitalized and then recovered under the depletion provisions of the Code. Under I.R.C. § 611, the yearly depletion allowance is figured under a two-part calculation. The depletion cost per unit is determined by dividing the total board feet (or other appropriate unit) by the consideration paid. That unit is then applied to the number of units sold during the year to determine the appropriate deduction. 26 C.F.R. § 1.611-3.

**§ 5:53 Grant of hunting and fishing rights**

The State of Florida    }  
County of \_\_\_\_\_

I, [name of grantor], of [address of grantor], City of [name of city], County of [name of county], State of [name of state], referred to below as Grantor, am the owner of the following described property: [insert legal description] and, as the owner, do grant, transfer, and convey and by these presents do grant, transfer, and convey to [name of grantee], referred to below as Grantee, the right to [description of hunting and fishing rights] that may be caught or found on the above described property, together with the necessary rights to enter and depart on and over the property for the purpose of [hunting and/or fishing].

Grantee will, as consideration for the grant made, pay [description of consideration].

TO HAVE AND TO HOLD TO the Grantee, Grantee's

heirs, successors, and assigns, and the guests, licensees, and invitees of Grantee for a period of [*description of term including begin and end dates*].

[*In the event that Grantee fails to exercise the rights and privileges granted hereunder for a period of [number of years] then, and in that event, this grant will be of no further force or effect.*]

Executed on [*date of execution*].

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[Signature]

Executed in the presence of: \_\_\_\_\_

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[Signatures]

[Acknowledgment]

This instrument was prepared by [*name of preparer*], [*address of preparer*].

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes to § 5:49.

##### Tax Notes

This is a license and not an easement since no property estate has been conveyed, only a temporary right to use the land for the purposes stated. The consideration received is therefore ordinary income under I.R.C. § 61(a).

If the grant is made for commercial purposes, the cost to the grantee is deductible through amortization or depletion. Otherwise, the cost is personal in nature and not deductible. I.R.C. § 262.

#### § 5:54 Lease—Grant of hunting and fishing privileges

This lease specifically includes to the lessee the full hunting and fishing privileges on the property. In light of the potential hazards to the public using the beltline, resulting from hunting on the subject property, as well as the hazards to those using the property to hunt, lessee agrees to hold lessor harmless and indemnified at all times against any loss, cost, damage, or expense by reason of any accident, loss, casualty, or damage resulting to any person or property

through any act or event related to hunting on the leased premises under this lease or by reason of any act or thing done or undone on the leased premises related to hunting. Lessee shall specifically have the duty to coordinate all hunting activity with any work crews performing any work on the subject property, and shall direct all hunting activity away from the areas where any construction or other work is occurring. In the event that hunting activities interfere with any work or construction on the property, as determined by the lessors, the lessors shall have the right to immediately cancel this lease.

## V. PROFITS A PRENDRE

### § 5:55 Introduction

The right to profits, denominated “profits a prendre,” consists of a privilege to acquire, by severance or removal from another’s land, some thing or things previously constituting part of the land or pertaining to the land.<sup>1</sup> It is distinguishable from an easement, since one of the features of an easement is the absence of all right to participate in the profits of the soil charged with such easement.<sup>2</sup>

## VI. PROFITS A PRENDRE

### § 5:56 Introduction

The right to profits, denominated “profits a prendre,” consists of a privilege to acquire, by severance or removal from another’s land, some thing or things previously constituting part of the land or pertaining to the land.<sup>1</sup> It is distinguishable from an easement, since one of the features

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#### [Section 5:55]

<sup>1</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

<sup>2</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

#### [Section 5:56]

<sup>1</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

of an easement is the absence of all right to participate in the profits of the soil charged with such easement.<sup>2</sup>

## VII. PROFITS A PRENDRE

### § 5:57 Introduction

The right to profits, denominated “profits a prendre,” consists of a privilege to acquire, by severance or removal from another’s land, some thing or things previously constituting part of the land or pertaining to the land.<sup>1</sup> It is distinguishable from an easement, since one of the features of an easement is the absence of all right to participate in the profits of the soil charged with such easement.<sup>2</sup>

## VIII. PROFITS A PRENDRE

### § 5:59 Introduction

The right to profits, denominated “profits a prendre,” consists of a privilege to acquire, by severance or removal from another’s land, some thing or things previously constituting part of the land or pertaining to the land.<sup>1</sup> It is distinguishable from an easement, since one of the features of an easement is the absence of all right to participate in the profits of the soil charged with such easement.<sup>2</sup>

## IX. PROFITS A PRENDRE

### § 5:60 Introduction

The right to profits, denominated “profits a prendre,” consists of a privilege to acquire, by severance or removal

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<sup>2</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

[Section 5:57]

<sup>1</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

<sup>2</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

[Section 5:59]

<sup>1</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

<sup>2</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

from another's land, some thing or things previously constituting part of the land or pertaining to the land.<sup>1</sup> It is distinguishable from an easement, since one of the features of an easement is the absence of all right to participate in the profits of the soil charged with such easement.<sup>2</sup>

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[Section 5:60]

<sup>1</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

<sup>2</sup>**Additional References:** See Fla. Jur. 2d, Easements and Licenses in Real Property § 4.

- ## Chapter 6
- ### Homesteads
- § 6:1 Introduction
  - § 6:2 Preemption of Florida's homestead law by federal law
  - § 6:3 Tax aspects
  - § 6:4 Form drafting principles
  - § 6:5 Checklist—Claim of homestead exemption
  - § 6:6 Voluntary designation of rural homestead
  - § 6:7 Notice to owner to designate rural homestead—
    - By officer holding execution—Return of notice
  - § 6:8 Designation of rural homestead by homestead claimant after notice from officer
  - § 6:9 Designation of rural homestead by commissioners
  - § 6:10 Return of execution after designation of rural homestead—Levy on and sale of property
  - § 6:11 Change of designation of rural homestead
  - § 6:12 Disclaimer and designation of urban homestead—
    - To secure loan on disclaimed land owned in fee simple absolute by a tenancy by the entireties
    - To secure loan on disclaimed land owned fee simple absolute in severalty
  - § 6:13 Notice of homestead—To judgment creditor—
    - Statutory form [Fla. Stat. Ann. § 222.01]

#### Scope

This chapter contains forms for use in designating and disclaiming rural homesteads, both voluntarily and on execution, and in designating and disclaiming urban homesteads to secure a loan on the disclaimed land.

#### Treated Elsewhere

Chapters containing related form and text material are Security Arrangements (Ch 4) and Mechanics' Liens (Ch 13).

#### Research References

The material cited below applies generally to homesteads. Material applicable to particular aspects of the topic is cited in footnotes throughout the chapter and in Tax Notes and Drafter's Notes following particular forms.

FLORIDA JUR FORMS—LEGAL AND BUSINESS

*West's Key Number Digest*

Homestead 1 to 218; Taxation 196, 219, 301, 327

*A.L.R. Library*

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions, 52 A.L.R. 5th 221

Validity and effect of one spouse's conveyance to other spouse of interest in property held as estate by the entireties, 18 A.L.R. 5th 230

Forfeiture of homestead based on criminal activity conducted on premises—state cases, 16 A.L.R. 5th 855

Lien of judgment on excess value of homestead, 41 A.L.R. 4th 292  
Statutory or constitutional provision allowing widow but not widower to take against will and receive dower interests, allowances, homestead rights, or the like as denial of equal protection of law, 18 A.L.R. 4th 910

Recovery of damages for breach of contract to convey homestead where only one spouse signed contract, 5 A.L.R. 4th 1310

Adultery on part of surviving spouse as affecting marital rights in deceased spouse's estate, 13 A.L.R. 3d 486

Abandonment, desertion, or refusal to support on part of surviving spouse as affecting marital rights in deceased spouse's estate, 13 A.L.R. 3d 446

When Does Forfeiture of Real Property Violate Excessive Fines Clause of Eighth Amendment—Post-Austin Cases, 168 A.L.R. Fed. 375

Exception from discharge of taxes under § 523(a)(1) of Bankruptcy Code (11 U.S.C.A. § 523(a)(1)), 145 A.L.R. Fed. 1

*Legal Encyclopedias*

Fla. Jur. 2d, Homesteads

Am. Jur. 2d, Federal Taxation; Homestead

*Trial Strategy*

Bankruptcy Action to Recover Preferential Pre-Petition Transfer of Property of Debtor Under 11 U.S.C.A. § 547, 48 Am. Jur. Proof of Facts 3d 159

Relief From Automatic Stay-Debtor's Lack of Equity in Residential Property, 21 Am. Jur. Proof of Facts 3d 769

*Forms*

Am. Jur. Pleading and Practice Forms, Homestead

*Law Reviews and Other Periodicals*

Brown and Grohman, 2000 Survey of Florida Law: Real Property, 25 Nova L. Rev. 115 (2000)

Brown and Grohman, Property Law: 1997 Survey of Florida Law, 22 Nova L. Rev. 269 (1997)

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- Cohen, The Use of the Florida Homestead to Defraud Creditors, 72 Fla. B.J. 35 (Dec. 1998)
- Connaughton, Equitable Conversion Bows to Homestead Exemption, Complicating Florida's Homestead Exemption Law, 18 Stetson L. Rev. 645 (1989)
- Currin, Florida's Homestead Exemption: Does this Chameleon Ever Die?, 50 Fla. L. Rev. 573 (1998)
- Johnson, Correction of Errors in the Assessment of Homestead Property After Smith v. Welton, 30 Stetson L. Rev. 1035 (2001)
- Kelley and Kelley, Homestead Made Easy—Part 3A: How to Find the Courthouse and What to do Next, 69 Fla. B.J. 56 (Aug. 1995)
- Kelley and Kelley, Homestead Made Easy—Part 3: How to Find the Courthouse and What to do Next, 59 Fla. B.J. 105 (June 1995)
- Klindt, Florida Homestead Exemption—Proceeds From the Voluntary Sale of a Homestead—A Shield for the Debtor?—McGuire v. Manufacturers & Traders Trust Co. (In re McGuire), 37 Bankr. 365 12 Fla. St. U. L. Rev. 923 (1985)
- Kolcon, Common Law Equity Defeats Florida's Homestead Exemption, 68 Fla. B.J. 54 (Nov. 1994)
- Nelson and Packman, Florida's Unlimited Homestead Exemption Does Have Some Limits—Part II, 77 Fla. B.J. 38 (Feb. 2003)
- Nelson and Packman, Florida's Unlimited Homestead Exemption Does Have Some Limits—Part I, 77 Fla. B.J. 60 (Jan. 2003)
- Payne, Lien on Me (Bankruptcy, Homesteads, and The Supreme Court), 20 Real Estate L.J. 263 (1992)
- Peterson, Higgins, and Beal, Is the Homestead Subject to the Statute on Fraudulent Asset Conversion?, 68 Fla. B.J. 12 (Dec. 1994)
- Seiden, There's No Place Like Home(stead) in Florida—Should it Stay that Way?, 18 Nova L. Rev. 801 (1994)
- Webber, Florida's Homestead Exemption in the Eye of the Hurricane, 71 Fla. B.J. 60 (April 1997)
- Zeitler, Florida Homestead Exemption: Effect of 1985 Amendment on Availability After Divorce, 38 U. Fla. L. Rev. 451 (1986)

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

### § 6:1 Introduction

The homestead of a natural person is protected by the

Florida Constitution<sup>1</sup> from forced sale under process of any court and is likewise protected from having a judgment, decree, or execution being imposed as a lien thereon, except for: (1) the payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement, or repair thereof; or (3) obligations contracted for house, field, or other labor performed on the realty.<sup>2</sup>

The Constitution provides for two types of homesteads—rural and urban.<sup>3</sup> If the homestead is located outside a municipality, it is protected to the extent of 160 acres of contiguous land and improvements thereon, which is not to be reduced without the owner's consent by reason of subsequent inclusion in a municipality, or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption is to be limited to the residents of the owner or the owner's family.<sup>4</sup> When the property in which a debtor claims Florida homestead exemption exceeds the maximum area limitation under the homestead law, Florida courts will divide the property and allow the nonexempt portion to be sold for payment of the owner's debts.<sup>5</sup> The exemption from forced sale provided by the Constitution does not

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**[Section 6:1]**

<sup>1</sup>Fla. Const. Art. X, § 4.

<sup>2</sup>Fla. Const. Art. X, § 4(a).

The Supreme Court of Florida declined to add a fourth exception to these three constitutional exceptions to the homestead exemption. In *Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018 (2001), the court held that the homestead exemption protects a homestead acquired by a debtor using nonexempt assets with the intent to hinder, delay, or defraud creditors because such a transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors is not one of the three exceptions to the homestead exemption provided in Florida's Constitution.

**Legal Encyclopedias:** For general discussion of homesteads, see Fla. Jur. 2d, Homesteads §§ 1 et seq.

<sup>3</sup>Fla. Const. Art. X, § 4(a)(1).

<sup>4</sup>Fla. Const. Art. X, § 4(a)(1).

<sup>5</sup>*Englander v. Mills*, 95 F.3d 1028 (11th Cir. 1996) (bankruptcy court could order the sale of property in which Chapter 7 debtors claimed a Florida homestead exemption, with debtors' exemption to attach to a portion of the sale proceeds, where the property exceeded maximum area limitation under Florida homestead law, and property could not practically or legally be subdivided); *In re Kellogg*, 197 F.3d 1116 (11th Cir. 1999) (debtor, whose 1.3 acre property exceeded the one-half acre allowed

extend to portions of the property severable from the residence which are used to produce rental income.<sup>6</sup>

A condominium may qualify as a homestead.<sup>6.25</sup>

The constitutional provision exempting a homestead from forced sale does not designate how title to the property is to be held and it does not limit the estate that must be owned; therefore, an individual claiming a homestead exemption need not hold fee simple title to the property.<sup>6.50</sup>

Each of two people who are married, but legitimately live apart in separate residences, can each have a homestead exemption if they otherwise meet the requirements of the exemption.<sup>7</sup>

The homestead exemption inures to the benefit of the surviving spouse or heirs of the owner.<sup>8</sup> The homestead may be waived in a prenuptial agreement, and the result is that, for purposes of the constitutional restriction on devise of the homestead, the waiving spouse is deemed to have predeceased the decedent.<sup>8.50</sup>

The homestead is not subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there is no minor child.<sup>9</sup> The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale, or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the

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for municipal homestead under Florida law, could not select a one-half acre portion of his property to be exempt homestead, to extent that local zoning laws prohibited him from subdividing his property).

<sup>6</sup>First Leasing & Funding of Florida, Inc. v. Fiedler, 591 So. 2d 1152 (Fla. Dist. Ct. App. 2d Dist. 1992).

<sup>6.25</sup>See Traeger v. Credit First Nat. Ass'n, 864 So. 2d 1188 (Fla. Dist. Ct. App. 5th Dist. 2004).

<sup>6.50</sup>Callava v. Feinberg, 864 So. 2d 429 (Fla. Dist. Ct. App. 3d Dist. 2003), review denied (Fla. June 30, 2004).

<sup>7</sup>In re Colwell, 196 F.3d 1225 (11th Cir. 1999); Law v. Law, 738 So. 2d 522 (Fla. Dist. Ct. App. 4th Dist. 1999).

<sup>8</sup>Fla. Const. Art. X, § 4(b).

<sup>8.50</sup>See James v. James, 843 So. 2d 304 (Fla. Dist. Ct. App. 5th Dist. 2003).

<sup>9</sup>Fla. Const. Art. X, § 4(c).

owner or spouse is incompetent, the method of alienation or encumbrance is to be governed by statute.<sup>10</sup>

Once a property acquires the status of a homestead, that characteristic continues to attach to it unless the homestead is alienated in the manner provided by law.<sup>11</sup>

The concept of abandonment as relating to the “head of a family” requirement no longer applies due to constitutional revisions in 1985.<sup>12</sup> A homestead will lose its status by abandonment when the owner voluntarily abandons the homestead with no intent to return.<sup>13</sup> Absence for financial, health, or family reasons is not abandonment.<sup>14</sup>

A person residing in Florida who wishes to avail of the homestead exemption may make a statement, in writing, containing a description of the real property, mobile home, or modular home claimed to be exempt in declaring that such property is the homestead of the party in whose behalf such claim is being made.<sup>15</sup> The statement must be signed by the person making it and must be recorded in the circuit court.<sup>16</sup>

If a levy is made upon the lands, tenements, mobile home, or modular home of a person whose homestead has not been set apart and selected, such person, or his or her agent or attorney, may in writing notify the officer making such levy, by notice under oath made before any officer of this state duly authorized to administer oaths, at any time before the

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<sup>10</sup>Fla. Const. Art. X, § 4.

<sup>11</sup>Wilson v. Florida Nat. Bank & Trust Co. at Miami, 64 So. 2d 309 (Fla. 1953).

**Legal Encyclopedias:** Termination of homestead, Fla. Jur. 2d, Homesteads §§ 84 et seq.

<sup>12</sup>Fla. Const. Art. X, § 4 (substituting ownership by a natural person for “head of family” requirement).

In re Estate of Scholtz, 543 So. 2d 219 (Fla. 1989).

<sup>13</sup>Bueno v. Bueno de Khawly, 643 So. 2d 1174 (Fla. Dist. Ct. App. 3d Dist. 1994); Cain v. Cain, 549 So. 2d 1161 (Fla. Dist. Ct. App. 4th Dist. 1989).

<sup>14</sup>In re Harrison, 236 B.R. 788 (Bankr. N.D. Fla. 1999).

<sup>15</sup>Fla. Stat. Ann. § 222.01(1); Miami Country Day School v. Bakst, 641 So. 2d 467, 94 Ed. Law Rep. 1021 (Fla. Dist. Ct. App. 3d Dist. 1994) (houseboat considered a dwelling house for purposes of homestead exemption).

<sup>16</sup>Fla. Stat. Ann. § 222.01(1).

day appointed for the sale thereof, or what such person regards as his or her homestead, with a description thereof, and the remainder only shall be subject to sale under such levy.<sup>17</sup>

A creditor in any execution or process who is dissatisfied with the quantity of land selected and set apart may notify the officer levying and request that the property be surveyed for the purpose of determining the area of the property set apart by the person claiming the homestead exemption.<sup>18</sup> After such survey, the officer making the levy may sell the property levied upon not included in such property setoff.<sup>19</sup>

A person who owns and occupies any dwelling house, including a mobile home used as a residence or modular home, on land not owned by such person but which such person may lawfully possess, by lease or otherwise, and claiming such house, mobile home, or modular home as his or her homestead, is entitled to the exemption of such property from levy and sale.<sup>20</sup>

In order to qualify his or her property with homestead status, the person seeking the homestead exemption must have an actual intent to live permanently on the property, as well as the actual use and occupancy of the property. The mere intent to make the property one's homestead in the future is insufficient to entitle a person to the constitutional homestead exemption.<sup>21</sup>

The circuit courts have equity jurisdiction in matters re-

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<sup>17</sup>The provision of Fla. Stat. Ann. § 222.02 does not provide the exclusive remedy for the assertion of the homestead rights under Florida Law, and failure to comply with such provision does not deprive the debtor of the Florida homestead exemption. *In re Smith*, 21 B.R. 345 (Bankr. M.D. Fla. 1982).

<sup>18</sup>Fla. Stat. Ann. § 222.03.

<sup>19</sup>Fla. Stat. Ann. § 222.04.

<sup>20</sup>Fla. Stat. Ann. § 222.05.

<sup>21</sup>See *Wechsler v. Carrington*, 214 F.Supp. 2d 1348 (S.D. Fla., 2002), holding that condominium was not owner's homestead at the time foreign default judgment against owner was recorded in county in which condominium was located, and thus, the condominium was not exempt from sale to satisfy the recorded judgment, where, although owner purchased the condominium over three months before the judgment was recorded, moved some of his belongings into that property, and spent some of his nights at that residence, he continued to live in an apartment from the time he purchased the condominium until two months after the judgment

lating to homestead exemptions, including the setting apart of homesteads,<sup>22</sup> enjoining the sale of all property exempt from forced sale,<sup>23</sup> and enforcing any unsatisfied judgment or decree, to determine whether any property claimed to be exempt is so exempt.<sup>24</sup>

In accordance with the provisions of § 522(b) of the Bankruptcy Code of 1978 (11 U.S.C.A. § 522(b)), residents of Florida are not entitled to the federal exemptions provided in § 522(d) of such Bankruptcy Code.<sup>25</sup> However, nothing in the provisions of the Florida Statutes shall affect the exemptions given to Florida residents by the state Constitution and the Florida Statutes.<sup>26</sup>

## § 6:2 Preemption of Florida's homestead law by federal law

Where the federal civil forfeiture law provides for forfeiture of real property and makes no allowances for property protected by state law, the federal law preempts Florida's constitutional homestead right.<sup>1</sup>

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was recorded and showed no intent to live permanently at the condominium prior to the recording of the judgment.

<sup>22</sup>Fla. Stat. Ann. § 222.08.

<sup>23</sup>Fla. Stat. Ann. § 222.09.

<sup>24</sup>Fla. Stat. Ann. § 222.10.

<sup>25</sup>Fla. Stat. Ann. § 222.20.

See *Owen v. Owen*, 500 U.S. 305, 111 S. Ct. 1833, 114 L. Ed. 2d 350 (1991).

<sup>26</sup>Fla. Stat. Ann. § 222.20.

### [Section 6:2]

<sup>1</sup>See *U.S. v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359 (11th Cir. 1994), holding that federal civil forfeiture law for real property used to facilitate the commission of federal narcotics law violations, which provides for forfeiture of real property, and which makes no allowances for property protected by state law, preempts the Florida homestead provision, thus permitting forfeiture of residential property claimed as a homestead under Florida law.

**Legal Encyclopedias:** Preemption of state law concerning homestead property by federal law, Fla. Jur. 2d, Homesteads § 6.

Another example of preemption by federal law is the federal tax lien. The homestead nature of a debtor-taxpayer's property does not prevent a federal tax lien from attaching.<sup>2</sup>

### § 6:3 Tax aspects

As an interest in property, a homestead is treated for tax purposes like any other similar right. No special tax provisions apply to homesteads.<sup>1</sup>

Also, a homestead interest is not treated differently for purposes of enforcing a federal tax lien against the property to which the homestead interest applies. The homestead exemption does not apply to a homeowner's unpaid federal taxes. Though the Internal Revenue Code exempts certain property from a tax lien and the resulting levy for taxes due, homestead interests are not included.<sup>2</sup>

The I.R.S. has the power to order a judicial sale of a family home to collect past due income taxes.<sup>3</sup> This right does not depend upon both spouses being delinquent in paying their taxes; it may be enforced against a nondelinquent spouse, as well.<sup>4</sup> When the home is sold, the nondelinquent spouse is entitled to so much of the proceeds as represents compensation for the loss of that spouse's separate homestead interest.<sup>5</sup>

This is not an unlimited right, however, since in some situations an innocent person's rights are affected. The court before which the enforcement procedure is brought must consider the following matters before permitting a sale that would affect an innocent spouse:<sup>6</sup>

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<sup>2</sup>In re McFadyen, 216 B.R. 1006, 1008 (Bankr. M.D. Fla. 1998).

[Section 6:3]

<sup>1</sup>See § 193.155, Fla. Stat. for statutory provisions relating to homestead assessments.

See also § 193.1551, Fla. Stat. relating to assessments of certain homestead property damaged in 2004 named storms.

<sup>2</sup>I.R.C. § 6334.

<sup>3</sup>U.S. v. Rodgers, 461 U.S. 677, 103 S. Ct. 2132, 76 L. Ed. 2d 236, 83-1 U.S. Tax Cas. (CCH) ¶ 9374, 52 A.F.T.R.2d 83-5042 (1983).

<sup>4</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 71938.

<sup>5</sup>Under I.R.C. § 7403.

<sup>6</sup>See U.S. v. Bachman, 710 F.2d 484 (8th Cir. 1983).

- (1) the extent the government would be prejudiced if forced to limit the sale to a partial interest in the property;
- (2) whether the nondelinquent spouse has a legally recognized expectation that the separate property would be subject to a sale;
- (3) prejudice to the nondelinquent spouse because of dislocation and compensation paid; and
- (4) the relative values of the respective interests in the property.

**§ 6:4 Form drafting principles**

The designation of a homestead by an owner before levy of such homestead may be made by making a statement, in writing, containing a description of the real property, mobile home, or modular home claimed to be exempt and declaring that such property is the homestead of the party in whose behalf such claim is being made, and such a statement must be signed by the person making it and must be recorded in the Circuit Court.<sup>1</sup> When a certified copy of a judgment has been filed in the public records of a county pursuant to Ch. 55, Fla. Stat., a person who is entitled to the benefit of the provisions of the State Constitution exempting real property as homestead and who has a contract to sell or a commitment from a lender for a mortgage on the homestead may file a notice of homestead in the public records of the county in which the homestead property is located in substantially the form provided in Fla. Stat. Ann. § 222.01(2).<sup>2</sup>

The designation of a homestead by an owner after levy has been made on such person's property may be made by a written notice to the officer making the levy, under oath before any officer of this estate duly authorized to administer oaths, at any time before the day appointed for the sale of the property, of what such person regards as his or her homestead, with a description thereof.<sup>3</sup>

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**[Section 6:4]**

<sup>1</sup>Fla. Stat. Ann. § 222.01(1).

<sup>2</sup>Fla. Stat. Ann. § 222.01(2).

See § 6:14 for statutory form.

<sup>3</sup>Fla. Stat. Ann. § 222.02.

**§ 6:5 Checklist—Claim of homestead exemption**

1. Identification of person claiming exemption.
  - a. Name.
  - b. Name of spouse.
  - c. Address.
  - d. Named persons are married.
    - (1) Children of marriage.
    - (2) Declarer is head of family.
2. Property upon which exemption claimed.
  - a. Common address.
  - b. Legal address.
  - c. General description of property.
  - d. Estimated value of property.
    - (1) Mortgage or trust deed on property.
3. Claim of homestead.
  - a. Property is principal residence of named persons.
    - (1) Currently residing on property.
  - b. Statutory citation for homestead exemption.
  - c. Property is homestead of named persons.
4. Miscellaneous.
  - a. Date.
  - b. Declaration is made on personal knowledge of signatories.
    - (1) Statements are true and correct.
  - c. Signatures.
  - d. Acknowledgments.

**NOTES****Drafter's Notes**

Any person residing in Florida who desires to avail of the homestead exemption may make a statement, in writing, containing a description of the real property, mobile home, or modular home claimed to be exempt and declaring that the real property, mobile home, or modular home is the homestead of the party in whose behalf such claim is being made, and such statement must be signed by the person making it and recorded in the circuit court. Fla. Stat. Ann. § 222.01(1). When a certified copy of a judgment has been filed in the public records of a county pursuant to Fla. Stat. Ann. § 55.10, a person who is entitled to the benefit of the provisions of the State Constitution exempting real property as homestead and who has a contract to sell or a commitment from a lender for a mortgage on the homestead may file a notice

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of homestead in the public records of the county in which the homestead property is located in substantially the form provided in Fla. Stat. Ann. § 222.01(2).

For forms of acknowledgment, see Conveyances (Ch 2).  
See § 6:14 for statutory form.

**§ 6:6 Voluntary designation of rural homestead**

The State of Florida  
County of \_\_\_\_\_ }

I, *[name of claimant]*, the undersigned, a natural person, of the County of *[name of county]*, State of Florida, own and am possessed of more land outside a town or city than is by law exempt to a family from forced sale. I desire to designate and set apart the homestead to which my family is entitled under the constitution and laws of this state.

I, therefore have designated, and do designate, as a homestead claimed by me, and to which my family is so entitled, exempt from forced sale, all that certain tract or parcel of land located in *[name of county]*, State of Florida, a part of the survey originally granted to *[name of original owner]*, consisting of *[number of acres]* acres of land, and more specifically described as follows: *[description of land]*.

Dated: *[date of designation]*.

---

*[Signature of claimant]*

*[Acknowledgment]*

**NOTES TO FORM**

**Drafter's Notes**

For forms of acknowledgments, see Conveyances (Ch 2).

**§ 6:7 Notice to owner to designate rural homestead—  
By officer holding execution—Return of notice**

To: \_\_\_\_\_, Defendant in Execution  
\_\_\_\_\_ *[address]*

\_\_\_\_\_ *[County]*, Florida

You are notified that I, the undersigned, *[name of under-*

*signed], [title of officer] of [name of county], have in my hands a writ of execution issued out of the [name of court] of [name of county], on [date], against you, in favor of [name of defendant].*

You are further notified, pursuant to Fla. Stat. Ann. § 222.02 to designate your homestead from the remainder of any land owned by you. If you do not do so before the [*ordinal number*] day after the date of delivery of this notice, I will proceed to have such partition and designation made in the manner prescribed by law.

Dated: *[date]*.

---

*[Signature of sheriff or officer]*

#### Return of Notice

This notice was issued on *[date of issuance]*, at *[time]*, and executed on *[date of execution]*, at *[time]*, in *[name of county]*, State of Florida, by *[reading it to [name of defendant], defendant in execution, in person/leaving a copy of it at the residence of [name of defendant], defendant in execution, with [name of occupant], a person therein who is 14 years of age or older]*.

I traveled a distance of *[number of miles]* miles in serving the notice. My fees are *[dollar amount]*.

---

*[Signature]*

*[Sheriff of \_\_\_\_\_ County, Florida/other officer]*

#### NOTES TO FORM

##### Tax Notes

The homestead exemption does not apply to a homeowner's unpaid federal taxes. I.R.C. § 7403. Though the Internal Revenue Code exempts certain property from a lien and the subsequent levy for taxes due, homestead interests are not included. I.R.C. § 6334. When an innocent party is affected, however, the right of the I.R.S. to sell a homestead for unpaid taxes is not unlimited. U.S. v. Rodgers, 461 U.S. 677, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983). In a suit claiming homestead right, a court must consider various things before permitting a sale that would affect an innocent spouse. These include the character and value of the various interest, the harm to the innocent

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spouse, the extent the I.R.S. would be prejudiced if limited to only a partial interest, and whether the innocent spouse might have been reasonably led to believe the homestead interest was protected. U.S. v. Rodgers, 461 U.S. 677, 103 S. Ct. 2132, 2151, 76 L. Ed. 2d 236 (1983).

**§ 6:8 Designation of rural homestead by homestead claimant after notice from officer**

The State of Florida    }  
County of \_\_\_\_\_

I, *[name of undersigned]*, the undersigned, a natural person of the County of *[name of county]*, State of Florida, own and am possessed of more land outside a town or city than is by law exempt to a natural person from forced sale. *[Name of officer]*, *[sheriff/deputy]* of *[name of county]*, has, pursuant to law, notified me that he or she has an execution against me, in favor of *[name of other claimant]*, and has further notified me to designate a homestead from the remainder of land owned by me which homestead is not now separated and partitioned from the rest of the land.

Therefore, I have designated, and do designate, as a homestead claimed by me, and to which *[my family is/I am]* so entitled, exempt from forced sale, all that certain tract or parcel of land located in *[name of county]*, Florida, a part of the survey originally granted to *[name of original owner]*, consisting of *[number of acres]* acres of land, and more specifically described as follows: *[description of designated property]*.

Dated: *[date]*.

---

*[Signature of claimant]*

*[Acknowledgment]*

**§ 6:9 Designation of rural homestead by commissioners**

The State of Florida    }  
County of \_\_\_\_\_

Whereas, on *[date of designation]*, *[name of officer]*,

[sheriff/deputy] of [name of county], State of Florida, held an execution against [name of party] in favor of [name of other party], issued out of the [name of court] of [name of county], and;

Whereas, the person against whom execution issued is the owner of excess land, over and above his or her exempt homestead and not separated and partitioned therefrom, the excess and homestead not being in a town or city, and constituting the following described [tract/tracts] of land in [name of county]: [description of property], consisting of [number of acres] acres, of which land the original grantee was [name of original grantee], and;

Whereas, on that date the officer holding execution duly served on [specify name], defendant in execution, written notice to designate his or her homestead from the remainder of the land owned and occupied by him or her and that if defendant failed to do so before the 11th day after the notice was delivered, the officer would have the designation made as provided by law, and;

Whereas the notice with the return endorsed on it has been deposited with and filed by the clerk of the [name of court] of [name of county], Florida, and;

Whereas, [name of defendant], defendant in execution, has not designated the homestead, before the 11th day after delivery of the notice, and accordingly, the officer holding execution has summoned the undersigned to act as commissioners to designate a homestead for defendant in execution.

Therefore, we, the undersigned commissioners, have designated the homestead of defendant in execution as follows: A certain tract or parcel of land situated in [name of county], Florida, a part of the survey originally granted to [name of original owner], consisting of [number of acres] acres, described as follows: [description of property].

The designation by us of this homestead is fair to the best of our judgment.

Dated: [date].

---

[Signature of commissioners]

Subscribed and sworn to before me by a majority of the above-named commissioners on [date].

---

[*Notary Public*]

My commission expires: \_\_\_\_\_

[*Acknowledgment of the majority of commissioners*]

**§ 6:10 Return of execution after designation of rural homestead—Levy on and sale of property**

[*If defendant has delivered a homestead designation, add: Thereafter, on [date], within the time required by law, the defendant delivered to me a designation of the homestead in due form of law, as follows: [set out designation], which designation I delivered for recording to the County Clerk of [name of county], Florida, on [date].*]

[*Alternative paragraph:*]

[*If defendant has not delivered a homestead designation, add: Thereafter, the defendant having failed and refused to deliver to me a designation of such homestead before the 11th day after the delivery of notice as prescribed by law, on [date], I duly summoned and appointed [name of disinterested landowner 1], [name of disinterested landowner 2], and [name of disinterested landowner 3], three disinterested landowners of [name of county], as commissioners to designate defendant's homestead. The commissioners so appointed by me proceeded to designate the homestead of defendant from the remainder of such [tract / tracts], and returned to me such designation in writing as required by law, on [date], as follows: [set out designation and certificate]. I filed the designation by the commissioners on [date of filing designation] with the county clerk of [name of county].*]

Thereafter on, [*date of levy*], I levied the within writ on the following-described land as the property of defendant, which land did not include the designated homestead and is described as follows: [*description of property levied on*].

Afterwards, on [*date of notice*], I gave notice of the sale as prescribed by the law governing execution sales. [*Description of notice given.*]

Attached to this return and made a part is a printed copy of the notice. [*I delivered defendant a written copy of the no-*

*tice on [date]/I mailed a written copy of the notice to defendant in the United States mail, directed to defendant at [his/her] post office address, on [date]], and mailed in the United States mail a written copy of the notice to [name of attorney], defendant's attorney of record, directed to the attorney at [his/her] post office address.*

On [date], in accordance with the notice, between the hours of [time 1] and [time 2], at the courthouse door in that county, I sold the property at public auction to [name of purchaser] for the sum of [dollar amount], which was the highest amount bid. On payment by [name of purchaser] of the sum bid, I executed to [him/her] a deed of all right, title, interest, and claim which defendant in execution had in the property sold, as prescribed by law.

Dated: *[date of return]*.

---

*[Signature]*

*[Sheriff of \_\_\_\_\_ County, Florida / other officer]*

#### § 6:11 Change of designation of rural homestead

I, *[name of undersigned]*, the undersigned, a natural person, of *[name of county]*, Florida, own and am possessed of more land outside a town or city than is by law exempt to a family from forced sale. *[I have/There has been by law]* up to this time designated and set apart the homestead to which I am entitled under the Constitution and laws of this state, which property is described as all that certain tract or parcel of land located in *[name of county]*, Florida, a part of the survey originally granted to *[name of original owner]*, consisting of *[number of acres]* acres of land, and more specifically described as follows: *[legal description]*. I desire to change that designation to a new homestead.

Therefore, I change the designation of my family homestead as follows: all that certain tract or parcel of land located in *[name of county]*, Florida, a part of the survey originally granted to *[name of original owner]*, consisting of *[number of acres]* acres of land, and more specifically described as follows: *[legal description]*.

Dated: *[date of designation]*.

---

*[Signature of claimant]*

*[Acknowledgment]*

**§ 6:12 Disclaimer and designation of urban homestead—To secure loan on disclaimed land owned in fee simple absolute by a tenancy by the entireties**

The State of Florida                                    }  
County of \_\_\_\_\_

We, *[name of husband]* and *[name of wife]*, declare that we are married and that we are residents of *[name of county]*, Florida.

**Disclaimer**

We declare that neither of us resides on, uses, or in any manner claims as a homestead, either business or residence, and we have no present intent to occupy in the future, use or claim in the future, either as a business or a residence homestead, the tract or parcel of land which we are now offering as security for a loan from *[name of lending institution]*, located in *[name of county]*, Florida, and described as follows: *[description of property]*. We renounce and disclaim any homestead right or interest whatsoever in that tract of land.

**Designation**

We, the undersigned, declare that we, *[name of husband]* and *[name of wife]*, as husband and wife, now reside on, use, and claim as our legal homestead, the tract or parcel of land in *[name of county]*, Florida, more particularly described as follows: *[legal description]*. We further declare that this property is improved with a dwelling-house, is sufficient for our purpose as a homestead, and that we own the property in fee simple. We set apart and designate the property described in this designation as the homestead to which we are entitled under the Constitution and laws of the State of Florida, exempt from forced sale.

We further declare that this affidavit, disclaimer, and

designation is made for the benefit of *[name of lending institution]*, which, on the representations contained here has agreed to advance to us a loan secured by a deed of trust or mortgage on the property disclaimed and first described here.

Dated: *[date of disclaimer]*.

---

---

*[Signatures]*

Subscribed and sworn to before me by \_\_\_\_\_ and  
\_\_\_\_\_, on *[date]*.

---

*[Notary Public]*

My commission expires: \_\_\_\_\_

*[Acknowledgment]*

**§ 6:13 Disclaimer and designation of urban homestead—To secure loan on disclaimed land owned fee simple absolute in severalty**

The State of Florida                                    }  
County of \_\_\_\_\_

I, *[name of person]*, declare that I am not married and that I am a resident of *[name of county]*, Florida.

**Disclaimer**

I, *[name of person]*, declare that I do not reside on, or in any manner claim as a homestead, either business or residence homestead, the tract or parcel of land which I am now offering as security for a loan from *[name of lending institution]*, located in *[name of county]*, Florida, and described as follows: *[description of property]*. I renounce and disclaim any homestead right or interest whatsoever in that tract of land.

**Designation**

I, the undersigned, declare that I, *[name of person]*, now

reside on, use, and claim as my legal homestead, the tract or parcel of land in *[name of county]*, Florida, more particularly described as follows: *[description of property]*. I further declare that this property is improved with a dwelling house, is sufficient for my purpose as a homestead, and that I own the house and land in fee simple absolute. I *[name of person]* set apart and designate the property described in this designation as my homestead to which I am entitled under the Constitution and the laws of the State of Florida, exempt from forced sale.

I further declare that this affidavit, disclaimer, and designation is made for the benefit of *[name of lending institution]*, which, on the representations contained here, has agreed to advance to me a loan secured by a deed of trust or mortgage on the property disclaimed and first described here.

Dated *[date of agreement]*.

---

*[Signatures]*

Subscribed and sworn to before me by \_\_\_\_\_ on *[date]*.

---

*[Notary Public]*

My commission expires: \_\_\_\_\_

**§ 6:14 Notice of homestead—To judgment creditor—  
Statutory form [Fla. Stat. Ann. § 222.01]**

NOTICE OF HOMESTEAD

To: \_\_\_\_\_ *[Name and address of judgment creditor as shown on recorded judgment and name and address of any other person shown in the recorded judgment to receive a copy of the Notice of Homestead]*

You are notified that the undersigned claims as homestead exempt from levy and execution under Section 4, Article X of the State Constitution, the following described property: *[legal description]*.

The undersigned certifies, under oath, that he or she has applied for and received the homestead tax exemption as to the above-described property, that *[tax number]* is the tax identification parcel number of this property, and that the undersigned has resided on this property continuously and uninterrupted from *[date]* to the date of this Notice of Homestead. Further, the undersigned will either convey or mortgage the above-described property pursuant to the following:

*[Description of contract of sale or loan commitment.]*

The undersigned also certifies, under oath, that the judgment lien filed by you on *[date]* and recorded in Official Records Book *[book number]*, Page *[page number]*, of the Public Records of *[name of county]*, Florida, does not constitute a valid lien on the described property.

YOU ARE FURTHER NOTIFIED, PURSUANT TO §§ 222.01 ET SEQ., FLORIDA STATUTES, THAT WITHIN 45 DAYS AFTER THE MAILING OF THIS NOTICE YOU MUST FILE AN ACTION IN THE CIRCUIT COURT OF *[name of county]*, FLORIDA, FOR A DECLARATORY JUDGMENT TO DETERMINE THE CONSTITUTIONAL HOMESTEAD STATUS OF THE SUBJECT PROPERTY OR TO FORECLOSE YOUR JUDGMENT LIEN ON THE PROPERTY AND RECORD A LIS PENDENS IN THE PUBLIC RECORDS OF THE COUNTY WHERE THE HOMESTEAD IS LOCATED. YOUR FAILURE TO SO ACT WILL RESULT IN ANY BUYER OR LENDER, OR HIS OR HER SUCCESSORS AND ASSIGNS, UNDER THE ABOVE-DESCRIBED CONTRACT OF SALE OR LOAN COMMITMENT TO TAKE FREE AND CLEAR OF ANY JUDGMENT LIEN YOU MAY HAVE ON THE PROPERTY.

*[date of notice].*

---

*[Signature of owner]*

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*[Printed name of owner]*

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*[Owner's address]*

Sworn to and subscribed before me by \_\_\_\_\_ who is personally known to me or produced \_\_\_\_\_ as identification, on [date].

---

Notary Public

#### NOTES TO FORM

##### Drafter's Notes

In the document above, the description of contract of sale or loan commitment must set forth the date, names of parties, date of anticipated closing, and amount. The name, address, and telephone number of the person conducting the anticipated closing must be set forth.

When a certified copy of a judgment has been filed in the public records of a county pursuant to Ch. 55, Fla. Stat., a person who is entitled to the benefit of the provisions of the State Constitution exempting real property as homestead and who has a contract to sell or a commitment from a lender for a mortgage on the homestead may file a notice of homestead in the public records of the county in which the homestead property is located in substantially this statutory form. Fla. Stat. Ann. § 222.01(2).

The clerk must mail a copy of the notice of homestead to the judgment lienor, by certified mail, return receipt requested, at the address shown in the most recent recorded judgment or accompanying affidavit, and to any other person designated in the most recent recorded judgment or accompanying affidavit to receive the notice of homestead, and must certify to the service on the face of the notice and record the notice. Notwithstanding the use of certified mail, return receipt requested, service shall be deemed complete upon mailing. Fla. Stat. Ann. § 222.01(3).

A lien pursuant to Ch. 55, Fla. Stat. of any lienor on whom the notice of homestead is served, who fails to institute an action for a declaratory judgment to determine the constitutional homestead status of the property described in the notice of homestead or to file an action to foreclose the judgment lien, together with the filing of a lis pendens in the public records of the county in which the homestead is located, within 45 days after service of the notice shall be deemed as not attaching to the property by virtue of its status as homestead property as to the interest of any buyer or lender, or his or her successors or assigns, who takes under the contract of sale or loan commitment described above within 180 days after the filing in the public records of the notice of homestead. Fla. Stat. Ann. § 222.01(4).

# Chapter 7

## Condominiums

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#### CONDOMINIUMS

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### Scope

This chapter contains forms relating to condominiums together with a discussion of legal principles, including tax aspects, that should be considered when drafting such instruments.

### Treated Elsewhere

Chapters that contain related text and form material are Sales (see Ch 1), Exchanges (see Ch 1C), Security Arrangements (see Ch 4), Cooperative Apartments (see Ch 8), and Real Property (see Ch 16A).

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- Zoning or building regulations as applied to condominiums, 71 A.L.R. 3d 866
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- Liability of vendor of condominiums for damages occasioned by defective condition thereof, 50 A.L.R. 3d 1071

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## I. GENERAL CONSIDERATIONS

### A. INTRODUCTION

#### § 7:1 Definitions and distinctions

“Condominium” is defined in the Florida Condominium Act as that form of ownership of real property created pursuant to the provisions of the Florida Condominium Act (Fla. Stat. Ann. §§ 718.101 et seq.), which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements.<sup>1</sup> The Act also sets forth a number of other pertinent definitions.<sup>2</sup>

Condominiums may be distinguished from cooperatives. In a cooperative, the entire property is owned by a single organization. The occupants hold ownership interests in the association and a lease or other evidence of title or possession granted by the association as the owner of all the cooperative property. A person can have no ownership interest in

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#### [Section 7:1]

<sup>1</sup>Fla. Stat. Ann. § 718.103(11).

<sup>2</sup>Fla. Stat. Ann. § 718.103(1) to (30).

a cooperative apartment aside from his or her ownership of stock in the corporation.<sup>3</sup>

### § 7:2 Statutory authorization

The Florida Condominium Act<sup>1</sup> authorizes creation of condominiums. The purpose of the act is to give statutory recognition to the condominium form of ownership of real property and to establish procedures for the creation, sale, and operation of condominiums.<sup>2</sup> Every condominium created and existing in Florida is subject to the provisions of the Condominium Act.<sup>3</sup>

## B. GENERAL BACKGROUND; FORM DRAFTING PRINCIPLES

### 1. Formation, Operation, and Termination

### § 7:3 Creation of condominiums

Condominiums are generally developed either by offering existing rental property for sale to tenants or others, or by developing an improved real estate as a condominium. In either case, the first legal step is to bring the property within the coverage of the Florida Condominium Act,<sup>1</sup> which provides that every condominium created in Florida must be created pursuant to the provisions of the Act.<sup>2</sup>

A condominium is created by recording a declaration in the public records of the county where the land is located, executed and acknowledged with the requirements for a deed. All persons who have record title to the interest in the land being submitted to condominium ownership, or their

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<sup>3</sup>**Legal Encyclopedias:** Fla. Jur. 2d, Condominiums and Cooperative Apartments § 1.

**[Section 7:2]**

<sup>1</sup>Fla. Stat. Ann. §§ 718.101 et seq.

<sup>2</sup>Fla. Stat. Ann. § 718.102.

**Legal Encyclopedias:** Governing Law, Fla. Jur. 2d, Condominiums and Co-operative Apartments § 2.

<sup>3</sup>Fla. Stat. Ann. § 718.102.

**[Section 7:3]**

<sup>1</sup>Fla. Stat. Ann. §§ 718.101 et seq.

<sup>2</sup>Fla. Stat. Ann. § 718.104.

lawfully authorized agents, must join in the execution of the declaration.<sup>3</sup>

All persons who have any record interest in any mortgage encumbering the interest in the land being submitted to condominium ownership must either join in the execution of the declaration or execute, with the requirements for deed, and record, a consent to the declaration or an agreement subordinating their mortgage interest to the declaration.<sup>4</sup>

The declaration must contain or provide for a number of items required by the statute.<sup>5</sup>

The declaration as originally recorded or as amended under the procedures provided therein may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.<sup>6</sup>

A person who joins in, or consents to the execution of, a declaration subjects his or her interest in the condominium property to the provisions of the declaration.<sup>7</sup>

All provisions of the declaration are enforceable equitable servitudes, run with the land, and are effective until the condominium is terminated.<sup>8</sup>

For purposes of the condominium law, the word "declaration" or "declaration of condominium" means the instrument or instruments by which a condominium is created, as they are from time to time amended.<sup>9</sup>

When executed as required by the law, a condominium declaration together with all exhibits and all amendments is entitled to recordation as an agreement relating to the conveyance of land.<sup>10</sup>

If the declaration fails to provide a method for amendment, the declaration may be amended as to all matters

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<sup>3</sup>Fla. Stat. Ann. § 718.104(2).

<sup>4</sup>Fla. Stat. Ann. § 718.104(3).

<sup>5</sup>Fla. Stat. Ann. § 718.104(4).

For a list of matters to be included in the declaration, see § 7:26.

<sup>6</sup>Fla. Stat. Ann. § 718.104(5).

<sup>7</sup>Fla. Stat. Ann. § 718.104(6).

<sup>8</sup>Fla. Stat. Ann. § 718.104(7).

<sup>9</sup>Fla. Stat. Ann. § 718.103(15).

<sup>10</sup>Fla. Stat. Ann. § 718.105(1).

except those described in Fla. Stat. Ann. § 718.110(4) and (8). If the amendment is approved by the owners of not less than two-thirds of the units; the declaration may also be corrected for errors and omissions, and if such error or omission affects the valid existence of the condominium and which may not be corrected by the amendment procedures provided for by the declaration or by law, the circuit court has jurisdiction to entertain a petition to do so.<sup>11</sup>

Unless otherwise provided in the declaration as originally recorded, no amendment to the declaration may change the configuration or size of any unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium unless the record owner of the unit and all record owners of liens on the unit join in the execution of the amendment and unless all the record owners of all other units in the same condominium approve the amendment.<sup>12</sup>

Florida law prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and declaring such leases void for public policy.<sup>13</sup>

#### **§ 7:4 Creation of condominiums—Timesharing**

Timesharing involves the division of ownership of a condominium apartment into a number of fixed time periods, dur-

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<sup>11</sup>Fla. Stat. Ann. § 718.110.

<sup>12</sup>Fla. Stat. Ann. § 718.110(4).

The bare majority of condominium unit owners could not, pursuant to a general amending provision in the Declaration of Condominium, amend the Declaration of Condominium to add a new provision which permitted the common elements to be amended or altered and, by applying the new provision retroactively, defeat vested rights of pre-amendment purchasers; the effect of the amendment, if applied retroactively, was to deprive a purchaser of a condominium unit of his vested interest in or to the common elements, and when the condominium project was placed on market, there was no provision in the Declaration which permitted alterations or additions to common area. *Wellington Property Management v. Parc Corniche Condominium Ass'n.*, 755 So. 2d 824 (Fla. Dist. Ct. App. 5th Dist., 2000).

<sup>13</sup>Fla. Stat. Ann. § 718.4015.

ing which each purchaser has the exclusive right of use and occupation of the specified apartment. By offering for sale apartments for temporal occupancy, a timeshare developer can substantially lower the purchase price of resort housing and at the same time increase overall profit. Conversely, by purchasing only the portion of the condominium property that he or she will actually use, a buyer lowers purchase and maintenance expenses and may not have to rent the apartment to others to help defray ownership expenses. As an additional purchasing incentive, some developers offer the added benefit of an exchange program through which timeshare owners can trade occupancy periods with owners in other states or countries, creating varying vacation sites for those in the program.

The Florida Condominium Act provides that no timeshare estates<sup>1</sup> are to be created with respect to any condominium unit except pursuant to provisions in the declaration expressly permitting the creation of such estates.<sup>2</sup>

If timeshare estates will or may be created with respect to any unit in the condominium, a statement in conspicuous type declaring that timeshare estates will or may be created with respect to units in the condominium must be contained or provided for in the declaration. In addition, the degree, quantity, nature, and extent of the timeshare estates that will or may be created must be defined and described in detail in the declaration, with a specific statement as to the minimum duration of the recurring periods of rights of use, possession, or occupancy that may be created with respect to any unit.<sup>3</sup>

The Florida Vacation Plan and Time Sharing Act<sup>4</sup> applies to all timeshare plans consisting of more than seven

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**[Section 7:4]**

<sup>1</sup>“Timeshare estate” means any interest in a unit under which the exclusive right of use, possession, or occupancy of the unit circulates among the various purchasers of a timeshare plan pursuant to Florida Statutes, Chapter 721 on a recurring basis for a period of time. Fla. Stat. Ann. § 718.103(25).

A “timeshare unit” means a unit in which timeshare estates have been created. Fla. Stat. Ann. § 718.103(26).

<sup>2</sup>Fla. Stat. Ann. § 718.1045.

<sup>3</sup>Fla. Stat. Ann. § 718.104(4)(o).

<sup>4</sup>Fla. Stat. Ann. §§ 721.01 et seq.

timeshare periods over a period of at least three years in which the facilities and accommodations are located within Florida.<sup>5</sup> The Act contains specific requirements for contracts for the purchase of timeshare periods.<sup>6</sup>

Notice to the managing entity of a timeshare plan of a transfer of an interest in a timeshare estate or timeshare license is required.<sup>7</sup>

### § 7:5 Condominium parcels and units

A “condominium parcel” means a unit, together with the undivided share in the common areas that are appurtenant to the unit.<sup>1</sup>

A “unit” means a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration.<sup>2</sup>

A “unit owner” or “owner of a unit” means a record owner of legal title to a condominium parcel.<sup>3</sup>

The term “condominium property” means the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.<sup>4</sup>

A “condominium parcel” created by the declaration is a separate parcel of real property, even though the condominium is created on a leasehold.<sup>5</sup>

Following the recording of the declaration, a description of a condominium parcel by the number or other designation by which the unit is identified in the declaration, together

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<sup>5</sup>Fla. Stat. Ann. § 721.03(1).

<sup>6</sup>Fla. Stat. Ann. § 721.06.

<sup>7</sup>Fla. Stat. Ann. § 721.15(7).

#### [Section 7:5]

<sup>1</sup>Fla. Stat. Ann. § 718.103(12).

<sup>2</sup>Fla. Stat. Ann. § 718.103(27).

<sup>3</sup>Fla. Stat. Ann. § 718.103(28).

<sup>4</sup>Fla. Stat. Ann. § 718.103(13).

<sup>5</sup>Fla. Stat. Ann. § 718.106(1).

with the recording data identifying the declaration, constitutes a sufficient legal description for all purposes. The description includes all appurtenances to the unit concerned, whether or not separately described, including, but not limited to, the undivided share in the common elements appurtenant thereto.<sup>6</sup>

### § 7:6 Rights and duties of unit owners

A unit owner is entitled to the exclusive possession of his or her unit, subject to the provisions of Fla. Stat. Ann. § 718.111(5), which declares that the association has the irrevocable right to access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit or units.<sup>1</sup>

A unit owner is entitled to use the common elements in accordance with the purposes for which they are intended, but no use may hinder or encroach upon the lawful rights of other unit owners.<sup>2</sup>

Funds for the payment of common expenses must be collected by assessments against unit owners in the proportions or percentages provided in the declaration. In a residential condominium or mixed use condominium created after January 1, 1996, each unit's share of the common expenses of the condominium and common surplus of the condominium shall be the same as the unit's appurtenant ownership interest in the common elements.<sup>3</sup>

Common surplus is owned by unit owners in the same share as the ownership interest in the common elements.<sup>4</sup>

The liability of the owner of the unit for common expenses is limited to the amounts for which the unit owner is assessed for common expenses from time to time in accordance

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<sup>6</sup>Fla. Stat. Ann. § 718.109.

**[Section 7:6]**

<sup>1</sup>Fla. Stat. Ann. § 718.106(3).

<sup>2</sup>Fla. Stat. Ann. § 718.106(3).

<sup>3</sup>Fla. Stat. Ann. § 718.115(2).

<sup>4</sup>Fla. Stat. Ann. § 718.115(3).

with the provisions of the Condominium Act, the declaration, and bylaws.<sup>5</sup> The owner of a unit may be personally liable for the acts or omissions of the association in relation to the use of the common elements, but only to the extent of the owner's pro rata share of that liability in the same percentage as his or her interest in the common elements, and then in no case shall that liability exceed the value of his or her unit.<sup>6</sup> In any legal action in which the association may be exposed to liability in excess of insurance coverage protecting it and the unit owners, the association must give notice of the exposure within a reasonable time to all unit owners, and they shall have the right to intervene and defend.<sup>7</sup> Ad valorem taxes, benefit taxes, and special assessment by taxing authorities is to be assessed against the condominium parcels and not upon the condominium property as a whole.<sup>8</sup> All common elements, common areas, and recreational facilities serving any condominium must be available to unit owners in the condominium or condominiums served thereby and their invited guests for the use intended for such common elements, common areas, and recreational facilities. The entity or entities responsible for the operation of the common elements, common areas, and recreational facilities may adopt reasonable rules and regulations pertaining to the use of such common areas, and recreational facilities. No entity or entities shall unreasonably restrict any unit owner's right to peaceably assemble or right to invite public officers or candidates for public office to appear and speak in common elements, common areas, and recreational facilities.<sup>9</sup> Any owner prevented from exercising rights guaranteed by the above-mentioned provision may bring an action in the appropriate court of the county in which the alleged infringement occurred, and, upon favorable adjudication the court shall enjoin the enforcement of any provision contained in any condominium document or rule which operates to deprive the owner of such rights.<sup>10</sup>

No resident of any condominium dwelling unit, whether

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<sup>5</sup>Fla. Stat. Ann. § 718.119(1).

<sup>6</sup>Fla. Stat. Ann. § 718.119(2).

<sup>7</sup>Fla. Stat. Ann. § 718.119(3).

<sup>8</sup>Fla. Stat. Ann. § 718.120.

<sup>9</sup>Fla. Stat. Ann. § 718.123(1).

<sup>10</sup>Fla. Stat. Ann. § 718.123(2).

tenant or owner, is to be denied access to any available franchised or licensed cable television service, and the resident or cable television service shall not be required to pay anything of value in order to obtain or provide the service except those charges normally paid for like services by residents of, or providers of the services to, single-family homes within the same franchised or licensed area and except for installation charges as the charges may be agreed to between the resident and the provider of the services.<sup>11</sup>

Each unit owner, each tenant, and other invitees, are to be governed by, and must comply with, the provisions of the Condominium Act, the declaration, the documents creating the association, and the association bylaws, and the provisions thereof shall be deemed expressly incorporated into any lease of a unit, and actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner. No such actions may seek specific performance.<sup>12</sup>

### § 7:7 Condominiums as residential property

For the purpose of property and casualty insurance risk classification, condominiums are classified as residential property.<sup>1</sup>

### § 7:8 Condominium administration

The operation of the condominium shall be by the association, which must be a Florida corporation for profit or a Florida corporation not for profit, with the owners of units as shareholders or members of the association.<sup>1</sup> The powers and duties of the association include those set forth in Fla. Stat. Ann. § 718.111, in the declaration and bylaws, and in Chapters 607 and 617 of the Florida Statutes.<sup>2</sup>

Among the powers conferred upon the association are to

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<sup>11</sup>Fla. Stat. Ann. § 718.1232.

<sup>12</sup>Fla. Stat. Ann. § 718.303(1).

#### [Section 7:7]

<sup>1</sup>Fla. Stat. Ann. § 718.1256.

#### [Section 7:8]

<sup>1</sup>Fla. Stat. Ann. § 718.111(1)(a).

<sup>2</sup>Fla. Stat. Ann. § 718.111(2).

manage the condominium property and to contract, sue, and be sued; to make and collect assessments; to manage common elements; to have access to units; to operate phase condominiums; to acquire title to property; to purchase leases or units; to grant and deal with easements; to obtain insurance; to maintain official records; and to furnish financial reports.<sup>3</sup>

In addition, the association has the power to enter into agreements, to acquire leaseholds, memberships, and other processory or use interests in lands or facilities.<sup>4</sup>

The Florida Statutes relating to condominiums also provide for the specific rights and obligations of the association relating to transfer of association control,<sup>5</sup> agreements entered into by the association,<sup>6</sup> agreements for operation, maintenance, or management of condominiums,<sup>7</sup> obligations of owners, waiver of a provision of the Condominium Act,<sup>8</sup> and levy of fine against unit by association.<sup>9</sup>

The condominium association, cooperative association, or homeowner's association may, with the approval of its board of administrators, file with the value adjustment board a single joint petition on behalf of any association members who own parcels of property which the property appraiser determines are substantially similar with respect to location, proximity to amenities, number of rooms, living area, and condition, but must provide unit owners with notice of its intent to make such petition and must also provide at least 20 days' notice for a unit owner to elect, in writing, that his or her unit not be included in the petition.<sup>9</sup>

The Condominium Act specifically requires the developer to pay into an escrow account sales or reservation deposits made prior to closing, and provides for the manner of handling of such funds by the escrow agent.<sup>10</sup> The Act also

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<sup>3</sup>Fla. Stat. Ann. § 718.111.

<sup>4</sup>Fla. Stat. Ann. § 718.114.

<sup>5</sup>Fla. Stat. Ann. § 718.301.

<sup>6</sup>Fla. Stat. Ann. § 718.302.

<sup>7</sup>Fla. Stat. Ann. § 718.3025.

<sup>8</sup>Fla. Stat. Ann. § 718.303.

<sup>9</sup>Fla. Stat. Ann. § 194.011(3)(e).

<sup>10</sup>Fla. Stat. Ann. § 718.202.

provides for certain warranties that are deemed to have been granted by the developer to the purchaser of each unit.<sup>11</sup>

### § 7:9 Termination of condominium

Unless otherwise provided in the declaration, the condominium property may be removed from the provisions of Chapter 718 of the Florida Statutes only by consent of all the unit owners, evidenced by a recorded instrument to that effect, and upon the written consent by all of the holders of recorded liens affecting any of the condominium parcels.<sup>1</sup>

Upon recordation of the instrument evidencing consent of all of the unit owners to terminate the condominium, the association must notify the division within 30 business days of the termination and the date the document was recorded, the county where the document was recorded, and the book and page number of the public records where the document was recorded, and must provide the division a copy of the recorded termination notice certified by the clerk.<sup>2</sup>

After commencement of a termination proceeding, the directors or other appropriate persons hold specific powers and duties to act for the association.<sup>3</sup> Where an association is winding up, assets are distributed after providing for liabilities.<sup>4</sup>

Also, unless otherwise provided in the declaration as originally recorded or as amended, upon removal of the condominium property from the provisions of Florida Statutes Chapter 718, the condominium property is owned in common by the unit owners in the same undivided shares as each owner previously owned in the common elements, and all liens shall be transferred to the undivided share in the condominium property attributable to the unit originally encumbered by the lien in its same priority.<sup>5</sup>

An association that has been terminated continues to exist

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<sup>11</sup>Fla. Stat. Ann. § 718.203.

#### [Section 7:9]

<sup>1</sup>Fla. Stat. Ann. § 718.117(1).

<sup>2</sup>Fla. Stat. Ann. § 718.117(1).

<sup>3</sup>Fla. Stat. Ann. § 718.117(2).

<sup>4</sup>Fla. Stat. Ann. § 718.117(5), (6), and (8).

<sup>5</sup>Fla. Stat. Ann. § 718.117(7).

for the purposes of winding up its affairs, prosecuting and defending actions, collecting and discharging obligations, disposing of and conveying property, and collecting and dividing its assets; however, the association may only conduct these certain activities as they relate to and as are necessary to wind up its affairs.<sup>6</sup>

The termination of a condominium does not bar the creation of another condominium affecting all or any portion of the same property.<sup>7</sup>

If substantial damage to or destruction of all or a substantial part of the condominium property occurs, and if the property is not repaired, reconstructed, or rebuilt within a reasonable period of time, any unit owner may petition a court for equitable relief, which may include a termination of the condominium and a partition.<sup>8</sup>

The shares in the common elements appurtenant to units are undivided, and no action for partition of the common elements shall lie.<sup>9</sup>

#### § 7:10 Bylaws

The operation of the association is to be governed by the articles of incorporation if the association is incorporated, and the bylaws of the association, which shall be included as exhibits to the recorded declaration.<sup>1</sup>

An amendment to the bylaws is not valid unless recorded, with identification on the first page thereof of the book and page of the public records where the declaration of each condominium operated by the association is recorded.<sup>2</sup>

The method to amend bylaws must be consistent with Chapter 718, and if the bylaws fail to state the method, the

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<sup>6</sup>Fla. Stat. Ann. § 718.117(9).

<sup>7</sup>Fla. Stat. Ann. § 718.117(10).

<sup>8</sup>Fla. Stat. Ann. § 718.118.

<sup>9</sup>Fla. Stat. Ann. § 718.107(3).

As to what constitutes “common elements,” see Fla. Stat. Ann. § 718.108.

#### [Section 7:10]

<sup>1</sup>Fla. Stat. Ann. § 718.112(1)(a).

<sup>2</sup>Fla. Stat. Ann. § 718.112(1)(b).

bylaws may be amended by approval of the owners of not less than two-thirds of the voting interests.<sup>3</sup>

The statute requires that the bylaws must provide for specified provisions, and if they do not do so, are deemed to include those required by the statute. The required provisions relate to administration, quorum, voting requirements, proxies, board of administration meetings, unit owner meetings, budget meeting, annual budget, assessments, amendment of bylaws, transfer fees, recall of board members, arbitration, certificate of compliance and the limited power to convey common elements.<sup>4</sup> The bylaws may also provide for optional provisions provided they are not inconsistent with the provisions of Chapter 718 of the Florida Statutes or the declaration.<sup>5</sup>

### **§ 7:11 Contracts for sale of units; leases**

The contract for the sale of a condominium unit is much the same as a standard real property sale contract.<sup>1</sup> However, the Condominium Act adds several requirements, specifically applicable to such contracts. For example, provision is made for certain filings prior to sale or lease by a developer of a residential or mixed-use condominium with the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business Regulation.<sup>2</sup>

In addition, there are express requirements concerning the prospectus or offering circular that must be filed with the Division of Florida Land Sales, Condominiums, and Mobile Homes and the furnishing of a copy to each buyer.<sup>3</sup> In addition to the prospectus or offering circular, each buyer shall be furnished a separate page entitled "Frequently Asked Questions and Answers".<sup>4</sup>

A lease of a condominium unit for more than five years is

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<sup>3</sup>Fla. Stat. Ann. § 718.112(2)(h).

<sup>4</sup>Fla. Stat. Ann. § 718.112(2).

<sup>5</sup>Fla. Stat. Ann. § 718.112(3)(d).

#### **[Section 7:11]**

<sup>1</sup>See Sales (Ch 1).

<sup>2</sup>Fla. Stat. Ann. § 718.502.

<sup>3</sup>Fla. Stat. Ann. § 718.504.

<sup>4</sup>Fla. Stat. Ann. § 718.504.

subject to the same requirements as a sale with respect to such matters as filing of copies of documents and items required to be furnished the buyer or lessee, disclosures prior to sale, and filing of prospectus or offering circular and furnishing a copy thereof to the buyer or lessee.<sup>5</sup> If the condominium is created on land held under lease, or includes recreational facilities or other common elements or commonly used facilities on a leasehold, and if the rent under the lease is payable by the association or by the unit owners, the lease must include specified statutory requirements.<sup>6</sup>

**§ 7:12 Unit deeds**

The Condominium Act does not include specific requirements concerning unit deeds. It does, however provide that following recordation of the declaration, a condominium parcel may, for all purposes, be described by the number or other designation by which the unit is identified in the declaration, together with the recording data identifying the declaration.<sup>1</sup>

**§ 7:13 Conversion of existing improvements to ownership as residential condominium**

By the provisions of Fla. Stat. Ann. § 718.606, when existing improvements are converted to ownership as a residential condominium, certain requirements described by law must be followed.

Each residential tenant who has resided in the existing improvements for at least 180 days preceding the date of the written notice of the intended conversion has the right to extend an expiring rental agreement on the same terms for a period that will expire no later than 270 days after the date of the notice. If the rental agreement expires more than 270 days after the date of the notice, the tenant may not unilaterally extend the rental agreement. Each other residential tenant has the right to extend an expiring rental

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<sup>5</sup>Fla. Stat. Ann. §§ 718.502, 718.503, 718.504.

For forms and materials as to leases, generally, see Real Property Leases (Ch 16A).

<sup>6</sup>Fla. Stat. Ann. § 718.401.

**[Section 7:12]**

<sup>1</sup>Fla. Stat. Ann. § 718.109.

agreement on the same terms for a period that will expire no later than 180 days after the date of the written notice of intended conversion. If the rental agreement expires more than 180 days after the date of the notice, the tenant may not unilaterally extend the rental agreement.<sup>1</sup>

Prior to or simultaneous with the first offering of individual units to any persons, each developer must deliver a notice of intended conversion to all tenants of the existing improvements being converted to a residential condominium. All such notices must be given within a 72 hour period, and must be dated and in writing, and contain the statements required by law.<sup>2</sup>

Prior to delivering any notice of intended conversion to the tenants, each developer must file a copy with the Division of Florida Land Sales, Condominiums, and Mobile Homes and pay a filing fee of \$100.<sup>3</sup>

A developer may elect to provide tenants who have been continuous residents of the existing improvements for at least 180 days preceding the date of the written notice of intended conversion and whose rental agreements expired within 180 days of the date of the written notice of intended conversion, the option of receiving in cash a tenant relocation payment at least equal to one month rent in consideration for extending the rental agreement for not more than 180 days, other than extending rental agreement for up to 270 days.<sup>4</sup>

Any provision of law or of the rental agreement of other contract or agreement to the contrary notwithstanding, whenever a county, including a charter county, determines that there exists within the county a vacancy rate in rental housing of three percent or less, the county may adopt an ordinance or other measure extending the 270-day extension period described in Fla. Stat. Ann. § 718.606(1)(a) and the 180-day extension described in Fla. Stat. Ann. § 718.606(b)

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**[Section 7:13]**

<sup>1</sup>Fla. Stat. Ann. § 718.606(1)(a) and (b).

<sup>2</sup>Fla. Stat. Ann. § 718.608.

<sup>3</sup>Fla. Stat. Ann. § 718.608(5).

<sup>4</sup>Fla. Stat. Ann. § 718.606(4).

for an additional 90 days under certain circumstances prescribed by law.<sup>5</sup>

Each tenant, who for the 180 days preceding a notice of intended conversion has been a residential tenant of the existing improvements, has the right of first refusal to purchase the unit in which he or she resides on the date of the notice under the terms and conditions prescribed by law.<sup>6</sup>

## 2. Regulation of Offerings and Advertising

### a. Florida Regulations

#### **§ 7:14 Condominium Act requirements**

Before offering units for sale, the developer will in most cases have to prepare a detailed prospectus or offering circular describing the project and must file it with the Division of Florida Land Sales, Condominiums, and Mobile Homes, and must furnish a copy of the prospectus or offering circular to each buyer.<sup>1</sup> In addition, each buyer shall be furnished a separate page entitled “Frequently Asked Questions and Answers.”<sup>2</sup> The Condominium Act also requires certain disclosures in the contract for the sale or lease for an unexpired term of more than five years of a condominium unit.<sup>3</sup>

In addition, the act prescribes certain contents for sale brochures and advertising.<sup>4</sup>

#### **§ 7:15 Securities aspects**

Condominium transactions which resemble investment contacts must be registered with the state under the Florida

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<sup>5</sup>Fla. Stat. Ann. § 718.606(6).

<sup>6</sup>Fla. Stat. Ann. § 718.612(1).

#### [Section 7:14]

<sup>1</sup>Fla. Stat. Ann. § 718.504.

<sup>2</sup>Fla. Stat. Ann. § 718.504. The Frequently Asked Questions and Answers sheet is available on the web site of the Division of Florida Land Sales, Condominiums, and Mobile Homes at <http://www.myflorida.com/db/pr/lsc/index.shtml>.

<sup>3</sup>Fla. Stat. Ann. § 718.503.

<sup>4</sup>Fla. Stat. Ann. § 718.503.

Securities and Investor Protection Act, administered by the Department of Banking and Finance.<sup>1</sup>

b. Federal Regulations

**§ 7:16 SEC regulation—Condominium offerings**

The offer of real estate as such, including the offer of condominium apartments for sale, does not by itself involve the sale of a security and therefore does not require registration under the Federal Securities Act. However, when a condominium unit is offered in connection with certain services, or if it is sold with emphasis on certain economic benefits to the purchaser to be derived from the managerial efforts of others, then the transaction may come within the Securities and Exchange Commission definition of the sale of a security, and registration may be required.

The term “security” means a certificate of interest or participation in a profit-sharing agreement or investment contract.<sup>1</sup> A profit-sharing agreement or investment contract includes a situation where real property is sold together with a contract for managing the property, with the expectation of a profit to be derived from the ownership of the property through the assistance of the manager, or the promoter, or a third party in the operation of the project. It is the presence of such a management or financial arrangement, in what would otherwise be a simple real property sales transaction, that can convert the matter into the sale of a security and require compliance with state and federal corporate securities laws and regulations.<sup>2</sup>

Condominiums offered with items such as rental pool arrangements or with limitations on the period of time that an owner may occupy or rent the apartment, or which require the use of an exclusive rental agent, suggest that the purchaser is investing in a business enterprise and registration may be required. The type of sales “pitch” used can be

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**[Section 7:15]**

<sup>1</sup>Le Chateau Royal Corp. v. Pantaleo, 370 So. 2d 1155 (Fla. Dist. Ct. App. 4th Dist. 1978); Fla. Stat. Ann. §§ 517.011 et seq.

**[Section 7:16]**

<sup>1</sup>15 U.S.C.A. § 77b(a)(1).

<sup>2</sup>See SEC Rel. No. 33-5347 for guidelines as to the applicability of federal securities laws to condominiums.

determinative. If units are sold with emphasis on economic benefit to the buyer from rental or other services to be performed by the developer or some third party, or if a “rate of return” is guaranteed, then the sale of condominium units where the condominium project includes commercial space in a common area (which fact is mentioned as an inducement to the buyer) probably means that registration will be required.

There are a number of exemptions to the registration requirements under the Federal Securities Act of 1933. For example, transactions which do not involve any public offering are exempted from registration procedures.<sup>3</sup>

#### § 7:17 SEC regulation—Condominium advertising

Whenever a condominium apartment is treated as a “security” requiring registration under the Securities Act of 1933, as amended,<sup>1</sup> advertising of such apartments is also subject to regulation. Specifically, dispersing sales literature, brochures, or publicity concerning the condominium apartments or the proposed offering prior to the filing of registration statement constitutes an illegal offer. No purchase price payments, deposits, or purchase commitments may be accepted, nor may indications of interest be solicited, prior to the filing of a registration statement.<sup>2</sup> However, prior to filing a registration statement, an issuer may give notice that it proposes to make a public offering of securities to be registered so long as the notice contains only certain prescribed information.<sup>3</sup>

After a registration statement has been filed, and before its effective date, offers to sell condominium interests required to be registered are permitted, but only by prelimi-

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<sup>1</sup>15 U.S.C.A. § 77d(2).

For a more detailed analysis concerning whether the requirements of a private offering have been met, see SEC Rule 146. Also see SEC Release No. 33-5487 (Apr 23, 1974).

[Section 7:17]

<sup>2</sup>See § 7:16.

<sup>2</sup>15 U.S.C.A. § 77e(c).

<sup>3</sup>See 17 C.F.R. § 230.135(a); SEC Rel. No. 33-5382 (April 9, 1973), p 1.

nary prospectus<sup>4</sup> or by a notice, circular, advertisement or the like which conforms to SEC guidelines.<sup>5</sup> Indications of interest in the purchase of condominium units may be taken, but the issuer may not accept deposits,<sup>6</sup> and such solicitations of interest must conform to SEC guidelines.<sup>7</sup>

### **§ 7:18 Applicability of truth in lending and interstate land sales requirements**

Regulation Z<sup>1</sup> of the Federal Truth in Lending Act requires that certain disclosures be made in connection with the extension of consumer credit.<sup>2</sup> Truth in lending requirements apply to condominium developers who have obtained a commitment from one or more mortgage lenders to provide financing to purchasers at fixed interest rates where the developer either: (1) receives a fee, compensation, or other consideration for such services; or (2) has knowledge of the credit terms and helps prepare the necessary credit documents. The disclosure requirements also apply when the developer offers to take back a purchase money mortgage or sells condominium units under installment contracts providing for passage of title only after specified payments have been made and imposing a finance charge or providing for more than four installments.<sup>3</sup> It is not clear, however, whether these disclosure requirements apply to purchases of condominium units by investors for rental.<sup>4</sup>

The Interstate Land Sales Full Disclosure Act and regula-

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<sup>4</sup>17 C.F.R. § 230.430(a).

<sup>5</sup>See 17 C.F.R. § 230.134.

<sup>6</sup>SEC Rel. No. 33-5382 (April 9, 1973), pp 1, 2.

<sup>7</sup>See 17 C.F.R. § 230.134(d).

#### **[Section 7:18]**

<sup>1</sup>15 U.S.C.A. §§ 1601 et seq.; 12 C.F.R. §§ 226.1 et seq.

For disclosure statement promulgated under Regulation Z of the Federal Truth in Lending Act, see § 4:98.

<sup>2</sup>For forms and materials related to truth in lending requirements generally, see Security Arrangements (Ch 4).

<sup>3</sup>FRB Rel. No. 676, March 8, 1973.

<sup>4</sup>FRB Rel. No. 675, March 1, 1973, provides that "the Board is not in a position to make a judgment as to whether individual credit transactions [for the purchase on credit of a single family house for rental] are primarily for personal, family, or household purposes," or for business purposes, which are exempted from coverage of Regulation Z. See 12

tions thereunder<sup>5</sup> impose certain registration, reporting, and disclosure requirements with respect to nonexempt interstate sales of real estate “lots.”<sup>6</sup> However, numerous exemptions exist with respect to these requirements, minimizing their impact on interstate sales of condominiums.<sup>7</sup>

### 3. FHA Insurance of Condominium Mortgages

#### § 7:19 Availability; procedure

FHA insurance of a blanket mortgage covering an entire condominium project, as well as insurance of apartment mortgages, may be available depending on the circumstances and on whether certain requirements are met.<sup>1</sup> The FHA divides the process of filing an application for project insurance on new construction into a maximum of three stages: Request for a feasibility analysis, request for a conditional commitment, and request for a firm commitment. The stages may be combined, and each request is made by filing the same form, HUD Form 93201.<sup>2</sup>

With respect to conversion projects, since there is no construction mortgage required, there are only two processing stages, feasibility and commitment, leading to a blanket

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C.F.R. § 226.3(a).

<sup>5</sup>15 U.S.C.A. §§ 1701 et seq.; 24 C.F.R. §§ 1710.1 et seq.

<sup>6</sup>“Lot” is defined as “any portion, piece, division, unit, or undivided interest in land located in any state or foreign country if the interest includes the right to the exclusive use of a specific portion of the land.” 24 C.F.R. § 1710.1.

<sup>7</sup>See 24 C.F.R. §§ 1710.5 et seq. for exemptions related to the size of the project and the intrastate character of the offering.

**A.L.R. Library:** Propriety, under Rule 23 of the Federal Rules of Civil Procedure, of class action for violation of Truth in Lending Act (15 U.S.C.A. §§ 1601 et seq.), 61 A.L.R. Fed. 603.

#### [Section 7:19]

<sup>1</sup>See 12 U.S.C.A. § 1715y; 24 C.F.R. §§ 234.1 et seq.; HUD Pub No. 4580.1 (Mortgage Insurance for Condominium Housing Insured Under § 234(d) of the National Housing Act).

<sup>2</sup>HUD Pub No. 4580.1 8-2a, b; HUD Form 93201 (formerly FHA Form 3201).

Forms included in this chapter are not drafted to meet FHA requirements. FHA model forms are frequently revised, and those seeking to comply with FHA requirements should always consult current HUD publications. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

commitment for individual mortgages. Application for feasibility analysis, or for commitment to issue a blanket mortgage is filed on FHA Form 3275-A.<sup>3</sup>

### § 7:20 Use of FHA model organizational documents

Before a developer may solicit offers to purchase condominium apartments, all organizational documents, including the declaration, bylaws, FHA regulatory agreement, and subscription and purchase agreements, must be approved by an FHA field office director.<sup>1</sup> In general, FHA model forms must be followed by the developer with only such changes as may be required to conform such documents to facts pertaining to individual projects, or to requirements of local law.<sup>2</sup> To expedite examination of organizational documents, the developer will often be required to submit not only typed copies thereof, but also marked-up drafts on FHA model forms, with changes shown by deletions or interlineations. In such case, a brief statement of the reason for any change, and citation of state law, if relevant, should accompany the drafts.<sup>3</sup>

The FHA also prescribes a model form of management agreement<sup>4</sup> which is to be used in all cases in which management functions are delegated to a professional management organization.<sup>5</sup>

## C. TAX ASPECTS

### § 7:21 Condominium—In general

A condominium is not a special kind of tax entity, only a

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<sup>3</sup>For listing of documents to be attached to FHA Form 3275-A, see HUD Pub No. 4580.1 8-11.

[Section 7:20]

<sup>1</sup>HUD Pub No. 4580.1 5-2a.

<sup>2</sup>HUD Pub No. 4580.1 5-2d.

<sup>3</sup>HUD Pub No. 4580.1 5-2f.

<sup>4</sup>FHA Form 3281.

<sup>5</sup>HUD Pub No. 4580.1 5-4c.

Forms included in this chapter are not drafted to meet FHA requirements. FHA model forms are frequently revised, and those seeking to comply with FHA requirements should always consult current HUD publications. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

form of real property ownership. It is treated for tax purposes like any other type of real estate holding.

Owning a condominium means having two things: (1) fee ownership in air space in a multi-unit structure; and (2) joint interest in the areas used in common by all the condominium units. These areas include sidewalks, yards, parking, swimming pools, hallways, elevators, and similar facilities. Each individual unit is owned separately by its owner, who is solely responsible for the mortgage payments, utility bills, taxes and similar expenses of the unit. All condominium owners are responsible for the expenses of the common areas, but that obligation does not extend to the individual units.

Each condominium unit is therefore treated, for tax purposes, the same as a similar unit that is not part of a condominium. If the unit is held for residential purposes, the same tax rules apply as to other residences. If held for business or investment purposes, the same rules apply as to other business and investment property.

The only unique aspect of condominiums is the homeowners association that operates the structure. Special Code provisions apply to these organizations, which are basically treated as conduits for the individual owners.

## § 7:22 Residential condominiums

In almost all respects, the same tax law applies to the ownership of a condominium unit used as a residence as applies to any other type of residential ownership. Not being a business or investment undertaking, ownership of a residential condominium prevents the owner from recovering the purchase price of the unit through amortization or depreciation.<sup>1</sup> Nor may a deduction be taken for repairs, replacements, maintenance, or any other expense of the unit.<sup>2</sup>

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### [Section 7:22]

<sup>1</sup>I.R.C. § 262.

<sup>2</sup>Capital assessments made against the owners of units in a condominium for repairs or replacements of the common elements of the development increase the unit owners' basis in their condominiums.

*Legal Encyclopedias:* Am. Jur. 2d, Federal Taxation ¶ 11522.

Two exceptions exist to those rules. The first is for real estate taxes. If a condominium owner itemizes deductions, he or she may deduct the interest and taxes paid.<sup>3</sup>

The second exception is for qualified residence interest, interest on indebtedness secured by the taxpayer's principal residence or by a qualifying vacation residence.<sup>4</sup> It is limited to the extent of \$1 million of debt incurred to purchase or improve the residence and \$100,000 of debt incurred for other purposes.<sup>5</sup> Nor can the debt exceed the taxpayer's net equity in the residence.

A residential condominium is subject to the special Code provision excluding gain on the sale of a principal residence. Gain of up to \$250,000 (\$500,000 in the case of a married couple filing jointly) is excluded from the sale or exchange of property if, during the five-year period ending on the date of the sale or exchange, the property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating two years or more.<sup>6</sup> This exclusion may be used only once in any two-year period.<sup>7</sup>

Casualty losses on a residential condominium—fire, flood, storm, etc.—are deductible to the extent they exceed \$100 and 10 percent of the owner's adjusted gross income.<sup>8</sup>

While a residential condominium is a capital asset,<sup>9</sup> a loss on its disposition is not deductible. Gain, however, must be reported as either long-term or short-term, depending on the period it was held.<sup>10</sup> Profit and loss is figured by deducting

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<sup>3</sup>I.R.C. § 164(a). If not itemized, the deduction will be part of the standard deduction permitted the taxpayer.

<sup>4</sup>The vacation residence must be used as a vacation home for the greater of 14 days a year or 10 percent of the days it is rented. I.R.C. § 163(h)(4)(A). If not rented, the 14 days and 10 percent rule does not apply.

**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 18355.

<sup>5</sup>I.R.C. § 163(h)(3).

<sup>6</sup>I.R.C. § 121(a).

<sup>7</sup>I.R.C. § 121(b).

<sup>8</sup>I.R.C. § 165(c)(3). If the condominium is used for business or investment, these limitations do not apply; the full amount of the loss is deductible.

<sup>9</sup>I.R.C. § 1221(a).

<sup>10</sup>If held for one year or more, it is long-term; otherwise, short-term.

the owner's tax basis in the condominium from the selling price after subtracting the expenses of the sale.

Mention must be made of various Code provisions that may indirectly affect the tax position of condominiums. The first relates to condominiums that are partially used to generate income. The condominium form is used for many vacation homes in resort areas and many of these are leased while not occupied by the owner. The condominium form does not affect the tax law governing this situation. The tax position of an owner is dependent on his or her position under I.R.C. § 280A and I.R.C. § 183. The first of these permits the owner to disregard income on property leased for fewer than 15 days a year if the owner uses it at least one day. Expenses (other than real estate taxes and, perhaps, interest) may not be deducted, however. If the owner uses the property as a home for the greater of 14 days or 10 percent of the number of days rented, the condominium is not considered held for business or investment purposes.

The second of these provisions, I.R.C. § 183, is called the "hobby loss" section. Certain presumptions are provided to determine if the taxpayer is actively engaged in a profit-seeking enterprise. If not, losses and expenses are deductible only to the extent of the rental income.

### § 7:23 Nonresidential condominiums

Though most condominiums are used for residential purposes, many do not fall under that classification. A condominium can be stock in trade for a dealer in that kind of property, a business asset under I.R.C. § 1231, or a capital asset held for investment or profit-seeking purposes.

These are treated the same as any other property that comes under these classifications. Expenses of maintaining these units, including depreciation, are deductible.<sup>1</sup>

Upon the sale of a condominium, excess depreciation may have to be reported as ordinary income instead of capital gain.<sup>2</sup> Gain or loss on property used in a business is subject to the special provisions of Section 1231. A loss on I.R.C.

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#### [Section 7:23]

<sup>1</sup>I.R.C. §§ 162, 167, 212.

<sup>2</sup>I.R.C. §§ 1245, 1250.

§ 1231 property is ordinary while a profit is capital, subject to the requirement that net losses during the previous five years be recaptured.<sup>3</sup>

When the tax status of a condominium changes from residential to rental, the business expenses of the property thereby become tax deductible. Those expenses include depreciation, which may be taken on a straight-line basis. A loss on a sale of the property will become deductible and the owner may also exchange the property tax-free for like-kind investment property.<sup>4</sup> If the value of the property at the time of conversion is less than the taxpayer's basis, the value is used instead of the basis for depreciation purposes and for determining gain or loss on a later sale.<sup>5</sup> Otherwise, the basis in the property is used to determine depreciation and gain or loss.<sup>6</sup>

A deduction for home office expenses of a condominium follows the same rules that apply to these expenses in other kinds of residences. The allocation of expenses and depreciation is based on the ratio of space used for business purposes to space used for all purposes.<sup>7</sup>

The use of the space must be for the convenience of the employer and the deduction is allowed only if the space is used under one or more of the five sets of conditions set forth in the Code.<sup>8</sup>

1. The space is used exclusively and on a regular basis as the taxpayer's principal place of business.
2. The space is used exclusively and on a regular basis as a place to meet clients, patients, or customers with whom the taxpayer deals in the ordinary course of business.
3. The space is used on a regular (but not necessarily exclusive) basis to store inventory of the taxpayer's business if the residence is the only fixed location for the business.
4. The space is not attached to the residence and is used exclusively and on a regular basis in connection with the taxpayer's business.

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<sup>3</sup>I.R.C. § 1231(a).

<sup>4</sup>I.R.C. § 1031.

<sup>5</sup>26 C.F.R. § 1.167(f)-1.

<sup>6</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 11504.

<sup>7</sup>I.R.C. § 280A(c).

<sup>8</sup>I.R.C. § 280A(c)(1).

5. The space is used for licensed day care to children, the handicapped, or elderly.

#### § 7:24 Homeowner's associations

Most residential condominiums are operated through an association of the unit owners. Many decisions must be made about the complex, and this almost invariably requires an organization of some type. From a tax viewpoint, that organization is usually a homeowners association.<sup>1</sup> By becoming a homeowners association, the association becomes a tax-exempt organization. This tax-exempt status is not automatic, however; the organization must meet the requirements under the Code to fit the definition of a "homeowners association." Those requirements are:<sup>2</sup>

1. The association is organized and operated to provide for the acquisition, construction, management, maintenance, and care of association property.
2. At least 60% of the income of the association comes from membership dues, fees, or assessments from the owners.
3. At least 90% of the expenditures of the association are used for the acquisition, construction, management, maintenance, and care of association property.
4. No part of the net earnings of the organization can inure to the benefit of any private shareholder or individual (but excess membership dues, fees or assessments may be rebated).
5. The association elects to qualify under the homeowners provisions of the Code.
6. Substantially all of the condominium units are used by individuals for residences.

A qualified association is exempt on income received as dues, fees, and assessments received by a condominium management association from owners of condominium housing units, or by a residential real estate management association from owners of real property (or by the owners of

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#### [Section 7:24]

<sup>1</sup>I.R.C. § 528.

<sup>2</sup>I.R.C. § 528(c)(1), (2).

timeshare interests in the case of a timeshare association).<sup>3</sup> It is taxed on income from investments and on income received from nonowners, such as fees and rent of the facilities. Taxable income is subject to a 30 percent tax rate (32 percent in the case of a timeshare association).<sup>4</sup>

If an association does not qualify as a homeowners association, it is also taxable on the dues, fees and assessments received from its members. The expenses of the condominium may be deducted against this income, however, and the association may arrange its finances to break even. In that way, no taxable income results. By either expending all its income on the property or rebating unused fees and assessments to its members, a nonqualifying association may conduct itself in a tax-exempt manner without being a tax-exempt organization.

Rental or investment income used for the benefit of the unit owners—for maintenance or repairs, for example—is taxable to the members as either a constructive dividend or a taxable distribution.

### § 7:25 Development and conversion

Conversion from a cooperative apartment to a condominium is usually made without tax consequence. The exchange of stock in a cooperative housing corporation for an interest in a condominium comes under the tax-free exchange provisions of the Code.<sup>1</sup>

Because cooperative housing corporations must get at least 80 percent of their income from tenant-stockholders,<sup>2</sup> the timing of the conversion can be critical. It should be such that any short-year resulting from the liquidation of the corporation will meet the 80 percent test.

Conversion of an apartment building other than a co-op can lead to taxable consequences. A sale of the building to

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<sup>3</sup>I.R.C. § 528(d)(3).

**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 20786.

<sup>4</sup>I.R.C. § 528(b).

#### [Section 7:25]

<sup>1</sup>Either I.R.C. § 1031(a) or I.R.C. § 121(d)(4). If the condominium is not the principal residence of the taxpayer, the first will usually apply.

<sup>2</sup>I.R.C. § 216(b).

someone else who makes the conversion is a simple disposition of a capital asset. If either the owner or the new owner makes the conversion, that person is likely to be treated as a dealer in real estate, with sales of the units taxed at ordinary income rates. The units become stock in trade of the taxpayer.<sup>3</sup>

A minimal exception to dealership status is provided to a taxpayer who has held property for five years or more (or who inherited the property), who is not in the real estate business, and who makes five or fewer sales.<sup>4</sup> The proceeds from the conversion are treated as from capital transactions, thus avoiding the problem of ordinary income.

#### D. CHECKLISTS

##### § 7:26 Checklist—Declaration

The declaration must contain or provide for the following matters:

1. A statement submitting the property to condominium ownership.
2. Name by which the condominium property is to be identified, which must include the word “condominium” or be followed by the words “a condominium.”
3. Legal description of the land and, if a leasehold estate is submitted to condominium ownership, an identification of the lease.
4. Identification of each unit by letter, name, or number, or combination thereof, so that no unit bears the same designation as any other unit.
5. Survey of the land which meets the minimum technical standards set forth by the Board of Professional Surveyors and Mappers, pursuant to Florida Statute § 472.027, and a graphic description of the improvements in which units are located and a plot plan thereof that, together with the declaration, are in sufficient detail to identify the common elements and each unit and their relative locations and approximate dimensions.
6. Undivided share of ownership of the common elements

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<sup>3</sup>*Legal Encyclopedias*: Am. Jur. 2d, Federal Taxation ¶¶ 11150 et seq.

<sup>4</sup>I.R.C. § 1237.

and common surplus of the condominium that is appurtenant to each unit stated as a percentage or a fraction of the whole.

7. Percentage or fractional shares of liability for common expenses of the condominium, which, for all residential units, must be the same as the undivided shares of ownership of the common elements and common surplus appurtenant to each unit as provided for in paragraph 6 above.
8. If a developer reserves the right, in a declaration recorded on or after July 1, 2000, to create a multicondominium, the declaration must state, or provide a specific formula for determining, the fractional or percentage shares of liability for the common expenses of the association and of ownership of the common surplus of the association to be allocated to the units in each condominium to be operated by the association. If a declaration recorded on or after July 1, 2000, for a condominium operated by a multicondominium association as originally recorded fails to so provide, the share of liability for the common expenses of the association and of ownership of the common surplus of the association allocated to each unit in each condominium operated by the association shall be a fraction of the whole, the numerator of which is the number "one" and the denominator of which is the total number of units in all condominiums operated by the association.
9. Name of the association, which must be a corporation for profit or a corporation not for profit.
10. Unit owners' membership and voting rights in the association.
11. Document or documents creating the association, which may be attached as an exhibit.
12. Copy of bylaws, which must be attached as an exhibit.
13. Other desired provisions not inconsistent with Ch 718 of the Florida Statutes.
14. Creation of a nonexclusive easement for ingress and egress over streets, walks, and other rights-of-way serving the units of a condominium, as part of the common elements necessary to provide reasonable access to the public ways, or a dedication of the streets, walks, and other rights-of-way to the public.

15. If timeshare estates will or may be created with respect to any unit in the condominium, a statement in conspicuous type declaring that timeshare estates will or may be created with respect to units in the condominium.

In addition, the degree, quantity, nature, and extent of the timeshare estates that will or may be created shall be defined and described in detail in the declaration, with a specific statement as to the minimum duration of the recurring periods of rights of use, possession, or occupancy that may be created with respect to any unit. The declaration may include the following optional provision:

16. Covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property; however, the rule against perpetuities shall not defeat a right given any person or entity by the declaration for the purpose of allowing unit owners to retain reasonable control over the use, occupancy, and transfer of units.

#### NOTES

##### Drafter's Notes

This checklist is based on Fla. Stat. Ann. § 718.104(4) and (5). When drafting declaration of condominium, statute should be read carefully to ensure full compliance.

### § 7:27 Checklist—Bylaws governing condominium association

Required provisions are:

1. Administration of the association, describing its form, indicating the title of the officers and board of administration, and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and boards.
2. Quorum, voting requirements and proxy requirements.
3. Board of administration meetings.
4. Unit owner meetings.
5. Budget meetings.
6. Annual budget.
7. Assessments.
8. Amendment of bylaws.

9. Transfer fees.
10. Recall of board members.
11. Arbitration.
12. Certificate of compliance
13. Limited power of association to convey common elements.

Optional provisions are:

1. Method of adopting and amending administrative rules and regulations governing the details of the operation and use of the common elements.
2. Restrictions on and requirements for the use, maintenance, and appearance of the units and the use of the common elements.
3. Provisions for giving notice by electronic transmission in a manner authorized by law of meetings of the board of directors and committees and of annual and special meetings of the members.
4. Other provisions which are not inconsistent with Ch. 718 of the Florida Statutes or with the declaration, as may be desired.

#### NOTES

##### Drafter's Notes

Florida law provides that the operation of the condominium association shall be governed by the articles of incorporation if the association is incorporated, and the bylaws of the association, which must be included as exhibits. Fla. Stat. Ann. § 718.112(1)(a). If one association operates more than one condominium, it shall not be necessary to rerecord the same articles of incorporation and bylaws as exhibits to each declaration after the first, provided that in each case where the articles and bylaws are not so recorded, the declaration expressly incorporates them by reference as exhibits and identifies the book and page of the public records where the first declaration to which they were attached is recorded. Fla. Stat. Ann. § 718.112(1)(a). Florida law also provides that no amendment to the articles of incorporation or bylaws is valid unless recorded, with identification on the first page thereof of the book and page of the public records where the declaration of each condominium operated by the association is recorded. Fla. Stat. Ann. § 718.112(1)(b).

Fla. Stat. Ann. § 718.112(2) provides that the bylaws governing a condominium association must provide for the items in the above checklist and, if they do not do so, the bylaws shall be deemed to include them. When drafting bylaws, Fla. Stat. Ann. § 718.112 should be carefully reviewed to ensure full compliance.

The optional provisions contained in this checklist are set forth in Fla. Stat. Ann. § 718.112(3).

### § 7:28 Checklist—Unit deeds

1. Date of conveyance.
2. Names and addresses of grantor and grantee.
3. Status of grantor and grantee.
  - a. Individual, or business entity.
  - b. Marital status.
  - c. Fiduciary status.
4. Nature of grantor's estate, and nature of estate to be conveyed to grantee.
5. Consideration.
6. Words of conveyance.
7. Description of property.
  - a. Name of condominium.
  - b. Political subdivision and county in which property is located, and reference to recording office, book and page where declaration and any amendments thereto are recorded.
  - c. Unit designation as set forth in declaration.
  - d. Reference to last prior unit deed conveying such unit, if previously conveyed.
  - e. Statement of proportionate undivided interest in common elements appurtenant to unit as set forth in declaration or any amendment thereto.
8. Easements appurtenant to unit.
9. Easements to which unit subject.
10. Obligations to which transfer subject.
11. Limitations on estate conveyed, as contained in declaration and bylaws, such as restrictive covenants and conditions.
12. Grantor's covenants.
13. Time interest is to vest.
14. Signatures.
15. Attestation.
16. Acknowledgment.
17. Name and address of person preparing deed.
18. Post office addresses of grantees, for tax purposes.

**NOTES****Drafter's Notes**

For discussion of legal requirements of deeds generally, see Conveyances (Ch 2).

**§ 7:29 Checklist—Prospectus or offering circular for residential condominium**

1. Front cover or first page:
  - a. Name of condominium.
  - b. Prescribed statements, in conspicuous type.
2. Next pages, in order indicated:
  - a. Summary—reproduction of all statements required to be in conspicuous type anywhere in the prospectus or offering circular.
  - b. Index of contents and exhibits of prospectus.
  - c. Description of condominium, including:
    - (1) Name and location.
    - (2) Description of condominium property, including:
      - (a) Number of buildings, units in each building, and bathrooms and bedrooms in each unit, and total number of units.
      - (b) Page in condominium documents where copy of plot plan and survey located.
      - (c) Estimated latest date of completion of construction, etc; in lieu of date, reference to such information in purchase agreement.
    - (3) Maximum number of units that will use facilities in common with condominium; if applicable, other related information.
  3. Rest of body of document:
    - a. Conspicuous statement as to whether condominium being sold as fee simple interest or as leasehold interest; reference to location of lease in disclosure materials, if applicable.
    - b. If timeshare estates are or may be created, statement in conspicuous type to that effect.
    - c. Description of recreational and other commonly used facilities that will be used only by unit owners.

- d. Description of recreational and other facilities to be used in common with other condominiums, and which require payment of the maintenance and expenses thereof, directly or indirectly, by unit owners, including various details concerning such facilities.
- e. Information as to any recreation lease or associated club membership.
  - (1) Include conspicuous statement if any recreational or other facilities are so covered.
  - (2) Conspicuous statement as to mandatory payment for use of facilities, if applicable.
  - (3) Conspicuous statement if facilities are leased or operated by a contracting party.
  - (4) Conspicuous statement as to payment of rent or land-use fees, if applicable.
  - (5) Conspicuous statement as to lien on units for nonpayment of assessments or rent for facilities so covered, if applicable.
- f. Conspicuous statement as to developer's right to add to or expand recreational facilities without consent of unit owners or association, if applicable.
- g. Statement where developer's plan includes program of leasing units rather than selling them. If so, description of plan, and statement in bold face type.
- h. Arrangement for management of association and maintenance of condominium property, etc., and description of management and related contracts, to include:
  - (1) Names of contracting parties.
  - (2) Term of contract.
  - (3) Nature of services included.
  - (4) Compensation, and provisions for increases therein.
  - (5) Reference to location in condominium documents of copies of such contracts.
  - (6) Conspicuous statement as to existence of management contract, if applicable.
- i. Conspicuous statement as to rights of developer or persons other than unit owners to control as-

sociation for more than one year after majority of units sold, if applicable.

- j. Conspicuous statement as to existence of restrictions on sale, transfer, conveyance, or leasing of units, if applicable.
- k. If condominium is part of phase project, statement to that effect, and description of phasing.
- l. If the condominium was created on or after July 1, 2000, and is or may become part of a multicondominium:
  - (1) Conspicuous statement that the condominium is (may be) part of a multicondominium development in which other condominiums will (may be) operated by the same association, immediately followed by information on the location in the prospectus or offering circular and its exhibits where the multicondominium aspects of the offering are described must be stated.
  - (2) Summary of the provisions in the declaration, articles of incorporation, and bylaws which establish and provide for the operation of the multicondominium, including a statement as to whether unit owners in the condominium will have the right to use recreational or other facilities located or planned to be located in other condominiums operated by the same association, and the manner of sharing the common expenses related to such facilities.
  - (3) Statement of the minimum and maximum number of condominiums, and the minimum and maximum number of units in each of those condominiums, which will or may be operated by the association, and the latest date by which the exact number will be finally determined.
  - (4) Statement as to whether any of the condominiums in the multicondominium may include units intended to be used for nonresidential purposes and the purpose or purposes permitted for such use.
  - (5) Description of the location and approximate

acreage of any land on which any additional condominiums to be operated by the association may be located.

- m. If conversion of existing development is involved:
  - (1) Date of type of construction.
  - (2) Prior use.
  - (3) Statement as to termite damage.
  - (4) Condition of various components.
  - (5) Caveat as to nonexistence of warranties, unless expressly stated in writing by developer.
- n. Summary of restrictions, if any, to be imposed on units concerning use of any condominium property.
- o. Statement as to land to be offered for use by unit owners, but is not owned by or leased to them, the association, etc., if applicable.
- p. Manner in which utility and related services will be provided, and by whom.
- q. Expansion of how apportionment of common expenses and ownership of common elements has been determined.
- r. Estimated operating budget for the condominium and association, with schedule of unit owner's expenses attached as exhibit, including detailed statement of prescribed items of information.
- s. Schedule of estimated closing expenses to be paid by buyer or lessee of a unit. Should include statement as to title opinion or title insurance.
- t. Identity of developer and chief operating officer or principal directing creation and sale of condominium, which statement of its and his or her experience in this field.
- u. Copies of the following, as exhibits and as applicable:
  - (1) Declaration, or proposed declaration.
  - (2) Articles of incorporation creating association.
  - (3) Bylaws of association.
  - (4) Ground lease or other underlying lease.
  - (5) Management agreement and all maintenance and other contracts for management of association and operation of condominium, etc. having service term in excess of one year.

- (6) Estimated operating budget for condominium; required schedule of unit owners' expenses.
  - (7) Copy of floor plan of unit and plot plan showing location of residential buildings and recreation and other common areas.
  - (8) Lease of recreational and other facilities to be used only by unit owners.
  - (9) Lease of facilities used by owners and others.
  - (10) Form of unit lease.
  - (11) Declaration of servitude of properties serving condominium but neither owned by unit owners nor leased to them or to the association.
  - (12) Statement of condition of existing building, if conversion involved.
  - (13) Statement of inspection for termite damage, and treatment of existing improvements, if conversion involved.
  - (14) Form of agreement for sale or lease of units.
  - (15) Copy of agreement for escrow of payments made to developer prior to closing.
  - (16) Copy of documents containing any restriction on use of property.
- v. Prior prospectus or offering circular, if applicable
  - w. Brief narrative description of location and effect of all existing and intended easements located or to be located on condominium property other than those described in declaration.
  - x. Copy of any required dock or marina approval.
  - y. Evidence of the developer's ownership, leasehold, or contractual interest in the land.

#### NOTES

##### Drafter's Notes

This checklist is based on Fla. Stat. Ann. § 718.504 and merely outlines the requirements set forth in that statute. The statute itself should be consulted for a detailed statement of the requirements.

In addition to the prospectus or offering circular, Fla. Stat. Ann. § 718.504 requires that each buyer shall be furnished a separate page entitled "Frequently Asked Questions and Answers," in accordance with a format approved by the Division of Florida Land Sales, Condominiums, and Mobile Homes. The information required on that page is set forth in the statute.

**§ 7:30 Checklist—Documents to be reviewed before buying condominium**

1. State condominium law.
2. Master deed for condominium or declaration of condominium.
  - a. All amendments.
3. Ground lease, if property held in that manner.
4. Title documents.
  - a. Opinion or preliminary report.
  - b. Insurance policy.
    - (1) Matters not insured.
5. Survey of property.
  - a. Recent date.
  - b. Encroachments.
6. Documents governing operations of owners association.
  - a. Charter.
  - b. Bylaws.
  - c. Minutes of meetings.
  - d. Tax ruling as to exempt status.
    - (1) Audits of association.
  - e. Method of electing managers.
    - (1) Voting rights.
  - f. Method of amendment charter and bylaws.
7. Rules and regulations governing ownership.
  - a. Restrictions on transfer of unit.
  - b. Pets, guests, window treatment, alterations, moving procedures, etc.
  - c. Use of recreational areas.
  - d. Commercial areas.
    - (1) Opening and closing times.
    - (2) Expansion of activities.
  - e. Insurance requirements: fire, extended coverage, casualty, liability, other.
  - f. Utilities.
    - (1) Billing and payment.
8. Financing services available from association.
  - a. Master mortgage.
  - b. Insurance policies.
    - (1) Required to be used.

- c. Moving services.
  - d. Maintenance services.
  - e. Other.
9. Financial history of complex.
    - a. Fees and assessments.
      - (1) Amount and percentage from owners and from commercial or nonowner sources.
      - (2) Method and procedure for assessment.
    - b. Real estate taxes.
      - (1) Allocation.
    - c. Reserves.
    - d. Uncollected assessments.
    - e. Units repurchased by association.
    - f. Audits and inspection reports.
      - (1) Accounting.
      - (2) Architectural and engineering.
      - (3) Insurance.
      - (4) Adequacy of auditing, insurance coverage, reserves for future repairs, and similar matters.
    - g. Management contract outstanding.
      - (1) Duration.
      - (2) Cost.
      - (3) Maintenance covered.
      - (4) Architectural.
    - h. Other outstanding contracts of association.
    - i. Litigation against association.
    - j. Future repairs or maintenance planned.
      - (1) Recommended by architects or engineers.
      - (2) Discussed by managers.
      - (3) Firm commitments.
10. Purchase contract.
    - a. Warranties included.
      - (1) Owners.
      - (2) Supplier.
    - b. Personal property included.
    - c. Other matters customary included in purchase contracts for residences.

## II. ORGANIZATIONAL DOCUMENTS

### § 7:31 Declaration

Declaration made on *[date of declaration]*, pursuant to Fla. Stat. Ann. § 718.104, by *[name of corporation]*, a corporation organized and existing under the laws of Florida, having its principal offices at *[address of corporation]*, in *[name of city]*, *[name of county]*, State of Florida, referred to below as “developer.”

1. Submission of property. Developer, who is owner in fee simple absolute of the lands, the building, and all other improvements constructed or to be constructed thereon, together with all easements, rights, and appurtenances belonging to it, and all other property, personal or mixed, intended for use in connection with it, as described below and collectively referred to as the “property,” declares certain divisions, covenants, restrictions, limitations, conditions, and uses respecting the property, intending to submit the property to the provisions of Chapter 718 of the Florida Statutes, referred to below as the Condominium Act, and further intending to create covenants running with the land and binding developer and its successors and assigns forever.

2. Name of condominium. The name by which the property shall be known is *[name of condominium]*.

3. Description of land. The land on which the building and improvements constituting the property are to be located, as depicted on the survey attached as Exhibit *[identification of exhibit]* and incorporated by reference, consists of *[legal description]*.

4. Description of building. The building to be constructed on the land, designated Building A on the survey attached as Exhibit *[identification of exhibit]* and incorporated by reference, will be constructed principally of *[type of materials]*, and will consist of *[description and number of floors as well as square footage of family and commercial units, common elements, parking for number of cars]*.

5. Units. As depicted in plats of the building, attached as *[identification of exhibit]* and incorporated by reference, on each of the *[ordinal number]* upper floors of the building there will be *[number]* units, which will be numbered consecutively from one to *[ending unit number]* on each floor. These numbers will be preceded by the hundredth which corresponds to each floor; for example, those on the first floor

will bear the numbers "101", "102," etc., those on the second floor the numbers "201", "202," etc. The units will be referred to as Unit Type Number One, Unit Type Number Two, etc, respectively.

Each unit will be equipped with [*description of amenities*].

As shown on the floor plans of the building referred to previously in this section, each unit will consist of the area enclosed by the interior surfaces of its perimeter walls, floors, and ceilings, and the exterior surfaces of its balconies and terraces, including the portions of the building so described and the airspace so enclosed, but not including any common elements located therein. When interpreting deeds, mortgages, deeds of trust, and other instruments of any representation of any unit contained in the plats referred to above, the existing physical boundaries of such unit or any unit reconstructed in substantial accordance with the original plans of such unit shall be conclusively presumed to be the boundaries regardless of any settling, rising, or lateral shifting of the building.

a. Unit Type Number One: As shown on the floor plan attached as Exhibit [*identification of exhibit*], this is a rectangular shaped unit measuring [*number of feet*] feet long by [*number of feet*] feet wide, making the total area [*number of square footage*] square feet. Its main door has access to the corridor of the floor on which it is located.

The unit consists of the following rooms and areas: A hall of [*number of square feet*] square feet; a living room of [*number of square feet*] square feet; a dining room of [*number of square feet*] square feet; a kitchen of [*number of square feet*] square feet, which includes [*description of amenities*];

[*Number of bedrooms*] bedrooms, one of [*number of square feet*] square feet and one of [*number of square feet*] square feet; and two bathrooms of [*number of square feet*] square feet, including vitreous enamel basin, bathtub, and toilet.

[*Description of each garage, carport, or other area to be subject to individual ownership and exclusive control by reference to plats showing such areas identified by letter or number.*]

[*Continue in similar manner for other types of units.*]

6. General common elements. The general common elements shall consist of the following:

- (a) the parcel of land described above;
- (b) a basement consisting of [*number of square feet*] square feet, and a sub-basement consisting of [*number of square feet*] square feet;
- (c) the following facilities located in the basement: [*description of basement facilities*];
- (d) parking facilities for approximately [*number of vehicles*] vehicles, consisting of [*number of square feet*] square feet;
- (e) the ground floor, consisting of [*number of square feet*] square feet;
- (f) the following facilities located on the ground floor:
  - (1) commercial area and facilities consisting of [*number of square feet*] square feet described as follows: (set forth legal description); and
  - (2) a lobby and facilities consisting of [*number of square feet*] square feet described as follows: [*description*]. [*Description of any other common areas*]; and
- (g) the following facilities located throughout the project:
  - (1) the foundations, columns, girders, beams, supports, exterior walls (not including portions thereof on unit sides of such walls), walls and partitions separating units from mechanical equipment spaces and other common areas (not including portions on unit sides of such walls), all walls separating unit, (not including the surfaces of such walls), and all roofs;
  - (2) all halls, corridors, lobbies, balconies, fire escapes, pavements, entrances and exits of the building;
  - (3) [*number of elevators*] elevators;
  - (4) an elevator shaft of [*number of square feet*] square feet, for the [*number of elevators*] elevators extending from the ground floor up to the [*number of floor*] floor;
  - (5) an elevator penthouse with corresponding elevator equipment located on the roof of the building, including all tanks, pumps, motors, fans, compressors and control equipment;
  - (6) a stairway, referred to in this declaration as stairway “A,” of [*number of square feet*] square feet, leading from the ground floor to the roof of the building;

(7) a stairway, referred to in this declaration as stairway "B," of [*number of square feet*] square feet leading from the open court to the [*number of floor*] floor;

(8) a flue extending from the incinerator in the basement to the roof of the building. This flue will have a hopper door on each one of the [*number of upper floors with hopper*] upper floors for the disposal of garbage and rubbish, to be fed from the janitor's room of each of the [*number of upper floors with hopper*] upper floors;

(9) a water tank located on the roof of the building;

(10) central and appurtenant installations for services such as power, telephone, light, gas, hot and cold water, heating, refrigeration, air conditioning, and incinerating;

(11) all sewer pipes;

(12) all gardens, swimming pools, recreational, and community facilities; and

(13) all other elements of the property desirable or rationally of common use, necessary to the existence, upkeep, and safety of the condominium regime, or designated common elements by the Florida Condominium Act as that Act may be from time to time amended.

7. Limited common elements. The following facilities located in each one of the [*number of upper floors*] upper floors are limited common elements restricted to the units of each respective floor:

(a) a lobby giving access to the elevators, to stairway "A," to the janitor's room, to the corridors, and to certain units;

(b) a room for the use of the janitor, of approximately [*number of square feet*] square feet; and

(c) all corridors.

8. Ownership of common elements. Each owner of a unit will own in fee simple absolute a proportionate, undivided interest in the common elements listed in Section 6 equal to the proportion that the value of the unit bears to the total value of all units, as follows:

Unit Type	Value of Unit	Value of all Units	Percentage
No. [number]	\$[dollar amount]	\$[dollar amount]	[percentage]%
No. [number]	\$[dollar amount]	\$[dollar amount]	[percentage]%
No. [number]	\$[dollar amount]	\$[dollar amount]	[percentage]%

9. Ownership of restricted common elements. Each owner of a unit located on each of the *[number of upper floors]* upper floors will own in fee simple absolute a proportionate undivided interest in the limited common elements listed in Section 7 equal to the proportion which the value of the unit bears to the total value of all units located on its respective floor, as follows:

Unit Type	Value of Unit	Value of all Units on Floors	Percentage
No. [number]	\$[dollar amount]	\$[dollar amount]	[percentage]%
No. [number]	\$[dollar amount]	\$[dollar amount]	[percentage]%
No. [number]	\$[dollar amount]	\$[dollar amount]	[percentage]%

10. Proportionate representation; participation in common profits and expenses. Each unit owner will share in the common profits and expenses, as defined, and in the total voting power of the association of owners, in accordance with such unit owner's interest in the common elements as set forth above.

a. For purposes of this declaration, "common profits" means the excess of all receipts over all disbursements of the association.

b. For purposes of this declaration, "common expenses" means expenses for the administration, maintenance, and repair of the property, and all sums that may be designated common expenses by this declaration or the bylaws of the association.

11. Covenants and agreements. Grantor, its successors

and assigns, by this declaration, and all future owners of units, by acceptance of their respective deeds, covenant and agree as follows:

a. The common elements will remain undivided, and no right will exist to partition or divide any of them, except when termination of the condominium and its removal from the provisions of Chapter 718 of the Florida Statutes is authorized by unanimous agreement of all of the owners of the condominium and all creditors in whose behalf the encumbrances are recorded against the condominium. On such authorization, all unit owners, mortgagees, and lienors shall execute and file for record in the office where this declaration is filed, an instrument of revocation of this declaration. On the filing of such instrument of revocation, the owners shall become tenants in common of the property, and each shall own an undivided interest therein equal to the percentage of his or her undivided interest in the common elements before the filing of such instrument. On the filing of such instrument of revocation, all liens shall be transferred to the undivided share in the condominium property attributable to the unit originally encumbered by the lien in its same priority. Termination of the condominium shall not bar subsequent resubmission to the provisions of such Act in accordance with the terms thereof.

b. Each unit owner will have an easement in common with all other unit owners for the use and maintenance of all pipes, wires, ducts, cables, conduits, public utility lines, and other common elements located in any of the other units and serving his or her unit, and each unit will be subject to such easement in favor of owners of all other units. Subject to reasonable regulation as may be provided in the bylaws, the board of administration will have a right of access to each unit to inspect it, and to maintain, repair, or replace all common elements located within it.

c. Units will be occupied and used by the respective owners only as private dwellings for the owner, the owner's family, tenants, and social guests, and for no other purpose.

d. Each owner of a unit or units will, automatically on becoming owner of the unit or units, become a member of [*name of condominium association*], referred to here as the association, and will remain a member until his or her ownership ceases, at which time membership in the association will also cease.

e. Each unit owner will, immediately on becoming an owner, grant to the board of administration on behalf of all unit owners, an irrevocable power of attorney coupled with an interest, to acquire title to or lease any unit whose owner desires to surrender, sell, or lease it, or that may be the subject of a foreclosure or other judicial sale, and to convey, sell, lease, sublease, mortgage, deed in trust, or otherwise deal with any unit so acquired.

f. Any unit leased or acquired by the board of administration in any manner will be held by the board on behalf of all unit owners, in proportion to the respective common interests of the owners as set forth above.

g. Administration of the condominium will be in accordance with the provisions of this declaration and the bylaws of the association, attached as Exhibit [*identification of exhibit*], as those documents may be amended from time to time.

h. Each unit owner, and all tenants who are occupants of units will comply with the provisions of this declaration, and the bylaws, decisions, and resolutions of the association, as lawfully amended from time to time. Failure to comply with these provisions, decisions, or resolutions will be grounds for an action to recover sum due for damages or injunctive relief, or both, maintainable by the association or by any unit owner or by a person who holds a blanket mortgage or unit mortgage and is aggrieved by any such noncompliance.

i. No unit owner may exempt himself or herself from liability for his or her proportionate share of the common expenses by waiver of the use or enjoyment of any of the common elements, or by abandonment of his or her unit.

12. Assessment liens. All sums assessed by the association for common charges applicable to any unit remaining unpaid will constitute a lien on the unit prior to all other liens except: (a) assessments, liens, and charges in favor of the state or any political subdivision thereof for taxes past due and unpaid on the unit; and (b) amounts unpaid under mortgage and trust deed instruments duly recorded. This lien may be foreclosed by suit of the board of administration, acting on behalf of all unit owners, in like manner as a mortgage of real property. In any such foreclosure, the defaulting unit owner will be required to pay a reasonable rental for the unit for the period beginning on the date no-

tice of default is first served and ending on the date of sale of the unit, and the board of administration will be entitled to a receiver to collect the same. The board of administration, acting on behalf of all unit owners, will have the power to bid on units at foreclosure, and to acquire, hold, lease, mortgage, deed in trust, and convey the units. Suit to recover a money judgment for unpaid common charges may also be maintained by the board without foreclosing or waiving the lien securing the payment of such expenses.

13. Acquisition of unit at foreclosure or other sale; effect. Where the mortgagee or trust deed beneficiary under a duly recorded instrument, or any other purchaser, obtains title to a unit as a result of foreclosure or exercise of a power of sale, such purchaser, his or her heirs, successors, and assigns, will not be liable for the share of common expenses or assessments by the association chargeable to the unit for any period prior to the acquisition of title to the unit by the purchaser. Any such unpaid share of common expenses or assessments will be deemed common expenses collectible from all units including the unit acquired by the purchaser, his or her heirs, successors and assigns.

14. Rental of units. Apartments will not be rented for transient or hotel purposes, which are defined as: (a) rental for any period less than *[number of days]* days; or (b) rental for any period if the occupants of the unit are provided with customary hotel services, such as room service for food and beverages, maid service, laundry and linen, and bellboy service. With the exception of rentals for transient or hotel purposes, unit owners will have the absolute right to lease their units, provided these leases are made subject to the covenants and restrictions contained in this declaration, and in the bylaws and rules and regulations of the condominium, as such documents may from time to time be amended.

15. Destruction of or damage to property; effect. In the event the property is damaged or destroyed; the repair, reconstruction, or disposition of the property shall be as provided in the Florida Statutes. In the event the property is not repaired, reconstructed, or rebuilt within a reasonable time, any unit owner is entitled to equitable relief as provided in Fla. Stat. Ann. § 718.118.

16. Eminent domain. If all or any part of the common elements shall be taken, injured, or destroyed by eminent domain, each unit owner shall be entitled to notice of such

taking and to participate through the association in all condemnation and other proceedings. Any damages shall be for the taking, injury, or destruction as a whole and shall be collected by the association and distributed by it among unit owners in proportion to their respective undivided interests in the common elements or limited common elements so taken, injured, or destroyed, except that such funds as are deemed by the association necessary or appropriate to be applied to the repair or restoration of property so injured or destroyed may be so applied.

17. Conveyance of units; unpaid assessments. On the voluntary sale or conveyance of a unit, all unpaid assessments against the unit will first be paid by the unit owner from the proceeds of sale or by the purchaser in preference to any other assessments or charges of whatever nature except: (a) assessments, liens, and charges in favor of the state for taxes past due and unpaid on the unit; and (b) amounts due under a duly recorded mortgage. Any payment by purchaser will be without prejudice to the right of the purchaser to recover from his or her seller any amounts for which he or she was not liable under his or her contract of sale. Additionally, any purchaser, mortgagee, or trust deed beneficiary will be entitled to a statement from the board of administration setting forth the amount of unpaid common charges due the association from any seller.

18. Insurance. The board of administration of the association, or the managing agent, will obtain and continue in effect insurance against loss by fire or other casualties in form and amounts satisfactory to mortgagees holding first mortgages covering [*a majority of*] units, but without prejudice to the right of each unit owner to obtain individual unit insurance as he or she may see fit. The board of administration, or the managing agent, shall also obtain and continue in effect insurance against liability for personal injury and death and for damage to property arising from accidents occurring within the common elements and limited common elements in such form and amounts, satisfactory to mortgagees holding first mortgages on the units, as shall be determined by the board of administration. Insurance premiums for such insurance coverage will be a common expense to be paid by monthly assessments levied by the association. These payments will be held in a separate escrow account of the association, and will be used solely for the payment of the insurance premiums as those premiums become due.

19. Duties and liabilities of developer. So long as developer, its successors and assigns, owns one or more of the units established and described herein, developer, its successors and assigns, will be subject to the provisions of this declaration and of all attached exhibits. Grantor further covenants to take no action that would adversely affect the right of the association with respect to assurances against latent defects in the property, or other rights assigned to the association by reason of the establishment of the condominium.

20. Unit owners' association. The administration and management of the condominium shall be vested in an association, to be known as *[name of association]*. The association shall be organized as a Florida *[stock corporation/not for profit corporation]* and shall be governed by the bylaws. The articles of incorporation creating the unit owners' association is annexed as Exhibit *[identification of exhibit]*.

21. Unit owners' membership and voting rights in association. The unit owners' membership and voting rights in the association shall be as provided in the bylaws annexed as Exhibit *[identification of exhibit]*. All agreements and determinations lawfully made by the association in accordance with the voting percentages established in the bylaws shall be binding on all unit owners, their heirs, successors, and assigns.

22. Amendment of declaration. This declaration may only be amended at a meeting of the unit owners at which the amendment is approved by the holders of at least *[percentage]%* of the ownership interest in the condominium. Any amendment of this declaration may not alter or destroy a unit or a limited common element without the consent of the owners affected and first lien mortgagees holding mortgages on *[number of units]* or more units. No such amendment shall be effective until recorded in the office of the Clerk of the Circuit Court of the County of *[name of county]*, State of Florida.

23. Invalidity. If one or more provisions of this declaration are declared invalid, such invalidity shall in no way impair or affect the validity, enforceability, or effect of the remainder of this declaration.

24. Waiver. No provision contained in this declaration will be deemed waived by reason of any failure to enforce the same, irrespective of the number of violations or the consistency of the failure of enforcement.

25. Captions. Captions are inserted in this declaration for convenience and reference only, and will not be taken in any way to limit or describe the scope of this declaration or any of its provisions.

In witness, developer has executed this declaration on [date of execution], at [place of execution].

---

[Developer]

By \_\_\_\_\_  
[Signature]

[Corporate seal]

Executed in the presence of \_\_\_\_\_  
[Signature]

[Acknowledgment]

This instrument was prepared by [name of preparer] of [address of preparer].

#### **§ 7:32 Declaration—Provision—Restrictions on use of condominium unit**

In addition to all of the covenants and conditions contained in this declaration of condominium, the use of the property and each condominium is subject to the following:

1. Condominium use. No condominium shall be occupied and used except for residential purposes by the owners, their tenants, and social guests, and no trade or business shall be conducted, except a residential unit may be used as a combined residence and executive or professional office by the owner of it, so long as the use does not interfere with the quiet enjoyment by other residential unit owners of their units. No tent, shack, trailer, basement, garage, outbuilding or structure of a temporary character shall be used at any time as a residence, either temporarily or permanently.

Residents shall be limited as follows:

No more than [number of persons] persons per bedroom in any unit shall be permitted as permanent residents ["perma-

*nent*" means more than [number of days] days out of each 12-month period], provided that one child under [age of child] years of age shall be allowed in addition to the maximum number of permanent residents otherwise permitted in each unit.

No unit or units or any portion of them in the project shall be leased, subleased, occupied, rented, let, sublet, or used for or in connection with any timesharing agreement, plan, program, or arrangement, including, without limitation, any so-called "vacation license," "travel club," "extended vacation," or other membership or time-interval ownership arrangement. The term "timesharing" as used here shall be deemed to include, but shall not be limited to, any agreement, plan, program, or arrangement under which the right to use, occupy, or possess the unit or units or any portion thereof in the project rotates among various persons, either corporate, partnership, individual, or otherwise, on a periodically reoccurring basis for value exchanged, whether monetary or like-kind use privileges, according to a fixed or floating interval or period of time [number of days] consecutive calendar days or less. Provided, this section shall not be construed to limit the personal use of any unit or any portion thereof in the project by any unit owner or his or her or its social or family guests.

No health care facilities operating as a business or charity in serving the sick, elderly, disabled, handicapped, or retarded shall be permitted in the project.

2. Nuisances. No noxious, illegal, or seriously offensive activities shall be carried on in any condominium, or in any part of the property, nor shall anything be done which may be or may become a serious annoyance or a nuisance to or which may in any way interfere with the quiet enjoyment of each of the owners of his or her respective unit, or which shall in any way increase the rate of insurance for the project, or cause any insurance policy to be canceled or cause a refusal to renew the same or which will impair the structural integrity of any building.

3. Vehicle restrictions. No trailer, camper, mobile home, motor home, house car, commercial vehicle, truck (other than standard size pick-up truck or standard size van), boat, inoperable automobile, or similar equipment shall be permitted to remain upon any area within the property, other than

temporarily, unless placed or maintained within an enclosed garage or carport. Commercial vehicles shall not include sedans or standard size vans and pick up trucks which are used both for business and personal use, provided that any signs or markings of a commercial nature on such vehicles shall be unobtrusive and inoffensive as determined by the board of administration of the association. No noisy or smoky vehicles shall be operated on the property. No unlicensed motor vehicles shall be operated upon the property. Garages shall be used to park permitted vehicles, and not for storage. *[Number of hours]* hours after notice has been personally delivered to the owner by an agent of the association or placed on the windshield of the vehicle or *[number of hours]* hours after notice has been mailed to the address of the registered owner of the vehicle parked, stored, or maintained on the premises, in violation of the provisions of this condominium declaration, the owner shall be deemed to have consented to removal of the vehicle from the project. The association or its agents or employees shall then have authority to tow away and store any such vehicle, whether the vehicle shall belong to a unit owner, or his or her tenant, a member of the owner's family, or the owner's guest or invitee. Charges for towing and storage shall be paid by the unit owner responsible for the presence of such vehicle.

4. Signs. No signs shall be displayed to the public view in any units or on any portion of the property except signs approved by the board or committee appointed by the board. One only "for sale" or "for rent" sign per unit shall be allowed, provided it does not exceed *[number of square feet]* square feet in size.

5. Animals. No animals, reptiles, insects, or birds of any kind shall be raised, bred, or kept in any condominium, or in any portion of the property except for pets kept in cages or aquariums or that no more than a total of *[number of pets]* usual and ordinary household pets, such as a dog, cat, bird, etc. may be kept provided that they are not kept, bred, or maintained for any commercial purposes, and they are kept under reasonable control at all times.

Notwithstanding the foregoing, no pets may be kept on the property which are obnoxious or annoying to other unit owners. No pets shall be allowed in the common area except as may be permitted by the rules of the board of administration. No dog shall enter the common area except

while on a leash which is held by a person capable of controlling it.

After making a reasonable attempt to notify the owner, the association or any owner may cause any unleashed dog found within the common area to be removed by the association to a pound or animal shelter under the jurisdiction of the City of *[name of city]*, or the County of *[name of county]*, State of Florida by calling upon the appropriate authorities, where the owner may, on payment of all expenses, repossess the dog. Owners shall prevent their pets from soiling any portion of the common area and shall promptly clean up any mess left by their pets. Owner shall be fully responsible for any damage caused by their pets.

6. Garbage and refuse disposal. All rubbish, trash, and garbage shall be regularly removed from the property, and shall not be allowed to accumulate on the property. Trash, garbage, and other waste shall not be kept except in sanitary containers. All equipment for the storage or disposal of the materials shall be kept in a clean and sanitary condition. All equipment, garbage cans, wood piles, or storage piles shall be kept screened and concealed from view of other units, streets, and common areas. The association shall be responsible for removal of garbage from central pick up points.

7. Radio and Television Antennas. No alteration to or modification of a central radio and/or television antenna or cable television system, whichever is applicable, if developed by condominium declarant or a cable television franchisee and as maintained by the association or the franchisee, shall be permitted, and no owner may be permitted to construct and/or use and operate an external radio and/or television antenna without the consent of the board. All fees for the use of any cable television system shall be borne by the respective unit owners, and not by the association.

8. Right to lease. No owner shall be permitted to lease his or her unit for any period less than 30 days. Any lease agreement shall be required to provide that the term of the lease shall be subject in all respects to the provisions of the condominium declaration and the bylaws and to all house rules and regulations adopted by the board and that any failure of the lessee to comply with the terms of the documents shall be a default under the lease. All owners leasing or renting their units shall promptly notify the secretary of the association in writing of the names of all tenants and members of

tenant's family occupying such unit and of the address and telephone number where the owner can be reached. All such leases shall be in writing.

9. Architectural control. No building, fence, wall, obstruction, outside or exterior wiring, balcony, screen, patio, patio cover, tent, awning, carport, carport cover, improvement, or structure of any kind shall be commenced, installed, erected, painted, repainted or maintained upon the property, nor shall any alteration or improvement of any kind be made, until it has been approved in writing by the board, or by an architectural control committee appointed by the board.

Plans and specifications showing the nature, kind, shape, color, size, materials, and location of the improvements alterations, etc., shall be submitted to the board or to the architectural control committee for approval as to quality of workmanship and design and harmony of external design with existing structures, and as to location with respect to surrounding structures, topography, and finish grade elevation. No permission or approval shall be required repaint in accordance with condominium declarant's original color scheme, or to rebuild in accordance with declarant's original plans and specifications. No permission or approval shall be required to repaint in accordance with a color scheme previously approved by the board or an architectural control committee, or to rebuild in accordance with plans and specifications previously approved by the board or by the architectural control committee appointed by the board. Nothing contained herein shall be construed to limit the right of an owner to paint the interior of his or her unit with any color desired.

No landscaping of patios or yards visible from the street or from the common areas not involving the use of natural plants, grass, trees, or shrubs, and which involves the use of synthetic materials, or concrete, rock, or similar materials shall be undertaken by any owner until plans and specifications showing the nature, kind, shape, and location of the materials shall have been submitted to and approved in writing by the board or by an architectural control committee appointed by the board.

The architectural control committee shall consist of *[number of members]* members. Condominium declarant may appoint all the original members of the committee and all

replacements until the first anniversary of the issuance of the original final public report for the project. Condominium declarant reserves to itself the power to appoint a majority of the members of the committee until *[percentage]*% of all the units in the project have been sold or until the *[year]* anniversary date of the issuance of the final public report for the first phase of the project whichever occurs first. Thereafter, the board shall have the power to appoint all of the members of the architectural control committee. Members appointed to the architectural control committee by the condominium declarant need not be members of the association. A majority of the architectural control committee may designate a representative to act for it. In the event of death or resignation of any member of the committee, the successor shall be appointed by the person, entity, or group that appointed the member until declarant no longer has the right to appoint any members to the committee, and after that, the board shall appoint a successor. Neither the members of the committee nor its designated representatives shall be entitled to any compensation for services performed. In the event the committee fails to approve or disapprove plans and specifications within *[number of days]* days after the same have been submitted to it, approval will not be required and the related covenants shall be deemed to have been fully complied with.

10. Drapes. All drapes, curtains, window coverings, shutters, or blinds visible from the street or common area shall be of colors, materials, and patterns that are approved by the board or its authorized committee.

11. Clotheslines. There shall be no outside laundering or drying of clothes, except inside fenced patios with clothes to be hung below fence level so as not to be visible from streets or common areas or other units. No draping of towels, carpets or laundry over railings shall be permitted.

12. Power equipment and car maintenance. No power equipment, hobby shops, or car maintenance (other than emergency work) shall be permitted on the property except with prior written approval from the board. Approval shall not be unreasonably withheld and, in deciding whether to grant approval, the board shall consider the effects of noise, air pollution, dirt or grease, fire hazard, interference with radio or television reception, and similar objections.

13. Liability of owners for damage to common area. The

owner of each unit shall be liable to the association for all damage to the common area or improvements on it caused by the owner or any occupant of his or her unit or guest or by the owner's pets, except for that portion of the damage, if any, fully covered by insurance. Liability of an owner shall be established only after notice to the owner and hearing before the board. In the event an owner disagrees with the decision of the board on the question of liability, the owner may petition a court of law or submit the matter to arbitration pursuant to the rules of the American Arbitration Association, and the decision of the arbitrator shall be final and conclusive on the parties.

14. Basketball standards. No basketball apparatus or fixed sport apparatus attached to the exterior surface of any portion of the common area, shall be permitted on the property.

15. Parking spaces; storage. The project includes *[number of spaces]* outside parking spaces. *[Number of parking spaces]* of those are designated as "restricted common area" on the condominium plan, and are reserved for the exclusive use of the owners of the units to which they are assigned. The remaining *[number of spaces]* spaces shall be controlled by the board, which shall assign such spaces and charge fees therefore, in accordance with rules to be adopted by the board. The board shall also control the allocation and use of storage space in the garage and shall set and assess fees to be charged for their use.

16. Heavy use of electrical power. No unusually large or heavy use of electrical power shall be permitted within the project where there is a central meter or master meter serving more than one unit. In any case where a *[garage/carport]* assigned to a particular unit is supplied with power through a central meter or master meter, the owner of the unit to which the *[garage/carport]* is assigned shall not use electrical outlets in the *[garage/carport]* for running appliances, tools, power equipment, battery chargers, or any other machinery or equipment using large amounts of electrical power.

17. Lagoon. No boats or water craft shall be permitted in the lagoon portion of the recreational common area. No dogs shall be permitted in the lagoon area. No garbage or waste shall be disposed of in the lagoon area. The board may adopt additional rules and regulations for the use of the lagoon,

and shall enforce the same. The lagoon area shall mean and refer to all areas of the project occupied by bodies of water (other than swimming pool), including fresh water or salt water.

18. Joining units. An owner of horizontally adjacent units shall have the right to join the units. In furtherance of that, an owner may notify and utilize common areas between the units so long as the modifications do not affect the structural integrity of the project or impair any other owner's reasonable use of the common areas, or the utilities that may be located on the common areas, or the value of the project, subject to the prior written approval of any such modifications by the architectural control committee. All costs and expenses of the modifications, and subsequent restoration of the areas shall be borne by the owner of the units so joined. After approval of the proposed modifications by the architectural control committee and prior to commencement of work, the owner making the modification shall post a bond or bonds in an amount acceptable to the architectural control committee to protect the association and project against liens and to insure completion of the work. In joining units, an owner shall have reasonable access to other units as may be required to accomplish the modifications approved by the architectural control committee. The modifications shall not, however, change the status of units which shall continue to be treated legally as separate condominium units, each entitled to one vote, and each required to pay its separate assessment. In the event common ownership of joined units is for any reason terminated, common areas which have been altered shall be immediately restored to their original design and status.

### **§ 7:33 Declaration—Provision—Restrictions on leasing**

All leases, subleases or assignments of leases and all renewals of such agreements shall be first submitted to the Board of Directors for approval or disapproval. No record owner or owners of units in this condominium shall rent or lease more than three of their units at any one time. No lease of an owner or owners who have three units rented or leased shall be approved by the Association. No unit may be rented for more than a total of nine months in any twelve month period. However, if the Association finds during the

term of any such lease that the lessee has violated the rules and regulations of the Association or the terms and provisions of the Declaration of Condominium of *[name of condominium]* or other documents governing *[name of condominium]*, a Condominium, or that the lessee has otherwise been the cause of a nuisance or annoyance to the residents of *[name of condominium]*, then the Association may so notify lessor of its disapproval of that lessee in writing and lessor shall be precluded from extending any lease to that lessee without the written approval of the Association.

No owner shall enter into a lease, rental agreement, or other similar conveyance of use of a unit during the first twelve months of ownership of that unit.

#### NOTES TO FORM

##### Drafter's Notes

Section 718.104(5) expressly recognizes that a declaration of condominium may contain restrictions concerning the use, occupancy, and transfer of units. The Supreme Court of Florida upheld the condominium declaration provision provided in this section as a valid amendment to an existing condominium declaration, where the condominium owners were on notice when they purchased their units that the leasing provisions in the declaration could be changed by amendment, the amendment was properly enacted under the amendment provisions of the declaration, and the leasing restrictions did not violate any public policy or owners' constitutional rights. *Woodside Village Condominium Ass'n, Inc. v. Jahren*, 806 So. 2d 452 (Fla. 2002).

See also *The Woodside Covenants*, 77 Fla BJ 10.

#### § 7:34 Declaration—Provision—Restriction against transfer of condominium unit—Right of first refusal in association

In the event a unit owner shall wish to sell his or her unit and shall have received a bona fide offer for it from a prospective purchaser, the owner shall give written notice of the offer together with an executed copy of the offer to the board of administration of the association. The board, acting on behalf of all of the other unit owners, may purchase the unit at the same price and on the same terms as offered by the proposed purchaser, provided written notice of the election to purchase is given to the selling owner, and a matching down payment or deposit is provided to the selling owner during the 15-day period immediately following the delivery of the notice of the offer and a copy of it to the board.

In the event any owner shall attempt to sell his or her condominium without offering the board the right of first refusal, the sale shall be null and void. If the board fails to so notify the owner within *[number of days]* -day period, owner may sell to the prospective purchaser in accordance with the terms of the offer.

The failure or refusal of the board to exercise the right of first refusal shall not constitute a waiver of the right to purchase the unit when the owner receives any subsequent bona fide offer from a prospective purchaser, or receives an offer containing different terms and conditions.

The right of first refusal to serve shall not affect the right of any owner to subject his or her condominium unit to a deed of trust, mortgage, or other security instrument. Any first lender coming into possession of a unit pursuant to the remedies provided in a mortgage foreclosure or deed in lieu of foreclosure shall be exempt from any right of first refusal. A unit owner may sell or give his or her unit to his or her spouse, children, parents, or brothers and sisters, or to a trust created for the benefit of any one of them, without first offering to sell the unit to the board. These restrictions on transfer shall terminate automatically *[number of years]* years following the recording of this condominium declaration.

#### **§ 7:34.25 Declaration—Provision—Additions, alterations or improvements by unit owners**

No unit owner shall make any addition, alteration or improvement in or to the common elements or any unit, including but not limited to, the installation of window boxes, screens, sliding glass doors, enclosure of balcony, awnings, hot tubs, trellises, or any other change to the physical appearance of the building or balconies, terraces and patio areas without the prior written consent of the Board of Directors. The Board of Directors, where applicable, shall have the obligation to answer, in writing, any written request by a unit owner for approval of such an addition, alteration or improvement within *[specify, such as: 30]* days after such request and all additional information requested is received, and the failure to do so within the stipulated time shall constitute the consent of the Board of Directors. No unit owner shall make any addition, alteration or

improvement in or to the interior of his or her unit without obtaining all appropriate governmental permits which are necessary for such work and provided that the alteration, addition or improvement will not adversely affect the structural integrity or aesthetic appeal of the building or cause any damage to or adversely affect the common elements, other units, or the condominium property. The proposed additions, alterations and improvements by the unit owner shall be made in compliance with all laws, rules, ordinances and regulations of all governmental authorities having jurisdiction. Further, no alteration, addition or modification may in any manner affect any other unit without the prior written consent of the unit owner, which consent may be withheld in his or her sole discretion. A unit owner making or causing to be made any such additions, alterations or improvements agrees, and shall be deemed to have agreed, for that unit owner, and his or her heirs, personal representatives, successors and assigns, as appropriate, to hold the Association, the developer, and all other unit owners harmless from and to indemnify them for any liability or damage to the condominium property and expenses arising therefrom, and shall be solely responsible for the maintenance, repair and insurance thereof from and after the date of installation or construction thereof. Neither the developer nor the Association, nor any of their officers, directors, employees, agents, contractors, consultants or attorneys shall be liable to any unit owner or any other person by reason of mistake in judgment, failure to point out or correct deficiencies in any plans or other submissions, negligence, or any other misfeasance, malfeasance or nonfeasance arising out of or in connection with the approval or disapproval of any plans or submissions. Anyone submitting plans pursuant to this Section \_\_\_\_\_, by the submission of the plans, and any unit owner, by acquiring title to same, agrees not to seek damages from the developer or the Association arising out of the review of plans by the developer or the Association. Without limiting the generality of the foregoing, the Association shall not be responsible for reviewing, nor shall its review of any plans be deemed approval of, any plans from the standpoint of structural safety, soundness, workmanship, materials, usefulness, conformity with building or other codes or industry standards, or compliance with governmental requirements. Further, each unit owner

(including his or her successors and assigns) agrees to indemnify and hold the developer and the Association harmless from and against any and all costs, claims (whether rightfully or wrongfully asserted), damages, expenses or liabilities whatsoever (including, without limitation, reasonable attorneys' fees and court costs at all trial and appellate levels), arising out of any review of plans under this Section \_\_\_\_\_. The provisions of this Section \_\_\_\_\_ shall not be amended without an affirmative vote of not less than \_\_\_\_\_ % of the unit owners.

**§ 7:34.50 Declaration—Provision—Additions,  
alterations or improvements by developer  
in developer-owned units**

The developer, including its agents, assignees and employees, shall have the right, without the consent or approval of the Board of Directors or other unit owners, to make alterations, additions or improvements, structural and non-structural, interior and exterior, including units, ordinary and extraordinary, in, to and upon any unit owned by it, including, without limitation, the removal of walls, floors, ceilings and other structural portions of the improvements; however, there shall be no change to the configuration or size of any unit in any material fashion, material alteration or modification of the appurtenances to any unit or change to the percentage interest in the common elements and share of common surplus and common expenses of any unit unless the record owner of the affected unit(s) and all record owners of mortgages or other liens on the affected unit(s) shall join in the execution of the amendment and unless a majority of the record owners of all other units approve the amendment.

**§ 7:35 Declaration—Provision—Unit owners' liability  
for negligence**

Each unit owner shall be liable for the expense of any maintenance, repair or replacement rendered necessary by the owner's negligence.

In any proceeding arising because of an alleged failure of a unit owner to comply with the terms of this Declaration of Condominium, the prevailing party shall be entitled to recover the costs of the proceeding and any reasonable attorney's fees as may be awarded by the court.

**NOTES TO FORM**

**Drafter's Notes**

This provision is in Fla. Stat. Ann. § 718.303(1), allowing attorney's fees for prevailing parties in such actions. See *Gittelmancher v. Anttila*, 595 So. 2d 237 (Fla. Dist. Ct. App. 4th Dist. 1992).

**§ 7:36 Declaration—Provision—Vehicles prohibited on condominium property**

No trailer, boat, camper, truck, motorcycle, moped, or any commercial vehicle shall be permitted on any portion of the condominium property except for trucks in the process of delivering goods or as long as there is a medical necessity.

**NOTES TO FORM**

**Drafter's Notes**

A provision of this type has been held to prohibit the use of pickup trucks by condominium residents. *High Point of Delray West Condominium Ass'n Section 3, Inc. v. Nielsen*, 594 So. 2d 828 (Fla. Dist. Ct. App. 4th Dist. 1992).

**§ 7:37 Declaration—Provision—Transient use only**

Each unit shall be used solely and exclusively for transient residential purposes. No unit in this condominium shall be utilized as a primary or permanent residence and purchasers of units in this condominium shall have purchased same with intent and for the sole purpose of using unit as a vacation facility.

**§ 7:37.50 Declaration—Provision—Mandatory nonbinding arbitration of disputes**

Prior to the institution of court litigation, the parties to a dispute, as further defined below, shall petition the Division of Florida Land Sales, Condominiums and Mobile Homes of the Department of Business and Professional Regulation (the "Division") for nonbinding arbitration. Arbitration shall be conducted according to rules promulgated by the Division. The filing of a petition for arbitration shall toll the applicable statute of limitations. For purposes of this Section \_\_\_\_\_, a dispute shall be as defined pursuant to Florida Statute § 718.1255, as amended from time to time.

At the request of any party to the arbitration, the arbitrator shall issue subpoenas for the attendance of witnesses

and the production of books, records, documents, and other evidence and any party on whose behalf a subpoena is issued may apply to the court for orders compelling such attendance and production. Subpoenas shall be served and shall be enforceable in the manner provided by the Florida Rules of Civil Procedure. Discovery may in the discretion of the arbitrator be permitted in the manner provided by the Florida Rules of Civil Procedure.

The arbitration decision shall be presented to the parties in writing. An arbitration decision shall be final if a complaint for a trial de novo is not filed within 30 days in a court of competent jurisdiction in which the condominium is located. The right to file for a trial de novo entities the parties to file a complaint in the appropriate trial court for a judicial resolution of the dispute. The prevailing party may be awarded reasonable attorney's fees, the costs of the arbitration, or both, in an amount determined in the discretion of the arbitrator.

The party who files a complaint for a trial de novo shall be assessed the other party's arbitration costs, court costs, and other reasonable costs, including attorneys' fees, investigation expenses, and expenses for expert or other testimony or evidence incurred after the arbitration hearing if the judgment upon the trial de novo is not more favorable than the arbitration decision. If the judgment is more favorable, the party who filed a complaint for trial de novo shall be awarded reasonable court costs and attorneys' fees.

The decision of an arbitrator shall be final; however, such a decision shall not be deemed final agency action. Nothing in this provision shall be construed to foreclose parties from proceeding in a trial de novo. If such judicial proceedings are initiated, the final decision of the arbitrator shall be admissible in evidence in the trial de novo.

Any party to an arbitration proceeding may enforce an arbitration award by filing a petition in a court of competent jurisdiction in which the condominium is located. A petition may not be granted unless the time for appeal by filing of a complaint for trial de novo has expired. If a complaint for a trial de novo has been filed, a petition may not be granted with respect to an arbitration award that has been stayed. If the petition is granted, the petitioner may recover reasonable attorney's fees and costs incurred in enforcing the arbitration award.

**NOTES TO FORM****Drafter's Notes**

This provision was drafted to comply with the provisions of the Florida Condominium Act that relate to mandatory nonbinding arbitration. See Fla. Stat. § 718.1255(4).

**§ 7:38 Articles of incorporation of homeowner's association—Not-for-profit corporation****ARTICLES OF INCORPORATION OF [name of association]**

We, the undersigned natural persons competent to contract, acting as incorporators of a corporation not for profit under Chapter 617 of the Florida Statutes, adopt the following articles of incorporation.

**ARTICLE I. NAME**

The name of this corporation is *[name of corporation]*.

**ARTICLE II. PURPOSES**

The purposes and objects of the corporation are such as are authorized under Chapter 617 of the Florida Statutes and include providing for the maintenance, preservation, administration, and management of *[name of corporation]*, a condominium under the Florida Condominium Act pursuant to a declaration of condominium executed on *[date of execution]* and recorded on *[date of recording]*, in the office of the Clerk of the Circuit Court of the County of *[name of county]*, State of Florida, in *[volume and book]*, beginning at page *[number of page]*.

The corporation is organized and operated solely for administrative and managerial purposes. It is not intended that the corporation show any net earnings, but no part of any net earnings that do occur shall inure to the benefit of any private member. If, in any taxable year, the net income of the corporation from all sources other than casualty insurance proceeds and other nonrecurring items exceeds the sum of: (1) total common expenses for which payment has been made or liability incurred within the taxable year; and (2) reasonable reserves for common expenses and other liabilities in the next succeeding taxable year, such excess shall be held by the corporation and used to reduce the amount of assessments that would otherwise be required in the following year. For such purposes, each unit owner will

be credited with the portion of any excess that is proportionate to his or her interest in the common elements of the condominium.

### ARTICLE III. MEMBERS

Each condominium unit shall have appurtenant to it a membership in the corporation, which membership shall be held by the person or entity, or in common by the persons or entities owning such unit, except that no person or entity holding title to a unit as security for performance of an obligation shall acquire the membership appurtenant to the unit by virtue of the title ownership. In no event may any membership be severed from the unit to which it is appurtenant.

Each membership in the corporation shall entitle the holder or holders of it to exercise that proportion of the total voting power of the corporation corresponding to the proportionate undivided interest in the common elements appurtenant to the unit to which the membership corresponds, as established in the declaration.

### ARTICLE IV. INITIAL REGISTERED OFFICE AND AGENT

The address of the initial registered office of the corporation is *[address of office]*.

The name of the initial registered agent at the office is: *[name of agent]*.

### ARTICLE V. INCORPORATORS

The names and residences of the incorporators of the corporation are as follows:

Name	Residence
<i>[name]</i>	<i>[address]</i>
<i>[name]</i>	<i>[address]</i>
<i>[name]</i>	<i>[address]</i>

### ARTICLE VI. DIRECTORS

The number of persons constituting the first board of directors is *[number of directors]*. The names and addresses of the directors who are to serve until the first annual meeting of the members or until their successors are elected and qualified are:

Name [name]	Address [address]
[name]	[address]
[name]	[address]

At the first annual meeting, the members shall elect from among the members of the corporation [*number of directors 1*] directors for a term of one year each, [*number of directors 2*] directors for a term of two years each, and [*number of directors 3*] for a term of three years each; at each annual meeting after that the members shall elect from among the membership [*number of directors*] directors for a term of three years each.

#### ARTICLE VII. OFFICERS

The affairs of the corporation are to be managed by a president, vice president, secretary, assistant secretary, and treasurer who will be accountable to the board of administration. Officers will be elected annually in the manner set forth in the bylaws.

The names of the officers who are to serve until the first election of officers are as follows: [*list names and titles*].

#### ARTICLE VIII. BYLAWS

Bylaws regulating operation of the corporation are annexed to the declaration. The bylaws may be amended by the first board of directors until the first annual meeting of members. Thereafter, the bylaws shall be amended by the members in the manner set forth in the bylaws.

#### ARTICLE IX. POWERS OF CORPORATION

To promote the health, safety, and welfare of the residents of [*name of condominium*], the corporation may:

- (1) exercise all of the powers and perform all of the duties of the association as set forth in the declaration of condominium and in the bylaws [*attached thereto*], as those documents may from time to time be amended;
- (2) determine, levy, collect, and enforce payment by any lawful means of all assessments for common charges, and pay such common charges as the same become due;
- (3) engage the services of a professional corporate management agent and delegate to the agent any of the powers or duties granted to the association of unit owners

under the declaration or bylaws other than the power to engage or discharge the agent; the power to adopt, amend and repeal the provisions of it, or of the declaration, bylaws, or rules and regulations of the condominium; and *[specify]*;

(4) take and hold by lease, gift, purchase, devise or bequest any property, real or personal, including any unit in the condominium, borrow money and mortgage any property to finance the acquisition of it on the vote of *[percentage]*% of members, and transfer, lease, and convey any such property;

(5) dedicate or otherwise transfer all or any portion of the common areas to any municipality, public agency, authority or utility on the approval of *[percentage]*% of the members; and

(6) have and exercise any and all rights, privileges and powers which may be held or exercised by corporations not for profit generally under Chapter 617 of the Florida Statutes, or by associations of unit owners under the Condominium Act.

#### ARTICLE X. DISSOLUTION

This corporation may be dissolved at any time with the written consent of all the members to it. On dissolution, the assets of the corporation shall be dedicated to an appropriate municipality, public agency or authority to be used for purposes similar to those for which the corporation is organized. In the event such dedication is not accepted, such assets shall be conveyed or assigned to any nonprofit corporation, association, or other organization devoted to purposes similar to those for which this corporation is organized.

In witness, we, the undersigned, being the incorporators of this corporation, have, for the purpose of forming this non-profit corporation under the laws of the State of Florida, executed these articles of incorporation on *[date of execution]*.

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*[Signatures]*

*[Acknowledgments]*

**NOTES TO FORM****Drafter's Notes**

Fla. Stat. Ann. §§ 617.01011 et seq. sets forth the provisions for amending articles of incorporation.

The association must be a corporation, either for profit or not for profit, under Fla. Stat. Ann. § 718.111(1). The declaration must include, or have attached to it as an exhibit, the document or documents creating the association. Fla. Stat. Ann. § 718.104(4)(k). Since the association for a residential condominium will not ordinarily show a profit, a nonprofit corporation is often used. The formal requirements regarding filing articles of incorporation are now set forth at Fla. Stat. Ann. § 617.01201, which requirements are discussed in Social and Recreation Organizations (Ch 41).

Fla. Stat. Ann. § 617.0202 sets forth the required content of the articles of incorporation.

**Tax Notes**

Formation under a not-for-profit act does not mean a corporation is exempt for federal tax purposes. Only an organization specifically defined in the Internal Revenue Code is tax exempt and then only if the organization continuously meets the Code requirements.

Condominium associations are subject to the same rules. Attempts have been made to class these associations as social clubs, social welfare organization, civic organizations, and other exempt organizations. The only successful classification, however, has been as a homeowners association under I.R.C. § 528. Some condominiums achieve the same effect by carefully balancing income with expenses so the result is the same as if the organization were tax-exempt. Those associations that maintain reserves, however, usually find it necessary to meet the Code requirements in order to avoid taxation.

The tax aspects of homeowners associations, including the qualifications that must be met, are discussed at § 7:24. Only qualified residential associations can be tax-exempt.

For forms and materials as to formation of stock corporations, see Business Corporations (Ch 28).

**Article III****Drafter's Notes**

Fla. Stat. Ann. § 718.107(1) provides that the proportionate undivided interest in the common elements assigned to each unit is inseparable from that unit. Since no particular manner of voting is prescribed by statute, the voting rights provided for in this article are merely suggestive.

**Article X****Drafter's Notes**

As to termination of a condominium, see § 7:9.

**Research References***Legal Encyclopedias*

Fla. Jur. 2d, For discussion of nonprofit corporations generally, see Business Relationships § 274.

**§ 7:39 Bylaws****BYLAWS OF [*name of condominium*], A CONDOMINIUM PURSUANT TO THE FLORIDA CONDOMINIUM ACT****ARTICLE ONE. PLAN OF UNIT OWNERSHIP**

Section One. Unit ownership. The condominium, located at [*address of condominium*], in the City of [*name of city*], County of [*name of county*], State of Florida, and known as [*name of condominium*], was submitted to the provisions of Chapter 718 of the Condominium Act, by declaration recorded simultaneously with these bylaws in the office of the County recording officer of the County of [*name of county*], State of Florida.

Section Two. Applicability to property. The provisions of these bylaws are applicable to the condominium, which term includes the land, the building(s) and all other improvements on it, all easements, rights, and appurtenances belonging to it, and all other property, personal or mixed, intended for use in connection with it.

Section Three. Applicability to persons. All present and future owners, lessees, and mortgagees, their employees, and any other person who may use the facilities of the condominium in any manner will be subject to these bylaws, relevant unit deeds, and rules and regulations pertaining to the use and operation of the condominium property attached as [*identification of exhibit*] and incorporated by reference.

Acquisition, rental, or occupancy of any unit in the condominium will be sufficient to signify acceptance and ratification of the provisions of the above instruments, and an agreement to comply with them.

Section Four. Office. The office of the condominium and of the board of administration shall be located at [*address of office*] in the City of [*name of city*], County of [*name of county*], State of Florida.

**ARTICLE TWO. BOARD OF ADMINISTRATION**

Section One. The association and board of administration. The affairs of the condominium shall be administered and managed by an association of unit owners organized as a Florida corporation not for profit, having the name [*name of association*] and referred to below as the "association." All power and authority of the association shall be exercised

through its board of directors, to be known as the “board of administration,” consisting of [*number of members*] members.

Section Two. Composition of board of administration. Members of the board of administration shall be designated by [*specify*], referred to below as “developer,” or elected by unit owners as follows:

(a) Until [*percentage*]% of the units that will eventually be operated by the association are owned by unit owners other than developer, and, after that, until successors shall have been elected by unit owners, the board of administration shall consist of the officers and directors of developer as developer shall from time to time designate.

(b) Then, in an election by unit owners as provided by law and in these bylaws, unit owners other than developer shall elect [*number of members*] members of the board, and an equal number of the members previously designated by developer shall resign.

(c) The unit owners’ representation on the board specified above shall continue until an election, as provided by law and in these bylaws, after the earliest of: (1) the date three years after sales by developer of 50% of the units in the condominium have closed; (2) the date three months after sales by developer of 90% of the units in the condominium have closed; or (3) the date when all the units have been completed, some of them have been sold, and no unsold units are being offered for sale by developer in the ordinary course of business. At such election, and in all subsequent elections, the unit owners other than developer shall elect the greater of: (1) a majority of the members of the board; or (2) that number of members corresponding to the aggregate voting power of unit owners other than developer.

(d) Developer shall be entitled to elect at least one member of the board for as long as developer holds any units in the condominium for sale in the ordinary course of business.

Persons elected to the board of administration by unit owners other than developer shall be owners, co-owners, spouses of owners, or mortgagees of units, or, in the case of corporate owners or mortgagees of units, officers, directors, shareholders, or employees of the corporations.

Section Three. Powers and duties. The board of administra-

tion will have the powers and duties necessary for the administration of the affairs of the condominium, and may do all acts and things as are not by law, by the declaration, or by these bylaws directed to be exercised and done by the owners. The powers and duties to be exercised by the board of administration include, but are not be limited to, the following:

- (a) care, upkeep, maintenance, and operation of the common elements;
- (b) determination, assessment, and collection of funds to defray common expenses of the condominium;
- (c) entering into contracts deemed necessary or appropriate in furtherance of the interests of unit owners generally;
- (d) maintenance of detailed, written, and accurate records of receipts and disbursements arising from the operation of the property, which records, together with vouchers accrediting entries made therein, will be made available for examination by unit owners at convenient hours on working days;
- (e) authorization and prosecution of suits to foreclose liens for nonpayment of common charges, or to recover money judgments for unpaid common charges, on behalf of the association;
- (f) authorization and prosecution of actions or proceedings on behalf of two or more unit owners concerning a matter related to the common elements of two or more units;
- (g) employment and dismissal of personnel necessary or appropriate for the maintenance and operation of the property, the common elements, and the restricted common elements;
- (h) adoption and amendment of rules and regulations, not inconsistent with these bylaws, covering the details of operation and use of the property;
- (i) establishment of bank accounts in the name of the condominium, and authorization of signatories therefor;
- (j) purchasing, leasing, or otherwise acquiring in the name of the board of administration, or its designee, corporate or otherwise, on behalf of the unit owners, units offered

- for sale, lease, or surrender by their owners to the board of administration;
- (k) purchasing units at foreclosure or other judicial or trustee's sale in the name of the board of administration or its designee, corporate or otherwise, on behalf of all unit owners;
  - (l) selling, leasing, encumbering, or otherwise dealing with units acquired by, and subleasing units leased by, the board of administration or its designee, corporate or otherwise, on behalf of the council of owners;
  - (m) organizing corporations to act as designees of the board of administration in acquiring title to or leasing units on behalf of all unit owners;
  - (n) leasing of stores, professional offices, and parking spaces, issuance of swimming pool memberships, and granting of vending machine licenses;
  - (o) procuring of insurance for the condominium property, including the units, as set forth here;
  - (p) contracting for repairs of and additions and improvements to the property, and for repairs to and restoration of the property in accordance with the provisions of these bylaws, after damage or destruction by fire or other casualty, or as a result of condemnation or eminent domain proceedings; and
  - (q) employment of a managing agent and/or manager at reasonable compensation to perform duties authorized by the board of administration. However, the board will not delegate to any managing agent or manager any of the powers set forth in subsections (b), (e), (f), (h), (i), (k), (l), and (m) of this section.

Section Four. Election and terms of office. At the first annual meeting of unit owners, the terms of office of the board of administration will be fixed as follows: the terms of office of [*number of members 1*] members will be set at three years; the terms of office of [*number of members 2*] members will be set at two years; and the terms of office of [*number of members 3*] members will be set at one year. At the expiration of the initial term of office of each board member, his or her successor will be elected to serve for a term of three years. Board members will hold office until their successors have been elected and hold their first meeting.

Section Five. Vacancies. Vacancies in the board of administration caused by any reason other than the removal of a board member by a vote of the unit owners will be filled by vote of the majority of the remaining board members, even though they may constitute less than a quorum. Each person so elected will hold office until a successor is elected at the next annual meeting of unit owners.

Section Six. Removal of board members. At any regular or special meeting duly called, any one or more members of the board of administration may be removed with or without cause by a majority of unit owners, and a successor may then and there be elected to fill the vacancy so created. Any board member so elected will serve for the unexpired term of the member's predecessor in office. Any board member whose removal has been proposed by the unit owners will be given an opportunity to be heard at the meeting at which a vote is to be taken on the issue of his or her removal.

Section Seven. Organizational meeting. The first meeting of the board of administration will be held within *[number of days]* days after the first annual meeting of the unit owners at which board members are elected and at a place as may be fixed by the board. No notice will be necessary to the newly elected board of administration in order to legally constitute the meeting, provided a majority of the board is present.

Section Eight. Regular meetings. Regular meetings of the board of administration may be held at such times and places as are determined by the board. However, at least *[number of meetings]* meetings will be held during each *[calendar/fiscal]* year. Notice of each regular meeting of the board will be given to each board member personally, or by mail, telephone, or telegraph, at least *[number of days]* days prior to the date set for the meeting. Notice of any meeting in which assessments against unit owners are to be considered for any reason shall specifically contain a statement that assessments will be considered and the nature of any such assessments.

Section Nine. Special meetings. Special meetings of the board of administration may be called by the president, and will be called by the president or secretary on the written request of at least *[number of board members]* board members, on *[number of days]* days' notice to each board

member, given personally, or by mail, telephone, or telegraph. Any notice will state the time, place, and purpose of the meeting.

Section Ten. Meetings open to unit owners. All meetings of the board of administration shall be open to all unit owners. Notice of each meeting will be posted at *[location of posting]* at least 48 hours before the meeting, except in the case of emergency meetings.

Section Eleven. Waiver of notice. Any board member may at any time waive notice of any meeting of the board of administration in writing, and any written waiver will be deemed equivalent to the giving of the notice required in this agreement. Attendance by any board member of any meeting of the board will constitute a waiver by that member of notice of the time and place thereof. If all board members are present at any meeting of the board, no notice will be required, and any business may be transacted at any such meeting.

Section Twelve. Quorum; adjournments. At all meetings of the board of administration, a majority of the board will constitute a quorum for the transaction of business, and the acts of a majority of members present at a meeting at which a quorum is present will constitute the acts of the board of administration. If at any meeting of the board of administration less than a quorum is present, a majority of those present may adjourn the meeting. At any such adjourned meeting at which a quorum is present, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

Section Thirteen. Minutes. Minutes shall be taken at all meetings of the board of administration. Copies of the minutes shall be available for inspection at the office of the association by unit owners and board members at all reasonable times.

Section Fourteen. Compensation.

Compensation of members of the board of administration will be *[\$/dollar amount]* per year.

*[Alternative paragraph]*

No member of the board of administration will receive compensation from the condominium for acting as such, but by resolution of the board of administration, a fixed fee and

expenses of attendance may be allowed for attendance at each regular and special meeting. Nothing contained in this agreement will be construed to preclude any board member from serving the unit owners or the board of administration in any other capacity and receiving compensation for those services.

Section Fifteen. Liability of board of administration. Members of the board of administration will not be liable to unit owners for mistakes in judgment, for negligence, or otherwise, except for their own willful misconduct or bad faith. Nor will members of the board of administration be personally liable with respect to any contract made by them on behalf of the unit owners, and the owners will indemnify the board of administration and each member of it against all contractual liability to third parties arising out of contracts made by the board of administration on behalf of the condominium. However, such indemnification will not extend to any contract made in bad faith or contrary to the provisions of the declaration or of these bylaws. The liability of each unit owner arising out of any contract made by the board of administration or out of the indemnification of the members of the board of administration will be the proportion of the total liability that the unit owner's interest in the common elements bears to the interests of all unit owners in the common elements. Every agreement made by the board of administration or by any managing agent or manager employed by the board of administration on behalf of the unit owners will provide that the members of the board of administration, or the managing agent or manager, as the case may be, are acting only as agents for the unit owners, and will have no personal liability under the agreement except as unit owners. Agreements will further provide that each unit owner's liability under the agreement is limited to the proportion of the total liability under it that his or her interest in the common elements bears to the interests of all unit owners in the common elements.

### ARTICLE THREE. UNIT OWNERS

Section One. Membership. Each unit owner will, automatically on becoming an owner, become a member of the association, sometimes called the unit owners, and will remain a member until such time as his or her ownership ceases, at which time his or her membership in the association will likewise cease.

Section Two. Annual meetings. Within *[number of days]* days after units representing *[percentage]%* or more in common interest have been sold by developer and paid for, developer will notify all unit owners of it, and the first annual meeting of the unit owners will be called by the president to be held within *[number of days]* days after that. At the meeting, officers and directors of developer holding office as members of the board of administration will resign, and all unit owners, including developer, will elect a new board of administration. After that, annual meetings of the unit owners will be held on the *[day]* of *[month]* of each succeeding year. At such meetings there will be elected by ballot of the owners a board of administration in accordance with the requirements of Section Three of Article Two of these bylaws. The owners may also transact any other business of the condominium as may properly come before the meeting.

Section Three. Special meetings. The president may, and will if directed by resolution of the board of administration or by petition signed and presented to the secretary by unit owners owning a total of at least *[percentage]%* of the common interest, call a special meeting of the unit owners. The notice of any special meeting will state the time and place of the meeting, and the intended purpose. No business will be transacted at a special meeting except as stated in the notice unless by consent of *[percentage]%* of the common interest of owners present, either in person or by proxy.

Section Four. Place of meetings. Meetings of unit owners will be held at the principal office of the condominium, or at any other suitable place convenient to the owners as may be designated by the board of administration.

Section Five. Notice of meetings. It will be the duty of the secretary to mail a notice of each annual or special meeting, stating its purpose, time, and place, to each unit owner, at the address last furnished the association, at least *[number of days]* days prior to the meeting. The mailing of a notice in the manner provided in this section will be considered notice served. Notice of the annual meeting shall be posted at *[location of posting]* at least *[number of days]* days prior to the annual meeting.

Section Six. Quorum; majority of unit owners defined. At all meetings of the council, a majority of unit owners will constitute a quorum for the transaction of business, and the

acts of those unit owners entitled to exercise 51% or more of the total voting power of those unit owners present at a meeting at which a quorum is present will bind all unit owners for all purposes except those for which the approval of a higher percentage is required by these bylaws, by the declaration, or by law. If, at any meeting of unit owners, there is less than a quorum present, a majority of those owners entitled to exercise 51% of the total voting power of those unit owners present may adjourn the meeting to a time not less than */number of hours* hours from the time the original meeting was called. At any such subsequent meeting at which a quorum is present, any business which might have been transacted at the meeting as originally called may be transacted without further notice. As used in these bylaws, the term "majority of unit owners" will mean those owners holding 51% in the aggregate in both common interest and in the number of units.

Section Seven. Order of business. The order of business at all meetings of the unit owners will be as follows:

- (a) roll call;
- (b) proof of notice of meeting or waiver of notice;
- (c) reading of minutes of preceding meeting;
- (d) reports of officers;
- (e) report of board of administration;
- (f) reports of committees;
- (g) election of inspectors of election (when appropriate);
- (h) election of members of board of administration (when required);
- (i) unfinished business; and
- (j) new business.

Section Eight. Voting. The owner or owners of each unit, or some person appointed by the owner or owners to act as proxy on his or her or their behalf, will be entitled to cast the vote appurtenant to each such unit at all meetings of the unit owners. The appointment of any proxy will be made in a writing filed with the secretary, and will be revocable at any time by notice in writing to the secretary. Voting will be on a percentage basis. The percentage of the vote to which an owner is entitled will be the percentage or the sum of the

percentages assigned to the unit or units owned by him or her as set forth in the declaration.

Section Nine. Minutes. Minutes shall be taken at all meetings of unit owners. Copies of the minutes shall be available for inspection at the office of the association by unit owners and members of the board of administration at all reasonable times.

Section Ten. Title to units. Title to units may be acquired and held in the name of an individual, in the name of two or more persons as joint tenants, tenants-in-common, or any other joint estate recognized under Florida law, or in the name of a corporation, a partnership, or a fiduciary.

#### ARTICLE FOUR. OFFICERS

Section One. Designation. The principal officers of the association will be a president, a vice president, a secretary, and a treasurer, all of whom will be elected by *[and from]* the board of administration. The board may also appoint *[name of other titles]* and any other officers as in its judgment may be necessary.

Section Two. Election of officers. The officers of the association will be elected annually by the board of administration at the organizational meeting of each new board, and will hold office at the pleasure of the board.

Section Three. Removal of officers. On the affirmative vote of a majority of the members of the board of administration, any officer may be removed, with or without cause, and his or her successor may be elected at any regular meeting of the board of administration, or at any special meeting of the board called for that purpose.

Section Four. President. The president will be the chief executive officer of the association. He or she will preside at all meetings of the board of administration and of unit owners. He or she will have all general powers and duties that are incident to the office of president of a not-for-profit corporation organized in Florida, including, but not limited to the power to appoint committees from among the owners as he or she may deem appropriate to assist in the conduct of the affairs of the association.

Section Five. Vice president. The vice president shall take the place of the president and perform his or her duties whenever the president is absent or unable to act. If neither

the president nor the vice president is able to act, the board of administration will appoint some other member of the board to do so on an interim basis. The vice president will also perform any other duties as may from time to time be imposed on him or her by the board of administration.

Section Six. Secretary. The secretary shall keep the minutes of all meetings of the board of administration and of the unit owners; he or she will have charge of the books and papers as the board of administration may determine; and he or she will, in general, perform all duties incident to the office of secretary of a corporation not for profit organized under the laws of the State of Florida.

Section Seven. Treasurer. The treasurer shall have responsibility for the funds and securities of the condominium, for keeping full and accurate accounts showing all receipts and disbursements, and for the preparation of all necessary financial statements. He or she shall be responsible for the deposit of all moneys and other valuable effects in the name of the board of administration or managing agent, in the depositories as may from time to time be designated by the board of administration, and will, in general, perform all duties incident to the office of treasurer of a corporation not for profit organized under the laws of the State of Florida.

Section Eight. Compensation.

The salaries of all officers will be fixed by the board of administration, and the fact that any officer is a member of the board will not preclude him or her from receiving his or her salary or from voting on any resolution providing for the same.

*[Alternative Paragraph]*

No officer will receive any compensation from the association for acting as such. However, nothing contained herein will be construed to preclude any officer from serving the association in any other capacity, and receiving compensation therefor.

## ARTICLE FIVE. OPERATION OF PROPERTY

Section One. Determination of common charges. The board of administration will from time to time, and at least annually, prepare a budget for the condominium. This budget will include projections of common expenses, common revenues (from sources other than assessments of unit owners), the

amount of common charges required to meet the excess of the former over the latter, and an allocation and assessment of the common charges against unit owners as provided in the declaration.

As used in these bylaws, the term “common expenses” or “common charges” shall mean expenses or charges for the association and condominium for which unit owners are proportionately liable, and shall include, but shall not be limited to the following:

- (a) all expenses of administration of the association;
- (b) management fees;
- (c) all expenses for maintenance, repair, and replacement of the common elements;
- (d) rent for recreational and other commonly used facilities;
- (e) taxes on association property;
- (f) taxes on leased areas;
- (g) insurance premiums on all policies of insurance obtained by the board of administration, managing agent, or manager;
- (h) security expenses;
- (i) working capital reserve;
- (j) general operating reserve;
- (k) repair and replacement reserve;
- (l) reserve for deficits accrued in prior years;
- (m) reserve for acquisition or lease of units, the owners of which have elected to sell or lease the same, or that may become available at a trustee’s sale or at foreclosure or other judicial sale;
- (n) utility expenses for water and gas, and related sewer rents;
- (o) utility expenses for electricity serving the common elements, other than leased portions of it which will be separately metered;
- (p) all other amounts that the owners may agree upon or that the board of administration may deem necessary or appropriate for the operation, administration, and maintenance of the condominium; and

- (q) all other amounts designated common expenses by the declaration, by these bylaws, or by law.

The board of administration will furnish copies of the budget on which the allocations and assessments of common charges are based to all unit owners and mortgagees and trust deed beneficiaries.

Section Two. Collection of assessments. The board of administration will assess common charges against the unit owners from time to time, and at least annually, and will advise each unit owner in writing of the amount of common charges payable by him or her. If any common charge remains unpaid for more than thirty (30) days from the date due, the board of administration will take prompt action to collect the same.

Section Three. Common surplus. If in any taxable year, the net income of the unit owners from assessments and all other sources except casualty insurance proceeds and other nonrecurring items exceeds the sum of: (a) total common expenses for which payment has been made or liability incurred within the taxable year; and (b) reasonable reserves for common expenses in the next succeeding taxable year as may be determined by the board of administration, the excess will be returned forthwith to unit owners, the share of each being in proportion to the amount of assessments for common expenses paid by him or her within the taxable year.

Section Four. Liability for assessments. All unit owners are obligated to pay the common charges assessed by the board of administration at such times as the board may determine. No unit owner may exempt himself or herself from liability for any assessment for common charges by waiver of the use or enjoyment of any of the common elements or by abandonment of his or her unit. However, no unit owner will be liable for any assessment for common charges against his or her unit subsequent to a sale, transfer, or other conveyance by him or her of the unit made in accordance with the provisions of Section Three of Article Seven of these bylaws. Moreover, any owner of an unit that is free and clear of all liens and encumbrances other than a first mortgage or deed of trust and any lien for unpaid common charges, may, subject to the provisions of these bylaws, convey the unit to the board of administration or its

designee, corporate or otherwise, as grantee on behalf of all other unit owners and such conveyance will exempt the owner from liability for any common charges assessed thereafter. On the voluntary sale or conveyance of an unit, all unpaid assessments against the seller for common expenses shall first be paid from the proceeds of sale or by the purchaser in preference to any other assessments or charges of whatever nature except: (a) assessments, liens, and charges in favor of the state or any political subdivision thereof for taxes past due and unpaid on the unit; or (b) amounts due under mortgage or deed of trust instruments duly recorded. Any payment by a purchaser will be without prejudice to the right of the purchaser to recover over from his or her seller any amounts for which he or she was not liable under his or her contract of sale. Additionally, any purchaser or mortgagee or trust deed beneficiary will be entitled to a statement from the board of administration setting forth the amount of unpaid common charges due the association from any seller, and will be entitled to rely on the statement. The purchaser, mortgagee, or beneficiary will not be liable, nor will the subject unit be subject to a lien, for any unpaid common charges in excess of the amount set forth in the statement. A mortgagee, trust deed beneficiary, or other purchaser of an unit at a trustee's sale, or at a foreclosure or other judicial sale, will not be liable for nonpayment of any common charges assessed prior to the date of the sale, and the unit will not be subject to a lien for nonpayment of the charges.

Section Five. Default in payment of common charges. In the event an unit owner fails, for thirty (30) days following the due date, to pay to the board of administration the common charges assessed against his or her unit, the unit owner will be deemed in default, and will be obligated to pay interest at the legal rate on the common charges from the due date thereof, together with all expenses, including reasonable attorney's fees, incurred by the board of administration in any proceeding brought to collect the same, or to foreclose the lien for nonpayment thereof.

Section Six. Foreclosure of liens for unpaid common charges. It will be the right and duty of the board of administration to attempt to recover unpaid common charges, together with interest, and expenses of the proceeding, including reasonable attorney's fees, by an action

brought against any unit owner in default on his or her obligation to pay the same, or by foreclosure of the lien on any unit in respect to which the default has occurred. Any such lien may be foreclosed in the same manner as a mortgage on real property. In any foreclosure, the unit owner will be required to pay reasonable rental for the unit for the period beginning on the date notice of default is first served and ending on the date of sale; and the board of administration, as plaintiff in the foreclosure, will be entitled to the appointment of a receiver to collect the same. The board of administration, acting on behalf of all unit owners as the unit owners, will have power to bid on and purchase any such unit, and to acquire, hold, lease, encumber, convey, or otherwise deal with it. Suit to recover a money judgment for unpaid common charges will be maintainable without foreclosing or waiving the lien securing the same, and foreclosure will be maintainable notwithstanding the pendency of a suit to recover a money judgment.

Section Seven. Maintenance and repair.

(a) Each owner will promptly perform all maintenance and repair work within his or her own unit, which if omitted would affect any common element, any portion of the property belonging to other owners, or the condominium as a whole, being expressly responsible for all damages and liabilities that any failure to repair or maintain may cause.

(b) All maintenance, repairs, and replacements to the common elements, whether located inside or outside individual units, will be the responsibility of the board of administration and will be charged to all unit owners as common expenses unless the maintenance, repairs, or replacements are necessitated by the negligence or misconduct of individual unit owners, in which case the expenses will be the responsibility of and will be charged to the individual unit owners.

(c) Each unit owner will be responsible for and reimburse the association for any expenditures incurred in repairing or replacing any common element damaged through his or her fault.

Section Eight. Uses of units.

(a) Units will be occupied and used by their respective owners only as private dwellings for the owner, his or her family, tenants, and social guests, and for no other purpose whatsoever.

(b) No portion of an unit other than the entire unit may

be rented, and no unit may be rented for hotel or transient purposes.

(c) Residents will exercise extreme care about making noises or playing music which may disturb other residents. Residents keeping domestic animals must abide by municipal sanitary regulations.

(d) Hanging, cleaning, or beating garments, rugs, etc., from or on the windows, terraces, or facades of the building is prohibited.

(e) Throwing garbage or trash outside of disposal installations provided for such purposes is prohibited.

(f) No owner, resident, or lessee will install wiring for any electrical or telephone installation, television antenna, air-conditioning unit, or machine of any kind on the exterior of the project which protrudes through the walls or the roof of the project except as authorized by *[the board of administration/a majority of unit owners]*.

(g) Owners will not take or cause to be taken within their units any action that would jeopardize the soundness or safety of any part of the condominium property or impair any easement or right appurtenant to it or affect the common elements without the unanimous consent of all unit owners who might be affected.

(h) Owners will not permit anything to be done or kept in their units that would increase the rate of fire insurance on it or on the condominium as a whole.

(i) No immoral, improper, offensive, or unlawful uses will be made of condominium property or any part of it, and each unit owner, at his or her own expense, will comply with, perform, and fully satisfy all city, state, and federal laws, statutes, ordinances, regulations, orders, or requirements affecting his or her unit.

Section Nine. Modifications by unit owners. No unit owner will make any structural addition or alteration in or to his or her unit without the prior written consent of the board of administration. On request by any unit owner for approval of a proposed addition or alteration, the board of administration will answer the same within *[number of days]* days after receipt of it, and failure to do so within the stipulated time will constitute a consent. Any application to any governmental authority for a permit to make any addition or alteration in or to any unit will be executed by the board of administra-

tion only. However, neither the board nor any member of the board will be liable to any contractor, subcontractor, or workers, or to any person claiming injury to person or property as a result of the addition or alteration or the construction of it. The provisions of this section will not apply to units owned by developer until the units have been initially sold by developer and paid for.

Section Ten. Right of entry. Each unit owner will grant to the manager, managing agent, or other person or persons authorized by the board of administration, a right of entry to correct any condition threatening his or her unit or originating in his or her unit and threatening another unit or a common element; to install, alter, or repair mechanical or electrical services or other common elements located in his or her unit or elsewhere; and to correct any condition which violates the provisions of any mortgage secured by, or deed of trust covering, any other unit. Requests for entry will be made in advance and will be scheduled for times convenient to the owner except that in case of emergencies, right of entry will be immediate, and will exist whether the unit owner is present at the time or not.

Section Eleven. Use of common elements.

(a) Unit owners will not place or cause to be placed in the lobbies, vestibules, stairways, elevators, and other condominium areas and facilities of a similar nature comprising either general or limited common elements, any furniture, packages, or objects of any kind. The areas (other than lobbies) will be used for no other purpose than for normal transit through them.

(b) The condominium will have [*number of elevators*] elevators, [*number of elevators 2*] devoted to the transportation of the owners and their guests, and [*number of elevators 3*] for freight service. Unit owners will require their tradespeople to utilize exclusively the elevators designated for freight service when transporting packages, merchandise, or other objects that may adversely affect the comfort and well-being of passengers in elevators devoted to the transportation of owners, residents, and guests.

Section Twelve. Modifications by board of administration. Any additions or alterations in or to the common elements costing *[\$/dollar amount]* or less may be made by the board of administration without approval of the unit owners or of

unit mortgagees or trust deed beneficiaries, and the costs of it will be treated as common expenses. Whenever, in the judgment of the board of administration, the common elements require additions or alterations costing in excess of *[\$/dollar amount]*, the making of the additions or alterations will require approval by a majority of unit owners, and by those mortgagees holding first mortgages, or those beneficiaries under deeds of trust, on *[number of units]* or more units. After approval has been obtained, the board of administration will proceed with the additions or alterations, and the costs will be treated as common expenses.

Section Thirteen. Repair or reconstruction. In the event of any damage to or destruction of any improvements on the condominium property or any part thereof, including any unit therein, but excluding furniture, fixtures, decorations, equipment, or personal property installed or placed therein by unit owners or to any common element or elements or any part of them, the improvements or common elements will be promptly repaired and restored by the board of administration using the proceeds of any insurance procured and maintained as provided in this agreement. If the proceeds are inadequate to cover the cost of repair and restoration, unit owners directly affected by the damage or destruction will be assessed on an equitable basis according to the benefit to be derived by them from the repair and restoration. If any one or more of those comprising a minority of unit owners refuses to pay the assessments, on proper resolution setting forth the circumstances of the case, the majority may proceed with the repair or restoration at the expense of the unit owners to be benefited by the repairs and restoration. However, if *[percentage]%* or more of the building is destroyed or substantially damaged, as shall be determined by the unit owners, unless otherwise unanimously agreed on by the unit owners, the board of administration will proceed to realize on the salvage value of the portion of the condominium property damaged or destroyed, by sale or otherwise, and will collect the proceeds of any insurance. After that, the net proceeds of the sale or other disposition of the property, together with the proceeds of any insurance, after making provision for the removal of all debris and the restoration of the land to level grade, if appropriate, will be considered as one fund, and will be divided among unit owners directly affected by the damage or de-

struction or their mortgagees or trust deed beneficiaries, as their interests may appear, in accordance with the percentages of their common interest as set forth in the declaration.

Section Fourteen. Fire and extended coverage insurance. The board of administration, or the managing agent or manager, as the case may be, will obtain and continue in effect insurance against loss by fire and other casualties normally covered under broad-form fire and extended coverage insurance as written in Florida, covering all general and limited common elements, all structural portions of the condominium property, and all units, but not including furniture, fixtures, decorations, equipment, or personal property installed or placed therein by unit owners, in an amount satisfactory to mortgagees holding first mortgages and/or beneficiaries under first trust deeds on *[number of units]* or more units but in any event not less than *[percentage]*% of the assessed value thereof. The premiums for such insurance will be a common expense to be paid by monthly assessments levied by the board of administration.

Section Fifteen. Liability insurance. The board of administration or the managing agent or manager, as the case may be, will obtain and continue in effect insurance against liability for personal injury and death and for damage to property arising from accidents occurring within the general and limited common elements in such amounts, satisfactory to mortgagees holding first mortgages and/or beneficiaries under first trust deeds on *[number of units]* or more units, as will be determined by the board of administration. The premiums for the insurance will be a common expense to be paid by monthly assessments levied by the board of administration.

Section Sixteen. Beneficiaries of insurance. All policies of insurance required to be obtained in this document will be written in the name of *[the unit owners/[name of trustee], as trustee for all unit owners, mortgagees, and trust deed beneficiaries]*. Even though not named in such policies, however, each unit owner and his or her mortgagee or mortgagees, or trust deed beneficiary or beneficiaries, if any, will be a beneficiary in the percentage assigned to his or her respective unit in the declaration.

Section Seventeen. Right of owners to insure units. Any insurance procured or maintained by the board of adminis-

tration, or managing agent or manager, as the case may be, will be without prejudice to the right of each unit owner to procure and maintain the unit insurance as he or she sees fit.

Section Eighteen. Rules and regulations. Rules and regulations concerning the use of the common elements and of individual units may be promulgated and amended from time to time by the board of administration with the approval of a majority of unit owners. Copies of all rules and regulations will be furnished by the board of administration to each unit owner prior to their effective date. Initial rules and regulations, which will be effective until amended by the board of administration with the approval of a majority of unit owners, are shown in attached Exhibit “[identification of exhibit],” and incorporated by reference.

Section Nineteen. Abatement of violations. Violation of any provision of the declaration, of these bylaws, or of any rule or regulation adopted pursuant to it, will give the board of administration, acting on behalf of all unit owners, the right, in addition to any other rights set forth here:

- (a) to enter any unit in or as to which the violation or breach exists and to summarily abate and remove, at the expense of the defaulting unit owner, any thing or condition constituting the violation or breach; and the board of administration will not be deemed guilty of trespass in so doing; or
- (b) to enjoin, abate, or remedy the continuance of the violation or breach by appropriate legal proceedings, or to bring an action for recovery of damages.

Section Twenty. Arbitration. In the event of internal disputes arising from the operation of the condominium among unit owners, associations, agents, and assigns, there shall be voluntary binding arbitration conducted by the Division of Florida Land Sales and Condominiums of the Department of Business Regulation. The decision of the arbitrator shall be final.

#### ARTICLE SIX. MORTGAGES AND DEEDS OF TRUST

Section One. Notice of encumbrance. An owner who mortgages his or her unit or deeds his or her unit in trust will, within *[number of days]* days after such mortgage or deed of trust has been executed, notify the manager, managing agent, or secretary of the association of the name and ad-

dress of his or her mortgagee or trust deed beneficiary; and the secretary will maintain such information in a book entitled "Mortgagees of Units."

Section Two. Payment of assessments. No unit owner will be permitted to convey, mortgage, deed in trust, pledge, sell, or lease his or her unit unless and until he or she has paid in full to the board of administration all unpaid charges assessed against his or her unit, and until he or she has satisfied all unpaid liens against his or her unit other than mortgage liens.

Section Three. Notice of unpaid assessments. The secretary of the association will, at the request of a mortgagee or trust deed beneficiary of a unit, report any unpaid assessments due from the owner of such unit.

Section Four. Notice of default. On giving notice to a unit owner of a default, whether in payment of common charges or otherwise, the board of administration will send a copy of the notice to each holder of a mortgage secured by the unit, or trust deed beneficiary of the unit, whose name and address appears in the book entitled "Mortgagees of Units."

Section Five. Inspection of books. Unit owners, mortgagees, and beneficiaries under deeds of trust covering units will be permitted to inspect the books of account of the condominium at reasonable times during business hours.

#### **ARTICLE SEVEN. SALES AND LEASES OF UNITS**

Section One. Compliance with article. No unit owner may sell or lease his or her unit or any interest in the unit except by complying with the provisions of this article.

Section Two. Severance of ownership. Any sale of a unit must include the sale of the undivided interest in the common elements appurtenant to that unit; the interest of the seller in any units acquired by the board of administration, or the proceeds of the sale or lease of it; and the interest of the seller in any other assets of the condominium (collectively referred to in this agreement as appurtenant interests). No part of the appurtenant interests of any unit may be sold, transferred, or otherwise disposed of, except as part of a sale, transfer, or other disposition of the unit to which the interests are appurtenant; or as a part of a sale, transfer, or other disposition of such part of the appurtenant interests of all units. Any deed, mortgage, deed of trust, or

other instrument purporting to affect a unit or one or more appurtenant interests without including all the interests will be deemed to include the interest or interests that were omitted; it being the intention here to prevent any severance of combined ownership of units and their appurtenant interests.

Section Three. Right of first refusal. Any unit owner who receives a bona fide offer for the sale or lease of his or her unit which he or she intends to accept will give notice to the board of administration of the terms of the offer, the name and address of the offeror, and other information as the board may reasonably request. The giving of this notice will constitute a warranty and representation by the unit owner to the board of administration that the owner believes the offer to be bona fide in all respects and intends to accept it. Within *[number of days]* days after receipt of the notice, the board may elect, by notice to the unit owner, to purchase or lease the unit, on behalf of the unit owners, on the same terms and conditions stated in the unit owner's notice. If the board or its designee fails, within *[number of days]* days, to give notice of its intent to purchase or lease the unit, the unit owner will be free to contract, sell, or lease the same to the outside offeror on the terms and conditions set forth in the original offer.

Section Four. Consent of unit owners. The right of first refusal set forth above may not be exercised by the board of administration without the prior approval of a majority of unit owners.

Section Five. Release of right of first refusal. The right of first refusal set forth above may be released or waived by the board of administration.

Section Six. Certificate of termination or waiver of right of first refusal. Any unit owner who has given the notice required in Section Three of this article, or in respect to whom the provisions of the section have been waived, may request a certificate of termination or waiver, as the case may be, of the right of first refusal. On the request, a certificate of termination or waiver will be executed and acknowledged by the secretary of the association, and the certificate will be conclusive on the board of administration and the unit owners in favor of all persons relying on it in good faith.

Section Seven. Financing acquisition of units by board of

administration. Acquisition of units may be financed from the acquisitions reserve, working capital, and common charges in the hands of the board of administration. If the funds are insufficient, the board may levy an assessment against unit owners in proportion to their ownership of the common elements, as a common charge. The board is also authorized to borrow money to finance the acquisition of these units. However, no lien or encumbrance on any property, other than the unit to be acquired, may be suffered to secure the financing.

Section Eight. Exceptions. The right of first refusal stated in this agreement will not apply to any sale or lease of an unit by its owner to his or her spouse, to any of his or her children, to his or her parent or parents, to his or her brothers or sisters, or to any one or more of them; nor will the right apply to any unit owned by the developer, or to the acquisition or sale of any unit by a mortgagee or trust deed beneficiary acquiring title by foreclosure or by exercise of a power of sale. Nor will the right apply to any transfer or conveyance of an unit by gift, by devise, or by intestate succession.

#### ARTICLE EIGHT. EMINENT DOMAIN

Section One. Condemnation of common elements. If all or any part of the general or limited common elements is taken, injured, or destroyed by eminent domain, each unit owner will be entitled to participate, through the association, in the proceedings incident to it. However, any damages shall be for the taking, injury, or destruction as a whole, and will be collected by the board of administration. If those unit owners entitled to exercise *[percentage]*% or more of the total voting power of the association duly and promptly approve the repair and restoration of the general or limited common elements, the board of administration will contract for repair and restoration, and will disburse the proceeds of the award in appropriate progress payments to contractors engaged in repair and restoration. If the proceeds of the award are insufficient to defray the entire expense of repair and restoration, the excess of the expense over the proceeds will be treated as a common expense or limited common expense. In the event that those unit owners entitled to exercise *[percentage]*% or more of the total voting power of the council do not duly and promptly approve the repair and restoration of the common

elements, the net proceeds will be divided by the board of administration among all unit owners in proportion to their respective general or limited common interests, as the case may be, paying out of the share of each unit owner the amount of any unpaid liens on his or her unit, in the order of priority of the liens.

Section Two. Condemnation of units. If all or any part of any unit or units, other than the undivided interest or interests in the general and limited common elements appurtenant to it, is taken, injured, or destroyed by eminent domain, each unit owner so affected will be entitled to participate directly in the proceedings incident to it. Any damages will be payable directly to the unit owner or owners.

#### ARTICLE NINE. RECORDS

Section One. Records; certification by certified public accountants. The manager, managing agent, and board of administration will keep detailed records of all actions of the manager, managing agent, and board of administration, as well as minutes of the meetings of the board of administration, minutes of the meetings of the unit owners, and financial records and books of account for the condominium, including a chronological record of all receipts and disbursements. A separate account will also be kept for each unit containing, among other things, the amount of each assessment against the unit, the date when due, amounts paid on it, and the balance remaining due. The board of administration will also prepare a quarterly written report summarizing receipts and disbursements of the condominium, copies of which will be made available to all unit owners. Additionally, an annual report of receipts and disbursements of the condominium, certified by an independent certified public accountant, will be rendered by the board of administration to all unit owners, mortgagees, and trust deed beneficiaries requesting it, promptly after the end of each fiscal year.

#### ARTICLE TEN. MISCELLANEOUS

Section One. Notices. All notices required or permitted to be sent to the board of administration will be sent by registered or certified mail in care of the manager or managing agent, or if there is no manager or managing agent, to the office of the board of administration at [*address of board*],

in the City of *[name of city]*, County of *[name of county]*, State of Florida, or to any other address as the board may from time to time designate. All notices required or permitted to be sent to any unit owner will be sent by registered or certified mail to the condominium or to any other address as the owner may have designated in writing to the board of administration. All notices to unit mortgagees or trust deed beneficiaries will be sent by registered or certified mail to their respective addresses, as maintained by the secretary in the book entitled "Mortgagees of Units." All notices will be deemed to have been given when mailed, except notices of change of address which will be deemed to have been given when received.

Section Two. Waiver. No restriction, condition, obligation, or provision contained in these bylaws will be deemed to have been abrogated or waived by reason of any failure to enforce it, irrespective of the number of violations and failures to enforce that may occur.

Section Three. Invalidity. If any provision or provisions of these bylaws is or are declared invalid, the invalidity will in no way impair or affect the validity, enforceability, or effect of the remaining provisions of these bylaws.

Section Four. Captions. Captions are inserted in these bylaws for convenience and reference only, and will not be taken in any way to limit or describe the scope of these bylaws or any provision thereof.

#### ARTICLE ELEVEN. AMENDMENTS

Section One. Amendments. These bylaws may be amended or supplemented by the vote of those unit owners entitled to exercise *[percentage]%* or more of the total voting power of the unit owners at a meeting of unit owners duly called and held for this purpose, *[but only with the written approval of those mortgagees holding mortgages constituting first liens and/or beneficiaries under first deeds of trust on [number of units] or more units]*. Any amendment or supplement shall be filed for record in the office in which these bylaws are recorded.

#### ARTICLE TWELVE. CONFLICTS

Section One. Conflicts. These bylaws are intended to comply with the requirements of, and are written according to the provisions of, Chapter 718 of the Florida Statutes. If

these bylaws or any provisions hereof are so construed as to be in conflict with the provisions of such statutes or of the declaration to which they are attached, the provisions of the statutes or of the declaration, as the case may be, will control.

#### NOTES TO FORM

##### Drafter's Notes

Fla. Stat. Ann. § 718.112 contains detailed provisions as to the bylaws of a condominium association, and should be carefully read.

For discussion of pertinent background and drafting principles, see § 7:3.

For checklist in drafting bylaws, see § 7:27.

##### Tax Notes

See Tax Notes following § 7:38.

#### Article Two

##### Drafter's Notes

Administration of the condominium by a board of administration is contemplated under Florida law. See Fla. Stat. Ann. § 718.112(2)(a).

##### Research References

###### *A.L.R. Library*

Construction of contractual or state regulatory provisions respecting formation, composition, and powers of governing body of condominium association, 13 A.L.R. 4th 598.

#### Article Two Section Two

##### Drafter's Notes

The changeover in composition of the board of administration provided for in this section reflects the provisions of Fla. Stat. Ann. §§ 718.301, 718.302.

#### Article Two Section Three

##### Drafter's Notes

The powers and duties of a condominium association are governed by Fla. Stat. Ann. §§ 718.111, 718.113 to 718.116.

#### Article Three

##### Drafter's Notes

Florida law contemplates operation of the condominium by an association. See Fla. Stat. Ann. § 718.111.

#### Article Three Section Two

##### Drafter's Notes

This section is drafted to reflect the common situation in which, at the time the bylaws are adopted, the developer retains title to a substantial number of units, and therefore retains a substantial inter-

est in the management of the condominium. See Fla. Stat. Ann. §§ 718.301, 718.302.

**Article Five Section One****Drafter's Notes**

For statutory provisions relating to budgets, see Fla. Stat. Ann. § 718.112(2)(f).

**Article Five Section Four****Drafter's Notes**

For statutory provisions relating to liability for assessments, see Fla. Stat. Ann. § 718.116.

**Article Five Section Eight****Research References***A.L.R. Library*

Enforceability of bylaw or other rule of condominium or co-operative association restricting occupancy by children, 100 A.L.R. 3d 241.

**Article Five Section Fifteen****Research References***A.L.R. Library*

Liability of condominium association or corporation for injury allegedly caused by condition of premises, 45 A.L.R. 3d 1171.

**Article Six****Drafter's Notes**

This article, included for the benefit of mortgagees and trust deed beneficiaries, is to facilitate the obtaining of financing by unit owners.

**Article Seven****Drafter's Notes**

This article provides for a right of first refusal in the board of administration. Such a right serves as an efficient and flexible way of exercising a reasonable measure of control over the membership of the condominium community.

**Research References***A.L.R. Library*

Validity, construction, and application of statutes, or of condominium association's bylaws or regulations, restricting sale, transfer, or lease of condominium units, 17 A.L.R. 4th 1247.

**Article Eight Section One****Drafter's Notes**

For statutory provisions relating to the association's limited power to convey common elements, see Fla. Stat. Ann. § 718.112(2)(m).

For statutory provisions relating to eminent domain procedure with

respect to condominium common elements, see Fla. Stat. Ann. § 73.073.

**Article Nine****Drafter's Notes**

As to records required to be kept by the association, see Fla. Stat. Ann. § 718.111(12).

**Article Ten****Drafter's Notes**

Florida law permits the inclusion of optional provisions in the bylaws. See Fla. Stat. Ann. § 718.112(3)(d).

**Article Eleven****Drafter's Notes**

For statutory provisions relating to amendment of bylaws, see Fla. Stat. Ann. § 718.112(2)(h).

**§ 7:40 Bylaws—Provision for administrative rules and regulations**

The board of administration may, by vote of a majority, adopt administrative rules and regulations governing the use and operation of the condominium property which are not in conflict with the articles of incorporation or the bylaws. The administrative rules and regulations must be recorded with the secretary and sent to each unit owner by certified mail, return receipt requested, prior to the effective date of their application. The rules and regulations may be amended from time to time by majority vote of the members of the board of administration.

**NOTES TO FORM****Drafter's Notes**

A condominium board may not adopt rules which modify the provisions of the declaration without proper amendment of the declaration itself. *Mohnani v. La Cancha Condominium Ass'n, Inc.*, 590 So. 2d 36 (Fla. Dist. Ct. App. 4th Dist. 1991).

**§ 7:41 Bylaws—Provision for use of unit**

Each unit will be used and occupied only as a private dwelling by the owner or his or her tenant. Each unit or any part of each unit will not be used for any other purpose. Each owner or any other occupant of the unit will respect the comfort, privacy, and peace of mind of his or her

neighbors, as well as other occupants of the condominium. Each owner will not do, or permit to be done, or keep in the unit, anything which would increase the rate of fire insurance for the condominium, or do or permit to be done any act or thing which will be a nuisance, annoyance, inconvenience, or cause damage to the unit or any occupant of the condominium.

**§ 7:42 Bylaws—Provision for maintenance and improvement charges**

1. All property and the improvements on the property (except portions or parcels of the property devoted to public or semi-public uses and not assessed by or included in any assessment by the city, county, or other political subdivision having jurisdiction for general tax purposes) shall be subject to a continuous maintenance lien securing payment of an annual assessment or shall be charged in an amount to be fixed, established, and collected from time to time as herein provided.

The association shall have sole authority:

(a) to fix and establish annually the amount of the annual charge or assessment (including penalties and costs of collection, together with reasonable attorney's fees) on each and every lot or parcel of the real property or any interest and on the improvements of the property, which annual charge or assessment shall be based on the assessed valuation of the real property and of the improvements as established by the county assessor of the County of [*name of county*], State of Florida, for the then current fiscal year at a ratio never in any one year in excess of the total annual tax rate established for all purposes for the then current fiscal year by the city council for the City of [*name of city*], or in accordance with some other legal or equitable plan to be adopted by the association, provided that the total amount of the annual charge or assessment under such alternate plan shall never exceed [*percentage*]% of the fair cash value of the property and all improvements on the property as determined by the assessor appointed by the association; and

(b) to expend for the purposes specified below the money paid on the charges or assessments.

2. The right to collect and enforce the collection of the charges or assessments, together with costs and penalties

imposed with the nonpayment of them, shall be and is granted to the association and developer as to any property conveyed by it, except as otherwise provided in this agreement.

3. The annual charge or assessment shall be fixed on or about *[date]* for the fiscal year beginning *[date]*, and annually after that on or about the first *[day]* of *[month]* of each year, for each current fiscal year, and the charge or assessment shall be paid annually in advance to the association on *[date]* and each and every year, beginning in *[date]*, on which date the annual charge or assessment shall become enforceable against the real property and so continue until full payment of the charge or assessment, together with all penalties and cost of collection of it, including reasonable attorney's fees. Developer, in respect to portions of real property not conveyed by it, and the purchaser of the property, or any portion of the property, by acceptance of a deed for it, whether from developer or from subsequent owners of the property, shall be and become personally obligated to pay the annual charge and assessments as are fixed during the time of their ownership, and the right and power to bring all actions for the collection of the charges and assessments and the enforcement of the liens is granted to and shall be vested in the association, and its successors in interest.

#### NOTES TO FORM

##### Tax Notes

A major tax difference exists between maintenance charges and improvements. For those condominium owners who hold their property as a business or investment, the cost of maintaining the units is a deductible expense, while the cost of improvements must be capitalized and recovered over the life of the improvements. Am. Jur. 2d, Federal Taxation ¶ 16400 et seq. For a condominium used as a personal residence, neither of these expenditures may be deducted, but must be capitalized and recovered only upon disposition of the property. I.R.C. § 262. An exception exists for any part of an assessment that is attributable to real estate taxes, I.R.C. § 164(a), or to qualified residence interest under I.R.C. § 163(h)(3).

#### § 7:43 Ground lease

##### GROUND LEASE

1. Parties. Lease made on *[date of lease]*, by and between *[name of lessor]*, a *[state of incorporation]* corporation having an office at *[address of lessor]*, in the City of

[name of city], County of [name of county], State of Florida, referred to below as lessor, and [name of lessee], a Florida corporation having an office at [address of lessee], in the City of [name of city], County of [name of county], State of Florida, referred to below as lessee.

2. Demise; description of property. Lessor leases to lessee all those parcels of land situated at [address of land parcels], in the City of [name of city], County of [name of county], State of Florida, and more particularly described as follows: [legal description].

3. Term. The land is leased for a term of [number of years] years, commencing on [date], and ending on [date], but subject to renewal or prior termination as provided in this lease.

4. Renewal. By written notice given at least [number of days] days prior to the expiration of this lease, lessee may renew the same for an additional term of [number of years] years on the same terms and conditions as are contained in this lease. [After that, on like notice, lessee may renew this lease for additional terms of [number of years] years.]

5. Rent. Lessee agrees to pay as rent for the premises over and above all real property taxes, assessments, and other charges set forth in this lease, the following:

(a) for the period beginning on [date], and ending on the date of completion of buildings or other improvements of a cost exceeding \$[dollar amount], or on [date], whichever first occurs, \$[dollar amount] per month;

(b) for the next [number of years] years beginning on the date of completion, or on [date], whichever first occurs, \$[dollar amount] per year, payable in 12 equal monthly installments in advance on the [ordinal number] day of each month; and

(c) for the remaining term of this lease and for any renewal of it, the rental will be determined as follows: The remaining term will be divided into [number of periods] rental periods of [number of years] years each, and a final rental period ending on the date of termination of this lease as provided in Section 3; any renewal will be divided into [number of periods] rental periods of [number of years] years each, and a final period of [number of years] years. The rental to be paid during each year of each rental period will be at the rate of [percentage]% of

the fair market value of the land then subject to the lease exclusive of any buildings or other improvements erected or placed on it by lessee. In no event will the annual net rental payable during any rental period be less than the annual net rental payable during any previous period. All rentals will be payable in 12 equal monthly installments in advance on the first day of each month.

In the event that lessor and lessee fail to agree, at least *[number of days]* days prior to the commencement of any rental period, on the fair market value of the land or the rental to be paid during the period, then the fair market value of the land for the period will be determined by three recognized real estate appraisers experienced in the appraisal of properties in the City of *[name of city]*. The appraisers will be appointed as follows: Within *[number of days]* days prior to the commencement of any period, lessor and lessee will each name one appraiser and give written notice of the appointment to the other. If either party fails to name an appraiser within *[number of days]* days after receiving notice of the appointment, the appraiser named will appoint a second appraiser and the two named appraisers will appoint a third appraiser. If the two appraisers fail to do so within *[number of days]* days after the appointment of the second appraiser, either party may have a third appraiser appointed by *[specify]*. The three appointed appraisers will proceed to determine the fair market value of the land for the rental period in question, and a decision of a majority of the appraisers will be final, conclusive, and binding on the parties as to the issue of annual rental payable by lessee during any period. All expenses of appraisals, exclusive of attorney's fees which will be paid by the respective parties, will be divided equally between lessor and lessee. Pending the determination of any rental pursuant to the appraisal procedure provided herein, lessee will continue to pay rent at the rate prevailing during the last preceding period. On termination of appraisal proceedings, lessee will promptly pay any deficiency occasioned by an increase in rental for the succeeding period.

6. Lessor's covenants.

- (a) Lessor is the owner of the leased premises and has the right to make this lease.

(b) Lessee, on paying the rent herein reserved and on performing all of the terms and conditions herein contained, shall at all times during the term hereof peacefully and quietly hold and enjoy the leased premises.

(c) The premises are now free from all encumbrances except mortgages and trust deeds of record.

(d) If requested by lessee, lessor will consent to and cooperate fully with lessee in establishing a condominium pursuant to Chapter 718 of the Florida Statutes as the same may be amended from time to time. In establishing the condominium, lessor will cooperate in the filing of a declaration and other documents as may be required by law.

7. Lessee's covenants.

(a) Taxes and assessments. Lessee agrees to pay when due all real property taxes, assessments, and charges of every kind whatsoever that may be lawfully imposed, assessed, or charged during the term of this lease against the leased premises or any part of the leased premises, whether the taxes, assessments, and charges are legally payable by lessor or lessee. Whenever taxes, assessments, or charges may be paid in installments, lessee is liable to pay those installments in respect to periods which fall wholly within the term of this lease, together with a proportionate part of any installment in respect to a period only a portion of which falls within the term of this lease. Real property taxes, assessments, and charges imposed on the premises for the initial year hereof, and for the terminal year hereof, or for the terminal year of any renewal hereof in the event of a renewal, will be prorated as of the dates of commencement and termination respectively. In the event that lessee determines, in the exercise of reasonable business judgment, to contest the amount or validity of any tax, tax rate, assessment, charge, or the like, lessor will join in the proceedings if legally required to do so. Lessee will pay any costs or attorney's fees lessor may incur in the proceedings. In the event that any court or other governmental authority of competent jurisdiction determines the tax, rate, assessment, charge, or the like to be valid or proper, lessee will promptly pay the same together with any interest, penalty, or fine resulting

from the contest.

(b) Utility and other charges. Lessee will pay when due all utility charges, including but not limited to water and sewer, gas, heat, light, power, and telephone charges.

(c) Improvements. Lessee will erect and maintain at lessee's own expense, during the term hereof, all sidewalks, roads, walls, sewers, and other improvements required by law to be erected and maintained in connection with the leased premises.

(d) Repair and maintenance. Except as otherwise provided in this lease, lessee will maintain and keep in good repair all buildings and other improvements now or later located on the leased premises.

(e) Unlawful uses; indemnification. Lessee will not make or allow to be made any unlawful, improper, or offensive use of the premises or any part of the premises, and agrees to keep the same in a strictly decent, safe, and sanitary condition, observing all municipal, state, and federal laws, ordinances, rules, and regulations, now or later in effect. Lessee further agrees to indemnify lessor against any and all claims, demands, costs, or judgments of any kind whatsoever made or suffered by reason of the breach of this covenant.

(f) Additional indemnification. Lessee agrees to indemnify lessor from and against any and all claims, demands, costs, attorney's fees, expenses, or judgments that may arise or that lessor may suffer on account of or in connection with the leased premises or any condition or occurrence thereon.

(g) Assignment and sublease. Lessee will not assign this lease nor sublet the premises without the prior written consent of lessor, which will not be unreasonably withheld. However, lessee may without consent sublet or rent apartments, offices, or shops in the normal course of any apartment, cooperative, or condominium regime, and may assign this lease by way of mortgage to an established lending institution as herein provided.

(h) Inspection. Lessor will have the right, at all reasonable times during the term of this lease or any renewal hereof, to enter the premises and any building or other improvement thereon to determine whether the

covenants herein made by lessee are being performed. Lessee will permit lessor access to the premises at all reasonable times, and [*number of days*] days following written notice by lessor, will remedy and repair any condition in violation of the terms of this lease.

(i) Liability insurance. Lessee will, at lessee's own expense, procure and maintain during the term of this lease and any renewal of this lease the following policy or policies of liability insurance: [*type of liability policy*].

(j) Fire insurance. Lessee will, at lessee's own expense, procure and maintain during the term of this lease and any renewal of this lease, the following policy or policies of fire insurance payable in case of loss to lessor and the beneficiary or beneficiaries under trust deeds covering the buildings as may now or later be erected on the premises: [*type of fire policy*].

(k) Liens and encumbrances. Lessee will keep the premises at all times free and clear of all liens and encumbrances of every kind whatsoever other than any mortgage liens as may be permitted hereunder.

(l) Construction of buildings. Before beginning construction or substantial alteration of any building or buildings on the demised premises, lessee will obtain lessor's written approval of all specifications and will furnish to lessor any reasonable assurances of completion according to specifications as lessor may require, including without limitation proof of financing and performance bonds.

(m) Surrender. At the end of the term of this lease or any renewal of this lease, lessee agrees to surrender to lessor the land leased together with all buildings and other improvements on the land, whether erected by lessee or otherwise, in good order, repair, and condition.

(n) Costs and expenses of lessor. Lessee agrees to pay on demand all costs and expenses, including reasonable attorney's fees, paid or incurred by lessor in enforcing this agreement or any provision of it.

#### 8. Mutual covenants.

(a) Eminent domain; condemnation in fee simple. In the event that all of the leased premises are taken or condemned in fee simple for any public or quasi-public use, this lease will terminate as of the date of the taking.

In the event that a portion, but not all, of the demised premises are so taken or condemned, this lease will terminate as to the part taken as of the date of the taking and will continue as to the remainder for the balance of the term hereof at a reduced rental based on the proportion which the total of the areas taken bears to the entire area leased. However, if the percentage of the demised land remaining after the taking is less than [percentage]% of the total land area, and the remaining land is, in lessee's reasonable business judgment, unsuitable for apartment, or [set forth other purposes], then lessee may at its option surrender this lease, being relieved of any further obligation under it. The award for any taking of the land or any improvements on the land, other than buildings as may be erected by lessee after the date of this lease, shall belong to lessor; the award for the taking of any building erected by lessee on the land after the date of this lease will belong to lessee. Lessee will also be entitled to assert claims against the condemning authorities for any damage to lessee's business on the premises and for any cost or loss lessee may incur in the removal of any improvements erected or fixtures installed by it on the premises.

(b) Eminent domain; condemnation of leasehold. If any leasehold interest in the demised premises is taken or condemned for any public or quasi-public use, this lease will remain in full force and effect, and lessee's covenants and obligations under this lease will remain unimpaired. The award for the taking of the leasehold interest will belong to lessee.

(c) Assignment by mortgage. Lessee may at any time and without the consent of lessor assign this lease by way of mortgage to any bank, trust company, insurance company, building and loan association, or other recognized institutional lender as mortgagee, and agrees promptly on the execution of the assignment to provide lessor with a copy of it. During the term of any such assignment, lessor agrees not to terminate this lease because of a default on the part of lessee without first giving [number of days] days written notice to the mortgagee of his or her intention to do so. If within the [number of days]-day period, the mortgagee cures the default, if the mortgage is subject to cure within that pe-

riod, or undertakes to cure the default and after that, exercises its best efforts to do so, if the default is not subject to cure within the period; lessor will desist from terminating this lease until the mortgage on it may be foreclosed. Any recognized institutional lender as mortgagee may enforce its mortgage and acquire title to the leasehold in any lawful manner and may assign the leasehold as it may deem desirable. However, any assignee of the mortgagee will expressly assume and agree to be bound by all the covenants of lessee in this lease and provide a copy of the assignment to lessor promptly on the execution of it.

(d) Lessor's rights on default. This lease is subject to lessee's performance of the covenants and conditions set forth in Paragraph 7. If lessee defaults in performance of any of the covenants or conditions, and the breach continues for more than *[number of days]* days after lessee receives written notice of it, or if lessee files or has filed against it any proceeding of any kind whatsoever under any provision of the Federal Bankruptcy Act, or becomes bankrupt or insolvent, or makes any assignment for the benefit of creditors, or suffers this lease or any interest in it to be taken under writ of execution, or abandons the premises, then lessor may, at its option:

(1) pursue any legal remedy to recover for the breach, and continue this lease in force; or

(2) declare the lease forfeited, re-enter the leased premises, and remove therefrom all persons claiming under lessee and all property of lessee; provided, however that any sublessee, pursuant to a sublease authorized by subparagraph (h) of paragraph 7, will be entitled to *[number of days]* days written notice of any such forfeiture, and may elect by written notice served on lessor within *[number of days]* days after the date of notice of the forfeiture, to sublease from the lessor, in which event the sublessor will hold as tenant of lessor the estate as was granted under the sublease on the terms and conditions contained in it.

(e) Nonwaiver of breach. Lessor's waiver of lessee's breach of any covenant or condition contained in this lease will not be construed as a waiver of the covenant or condition itself, of any subsequent breach of it, or of any other covenant or condition contained in the lease.

Lessor's subsequent acceptance of rent under this lease will not be construed as a waiver of any preceding breach by lessee of any covenant or condition contained in it, other than of lessee's failure to pay, when due, the rent accepted.

(f) Notices. Any notice or demand required or permitted to be given under this lease will be deemed sufficiently given when delivered or mailed by registered or certified mail, postage prepaid, addressed to the party to receive it at the addresses specified in this lease, or at any other address or addresses which the receiving party has designated in writing.

Executed at *[location of execution]* on the date written above.

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*[Signatures and titles as appropriate]  
[Corporate seals as appropriate]*

*[Acknowledgments]*

#### NOTES TO FORM

##### Drafter's Notes

This lease is intended for use in situations where the developer is to maintain a "sandwich" position as lessee of the land and lessor of apartments to be created by submission of the leasehold to the condominium provisions. Ordinarily in such cases, the fee owner of the land joins in the declaration. This position enables the developer to take a portion of the profit over a period of years in the form of rental income from apartment sublessees in excess of rental obligations under the ground lease. It is also possible, however, to develop the leasehold condominium in such manner that the developer leases the ground only until such time as construction is completed, whereupon the landowner submits the entire property to the condominium provisions, cancels the ground lease, and issues individual apartment leases to apartment lessees. This arrangement eliminates the developer's position as of the end of construction, and calls for a less detailed ground lease than that set forth above.

For forms of acknowledgment, see Conveyances (Ch 2).

For forms of and legal discussion relating to leases of real property generally, see Real Property (Ch 16A).

##### Tax Notes

When entered into as part of a condominium development, a lease of this nature is classed, for tax purposes, as part of business or as

part of an enterprise entered into for investment and income. The cost of the lease, including rents, are therefore deductible under either I.R.C. § 162(a) or I.R.C. § 212. The same circumstances that permit those expenses to be deducted also make the lessee a dealer in real estate, with the condominium units considered as stock in trade. Profit from the sale of the condominium units will therefore be taxed at ordinary income rates. Am. Jur. 2d, Federal Taxation ¶ 11152, 11166. A limited exception exists for developers who have held the property for at least five years (or have inherited it) and who make five or fewer sales without improving the property. I.R.C. § 1237. If the taxpayer is not in the real estate business, the sales will be treated as capital transactions. Am. Jur. 2d, Federal Taxation ¶¶ 11176 et seq.

### III. DOCUMENTS RELATED TO PROMOTION, SALE, AND LEASE OF UNITS

#### § 7:44 Reservation of unit and receipt for returnable deposit

[date]

To: \_\_\_\_\_ [address]

We are pleased to acknowledge receipt of your deposit in the amount of \$[dollar amount], and to reserve in your name Unit No. [number of unit] in [name of condominium], to be constructed at [location of condominium]. The total purchase price of this unit is \$[dollar amount].

In consideration of your deposit, we will reserve the unit for you until [date]. On or before that date, we will notify you when we intend to begin construction of the condominium. If this notice is not given, or if we notify you of our intention not to begin construction, then the deposit referred to above will be returned to you with interest, and all parties will be relieved of their obligations under this agreement.

At the time the notice of our intention to begin construction is given, you will also be sent a contract of sale and, if not already furnished, copies of the prospectus prepared by developer in connection with the project, as well as the final floor plan of the unit and all the condominium documents to which you will be subject as an unit owner in the condominium. You will have [number of days] days from the date these documents are sent to you to execute them and

return them to us with your additional deposit of *[\$/dollar amount]*, making a total down payment of *[\$/dollar amount]*. On the execution of those documents, and the payment of the additional deposit, the parties will be bound by the terms of those documents. The initial deposit, plus interest, and the additional deposit referred to above will be applied toward the purchase price of your unit. If you fail to make the additional deposit within the *[number of days]* day period, we will have the right to cancel this reservation and return the initial deposit, in which event all parties will be relieved of any further obligations under this receipt.

This receipt *[shall not be assignable by us/will be freely assignable by us, and on any assignment of it, we will be relieved of all responsibilities under it. In the event of any assignment, notice will be given to you of the assignee, and the assignee will assume all of our responsibilities under this receipt]*. This receipt may not be assigned by you, as we have relied on your personal character and credit in deciding to accept your reservation.

Your execution of this letter in the space provided below will constitute your agreement to be bound by its terms.

---

*[Signature of developer]*

The undersigned agrees to be bound by the terms and conditions contained in this receipt, and contained in the condominium documents mentioned in it. The undersigned acknowledges receipt of a copy of the prospectus describing the project and of the preliminary floor plan of the unit reserved under this receipt.

Dated *[date]*.

---

*[Signature of purchaser]*

#### § 7:45 Contract of sale of condominium unit

##### CONTRACT OF SALE

This instrument was prepared by *[name of preparer]* of *[address of preparer]*.

**CONTRACT OF SALE**

ORAL REPRESENTATIONS CANNOT BE RELIED ON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. FOR CORRECT REPRESENTATIONS REFERENCE SHOULD BE MADE TO THIS CONTRACT AND THE DOCUMENTS REQUIRED BY FLA. STAT. ANN. § 718.503 TO BE FURNISHED BY A DEVELOPER TO A BUYER OR LESSEE.

Unit No. *[number of unit]*

**RECITALS**

A. *[Name of developer]*, a corporation organized and existing under the laws of the State of Florida, and having offices at *[address of developer]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, referred to below as seller, is the owner of a certain condominium unit designated as Unit No. *[number of unit]*, and sometimes called the unit.

B. The building in which the unit is located and the land on which the building is erected have been submitted to the provisions of the Florida Condominium Act (Chapter 718 of the Florida Statutes) by a declaration dated *[date of declaration]* and recorded on *[date of recording]* in Volume *[volume number]*, page *[page number]* of the official records of *[name of county]*, Florida. Unit No. *[number of unit]* is so designated in the declaration and on the floor plans of the *[number of floor]* floor of the building, certified by *[name of certifier]*, a *[registered architect/licensed professional engineer]* and filed with the declaration as Exhibit *[identification of exhibit]*, and incorporated by reference.

C. Seller has delivered to *[name of purchaser]*, of *[address]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, referred to below as purchaser, a copy of the prospectus prepared by seller in connection with the condominium project. The prospectus includes, as exhibits, copies of the declaration, the bylaws governing operation of the condominium, and various other important documents. Seller has also delivered to purchaser copies of the floor plan of Unit No. *[number of unit]*, the condominium rules and regulations, and an escrow agreement dated *[date of agreement]*, entered into between seller and *[name*

*of bank]* (referred to below as the bank), all of which documents are incorporated by reference and made a part of this contract. Purchaser acknowledges receipts of these documents.

D. Purchaser is desirous of purchasing, and seller is desirous of selling, Unit No. *[number of unit]*, together with the undivided interest in the common elements and voting rights appurtenant thereto. It is understood that, at the time purchaser will take possession of the unit, it will not have been occupied at any time.

In consideration of the mutual covenants set forth below, purchaser and seller agree as follows:

1. Purchase and sale. Purchaser agrees to purchase and seller agrees to sell the unit designated as Unit No. *[number of unit]* together with a *[percentage]%* undivided interest in the common elements appurtenant to it.

2. Payment of purchase price. The purchase price for the unit is *[\$dollar amount]*, of which *[\$dollar amount]* has previously been paid as a deposit and *[\$dollar amount]* is payable on the signing of this agreement.

Receipt of the latter amount, by check to the order of the bank, as escrow agent, is acknowledged subject to collection. The balance of *[\$dollar amount]* will be paid by purchaser on the closing of title, as provided here, unless this contract is canceled by purchaser, also as later provided.

3. Cancellation by purchaser. THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER, AND RECEIPT BY BUYER OF ALL OF THE ITEMS REQUIRED TO BE DELIVERED TO BUYER BY THE DEVELOPER UNDER SECTION 718.503, FLORIDA STATUTES. THIS AGREEMENT IS ALSO VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF RECEIPT FROM THE DEVELOPER OF ANY AMENDMENT WHICH MATERIALLY ALTERS OR MODIFIES THE OFFERING IN A MANNER THAT IS ADVERSE TO THE BUYER. ANY PURPORTED WAIVER OF THESE VOIDABILITY

RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 15 DAYS AFTER THE BUYER HAS RECEIVED ALL OF THE ITEMS REQUIRED. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

4. Closing of title. Closing of title will take place at [address of closing], on [date of closing], at [time of closing], or on any later date as the parties may designate in writing.

At closing, seller will deliver to purchaser a [type of deed] deed, with covenants of [name of covenants] of the form annexed as Exhibit “[identification of exhibit],” conveying the unit and the undivided interest in the common elements appurtenant to it to purchaser. The deed will be executed and acknowledged by seller in form suitable for recording. Simultaneously with the delivery of the deed, purchaser will pay to seller the balance of the purchase price by certified check or cashier's check to the order of seller. Purchaser shall also execute instructions to the bank as escrow agent to turn over to developer the sum in the escrow account credited to purchaser.

5. Payment of closing expenses. At the time title is conveyed to [him/her], purchaser will pay recording fees for the deed and trust deed, if any, charges of the trust deed beneficiary, if any, and all premiums for title insurance. Estimated real estate taxes and assessments for the taxable year in which title closes, and estimated common charges for the month in which title closes, will be adjusted as of the closing date.

6. Marketable title. Seller will convey good and marketable title in fee simple to the unit and to the undivided interest in the common elements appurtenant to it, free and clear of all liens and encumbrances other than those set forth in [identification of exhibit], attached and incorporated by reference.

7. Power of attorney to board of administration. At the closing of title, and simultaneously with delivery to purchaser of [his/her] unit deed, purchaser will execute and acknowledge a power of attorney of the form attached as [identification of exhibit] and incorporated by

reference. The power of attorney will be delivered at the closing of title to the attorney for seller for recording in the official records of [*name of county*], Florida.

8. Title insurance. If purchaser so elects, seller will obtain at the closing of title, at purchaser's expense, a certificate issued by [*name of insurer*], agreeing to insure purchaser's fee title to the unit in the amount of the purchase price, subject only to the exceptions set forth in [*identification of exhibit*], attached and incorporated by reference; the conditions of the standard title insurance policies written by the company; the conditions set forth in this contract of sale; and the provisions of the declaration, bylaws, and regulations.

9. Risk of loss. In the event that the unit or any of the common elements, an undivided interest in which is apurtenant to it, is damaged, destroyed, or taken for public use prior to the closing of title, seller will bear the risk of loss and will be entitled to all damages and awards. If the premises are substantially damaged, destroyed, or taken prior to closing, either purchaser or seller may elect to cancel this contract by written notice served on the other within [*number of days*] days after the canceling party receives notice of the damage, destruction, or taking, in which event seller will promptly refund purchaser's deposit with interest at [*percentage*]. Failure of either party to notify the other of his or her election to cancel within the [*number of days*]-day period will constitute an election to proceed with the transaction according to the terms of this agreement.

10. Effect of declaration, bylaws, rules and regulations, and escrow agreement. Purchaser agrees to be bound by the declaration, bylaws, rules and regulations, and escrow agreement.

11. Default by purchaser. Time is of the essence for this contract. In the event that purchaser fails to make any payment of the purchase price promptly when the payment becomes due, or on a later date as the parties may agree on, or fails promptly to perform any covenant or agreement herein contained, seller may notify purchaser of seller's intention to cancel [*his/her*] agreement if the default is not cured within [*number of days*] days after the date of the notice. If purchaser fails to

cure the default within the *[number of days]* day period, seller may, at its option, cancel this agreement by notice of cancellation sent to purchaser within *[number of days]* days after the sending of the notice of default. In the event that seller elects to cancel this agreement, it will, not less than *[number of days]* days after giving purchaser notice of cancellation, certify to the bank, as escrow agent, that title has not closed on account of purchaser's default, and will direct the bank to pay over to seller all payments made by purchaser pursuant to this agreement. On receipt of the payments, seller will retain them as liquidated damages, and each of the parties to this agreement will be relieved of any further liability or obligation under this agreement.

Service of all notices with respect to termination and retention of payments will be made by registered mail to purchaser at: *[address of purchaser]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, or at any other address as purchaser may indicate in writing to seller subsequent to the execution of this agreement.

12. *[List of fixtures to be included in sale of unit/ Completion of unit by seller]*. Prior to closing of title, the unit will be completed by seller substantially in accordance with the plans and specifications prepared by *[name of preparer of plans]*, which plans and specifications are available for inspection by purchaser at *[address for inspection]*. All *[name of fixtures]*, and all other fixtures, appliances, and equipment shown in the plans and specifications, or fixtures, appliances, and equipment substantially equivalent thereto, will be installed. The *[painting/decorating/painting and decorating]* of the units, and the installation of fixtures and appliances not called for in the plans and specifications, will be the obligation of purchaser. If a permanent certificate of occupancy is not issued for all units at or prior to the closing date, seller will obtain the certificate at its own expense as soon after the closing date as may be practicable, by due and diligent efforts.

13. No covenants or representations. Purchaser stipulates that a full inspection of the premises has been made and that *[he/she]* is purchasing the unit in its existing condition, except as set forth in Paragraph 12

above. Purchaser acknowledges that *[he/she]* has not relied on any plans, brochures, advertisements, representations, covenants, warranties, or statements of any kind whatsoever, whether made by seller, *[his/her]* agents, assigns, or otherwise, except as specifically set forth in this agreement or in the declaration or prospectus. Purchaser has determined to purchase the unit in reliance on *[his/her]* own investigation and examination of it, whether or not any layout or dimension of the unit or any part of it, or of the common elements, as shown in the floor plans of the building included as Exhibit *[identification of exhibit]* to the declaration, filed contemporaneously with and as a part of the declaration, is or is not accurate or correct.

14. Assignment of agreement. Purchaser will have no right to assign this agreement without the prior written consent of seller, and any purported assignment of this agreement will be voidable at the option of seller.

15. *[Details of any secured indebtedness to be assumed/Release from liens of blanket mortgages].* At or prior to the closing date, seller will secure a release of the unit from the lien of any blanket mortgages now or hereafter secured by the property of which the unit forms a part.

16. Delivery of deed for recording. At the time of the closing of title, purchaser will deliver the executed deed received from seller to the attorneys of seller, for recording in the official records of *[name of county]*, Florida, at purchaser's expense.

17. Additional agreements. This contract supersedes any and all prior or contemporaneous written or oral understandings between the parties, and constitutes their entire agreement.

18. Amendments. This agreement may not be amended or revoked except by written agreement signed by the party sought to be charged or his or her duly authorized agent.

19. Binding effect. This agreement will bind and inure to the benefit of the parties and their heirs, personal representatives, successors, and assigns.

20. Brokers. Purchaser warrants to seller that purchaser did not negotiate with any broker other than

[name of selling agent], the selling agent for seller.

21. Captions. Captions are inserted in this agreement for convenience and reference only, and will not be taken in any way to limit or describe the scope of this agreement or any provision of it.

Executed at [location of execution], on [date of execution].

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[Signatures]

[Acknowledgments]

#### NOTES TO FORM

##### Drafter's Notes

The contract of sale must meet certain statutory requirements as to form and content, and a copy of the prospectus (or, if a prospectus is not required, a number of specified documents) and of the floor plan of the unit must be furnished the buyer before the contract becomes binding. See §§ 7:12, 7:14.

Depending upon the circumstances, the contract may have to include other statements, some of which may have to be printed conspicuously. See Fla. Stat. Ann. § 718.503(1).

If the contract is for the sale or transfer of a unit in a condominium in which timeshare estates have or may be created, the contract must contain within the text in conspicuous type "UNITS IN THIS CONDOMINIUM ARE SUBJECT TO TIMESHARE ESTATES." See Fla. Stat. Ann. § 718.503(l)(a)(8).

For statutory provisions relating to disclosures prior to sale and contents of contracts for sale or lease of condominium unit, see Fla. Stat. Ann. § 718.503.

For related forms and materials on sale of interests in real property, see Sales (Ch 1) and Exchanges (Ch 1C).

For discussion of truth in lending requirements with respect to certain sales of units, see § 7:18.

##### Tax Notes

Unless the developer is able to bring the condominium sales under the provisions of I.R.C. § 1237, the units will be treated, for tax purposes, as stock in trade of the developer. Profit from the sale of the units will therefore be taxed at ordinary income rates. Am. Jur. 2d, Federal Taxation ¶¶ 11152, 11166.

The exception provided by I.R.C. § 1237 applies to developers who have held the property for at least five years (or have inherited it) and who make five or fewer sales without improving the property. If the

developer is not in the real estate business, the sales will be treated as capital transactions. Am. Jur. 2d, Federal Taxation ¶¶ 11176 et seq.

The terms of this contract show that it is for the sale of a residential unit. The buyer will be subject to the same tax rules that apply to any other type of residential property. If used as a personal residence, the expenses, other than real estate taxes and qualified residence interest, are not deductible. Profit on the sale of the unit is taxable at capital gains rates, but a loss is not deductible.

See the discussion of the tax aspects of condominiums commencing at § 7:21.

#### Research References

##### *A.L.R. Library*

Risk of loss by casualty pending contract for conveyance of real property—modern cases, 85 A.L.R. 4th 233.

Validity, construction, and application of statutes, or of condominium association's bylaws or regulations, restricting sale, transfer, or lease of condominium units, 17 A.L.R. 4th 1247.

### § 7:46 Purchase agreement

This instrument was prepared by *[name of preparer]* of *[address of preparer]*. THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER, AND RECEIPT BY BUYER OF ALL OF THE ITEMS REQUIRED TO BE DELIVERED TO HIM OR HER BY THE DEVELOPER UNDER SECTION 718.503, FLORIDA STATUTES. THIS AGREEMENT IS ALSO VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF RECEIPT FROM THE DEVELOPER OF ANY AMENDMENT WHICH MATERIALLY ALTERS OR MODIFIES THE OFFERING IN A MANNER THAT IS ADVERSE TO THE BUYER. ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 15 DAYS AFTER THE BUYER HAS RECEIVED ALL OF THE ITEMS REQUIRED. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. FOR CORRECT REP-

SENTATIONS, REFERENCE SHOULD BE MADE TO THE CONTRACT AND THE DOCUMENTS REQUIRED BY SECTION 718.503, FLORIDA STATUTES, TO BE FURNISHED BY A DEVELOPER TO A BUYER OR LESSEE.

Agreement made on *[date of agreement]*, between *[name of seller]*, a corporation organized under the laws of the State of Florida, with its principal place of business at *[address of seller]*, City of *[name of city]*, County of *[name of county]*, State of Florida, referred to below as seller, and *[name of purchaser]*, of *[address of purchaser]*, City of *[name of city]*, County of *[name of county]*, State of Florida, referred to below as purchaser.

#### SECTION I. PROPERTY TO BE PURCHASED

Seller agrees to sell and convey, and purchaser agrees to purchase, the following described property:

Apartment unit number *[number of unit]*, of *[name of corporation]*, a condominium, with *[number of bedrooms]* bedrooms and *[number of baths]* baths; together with an undivided *[to be assigned]* interest in the common elements pertinent to the unit.

#### SECTION II. TERMS AND CONDITIONS OF SALE

The purchase price will be *[\$dollar amount]*.

The initial payment will be *[\$dollar amount]*.

The second payment will be *[\$dollar amount]*, due on *[date]*.

The closing cost will be *[\$dollar amount]*, due on closing.

The mortgage to be assumed by purchaser is in the amount of *[\$dollar amount]*.

The monthly installment of principal and interest on mortgage is estimated to be *[\$dollar amount]*.

The monthly installment of condominium association's assessment of purchaser's condominium unit is estimated to be *[\$dollar amount]*.

#### SECTION III. PAYMENT OF PURCHASE PRICE

Purchaser agrees to purchase the above described apartment unit for the price set forth above. The purchase price will be paid to seller by:

- (a) an initial payment on purchaser's execution of this agreement;

- (b) a second payment to be made within *[number of days]* days of notification by the seller to the purchaser that seller has approved the purchase, and the financing institution has approved purchaser's credit obligations;
- (c) agreement to assume and pay a first mortgage on the apartment unit in the amount indicated above, which mortgage will require the repayment of principal together with interest at the prevailing rate at time of closing in equal monthly installments over a period of at least *[number of years]* years. Purchaser agrees to furnish the financing institution with a credit report and any other information deemed necessary by the financing institution to approve the financial ability of purchaser; and
- (d) the remaining portion of the purchase price if any, plus or minus all prorations and adjustments and expenses, will be paid in cash at time of closing.

#### SECTION IV. INCORPORATION OF CONDOMINIUM DOCUMENTS

The apartment unit involved in this agreement is a portion of land, improvements, and property which have been or prior to the time of closing will be submitted to the condominium form of ownership. The nature of the rights and undertakings of the purchaser in acquiring and owning the apartment unit are controlled by and will be subject to a declaration of condominium, articles of incorporation of the condominium association, bylaws of the association, rules and regulations of the association, a management agreement regarding the operation and management of the condominium, and a community facility lease as to the recreation facilities. Purchaser acknowledges reading and approving these documents. These documents are made a part of this agreement and copies will be furnished to purchaser at the time the second payment is received by seller.

Seller reserves the right to amend the documents without notice to or consent of purchaser provided the amendments do not materially affect any of the substantial rights of the purchaser or if the amendments will, in the opinion of seller's legal counsel, be required by law.

#### SECTION V. ASSESSMENTS AGAINST PURCHASER

The declaration of condominium and the bylaws of the as-

sociation require assessment of apartment unit owner by the condominium association so as to produce sufficient funds to pay for insurance, maintenance, operations, repairs of the condominium, rent under the lease as to the community facilities, and to otherwise perform its promises under the lease, in order to enable it to perform its undertakings. The amount of the assessments, which do not include taxes on the purchaser's apartment, are to be paid from time to time, based on an estimate of anticipated costs and expenses, by the board of administration of the condominium association, of which association the purchaser will be a member. At closing, each purchaser will make an initial working capital contribution to the condominium association in an amount equal to twice the regular monthly installment of the condominium association's assessment on purchaser's apartment.

#### **SECTION VI. MINOR CHANGES**

Seller reserves the right to make minor architectural, structural, or design modifications or changes in both the building and/or apartment unit as it deems fit; however, purchaser's apartment unit, as selected in this agreement, will be substantially similar to the plans or working drawings on file in the seller's sales office. On the modification by the seller, purchaser will promptly make color selection and, if purchaser fails to do so, seller may do so for purchaser if it is necessary to avoid delays in construction and completion. Purchaser will not be entitled to possession, constructive or otherwise, until this transaction has closed and title has passed to purchaser.

#### **SECTION VII. LIENS AND MORTGAGES**

Execution of this agreement will not be construed as giving purchaser any lien upon the apartment unit. Purchaser expressly waives and relinquishes any lien or lien rights, legal or equitable, which might otherwise accrue to purchaser by operation of law. Purchaser agrees that all terms and provisions of this agreement will be subject and subordinate to any building loan mortgage made before or after this agreement and to any advances made on the mortgage to its fullest extent without the execution of any further legal documents by purchaser.

#### **SECTION VIII. SUBSTANTIAL COMPLETION**

No extension of time of closing given by seller will be effec-

tive unless in writing. Substantial completion will be presumed on issuance of a temporary or final certificate of occupancy by the appropriate governmental authorities. The date of substantial completion of purchaser's apartment unit will be the date of prorations and adjustments, and is called the adjustment date.

#### SECTION IX. INSURANCE

Insurance on the apartment and assessments of the association will be adjusted and prorated as of the adjustment date. The association will carry public liability and fire and extended coverage insurance which will insure each of the apartments. In the event that only the land and not the building is subject to real estate taxes for the current year of closing, there will be no proration. Prepaid or accrued interest on the mortgage to be assumed by the purchaser will be adjusted as of the adjustment date. Any payments made by seller to the association in anticipation of assessments which are applicable to purchaser's apartment and have not yet been expended will be a credit to seller.

#### SECTION X. TITLE TO PROPERTY

It is understood and agreed that purchaser is purchasing the subject apartment unit subject to the terms set forth in this agreement, and that title to the property which purchaser will acquire pursuant to this agreement will be good, marketable, and/or insurable subject only to the following:

- (a) conditions, restrictions, limitations, and easements of record common to the area in which the property lies;
- (b) taxes, pending municipal liens, and easements existing and to be created for ingress and egress to the property;
- (c) facts that an agreed survey or personal inspection of the property will disclose;
- (d) mortgage, if any, in favor of a mortgage lender in connection with the apartment unit, as contemplated by this agreement;
- (e) covenants, conditions, restrictions, terms and other provisions of the declaration of condominium of *[name of condominium]*, and articles of incorporation and bylaws of *[name of condominium association]*;
- (f) a management agreement regarding the operation and management of the condominium; and

(g) a community facility lease as to the recreational facilities.

#### SECTION XI. TERMINATION

Seller will have the right to terminate this agreement at any time prior to the date on which it files among the public records of the County of [*name of county*], State of Florida, the declaration of condominium establishing this condominium. In the event of such termination, seller's sole obligation to purchaser will be the return of the entire deposit or deposits made under this agreement, and, on the return, the parties will be relieved of all obligations to each other and this agreement will be deemed null and void.

#### SECTION XII. RECORDATION

This agreement may not be recorded or assigned without the written consent of seller. It is specifically agreed and understood that purchaser's interest in this agreement and the apartment unit will be considered as personal property until the purchaser has closed this transaction and received [*his/her*] deed.

#### SECTION XIII. COSTS

At the time of closing, purchaser will pay the costs of recording the warranty deed and the cost of the documentary tax plus the cost of the abstract and surtax on the warranty deed. Additionally, at the time of closing, purchaser will pay a sum equivalent to [*number of months*] months' maintenance as and for a contribution to the working capital of the condominium association.

#### SECTION XIV. DEFAULT BY PURCHASER

If purchaser fails to do any of the several things required of the purchaser within the time allowed and does not correct the default within [*number of days*] days from notification by seller, this agreement may, at the option of seller, be deemed terminated and purchaser's initial and second payment will be deemed as liquidated and agreed on damages and all obligations and duties of the parties will cease. It is specifically recognized by purchaser that the apartment which the purchaser is agreeing to purchase is a part of a large and complex development which requires substantial administrative and promotional expenses and that sales are and will be, in part, seasonal, and that it will be extremely

difficult if not impossible to determine actual damages incurred by seller by breach of purchaser. Therefore, the provision with regard to damages is an attempt by the parties to liquidate the damages rather than provide for a penalty, and the damages will not be considered as a penalty.

#### SECTION XV. NOTICE

When required to be given under this agreement, notice must be in writing. When furnished by mail, notice will be effective and the time period will commence from the time of deposit in the United States mail, properly addressed to the point of destination.

#### SECTION XVI. MISCELLANEOUS

This agreement will supersede any and all undertakings and agreements between the parties to the agreement, and it is mutually understood and agreed that this agreement represents the entire understanding between the parties. No representations or inducements prior to this agreement which are not included and embodied in it will be of any force and effect.

This agreement may be modified or amended only in writing signed by both the purchaser and seller.

In witness, the parties to this agreement have executed this agreement at *[place of execution]* the day and year first above written.

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*[Signatures]*

*[Acknowledgment]*

#### NOTES TO FORM

##### Drafter's Notes

If the seller is not the developer and the unit is a residential unit, then the initial paragraph of this form should read as either of the following (Fla. Stat. Ann. § 718.503):

THE BUYER HEREBY ACKNOWLEDGES THAT BUYER HAS BEEN PROVIDED A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION OF THE ASSOCIATION, BYLAWS, RULES OF THE ASSOCIATION, AND A

**CONDOMINIUMS****§ 7:46.50**

COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, PRIOR TO EXECUTION OF THIS CONTRACT.

*or*

THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER AND RECEIPT BY BUYER OF A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION, BYLAWS, RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION IF SO REQUESTED IN WRITING. ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE BUYER RECEIVES THE DECLARATION, ARTICLES OF INCORPORATION, BYLAWS, AND RULES IF REQUESTED IN WRITING. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

**Tax Notes**

Assumption of the mortgage under Section II increases the tax basis of the purchaser of the property by the amount assumed. Am. Jur. 2d, Federal Taxation ¶ 11428.

**§ 7:46.50 Purchase agreement—Provision—Treatment of special assessments**

There are total special assessments in the amount of *[\$/dollar amount]* as of the date of the acceptance of this purchase agreement by Seller and Purchaser, owing to the Condominium or Association Board for *[nature of expense]*. As of the date of the acceptance of this purchase agreement by the Purchaser and the Seller, there are no other unpaid special assessments owing to the condominium or Association Board which are or may become liens against the property. The Seller has not received written notice of any other special assessments, or proposed capital improvements, or construction by the Condominium or Association Board. The current special assessments shall be the responsibility of, and paid for by *[the Buyer/the Seller]*.

**NOTES TO FORM****Research References**

*West's Key Number Digest*  
Condominium ¶¶12, 13, 15

*Forms*

Florida Pleading and Practice Forms, Condominiums and Cooperative Apartments Ch 13

**§ 7:46.60 Purchase agreement—Provision—Covenant of the seller as to alterations or improvements**

The Seller has made no interior or exterior alterations or improvements to the unit except with the consent of the Condominium or Association Board, and if any such alterations or improvements have been made, they are in full compliance with the Declaration, By-Laws, and Rules and Regulations of the Association.

**NOTES TO FORM****Research References***West's Key Number Digest*

Condominium ☞13, 15

*Forms*

Florida Pleading and Practice Forms, Condominiums and Cooperative Apartments Ch 13

**§ 7:46.70 Purchase agreement—Provision—Covenant of the seller as to common area assessments**

There are no unpaid common area assessments owed to the Condominium or the Association Board which are or may become liens against the property, or if there are any such unpaid common area assessments owed to the Condominium or Association Board, in that event the Seller shall pay all such unpaid common area assessments on or before the transfer of title.

**NOTES TO FORM****Research References***West's Key Number Digest*

Condominium ☞12, 13, 15

*Forms*

Florida Pleading and Practice Forms, Condominiums and Cooperative Apartments Ch 13

**§ 7:46.80 Purchase agreement—Provision—Seller to provide various documents**

The Seller shall provide to the Purchaser at least [number]

*of days] days prior to the transfer of title the following documents:*

- (1) statement from Association setting forth the present status of common area assessments against the property;
- (2) if any alterations, improvements or additions have been made to the property, a statement from the Association certifying that they have been approved;
- (3) copy of the most recent financial statement of the Association;
- (4) name and address of the insurance agent administering the master insurance policy;
- (5) copies of the Declaration, By-laws, Rules and Regulations now in effect;
- (6) copies of the current budget and any other documents related to the current or future budget or assessments;
- (7) copy of the current management agreement; and
- (8) copy of the title insurance policy on the common areas.

#### NOTES TO FORM

##### Research References

*West's Key Number Digest  
Condominium ☞15*

##### *Forms*

*Florida Pleading and Practice Forms, Condominiums and Cooperative Apartments Ch 13*

#### § 7:47 Purchase agreement for timeshare interest

This instrument was prepared by *[name of preparer]* of *[address of preparer]*.

ORAL REPRESENTATIONS CANNOT BE RELIED ON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. FOR CORRECT REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THIS CONTRACT AND THE DOCUMENTS REQUIRED BY SECTION 718.503, FLORIDA STATUTES TO BE FURNISHED BY A DEVELOPER TO A BUYER OR LESSEE.

Agreement made on *[date of agreement]*, between *[name of seller]*, a corporation organized under the laws of the State of Florida, with its principal place of business at *[address of*

*seller], City of [name of city], County of [name of county], State of Florida, referred to below as seller, and [name of purchaser], of [address of purchaser], City of [name of city], County of [name of county], State of Florida, referred to below as purchaser.*

#### RECITALS

1. Seller agrees to sell and purchaser agrees to purchase the following described unit: *[number of unit]* in *[name of condominium]*, a condominium, according to the proposed Declaration of Condominium, to be recorded in the public records in the County of *[name of county]*, State of Florida, a copy of which is attached to and made a part of this agreement, on the following terms and conditions:

Code: *[specify]*.

Building: *[number of building]*.

Floor: *[number of floor]*.

Unit number: *[number of unit]*.

Duration of timeshare period: *[duration]*.

Nature of time share period: *[specify]*.

Week or weeks: *[specify]*.

Estimated date of completion of construction: *[date of completion]*.

Occupancy may commence: *[date of occupancy]*.

Estimated date of closing: *[date of closing]*.

2. The purchase price will be *[\$/dollar amount of purchase]*.

3. The initial payment will be *[\$/dollar amount initial]*, payable on the date of the execution of this agreement by purchaser, the receipt of which is acknowledged by seller.

4. *[\$/Dollar amount]* will be paid on or before *[number of days]* days from the date of acceptance of this agreement by seller.

5. *[\$/Dollar amount]* will be paid at closing either in cash or by a cashier's check or certified check.

6. *[\$/Dollar amount]* requested mortgage.

7. *[\$/Dollar amount]* total purchase price.

8. Requested mortgage of *[\$/dollar amount]*, at *[percentage]%* interest rate, for *[number of years]* years from the *[name of bank]* Bank, with monthly payments of *[\$/dollar amount]*.

9. UNITS IN THIS CONDOMINIUM ARE SUBJECT TO TIMESHARE ESTATES.

10. This agreement is subject to the terms and conditions enumerated herein.

11. ANY PAYMENT IN EXCESS OF 10% OF THE PURCHASE PRICE MADE TO DEVELOPER PRIOR TO CLOSING PURSUANT TO THIS CONTRACT MAY BE USED FOR CONSTRUCTION PURPOSES BY THE DEVELOPER.

12. FOR THE PURPOSE OF AD VALOREM ASSESSMENT, TAXATION, AND SPECIAL ASSESSMENTS, THE MANAGING ENTITY WILL BE CONSIDERED THE TAXPAYER AS YOUR AGENT PURSUANT TO SECTION 192.037, FLORIDA STATUTES.

13. In the event that the purchaser cancels the contract during a 10-day cancellation period, the developer will refund to the purchaser the total amount of all payments made by the purchaser under the contract, reduced by the proportion of any contract benefits the purchaser has actually received under the contract prior to the effective date of the cancellation. The refund will be made within 20 days after receipt of notice of cancellation or within five days after receipt of funds from the purchaser's cleared check, whichever is later.

14. YOU MAY CANCEL THIS CONTRACT WITHOUT ANY PENALTY OR OBLIGATION WITHIN 10 DAYS FROM THE DATE YOU SIGN THIS CONTRACT, AND UNTIL 10 DAYS AFTER YOU RECEIVE THE PUBLIC OFFERING STATEMENT, WHICHEVER IS LATER.

IF YOU DECIDE TO CANCEL THIS CONTRACT, YOU MUST NOTIFY THE DEVELOPER IN WRITING OF YOUR INTENT TO CANCEL. YOUR NOTICE OF CANCELLATION SHALL BE EFFECTIVE UPON THE DATE SENT AND SHALL BE SENT TO *[name of developer]* AT *[address of developer]*. ANY ATTEMPT TO OBTAIN A WAIVER OF YOUR CANCELLATION RIGHT IS UNLAWFUL. WHILE YOU MAY EXECUTE ALL CLOSING DOCUMENTS IN ADVANCE, THE CLOSING, AS EVIDENCED BY DELIVERY OF THE DEED OR OTHER DOCUMENT, BEFORE EXPIRATION OF YOUR 10-DAY CANCELLATION PERIOD, IS PROHIBITED.

Purchaser: *[purchaser]*

Address: *[address]*

Date: *[date]*

Seller: *[seller]*

Address: *[address]*

By: *[name of authorized representative of seller]*

Acceptance date: *[date]*

Developer: *[developer]*

Address: *[address]*

*[If applicable, add: Owner of underlying fee [specify]]*

Address: *[address]*

## PURCHASE TERMS AND CONDITIONS

### SECTION ONE. DEPOSITS

The initial deposit or subsequent payments made pursuant to this agreement by purchaser to seller will, prior to the closing of title, until the amount to the seller equals *[percentage]*% of the total sale price, be held in escrow, pursuant to the provisions of Fla. Stat. Ann. § 718.202(1). All amounts paid by purchaser to seller in excess of *[percentage]*% of the total sales price will be held in a special account by seller or its authorized agent, pursuant to the provisions of Fla. Stat. Ann. § 718.202(2) and (3). These funds may be used prior to closing only for refund to the purchaser or in the actual construction and development of the condominium named in this agreement; however, no part of the funds will be used for salaries of salespersons, commissions, or expenses of salespersons, or for advertising purposes. The initial downpayment or subsequent payments made pursuant to this agreement by purchaser to seller will, prior to the closing of title, be held in an escrow account with *[name and address of licensed Florida real estate broker]*, whose principal place of business is located at *[address of broker]*, City of *[name of city]*, County of *[name of county]*. The purchaser may obtain a receipt for the deposit on request.

### SECTION TWO. UNIT WEEKS

Unit week number 1 is the seven days commencing on the first Friday in each year. Unit week number 2 is the seven days succeeding. Additional weeks up to and including unit week number 51 are computed in a like manner. Unit week number 52 contains the seven days succeeding the end of

unit week number 51 without regard to the month or year plus any excess days not otherwise assigned. Unit weeks run from noon on the first Friday of the unit week purchased to noon on the last Friday of that week.

#### SECTION THREE. MAINTENANCE FEE

Purchaser understands and agrees that in accordance with the Declaration of Condominium, purchaser will be responsible for the above-described unit week owner's share of common expenses, assessments, maintenance fee, and any and all other expenses incurred in the operation of the condominium.

#### SECTION FOUR. PURCHASER'S ACKNOWLEDGMENTS

Purchaser acknowledges by execution of this agreement that prior to the execution of this agreement, purchaser received and read a copy of the developer's prospectus and declaration together with exhibits attached to it, which include the bylaws and articles of incorporation of the condominium association and the management agreement. Purchaser received and read a copy of the initial rules and regulations of the condominium, and a copy of the sales brochure, floor plan, and estimated operating budget for the condominium. Purchaser further acknowledges, represents, and warrants that the purchase of the *[unit weeks]* is made for purchaser's personal use, without reliance on representations concerning rentals, rent return, tax advantages, depreciation, or investment potential, or other monetary or financial advantage by seller, its agents, employees, or associates.

#### SECTION FIVE. MODIFICATION AND CHANGES

The Declaration of Condominium will be recorded prior to closing. Seller reserves the right to make changes in the proposed Declaration of Condominium as provided, a copy of which has been delivered to the purchaser, provided those elements do not decrease purchaser's share in the common elements, change purchaser's voting rights, or increase purchaser's share of the common expenses. The condominium described in this agreement and proposed improvements on the condominium property will be substantially similar to drawings shown to purchaser; however, the seller will have the right to make reasonable modifications to the plans and specifications as it deems advisable. Purchaser acknowledges that dimensions are approximate.

## SECTION SIX. CONSTRUCTION OF THE CONDOMINIUM

Purchaser fully understands and is aware that seller anticipates that the building in which the above-described condominium parcel is contained will be completed as described in this agreement, if not already completed, but cannot provide a fixed date for occupancy, by reason of factors influencing the rate of construction such as, but not limited to, acts of God, strikes, wars, availability of material, and the like. In all events, seller will cause the building containing the above described condominium parcel to be completed no later than *[number of years]* years from the date of this agreement.

## SECTION SEVEN. CLOSING AND TITLE

If the condominium unit described in this agreement is purchased prior to or during construction, closing purchase will be consummated no later than *[number of days]* days after a certificate of occupancy has been issued for the building containing the unit. If a certificate of occupancy has been issued for the building containing the unit on or before the date of this agreement, closing will be consummated no later than *[number of days]* days after execution of this agreement. If purchaser fails to meet these requirements, this agreement will become null and void, and at the option of seller, all moneys previously paid by purchaser will be forfeited as outlined in Section Fourteen below. Seller will deliver at closing its *[type of deed]* conveying fee title to the unit week or weeks to purchaser under a plan of interval ownership as defined in the Declaration of Condominium free and clear of all encumbrances, except: conditions, restrictions, reservations, limitations, zoning and easements of record at the time of closing, and the terms and conditions of the Declaration of Condominium and taxes for the then-current and subsequent years. The closing shall be at such place as will be specified by mail or by seller, if authorized by seller. Purchaser at closing will execute any necessary documents. All representations, duties, and obligations of the purchaser and the terms and conditions of this agreement will survive the closing.

## SECTION EIGHT. CANCELLATION PRIVILEGE PURCHASER MAY CANCEL THIS CONTRACT WITH-

OUT ANY PENALTY OR OBLIGATION WITHIN 10 DAYS FROM THE DATE PURCHASER SIGNS THIS CONTRACT, AND UNTIL 10 DAYS AFTER PURCHASER RECEIVES THE PUBLIC OFFERING STATEMENT, WHICHEVER IS LATER.

IF PURCHASER DECIDES TO CANCEL THIS CONTRACT, PURCHASER MUST NOTIFY THE DEVELOPER IN WRITING OF PURCHASER'S INTENT TO CANCEL. PURCHASER'S NOTICE OF CANCELLATION SHALL BE EFFECTIVE UPON THE DATE SENT AND SHALL BE SENT TO *[name of developer]* AT *[address of developer]*. ANY ATTEMPT TO OBTAIN A WAIVER OF PURCHASER'S CANCELLATION RIGHT IS UNLAWFUL. WHILE PURCHASER MAY EXECUTE ALL CLOSING DOCUMENTS IN ADVANCE, THE CLOSING, AS EVIDENCED BY THE DELIVERY OF THE DEED OR OTHER DOCUMENT, BEFORE EXPIRATION OF PURCHASER'S 10-DAY CANCELLATION PERIOD, IS PROHIBITED.

#### SECTION NINE. FURNISHINGS

Although models are for display purposes only, the condominium unit described in this agreement will have furniture, appliances, equipment, and all accent furnishings substantially similar to or of equal quality to those shown or used in the model.

#### SECTION TEN. TITLE INSURANCE PAID BY SELLER

At closing, and simultaneously with the delivery of seller's *[type of deed]*, seller shall cause to be issued to purchaser at seller's cost an owner's title insurance policy insuring the purchaser's title to the condominium unit for the unit week or weeks purchased, subject only to the conditions of title set forth in this agreement. If, after use of reasonable diligence to make the title insurable, seller is unable to do so, seller will refund purchaser all moneys paid under this agreement and will thereupon be released from any and all obligations under it.

#### SECTION ELEVEN. CLOSING COSTS

Seller will pay for recording of deed and applicable required state tax stamps on the deed.

#### SECTION TWELVE. OCCUPANCY

Purchaser may not occupy the condominium unit described

in this agreement until *[percentage]*% of the purchase price has been paid.

#### SECTION THIRTEEN. BINDING EFFECTS

This agreement is binding on the parties to it and their heirs, legal representatives, successors, and assigns and may not be assigned by purchaser without the prior written consent of seller. This agreement will supersede any and all understandings and agreements between the parties and it is mutually understood and agreed that this agreement represents the entire agreement between the parties and no representations or inducements which are not included in and embodied in this agreement will be of any force and effect. This agreement may only be amended and modified by a written agreement between the parties. This agreement shall not be recorded in the Office of the Clerk in any Circuit of the State of Florida and the recording of it by the purchaser will be considered a breach of this agreement and will terminate this agreement at seller's option.

#### SECTION FOURTEEN. PURCHASER'S DEFAULT

Time is of the essence except where otherwise specifically provided for in this agreement. Purchaser expressly waives notice of default or breach of any term of this agreement. On purchaser's default, or breach of any term or condition of this agreement, all sums paid under this agreement by purchaser will be retained by the seller as liquidated and agreed damages, and the parties will be relieved from all obligations under it. Purchaser will be liable for seller's reasonable attorney's fees and costs incurred by it from of any litigation of the parties' rights under this agreement, if the seller is the prevailing party. Purchaser covenants to defend and indemnify seller against all claims of real estate brokers or salespersons due to acts of purchaser or purchaser's representatives other than brokers or salespersons employed by seller.

#### SECTION FIFTEEN. MORTGAGE PURCHASE

If purchaser desires mortgage financing, a mortgage application will be completed and submitted as part of this agreement. In which case, this agreement is contingent on purchaser obtaining a first mortgage commitment for the amount specified in this agreement.

## SECTION SIXTEEN. TAXES AND SPECIAL ASSESSMENTS

FOR THE PURPOSE OF AD VALOREM ASSESSMENT, TAXATION, AND SPECIAL ASSESSMENTS, THE MANAGING ENTITY WILL BE CONSIDERED THE TAXPAYER AS YOUR (PURCHASER'S) AGENT PURSUANT TO SECTION 192.037, FLORIDA STATUTES. YOU HAVE THE RIGHT TO CHALLENGE AN ASSESSMENT BY A TAXING AUTHORITY RELATING TO YOUR TIMESHARE ESTATE PURSUANT TO THE PROVISIONS OF CHAPTER 194, FLORIDA STATUTES.

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[*Purchaser*]

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[*Seller*]

By: \_\_\_\_\_

[*Signature*]

Date: [*date*].

[*Acknowledgment*]

### NOTES TO FORM

#### Drafter's Notes

For statutory provisions relating to sales or reservation deposits prior to closing, see Fla. Stat. Ann. § 718.202.

For statutory provisions relating to vacation plans and timesharing, see Fla. Stat. Ann. §§ 721.01 et seq.

#### Tax Notes

Sharing of condominium use is often a matter of importance, particularly for vacation condominiums. Various methods are used for this purpose. Two or more owners can purchase a unit and enter into their own individual agreement as to its use. A license to use the unit can be sold, with title retained in the owner. An agent can be appointed to rent a unit. Joint owners sometimes pool their interests and share in the total rentals.

None of these methods engender any major tax problem. Consideration received from the sale of a license will be fully taxable when received, while the expenses may be spread over future years. Income would therefore be bunched in the year of sale and excessive deductions would be taken as expenses are incurred in later years. A rental pool may require the owners to report their income either as partners or as an association taxable as a corporation. To avoid this latter clas-

sification, a formal partnership agreement may be advisable. Joint ownership of a condominium is subject to the same rules that apply to any other jointly-owned real estate. See Am. Jur. 2d, Federal Taxation ¶ 13300.

For general discussion of timesharing, see § 7:4.

#### **Research References**

##### *A.L.R. Library*

Regulation of time-share or interval ownership interests in real estate, 6 A.L.R. 4th 1288.

##### *Legal Encyclopedias*

Fla. Jur. 2d, Timesharing, Condominiums and Co-operative Apartments §§ 221 to 232.

##### *Law Reviews and Other Periodicals*

- Bell and Aron, The New Timeshare Act, 58 Fla. B.J. 194 (1984).  
Davis, Legal Considerations: Real Estate Time Sharing in Florida—A Practitioner's View, 55 Fla. B.J. 116 (1981).  
Fleming and Keane, Securities Implications of Time Share Condominium Offerings: A Fresh Look, 55 Fla. B.J. 467 (1981).  
Kinsolving and Caron, Tax Considerations in Timeshare Development, 13 Stetson L. Rev. 25 (1983).  
Kobrin, The Florida Real Estate Time Sharing Act, 55 Fla. B.J. 655 (1981).  
McDowell, Recent Developments in Florida Timesharing: Good News and Bad for the Timeshare Consumer, 13 Stetson L. Rev. 591 (1984).

## **§ 7:48 Condominium owner's questionnaire**

### Property Owner's Questionnaire

#### History of Property and Service Record

To Owner: The prospective purchaser would like to know as much as possible about the property's various features, condition, and service record. While we will inspect the property and prepare a report for the purchaser, the present owner can provide an invaluable insight not possible in a limited inspection. Also, the service record will be of great benefit to the purchaser should a future need arise for outside services.

1. What is your full name?: [name of owner].
2. What is your current address?: [address of owner].
3. Are you the  owner  tenant?
4. How old is the house?: [number of years] years.   
Don't know.
5. How long have you lived on this property?: [number of years] years.

6. Are you providing a warranty through your Realtor?:  
 No.  Yes. Warranty Company  No.  Yes.

#### Roofing

7. How old is the main roof?: *[number of years]* years.  
 Don't know.

8. How old are the other areas?: *[number of years]* years.  
 Don't know.

9. Have you had any leaks or problems?:  No.  Yes.  
When? *[time]*. Where? *[location]*.

#### Heating

10. What type of heating do you have?: *[specify]*.  
Number *[specify]*. Age *[specify]*.

11. Have you had any heating problem?:  No.  Yes.  
When? *[time]*. Where? *[location]*.

12. Do you have any areas that don't have a heat  
source?:  No.  Yes. Where? *[location]*.

#### Cooling

13. Do you have central air?:  No.  Yes. Number:  
*[specify]*. Age: *[specify]*.

14. Have you had any cooling problems?:  No.  Yes.  
When? *[time]*. Where? *[location]*.

#### Electrical

15. What type of wiring do you have?:  Copper.  Aluminum.  
 Don't know.

16. Have you had any electrical problems or work done  
on system?:  No.  Yes. When? *[time]*. Where?  
*[location]*.

#### Plumbing

17. What is your water supply?:  Municipal.  Well.  
 Other: *[specify other]*.

18. What is your waste system?:  Municipal.  Septic.  
 Cesspool.  Other: *[specify other]*.

19. If septic or cesspool, have you had any problems or  
done any repairs?:  No.  Yes. When?: *[time]*. Where?:  
*[location]*.

Date of last pumping: *[date]*.

20. If well water, have you had any system problems?:  
 No.  Yes. When?: *[time]*. Where?: *[location]*.

21. Have you had any water pressure, quality, or volume problems?:  No.  Yes. When?: *[time]*. Where?: *[location]*.

22. Are you aware of any plumbing or shower stall leaks?:  No.  Yes. When?: *[time]*. Where?: *[location]*.

#### Hot Water

23. How do you generate your hot water?:  Separate heater.  Off boiler.  Solar.  Other: *[specify other]*. Age: *[age]*.

24. Have you had any problems with the amount and temperature of the hot water?:  No.  Yes. When?: *[time]*. What problem?: *[specify]*.

#### Wood Destroying Insects

25. Are you aware of any present or past wood destroying insects like termites or carpenter ants?:  No.  Yes. When?: *[time]*. Where?: *[location]*.

26. Has the property been treated for insects:  No.  Yes. When?: *[time]*. Where?: *[location]*.

27. Have you had any air quality problem due to insect treatment?:  No.  Yes. When?: *[time]*. Where?: *[location]*.

#### Water Penetration

28. Have you ever had any water in basement, crawl space, or lower level?:  No.  Yes. When?: *[time]*. Where?: *[location]*.

29. Have you had any waterproofing done?:  No.  Yes. When?: *[time]*. By whom?: *[name]*.

#### Miscellaneous

30. Are you aware of any wall insulation in the exterior walls?:  No.  Yes. Type: *[type]*.

31. Are there any air quality, water quality, fume, or sensitivity problems in the property?:  No.  Yes. When?: *[time]*. What?: *[specify]*.

32. If you have a pool, have you had any structural, leakage, or equipment problems?:  No.  Yes. When?: *[time]*. Where?: *[location]*.

33. Are you aware of any condition that would affect the stability or habitability of this property?:  No.  Yes. When?: *[time]*. Where?: *[location]*.

34. If there is a fireplace, fireplace insert, or wood/coal burning stove, have you had any problems?:  No.  Yes. When?: *[time]*. Where?: *[location]*.

35. How old are the kitchen appliances that will remain?: Range *[age]*; Oven *[age]*; Dishwasher *[age]*; Disposal *[age]*; Compactor *[age]*. Any current problems?:  No.  Yes. Which one(s): *[specify]*. What?: *[specify]*. When?: *[time]*.

Check one:

- Owner declined to provide information at time of inspection.  
 Owner was not available to answer this questionnaire.

To Buyer: We strongly recommend that buyer review this document and question owner about unanswered or uncertain areas prior to purchase.

Dated *[date]*.

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*[Signature of Owner or Authorized Representative]*

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*[Signature of Inspector]*

#### NOTES TO FORM

##### Drafter's Notes

Under Florida law, the bylaws of condominium associations must contain a provision with respect to sale or transfer of units. Fla. Stat. Ann. § 718.112(2)(i) provides that no charge shall be made by a condominium association or any body of a condominium association in connection with the sale, mortgage, lease, sublease, or other transfer of a unit unless the association is required to approve the transfer and a fee for the approval is provided for in the declaration, articles, or bylaws. Any such fee may be preset, but the fee cannot exceed \$100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant.

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, Recovery of payments or deposits, Real Property Sales and Exchanges §§ 275 et seq.

###### *Law Reviews and Other Periodicals*

Jaquish, Real Property Law: Seller's Duty to Disclose Material Facts in Used Home Sales: Overdue or Overprotection? (Johnson v. Davis, 480 So. 2d 625 (Fla. 1985)), 38 Fla. L. Rev. 309 (1986).

**§ 7:49 Deed with covenants of title—Timeshare condominium**

This instrument was prepared by [name of preparer] of [address of preparer].

This [warranty / special warranty] deed is made on [date] by and between [name of grantor], a corporation organized and existing under the laws of the State of Florida, referred to as grantor, and [name of grantee], of [address of grantee], [name of city], [name of county], State of Florida, referred to as grantee.

For consideration in the amount of \$[dollar amount], grantor conveys to grantee the following unit: [amount of time] in condominium Unit No. [number of unit] of [name of condominium project] Condominiums, located at [address of condominium], [name of city], [name of county], State of Florida, together with all appurtenances to it, as described in the Declaration of Condominiums recorded in the Office of the County Clerk of [name of county], State of Florida. Grantor further grants to grantee a remainder in the fractional interest described in the Declaration of Condominiums after termination in fee simple absolute, as tenant in common with other unit week owners of the condominium project described above.

Unit week No. [number of week] begins at noon on the first Saturday of each year, and extends for seven days, ending at noon on the seventh day. Unit week No. [number of week] is composed of the succeeding seven days. Additional unit weeks are composed in the same manner.

Grantee's ownership of the unit week described above is subject to the following:

- (1) taxes for current and subsequent years;
- (2) conditions, restrictions, reservations, easements, and other matters recorded in the Office of the Clerk of the [name of circuit court]; and
- (3) the Declaration of Condominiums recorded in the Office of the Clerk of the [name of circuit court].

Grantor fully warrants title to the unit week granted to grantee, and will defend the unit week against the legal claims of the persons.

Dated: [date].

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*[Signature of grantor]*

*[Acknowledgment]*

Send subsequent tax bills to *[grantee]* at *[post office address]*.

#### NOTES TO FORM

##### Tax Notes

See Tax Notes following § 7:47.

### § 7:50 Membership purchase agreement for use of condominium unit

This instrument was prepared by *[name of preparer]* of *[address of preparer]*.

Agreement made on *[date of agreement]*, between *[name of seller]*, a corporation organized under the laws of the State of Florida, with its principal place of business at *[address of seller]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, referred to as seller, and *[name of purchaser]*, of *[address of purchaser]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, referred to as purchaser.

#### RECITALS

1. Seller is the owner of memberships in *[name of corporation / name of association]* which entitle each member to the exclusive use and occupancy of a specific condominium unit for a designated use period in *[name of condominiums]*.

2. Seller agrees to sell and purchaser agrees to purchase a membership in *[name of corporation / name of association]* which will entitle purchaser to use and occupy condominium unit number *[number of unit]* in *[name of condominiums]* for the following use period: *[identify week numbers]*.

This purchase and sale is subject to the following terms and conditions:

#### SECTION ONE. SUBJECT MATTER OF SALE

Seller sells to purchaser and purchaser purchases from seller a membership which entitles purchaser to the exclusive

right of possession, use, and occupancy of the unit specified above during the period designated above, and the nonexclusive right to use the appurtenant common elements within the condominium, and all services of the seller within the condominium and surrounding grounds, as set forth in the bylaws and rules and regulations of the seller.

## SECTION TWO. USE PERIOD

Use periods will consist of unit weeks. Use period number 1 is the seven days commencing at noon on the first *[name of day]* in each year. Use period number 2 is the seven days succeeding use period number 1. Use period number 3 is the seven days succeeding use period number 2. Succeeding use periods up to and including use period number 51 are computed in like manner. Use period number 52 consists of the seven days succeeding use period number 51 without regard to the month or year plus any excess days not otherwise assigned.

## SECTION THREE. PURCHASE PRICE AND MANNER OF PAYMENT

1. The purchase price will be *[\$/dollar amount]*.
2. The down payment will be *[\$/dollar amount]*, payable on the date of the execution of this agreement, the receipt of which is acknowledged by seller.
3. The balance of the purchase price to be financed by seller will be *[\$/dollar amount]*.
4. The rate of interest for the amount to be financed will be *[percentage]%* per year.
5. The balance shall be paid in *[number of installments]* equal monthly installments at the rate of *[\$/dollar amount]* per month commencing on the month of *[name of month]*, *[year]*, until the month of *[name of month]*, *[year]*. Payment shall be made by check or money order made payable to *[name of seller]*, at *[address of seller]* or such other address as may be designated by seller. Payment will be made on or before the *[ordinal number of days]* day of each month. Payment will be delinquent *[number of days]* days after the due date and a late payment charge of *[percentage]%* of the amount of the delinquent payment equivalent to *[\$/dollar amount]*, will be added to the delinquent payments. The balance due under this agreement may be prepaid at any time without penalty.

**SECTION FOUR. DURATION OF MEMBERSHIP**

The duration of the membership of the purchaser in the condominium unit will commence on *[date begin]*, and end on *[date ends]*.

**SECTION FIVE. TITLE INSURANCE**

At closing, and simultaneously with the delivery of seller's *[warranty deed/grant deed]*, seller will issue to purchaser at seller's cost a title insurance policy insuring the seller's interest to the property and the purchaser's use rights in the property as set forth in the declaration of restrictions of the seller dated *[date]*.

**SECTION SIX. CLOSING COSTS AND EXPENSES**

*[Seller/Purchaser]* will pay the closing costs and other expenses of sale, including taxes and fees.

**SECTION SEVEN. FURNISHINGS**

Seller will furnish the condominium unit covered by this agreement with furniture, appliances, equipment, and furnishings substantially similar to or of equal quality to those shown or used in the model.

**SECTION EIGHT. PURCHASER'S  
ACKNOWLEDGMENTS**

Purchaser acknowledges and agrees that prior to the execution of this agreement:

- (1) purchaser has read, understood, and received a copy of the following documents: the declaration of restrictions, rules and regulations, bylaws, and the current operating budget of the seller;
- (2) there has been and will be no extension of credit in connection with this agreement other than that represented by this membership purchase agreement; and
- (3) there is no promise to compensate purchaser for referring prospective purchasers to seller.

**SECTION NINE. MAINTENANCE FEE**

Purchaser will be responsible for the owner's share of common expenses, assessments, maintenance fee, and all other expenses incurred in the operation of the above-numbered condominium unit. The amount of the owner's share of the

expenses will be *[\$/dollar amount]* per month, which will be due and payable together with the payment of the unpaid balance of the purchase price.

#### SECTION TEN. SECURITY AGREEMENT

To secure performance by purchaser of purchaser's obligations under this agreement, purchaser grants to seller: (1) a security interest in the membership of the purchaser; and (2) an irrevocable proxy coupled with an interest as creditor to cast purchaser's vote at any membership meeting until purchaser has made full payment of the purchase price agreed upon, on which date, the proxy will be revocable by purchaser by written notice to seller, which will be effective on the date of the revocation, or by the purchaser's exercise of *[his/her]* right to vote as of the date of the vote. In the event of nonfulfillment by the purchaser of any of the terms and conditions of this agreement and if the violation is not cured within *[number of days]* days of the date notice of the violation is given to purchaser by seller, seller without any further notice may immediately terminate this purchase agreement, retain all monies paid by purchaser to seller, and substitute itself in place of purchaser as member of the *[name of association/name of corporation]*. In the event that seller elects to terminate this purchase agreement and retain all payments made by purchaser to seller, purchaser will forfeit purchaser's interest in the membership but will be released from any further obligation to seller under this agreement. If seller elects not to terminate this purchase agreement, payment hereunder will be accelerated to require the immediate payment by purchaser of the entire balance of the total payment due hereunder and suit may be brought against member for specific performance and/or to collect all sums due under this agreement. The rights given to seller under this provision are in addition to, and not exclusive of, any of the rights which the seller may have against buyer, including the rights of a secured party under the applicable laws to proceed against a defaulting purchaser or debtor.

#### SECTION ELEVEN. DAMAGES

In the event that seller elects to terminate this agreement pursuant to the provisions of the preceding section, the parties agree that seller may, at its option, retain all monies paid by purchaser as liquidated damages, in view of the impracticability and difficulty of fixing the amount of dam-

ages which may result by reason of the purchaser's default, and it is agreed that such amount will constitute a reasonable amount of damages suffered by the seller. On termination of this agreement, any and all rights of the purchaser under this agreement will immediately terminate and seller may resell the membership purchased by the purchaser free and clear of any claims, rights, or interests arising out of this agreement.

#### **SECTION TWELVE. ASSIGNMENT**

Before the purchaser has paid in full the purchase price and other charges as provided above, purchaser will not sell, transfer, or assign purchaser's rights and interests under this agreement without the prior written consent of seller. In the event that purchaser sells, transfers, or assigns purchaser's rights and interests with the consent of the seller, any purchaser, transferee, or assignee will agree in writing to adopt and abide by this purchase agreement and the related documents received and read by the purchaser as enumerated in Section Eight above. No sale, transfer, or assignment of any membership and/or this purchase agreement will be valid or recognized if the purchaser is in default in its obligations under the provisions of this agreement.

#### **SECTION THIRTEEN. BINDING EFFECT**

This agreement will be binding on, and inure to the benefit of, seller and purchaser and their respective successors, heirs, executors, administrators, and assigns.

#### **SECTION FOURTEEN. TERMINATION PRIVILEGE**

This agreement may be terminated by purchaser by delivering to seller written notice of purchaser's intention to cancel within *[number of days]* days after the date of the execution of this agreement. After such period of time, purchaser will have no right to terminate this agreement.

#### **SECTION FIFTEEN. GOVERNING LAW; PLACE OF ACTION**

All the provisions of this membership purchase agreement will be governed by the laws of the State of Florida. Any action arising from or in connection with this agreement will be brought in the courts of the State of Florida.

#### **SECTION SIXTEEN. ENTIRE AGREEMENT**

This agreement constitutes the entire agreement between

the parties respecting the subject matter of this transaction and supersedes and cancels all prior negotiations, representations, and agreements. This agreement may only be amended or modified by written agreement between the parties. Seller has no knowledge of nor has it authorized any representations made by any employee, salesperson, or broker concerning income or other economic benefit to be derived from this transaction or of any possible tax benefits.

In witness, the parties have executed this agreement at [address of execution], City of [name of city], County of [name of county], State of Florida, the day and year first above written.

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[Signatures]

[Acknowledgment]

#### NOTES TO FORM

##### Tax Notes

For general discussion of timesharing, see § 7:4.  
See Tax Notes following § 7:47.

#### § 7:51 Unit deed with special warranty

##### SPECIAL WARRANTY DEED

This instrument was prepared by [name of preparer] of [address of preparer].

Deed made on [date], between [name of grantor], a corporation organized and existing under the laws of the State of Florida, having a place of business at [address of grantor], in the City of [name of city], County of [name of county], State of Florida, referred to below as grantor, and [name of grantee], residing at [address of grantee], in the City of [name of city], County of [name of county], State of Florida, referred to below as grantee.

Grantor, in consideration of \${dollar amount}, and other good and valuable consideration paid by grantee, grants to grantee the following:

The unit (referred to below as the “unit,”) known as Unit

No. *[number of unit]* in the building, known by name as *[name of building]* and by street number as *[street address of building]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida. The unit is designated and described as Unit No. *[number of unit]* in the declaration executed by grantor under the Condominium Act of the State of Florida (Chapter 718 of the Florida Statutes), dated *[date of declaration]*, and recorded in the official records of *[name of county]*, Florida, on *[date]*, in *[volume and book]* at page *[number of page]* and on the floor plans of the building certified by *[name of registered architect / name of licensed professional engineer]*, a *[registered architect / licensed professional engineer]* and included as Exhibit *[identification of exhibit]* to the declaration. The land on which the building is located is described as follows: *[description of land]*.

Together with an undivided *[percentage]%* interest in the common elements of the property described in the declaration, referred to below as the common elements;

Together with an easement for the continuance of all encroachments by the unit on any adjoining units or common elements, now existing as the result of the construction of the building, or that may occur later as a result of settling or shifting of the building, or as a result of repair or restoration of the building or unit after damage or destruction by fire or other casualty, or after a taking in condemnation or eminent domain proceedings, or by reason of an alteration of the common elements, so that any such encroachment may remain so long as the building stands;

Together with an easement in common with the owners of all other units to use and maintain all pipes, wires, ducts, cables, conduits, public utility lines, and other common elements located in any of the other units or elsewhere on the property and serving the unit;

Together with an easement in common with the owners of all other units over all streets, walks, and other rights of way serving units of the condominium, as part of the common elements, and providing access to streets and ways of the city existing now or in the future;

Together with the appurtenances and all the estate and rights of the grantor in and to the unit;

Together with and subject to all easements of necessity in favor of the unit or in favor of other units or the common elements;

Together with an easement for the exclusive use of any terrace to which the unit has sole access; and

Subject to easements in favor of adjoining units and in favor of the common elements for the continuance of all encroachments of such adjoining units or common elements on the unit, now existing, or that may come into existence hereafter as a result of settling or shifting of the building, or as a result of repair or restoration of the building or unit after damage or destruction by fire or other casualty, or after a taking in condemnation or eminent domain proceedings, or by reason of an alteration to the common elements, so that any such encroachment may remain so long as the building stands;

Subject to an easement in favor of the other units to use and maintain pipes, wires, ducts, cables, conduits, public utility lines, and other common elements located within the unit or elsewhere on the property and serving the other units;

*[Subject also to a first mortgage in the amount of \$[dollar amount] executed by [specify name] to [specify name], dated [date of first mortgage], and recorded on [date recorded], in Volume [number of volume], page [number of page] of the official records of [name of county], Florida, which grantee assumes and agrees to pay]; and*

Subject to the provisions of the declaration and of the bylaws, and the rules and regulations of the condominium, included as Exhibit *[identification of exhibit]* to the declaration, as they may be from time to time amended by instruments duly recorded in the official records of *[name of county]*, Florida, which provisions, together with any amendments, shall constitute covenants running with the land, and shall bind forever any person having at any time any interest or estate in the unit as though such provisions were recited and stipulated at length herein;

To have and to hold the above-described premises unto grantee and *[his/her]* heirs or successors and assigns forever.

Grantor covenants as follows:

- (1) that the unit is free from all encumbrances made by grantor, except *[list any encumbrances]*; and
- (2) that grantor will warrant and defend the property conveyed against the lawful claims and demands of all

persons claiming by, through, or under it, but against none other.

*[If appropriate, add: The last prior unit deed conveying this unit was recorded in the official records of [name of county], Florida on [date], in [volume and book] at page [page number].]*

Executed at *[location of execution]* on the date written above.

---

*[Grantor]*

By: \_\_\_\_\_

*[Corporate Seal]*

*[Corporate Acknowledgment]*

Send subsequent tax bills to: *[grantee]* at *[post office address]*.

#### NOTES TO FORM

##### Drafter's Notes

Matters required to be included in unit deeds are set forth at § 7:28.

For forms and materials related to conveyance of real property generally, and for forms of acknowledgment, see Conveyances (Ch 2).

#### § 7:52 Unit sublease

#### UNIT SUBLEASE

This instrument was prepared by *[name of preparer]* of *[address of preparer]*.

1. Parties. Sublease made on *[date]*, by and between *[name of sublessor]*, a Florida corporation with offices at *[address of sublessor]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, referred to below as sublessor, and *[name of sublessee]*, of *[address of sublessee]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida referred to below as sublessee.

2. Demise; description of unit. Sublessor leases to sublessee Unit No. *[number of unit]*, referred to below as the unit, in *[name of condominium]*, referred to below as the condominium, a condominium pursuant to a declara-

tion of condominium, referred to as the declaration, executed on [*date of execution*], and recorded on [*date of recording*] in Volume [*volume number*], page [*page number*] of the official records of [*name of county*], Florida. The unit is also so designated on a floor plan of the building attached to the declaration as Exhibit [*identification of exhibit*].

*[If appropriate, add: Sublessor also leases to sublessee items of personal property, now located in the unit, generally described as follows: [description of property]. No other personal property will be furnished by sublessor.]*

3. Occupancy. The unit is leased for occupancy as a private dwelling to sublessee, [*his/her*] heirs and assigns, and their families, and is not to be used for any other purpose or occupied by any other person, other than transient relatives and friends, without first obtaining sublessor's written consent for such use.

4. Term. The term of the sublease shall commence on [*date begins*], and shall continue for the full unexpired term, and for the term of any renewal, of any renewal of a ground lease, referred to below as the ground lease, entered into on [*date of ground lease*] by and between [*name of lessor*] of [*address of lessor*], in the City of [*name of city*], County of [*name of county*], State of Florida, as lessor, and sublessor as lessee, recorded on [*date*] in Volume [*number of volume*], page [*number of page*], of the official records of [*name of county*], Florida. The term of the ground lease is [*number of years*] years from the date of its execution and [*is/is not*] renewable forever. A copy of the ground lease is included in the prospectus prepared by sublessor in connection with the condominium project, a copy of which has been delivered to sublessee.

5. Rent and assessments.

(a) During the term of this sublease, sublessee shall be liable for both rent and assessments, such assessments to be determined by the board of administration of the condominium, referred to below as the board of administration, as set forth in the declaration and bylaws of the condominium.

(b) Rent for the unit is *[\$/dollar amount]* per month, due and payable in advance to sublessor on the [*ordinal number*] day of each month. The sum of *[\$/dollar*

*amount], representing the amount due for the first month or part thereof of occupancy, is payable by check to the order of sublessor on execution of this sublease. Increases in the amount of rent due under this sublease will be made only at [number-year interval] intervals as sublessor may determine. Any such adjustment will be made in accordance with [name of nationally recognized price index]. No decrease that would establish the rent at an amount less than the amount specified above shall be made [except [specify exceptions, if any]].*

(c) Assessments will be made against the unit on the basis of the undivided interest in the common elements of the condominium allocated to the unit, as set forth in the declaration. The interest of the unit, expressed as a percentage of the overall annual budget of common expenses for each year, is [percentage]. Assessments will be made by the board of administration [name a period of time], on [days and months]. [Number expressed as fraction] of the amount of each assessment will be payable by sublessee in advance to the board of administration on the [ordinal number] day of each month. The sum of \$[dollar amount] representing assessment against the unit for the first month or part thereof of occupancy, is payable by check to the order of [name of sublessees' association] on execution of this sublease.

6. Rights appurtenant to unit. Except as otherwise provided in this sublease, sublessee will be deemed owner of the unit for all purposes provided in the declaration, bylaws, and rules and regulations of the condominium, and shall have all the rights, privileges, and duties appurtenant to such ownership, including, without limitation, membership and the right to vote in the association.

7. Sublessee's covenants.

(a) Payment of rent. Sublessee agrees to pay the rent in this sublease reserved without any deduction and without notice or demand.

(b) Taxes and assessments. Sublessee agrees to pay promptly when due all real property taxes and assessments payable with respect to the unit.

(c) Assessments, common expenses. Sublessee agrees to pay promptly when due all assessments, whether for common expenses or otherwise, as may be levied against the unit pursuant to the declaration, bylaws, and rules

and regulations of the condominium, or pursuant to law.

(d) Liens. Sublessee will not, individually or as a member of the unit owners association, fail to do any act which results in the premises or any part of the premises becoming subject to a lien or encumbrance other than the mortgage liens as are herein authorized. Sublessee agrees to indemnify lessor and sublessor from and against any and all liability, loss, cost, and expense, including reasonable attorney's fees lessor or sublessor may sustain or incur by reason of any lien or encumbrance.

(e) Fire insurance. Sublessee agrees, at *[his/her]* proportionate share of the expense as a member of the unit sublessees' association and at all times during the term of this sublease, to keep the property insured against fire as follows: *[description of fire insurance plan]*.

(f) Liability insurance. Sublessee agrees, at *[his/her]* proportionate share of the expense as a member of the unit sublessees' association and at all times during the term of this lease, to maintain comprehensive liability insurance as follows: *[description of comprehensive liability insurance plan]*.

(g) Managing agent. Sublessee agrees, at *[his/her]* proportionate share of the expense as a member of the unit sublessees' association, to engage and maintain a responsible managing agent who will have charge of the collection of assessments payable to the board of administration, of rentals, and of all other payments and charges payable under this sublease to sublessor or to the board of administration.

(h) Repair and maintenance. Sublessee agrees, at *[his/her]* own expense, to maintain *[his/her]* unit and keep it in good repair, and at *[his/her]* proportionate share of the expense as a member of the unit sublessees' association, to maintain the common elements and keep them in good repair.

(i) Lawful use of premises. Sublessee agrees on *[his/her]* own behalf and as a member of the unit sublessee's association to keep *[his/her]* unit and all common elements in a strictly decent, safe, and sanitary condition, to observe all municipal, state, and federal laws, ordi-

nances, rules, and regulations, and to abide by the [*declaration/master deed/master lease*], bylaws, and rules and regulations of the condominium, and any agreements or decisions made pursuant thereto by the council of owners. Sublessee further agrees to indemnify lessor and sublessor from and against any and all claims, demands, costs, including reasonable attorney's fees, or judgments which may arise or be incurred as a result of the breach of this covenant.

(j) Inspection of premises. Sublessee agrees to permit lessor, sublessor, and their agents to enter [*his/her*] unit or any of the common elements appurtenant to it for inspection purposes at all reasonable times. Sublessee further agrees, at [*his/her*] own expense with respect to [*his/her*] unit, and at his or her proportionate share of the expense with respect to the common elements, to repair and remedy all defects within [*number of days*] days after having received notice of the same from lessor or sublessor or their agents.

(k) Indemnification. Sublessee agrees, at [*his/her*] own expense with respect to [*his/her*] unit, and at [*his/her*] proportionate share of the expense with respect to the common elements, to indemnify lessor and sublessor from and against any and all claims, demands, costs, including reasonable attorney's fees, or judgments arising out of or in any way connected with the use or occupancy of the unit or of any of the common elements, or any furniture, fixtures, equipment, machinery, or other property located in or comprising the unit or the common elements.

(l) Improvements. No construction to erect any improvement on the premises or to alter the design or structure of any building or improvement on the premises may be undertaken without the prior written approval of lessor, sublessor, the board of administration, and a majority of members of the council of owners. Sublessee will not individually or as a member of the unit owners' association undertake any such construction without such approval.

(m) Costs and expenses of lessor and sublessor. Sublessee agrees to indemnify sublessor and lessor against all costs and expenses including reasonable at-

torney's fees incurred or expended by lessor or sublessor in enforcing this agreement or any provision of it.

8. Mutual covenants.

(a) Eminent domain; condemnation in fee simple. In the event that the unit or any part of it or any common element appurtenant to it is taken or condemned in fee simple for public or quasi-public use, this lease will terminate as to the property taken as of the date of taking. That portion of any award representing the value of the land or any improvements on it other than the buildings and improvements that have been erected by sublessor after the date of the ground lease will be payable to lessor under the ground lease. That portion of any award representing the value of the leased unit or any appurtenant common interest in buildings and improvements erected by sublessor after the date of the ground lease will be payable to the board of administration as trustee for sublessee and all other unit sublessees, and mortgagees in proportion to the loss or damage to their respective units, and will be used by the board of administration for the prompt restoration or reconstruction of the units, buildings, and improvements. However, if only a portion of the property is taken, and if the percentage of the land leased under the ground lease remaining after the taking is less than *[percentage]*% of the total land area, and the remaining land is, in sublessor's reasonable business judgment, unsuitable for apartment or *[description of other purposes]* purposes, then sublessor may at its option cancel this sublease, in which event that portion of any award representing the value of sublessee's unit and its appurtenant common interests will be payable to sublessee. Additionally, if all or any portion of the leased unit is taken or condemned so as to render any remaining portion of the unit unsuitable for dwelling purposes, sublessee may at *[his/her]* option surrender this lease, being thereupon relieved of any further obligation under it, in which event any award representing the value of the unit and its appurtenant common interests, after making provision for the removal of all remains of the unit and its appurtenant common interests, will be payable to sublessee. It is expressly understood that sublessee will not be entitled to any claim against sublessor or

others for compensation for the leasehold interest, but nothing contained herein will prevent sublessee from asserting claims against the condemning authorities for any damage to sublessee's business on the premises and for any cost or loss sublessee may incur in the removal of any improvements erected or fixtures installed by [him/her] on the demised premises.

(b) Eminent domain; condemnation of leasehold. In the event that any leasehold interest in the premises is taken or condemned for any public or quasi-public use, this lease will remain in full force and effect, and lessee's covenants and obligations under it will remain unimpaired. The award for the taking of a leasehold interest will belong to sublessee.

(c) Casualty losses. If at any time during the term of this sublease: (1) the building in which the unit is located is destroyed or substantially damaged by any casualty not herein required to be insured against; (2) the board of administration, acting on behalf of all unit sublessees, causes the remains of the building to be removed and the land to be restored to good and orderly condition and even grade; and (3) all unit sublessees in the building surrender their subleases; then sublessee may surrender this sublease, being thereupon relieved of any further obligation hereunder.

(d) Assignments. Sublessee may, at any time and without the consent of sublessor, assign this sublease, provided that any assignee will expressly assume and agree to be bound by all the covenants of sublessee in this sublease, and provided further that a copy of any such assignment will be delivered to sublessor promptly on the execution of it.

(e) Mortgages. Sublessee may, at any time and without the consent of sublessor, assign this lease by way of mortgage to any bank, trust company, insurance company, building and loan association, or other recognized institutional lender as mortgagee, and agrees promptly on the execution of any such assignment to provide a copy of it to sublessor. During the term of the assignment, sublessor agrees not to terminate this lease because of a default on the part of sublessee without giving *[number of days]* days' written notice to the

mortgagee of [*his/her*] intention to do so. If within the [*number*]-day period the mortgagee cures the default, if the same is subject to cure within the period, or, if the default is not subject to cure within the period, if the mortgagee commences promptly to cure the default and thereafter exercises its best efforts to do so, sublessor will desist from terminating this sublease until the mortgage on it is foreclosed. Any recognized institutional lender as mortgagee may enforce its mortgage and acquire title to the leasehold in any lawful manner and may assign this sublease as it may deem desirable; provided, that any assignee of the mortgagee will expressly assume and agree to be bound by all the covenants of sublessee in this sublease, and provided further that a copy of the assignment will be delivered to sublessor promptly on its execution.

(f) Sublessor's rights on default. This sublease is subject to sublessee's performance of the covenants and conditions set forth above in paragraph 7. If sublessee defaults in performance of any of these covenants or conditions and the breach continues for more than [*number of days*] days after sublessee receives written notice of it, or if sublessee files or has filed against [*him/her*] any proceeding of any kind whatsoever under any provision of the Federal Bankruptcy Act, or becomes bankrupt or insolvent, or makes any assignment for the benefit of creditors, or suffers this sublease or any interest in it to be taken on writ of execution, or abandons the premises; then sublessor may, at its option:

(1) pursue any legal remedy to recover for the breach, and continue this lease in force; or

(2) declare the lease forfeited, enter the leased premises, and remove all persons claiming under sublessee and all property of sublessee.

(g) Nonwaiver of breach. Sublessor's waiver of sublessee's breach of any covenant or condition contained in this sublease will not be construed as a waiver of the covenant or condition itself, of any subsequent breach of it, or of any other covenant or condition contained in this sublease. Sublessor's subsequent acceptance of rent under this sublease will not be construed as a waiver of any preceding breach by sublessee of any covenant or condition contained in this sublease, other than of

sublessee's failure to pay, when due, the rent accepted.

(h) Notices. Any notice or demand required or permitted to be given under this sublease will be deemed sufficiently given when delivered or mailed by registered or certified mail, postage prepaid, addressed to the party to receive it at the address specified in this sublease, or at any other address or addresses as the receiving party designates in writing.

(i) Termination of ground lease. In the event that the ground lease is declared forfeited by the lessor or is otherwise terminated, except by reason of condemnation or taking in eminent domain, sublessee will have the right on *[number of days]* days written notice to lessor, as provided in the ground lease, to become lessor's tenant. In such event, sublessee will hold as tenant of lessor, the estate granted in this sublease, subject to the terms and conditions of this agreement.

Executed at *[location of execution]* on the date first written above.

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*[Signatures]*

*[Acknowledgments]*

#### NOTES TO FORM

##### Drafter's Notes

This sublease contemplates a situation in which the developer retains a "sandwich" position as lessee of the land, but may be used with minor alteration as an unit lease issued directly from the land-owner to the unit lessee.

See Drafter's Notes following § 7:43.

##### Tax Notes

Though this document is couched in terms of a sublease, for tax purposes the condominium is nevertheless treated as purchased by the sublessee. If the sublessee otherwise qualifies for the special Code provisions dealing with the exclusion of gain on the sale of a principal residence, I.R.C. § 121, the lease form will not be an impediment to these benefits. See the more extensive discussion of this subject at § 7:22. The term "residence" does not always require fee ownership of a house for the appropriate tax provisions to apply. The many forms

of home ownership, such as membership in a cooperative housing corporation or ownership of a houseboat, are also included. Purchase and use of an apartment in a condominium qualifies. Rev. Rul. 64-31, 1964-1 C.B. 300.

### § 7:53 Assignment of unit sublease with consent of mortgagee

This instrument was prepared by [name of preparer] of [address of preparer].

#### ASSIGNMENT OF UNIT SUBLEASE

Assignment made on [date] by [name of assignor], of [address of assignor], in the City of [name of city], County of [name of county], State of Florida, referred to below as assignor, to [name of assignee], of [address of assignee], in the City of [name of city], County of [name of county], State of Florida, referred to below as assignee.

In consideration of \$[dollar amount], and of the covenants and agreements set forth here, assignor assigns to assignee all of assignor's right, title, and interest in and to a certain unit sublease, referred to below as the "sublease," entered into on [date of sublease] by and between [name of sublessor], a Florida corporation, as sublessor, and assignor as sublessee, and recorded in Volume [number of volume], page [number of page] of the Records of Leases of [name of county], Florida, demising the following:

The unit known as Unit No. [number of unit] in the building known by name as [name of building] and by street number as [street address] in the City of [name of city], County of [name of county], State of Florida, designated and described as Unit No. [number of unit] in a declaration of condominium executed under the Florida Condominium Act, dated [date declaration executed], and recorded on [date of recording] in Volume [volume number], page [page number] of the official records of [name of county], Florida. The unit is also designated in floor plans of the building, attached to the declaration as Exhibit [identification of exhibit].

Together with an undivided [percentage]% interest in the common elements of the condominium described in the declaration;

Together with all of the easements and rights appurtenant to it, and subject to all of the easements, covenants, condi-

tions, and encumbrances with respect to it, all as set forth in the sublease;

And subject further to that certain mortgage executed in favor of *[specify]*, a Florida corporation having an office at *[address of corporation]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, on *[date]*, and recorded on *[date of recording]*, in Volume *[number of volume]*, page *[number of page]* in the official records of *[name of county]*, Florida.

To have and to hold unto assignee and *[his/her]* heirs, successors, and assigns for and during the full unexpired term of the sublease.

This assignment is subject to full performance by assignee of all of the covenants and conditions contained in the sublease, and subject further to the following covenants and conditions:

1. Assignee will fully perform and observe all of the covenants and conditions contained in the sublease, and will at all times during its term indemnify assignor and assignor's heirs, executors, and administrators from and against any and all liability, loss, costs, and expenses, including reasonable attorney's fees that assignor may sustain by reason of the nonperformance or nonobservance of the covenants and conditions.

2. On the written consent of the mortgagee under the mortgage described in this sublease, which consent is a condition precedent to this assignment, assignee will assume and fully perform all the obligations, including payments on the remaining principal balance of *[\$/dollar amount]* together with interest accruing from and after *[date]*.

Executed at *[location of execution]* on the date first written above.

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*[Signatures]*

Executed in the presence of \_\_\_\_\_  
*[Signature]*

*[Acknowledgments]*

Mortgagee, in consideration of \$/[dollar amount], receipt of which is acknowledged, and for other good and valuable consideration, accepts the written undertaking of assignee set forth above to assume and discharge all obligations under the mortgage described in this sublease [*and to discharge assignor from further liability under it*].

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*[Signature]**[Acknowledgment]***NOTES TO FORM****Tax Notes**

See Tax Notes following § 7:52.

For forms and related materials concerning assignments, generally, see Assignments (Ch 23).

**§ 7:54 Receipt for condominium documents****RECEIPT FOR CONDOMINIUM DOCUMENTS**

The undersigned acknowledges receipt of the items checked below, as required by the Condominium Act, relating to *[name of condominium]* condominium, physically located at *[address of condominium]*.

Place a check in the column by each item received. If an item does not apply, place “N/A” in the column.

ITEM	RECEIVED
Prospectus	
Declaration of Condominium	
Articles of Incorporation	
Bylaws	
Estimated Operating Budget	
Form of Agreement for Same	
Covenants and Restrictions	
Ground Lease	
Management and Maintenance Contracts for More Than One Year	

Renewable Management Contracts  
Lease of Recreational and Other Facilities  
to be Used Exclusively by Unit  
Owners of Subject Condominium  
Form of Unit Lease if a Leasehold  
Declaration of Servitude  
Statement of Conversion Conditions  
Plot Plan  
Floor Plan  
Survey of Land and Graphic  
Description of Improvements

THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER, AND RECEIPT BY BUYER OF ALL OF THE ITEMS REQUIRED TO BE DELIVERED TO BUYER BY THE DEVELOPER UNDER FLA. STAT. ANN. § 718.503. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 15 DAYS AFTER BUYER HAS RECEIVED ALL OF THE ITEMS REQUIRED. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

Executed on \_\_\_\_\_ [*date*].

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[*Purchaser*]

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[*Address*]

#### NOTES TO FORM

##### Drafter's Notes

The developer disclosure contained in all capital letters in the final paragraph of this form can be found at Fla. Stat. Ann. § 718.503(1)(a).

**§ 7:55 Notification to purchaser—Special flood hazard area**NOTIFICATION TO PURCHASER UNDER PUBLIC LAW  
93-234

## SPECIAL FLOOD HAZARD AREA

Federal legislation requires that all purchasers of residential property within the United States be specifically notified if the property is within an area designated by the federal government as being prone to flooding.

Because *[description of property]* is situated within such a designated area, it is necessary that this acknowledgment be signed by each purchaser.

This form will be held in your purchaser file and copies will be provided to all necessary institutions.

ACKNOWLEDGMENT OF NOTIFICATION OF  
PURCHASE OF LAND OR RESIDENTIAL UNIT WITHIN  
SPECIAL FLOOD HAZARD AREA

I, *[name of purchaser]*, of the following described property: *[address of property]*, unit number *[number of unit]*, weeks number *[identification of the week numbers]*, acknowledge that I have been advised that the property is located within an area as having special flood hazards as determined pursuant to Public Law 93-234 and that the notification has been given to me within a reasonable period of time in advance of my signing the purchase agreement, lease, mortgage, loan closing papers, or other documents involved in the transaction.

Notice to me has been given not less than 10 days in advance of the scheduled closing of my purchase of the property and the financing that I have secured, and I have been fully advised that the property has been identified by the Department of Housing and Urban Development as existing within a Flood Hazard area.

Date: *[date of acknowledgment]*

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*[Signatures of purchasers]*

**§ 7:56 Notice of intended conversion of existing improvements to a residential condominium**

To: \_\_\_\_\_ [*tenant*]  
\_\_\_\_\_ [*address*]

Apartment number \_\_\_\_\_

**NOTICE OF CONVERSION OF EXISTING  
IMPROVEMENTS TO RESIDENTIAL CONDOMINIUM**

These apartments are being converted to condominiums by */name of developer*, the developer.

1. YOU MAY REMAIN AS A RESIDENT UNTIL THE EXPIRATION OF YOUR RENTAL AGREEMENT. FOLLOWING THAT, YOU MAY EXTEND YOUR RENTAL AGREEMENT AS FOLLOWS:

a. If you have continuously been a resident of these apartments during the last 180 days and your rental agreement expires during the next 270 days, you may extend your rental agreement for up to 270 days after the date of this notice.

b. If you have not been a continuous resident of these apartments for the last 180 days and your rental agreement expires during the next 180 days, you may extend your rental agreement for up to 180 days after the date of this notice.

c. IN ORDER FOR YOU TO EXTEND YOUR RENTAL AGREEMENT, YOU MUST GIVE THE DEVELOPER WRITTEN NOTICE WITHIN 45 DAYS AFTER THE DATE OF THIS NOTICE.

2. IF YOUR RENTAL AGREEMENT EXPIRES IN THE NEXT 45 DAYS, you may extend your rental agreement for up to 45 days after the date of this notice while you decide whether to extend your rental agreement as explained above. To do so, you must notify the developer in writing. You will then have the full 45 days to decide whether to extend your rental agreement as explained above.

3. During the extension of your rental agreement, you will be charged the same rent that you are now paying.

4. YOU MAY CANCEL YOUR RENTAL AGREEMENT AND ANY EXTENSION OF THE RENTAL AGREEMENT AS FOLLOWS:

- a. If your rental agreement began or was extended or renewed after August 6, 1980, you may cancel your rental agreement upon 30 days' written notice and move. Also, upon 30 days' written notice, you may cancel any extension of the rental agreement.
- b. If your rental agreement was not begun or was not extended or renewed after August 6, 1980, you may not cancel the rental agreement without the consent of the developer. You may, however, upon 30 days' written notice cancel any extension of the rental agreement.
5. All notices must be given in writing and sent by mail, return receipt requested, or delivered in person to the developer at this address: *[name and address of developer]*.
6. If you have continuously been a resident of these apartments during the last 180 days:
  - a. You have the right to purchase your apartment and will have 45 days to decide whether to purchase. If you do not buy the unit at that price and the unit is later offered at a lower price, you will have the opportunity to buy the unit at the lower price. However, in all events your right to purchase the unit ends when the rental agreement or an extension of the rental agreement ends or when you waive these right in writing.
  - b. Within 90 days, you will be provided purchase information relating to your apartment, including the price of your unit and the condition of the building. If you do not receive this information within 90 days, your rental agreement and any extension will be extended one day for each day over 90 days until you are given the purchase information. If you do not want this rental agreement extension, you must notify the developer in writing.
7. If you have any questions regarding this conversion or the Condominium Act, you may contact the developer or the state agency which regulates condominiums: The Division of Florida Land Sales, Condominiums, and Mobilehomes, *[insert Tallahassee address and telephone number of division]*.

Dated: *[date]*.

---

*[Signature of developer]*

**NOTES TO FORM****Drafter's Notes**

The above notice is based on the provisions of Fla. Stat. Ann. § 718.608(2)(a).

Florida law requires that prior to or simultaneous with the first offering of individual units to any person, its developer must deliver a notice of intended conversion to all tenants of the existing improvements being converted to residential condominium, and all such notices must be given within a 72-hour period. See Fla. Stat. Ann. § 718.608(1).

The portions of the above notice which appear in upper case must be printed in conspicuous type. See Fla. Stat. Ann. § 718.608(2)(a).

**§ 7:57 Notice of conversion of existing improvements  
to ownership as residential condominium—  
Statement when developer offers tenant  
optional tenant relocation payment**

If you have been a continuous resident of these apartments for the last 180 days and your lease expires during the next 180 days, you may extend your rental agreement for up to 270 days, or you may extend your rental agreement for up to 180 days and receive a cash payment at least equal to one month's rent. You must make your decision and inform the developer in writing within 45 days after the date of this notice.

**NOTES TO FORM****Drafter's Notes**

This notice must be included in the notice of conversion of existing improvements to ownership as a residential condominium when a developer offers tenants an optional relocation payment pursuant to Fla. Stat. Ann. § 718.606(4).

See Fla. Stat. Ann. § 718.608(2)(b).

**§ 7:58 Notice of conversion of existing improvements  
to ownership as residential condominium—  
Where county adopts ordinance or other  
measure extending extension period**

*[In lieu of paragraph 1(a) and 1(b) of § 7:56, insert the following:]*

1. YOU MAY REMAIN AS A RESIDENT UNTIL THE EXPIRATION OF YOUR RENTAL AGREEMENT. FURTHER, YOU MAY EXTEND YOUR RENTAL AGREEMENT AS FOLLOWS:

- a. If you have been continuously been a resident of these apartments during the last 180 days and your rental agreement expires during the next 360 days, you may extend your rental agreement for up to 360 days after the date of this notice.
- b. If you have not been a continuous resident of these apartments for the last 180 days and your rental agreement expires during the next 270 days, you may extend your rental agreement for up to 270 days after the date of this notice.

#### NOTES TO FORM

##### Drafter's Notes

This notice must be included in a notice of conversion of existing improvements to ownership as a residential condominium when the rental agreement extension provisions of Fla. Stat. Ann. § 718.606(6) relating to the adoption by a county of an ordinance or other measure extending the extension period provided for in Fla. Stat. Ann. § 718.606(1)(a) and (b) are applicable. See Fla. Stat. Ann. § 718.608(2)(c).

If applicable, this notice should be inserted in lieu of Paragraph 1, subparagraphs a and b of § 7:56.

## IV. OPERATIONAL DOCUMENTS

### A. GENERAL MANAGEMENT

#### § 7:59 Provision in management contract—Duties of manager—Fiscal and administrative duties

Agent will perform the following services with regard to the fiscal management of the condominium:

1. Collection of assessments. Agent will bill or cause to be billed all unit owners for assessments levied against them and will make every effort to collect them promptly. In the event of delinquency, agent will mail notice to the delinquent owner, and will use every effort to collect delinquent accounts, including the sending of notices and letters and the making of telephone calls and personal contacts. In the event that these efforts fail, agent will refer the account to the board of administration for disposition.

2. Disbursements. Agent will make all disbursements as provided in the annual budget from common charges assessed against and collected from unit owners. In addition, agent is granted authority to make unbudgeted expenditures necessary or appropriate for the maintenance, operation, or

care of the condominium not exceeding *[\$/dollar amount]*, or not exceeding *[\$/dollar amount]* when approved by the treasurer of the association. All other unbudgeted expenditures may be made only with the approval of the board of administration except in case of emergencies requiring prompt action to minimize loss.

3. Employee taxes. Agent will compute and pay employee taxes, and will prepare and file or cause to be prepared and filed the necessary forms for withholding taxes, social security taxes, unemployment insurance, and all other tax and other forms, federal, state, or municipal, relating to the employment of condominium personnel.

4. Annual operating budget. Prior to the last meeting of the board of administration of the condominium held in each *[calendar/fiscal]* year, agent will prepare and submit to the board of administration an annual operating budget setting forth income and expenses of the condominium for the preceding and current years, anticipated income of the condominium for the following year, and explanations necessary to account for differences between these figures.

5. Records and books of account. Agent will establish and maintain an accurate and complete set of books, including records, in chronological order, of receipts and disbursements arising from operation of the property. Agent will also establish and maintain accounts for each unit, detailing assessments levied against the unit, amounts paid, and amounts remaining unpaid. Orderly files will also be kept, containing invoices, statements, vouchers, correspondence, insurance policies, and all other documents and papers pertaining to the condominium or its operation. All records and books of account will be open to inspection during business hours on weekdays by owners, their tenants, mortgagees, and representatives.

6. Monthly statements. Agent will, not later than the tenth day of each month, render a monthly statement to the board of administration, supported by disbursement vouchers and bills, setting forth the receipts and disbursements of the condominium for the preceding month. Agent will further remit to the board of administration any amounts collected during the preceding month less: (a) disbursements made pursuant to this agreement for the care and maintenance of the property, including agent's compensation hereunder; and (b) any amounts as may in agent's judgment be

necessary or advisable to be retained as reserves for future obligations.

7. Annual report; certification. Agent will prepare and distribute to each unit owner, at the end of each [*calendar/fiscal*] year, an annual report of the operations of the condominium for that year, including a statement of receipts and disbursements, and a balance sheet showing the assets and liabilities of the condominium as of the close of that [*calendar/fiscal*] year. Agent will cooperate with the certified public accountant of the condominium in the audit and certification of the report, in the audit of the books of account of the condominium, and in the preparation of federal income and other tax returns.

Agent will also perform the following administrative services for the benefit of the board of administration and unit owners:

(a) Meetings. Agent will provide suitable meeting places for, prepare agendas for, send notices to unit owners and board members of, and cause a representative of its organization to attend all meetings of the unit owners and of the board of administration. If requested by the board of administration, agent will have its representative act as secretary of the association and record and keep the minutes of meeting.

(b) Letters and reports. Agent will prepare and post all letters and reports as the board of administration may direct.

(c) Records. Agent will keep all records of the affairs and proceedings of the association and of the board, including but not limited to minutes of meetings, bylaws, rules and regulations, and amendments thereto.

(d) *[\$/Dollar amount]* Insurance. Agent will have responsibility for the supervision of all condominium insurance policies, which responsibility will include the filing and pressing of claims, and review and recommendations, from time to time, as to the adequacy of coverage.

(e) Newsletter. From time to time agent will prepare and mail, or cause to be prepared and mailed, a newsletter containing decisions of the board and other items of interest to unit owners.

**NOTES TO FORM****Drafter's Notes**

This provision, together with the provisions in § 7:60, contemplates the assumption of a wide range of duties by a professional management agent. Many of the duties imposed on the board of administration by law are delegated to the management agent, and before an agreement containing such provisions is entered, care should be taken to ascertain whether the board of administration is free under the bylaws to engage the services of a management agent and to delegate the substantial duties delegated in these provisions.

**Tax Notes**

Reporting these transactions on behalf of the owners may be a duty assigned to the agent. Amounts received by the manager as an agent aren't includable in the manager's gross income. *Ball v. C.I.R.*, T.C. Memo. 1984-218, T.C.M. (P-H) ¶ 84218, 47 T.C.M. (CCH) 1684, 1984 WL 14473 (1984), judgment aff'd, 770 F.2d 1066 (3d Cir. 1985) and judgment aff'd, 770 F.2d 1066 (3d Cir. 1985). As an agent of the owners, the manager is not responsible for the tax obligations resulting from amounts collected as assessments and the disbursements made for expenses. This is the responsibility of either the owners or the homeowners association that has hired the manager. A homeowners association is usually operated either as a tax-exempt organization under I.R.C. § 528 or as an organization that balances income with expenses so no tax is payable at the end of the year. See the more extensive discussion of this subject at §§ 7:21 to 7:25.

The manager is personally responsible for reporting income earned from the contract after deducting the ordinary and reasonable expenses of fulfilling his or her management duties under the contract. I.R.C. §§ 61(a), 162(a).

For detailed treatment of management contracts, see *Management of Real Property* (Ch 9).

**Research References***A.L.R. Library*

Construction of contractual or state regulatory provisions respecting formation, composition, and powers of governing body of condominium association, 13 A.L.R. 4th 598.

**§ 7:60 Provision in management contract—Duties of manager—Physical management, and services to unit owners**

Agent will perform the following services with regard to the physical management of the condominium:

1. Contracting for services. Agent is authorized on behalf of all unit owners to hire, pay, supervise, and discharge, or cause to be hired, paid, supervised, and discharged, all employees and independent contractors that may be required

for the proper maintenance and operation of the condominium. Unless otherwise specified in writing by agent, employees so hired (including the resident manager) will be deemed employees of agent; provided however, that the compensation of these employees will be the responsibility of the board of administration.

2. Maintenance of building. Agent will cause the building, other improvements, and equipment of the condominium to be maintained in a condition as may be deemed advisable by the board of administration and will direct, supervise, and order to be done all things requested by the board or which are in agent's judgment necessary to the proper maintenance of the condominium property [*subject only to the limitations imposed by paragraph [number of paragraph] of this agreement*].

3. Inspections of property. Agent will make regular inspections of the condominium and render reports as to its condition, including recommendations for repair, restoration, and maintenance.

4. Sale and lease of units. When directed by the board, agent will list and offer for sale or lease through its own organization and, if so directed, through other brokers, units acquired or reacquired by the board, acting on behalf of all unit owners. Agent will use its best efforts to sell or lease any such units.

5. Rental of commercial space. Agent will use its best efforts to keep commercial space in the building rented to desirable tenants on such terms as the board may deem appropriate, and in so doing is authorized to enlist the services of real estate brokers on behalf of the board.

6. Miscellaneous. Agent is further authorized to do all things reasonably deemed necessary or desirable by the board for the proper maintenance and operation of the property.

Agent will also perform the following services for the benefit of unit owners:

(a) Complaints. Agent will consider, and when reasonable, attempt to remedy complaints of unit owners or their tenants. Agent will refer any complaints it deems unreasonable to the board of administration.

(b) Moving assistance. [*If agent is to assume duties prior to completion of construction, add: At the time the building*

*is completed and ready for occupancy, agent will inspect the common elements and each unit for any apparent defects, and render a report thereon to the board of administration.] Agent will make arrangements for the delivery of units to their owners, including keys, copies of the rules and regulations, and any relevant documents or warranties. Agent will also coordinate the delivery of furniture and household effects, will inspect the same, and will render an inventory to absentee owners.*

(c) Assessments. When the books of tentative assessed valuations of *[location of valuation books]* are opened for public inspection each year, agent will ascertain the assessments of the units and report such assessments to the respective unit owners.

#### **NOTES TO FORM**

##### **Drafter's Notes**

See Drafter's Notes following § 7:59.

#### **§ 7:61 Rules and regulations**

##### **RULES AND REGULATIONS**

1. Vestibules, halls, stairways, elevators, and other common areas and facilities of a similar nature must remain unobstructed, and will be used only for normal transit.
2. Lobbies, vestibules, hallways, stairways, elevators, and other condominium areas and facilities of a similar nature will not be used for storage or placement of any furniture, packages, or objects of any kind.
3. Children will not be permitted to loiter or play in the lobbies, vestibules, hallways, stairways, elevators, and other common areas and facilities of a similar nature.
4. Hanging, cleaning, or beating garments, rugs, or the like from or on the windows, terraces, or facades of the building, or in lobbies, vestibules, hallways, stairways, or other condominium areas of a similar nature, is prohibited.
5. Throwing garbage or trash outside disposal installations provided for such purposes is prohibited.
6. Unit owners will require their tradespeople to utilize only elevators designated for freight service when transporting packages, merchandise, or other objects that may adversely affect the comfort and well being of passengers

in elevators devoted to the transportation of owners, residents, and guests.

7. All damage to common elements caused by the moving or carrying of articles therein shall be the responsibility of, and will be paid for by, the owner or person in charge of the articles.

8. No owner, occupant, or licensee will post his or her name or any other notice in any lobby, vestibule, hallway, stairway, or other condominium area except in places provided for this purpose.

9. Units will be occupied and used by their respective owners only as private dwellings for the owners, their families, tenants, and social guests, and for no other purpose.

10. Units may be rented only in entirety, and no unit may be rented for hotel or transient purposes.

11. Residents will exercise extreme care about making noises or playing music which may disturb other residents. No residents will play or allow to be played any musical instrument, radio, television, phonograph, or the like between the hours of 11:00 p.m. and the following 8:00 a.m. if it will disturb or annoy any other resident.

12. Residents will be permitted to keep domestic animals only if the animals do not disturb or annoy other residents. Residents keeping domestic animals will abide by municipal sanitary regulations and will be responsible for any inconvenience or damage caused by them.

13. Owners will not take or cause to be taken within their units any action which would jeopardize the soundness or safety of any part of the condominium property or impair any easement or right appurtenant thereto or affect the common elements without the unanimous consent of all unit owners who might be affected thereby.

14. Owners will not permit anything to be done or kept in their units that would increase the rate of fire insurance on their unit or on the condominium as a whole.

15. No owner, lessee, or licensee will install wiring for electrical or telephone installation, television antenna, machines, air conditioning units, or the like on the exterior of the project which protrude through the walls or the roof of the project except as authorized by *[the board of administration/a majority of unit owners]*.

16. Draperies, shades, awnings, or the like other than those installed or approved by the board of administration will not be used, and no signs of any kind will be placed in or on windows, doors, terraces, facades, or other exterior surfaces of the building.

17. Water will not be kept running for an unreasonable and unnecessary length of time.

18. Each unit owner will promptly perform all maintenance and repair work within his or her apartment that, if omitted, would affect any common elements, any portion of the property belonging to other owners, or the project as a whole. Each unit owner will be responsible for all damages and liabilities that any failure to maintain or repair may cause.

19. No immoral, improper, offensive, or unlawful use will be made of condominium property or any part thereof, and each unit owner will, at his or her own expense, comply with all city, state, and federal laws, statutes, ordinances, regulations, orders, or requirements affecting his or her unit.

20. Units containing one bedroom or less may be regularly occupied by no more than *[number of persons]* persons. Units containing two bedrooms may be regularly occupied by no more than *[number of persons]* persons. Units containing three bedrooms may be regularly occupied by no more than *[number of persons]* persons. As used in this rule, "regularly occupied" means occupancy for a period in excess of *[number of days]* days consecutively, or *[number of days]* days in any one calendar year.

21. Each apartment owner will provide the *[manager/managing agent]* with any key or keys necessary to gain access to owner's unit, and any owner altering any lock or installing any new lock on any door providing access to his or her unit will give a key to the new or altered lock to the *[manager/managing agent]*.

22. Unit owners and their families, guests, tenants, and employees will abide by the following parking and traffic regulations:

- (a) horns are to be used only when necessary for the safe operation of vehicles;
- (b) owners will not park, nor will they permit their families, guests, or tenants to park, in the parking

spaces of other owners, or in such manner as to prevent ready access to the parking spaces of other owners. Improperly parked vehicles are subject to removal at their owners' expense; and

(c) owners, their families, guests, tenants, and employees will abide by such traffic and parking regulations as may be posted at the parking areas and on the driveways of the condominium.

23. These regulations will be posted at all times at [*location of posting*], and a copy of them will be furnished to each unit owner.

The board of administration reserves the right, subject to approval by a majority of unit owners, to amend, repeal, or add to these rules and regulations from time to time as may be deemed necessary for the safe and efficient maintenance of the condominium and for the comfort and convenience of its occupants.

Adopted on [*date*].

#### NOTES TO FORM

##### Research References

###### *A.L.R. Library*

Validity and construction of condominium association's regulations governing members' use of common facilities, 72 A.L.R. 3d 308.

### § 7:62 Rules and regulations—Provision—Swimming pool regulations

1. Swimming will be permitted only between the hours of [*start hour*] a.m. and [*end hour*] p.m. from [*start day and month*] to [*end day and month*] or between such hours as will be prescribed by the manager.
2. Soap showers will be taken before entering the pool.
3. No person having any disease of the eyes, ears, nose, throat, or skin, or any communicable disease will be permitted in the pool.
4. No life preservers, rafts, toys, or other objects will be permitted in the pool.
5. Persons having long hair will wear bathing caps.
6. No running, pushing, shouting, or unnecessary splashing will be permitted in the pool area.
7. No radios, phonographs, television sets, tape recording, playing devices, or the like will be permitted in the pool area.

8. No glass container of any kind will be permitted in the pool area.

9. No furniture other than that provided for the pool area will be permitted in the area, and no furniture provided for the pool area may be removed from the area.

10. No occupant of the condominium under the age of *[age of occupant]* will be permitted to entertain guests at the pool or pool area unless accompanied and supervised by a parent or guardian who is an occupant of the condominium.

11. The pool and pool area are for the exclusive use of occupants and their guests, and occupants will in all cases be responsible for the conduct of their guests.

12. All persons using the pool and pool area will comply with the requests of the manager respecting matters of personal conduct in and about the pool area.

**§ 7:62.50 Rules and regulations—Provision—  
Restrictions on use of courtyard**

The occupants of the condominium and their guests and invitees will have the right to the non-exclusive use of the courtyard for ingress and egress 24 hours a day, except that the following restrictions on uses of the courtyard shall apply:

(a) Nuisance. Any use of the courtyard which would constitute a public or private nuisance is absolutely prohibited. The emission of noise over \_\_\_\_\_ dBA shall be a violation of this restriction.

(b) Obstructions. The placing of any signs, structures or obstructions in the courtyard is absolutely prohibited.

(c) Parties. The use of the courtyard for parties or receptions without the Association's prior consent, to be given in the Association's sole discretion, is absolutely prohibited.

(d) Insurance Risks. Any use which would constitute an unusual fire hazard or which would result in jeopardizing any insurance maintained on any part of the property or the premises or would result in an increase in the premium therefor is absolutely prohibited; however, the Association may approve such use, in the Association's sole discretion, if adequate safeguards are undertaken at the sole expense of the occupant of the condominium and any increase in insurance premiums is allocated to, and paid by, the occupant.

(e) Trash. Littering or depositing trash or rubbish in the courtyard, other than in trash receptacles provided by the

Association and located throughout the courtyard for that purpose, is absolutely prohibited.

(f) Security. Any use which threatens the security of occupants of the condominium or the occupants of any adjacent building, including leaving the gate unlocked, or propped open, is absolutely prohibited.

(g) Animals. Animals, including domesticated pets, are not permitted in the courtyard.

(h) Smoking. Smoking in the courtyard is absolutely prohibited.

(i) Violation of Law. Any use of the courtyard that constitutes a violation of any law, statute, ordinance, rule, regulation or order of any governmental authority having jurisdiction over any activities conducted on the property is absolutely prohibited.

### § 7:63 Notice of meeting of unit owners

To: *[name]*

Unit No. *[number of unit]*

#### NOTICE OF MEETING

Notice is given of a meeting of the unit owners of *[name of condominium]* on *[date]*, at *[time]*, at *[address of meeting]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, for the following purposes: *[purposes of meeting]*.

If you are unable to attend the meeting, please sign the enclosed proxy and return it in the stamped, self-addressed envelope.

Dated *[date of notice]*.

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*[Signature]*

### § 7:64 Unit owner's proxy

#### GENERAL PROXY

The undersigned, as a unit owner of *[name of condominium]*, appoints *[name of proxy]*, of *[address of proxy]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, as proxy to attend any regular, special, or annual meeting, including all adjournments thereof, of the unit own-

ers of [*name of condominium*] held subsequent to the date of this proxy and until this proxy has been revoked. [*Name of proxy*] has full power to vote and act for the undersigned according to the number of units on which the undersigned would be entitled to vote if personally present at the meetings, has full power to appoint a substitute proxy to vote and act for the undersigned, and has full power to revoke the appointment of the substitute proxy.

Dated [*date of proxy*].

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[Signature]

#### NOTES TO FORM

##### **Drafter's Notes**

Members of a condominium association may vote by proxy. Fla. Stat. Ann. § 718.112(2)(b)2. Any proxy given is effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof, but in no event shall any proxy be valid for a period longer than 90 days after the date of the first meeting for which it was given. Fla. Stat. Ann. § 718.112(2)(b)3.

#### **§ 7:65 Revocation of unit owner's proxy**

#### REVOCATION OF PROXY

The undersigned, as a unit owner of [*name of condominium*], having on [*date of appointment*] appointed [*name of proxy*] to act as proxy by a signed instrument, a copy of which is attached, revokes that proxy, effective immediately. Duplicate originals of this revocation will be filed with the secretary of the condominium and served on the proxy holder.

Dated [*date of revocation*].

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[Signature]

#### NOTES TO FORM

##### **Drafter's Notes**

Every proxy is revocable at any time at the pleasure of the unit owner executing it. See Fla. Stat. Ann. § 718.112(2)(b)3.

**§ 7:66 Notice to unit owner—Default in payment of assessment**

To: \_\_\_\_\_ [unit owner]  
\_\_\_\_\_ [address]

Unit No. \_\_\_\_\_

**NOTICE OF DEFAULT**

Notice is given that an assessment in the amount of \$[dollar amount] for common charges for the period [begin date] through [end date], levied against the above unit and billed to you on [date of billing], is and for more than [number of days] days has remained, as of the date of this notice, due and owing. Notice is further given, pursuant to Article [identification of article], Section [number of section] of the Bylaws of [name of condominium] that you are in default in your obligation, as owner of the above unit, to pay the aforementioned assessment, and are consequently liable for interest [at the legal rate/at the rate of [percentage]% per year] on the assessment from the due date, together with all expenses, including reasonable attorney's fees, which may be incurred by the board of administration in any proceeding brought to collect the same, or to foreclose the lien for nonpayment of common charges granted by Fla. Stat. Ann. § 718.116(4).

Your prompt payment will be appreciated.

Dated [date of notice].

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[Signature]

cc: [name of mortgagee]

**NOTES TO FORM****Drafter's Notes**

This notice is designed for use with bylaws of the form set forth at § 7:40. Under those bylaws, a copy of this notice should be sent to each mortgagee holding a mortgage secured by the unit with respect to which a default has occurred.

The Condominium Act provides that the association has a lien on each condominium parcel for any unpaid assessment. As to first mortgages of record, the lien is effective from the recording of a claim of lien in the public records of the county in which the condominium is located. Fla. Stat. Ann. § 718.116(5)(a). No lien shall be effective lon-

ger than one year after the claim of lien is commenced. The one-year period will be automatically extended for any length of time during which the association is prevented from filing a foreclosure action by automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. Fla. Stat. Ann. § 718.116(5)(b).

**§ 7:67 Notice of lien for unpaid common charges**

To: The Recording Officer  
of \_\_\_\_\_ County, State of Florida;  
*[name of unit owner];*  
and whom else it may concern:

Notice is given that *[name of association]*, the undersigned lienor, has and claims a lien for unpaid common charges, pursuant to Fla. Stat. Ann. § 718.116(5)(a), *[if applicable, add: and pursuant to Article [identification of article], Section [number of section] of the bylaws of [name of condominium]]* as follows:

1. The name of the lienor is *[name of association]*, acting on behalf of all unit owners of *[name of condominium]*, a condominium pursuant to a Declaration of Condominium, herein called the declaration and recorded on *[date of recording]* in Volume *[volume number]*, page *[page number]* of the official records of *[name of county]*, Florida. *[If appropriate, add: Lienor's attorney is [name of lienor's attorney], whose office address is [address of lienor's attorney], in the City of [name of city], County of [name of county], State of Florida.]*
2. The name of the owner of the real property described below, against whose interest lienor claims a lien, is *[name of owner]*, and *[his/her]* interest is *[description of interest]*.
3. The property subject to the lien claimed herein is that portion of *[name of condominium]* designated as Unit *[number of unit]* in the declaration and on the floor plan of the *[number of floor]* floor of the building recorded contemporaneously with and as a part of the declaration.
4. As provided in the declaration, the owner of the unit is liable for a proportionate share of the common expenses of the condominium equal to *[percentage]%* of the total amount of the common expenses.
5. As provided in the declaration, and in the bylaws of the condominium, amounts assessed as common expenses remaining unpaid constitute a lien against the unit with respect to which the assessment was made.

6. As recited in the deed to the unit, accepted by [*name of owner*] as grantee, and recorded on [*date of recording*] in the official records of [*name of county*], Florida, in Volume [*number of volume*], page [*number of page*], the unit is held subject to all the terms and conditions contained in the declaration and bylaws of the condominium.

7. Common charges and accrued interest thereon, in the total amount of *[\$dollar amount]* are and remain due and owing with respect to the unit:

<i>Dates</i>	<i>Aggregate Common Charges</i>	<i>Proportion Applicable to Unit</i>	<i>Amount Due</i>	
[ <i>date</i> ]	<i>[\$dollar amount]</i>	<i>[percentage]%</i>	<i>[\$dollar amount]</i>	
[ <i>date</i> ]	<i>[\$dollar amount]</i>	<i>[percentage]%</i>	<i>[\$dollar amount]</i>	
[ <i>date</i> ]	<i>[\$dollar amount]</i>	<i>[percentage]%</i>	<i>[\$dollar amount]</i>	
			<i>[\$dollar amount]</i>	TO-TAL DUE

The undersigned, acting on behalf of all unit owners of [*name of condominium*], claims a lien on Unit [*number of unit*] until all sums for unpaid common charges and accrued interest thereon are paid.

Dated [*date of notice*].

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[*Association*]

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[*Signature*]

[*Acknowledgment*]

#### NOTES TO FORM

##### Drafter's Notes

A claim of lien must be executed and acknowledged by an officer or authorized agent of the association. Fla. Stat. Ann. § 718.116(5)(b).

The association may bring an action in its name to foreclose a lien for assessments in the manner that a mortgage of real property is foreclosed and may also bring an action to recover a money judgment

for the unpaid assessments without waiving any claim of lien. Fla. Stat. Ann. § 718.116(6)(a).

This form is intended for use in connection with bylaws, such as those set out at § 7:40, which provide the association with a lien for nonpayment of common charges.

See Drafter's Notes following § 7:66.

### **§ 7:68 Notice of contest of lien**

To: \_\_\_\_\_ [association]  
\_\_\_\_\_ [address]

You are notified that the undersigned contests the claim of lien filed by you on *[date claim filed]*, and recorded in the Official Records Book *[number of volume]* at Page *[number of page]*, of the public records of *[name of county]*, Florida, and that the time within which you may file suit to enforce your lien is limited to 90 days from the date of service of this notice.

Executed this *[ordinal number of days]* day of *[month]*, *[year]*.

\_\_\_\_\_  
[Signature of owner or attorney]

### **NOTES TO FORM**

#### **Drafter's Notes**

By recording a notice in substantially the above form, a unit owner or his or her agent or attorney may require the association to enforce a recorded claim of lien against his or her condominium parcel. Fla. Stat. Ann. § 718.116(5)(c).

### **§ 7:69 Certificate of satisfaction of lien**

This is to certify that the lien for nonpayment of common charges in the amount of \$*[dollar amount]* filed by the undersigned, *[name of association]*, on *[date lien filed]* in Volume *[number of volume]*, page *[number of page]* of the *[name of records]* official records of *[name of county]*, Florida against a condominium unit known as Unit *[number of unit]* and located in *[name of condominium]*, a condominium pursuant to a Declaration of Condominium executed on *[date of execution]*, and recorded on *[date of recording]* in Volume *[volume number]*, page *[page number]* of the official records

of [*name of county*], Florida has been satisfied in full, and that the undersigned releases the claim as to the whole of the above-described property, and consents that it be discharged of record.

Dated [*date of certificate*].

---

[Signature]

[Acknowledgment]

#### NOTES TO FORM

##### Drafter's Notes

Upon payment in full, the person making the payment is entitled to a satisfaction of the lien. Fla. Stat. Ann. § 718.116(5)(b).

See Drafter's Notes following § 7:67.

#### § 7:70 Dedication of condominium apartment to rental pool; appointment of agent

##### DEDICATION OF CONDOMINIUM APARTMENT TO RENTAL POOL AND APPOINTMENT OF AGENT

This Agreement is made on [*date*], by and between [*name of condominium*] of [*address of condominium*], [*city*], Florida (referred to here as "Agent") and [*name of condominium owner*], whose address is [*address of owner*], [*number of apartment*], [*city*], Florida (referred to here as "Owner").

##### RECITALS:

A. The undersigned is the owner of a condominium apartment which is a part of [*name of condominiums*], the identification of which is set forth below; and

B. In connection with the sales of the condominium apartments in [*name of condominiums*], a majority of the apartment purchasers have indicated a desire to dedicate their apartments to a rental pool during the periods when the Owners of their apartments do not occupy them, so that income from the operation may be shared equitably after payments to the Agent of a percentage of the income to cover the expenses of the operation and services of Agent; and

C. Day-to-day management is required, and the Agent is prepared to assume those responsibilities according to the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the covenants and agreements set forth below, and the mutual benefits to the respective parties, and the joining by the one or more Owners of condominium apartment units in [name of condominiums], it is agreed as follows:

1. DEDICATION OF APARTMENT TO RENTAL POOL. The Owner dedicates to the rental pool [his/her] condominium apartment No. [number of apartment], Bldg. [number of building], which apartment is a [type of apartment] apartment unit, in accordance with the terms of this Agreement.

2. EXCLUSIVE AGENCY EMPLOYMENT: Owner employs Agent to manage the rental of [his/her] unit number for a period commencing on [begin date] and ending on [end date], with the understanding that the Agency will be renewed automatically on an annual basis unless either party has given written notification of termination prior to [month] [day] of any given year. If notice of termination is given, this agreement will terminate on [month] [day] of the year in which the notice of termination is received.

3. RESERVATION OF OWNER'S OCCUPANCY. Owner agrees and dedicates [his/her] apartment to the rental pool for rental occupancy for the total period of this Agreement except for the period of time set forth below which the Owner specifically reserves for the Owner's personal use, subject to the limitations set forth in Paragraph 4 of this Agreement.

a. Owner reserves Owner's apartment for [dates of owner occupation].

b. Except when reserved by Owner for [his/her] personal use, Owner's apartment shall be subject to rental to tenants that may be provided by Agent for terms of one or more days by oral or written lease or rental arrangement.

c. Subject to the limitations set forth in Paragraph 4 of this Agreement, Owner may at any time, by written notice to Agent, during the term of this Agreement, withhold [his/her] unit from such renting, for Owner's personal use, for not more than the limitations on Owner occupancy for the succeeding calendar year. Owner must notify Agent as to the dates to be set aside for Owner's

personal use prior to *[month]* *[day]* of each year. Owner understands that Owner's failure to provide timely notification to Agent could result in the inavailability of Owner's unit on desired dates. If Owner provides no notification to Agent, it will be assumed that the Owner desires to reserve the same days for *[his/her]* personal use that were reserved in the previous year. Agent agrees to provide Owner with a reminder notice regarding renewal options and reservation days by mail on or before *[month]* *[day]* of each calendar year.

d. Notwithstanding any other provision set forth in this Agreement, in the event that an Owner desires to occupy *[his/her]* own apartment other than at periods reserved by the Owner pursuant to Paragraphs 2 (a) and (c) above, and if Owner's apartment is not occupied, or in the sole opinion of the Agent likely to be occupied, for all or any part of the period for which Owner desires occupancy, the Owner may take the apartment out of the pool for that period and use the apartment. In that event, the Owner shall give Agent a minimum of *[number of hours]* hours' written notice of the temporary removal of the apartment from the pool. In the event that the apartment is occupied, or in the sole opinion of the Agent is likely to be occupied, for all or any part of the period the Owner desires to have additional occupancy, then the Owner shall have no right to remove the unit from the rental pool.

e. In the event that the Owner desires to occupy *[his/her]* own apartment, other than at a time reserved for Owner occupancy, during any period when it is dedicated to the rental pool and does not wish to remove the apartment from the rental pool, Owner may do so as a rental tenant and, as such, shall have preference to occupy *[his/her]* condominium apartment unit if the unit has not been previously reserved by a tenant. Owner shall pay the prevailing rental charges as established by the Agent for the apartment.

4. LIMITATIONS ON OWNER OCCUPANCY. The parties acknowledge that in order to have a successful rental pool operation, there must be a limitation on Owner occupancy of the units so dedicated to the rental pool. It is mutually agreed that participating Owners in this rental pool are guaranteed the use of their units for *[number of*

*[days]* days per calendar, with not more than *[number of days]* of those days to fall in the period beginning *[month] [day]* and ending *[month] [day]*. Nothing contained in this Agreement shall be construed as prohibiting a participating Owner from occupying *[his/her]* dedicated unit in excess of the above limitations if *[his/her]* unit is available in the sole judgement of the Agent. The above provision concerning occupancy is a contractual agreement between Agent and Owner.

5. TERMINATION OF AGREEMENT. The parties to this Agreement, both the Owner and the Agent, may terminate this Agreement by giving not less than *[number of months]* months' notice to the other party of *[his/her]* intention to terminate this Agreement.

6. OWNER'S RESPONSIBILITY. Owner recognizes and agrees that the Owner's right to participate in the rental pool depends upon the Owner maintaining the interior of *[his/her]* condominium apartment in a first-class occupancy condition, and Owner agrees, so long as Owner is a party to this Agreement, to so maintain the interior of *[his/her]* apartment. Agent, in its sole discretion, shall have the right to take such steps as necessary to bring the interior of the apartment to such condition, including but not limited to redecoration of walls and ceilings and replacement or repairs of draperies, carpeting, furniture, and equipment. Costs for such expenditures shall be charged against the Escrow Account more fully described below in paragraph 18, and if the account is insufficient, the balance of those costs may be deducted from any amounts owing to Owner from *[his/her]* share of the rental pool, provided, however, that in the event that the proposed expenditure would both exceed the amount in the Escrow Account and is over *[\$/dollar amount]*, Agent agrees to get Owner's permission prior to making such expenditures, provided further that should Owner refuse to authorize such expenditures, Agent may immediately terminate this Agreement. In the event that Agent shall exercise its right to bring a rental unit into first-class occupancy condition as provided in this Paragraph 6, subject to the Owner's right of approval, if applicable, and the expenditures exceed both the amounts in the Escrow Account and owing to Owner from Owner's share in the rental pool, Owner agrees to promptly fully recompense

Agent for the balance of the expenditures. In the event that Owner fails to so recompense Agent, Agent may immediately terminate this Agreement as to Owner's apartment unit, and upon due notification to *[name of association]*, the Association will recompense Agent and exercise the remedies against Owner and/or Owner's apartment unit as are set forth in the Articles of Incorporation and Bylaws of the Association pertaining to assessments. Owner further agrees that the Agent shall have the right to reasonable inspection of the interior of the Owner's apartment in order to satisfy itself that the unit is being so maintained, and Agent shall at all times have a passkey to Owner's apartment. No apartment Owner shall alter any lock or install any new lock on any doors leading into *[his/her]* apartment without the consent of the Agent, and if such consent be given, the Agent shall be provided with a key.

7. DEFINITION AND ALLOCATION OF NET RENTAL INCOME. The parties agree that net rental income for purposes of this Agreement is defined as follows: apartment and room rentals received, less marketing surcharge of a maximum of *[percentage]*% of rentals received in each calendar year, a *[percentage]*% management fee to Agent, travel agents' commissions, and reserve for bad debt and credit card expenses. The proceeds of the marketing surcharge will be made available for promoting and advertising the *[name of condominiums]* resort operations. The remaining amount of net rental income, as defined, shall be distributed as follows:

a. Rental Pool Income: *[Percentage]*% to the rental pool, to be allocated among the Owners in accordance with the formula for calculating shares of interest as set forth below.

b. Occupancy Fee: *[Percentage]*% of Net Rental Income to the Owner of a rented apartment unit; prior to determination of the *[percentage]*% occupancy fee, a deduction will be made for all minor repair and replacement charges of *[\$/dollar amount]* or less. Items in this category shall include but not be limited to common repair and replacement charges applicable to all units such as replacing light bulbs, air conditioner filter, and smoke detector batteries. A participant's occupancy fee is subject to the provisions of Paragraphs 6 and 18.

c. *[Percentage]*% to Agent for its services as manager of the rental pool and the resort hotel operation.

8. CALCULATION OF SHARES IN RENTAL POOL. The Owner's share in the money allocated to the rental pool shall be determined as follows:

a. Unit Factor: A point allocation, attributable to the purchase price of each dedicated apartment unit, will be calculated quarterly so as to determine the Owner's unit factor. The computation of this factor will be based on the purchase price of each apartment unit as of *[month]* *[day]* of each year for each type of apartment. The unit factor will be the sum total of the purchase price of all apartment units dedicated during the quarter, divided into the purchase price of the particular dedicated apartment unit, expressed as a decimal.

b. Availability Factor: The summation of the number of days that all apartments are dedicated to the rental pool in the quarter shall be the denominator. The number of days that the particular dedicated apartment is in the rental pool in the quarter shall be the numerator. The resulting fraction, expressed as a decimal, shall be the availability factor for an apartment unit for that calendar quarter.

c. Participation Factor: The unit factor shall be multiplied by the availability factor, and the resulting figure shall be the Owner's rental pool participation factor for such quarter.

d. Rental Pool Income: The total of the participation factors for each apartment unit in the rental pool for the calendar quarter shall be divided into the total rental pool income (45% of net rental income), as herein defined, available to the rental pool participants, and the resulting figure times each Owner's participation factor shall equal *[his/her]* income from the rental pool for the calendar quarter.

9. COMPLIMENTARY ROOMS. Owner acknowledges that, in connection with rental promotion activities, Agent will find it necessary and desirable to furnish complimentary rooms from time to time. Owner agrees that Agent may so furnish complimentary rooms when Agent, in its sole discretion, deems it necessary or desirable to do so and that in such event, Agent shall pay an amount repre-

sentative of [*percentage*]% of the normal unit rental for each apartment unit or units which are used as complimentary rooms, and the [*percentage*]% amount shall be paid pursuant to the terms of this Agreement to the Owner of the respective apartment unit or units whose apartments have been used for complimentary occupancy.

**10. AGENT OBLIGATION FOR RENTAL EXPENSES.** Owner shall have no expenses for rental operation as a deduction from net rentals except as provided in Paragraph 7, as long as [*name of condominiums*] is the Agent under the Agreement, except the utilities and property taxes for Owner's apartment and Owner's obligations for the common element expenses under the Declaration of Condominium.

**11. PAYMENT OF RENTAL SHARES.** Payment of rental pool shares shall be made on a quarterly basis within [*number of days*] days of the close of each calendar quarter. The Agent shall distribute to the participating Owners their respective rental and occupancy fees as heretofore provided, based on their respective participating factors for that calendar quarter accompanying such distribution with adequate accounting data in support thereof, such payments to be subject to all provisions of this Agreement.

**12. OWNER'S OBLIGATIONS.** In addition to the obligations at law of Owner as a lessor, Owner covenants as follows:

- (a) to fully perform, in a timely manner, Owner's obligation as a condominium owner in [*name of condominiums*], including payment of the periodic charges and assessments attributable to condominium ownership;
- (b) to keep Owner's apartment furnished to the extent and in the manner reasonably required by Agent as necessary for rental purposes under this Agreement. In order to maintain the quality of the Owner's apartment comparable with other rental units in [*name of condominiums*], Agent is authorized to establish required minimum quantity and style of furnishings and equipment for purposes of efficient rental pool operations;
- (c) subject to Owner's rights of privacy during periods of Owner occupancy of Owner's apartment, to permit Agent and tenants access to Owner's apartment consistent with rental occupancy under this Agreement;

- (d) not to leave upon the premises valuable personal effects or matters of a nature unsuitable for rental occupancy; and
- (e) to authorize the Agent to use seasonal rates, to grant discounts in room rates to individuals and/or groups, and to use package plans. All package plan discounts will be allocated on a prorata basis to all cost centers affected.

13. ACCOUNTING AND RECORDS. Agent shall cause appropriate books and records to be maintained for the rental pool, which books and records shall be subject to examination by or on behalf of participating Owners at any and all reasonable times. In addition to quarterly distribution of accounting data in connection with distribution of rental shares as per Paragraph 11 of this Agreement, Agent will cause an annual summary to be distributed to each Owner in a form that is useful for Owner's income, expense, tax, and depreciation records.

14. TERMINATION. Agent may terminate its designation under this Agreement by giving [*number of months*] months' written notice. Termination of this Agreement by Agent will not of itself terminate the rental pool, and the Owners participating in the rental pool may designate a replacement manager for the performance of Agent's duties under this Agreement effective with the termination. Terms of successor agent's appointment shall be as agreed between Owners and the successor and, to the extent that the successor agent does not assume the Agent's duties under this Agreement, the same shall be the obligation and expense of the participating Owners. Upon expiration of the term of this Agreement, or as the same may be renewed or upon termination of this Agreement by Agent under the provisions of this Paragraph, Agent will offer for sale to the Owners participating in the rental pool at the then amortized cost thereof, the innkeeper's supplies then in use by Agent in the management of the rental pool, and if the same be purchased by participants for continuing the rental pool, the expense of the acquisition shall require the Agent to acquire charge against the Owners electing to participate therein, provided, however, that nothing in this Agreement shall require the Agent to acquire innkeeper's supplies should Agent engage the services of an independent operating firm as provided below. Participating

Owners may individually withdraw from the rental pool upon *[number of months]* months' written notice to Agent as provided above. Withdrawal from the rental pool by an individual Owner shall not terminate the rental pool as between Agent and other participating Owners. In the event of transfer by Owner of *[his/her]* condominium apartment in the *[name of condominiums]* project to a new owner, any such sale shall be subject to the current rental reservations for a period of *[number of months]* months after closing; however, the successor owner shall not otherwise be a participating member of the rental pool except by joining as a party to the rental pool by execution and delivery of a similar agreement to this Agreement.

15. INSURANCE. Owner recognizes that the maintenance of fire and extended coverage insurance upon the common property of the condominium project is an ordinary and assessable cost of the condominium, exclusive of the agency arrangements under this Agreement. Additionally, Owner recognizes the maintenance of fire and extended coverage insurance upon Owner's property located at Owner's apartment unit in the condominium project is the Owner's own responsibility. Recognizing that the conduct of the rental pool under this Agreement is for the common benefit of the participants, Owner covenants that Owner will maintain additional insurance that Owner deems necessary with the subrogation waiver clause provisions, and Owner waives subrogation as to damage or destruction of *[his/her]* property to the extent that damage or destruction may occur during or arise in connection with rental occupancy of Owner's property or the conduct of the rental pool under this Agreement. Agent will procure, as a rental pool expense chargeable to Agent's share of the rental income, liability insurance protecting the rental pool, the participants in the rental pool, and the Agent as to liability for property damage, bodily injury, or death occurring or claimed to occur by reason of or connected with the rental pool operations under this Agreement or the conditions of the rented property or common property. Agent is further authorized, but only as Agent may determine economically feasible, in the name of itself and the rental pool, to procure burglary and theft insurance, and use and occupancy insurance coverage.

#### 16. MAINTENANCE OF OWNER'S APARTMENT

UNIT. The Agent is not responsible for repair, restoration, redecorating, or other expenses arising by reason of ordinary wear, tear, obsolescence, and depreciation. Owner recognizes that those expenditures are Owner's responsibility and, to the extent connected with rental pool participation, adequately compensated by the occupancy fee provided for in Paragraph 7(b) above.

17. AGENT'S DELEGATION OF DUTIES TO AN INDEPENDENT OPERATOR. The parties agree that Agent has the right to delegate many of Agent's duties to an independent operating corporation at Agent's discretion. Such delegation may include, but is not limited to, arranging for all advertising and promotion, employing a general manager and other necessary personnel, maintaining the books and records of the rental pool, staffing and operating a rental reservation system, and any and all other operations and employment of personnel which are consistent with the operation and maintenance of a recreational resort facility. Owner shall have no liability for any charges made to Agent for the services of the independent operator, and all cost for the independent contractor's services shall be paid by Agent out of its portion of the gross rentals.

18. ESCROW ACCOUNT. Agent will establish an Escrow Account in which shall be deposited quarterly Owner's *[percentage]*% occupancy fee (which equals *[percentage]*% of the net rental income) for use of its individual apartment in the rental pool, such *[percentage]*% occupancy fee being more fully described above in Paragraph 7(b). The Escrow Account is established for the purpose of enabling Agent to have funds on hand from which Agent, at its sole discretion, may maintain the interior of each apartment, including maintenance, redecoration, repair, and/or replacement of walls, ceilings, floors, carpeting, furniture, fixtures, and equipment, such redecoration, repairs, and replacement being necessitated by normal wear and use. The parties acknowledge that establishment of the Escrow Account and the repair, replacement, and redecoration is necessary to keep all participating apartments in the rental pool up to standards established for *[name of condominiums]*. Subject to limitations set forth in Paragraph 6, Agent, in its sole discretion, shall have the right to expend from the Escrow Account funds

that are set aside for redecoration, repairs, and replacement. Agent agrees that each apartment in the rental pool shall be maintained in a condition with the standards established for *[name of condominiums]* as a resort hotel, and Owner agrees that Owner will provide any and all additional funds that are necessary for this maintenance and upkeep upon request of management. After that, Agent shall deposit the Owner's occupancy fee into the Escrow Account until the Owner shall have on deposit in the Escrow Account *[percentage]%* of the then existing value of the standard furniture package for condominium apartment unit comparable to Owner's unit. Additional funds will be deposited from Owner's occupancy fees from time to time in order to maintain Owner's interest in the Escrow Account at the level as described above. The Escrow Account shall be an interest-bearing account, and interest shall be credited to the respected apartment Owner's share of the funds in the account. Agent shall annually report to the apartment Owner on all expenditures made from the Escrow Account on *[his/her]* apartment and as to the balance remaining in the Escrow Account together with any interest accrued on the balance. If Owner's Escrow Account, including interest, shall exceed the *[percentage]%* maximum, the excess will be refunded on an annual basis. In the event that the Owner should sell *[his/her]* unit, the Escrow balance shall be returned to Owner within *[number of days]* days from the transfer of ownership.

19. NOTICES, ASSIGNMENT, AND ENFORCEMENT. Notices required or appropriate pursuant to this Agreement may be given in writing, addressed to the recipient at the address set forth above as to Agent, or set forth below as to Owner, and deposited in the United States mail, postage prepaid, and in such case shall be deemed received on the fifth business day following such dispatch. Either party, by written notice, may provide a different address for the receipt of notice under this Agreement. Because of the necessity of dependable performance by the parties of their respective undertakings, neither party may assign its rights or obligations under this Agreement to any other person or party except with written consent of the other party, other than as provided in Paragraph 17 above. This Agreement is binding upon and for the benefit

of the respective parties, their heirs, representatives, successors, and, to the extent permitted by this Agreement, their respective assigns. In the event that an action is brought to enforce the terms of this Agreement, the prevailing party shall be entitled to recover the expenses of that action, including reasonable attorney's fees.

20. CONDITIONS OF OCCUPANCY. Agent may enter Owner's apartment, and Agent may remove any and all personal effects that Agent determines appropriate to be moved and shall store the personal effects for reinstallation at the end of the rental period, provided, however, that nothing in this shall obligate Agent to so remove the personal effects or create any liability against Agent for the failure to remove the personal effects. Agent will cause the apartment to be cleaned and prepared for rental occupancy and so maintained during rental occupancy. At the termination of rental occupancy, Agent will remove linens and supplies utilized for rental occupancy and will replace linens and any personal effects of Owner that were removed by Agent, leaving the premises for reoccupancy by Owner.

21. MISCELLANEOUS MATTERS.

a. This Agreement contains all the terms and conditions agreed to between the parties, and any amendments or modifications shall be in writing and executed with the same formality as this Agreement.

b. Whenever used, the singular number shall include the plural, the plural the singular, and the use of any gender shall include all genders.

c. The parties agree that this Agreement shall be interpreted under the laws of the State of Florida and that the invalidity of one or more parts of the Agreement shall not affect the remaining parts of the Agreement.

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*[Signature of Agent]*

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*[Signature of Owner]*

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*[Signatures of Witnesses]*

**NOTES TO FORM****Drafter's Notes**

This form is for use in a rental pool arrangement, by which condominium unit owners agree with a hotel operator that whenever a condominium unit is vacant, it can be rented to vacationers or other parties just like hotel rooms are rented. If a unit owner chooses to enter the rental pool, he or she shares the revenues from the rentals with the hotel operator. In turn, the unit owner receives the benefit of the hotel operator's expertise, advertising, and reservation system and is therefore likely to receive a higher rental profit than renting the unit through his or her own efforts.

**B. PURCHASE OR LEASE OF UNITS****§ 7:71 Power of attorney authorizing board of administration to acquire condominium units****POWER OF ATTORNEY**

This instrument was prepared by *[name of preparer]* of *[address of preparer]*.

The undersigned, *[name of owner]*, is the owner of Unit No. *[number of unit]* in a condominium known as *[name of condominium]*, and consisting of the property known by the street number *[street address]*, City of *[name of city]*, County of *[name of county]*, State of Florida, as set forth in a Declaration of Condominium executed *[date of execution]*, and recorded on *[date]* in Book *[number of book]*, page *[number of page]* of the official records of *[name of county]*, Florida. As owner, the undersigned appoints the persons who may from time to time constitute the board of administration of *[name of condominium]*, jointly as true and lawful attorneys in fact for the undersigned, coupled with an interest, with power of substitution. The board of administration will act on behalf of all unit owners organized as the council of owners of the condominium and in accordance with the respective common interests of the owners in the condominium:

1. To acquire in the name of the board of administration, or its designee, corporate or otherwise, any unit, the owner of which desires to abandon or sell the unit, the appurtenant interests of the common elements, and the interests of the unit owner's other assets of the condominium.

ium, including any other units acquired by the board of administration or its designee, or the proceeds of any sale or lease thereof (herein collectively referred to as appurtenant interests); or any unit, together with the appurtenant interests, that may be the subject of a foreclosure or other judicial sale; or

2. To lease any unit, the owner of which desires to let it, at such price or on such rental, as the case may be, and on such terms, as the attorneys in fact may deem proper; and

3. After that, to convey, sell, lease, encumber, or otherwise deal with any such unit acquired by them, or to sublease any unit leased by them, on such terms as the attorneys in fact may deem proper; and

4. Granting to the attorneys in fact the power to do all things that the undersigned could do if he or she were personally present.

The acts of a majority of the persons constituting the board of administration will constitute the acts of the attorneys in fact.

This power of attorney will be irrevocable.

Executed at *[location of execution]* on *[date of execution]*.

---

*[Signature]*

*[Acknowledgment]*

#### **NOTES TO FORM**

##### **Drafter's Notes**

This form is intended to enable the board of administration of a condominium to acquire, by lease or purchase, condominium units which may become available.

For forms and materials related to powers of attorney generally, see Powers of Attorney (Ch 21).

#### **§ 7:72 Notice to board of administration of offer to purchase or lease unit**

To: \_\_\_\_\_ *[board of administration]*  
\_\_\_\_\_ *[condominium]*  
\_\_\_\_\_ *[address]*

Notice is given, pursuant to Section [number of section] of the Declaration of [name of condominium], [if applicable, add: and Article [identification of article] of the bylaws of [name of condominium],] that the undersigned has received, and intends to accept, an offer for the [purchase/lease] of [his/her] Unit No. [number of unit], as follows:

1. The name and address of the offeror are [name and address of offeror].
2. The terms of the proposed transaction are [description of terms].

The undersigned offers to the board of administration, acting on behalf of all unit owners, the opportunity to [purchase/lease] [his/her] Unit No. [number of unit] on the terms set forth above. This offer will remain open for a period of [number of days] days from its date, as required by the declaration [if applicable, add: and the bylaws], and the undersigned will later consider [himself/herself] free to [sell/lease] the unit on the terms and conditions set forth in this notice.

Executed at [location of execution] on [date of execution].

---

[Signature]

[Acknowledgment]

#### NOTES TO FORM

##### Drafter's Notes

A right of first refusal in the board of administration provides an effective means of exercising control over the membership of the condominium community.

A provision requiring notice of offers to buy or rent condominium units and providing for a right of first refusal in the board of administration (such as that contained in Article Seven of the bylaws set forth at § 7:39) must be included in the bylaws to be binding on unit owners.

#### § 7:73 Notice by board of administration—Exercise of option to purchase or lease unit

To: \_\_\_\_\_ [unit owner]  
\_\_\_\_\_  
\_\_\_\_\_ [address]

Notice is given that the board of administration has determined to exercise the option granted in your notice of [date], to [purchase/lease] your Unit No. [number of unit] on the terms and conditions set forth in the notice. [If appropriate, add: *By vote cast at a meeting duly called and held on [date of meeting], a majority of unit owners has approved the [acquisition/lease].*]

[Set forth any necessary details of the transaction such as payment, closing.]

Dated [date].

---

[Signature]

**§ 7:74 Notice by board of administration—  
Determination not to exercise option to  
purchase or lease unit**

To: \_\_\_\_\_ [unit owner]  
\_\_\_\_\_ [address]

Notice is given that the board of administration, acting on behalf of all unit owners, has determined not to exercise its option to [purchase/lease] your unit on the terms and conditions set forth in your notice of [date of notice], and you may consider yourself at liberty to [sell/lease] the unit on the terms and conditions set forth in the notice.

Dated [date of determination].

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[Signature]

**§ 7:75 Certificate of termination of right of first  
refusal**

To: \_\_\_\_\_ [unit owner]  
\_\_\_\_\_ [address]

**CERTIFICATE OF TERMINATION**

Notice is given, pursuant to Section [number of section] of Article [number of article] of the bylaws of [name of condo-

*minimum], referred to as the condominium, that the board of administration, acting on behalf of all unit owners of the condominium, acknowledges receipt on [date of receipt] of a notice of right of first refusal as to the [purchase/lease] of Unit No. [number of unit] of the condominium, and further acknowledges that since more than [number of days] days have elapsed since receipt of the notice, the right of first refusal of the board of administration as to the [purchase/lease] of Unit No. [number of unit] has terminated as of the date of this notice, and the board will make no effort to exercise it.*

Dated [date of certificate].

---

[Signature]

#### § 7:76 Certificate of waiver of right of first refusal

To: \_\_\_\_\_ [unit owner]  
\_\_\_\_\_  
[address]

#### CERTIFICATE OF WAIVER

Notice is given, pursuant to Section [number of section] of Article [number of article] of the bylaws of [name of condominium] that [if appropriate, add: *all other unit owners having failed to approve the [acquisition/lease] thereof by majority vote,*] the board of administration, acting on behalf of all unit owners, of the condominium, waives and releases its right of first refusal as to the [purchase/lease] of Unit No. [number of unit] of the condominium on the terms and conditions set forth in an offer of [name of offeror] and detailed in a notice of right of first refusal dated [date of notice].

This waiver constitutes an acknowledgment on the part of the board of administration, acting on behalf of all unit owners, of the right of [name of unit owner] forthwith to [convey/lease] Unit No. [number of unit] to [name of offeror] on the terms and conditions set forth in the notice dated [date of notice] and referred to above. However, nothing contained here will be construed as a waiver of the right of the board of administration, acting on behalf of all unit owners to first refuse the [purchase/lease] of Unit No. [number of unit] on any other terms and conditions, or on notice of the [sale/lease] of the unit to any other offeror.

Dated [date of certificate].

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[Signature]

## V. FINANCIAL DOCUMENTS

### § 7:77 Partial release of mortgage

[Name of mortgagor], by mortgage dated [date of mortgage] and recorded on [date of recording] in Book [number of book], page [number of page] of the official records of [name of county], Florida for the consideration and to secure payment of certain notes payable to the order of the undersigned specified in the mortgage, did mortgage to [name of mortgagee], referred to below as mortgagee, certain lands and tenements of which the described property is a part.

Inasmuch as the mortgagee, at the request of mortgagor, has agreed to surrender and release the property described here to mortgagor, the parties have negotiated a partial release as follows:

In consideration of \$[dollar amount] paid by mortgagor, receipt of which is acknowledged by mortgagee, mortgagee releases and discharges from all liens held by the undersigned to secure payment of the notes specified in the mortgage, all of that portion of the property mortgaged, described as follows:

Condominium Unit No. [number of unit] of the [name of condominium] Condominium, a condominium pursuant to a Declaration of Condominium executed and recorded by [name of corporation], [a Florida corporation], which declaration was executed on [date of execution], and recorded on [date of recording] in Book [number of book], page [number of page] of the official records of [name of county], Florida.

Together with the hereditaments and appurtenances belonging to it, and all right, title, and interest of mortgagee in the same, to the intent that the lands released may be discharged from the mortgage, but it is expressly understood and agreed, however, that this is a partial release only, and will not affect the lien secured by the aforementioned mortgage as to the remainder of the property described in it.

Executed at [location of execution] on [date of execution].

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*[Signature]**[Acknowledgment]***NOTES TO FORM****Drafter's Notes**

This form is intended for use in the common situation in which, at the time they are first sold by the developer, units are still subject to the lien of a blanket mortgage on the entire condominium project.

For materials related to mortgages and releases of real property, generally, see Security Arrangements (Ch 4).

**§ 7:78 Description of property for inclusion in unit mortgage, with agreement to execute proxy****DESCRIPTION OF PROPERTY**

The Unit known as Unit No. *[number of unit]* in the building known by name as *[name of building]* and by street number as *[street address]* in *[name of city]*, Florida, designated and described as Unit No. *[number of unit]* in a Declaration of Condominium (“declaration”) executed pursuant to Chapter 718 of the Florida Statutes, dated *[date of execution]*, and recorded on *[date of recording]* in Book *[number of book]*, page *[number of page]* of the official records of *[name of county]*, Florida, and as so designated and described on floor plans of the *[number of floor]* floor of the condominium building certified by *[name of certifier]*, an *[architect/professional engineer]* authorized to practice in Florida, which floor plans are attached to the declaration as Exhibit *[identification of exhibit]*, and are incorporated by reference.

Together with an undivided *[percentage]%* interest in the common elements of the condominium described in the declaration, referred to here as the common elements;

Together with the right in common with other owners from time to time to use and enjoy the common elements, as set forth in the declaration and the bylaws of the condominium, as the same may from time to time be amended;

Together with an exclusive easement for the use of the air space occupied by the unit, as provided by law;

Together with an easement in common with the owners of all other units to use all streets, walks, and other rights of

way serving the units of the condominium as part of the common elements and providing access to the streets and other public ways of the city; and to use all pipes, wires, ducts, cables, conduits, public utility lines, and other common elements located in any of the other units or elsewhere on the property used in serving the units;

Together with and subject to all easements of necessity in favor of the unit or in favor of other units or the common elements;

Together with an easement for the exclusive use of any terrace to which the unit has sole access;

Together with the appurtenances and all the estate and rights of mortgagor in and to the unit; and

Together with all rights and options and voting rights appurtenant to the unit under the terms of the unit deed, declaration, bylaws, and other documents of the condominium, it being agreed and understood that at the option of mortgagee in all cases where mortgagor has the right to exercise any options or rights as a unit owner, decision in the exercise of such rights and options will be made by mortgagee. For this purpose, mortgagor agrees to execute contemporaneously, and to execute at successive intervals of *[number of years]* years after the date of this document for so long as this mortgage remains in effect, a proxy nominating and appointing mortgagee/mortgagor's proxy to vote, and mortgagor's agent to act, pursuant to the declaration, bylaws, and other documents of the condominium. Any failure of mortgagee to exercise any voting rights, other rights, and options will not be construed as a waiver of the right to exercise the voting rights, rights, and options.

Subject, however, to easements in favor of adjoining units and in favor of the common elements for the continuance of all encroachments of such adjoining units or common elements on the unit, now existing, or that may come into existence hereafter as a result of settling or shifting of the building, or as a result of repair or restoration of the building or unit after damage or destruction by fire or other casualty, or after a taking in condemnation or eminent domain proceedings, or by reason of an alteration to the common elements, so that any such encroachment may remain so long as the building stands;

Subject to an easement in favor of the other units to use of

streets, walks, and other rights of way serving the condominium as part of the common elements, and to use of all pipes, wires, ducts, cables, conduits, public utility lines, and other common elements located within the unit or elsewhere on the property and serving such other units;

Subject to easements in favor of any unit having sole access to a terrace for the exclusive use of such terrace; and

Subject to the provisions of the declaration, bylaws, and other documents of the condominium, as these documents may from time to time be amended.

#### NOTES TO FORM

##### Drafter's Notes

This form is intended for inclusion in a standard form of mortgage to adapt it for condominium use, and includes provisions granting to the mortgagee the right to exercise voting and other appurtenant rights of the unit owner in order to protect its interests.

For forms of security instruments and related legal discussion, see Security Arrangements (Ch 4).

#### § 7:79 Covenants for inclusion in unit mortgage

1. Mortgagor will promptly pay all assessments, for common charges or otherwise, as may from time to time be assessed against the unit by the board of administration of the condominium, and will not permit any lien for nonpayment of the assessments to arise with respect to the unit. In the event that mortgagor should fail to pay any assessment, or should suffer any lien to arise, mortgagee may, without notice to or demand on mortgagor and without releasing mortgagor from any obligations hereunder, pay any the assessment, or purchase, contest, or compromise any lien, and in so doing may incur any liability or expend any amount mortgagee may deem necessary. All amounts incurred or expended pursuant to this provision will be paid by mortgagor promptly on request, and if not promptly paid, will be added to and bear interest at the rate provided with respect to the debt secured, these amounts will become a lien on the premises fully secured by this mortgage and as such will be prior and paramount to any right, title, interest, or claim to or in the premises accruing or attaching subsequent to the lien of this mortgage.

2. Mortgagor covenants and agrees to abide by the declaration, bylaws, and rules and regulations of the condominium.

ium as those documents may from time to time be amended, and further to abide by decisions of the board of administration, managing agent, or manager, as the case may be, made pursuant to the authority granted by the documents.

**NOTES TO FORM****Drafter's Notes**

This form includes the provisions intended for inclusion in a standard form of mortgage. Inclusion of these provisions, together with the description of property at § 7:78, will ordinarily be sufficient to adapt a standard form of mortgage for use in connection with condominium units.

For a standard form of mortgage, see Security Arrangements (Ch 4).

**§ 7:80 Covenants for inclusion in unit mortgage**

1. Mortgagor will promptly pay all assessments, for common charges or otherwise, as may from time to time be assessed against the unit by the board of administration of the condominium, and will not permit any lien for nonpayment of the assessments to arise with respect to the unit. In the event that mortgagor should fail to pay any assessment, or should suffer any lien to arise, mortgagee may, without notice to or demand on mortgagor and without releasing mortgagor from any obligations hereunder, pay any the assessment, or purchase, contest, or compromise any lien, and in so doing may incur any liability or expend any amount mortgagee may deem necessary. All amounts incurred or expended pursuant to this provision will be paid by mortgagor promptly on request, and if not promptly paid, will be added to and bear interest at the rate provided with respect to the debt secured, these amounts will become a lien on the premises fully secured by this mortgage and as such will be prior and paramount to any right, title, interest, or claim to or in the premises accruing or attaching subsequent to the lien of this mortgage.

2. Mortgagor covenants and agrees to abide by the declaration, bylaws, and rules and regulations of the condominium as those documents may from time to time be amended, and further to abide by decisions of the board of administration, managing agent, or manager, as the case may be, made pursuant to the authority granted by the documents.

**NOTES TO FORM****Drafter's Notes**

This form includes the provisions intended for inclusion in a standard form of mortgage. Inclusion of these provisions, together with the description of property at § 7:78, will ordinarily be sufficient to adapt a standard form of mortgage for use in connection with condominium units.

For a standard form of mortgage, see Security Arrangements (Ch 4).

**§ 7:81 Covenants for inclusion in unit mortgage**

1. Mortgagor will promptly pay all assessments, for common charges or otherwise, as may from time to time be assessed against the unit by the board of administration of the condominium, and will not permit any lien for nonpayment of the assessments to arise with respect to the unit. In the event that mortgagor should fail to pay any assessment, or should suffer any lien to arise, mortgagee may, without notice to or demand on mortgagor and without releasing mortgagor from any obligations hereunder, pay any the assessment, or purchase, contest, or compromise any lien, and in so doing may incur any liability or expend any amount mortgagee may deem necessary. All amounts incurred or expended pursuant to this provision will be paid by mortgagor promptly on request, and if not promptly paid, will be added to and bear interest at the rate provided with respect to the debt secured, these amounts will become a lien on the premises fully secured by this mortgage and as such will be prior and paramount to any right, title, interest, or claim to or in the premises accruing or attaching subsequent to the lien of this mortgage.

2. Mortgagor covenants and agrees to abide by the declaration, bylaws, and rules and regulations of the condominium as those documents may from time to time be amended, and further to abide by decisions of the board of administration, managing agent, or manager, as the case may be, made pursuant to the authority granted by the documents.

**NOTES TO FORM****Drafter's Notes**

This form includes the provisions intended for inclusion in a standard form of mortgage. Inclusion of these provisions, together with the description of property at § 7:78, will ordinarily be sufficient to adapt a standard form of mortgage for use in connection with condominium units.

For a standard form of mortgage, see Security Arrangements (Ch 4).

**§ 7:82 Covenants for inclusion in unit mortgage**

1. Mortgagor will promptly pay all assessments, for common charges or otherwise, as may from time to time be assessed against the unit by the board of administration of the condominium, and will not permit any lien for nonpayment of the assessments to arise with respect to the unit. In the event that mortgagor should fail to pay any assessment, or should suffer any lien to arise, mortgagee may, without notice to or demand on mortgagor and without releasing mortgagor from any obligations hereunder, pay any the assessment, or purchase, contest, or compromise any lien, and in so doing may incur any liability or expend any amount mortgagee may deem necessary. All amounts incurred or expended pursuant to this provision will be paid by mortgagor promptly on request, and if not promptly paid, will be added to and bear interest at the rate provided with respect to the debt secured, these amounts will become a lien on the premises fully secured by this mortgage and as such will be prior and paramount to any right, title, interest, or claim to or in the premises accruing or attaching subsequent to the lien of this mortgage.

2. Mortgagor covenants and agrees to abide by the declaration, bylaws, and rules and regulations of the condominium as those documents may from time to time be amended, and further to abide by decisions of the board of administration, managing agent, or manager, as the case may be, made pursuant to the authority granted by the documents.

**NOTES TO FORM****Drafter's Notes**

This form includes the provisions intended for inclusion in a standard form of mortgage. Inclusion of these provisions, together with the description of property at § 7:78, will ordinarily be sufficient to adapt a standard form of mortgage for use in connection with condominium units.

For a standard form of mortgage, see Security Arrangements (Ch 4).

**§ 7:83 Covenants for inclusion in unit mortgage**

1. Mortgagor will promptly pay all assessments, for common charges or otherwise, as may from time to time be as-

sessed against the unit by the board of administration of the condominium, and will not permit any lien for nonpayment of the assessments to arise with respect to the unit. In the event that mortgagor should fail to pay any assessment, or should suffer any lien to arise, mortgagee may, without notice to or demand on mortgagor and without releasing mortgagor from any obligations hereunder, pay any the assessment, or purchase, contest, or compromise any lien, and in so doing may incur any liability or expend any amount mortgagee may deem necessary. All amounts incurred or expended pursuant to this provision will be paid by mortgagor promptly on request, and if not promptly paid, will be added to and bear interest at the rate provided with respect to the debt secured, these amounts will become a lien on the premises fully secured by this mortgage and as such will be prior and paramount to any right, title, interest, or claim to or in the premises accruing or attaching subsequent to the lien of this mortgage.

2. Mortgagor covenants and agrees to abide by the declaration, bylaws, and rules and regulations of the condominium as those documents may from time to time be amended, and further to abide by decisions of the board of administration, managing agent, or manager, as the case may be, made pursuant to the authority granted by the documents.

#### NOTES TO FORM

##### Drafter's Notes

This form includes the provisions intended for inclusion in a standard form of mortgage. Inclusion of these provisions, together with the description of property at § 7:78, will ordinarily be sufficient to adapt a standard form of mortgage for use in connection with condominium units.

For a standard form of mortgage, see Security Arrangements (Ch 4).

#### § 7:89 Covenants for inclusion in unit mortgage

1. Mortgagor will promptly pay all assessments, for common charges or otherwise, as may from time to time be assessed against the unit by the board of administration of the condominium, and will not permit any lien for nonpayment of the assessments to arise with respect to the unit. In the event that mortgagor should fail to pay any assessment, or should suffer any lien to arise, mortgagee may, without notice to or demand on mortgagor and without releasing

mortgagor from any obligations hereunder, pay any the assessment, or purchase, contest, or compromise any lien, and in so doing may incur any liability or expend any amount mortgagee may deem necessary. All amounts incurred or expended pursuant to this provision will be paid by mortgagor promptly on request, and if not promptly paid, will be added to and bear interest at the rate provided with respect to the debt secured, these amounts will become a lien on the premises fully secured by this mortgage and as such will be prior and paramount to any right, title, interest, or claim to or in the premises accruing or attaching subsequent to the lien of this mortgage.

2. Mortgagor covenants and agrees to abide by the declaration, bylaws, and rules and regulations of the condominium as those documents may from time to time be amended, and further to abide by decisions of the board of administration, managing agent, or manager, as the case may be, made pursuant to the authority granted by the documents.

#### **NOTES TO FORM**

##### **Drafter's Notes**

This form includes the provisions intended for inclusion in a standard form of mortgage. Inclusion of these provisions, together with the description of property at § 7:78, will ordinarily be sufficient to adapt a standard form of mortgage for use in connection with condominium units.

For a standard form of mortgage, see Security Arrangements (Ch 4).

#### **§ 9:99 Covenants for inclusion in unit mortgage**

1. Mortgagor will promptly pay all assessments, for common charges or otherwise, as may from time to time be assessed against the unit by the board of administration of the condominium, and will not permit any lien for nonpayment of the assessments to arise with respect to the unit. In the event that mortgagor should fail to pay any assessment, or should suffer any lien to arise, mortgagee may, without notice to or demand on mortgagor and without releasing mortgagor from any obligations hereunder, pay any the assessment, or purchase, contest, or compromise any lien, and in so doing may incur any liability or expend any amount mortgagee may deem necessary. All amounts incurred or expended pursuant to this provision will be paid by mortgagor promptly on request, and if not promptly paid, will be

added to and bear interest at the rate provided with respect to the debt secured, these amounts will become a lien on the premises fully secured by this mortgage and as such will be prior and paramount to any right, title, interest, or claim to or in the premises accruing or attaching subsequent to the lien of this mortgage.

2. Mortgagor covenants and agrees to abide by the declaration, bylaws, and rules and regulations of the condominium as those documents may from time to time be amended, and further to abide by decisions of the board of administration, managing agent, or manager, as the case may be, made pursuant to the authority granted by the documents.

**NOTES TO FORM**

**Drafter's Notes**

This form includes the provisions intended for inclusion in a standard form of mortgage. Inclusion of these provisions, together with the description of property at § 7:78, will ordinarily be sufficient to adapt a standard form of mortgage for use in connection with condominium units.

For a standard form of mortgage, see Security Arrangements (Ch 4).

# **Chapter 8**

## **Cooperative Apartments**

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- § 8:2 Relationship between association and unit owners

#### **B. GENERAL BACKGROUND; FORM DRAFTING PRINCIPLES**

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- § 8:4 Creation of cooperative; articles of incorporation and bylaws
- § 8:5 Sale of membership interests
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## COOPERATIVE APARTMENTS

### B. OPTIONAL LEASE PROVISIONS

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- § 8:41 Terraces, balconies, and penthouses
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- § 8:48 Lessor's immunities
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#### Scope

This chapter contains forms relating to cooperative apartments, together with a discussion of legal principles, including tax aspects, that should be considered when drafting such documents.

#### Treated Elsewhere

Chapters that contain related text and form material are Sales (see Ch 1), Exchanges (See Ch 1C), Condominiums (see Ch 7), Security Arrangements (see Ch 4), Real Property (see Ch 16A), and Cooperatives (see Ch 39).

#### Research References

The material cited below is generally applicable to cooperative apartments. Material that is applicable to particular aspects of the topic is cited in footnotes throughout the chapter and in Drafter's Notes following particular forms.

- West's Key Number Digest*  
Landlord and Tenant ¶350 to 369
- A.L.R. Library*  
Children's day care use as violation of restrictive covenant, 81  
A.L.R. 5th 345  
Validity and construction of regulations of governing body of condominium or cooperative apartment pertaining to parking, 60  
A.L.R. 5th 647  
Enforceability of bylaw or other rule of condominium or co-operative association restricting occupancy by children, 100 A.L.R. 3d 241  
Co-operative associations: validity and enforceability of by-law amendment reducing benefits available to members, 61 A.L.R. 3d 976  
Co-operative associations: rights in equity credits or patronage dividends, 50 A.L.R. 3d 435

FLORIDA JUR FORMS—LEGAL AND BUSINESS

*Legal Encyclopedias*

Fla. Jur. 2d, Condominiums and Co-operative Apartments  
Am. Jur. 2d, Condominiums and Cooperative Apartments; Federal  
Taxation

*Treatises and Practice Aids*

RIA Federal Tax Coordinator 2d, Corporate Formation, Redemptions, Reorganizations, Liquidations  
RIA Federal Tax Coordinator 2d, Sales and Exchanges, Capital Gains and Losses, Cost Recovery Recapture, Depreciation Recapture  
RIA Federal Tax Coordinator 2d, Special Corporations and Organizations: Consolidated Returns

*Trial Strategy*

Landlord Liability for Criminal Attack on Tenant, 35 Am. Jur. Trials 1

*Forms*

Federal Tax Guide To Legal Forms, Business Associations and Charitable Organizations (Ch 10)  
Federal Tax Guide To Legal Forms, Corporations (Ch 8)  
Federal Tax Guide To Legal Forms, Real and Personal Property Interests (Ch 4)  
Am. Jur. Pleading and Practice Forms, Condominiums and Cooperative Apartments  
Florida Pleading and Practice Forms, Condominiums and Cooperative Apartments Ch 13

*Law Reviews and Other Periodicals*

Adams, Community Associations: 1998 Survey of Florida Law, 23 Nova L. Rev. 65 (1998)  
Adams, Community Associations: 1996 Survey of Florida Law, 21 Nova L. Rev. 69 (1996)  
Brown and Grohman, Property Law: 1998 Survey of Florida Law, 23 Nova L. Rev. 229 (1998)  
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Buck, Drafting Dockominium Documents, 4 Prac. Real Est. Law. 27 (1988)  
Centner, Florida Cooperatives and Antitrust Problems from Terminating Members, 58 Fla. B.J. 45 (1985)  
Moskowitz, Cooperative Apartments: The Enforceability of Transfer Restrictions and the Impact of Bankruptcy, 18 Real Est. L.J. 142 (1989)  
Reynolds, What Then to Do With a Non-Cooperative Cooperative?, 56 Tax Law. 825 (2003)

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## I. GENERAL CONSIDERATIONS

### A. INTRODUCTION

#### § 8:1 Definitions and distinctions

Cooperative apartments, known in some jurisdictions as tenant-owned apartment corporations,<sup>1</sup> reflect a form of joint control over property in which title to the fee or leasehold is held in the name of a corporation. A prospective tenant generally purchases a membership interest in a not-for-profit corporation which entitles the holder to the exclusive use and occupancy of a portion of the property under a proprietary lease or occupancy agreement.

In the unusual situation where the corporation is for profit, the prospective tenant purchases a block of shares in the corporation instead of a membership interest, and receives a proprietary lease or occupancy agreement similar to a not-for-profit lease or occupancy agreement. Throughout this chapter, membership interest will be used to signify either membership in a not-for-profit corporation or a stock interest in a for-profit corporation unless the context indicates otherwise.

As used in the Florida Cooperative Act, the term “cooperative” means that form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or posses-

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#### [Section 8:1]

<sup>1</sup>Strictly speaking, the term “cooperative apartment” is the broader of the two because a cooperative may be organized as a trust or tenancy in common as well as a corporation. This is rarely the case, however, and the term “cooperative apartment” is taken in most jurisdictions as being synonymous with “tenant-owned apartment corporation.”

sion granted by the association as the owner of all the cooperative property.<sup>2</sup>

Cooperative apartments may be distinguished from condominiums. A condominium is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements, whereas a cooperative is a form of ownership of real property in which legal title is vested in a corporation or other entity. A person can have no ownership interest in a cooperative apartment aside from his or her ownership of stock in the corporation.<sup>3</sup>

## § 8:2 Relationship between association and unit owners

The relationship between the association and the unit owners is largely contractual; it may be determined by reading together the cooperative documents, which consist of:

- (1) the documents that create a cooperative, including, but not limited to, articles of incorporation of the association, bylaws, and the ground lease or other underlying lease, if any;
- (2) the document evidencing a unit owner's membership or share in the association; and
- (3) the document recognizing a unit owner's title or right of possession to his or her unit.<sup>1</sup>

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<sup>2</sup>Fla. Stat. Ann. § 719.103(12).

For other definitions, see the other subsections of Fla. Stat. Ann. § 719.103.

**Legal Encyclopedias:** Generally; Definitions, Fla. Jur. 2d, Condominiums and Co-operative Apartments § 1.

<sup>3</sup>Legal Encyclopedias: Generally; Definitions, Fla. Jur. 2d, Condominiums and Co-operative Apartments § 1.

### [Section 8:2]

<sup>1</sup>Fla. Stat. Ann. § 719.103(13).

For further discussion of the agreements or documents referred to, see §§ 8:4 to 8:9.

**B. GENERAL BACKGROUND; FORM DRAFTING PRINCIPLES**

## 1. Formation and Operation

**§ 8:3 In general**

Cooperative apartments are generally developed either by offering an existing rental property for sale to tenants or others, or by developing unimproved real estate for initial sale as a cooperative apartment complex. In either case, the initial legal step will be to organize a corporation to take title to the property.<sup>1</sup> Memberships in the corporation are then offered for sale, with each membership carrying with it the right to occupy a particular unit.<sup>2</sup> In the case of for-profit stock corporations, blocks of stock in the corporation are allocated to each apartment and offered for sale under a stock subscription agreement.<sup>3</sup> On the closing date for the sale of memberships or stock, each member or stockholder is issued a proprietary lease or occupancy agreement giving him or her the right to occupy a particular apartment.<sup>4</sup>

Florida law prohibits the inclusion or enforcement of escalation clauses in land leases or other leases or agreements for recreational facilities, land, or other commonly used facilities serving residential cooperatives, and such clauses are declared void for public policy.<sup>5</sup>

**§ 8:4 Creation of cooperative; articles of incorporation and bylaws**

Under the Florida Cooperative Act, the “association” is the corporation for profit or not for profit that owns the record interest in the cooperative property or a leasehold of the property of a cooperative and that is responsible for the

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**[Section 8:3]**

<sup>1</sup>See § 8:4.

In the case of conversion of existing, previously occupied improvements to a cooperative, certain statutory requirements must be met. See Fla. Stat. Ann. §§ 719.402 and 719.604 et seq.

<sup>2</sup>The sale of memberships is discussed in § 8:5.

<sup>3</sup>The subscription agreement is discussed in § 8:5.

<sup>4</sup>For discussion of the proprietary lease or occupancy agreement, see § 8:6.

<sup>5</sup>Fla. Stat. Ann. § 719.4015.

operation of the cooperative.<sup>1</sup> In the former case, rights of “unit owners” are based on ownership of stock in the corporation. In the latter case, the “unit owners” are members of a not-for-profit corporation, and members’ rights are set forth in proprietary leases and the corporate bylaws and, if desired, in separate membership certificates.<sup>2</sup>

Since most such entities are organized as nonprofit corporations, most of this chapter contemplates organization on that basis.<sup>3</sup> However, the materials and forms have some reference to cooperatives incorporated under the general (for profit) corporate provisions.<sup>4</sup>

Unless made applicable by a specific reference in the Florida Not-For-Profit Corporation Act,<sup>5</sup> the Florida Business Corporation Act<sup>6</sup> does not apply to not-for-profit corporations.

The Florida Not-for-Profit Corporation Act provides that one or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the Department of State for filing.<sup>7</sup>

The articles of incorporation must set forth:

- (1) a corporate name that satisfies the requirements of Fla. Stat. Ann. § 617.0401;
- (2) the address of the initial principal office, and if different, the mailing address of the corporation;

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**[Section 8:4]**

<sup>1</sup>Fla. Stat. Ann. § 719.103(2).

<sup>2</sup>The Florida Cooperative Act defines “unit owner” or “owner of a unit” as the person holding a share in the cooperative association and a lease or other muniment of title or possession of a unit that is granted by the association as the owner of the cooperative property. Fla. Stat. Ann. § 719.103(25).

The Act defines the term “unit” as a part of the cooperative property that is subject to exclusive use and possession, and a unit may be improvements, land, or land and improvements together, as specified in the cooperative documents. Fla. Stat. Ann. § 719.103(24).

<sup>3</sup>For statutory provisions relating to Florida nonprofit corporations, see Fla. Stat. Ann. §§ 617.01011 to 617.312.

<sup>4</sup>Incorporation under Chapter 607 of the Florida Statutes is treated in detail in Business Corporations (Ch 28).

<sup>5</sup>Fla. Stat. Ann. §§ 617.01011, 617.2101.

<sup>6</sup>Fla. Stat. Ann. § 617.1908.

<sup>7</sup>Fla. Stat. Ann. § 617.02011.

- (3) the purpose or purposes for which the corporation is organized;
- (4) a statement of the manner in which the directors are to be elected or appointed. Alternatively, the articles may provide that the method of election of directors be stated in the bylaws;
- (5) any provision that limits in any manner the corporate powers authorized under the law;
- (6) the street address of the corporation's initial registered office and the name of its initial registered agent at that address together with a written acceptance of appointment as a registered agent as required by Fla. Stat. Ann. § 617.0501; and
- (7) the name and address of each incorporator.<sup>8</sup>

In addition, the statute sets forth additional elements that the articles of incorporation may contain, including:

- (8) the names and addresses of the individuals who are to serve as the initial directors;
- (9) any provision regarding the regulation of the internal affairs of the corporation including, without limitation, any provision with respect to the relative rights or interests of the members as among themselves or in the property of the corporation;
- (10) the manner of termination of membership in the corporation;
- (11) the rights, upon termination of membership, of the corporation, the terminated members, and the remaining members;
- (12) the transferability or nontransferability of membership;
- (13) the distribution of assets upon dissolution or final liquidation or, if otherwise permitted by law, upon partial liquidation;
- (14) if the corporation is to have one or more classes of members, any provision designating the class or classes of members and stating the qualifications and rights of the members of each class;
- (15) the names of any persons or the designations of any groups of persons who are to be the initial members;
- (16) a provision to the effect that the corporation will be

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<sup>8</sup>Fla. Stat. Ann. § 617.0202(1)(g).

subordinate to and subject to the authority of any head or national association, lodge, order, beneficial association, fraternal or beneficial society, foundation, federation, or other corporation, society, organization, or association not for profit; and

- (17) any provision that is required to be set forth in the bylaws.<sup>9</sup>

The corporate name must comply with the provisions of Fla. Stat. Ann. § 617.0401 (relating to the corporate name of corporations organized under the Florida Not-For-Profit Corporation Act), including the requirement that the corporate name must contain the word “incorporated” or “corporation,” or other such word or abbreviation which clearly indicates the organization is not a natural person, unincorporated association, or a partnership. The corporate name may contain the word “cooperative” or “co-op” only if the resulting name is not deceptively similar to the name of any corporation, agricultural cooperative marketing association, or nonprofit cooperative association existing or doing business in this state.<sup>10</sup>

The purpose clause of the articles should provide that the purpose of the corporation is to lease housing to stockholders, and that the corporation will have specific power to own land, to build, lease, operate, and maintain structures, to borrow money on the security of such land and structures, to enter into contracts, to assess members or stockholders for expenses incident to the operation of properties owned by the corporation, and to make refunds to members or stockholders of any inadvertent overassessments.<sup>11</sup>

A dividend may not be paid, and any part of the income or profit of a not-for-profit corporation may not be distributed, to its members, directors, or officers. A private club that is established for social, pleasure, or recreational purposes and organized as a corporation of which the equity interests are held by the members may purchase the equity membership interest of any member and the payment for such interest is

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<sup>9</sup>Fla. Stat. Ann. § 617.0202(2)(j).

Incorporation under the Florida Not-for-Profit Corporation Act is treated in detail in Social and Recreational Organizations (Ch 41).

<sup>10</sup>Fla. Stat. Ann. § 617.0401(1).

<sup>11</sup>As to purposes of nonprofit corporations, generally, see Social and Recreational Organizations (Ch 41).

not a distribution for purposes of § 617.0505, Fla. Stat. Such a corporation may, however, pay compensation in a reasonable amount to its members, directors, or officers for services rendered, and may confer benefits upon its members in conformity with its purposes. Furthermore, upon dissolution or final liquidation, the corporation may make distributions to its members as permitted under Chapter 617. In addition, if expressly permitted by its articles of incorporation, a corporation may make distributions upon partial liquidation to its members, as permitted by statute. Any such payment, benefit, or distribution does not constitute a dividend or a distribution of income or profit.<sup>12</sup>

Under prior law, not-for-profit corporations organized on a stock share basis could issue shares of stock which were to be evidenced by stock certificates.<sup>13</sup> Under present law, however, not-for-profit corporations may issue only membership certificates, in any form, evidencing membership in the corporation.<sup>14</sup> Stock certificates issued under the former law now constitute membership certificates under the new law.<sup>15</sup>

Bylaws of a nonprofit corporation serve the same purpose as do bylaws of a corporation for profit. They set forth the details of internal government with respect to the membership structure and details concerning regulation of the corporation's directors and officers. Any provision that might properly be included in the bylaws may be incorporated in the articles; however, the day to day regulation of corporate affairs is generally specified in the bylaws, allowing the articles to be kept as simple as possible. Another reason for setting forth most regulations in the bylaws is that they may be amended in any manner adopted by the corporation, such as a simple majority vote of the membership. On the other hand, the articles of incorporation may be amended only on the satisfaction of certain formal requirements.<sup>16</sup>

The Cooperative Act specifies certain provisions that must

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<sup>12</sup>Fla. Stat. Ann. § 617.0505(1).

<sup>13</sup>See former Fla. Stat. Ann. § 617.011(2) and amended Fla. Stat. Ann. § 617.0505(3).

<sup>14</sup>Fla. Stat. Ann. §§ 617.0505(2), 617.0601(2).

<sup>15</sup>Fla. Stat. Ann. § 617.0505(3).

<sup>16</sup>See Fla. Stat. Ann. § 617.1001.

For statutory provisions relating to what a nonprofit corporation may provide in its bylaws, see Fla. Stat. Ann. §§ 617.0206 and 617.0207.

be included in the bylaws or other cooperative documents, namely:

- (1) the form of administration of the association;
- (2) decision making by unit owners, including quorums, voting requirements, and proxies;
- (3) meetings of the board of administration;
- (4) shareholder meetings and election of members of the board of administration;
- (5) budget procedure;
- (6) recall of board members;
- (7) manner of collecting from the unit owners their shares of common expenses and assessments;
- (8) amendment of bylaws;
- (9) certain transfer fees relating to the sale, mortgage, lease, or sublease or other transfer of units;
- (10) the annual budget;
- (11) insurance or fidelity bonding of persons who control or disburse funds of the association; and
- (12) arbitration of disputes.<sup>17</sup>

The Act also provides that the bylaws may contain optional provisions, provided they are not inconsistent with the Cooperative Act or with the cooperative documents.<sup>18</sup>

The date when cooperative existence begins is on commencement of corporate existence of the cooperative association as provided in Fla. Stat. Ann. § 607.0203. The cooperative documents must be recorded in the county in which the cooperative is located before property may be conveyed or transferred to the cooperative. All persons who have any record interest in any mortgage encumbering the interest in the land being submitted to cooperative ownership must either join in the execution of the cooperative documents or execute, with the requirements for deed and record a consent

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As to amendment of articles of incorporation of corporations not for profit, see Social and Recreational Organizations (Ch 41).

For discussion of bylaws of nonprofit corporations, including function, contents, adoption, amendment, and repeal, generally, see Social and Recreational Organizations (Ch 41).

<sup>17</sup>Fla. Stat. Ann. § 719.106(1).

For checklist of matters that should be set forth in the bylaws, see § 8:20.

<sup>18</sup>Fla. Stat. Ann. § 719.106(2).

to the cooperative documents or an agreement subordinating their mortgage interest to the cooperative documents. Upon creation of a cooperative, the developer or association shall file the recording information with the division within 30 working days on a form prescribed by the division. All provisions of the cooperative documents are enforceable equitable servitudes, run with the land, and are effective until the cooperative is terminated.<sup>19</sup>

Unless otherwise provided in the original cooperative documents, no amendment to the documents may change the configuration or size of any cooperative unit in any material fashion, materially alter or modify the appurtenances of the unit, or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus, unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless the record owners of all other units approve the amendment.<sup>20</sup>

Cooperative documents in a cooperative created after July 1, 1994 may not require less than a majority of total voting interests for amendments under this section, unless required by any governmental entity.

Unless a lower number is provided in the cooperative documents or unless expressly prohibited by the articles of incorporation or bylaws of the cooperative, the acquisition of real property by the association, and material alterations or substantial additions to the acquired property, will not be deemed to constitute a material alteration or modification of the appurtenances to the unit if the action is provided by two-thirds of the total voting interests in the cooperative.<sup>21</sup>

The cooperative association may, with the approval of its board of administrators, file with the value adjustment board a single joint petition on behalf of any association members

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<sup>19</sup>Fla. Stat. Ann. § 719.1035.

<sup>20</sup>Special rules apply concerning the retrofitting of condominium units and common areas with fire sprinkler systems. Fla. Stat. Ann. § 719.1055(5).

Fla. Stat. Ann. § 719.1055(1). Similarly, special rules apply concerning the retrofitting of common areas with hand and guardrails in residential cooperatives that meet the statutory definition of "housing for older persons." Fla. Stat. § 719.1055(6).

<sup>21</sup>Fla. Stat. Ann. § 719.1055(2).

who own parcels of property which the property appraiser determines are substantially similar with respect to location, proximity to amenities, number of rooms, living area, and condition, but must provide unit owners with notice of its intent to make the petition and must also provide at least 20 days' notice for a unit owner to elect, in writing, that his or her unit not be included in the petition.<sup>22</sup>

#### § 8:5 Sale of membership interests

Once the corporation has been formed, membership interests therein are offered for sale in the corporation. The purchase agreement should provide that membership interests will carry with it the right to occupy a particular unit, and that a proprietary lease or occupancy agreement between the corporation and the membership interest owner be executed at the time of closing. Generally, such an agreement should provide the type of information customarily set forth in a contract for acquiring an interest in real property,<sup>1</sup> as well as satisfying all applicable statutory requirements.

There are a number of regulations and disclosure requirements that a developer must comply with prior to the sale of residential cooperatives.<sup>2</sup> A developer of a residential cooperative must file with the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business Regulation (referred to in this chapter as the “division”), one copy of each of the documents and items required to be furnished by buyer or lessee by Fla. Stat. Ann. §§ 719.503 and 719.504.<sup>3</sup> Until the developer has so filed, a contract for sale or lease of a unit for more than five years shall be voidable by the purchaser or lessee prior to the closing of his or her purchase or lease of a unit.<sup>4</sup> Prior to filing the documents with the division, and prior to acquiring an ownership, leasehold, or contractual interest in the land upon which the cooperative is to be developed, a developer may not offer a contract for purchase or lease of a unit for

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<sup>22</sup>Fla. Stat. Ann. § 194.011(3)(e).

#### [Section 8:5]

<sup>1</sup>See Sales (Ch 1).

<sup>2</sup>See Fla. Stat. Ann. §§ 719.502 et seq.

<sup>3</sup>Fla. Stat. Ann. § 719.502(1)(a).

<sup>4</sup>Fla. Stat. Ann. § 719.502(1)(a).

more than five years.<sup>5</sup> However, the developer may accept deposits for reservations upon the approval of a fully executed escrow agreement and reservation agreement form properly filed with the division; but, reservations shall not be taken unless the developer has an ownership, leasehold, or contractual interest in the land. Each filing of a proposed reservation program must be accompanied by a filing fee of \$250.<sup>6</sup> The Cooperative Act requires the executed escrow agreement signed by the developer and the escrow agent and the reservation agreement form to contain specified information.<sup>7</sup>

The Act also requires certain disclosures prior to sale, and specifies the requirements that must be contained in contracts for the sale of a unit or a lease thereof for an unexpired term of more than five years and particular legends and caveats that must appear in conspicuous type.<sup>8</sup> The Act also provides that, until such time as the developer has furnished the documents specified in the Act to a person who has entered into a contract to purchase a unit or lease it for more than five years, the contract may be voided by that person, entitling the person to a refund of any deposit together with interest thereon.<sup>9</sup> The contract may be terminated by written notice from the proposed buyer or lessee delivered to the developer within 15 days after the buyer or lessee receives all of the documents required.<sup>10</sup> The developer shall not close for 15 days following the execution of the agreement and delivery of the documents to the buyer as evidenced by a receipt for documents signed by the buyer unless the buyer is informed in the 15-day voidability period and agrees to close prior to the expiration of the 15 days.<sup>11</sup> The Act further provides for other disclosures that must be made prior to the sale or lease of a unit for more than five

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<sup>5</sup>Fla. Stat. Ann. § 719.502(2)(a).

<sup>6</sup>Fla. Stat. Ann. § 719.502(2)(a).

<sup>7</sup>See Fla. Stat. Ann. § 719.502(2)(b), (c).

<sup>8</sup>Fla. Stat. Ann. § 719.503(1).

<sup>9</sup>Fla. Stat. Ann. § 719.503(1)(b).

<sup>10</sup>Fla. Stat. Ann. § 719.503(1)(b).

<sup>11</sup>Fla. Stat. Ann. § 719.503(1)(b).

years.<sup>12</sup> Lastly, the Cooperative Act also places disclosure requirements on nondevelopers (e.g. individuals reselling their cooperative interest).<sup>13</sup>

Every developer of a residential cooperative that contains more than 20 residential units, or that is part of a group of residential cooperatives that will be served by property to be used in common by members of more than 20 residential units, must prepare a prospectus or offering circular and file it with the division prior to entering into an enforceable contract of purchase and sale of any unit or lease of a unit for more than five years, and must furnish a copy of the prospectus or offering circular to each buyer, containing the information required by the Act.<sup>14</sup>

In addition to the prospectus or offering circular, each buyer must be furnished with a separate page entitled “Frequently Asked Questions and Answers,” which must be in accordance with a format approved by the division.<sup>15</sup>

This page must, in readable language:

- (1) inform prospective purchasers of their voting rights and unit use restrictions;
- (2) indicate whether and in what amount the unit owners or the association is obligated to pay rent or land use fees for recreational or other commonly used facilities;
- (3) contain a statement identifying that amount of assessment which, pursuant to the budget, would be levied upon each unit type, exclusive of any special assessments, and which identifies the basis upon which assessments are levied, whether monthly, quarterly, or otherwise;
- (4) state and identify any court cases in which the association is currently a party of record in which the association may face liability in excess of \$100,000; and
- (5) state whether membership in a recreational facilities

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<sup>12</sup>Fla. Stat. Ann. § 719.503(3).

<sup>13</sup>Fla. Stat. Ann. § 719.503(2).

<sup>14</sup>Fla. Stat. Ann. § 719.504.

<sup>15</sup>Fla. Stat. Ann. § 719.504.

association is mandatory, and if so, identify the fees currently charged per unit type.<sup>16</sup>

The Cooperative Act specifically requires the developer to pay into an escrow account sales or reservation deposits made prior to closing, and provides for the manner of handling of such funds by the escrow agent.<sup>17</sup> The Act also provides for certain warranties that are deemed to have been granted by the developer to the purchaser of each unit.<sup>18</sup>

The purchase agreement is sometimes drafted so as not to become effective until some minimum percentage of the memberships have been sold, thus giving the developer an option to hold or sell the project as a rental property if it appears unlikely that he or she will be able to sell it as a cooperative. Often, the agreement is executed contemporaneously with the filling out of an application form intended to provide the cooperative with background information with which it can determine acceptability of the prospective member.

Ordinarily, a down payment is collected at the time of the execution of the membership application. The balance of the purchase price is made payable on notification to the purchaser that the agreement has become effective. However, if the stock of a for-profit corporation is treated as a nonexempt security requiring registration under federal law,<sup>19</sup> no purchase price payments, deposits, or purchase commitments may be accepted, nor may indications of interest be solicited, prior to the filing of a registration statement.<sup>20</sup> A sale of a membership interest in a not-for-profit corporation, on the other hand, would probably not be considered a security and therefore not be subject to federal securities laws.<sup>21</sup>

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<sup>16</sup>Fla. Stat. Ann. § 719.504.

<sup>17</sup>Fla. Stat. Ann. § 719.202.

<sup>18</sup>Fla. Stat. Ann. § 719.203.

<sup>19</sup>See § 8:11.

<sup>20</sup>See 15 U.S.C.A. § 77e(c).

<sup>21</sup>See *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975).  
See also § 8:11.

**§ 8:6 The proprietary lease or occupancy agreement**

The proprietary lease or occupancy agreement<sup>1</sup> is the basic document entitling the member (or stockholders in the case of a for-profit corporation) to occupy his or her unit, and defining his or her rights with respect to it. Such a lease contains those provisions ordinarily found in long-term leases of real property.<sup>2</sup>

The proprietary lease also contains several unique features, namely:

First, in addition to the basic “rent,” unit owners are subject to assessment, at least quarterly,<sup>3</sup> to cover common expenses of the association for each year as determined by the board of directors.<sup>4</sup> Ordinarily, the lease provides that the member will pay that proportion of the annual cash requirements that either: (1) the value of his or her unit bears to the value of all units covered by proprietary leases; (2) the number of membership interests or shares held by him or her bears to the total number of membership interests or shares then issued and outstanding; or (3) a predetermined percentage stated in either the proprietary lease or occupancy agreement or the document including the membership interest.

Second, each unit lease is issued to the particular person who purchased the membership to which that lease is appurtenant. The lease ordinarily provides for termination of the occupancy if the member ceases to be the owner of the membership appurtenant to his or her unit. This type of termination most commonly occurs when a pledgee-lender

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**[Section 8:6]**

<sup>1</sup>The terms “proprietary lease” and “occupancy agreement” are largely synonymous. The former term is perhaps more widely used; the latter term is the one employed by the FHA in its publications and documents.

<sup>2</sup>For discussion of leases of real property generally, see Real Property (Ch 16A).

<sup>3</sup>Fla. Stat. Ann. § 719.106(1)(g).

<sup>4</sup>The Cooperative Act defines the term “common expenses” to mean all expenses and assessments properly incurred by the association for the cooperative. Fla. Stat. Ann. § 719.103(9).

**Legal Encyclopedias:** Common expenses and assessments, Fla. Jur. 2d, Condominiums and Co-operative Apartments § 152.

acquires title to membership or stock by reason of the default of a pledgor-lessee. As the principal balance of mortgages outstanding against the property is reduced, the value of each member's equity increases. Therefore, this termination clause in the proprietary lease facilitates transfers of cooperative interests.

Third, since tenants or occupants are also owners of the lessor corporation, the proprietary lease frequently requires the corporation to insure the building in some specified manner. In the event of insured losses, the corporation is required to procure prompt repairs; in the event of uninsured losses or total losses, a procedure is established whereby the membership interest owners may authorize termination of all tenancies and the winding up of the corporation.

Finally, due to the proprietary nature of members' interests in the venture, substantial restrictions are generally imposed on lessees' rights to assign and sublease. Typically, assignment and sublease require consent of the board of directors of the corporation after examination of the suitability of the prospective assignee or sublessee. An alternative method is to provide the corporation with a right of first refusal as to all assignments and subleases.

Under Fla. Stat. Ann. § 719.112, a lease pertaining to use of recreational facilities or other common facilities by residents of cooperatives is presumptively unconscionable if certain enumerated elements exists.<sup>5</sup> A proprietary lease must be executed with the same formalities as any other lease of real property.<sup>6</sup>

### § 8:7 Transfers of cooperative interests

Two basic documents are ordinarily involved in the transfer of a member's or stockholder's interest in a cooperative apartment corporation: (1) an agreement for the assignment of the proprietary lease and the membership or stock appurtenant thereto; and (2) the instrument of assignment.

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<sup>5</sup>See Fla. Stat. Ann. § 719.112(2).

<sup>6</sup>For discussion of, and forms relating to, leases of real property, see Real Property (Ch 16A).

The Florida Residential Landlord and Tenant Act does not apply to the occupancy by the holder of a proprietary lease in a cooperative apartment. Fla. Stat. Ann. § 83.42(4).

The agreement to assign is similar in format to an agreement for the sale of real property.<sup>1</sup> The seller agrees to assign all his or her rights under the proprietary lease covering his or her unit, and to sell his or her membership or stock in the corporation appurtenant thereto. The seller also agrees to procure the consent of the corporation to the transfer if this is required in the proprietary lease. The buyer agrees to pay the purchase price and to submit references to the corporation and otherwise cooperate in procuring its consent to the transfer, and also promises to execute an agreement in a form approved by the corporation by which he or she assumes and agrees to be bound by all the covenants and conditions of the proprietary lease.

The instrument of assignment does not differ materially from an ordinary assignment of a lease of real property, except that the assignor's interest in his or her membership or stock in the corporation is assigned together with his or her interests under the proprietary lease. Ordinarily, the assignor declares that there are no liens or other claims outstanding against the lease or the shares to be assigned, that there are no undischarged bankruptcy proceedings or unsatisfied judgments or tax liens outstanding against the assignor, and that the assignor has full right and authority to assign the lease and shares.<sup>2</sup>

### § 8:8 Formal requirements

The articles of incorporation of the nonprofit corporation must be typewritten or printed, must be legible, and must be in the English language. The corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of authority required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation. The document must be executed: (1) by the chairman or any vice chairman of the board of directors of a domestic or foreign corporation, or by its president or by another of its officers; (2) if directors

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#### [Section 8:7]

<sup>1</sup>For discussion of agreements of sale for real property, see Sales (Ch 1) and Exchanges (Ch 1C).

<sup>2</sup>For forms and materials relating to assignment of leases generally, see Assignments (Ch 23).

have not been selected or the corporation has not been formed, by an incorporator; or (3) if the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary, by that fiduciary. The person executing the document shall sign it and state, beneath or opposite his or her signature, his or her name and the capacity in which he or she signs. The document may, but need not, contain: (1) the corporate seal; (2) an attestation by the secretary or an assistant secretary; or (3) an acknowledgment, verification, or proof. The document must be delivered to the office of the Department of State for filing and must be accompanied by the correct filing fee.<sup>1</sup> Amendments to the articles of incorporation must be executed in a similar fashion.<sup>2</sup>

A proprietary lease must be executed with the same formalities as any other lease of real property.<sup>3</sup> If the term exceeds one year, the lease must be in writing, signed by the lessor or the lessor's agent, and attested by two witnesses.<sup>4</sup> A lease does not have to be acknowledged or attested in order to be valid, but before it may be recorded, it must be either: (1) acknowledged; (2) proved by a subscribing witness to it; or (3) under certain circumstances, legalized or authenticated by a civil-law notary or notary public.<sup>5</sup> Under Florida law, a conveyance or transfer of real property, or of any interest in it, or a lease for one year or longer, in order to be good and effectual against creditors or subsequent purchasers for valuable consideration and without notice, must be recorded according to law; and if the instrument is made or executed by virtue of a power of attorney, the power of attorney must also be recorded in order that the instru-

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**[Section 8:8]**

<sup>1</sup>Fla. Stat. Ann. §§ 617.02011, 617.0202 and 617.01201.

<sup>2</sup>Fla. Stat. Ann. § 617.1006.

<sup>3</sup>For discussion of, and forms relating to, leases of real property, see Real Property Leases (Ch 16A).

<sup>4</sup>See Fla. Stat. Ann. § 689.01.

<sup>5</sup>See Fla. Stat. Ann. §§ 689.01, 695.03.

For forms and materials concerning acknowledgments, see Sales (Ch 1).

ment will be good and effectual against creditors or subsequent purchasers for valuable consideration.<sup>6</sup>

### § 8:9 Conversion of existing improvements to ownership as residential cooperative

By the provisions of Fla. Stat. Ann. § 719.606, when existing improvements are converted to ownership as a residential cooperative, certain requirements described by law must be followed.

Each residential tenant who has resided in the existing improvements for at least 180 days preceding the date of the written notice of the intended conversion has the right to extend an expiring rental agreement on the same terms for a period that will expire no later than 270 days after the date of the notice. If the rental agreement expires more than 270 days after the date of the notice, the tenant may not unilaterally extend the rental agreement. Each other residential tenant has the right to extend an expiring rental agreement on the same terms for a period that will expire no later than 180 days after the date of the written notice of intended conversion. If the rental agreement expires more than 180 days after the date of the notice, the tenant may not unilaterally extend the rental agreement.<sup>1</sup>

Prior to or simultaneous with the first offering of individual units to any persons, each developer must deliver a notice of intended conversion to all tenants of the existing improvements being converted to a residential cooperative. All such notices must be given within a 72-hour period, and must be dated and in writing, and contain the statements required by law.<sup>2</sup> Prior to delivering any notice of intended conversion to the tenants, each developer must file a copy with the Division of Florida Land Sales, Condominiums, and Mobile Homes and pay a filing fee of \$100.<sup>3</sup>

A developer may elect to provide tenants who have been continuous residents of the existing improvements for at

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<sup>6</sup>See Fla. Stat. Ann. § 695.01.

[Section 8:9]

<sup>1</sup>Fla. Stat. Ann. § 719.606(1)(a) and (b).

<sup>2</sup>Fla. Stat. Ann. § 719.608.

<sup>3</sup>Fla. Stat. Ann. § 719.608(5).

least 180 days preceding the date of the written notice of intended conversion and whose rental agreements expired within 180 days of the date of the written notice of intended conversion, the option of receiving in cash a tenant relocation payment at least equal to one month's rent in consideration for extending the rental agreement for not more than 180 days, other than extending rental agreement for up to 270 days.<sup>4</sup>

Any provision of law or of the rental agreement or other contract or agreement to the contrary notwithstanding, whenever a county, including a charter county, determines that there exists within the county a vacancy rate in rental housing of three percent or less, the county may adopt an ordinance or other measure extending the 270-day extension period described in Fla. Stat. Ann. § 719.606(1)(a) and the 180-day extension described in Fla. Stat. Ann. § 719.606(1)(b) for an additional 90 days under certain circumstances prescribed by law.<sup>5</sup>

Each tenant, who for the 180 days preceding a notice of intended conversion has been a residential tenant of the existing improvements, has the right of first refusal to purchase the unit in which he or she resides on the date of the notice under the terms and conditions prescribed by law.<sup>6</sup>

## 2. Regulation of Offerings and Advertising

### a. Florida Regulation

#### **§ 8:10 State regulation of offerings and advertising**

The Florida Securities and Investor Protection Act,<sup>1</sup> which was enacted to protect the public from fraudulent and deceptive practices in securities market,<sup>2</sup> generally requires that no securities that must be registered under Florida Statutes, Chapter 517, may be sold or offered for sale in Florida unless the securities have been registered pursuant to the statute and unless prior to each sale the purchaser is furnished

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<sup>4</sup>Fla. Stat. Ann. § 719.606(4).

<sup>5</sup>Fla. Stat. Ann. § 719.606(6).

<sup>6</sup>Fla. Stat. Ann. § 719.612(1).

#### [Section 8:10]

<sup>1</sup>Fla. Stat. Ann. §§ 517.011 et seq.

<sup>2</sup>Rudd v. State, 386 So. 2d 1216 (Fla. Dist. Ct. App. 5th Dist. 1980).

with a prospectus that meets the requirements of rules adopted by the Financial Services Commission.<sup>3</sup>

There are exceptions to the registration requirement, however.<sup>4</sup> The registration requirement does not apply to the offer or sale of shares of a corporation which represent ownership, or entitle the holders of the shares to possession and occupancy, of specific apartment units in property owned by such corporation and organized and operated on a cooperative basis, solely for residential purposes.<sup>5</sup> The registration requirements also do not apply to a security issued by a corporation organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, no part of the net earnings of which corporation inures to the benefit of any private stockholder or individual, or any security of a fund that is excluded from the definition of an investment company under § 3(c)(10)(B) of the Investment Company Act of 1940; provided that no person shall directly or indirectly offer or sell securities under that subsection of the statute except by an offering circular containing full and fair disclosure, as prescribed by the rules of the commission, of all material information, including, but not limited to, a description of the securities offered and terms of the offering, a description of the nature of the issuer's business, a statement of the purpose of the offering and the intended application by the issuer of the proceeds thereof, and financial statements of the issuer prepared in conformance with United States generally accepted accounting principles.<sup>6</sup> The exemptions from the registration requirement are self-executing and do not require any filing with the Office of Financial Regulation of the Financial Services Commission prior to claiming an exemption.<sup>7</sup> In other situations not falling within one of the exemptions, prudent practice dictates that details concerning a proposed project be presented to the Florida

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<sup>3</sup>Fla. Stat. Ann. § 517.07(2).

<sup>4</sup>Fla. Stat. Ann. §§ 517.051, 517.061.

<sup>5</sup>Fla. Stat. Ann. § 517.061(14).

<sup>6</sup>Fla. Stat. Ann. § 517.051(9).

<sup>7</sup>Fla. Stat. Ann. §§ 517.051, 517.061.

Department of Banking and Finance for a determinative ruling.<sup>8</sup>

The Cooperative Act requires developers of residential cooperatives to file with the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business Regulation one copy each of the documents and items required to be furnished to a buyer or lessee by Fla. Stat. Ann. § 719.503 (relating to disclosures prior to sale) and Fla. Stat. Ann. § 719.504 (relating to prospectus or offering circular), and until the developer has so filed, a contract for sale or lease of a unit for more than five years shall be voidable by the purchaser or lessee prior to the closing of the purchase or lease of a unit.<sup>9</sup> The Cooperative Act requires a developer to make specified disclosures prior to the sale,<sup>10</sup> and also requires every developer of a residential cooperative that contains more than 20 residential units, or that is part of a group of residential cooperatives that will be served by property to be used in common by members of more than 20 residential units, to prepare a prospectus or offering circular and to file it with the Division of Florida Land Sales, Condominiums, and Mobile Homes, and furnish a copy thereof to each buyer, which must contain detailed information as provided by the Act.<sup>11</sup> In addition to the prospectus or offering circular, each buyer must be furnished with a separate page entitled "Frequently Asked Questions and Answers," which accords with various requirements set forth in the Act.<sup>12</sup>

b. Federal Regulation

**§ 8:11 SEC regulation—Offerings**

It remains unclear whether membership interests in a not-for-profit cooperative apartment can be considered secu-

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<sup>8</sup>The view that use of a nonstock corporation precludes applicability of securities requirements, although generally upheld in the past, should not be relied on.

<sup>9</sup>Fla. Stat. Ann. § 719.502(1)(a).

<sup>10</sup>Fla. Stat. Ann. § 719.503.

<sup>11</sup>Fla. Stat. Ann. § 719.504.

**Legal Encyclopedias:** Prospectus, Fla. Jur. 2d, Condominiums and Cooperative Apartment § 214.

<sup>12</sup>See Fla. Stat. Ann. § 719.504.

rities subject to Federal Securities law, but it appears they cannot.<sup>1</sup>

Generally, stock in for-profit cooperative apartments is a security subject to regulation under the Securities Act of 1933, as amended. Although detailed coverage of SEC registration requirements is beyond the scope of this discussion, the existence of several exemptions reduces the impact of federal securities regulation. For example, securities may be exempt as an intrastate issue,<sup>2</sup> and a transaction may be exempt as not involving any public offering.<sup>3</sup>

Of particular importance is the special exemption, set forth in the regulations,<sup>4</sup> available in connection with cooperative apartments when certain terms and conditions are met. The total gross proceeds from the sale of all securities offered may not exceed \$300,000.<sup>5</sup>

### **§ 8:12 SEC regulation—Advertising**

Whenever stock in a cooperative apartment is treated as a nonexempt “security” requiring registration under the Securities Act of 1933, advertising of such units is also subject to regulation. The nature of this regulation is discussed elsewhere.<sup>1</sup>

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#### **[Section 8:11]**

<sup>1</sup>See *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975) and *Penturelli v. Spector, Cohen, Gadon & Rosen, Attorneys at Law*, 779 F.2d 160 (3d Cir. 1985).

<sup>2</sup>See 15 U.S.C.A. § 77c(a)(11).

<sup>3</sup>See 15 U.S.C.A. § 77d(2); *Securities and Exchange Commission v. Ralston Purina Co.*, 346 U.S. 119, 73 S. Ct. 981, 97 L. Ed. 1494 (1953).

For additional discussion concerning exemption from SEC requirements, see *Syndication—Limited Partnerships* (Ch 14).

<sup>4</sup>See 17 C.F.R. § 230.236.

<sup>5</sup>See 17 C.F.R. § 230.236(b).

#### **[Section 8:12]**

<sup>1</sup>See *Condominiums* (Ch 7).

**§ 8:13 Applicability of truth-in-lending and interstate land sales requirements**

The federal Truth in Lending Act and Regulation Z<sup>1</sup> require that certain disclosures be made in connection with the extension of consumer credit.<sup>2</sup> It is unclear whether disclosure requirements would be applicable to sales of membership interests in cooperative apartments.

For this reason, and because of substantial similarities between cooperative apartments and condominiums, disclosure should be made in connection with sales of cooperative apartments in the same situations in which such disclosures would be required if a condominium unit were being sold.<sup>3</sup>

The Interstate Land Sales Full Disclosure Act and regulations thereunder<sup>4</sup> impose certain registration, reporting, and disclosure requirements with respect to nonexempt interstate sales of real estate lots.<sup>5</sup>

**3. FHA Insurance of Mortgages****§ 8:14 Availability; procedure**

FHA insurance of mortgages on cooperative apartment buildings may be available depending on the circumstances and on whether certain requirements are met.<sup>1</sup> In general, mortgages are insured by HUD on cooperative housing proj-

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**[Section 8:13]**

<sup>1</sup>15 U.S.C.A. §§ 1601 et seq.; 12 C.F.R. §§ 226.1 et seq.

For disclosure statement promulgated under Regulation Z of the Federal Truth and Lending Act, see Security Arrangements § 4:98.

<sup>2</sup>For forms and materials related to truth in lending requirements generally, see Security Arrangements (Ch 4).

<sup>3</sup>For situations in which disclosure must be made with respect to condominium units, see Condominiums (Ch 7).

<sup>4</sup>15 U.S.C.A. §§ 1701 et seq.; 24 C.F.R. §§ 1710.1 et seq.

<sup>5</sup>“Lot” is defined as any portion, piece, division, unit, or undivided interest in land located in any state or foreign country if that interest includes the right to the exclusive use of a certain portion of the land. 24 C.F.R. § 1710.1.

**[Section 8:14]**

<sup>1</sup>See 12 U.S.C.A. § 1715e; 24 C.F.R. §§ 213.1 et seq.; HUD Pub. No. 4550.1; HUD Pub. No. 4550.5.

FHA and HUD publications are revised frequently and therefore the practitioner is advised to check with the Federal Housing Authority to

ects of five or more dwelling units to be occupied by members of nonprofit cooperative ownership housing corporations under Section 213 of the National Housing Act. These insured loans may be used to finance: construction of a project; rehabilitation and acquisition of an existing project by a cooperative corporation; improvement or repair of a project already owned by the cooperative corporation, and resale of individual memberships; construction of projects of individual family dwellings that will be bought by individual members with separate insured mortgages; and construction or rehabilitation of projects that the owners intend to sell to nonprofit cooperatives.<sup>2</sup> The process of filing an application for project insurance involves completing and filing HUD Form 93201.<sup>3</sup>

The FHA does not permit a developer to accept down payments from prospective tenant-members until such time as a commitment to insure has been issued and the corporation's organizational documents have been approved. However, solicitations of interest may be taken and an amount may be collected to evidence sincerity, provided such sum is refundable at any time at the option of the prospective purchaser.<sup>4</sup>

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see whether the number and provisions of a particular publication are current. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

<sup>2</sup>HUD Pub No. 4550.1 1-9.

FHA and HUD publications are revised frequently and therefore the practitioner is advised to check with the Federal Housing Authority to see whether the number and provisions of a particular publication are current. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

<sup>3</sup>See HUD Form 93201 (formerly FHA Form 3201).

FHA and HUD publications are revised frequently and therefore the practitioner is advised to check with the Federal Housing Authority to see whether the number and provisions of a particular publication are current. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

<sup>4</sup>HUD Pub No. 4550.1 1-26.

FHA and HUD publications are revised frequently and therefore the practitioner is advised to check with the Federal Housing Authority to see whether the number and provisions of a particular publication are current. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

**§ 8:15 Use of FHA model organizational documents**

Before a developer or other mortgagor may solicit prospective tenants in an FHA tenant-owned housing corporation, FHA approval of the following documents must be obtained:

- (1) articles of incorporation of the mortgagor;
- (2) bylaws of the mortgagor;
- (3) FHA regulatory agreement;
- (4) information bulletin containing certain information of importance to prospective purchasers;
- (5) stock subscription agreement; and
- (6) occupancy agreement and cooperative agency agreement, if any.

In addition, with respect to investor-sponsored projects and conversion projects, the contract of sale of the property must be approved.<sup>1</sup>

In general, FHA model forms must be followed by the mortgagor with only such changes as may be required to conform such documents to facts pertaining to individual projects, or to requirements of local law.<sup>2</sup> To expedite examination of organizational documents, the mortgagor will often be required to submit not only typed copies thereof, but also marked-up drafts on FHA model forms, with changes shown by deletions or additions. In such case, a brief statement of

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**[Section 8:15]**

<sup>1</sup>HUD Pub. No. 4550.1 3-1. The information bulletin must accurately describe the proposed cooperative and the method in which it is being organized; it must contain general information concerning the cooperative housing concept, tax consequences of tenant-stockholder (tenant-member in the case of a Florida Not-for-Profit Cooperative) status, and an estimate of monthly carrying charges (see HUD Pub. No. 4550.1 3-4).

FHA and HUD publications are revised frequently and therefore the practitioner is advised to check with the Federal Housing Authority to see whether the number and provisions of a particular publication are current. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

<sup>2</sup>HUD Pub No 4550.1 3-2a.

FHA and HUD publications are revised frequently and therefore the practitioner is advised to check with the Federal Housing Authority to see whether the number and provisions of a particular publication are current. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

the reason for any change, and citation of state law, if relevant, should accompany the drafts.<sup>3</sup>

### C. TAX ASPECTS

#### § 8:16 Homeowner's associations

Though not required to do so, most cooperative apartments are operated under the specific provision of the Internal Revenue Code that governs cooperative housing corporations.<sup>1</sup> By doing so, a significant tax benefit accrues to the members: they may deduct their proportionate share of the taxes and interest paid by the housing corporation. The members are thus placed in the same tax position as if they owned their apartments individually.<sup>2</sup> If the tenant-stockholder also uses the apartment for business or investment purposes, depreciation and the costs of operating and maintaining the apartment may also be deducted.<sup>3</sup>

To qualify for this major tax benefit, a cooperative must meet all the following requirements:

- (1) It can have only one class of stock;<sup>4</sup>
- (2) Each tenant-stockholder must be entitled to occupy an apartment “for dwelling purposes” in the building owned or leased by the corporation;<sup>5</sup>
- (3) No stockholder is allowed to receive any distribution

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<sup>3</sup>See HUD Pub No. 4550.1 3-2 subds b, c.

FHA and HUD publications are revised frequently and therefore the practitioner is advised to check with the Federal Housing Authority to see whether the number and provisions of a particular publication are current. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

Forms included in this chapter are not drafted to meet FHA requirements.

#### [Section 8:16]

<sup>1</sup>I.R.C. § 216.

<sup>2</sup>I.R.C. § 216(a). Because only the taxes and interest that the cooperative could deduct are deductible by the tenant-stockholders, these are not deductible by members of co-op that leases both the land and building. Rev. Rul. 62-177, 1962-2 C.B. 89.

<sup>3</sup>I.R.C. § 216(c).

<sup>4</sup>I.R.C. § 216(b)(1)(A).

<sup>5</sup>I.R.C. § 216(b)(1)(B).

**Legal Encyclopedias:** See Am. Jur. 2d, Federal Taxation ¶¶ 19425 et seq.

from the corporation that is not out of earnings and profits or that is not in liquidation of the corporation;<sup>6</sup> and

(4) At least 80% of the gross income of the corporation must come from its tenant-stockholders for services relating to the use of the apartments as dwellings.<sup>7</sup> Amounts collected from tenant-stockholders for mortgage amortization, local taxes, interest, operating expenses, maid and secretarial services, garage or parking space, utilities, recreational facilities, cleaning, and related services are considered gross income from tenant-stockholders.<sup>8</sup> Income from commercial leases, whether to tenant-stockholders or to others, is not included in this calculation.<sup>9</sup>

In addition to the requirements imposed on the corporation, each tenant-stockholder must meet two other qualifications:

(1) The stock owned by him or her in the corporation must be fully paid-up.<sup>10</sup> To be paid-up means that consideration has been paid for it in an amount that bears a reasonable relationship to the value of the stockholder's interest in the land and building.<sup>11</sup> Stock acquired by gift is paid-up if it was paid-up in the hands of the donor; and

(2) The tenant-stockholder must be the real owner of the stock, not a nominee. A stockholder can be an individual, corporation, trust, estate, partnership, company, or association.<sup>12</sup>

As stated, most cooperative apartments are organized and operated so as to comply with the above requirements. That is not essential, however, and a second choice is available to

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<sup>6</sup>I.R.C. § 216(b)(1)(C). The purpose of this is to prevent the corporation from returning the capital investment of the stockholders.

<sup>7</sup>I.R.C. § 216(b)(1)(D). This allows the co-op to earn up to 20% of its income from commercial leases and services offered to other than tenant-stockholders.

<sup>8</sup>Park Place, Inc. v. Commissioner of Internal Revenue, 57 T.C. 767, 1972 WL 2472 (1972); Rev. Rul. 68-387, 1968-2 C.B. 112, amplified Rev. Rul. 68-387, 1979-1 C.B. 118, Rev. Rul. 79-137, 1979 WL 50792 (1979).

<sup>9</sup>Nor is income from any business conducted with a tenant-stockholder other than in their capacity as tenants of a housing unit. Rev. Rul. 68-387, 1968-2 C.B. 112.

<sup>10</sup>26 C.F.R. § 1.216-1(f).

<sup>11</sup>I.R.C. § 216(b)(2).

<sup>12</sup>I.R.C. § 7701(a)(1).

cooperative apartments: the homeowners association.<sup>13</sup> A homeowners association must get 60% or more of its income from dues or assessments and must spend at least 90% of its expenditures for the maintenance of the association property, and it must meet other requirements under the Code in order to enjoy tax-exempt status.<sup>14</sup> The association is not taxed on its exempt-function income and pays a tax at the rate of 30% on its other income (32% in the case of timeshare associations).<sup>15</sup> This other income is normally rent from commercial leases and fees from nonmembers for recreational facilities.

Though available to cooperative apartment operations, the homeowners association is usually considered less suitable than the co-op provisions of the Code. It is used primarily by condominiums and is discussed in more detail under that heading in this volume.

### § 8:17 Taxation of cooperative housing corporations

While a cooperative housing corporation is basically taxed the same as any other corporation, various exceptions are made because of its nature. It is organized as a cooperative, which means that the members are, in effect, using it as an agent for their benefit. Because of its character, it can sometimes operate as a tax-exempt organization merely by serving as an agent for the tenant-stockholders and balancing income with disbursements. This is not normally possible if reserves are maintained, however.

Amounts collected and spent for maintenance of the property are not included as income since the corporation is merely acting as the agent of the stockholders for this purpose. Similarly, payments made by the tenant-stockholders for the mortgage indebtedness are not income to the corporation.<sup>1</sup>

Most housing co-ops avoid taxation by making deductible expenditures to offset revenue from the tenant-stockholders.

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<sup>13</sup>I.R.C. § 528.

<sup>14</sup>I.R.C. § 528(c)(1).

<sup>15</sup>I.R.C. § 528(b).

#### [Section 8:17]

<sup>1</sup>Park Place, Inc. v. Commissioner of Internal Revenue, 57 T.C. 767, 1972 WL 2472 (1972). This case is a primer of cooperative taxation.

Income from a trade or business not related to the housing service—from commercial leases, for example—is taxable, though, as are assessments collected from tenant-stockholders that exceed operating expenses. These are optional operating reserves and are therefore taxable.<sup>2</sup>

No gain or loss is recognized if the co-op distributes a dwelling unit to a stockholder in exchange for stock.<sup>3</sup> The distribution must be in exchange for the stockholder's stock in the co-op and the dwelling unit must have been used as the stockholder's principal residence, within the meaning of I.R.C. § 121.<sup>4</sup>

A cooperative apartment corporation may deduct depreciation on property it leases to its tenant-stockholders, even if the tenant-stockholder is also entitled to a depreciation allowance on his or her stock in the corporation.<sup>5</sup>

### **§ 8:18 Residential cooperative apartment corporations**

Ownership of a cooperative apartment is treated the same as ownership of single family dwelling for most tax purposes. Because of the residential nature of the use of the property, no deduction may be taken for depreciation, maintenance, utilities, or the other expenses of owning the apartment.<sup>1</sup> Nor is it possible to recover the purchase price of the property through depreciation or amortization.

Two batches of expenses may, however, be deducted: real estate taxes and (perhaps) interest. The proportionate part of real estate taxes is always deductible by a taxpayer who itemizes deductions.<sup>2</sup> Interest is deductible only if it meets

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<sup>2</sup>Concord Village, Inc. v. Commissioner of Internal Revenue, 65 T.C. 142, 1975 WL 3188 (1975), recommendation regarding acquiescence, AOD-1976-329, 1976 WL 39554 (I.R.S. AOD 1976). This case, also, should be read by anyone concerned with cooperative housing taxation.

<sup>3</sup>I.R.C. § 216(e).

<sup>4</sup>I.R.C. § 216(e).

<sup>5</sup>I.R.C. § 216(c).

#### [Section 8:18]

<sup>1</sup>I.R.C. § 262.

<sup>2</sup>I.R.C. § 264(a). If the standard deduction is taken, taxes are included in that amount.

the qualified residential interest qualifications.<sup>3</sup> In general, interest on personal debts is not deductible. An exception exists for interest on debt that is secured by a taxpayer's principal residence or by a qualifying vacation residence, however.<sup>4</sup> Several limits apply to the amount of this debt. If the debt is incurred to purchase or improve a residence, it cannot exceed \$1 million. If incurred for some other purpose, it cannot exceed the owner's net equity in the residence with a \$100,000 ceiling. The net equity is determined by deducting any acquisition indebtedness on the property from its fair market value.

The deduction available to a tenant-stockholder for taxes and interest paid by the corporation is determined in one of two ways.<sup>5</sup> The number of shares of the corporation owned in comparison to the total shares outstanding can be used to determine the portion available to the tenant-stockholder.<sup>6</sup> Alternatively, the cooperative may allocate shares of the real estate taxes and interest separately to each unit and to the common elements.<sup>7</sup> This allocation must reasonably reflect the cost to the cooperative of the taxes or interest for that unit. The second method usually permits a more accurate allocation of the taxes and interest. If chosen by the co-op, it is binding on the tenant-stockholders and applies to all succeeding years.<sup>8</sup>

The interest deductible is that incurred for debts relating to the acquisition or improvement of the land and buildings of the corporation.<sup>9</sup> Taxes are not deductible on a leased building, even if it is the obligation of the co-op to pay them. Both taxes and interest must be reduced by a proportionate

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<sup>3</sup>I.R.C. § 163(h).

<sup>4</sup>A second residence that is rented to others does not qualify unless the owner also uses it as a residence during the year for more than the greater of 14 days or 10% of the days it is rented. If not rented, it can qualify even if the owner does not use it at all. I.R.C. § 163(h)(4)(A).

<sup>5</sup>*Legal Encyclopedias:* Am. Jur. 2d, Federal Taxation ¶¶ 19432, 19433.

<sup>6</sup>Stock owned by a government agency or by the corporation is counted in making this calculation, thus reducing the amount the tenant-stockholder can deduct. 26 C.F.R. § 1.216-1.

<sup>7</sup>I.R.C. § 216(b)(3)(B).

<sup>8</sup>26 C.F.R. § 1.216-1(d)(2)(ii).

<sup>9</sup>I.R.C. § 216(a)(1).

share of the income of the co-op from commercial leases.<sup>10</sup> If depreciation is deductible by a tenant-stockholder—because the unit is used for business purposes, for example—the depreciation is calculated on the tax basis of the tenant for the stock in the corporation.<sup>11</sup> A business user of a unit may also deduct his or her proportionate share of maintenance and repair expenses, but not any portion of expenditures that must be capitalized and charged to the co-op's capital account.<sup>12</sup>

A residential apartment is a capital asset.<sup>13</sup> Gain on its sale is capital in nature, but a loss is not deductible. The profit or loss is calculated by subtracting the tax basis in the stock from the consideration received from its sale. Basis includes both the expenses of buying the property and the expenses of selling it. Basis also includes the portion of the mortgage on the property allocated to the tenant-stockholder's apartment if the tenant must pay this amount.

The sale of a cooperative apartment by a tenant-stockholder is subject to a special tax provision. Gain of up to \$250,000 (\$500,000 for certain married couples filing jointly) is excluded from the sale or exchange of a cooperative apartment if, during the five-year period ending on the date of the sale or exchange, the taxpayer has held the stock and has used the cooperative apartment as the taxpayer's principal residence for periods aggregating two years or more.<sup>14</sup> This privilege may be used only one time in any two-year period.<sup>15</sup> Basis for the new residence is calculated by deducting the gain on the old residence from the consideration paid for the new one.

### § 8:19 Miscellaneous

Various provisions in the tax law may indirectly affect cooperative housing organizations. One of these applies to apartments that are used partially as a residence and partially as an income producer. That is the situation with

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<sup>10</sup>26 C.F.R. § 1.216-1(g).

<sup>11</sup>*Legal Encyclopedias*: Am. Jur. 2d, Federal Taxation ¶ 19434.

<sup>12</sup>*Legal Encyclopedias*: Am. Jur. 2d, Federal Taxation ¶ 19435.

<sup>13</sup>I.R.C. § 1221(a).

<sup>14</sup>I.R.C. § 121(a), (b), (d)(4).

<sup>15</sup>I.R.C. § 121(b)(3).

apartments that are rented part of the time. The owner's tax position is governed by I.R.C. §§ 280A and 183. I.R.C. § 280A allows the owner to disregard income on property leased for fewer than 15 days a year if the owner uses it for at least one day. Expenses (other than real estate taxes and, perhaps, interest) may not be deducted, however. If the owner uses the property as a home for the greater of 14 days or 10% of the number of days rented, the condominium is not considered held for business or for investment purposes.

The second of these provisions, I.R.C. § 183, is called the "hobby loss" section. Certain presumptions are provided to determine if the taxpayer is actively engaged in a profit-seeking enterprise. If not, losses and expenses are deductible only to the extent of the rental income.

Sometimes a cooperative apartment is used partially as a home office for the tenant-stockholder. The deductibility of expenses follows the same rules that apply to other types of residences. The allocation of expenses and depreciation that is deductible is based on the ratio of space used for business purposes to space used for all purposes.<sup>1</sup>

The use of the space must be for the convenience of the employer and the deduction is allowed only if the space is used under one or more of the five sets of conditions set forth in the Code:<sup>2</sup>

- (1) the space is used exclusively and on a regular basis as the taxpayer's principal place of business;
- (2) the space is used exclusively and on a regular basis as a place to meet clients, patients, or customers with whom the taxpayer deals in the ordinary course of business;
- (3) the space is used on a regular (but not necessarily exclusive) basis to store inventory of the taxpayer's business if the residence is the only fixed location for the business;
- (4) the space is not attached to the residence and is used exclusively and on a regular basis in connection with the taxpayer's business; or

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[Section 8:19]

<sup>1</sup>I.R.C. § 280A(c)(4), (5).

<sup>2</sup>I.R.C. § 280A(c)(1).

- (5) the space is used for licensed day care to children, the handicapped, or elderly.

The special tax problems that arise when a cooperative apartment complex is converted to condominiums are discussed in this volume under the condominiums topic.

#### **D. CHECKLISTS**

##### **§ 8:20 Checklist—Bylaws**

1. Corporation.
  - a. Name.
  - b. Principal office.
    - (1) Registered office.
  - c. Other offices.
2. Membership in, or capital stock of, corporation.
  - a. Membership or capital stock issued only in connection with execution of proprietary lease.
  - b. Form of membership or stock certificate.
    - (1) Replacement of lost certificates.
    - (2) Cost of replacing.
  - c. Maintenance of register of members or shareholders.
  - d. Transfer of membership or stock.
    - (1) Method of effecting.
    - (2) Only in accordance with transfer of proprietary lease.
    - (3) No division of ownership to individual apartments.
    - (4) Transfer only as an entirety.
      - (a) Exception for multiple apartments owned by single member or shareholder that are subdivided into original units.
    - (5) No transfer except on register of corporation.
    - (6) No transfer unless all assessments and fees have been paid.
    - (7) Transfer fees.
  - e. Legend on certificates.
    - (1) Rights subject to articles of incorporation, bylaws, proprietary lease, and rules of corporation adopted from time to time.
    - (2) Lien of corporation for all indebtedness of member or shareholder to corporation.

- (a) Pledge of shares not to constitute a prior lien.
- 3. Proprietary leases.
  - a. Assignable only as part of assignment of membership of stock.
    - (1) In compliance with all corporate provisions.
  - b. Regrouping of space and reallocation of shares.
    - (1) No subdividing of individual units.
    - (2) Right to consolidate more than one unit.
      - (a) Single ownership of units.
      - (b) Only under conditions approved by board of managers.
        - (i) Right to require bond for compliance with conditions.
    - (3) Right to subdivide multiple units held as a entity.
      - (a) Only under conditions approved by board of managers.
        - (i) Right to require bond for compliance with conditions.
  - 4. Meetings of members or stockholders.
    - a. Annual meeting.
      - (1) Dates, times, location.
      - (2) Quorum.
      - (3) Voting procedures.
      - (4) Proxies.
      - (5) Notices.
    - b. Special meetings.
      - (1) Method of calling.
        - (a) Notice.
          - (i) Purpose.
          - (ii) Number of days.
          - (iii) Time and location.
        - (2) Who may call.
        - (3) Quorum.
        - (4) Voting procedures.
        - (5) Proxies.
  - 5. Governing body.
    - a. Title.
    - b. Powers and duties.

- (1) Governing body for cooperative housing organization.
  - (a) All operating matters.
    - (i) Adopt and amend rules from time to time.
  - (b) All financial matters.
    - (i) Annual budget.
    - (ii) Establishment of reserves.
    - (iii) Make assessments and charge fees.
    - (iv) Enter into leases.
      - (A) Proprietary.
      - (B) Commercial.
  - (2) All powers granted by law or set forth in articles of incorporation and bylaws.
- c. Number of members.
  - (1) Qualifications.
    - (a) Member or stockholder.
    - (b) Resident.
- d. Staggered terms.
- e. Election.
  - (1) Annual meeting.
  - (2) Voting.
    - (a) Cumulative voting.
- f. Powers and duties.
- g. Meetings.
  - (1) Annual.
  - (2) Regular.
  - (3) Special.
    - (a) Method for calling.
    - (b) Persons with power to call.
- h. Removal of member of board.
  - (1) By governing board or members.
  - (2) Method and procedure.
- i. Filling of vacancy.
  - (1) By remaining members of board.
  - (2) By members.
- j. Compensation of members of board.
- k. Indemnification of members of board.
- l. Insurance.
- 6. Officers.

- a. Titles.
- b. Duties.
- c. Election by governing board.
  - (1) Annual meeting.
- d. Removal and replacement by board.
- e. Compensation.
- f. Indemnification.
- 7. Financial and accounting.
  - a. Right of governing board to make assessments and charge fees.
  - b. Prepare annual budget and submit to members.
  - c. Prepare annual report and submit to members.
    - (1) Interim financial statements.
  - d. Fiscal year of organization.
  - e. Outside independent accountants.
  - f. Insurance or fidelity bonds to cover all persons with access to funds of organization.
- 8. Amendment of bylaws.
  - a. Special meeting.
  - b. Quorum.
  - c. Voting procedure.
    - (1) Special voting requirements.
- 9. Arbitration.
  - a. Mandatory.
  - b. Nonbinding.
- 10. Manner of collecting from the unit owners their shares of the common expenses.

#### NOTES

##### Drafter's Notes

The Florida Cooperative Act provides for the inclusion of mandatory and optional provisions in the bylaws. See Fla. Stat. Ann. § 719.106.

#### § 8:21 Checklist—Proprietary lease

- 1. Names and addresses of parties.
- 2. Description of unit sufficient to pass title; designation of available common areas, recreational facilities, etc.; description of any personal property to be included.
- 3. Term of lease.

4. Rent and assessments.
  - a. How determined.
  - b. Effect of failure to determine for a given period.
  - c. Statement that all lessees will pay rent at same rate.
  - d. Authorization for directors to credit portions of rent representing capital expenditures and repayments of principal on mortgages to "capital surplus."
  - e. Time and basis for adjustment of rent.
  - f. Determination of annual budget of common expenses.
  - g. Allocation of common expenses, payable by assessment, among units.
  - h. Time and manner of collecting assessments.
  - i. Lien of lessor for unpaid rent and assessments; right of lessee to interpose defenses with respect to lessor's obligations.
5. Lessor's covenant to repair all areas other than apartment interiors.
6. Lessor's covenants as to services to be rendered.
  - a. General maintenance.
  - b. Light, heat, air-conditioning, hot and cold water, and the like.
  - c. Discretionary power of directors to determine from time to time which services are to be rendered.
7. Damage to property.
  - a. Repairs following insured losses.
  - b. Provision enabling members to vote against repair in case of uninsured or total losses.
  - c. Termination of rent when apartment rendered unfit for occupation or inaccessible.
  - d. Undertaking by lessor to obtain waiver of subrogation provisions in insurance policies, and releases of both parties from liability for losses covered by policies containing such provisions.
8. Books and records.
  - a. Accounts and records to be kept by lessor.
  - b. Lessee's right of inspection.
  - c. Lessor's agreement to deliver to lessee an annual

report including a balance sheet and an income statement certified by an independent certified public accountant.

9. Lessor's covenant that all proprietary leases will be in the form of the lease being executed, and procedure whereby lessees may change the form of such lease.
10. Assignment to lessee of lessor's rights as against any occupant in possession of the leased apartment after the beginning of lease term.
11. Statement that lease supersedes all rights of lessee to possession of apartment under any prior agreement or statutory tenancy.
12. Lessor's covenant of quiet enjoyment.
13. Lessee's covenant to pay rent.
14. Statement that lease is subject to house rules, and that breach of house rules constitutes default under lease.
15. Procedure for obtaining authorization to sublease.
  - a. Requirement as to consent of directors or members.
16. Procedure for obtaining authorization to assign.
  - a. Requirement as to consent of directors or members.
17. Pledge of lease and membership interest appurtenant thereto.
  - a. Right of lessee to pledge lease and membership interest subject to restrictions on rights of pledgee or other transferee to have the interests transferred of record, to vote them, to sell them, or to occupy or permit occupancy of the apartment.
  - b. Undertaking by lessor to notify pledgees as to defaults on the part of pledgor-lessees, and covenant that pledgees will be permitted to cure such defaults.
  - c. Undertaking by lessor to terminate lease on notification of default by pledgor-lessees in their obligations to pledgees.
18. Lessee's covenants as to occupancy of the premises.
  - a. Restrictions on use of premises.
  - b. Maintenance and repair of apartment interior.
  - c. Prohibition of unreasonable odors, noises, or other annoying conditions.

- d. Restriction on right to use appliances which might result in overloading or damage to facilities, or in interruption or poor quality of service to other portions of the building.
- e. Covenant to comply with all laws, ordinances, rules and regulations, and requirements of mortgagees and insurers.
19. Lessor's right to remedy defaults in performance of lessee's covenants, and to charge lessee therefor.
20. Lessee's covenant not to permit anything to be done or kept in the apartment which would increase the rate of insurance on the building.
21. Restrictions on lessee's right to make alterations in the premises and to remove fixtures.
  - a. Requirement that lessor consent to alterations affecting roofs, terraces, balconies, and utilities installations.
  - b. Requirements that lessor's consent be obtained before any fixtures, appliances, or improvements (other than those placed or installed in the apartment by lessee or his or her predecessors in interest) are removed from the building.
22. Lessee's covenant to surrender possession of the apartment on expiration of the term of the lease.
23. Subordination of lease to mortgages and ground leases.
24. Lessee's undertaking to discharge all mechanics' liens for labor or material furnished or delivered to or for lessee.
25. Lessee's covenant to observe and promote the cooperative purposes of lessor.
26. Lessor's right of entry for purposes of making repairs.
  - a. Requirement that lessee provide lessor with key to each lock necessary for access to areas of the building controlled by lessee.
27. Lessee's undertaking to reimburse lessor for all expenses incurred by reason of lessee's defaults.
28. Lessor's immunities.
  - a. Liability for failure to provide services required under lease limited to negligence liability.
  - b. Statement that no abatement of rent, compensation, or constructive eviction or similar construc-

- tions of law may be claimed by lessee for lessor's failure to repair when such failure is due to circumstances beyond lessor's control.
- c. Statement that lessee will use all facilities provided by lessor outside the apartment, such as television antennas, storage space, and laundry facilities at lessee's risk.
  - d. Lessor's immunity from liability for loss or damage to property left by lessee in the custody of an employee of lessor, and agreement by lessee to indemnify lessor against liability arising from use of any vehicle by an employee of lessor after such vehicle has been entrusted to such employee by lessee.
29. Circumstances under which lessor may terminate lease.
- a. Lessee no longer owner of shares to which lease is appurtenant.
  - b. Lessee becomes bankrupt.
  - c. Unauthorized assignment, sublease, or occupancy.
  - d. Default in payment of rent.
  - e. Default in performance of other covenants.
  - f. Lessee's objectionable conduct.
  - g. Condemnation.
  - h. Destruction of building and determination by members not to repair.
  - i. Termination of all proprietary leases on vote of directors and members.
30. Lessor's rights on lessee's default.
- a. Lease of unit to another tenant for lessor's account.
  - b. Lease of unit to another tenant for lessee's account.
  - c. In case of default by lessee after sublease, lessor's right to collect rent from sublessee.
  - d. Lessor's right to resell membership interest and issue new proprietary lease to another tenant on default.
31. Lessee's waiver of right of redemption on dispossession by judgment or warrant of court.
32. When lessee will remain liable for rent on termination of lease.

33. Lessee's option to cancel.
34. What will happen after all proprietary leases are terminated.
35. Provisions respecting memberships and units developer is unable to sell prior to the closing date.
  - a. Inapplicability of restriction respecting assignments and subleases.
  - b. Inapplicability of voluntary cancellation provisions.
  - c. Inapplicability of changes in form of proprietary lease authorized by other tenants.
36. Lessee's covenant to pay rent to receiver in case of lessor's default on mortgage.
37. Statement that failure of lessor to insist on strict performance under the lease will not be held to constitute a waiver of lessor's right to insist on such performance in the future.
38. Manner in which notices and demands will be served under the lease.
39. Applicability of covenants to successors and assigns of lessor and to executors, administrators, legal representatives, legatees, distributees, and assigns of lessee.
40. Waiver of jury trial.
41. Lessor's right to invoke remedies in addition to those specifically mentioned in lease.
42. Joint and several liability of multiple lessees.
43. Effect of partial invalidity of lease.
44. Statement that paragraph headings will not be considered a part of the lease.
45. Statement that written lease represents entire agreement of parties.
46. Requirement that any changes in lease be in writing.
47. Signatures.
48. Acknowledgments.
49. Name and address of preparer of instrument.

**§ 8:22 Checklist—Documents to be reviewed before buying cooperative apartment**

1. Charter or articles of incorporation.
  - a. Copy of state law governing organization and operation of corporation.

- b. Special restrictions or requirements regarding amendment, election of directors, restrictions on occupancy, other.
- 2. Deeds, covenants of records, other recorded instruments regulating use of land.
  - a. Title report.
  - b. Survey of property.
- 3. Bylaws of association.
  - a. Method of amendment.
  - b. Method of electing and dismissing directors.
    - (1) Vote requirements.
  - c. Meetings of shareholders.
    - (1) Voting.
  - d. Reports to be given to tenants.
  - e. Right of tenants to inspect books.
- 4. Documents reflecting operations of association.
  - a. Recent minutes.
  - b. Budgets.
    - (1) Required reserves.
    - (2) Discretionary reserves.
  - c. Insurance maintained.
  - d. Estimates of future repairs and replacements.
    - (1) History of repairs.
    - (2) Repairs required to be made by landlord and those required of tenants.
    - (3) Reserves available.
  - e. Tax rulings.
    - (1) Audits.
  - f. History of litigation.
    - (1) Pending claims.
  - g. History of rent, assessments, and fees against unit being acquired.
  - h. Service contracts.
    - (1) Services required of landlord under lease.
  - i. Audits of corporation.
    - (1) Management report.
  - j. Compensation paid directors and officers.
  - k. Management contract.
    - (1) Duration.

- (2) Payments.
  - l. Total debt owed.
  - m. Amounts uncollected from tenants.
- 5. Tenant's proprietary lease.
  - a. Rights upon destruction or damage to unit and to complex in general.
  - b. Right of corporation to change terms of lease.
    - (1) Vote required.
    - (2) Matters that cannot be changed.
  - c. Mortgage restrictions and mortgage availability from corporation.
- 6. Legal restrictions imposed on tenant-stockholders, whether in articles of incorporation, bylaws, lease, house rules, or elsewhere.
  - a. Restrictions on transfer of unit.
    - (1) Right to sublease.
    - (2) Right of heirs upon death of tenant.
  - b. Insurance requirements: fire, casualty, liability, etc.
  - c. Mortgage restrictions.
  - d. Liability for assessments or other fees.
    - (1) Method of imposition.
    - (2) Method of allocation among tenants.
  - e. Lien of corporation on shares of stock of tenant.
  - f. Restrictions on alteration of premises.
- 7. House or operating rules for tenants.
  - a. Pets, moving procedures, guests, nonoccupancy of premises, window treatment, restriction against business use, etc.
  - b. Utilities.
    - (1) Procedure for connection.
    - (2) Billing.
  - c. Services provided to tenants by landlord.
  - d. Use of common areas.
    - (1) Recreational.
    - (2) Commercial.
  - e. Access to laundry, pool, exercise room, penthouse garden, or other facilities.
  - f. Method of assigning parking spaces, storage areas, etc.

- g. Noise, odor, use restrictions.
  - h. Cleaning or painting requirements on tenant.
  - i. Repairs required of tenant.
8. Purchase contract.
    - a. Method of allocation of rent, assessments, or other liabilities.
    - b. Personal property included.
    - c. Space included in lease.
      - (1) Main unit.
      - (2) Storage units.
      - (3) Parking spaces.
    - d. Warranties and guarantees included.

## II. ORGANIZATIONAL DOCUMENTS

### § 8:23 Articles of incorporation

#### ARTICLES OF INCORPORATION

OF [*name of corporation*]

We, the undersigned [*persons competent to contract/partnership/corporation/association*], acting as incorporators of a corporation not for profit under Chapter 617 of the Florida Statutes, do adopt the following articles of incorporation for such corporation:

#### ARTICLE ONE. NAME

The name of the corporation is [*name*].

#### ARTICLE TWO. DURATION

The duration of the corporation will be [*perpetual/a term of [number] years*].

#### ARTICLE THREE. PURPOSES

The purposes of the corporation are such as are authorized under Chapter 617 of the Florida Statutes, and include the following:

- (a) to provide housing on a cooperative basis to members who will be entitled, solely by reason of their ownership of membership interests in the corporation, to occupy for dwelling purposes under proprietary leases, apartments in a building or buildings to be owned or leased by the corporation;

- (b) to construct, operate, maintain, and improve, and to buy, own, sell, convey, assign, mortgage, or lease any real and personal property necessary or appropriate for the provision of housing to members;
- (c) to acquire, hold, and dispose of membership interests and bonds and other evidences of indebtedness of any corporation; to acquire, hold, and dispose of bonds, mortgages, and assignments thereof; and insofar as it is permitted by law, to purchase, hold, and reissue membership interests and its own bonds;
- (d) to borrow money and issue evidences of indebtedness to further any or all of the objects of its business; and to secure the indebtedness by mortgage, deed of trust, pledge, or other lien;
- (e) to enter into and perform contracts of any kind necessary or incidental to the accomplishment of any one or more of the purposes of the corporation;
- (f) to make refunds of overassessments to members, occupants of apartments, or others as provided in the bylaws; and
- (g) to have and exercise all rights and powers that are now or may hereafter be granted to corporations not for profit by law.

The objects, purposes, and powers specified in each of the clauses or paragraphs of these articles of incorporation will be treated as independent objects, purposes, and powers. Except as otherwise specifically provided, the objects, purposes, and powers specified in each clause or paragraph of these articles will be in no way limited or restricted by reference to or inference from the terms of any other clause or paragraph of these articles.

The corporation may in its bylaws grant and abate powers not inconsistent with law and powers and authority expressly conferred by statute to its directors.

#### ARTICLE FOUR. MEMBERS

The corporation shall be organized with only one class of membership interests. The qualifications for members and the manner of their admission shall be as set forth in the bylaws.

Membership in the corporation shall entitle the member to occupy, under a proprietary lease executed by the corpora-

tion as lessor, an apartment unit or other dwelling unit in a building owned or leased by the corporation, and memberships shall be transferable only in connection with the assignment of all of the transferor's interest under the proprietary lease. In connection with such transfers, the bylaws may set forth any reasonable restrictions, including without limitation a power of approval or right of first refusal in the board of directors and/or members as the board or members may see fit.

Each membership will carry with it [*one*] membership vote in the corporation. Each member will be liable for a fixed amount of rent as well as for his or her proportionate share of the expenses of the corporation not covered by rent, as determined by the board of directors. Voting and other rights of members, and members' duties, shall be as set forth in the bylaws.

Each member shall be issued a membership certificate which will contain a general description of the appurtenant dwelling unit and a brief description of membership rights.

#### ARTICLE FIVE. REGISTERED OFFICE; REGISTERED AGENT

The street address of the initial registered office of the corporation is [*address*], in the City of [*name of city*], County of [*name of county*], State of Florida. The name of the initial registered agent of the corporation at such address is [*address*].

#### ARTICLE SIX. DIRECTORS

The number of persons constituting the first board of directors is [*number, not less than three*]. The names and addresses of the persons who are to serve as directors until the first annual meeting of stockholders or until their successors are elected and qualify are:

NAME	ADDRESS
[ <i>name of director1</i> ]	[ <i>address of director1</i> ]
[ <i>name of director2</i> ]	[ <i>address of director2</i> ]
[ <i>name of director3</i> ]	[ <i>address of director3</i> ]

## ARTICLE SEVEN. INCORPORATORS

The names and addresses of the incorporators are:

NAME	ADDRESS
[name of incorporator1]	[address of incorporator1]
[name of incorporator2]	[address of incorporator2]
[name of incorporator3]	[address of incorporator3]

## ARTICLE EIGHT. AMENDMENTS TO ARTICLES

Amendments to these articles of incorporation may be proposed by [number] of the directors or by members entitled to vote. Amendments may be adopted by vote of members entitled to exercise at least [three-fourths or as the case may be] of the then authorized membership votes. Additional requirements concerning proposal and adoption of amendments to the articles shall be as set forth in the bylaws.

Executed on [date] at [designate place of execution].

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[Signature(s)]

[Acknowledgments]

## NOTES TO FORM

**Drafter's Notes**

Required contents of articles of incorporation are set forth in Fla. Stat. Ann. § 617.0202.

For effect of certificate of incorporation, see Fla. Stat. Ann. § 617.0203.

**Tax Notes**

Organizing as a not-for-profit corporation does not mean that tax-exempt status has been achieved for federal tax purposes. The corporation must also be organized and operated in such a way that the requirements of the Code are met for the particular type of exempt entity. In the above form, paragraph (a) of both Article Three and Article Four show that the incorporators will try to make the corporation tax-exempt as a cooperative housing venture under I.R.C. § 216. (The statutory language of I.R.C. § 216(b)(1)(B) has been followed closely in Article Three, and Article Four is devoted to the proprietary lease required to be offered to stockholders.) If the Code requirements are met, the owners of the cooperative apartments will have the benefit of a personal deduction for their portion of the property taxes and, perhaps, their portion of the interest paid by the corporation. I.R.C. § 216(a).

The major requirements for exempt status are that the tenant-stockholders not share in the earnings of the corporation, that at least 80% of the income of the corporation come from the tenant-stockholders, that only one class of stock be issued, that the stock of the taxpayer be paid-up, and that the stockholders have the right to a lease for a dwelling in the building. This is discussed in greater detail in the tax aspects of cooperative apartments commencing at § 8:16.

For form of acknowledgment, see Sales (Ch 1).

For further discussion, see §§ 8:4, 8:8. For forms and materials related to business corporations generally, see Business Corporations (Ch 28).

For forms and materials related to not-for-profit corporations, see Social and Recreational Organizations (Ch 41).

**Article One****Drafter's Notes**

The corporate name must comply with Fla. Stat. Ann. § 617.0401, except that the corporate name may not contain the word "company" but it may contain the word "cooperative" or "co-op" only if the resulting name is not deceptively similar to the name of any other entity existing or doing business in this state. Fla. Stat. Ann. § 617.0401.

**Article Four****Drafter's Notes**

Restrictions on transferability of memberships may be set forth in the bylaws or in a separate agreement, as well as in the articles.

For statutory provisions relating to members of not-for-profit corporation, see Fla. Stat. Ann. §§ 617.0601 et seq.

**Research References***Legal Encyclopedias*

Fla. Jur. 2d, Membership in corporation not for profit, Business Relationships § 171.

**Article Five**

**Drafter's Notes**

The provisions of Fla. Stat. Ann. § 607.0501 relate to registered office and registered agent of corporation.

**Article Six****Drafter's Notes**

The board of directors must consist of at least three persons. Only the initial number of directors need be set forth in the articles. The procedure for election of directors and the number of directors to be elected thereby may be set forth in the bylaws.

The provisions regarding the number of directors are set forth at Fla. Stat. Ann. § 617.0803. The provisions regarding the exercise of corporate powers are set forth at Fla. Stat. Ann. § 617.0801.

**Article Seven****Drafter's Notes**

As to who may be incorporators, see Fla. Stat. Ann. § 617.02011.

**Article Eight****Drafter's Notes**

For statutory provisions relating to right to amend articles, procedure to amend articles of incorporation, articles of amendment, execution, content, delivery, and filing, and effect of amendment, see Fla. Stat. Ann. §§ 617.1001 and 617.1002.

**§ 8:24 Articles of incorporation—Provision—Action requiring vote of greater than majority of membership**

As shall be provided in the standard form of proprietary lease to be adopted by the directors, any change in the standard form after leasing one or more dwelling units will require the affirmative vote of members entitled to exercise at least [*three-fourths*] of the then authorized membership votes in the corporation. Any modification in the form with respect to any one or more dwelling units shall require the vote of members entitled to exercise at least [*two-thirds*] of the then authorized votes of the corporation.

As shall be provided in the standard form of proprietary lease to be adopted by the directors, if the directors determine that: (1) a building owned by the corporation has been totally destroyed by fire or other cause; (2) the building has been so damaged that it will not be possible to repair it within a reasonable time after the loss has been adjusted with the insurance carriers; or (3) the destruction or damage was not insured; the directors will submit to the members the ques-

tion whether the building will be repaired and restored or whether some other disposition will be made of the property. Any determination not to proceed with repair and restoration will require the affirmative vote of members entitled to exercise at least *[two-thirds]* of the then authorized membership votes of the corporation.

As shall be provided in the standard form of proprietary lease to be adopted by the directors, the termination of all proprietary leases shall require the affirmative vote of at least *[two-thirds]* of the then board of directors, and of members entitled to exercise at least *[three-fourths]* of the then authorized membership votes of the corporation.

#### § 8:25 Bylaws

##### ARTICLE ONE. NAME AND ADDRESS

The name of this corporation is *[name]*. The principal office of the corporation is located at *[location]*.

##### ARTICLE TWO. PURPOSE

Section One. The primary purpose of the corporation is to provide residences for members who shall be entitled, solely by reason of their membership, to proprietary leases for units in the building or buildings owned or leased by the corporation.

##### ARTICLE THREE. MEMBERS

Section One. Membership. The corporation shall have one class of members. All voting rights and other rights, interests, and privileges of each member shall be equal. Any person may become a member of the corporation by purchasing a membership from the corporation at such price as shall be determined by the board of directors, or from another member. No membership in the corporation shall be authorized except in connection with the execution of a proprietary lease of an apartment unit in the building owned or leased by the corporation.

Section Two. Annual Meetings. Within *[number of days]* days after memberships representing *[percentage]%* or more of the authorized memberships in the corporation have been sold, the president shall notify all members, and the first annual meeting of the members shall be called by the president to be held within *[number of days]* days after that. At

the meeting, the members shall elect a new board of directors. After that, annual meetings of the members shall be held on the [*specify, such as: first Monday in February*] of each succeeding year. At the meetings there shall be elected by ballot of the members a board of directors in accordance with the requirements of Section Three of Article Two of these bylaws. The members may also transact any other business of the corporation as may properly come before the meeting.

Section Three. Special Meetings. The president may, and shall if directed by resolution of the board of directors or by petition signed and presented to the secretary by members owning a total of at least [*percentage*]% of the authorized membership, call a special meeting of the members. The notice of any special meeting shall state the time and place of the meeting, and the intended purpose. No business shall be transacted at a special meeting except as stated in the notice unless by consent of [*percentage*]% of the authorized membership present, either in person or by proxy.

Section Four. Place of Meetings. Meetings of members shall be held at the principal office of the corporation, or at any other suitable place convenient to the members as may be designated by the board of directors.

Section Five. Notice of Meetings. It shall be the duty of the secretary to mail a notice of each annual or special meeting, stating its purpose, time, and place, to each unit owner, at the address last furnished the corporation, at least [*number of days*] days prior to the meeting. The mailing of a notice in the manner provided in this section shall be considered notice served. Notice of the annual meeting shall be posted at [*specify location, which must be in a conspicuous place on the cooperative property*] at least [*number of days*] days prior to the annual meeting. The secretary shall provide an affidavit to be included in the official records of the corporation, affirming that notices of the corporation meeting were mailed or hand-delivered, in accordance with this provision, to each member at the address last furnished the corporation.

Section Six. Quorum; Majority of Members Defined. At all meetings of the members, a majority of members shall constitute a quorum for the transaction of business, and the acts of those members entitled to exercise 51% or more of

the total voting power of those members present at a meeting at which a quorum is present shall bind all members for all purposes except those for which the approval of a higher percentage is required by these bylaws, by a declaration, or by law. If, at any meeting of members, there is less than a quorum present, a majority of those members entitled to exercise 51% of the total voting power of those members present may adjourn the meeting to a time not less than */number of days/* days from the time the original meeting was called. At any subsequent meeting at which a quorum is present, any business that might have been transacted at the meeting as originally called may be transacted without further notice. As used in these bylaws, the term “majority of members” shall mean those members holding 51% of the authorized membership of the corporation.

Section Seven. Order of Business. The order of business at all meetings of the members shall be as follows:

- (a) roll call;
- (b) proof of notice of meeting or waiver of notice;
- (c) reading of minutes of preceding meeting;
- (d) acceptance of minutes;
- (e) reports of officers;
- (f) report of board of directors;
- (g) reports of committees;
- (h) election of inspectors of election (when appropriate);
- (i) election of members of board of directors (when required);
- (j) unfinished business; and
- (k) new business.

Section Eight. Voting. Each member or unit owner, or some person appointed by the member or unit owner to act as proxy on *[his/her]* behalf, shall be entitled to cast the vote appurtenant to each such unit at all meetings of the members. The appointment of any proxy shall be made in a writing filed with the secretary, and shall be revocable at any time by notice in writing to the secretary. Each member or unit owner shall be entitled to one vote.

Section Nine. Minutes. Minutes shall be taken at all meetings of members. Copies of the minutes shall be available for

inspection at [*the office of the corporation*] by members and members of the board of directors at all reasonable times.

#### ARTICLE FOUR. BOARD OF DIRECTORS

Section One. Governing Board of the Corporation. The affairs of the corporation shall be administered and managed by a governing board, to be known as the “board of directors,” consisting of [*not less than three*] members.

Section Two. Powers and Duties. The board of directors shall have the powers and duties necessary for the administration of the affairs of the corporation, and may do all acts and things as are not by law, by the cooperative documents, or by these bylaws directed to be exercised and done by the members. The powers and duties to be exercised by the board of directors include, but are not be limited to, the following:

- (a) care, upkeep, maintenance, and operation of the common elements;
- (b) determination, assessment, and collection of funds to defray common expenses of the corporation;
- (c) entering into contracts deemed necessary or appropriate in furtherance of the interests of the members generally;
- (d) maintenance of detailed, written, and accurate records of receipts and disbursements arising from the operation of the property, which records, together with vouchers accrediting entries made therein, shall be made available for examination by the members at convenient hours on working days;
- (e) authorization and prosecution of suits to foreclose liens for nonpayment of common charges, or to recover money judgments for unpaid common charges, on behalf of the corporation;
- (f) authorization and prosecution of actions or proceedings on behalf of two or more members concerning a matter related to the common elements of two or more units;
- (g) employment and dismissal of personnel necessary or appropriate for the maintenance and operation of the property, the common elements, and the restricted common elements;
- (h) adoption and amendment of rules and regulations, not

- inconsistent with these bylaws, covering the details of operation and use of the property;
- (i) establishment of bank accounts in the name of the corporation, and authorization of signatories therefor;
  - (j) purchasing, leasing, or otherwise acquiring in the name of the corporation units offered for sale, lease, or surrender by their owners to the board of directors;
  - (k) purchasing units at foreclosure or other judicial or trustee's sale in the name of the corporation on behalf of all unit owners;
  - (l) selling, leasing, encumbering, or otherwise dealing with units acquired by, and subleasing units leased by, the corporation, on behalf of the members;
  - (m) leasing of stores, professional offices, and [*parking spaces*], issuance of swimming pool memberships, and granting of vending machine and other licenses;
  - (n) procuring of insurance for the corporation, its directors and officers, and its property, including the units thereof, as herein set forth;
  - (o) contracting for repairs of and additions and improvements to the property, and for repairs to and restoration of the property in accordance with the provisions of these bylaws, after damage or destruction by fire or other cause, or as a result of condemnation or eminent domain proceedings; and
  - (p) employment of a managing agent or manager, which may be a management company, at reasonable compensation to perform duties authorized by the board of directors. However, the board shall not delegate to any managing agent or manager any of the powers set forth in subsections (e), (f), (h), (i), (k), and (l) of this section.

Section Three. Election and Terms of Office. At the first annual meeting of members, the terms of office of the board of directors shall be fixed as follows: [*the terms of office of [specify] directors shall be set at three years; the terms of office of [specify] directors shall be set at two years; and the terms of office of [specify] directors shall be set at one year. At the expiration of the initial term of office of each director, his or her successor shall be elected to serve for a term of three years.*]. Directors shall hold office until their successors have been elected and hold their first meeting.

Section Four. Vacancies. Vacancies in the board of directors caused by any reason other than the removal of a board member by a vote of the members shall be filled by vote of the majority of the remaining board members, even though they may constitute less than a quorum. Each person so elected shall hold office until a successor is elected at the next annual meeting of members.

Vacancies created by the recall and removal of a board member by the vote of the members shall be filled by a vote of the majority of the members at any regular or special meeting. The notice shall state the purpose of the meeting. Any member so elected shall serve for the unexpired term of the predecessor in office.

Section Five. Recall and Removal of Board of Directors. Subject to the provisions of Fla. Stat. Ann. § 719.301, any member of the board of directors may be recalled and removed from office with or without cause by the vote or agreement in writing of a majority of all the voting interests. A special meeting of the voting interests to recall any member of the board of directors may be called by 10% of the members, giving notice of the meeting as required for a meeting of the members, and the notice shall state the purpose of the meeting.

If the recall is approved by a majority of all voting interests by a vote at a meeting, the recall shall be effective immediately, and each recalled member of the board of directors shall turn over to the board any and all records of the corporation in his or her possession within 72 hours after the meeting.

If the proposed recall is by an agreement in writing by a majority of all voting interests, the agreement in writing shall be served on the corporation by certified mail. The board of directors shall call a meeting of the board within 72 hours after receipt of the agreement in writing and shall either certify the written agreement to recall members of the board, in which case such members shall be recalled effective immediately and shall turn over to the board, within 72 hours, any and all records of the corporation in their possession, or proceed as described in the next paragraph.

If the board determines not to certify the written agreement to recall members of the board, or if the recall by a vote at a meeting is disputed, the board shall, within 72

hours, file with the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business Regulation a petition for binding arbitration pursuant to the procedures of § 719.1255 of the Florida Statutes. For purposes of this paragraph, the members who voted at the meeting or who executed the agreement in writing shall constitute one party under the petition for arbitration. If the arbitrator certifies the recall as to any member of the board, the recall shall be effective upon service of the final order of arbitration on the association. If the association fails to comply with the order of the arbitrator, the Division may take action pursuant to § 719.501 of the Florida Statutes. Any member so recalled shall deliver to the board any and all records of the corporation in his or her possession within 72 hours of the effective date of the recall.

Section Six. Organizational Meeting. The first meeting of the board of directors shall be held within [*number of days*] days after the first annual meeting of the members at which board members are elected and at a place as may be fixed by the board. No notice shall be necessary to the newly elected board of directors in order legally to constitute the meeting, provided a majority of the board is present.

Section Seven. Regular Meetings. Regular meetings of the board of directors may be held at such times and places as are determined by the board. However, at least [*number*] meetings shall be held during each [*calendar*] year. Notice of each regular meeting of the board shall be given to each board member personally, or by mail, telephone, or telegraph, at least [*number of days*] days prior to the date set for the meeting. Notice of any meeting in which assessments against members are to be considered for any reason shall specifically contain a statement that assessments shall be considered and the nature of any such assessments.

Section Eight. Special Meetings. Special meetings of the board of directors may be called by the president, and shall be called by the president or secretary on the written request of at least [*number*] board members, on [*number of days*] days' notice to each board member, given personally, by mail, or by telephone. The notice shall state the time, place, and purpose of the meeting.

Section Nine. Meetings Open to Members. All meetings of the board of directors shall be open to all members. Notice of

each meeting shall be posted at [*conspicuous location within the corporation property*] at least 48 hours before the meeting, except in the case of emergency meetings.

Section Ten. Waiver of Notice. Any board member may at any time waive notice of any meeting of the board of directors in writing, and any written waiver shall be deemed equivalent to the giving of the notice required in these bylaws. Attendance by any board member of any meeting of the board shall constitute a waiver by that member of notice of the time and place thereof. If all board members are present at any meeting of the board, no notice shall be required, and any business may be transacted at any such meeting.

Section Eleven. Quorum; Adjournments. At all meetings of the board of directors, a majority of the board shall constitute a quorum for the transaction of business, and the acts of a majority of members present at a meeting at which a quorum is present shall constitute the acts of the board of directors. If at any meeting of the board of directors less than a quorum is present, a majority of those present may adjourn the meeting. At any such adjourned meeting at which a quorum is present, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

Section Twelve. Minutes. Minutes shall be taken at all meetings of the board of directors. Copies of the minutes shall be available for inspection at [*the office of the corporation*] by members and board members at all reasonable times.

Section Thirteen. Fidelity Bonds. The board of directors shall require that all officers, employees of the corporation, and any other persons who control or disburse funds of the corporation furnish adequate fidelity bonds, in the principal sum of not less than \$50,000 for each such person. The premiums on the bonds shall constitute a common expense.

Section Fourteen. Compensation. [*Compensation of members of the board of directors shall be: [specify]*]/*No member of the board of directors shall receive compensation from the corporation for acting as such, [but by resolution of the board of directors, a fixed fee and expenses of attendance may be allowed for attendance at each regular and special meeting].*] Nothing contained in these bylaws shall be construed to preclude any board member from serving the members or the board of directors in any other capacity and receiving compensation for those services.

Section Fifteen. Liability of Board of Directors; Indemnification. Members of the board of directors shall not be liable to members of the corporation for mistakes in judgment, for negligence, or otherwise, except for their own willful misconduct or bad faith. Nor shall members of the board of directors be personally liable with respect to any contract made by them on behalf of the members of the corporation, and the members of the corporation shall indemnify the board of directors and each member of it against all contractual liability to third parties arising out of contracts made by the board of directors on behalf of the corporation. However, the indemnification shall not extend to any contract made in bad faith or contrary to the provisions of law, or of these bylaws. The liability of each member of the corporation arising out of any contract made by the board of directors or out of the indemnification of the members of the board of directors shall be the proportion of the total liability that the member's interest in the common elements bears to the interests of all members in the common elements. Every agreement made by the board of directors or by any managing agent or manager employed by the board of directors on behalf of the members of the corporation shall provide that the members of the board of directors, or the managing agent or manager, as the case may be, are acting only as agents for the members of the corporation, and shall have no personal liability thereunder except, if applicable, as members of the corporation. Agreements shall further provide that each member's liability is limited to the proportion of the total liability that his or her interest in the common elements bears to the interests of all members in the common elements.

Section Sixteen. House Rules. The board of directors may from time to time adopt and amend house rules as it may deem necessary for the operation of the buildings and property of the corporation or for the health, safety, and convenience of the members. Copies of the house rules and the changes shall be furnished to each member.

#### ARTICLE FIVE. OFFICERS

Section One. Designation. The principal officers of the corporation shall be a president, a vice president, a secretary, and a treasurer, all of whom shall be elected by [and from] the board of directors. The board may also appoint

*[one or more assistant vice presidents, an assistant treasurer, an assistant secretary, and] any other officers as in its judgment may be necessary.*

Section Two. Election of Officers. The officers of the corporation shall be elected annually by the board of directors at the organizational meeting of each new board, and shall hold office at the pleasure of the board.

Section Three. Removal of Officers. On the affirmative vote of a majority of the members of the board of directors, any officer may be removed, with or without cause, and his or her successor may be elected at any regular meeting of the board of directors, or at any special meeting of the board called for that purpose.

Section Four. President. The president shall be the chief executive officer of the corporation. He or she shall preside at all meetings of the board of directors and of members. He or she shall have all general powers and duties that are incident to the office of president of *[a not-for-profit corporation organized in Florida]*, including but not limited to the power to appoint committees from among the members as he or she may deem appropriate to assist in the conduct of the affairs of the corporation.

Section Five. Vice President. The vice president shall take the place of the president and perform his or her duties whenever the president is absent or unable to act. If neither the president nor the vice president is able to act, the board of directors shall appoint some other member of the board to do so on an interim basis. The vice president shall also perform such other duties as may from time to time be imposed on him or her by the board of directors.

Section Six. Secretary. The secretary shall keep the minutes of all meetings of the board of directors and of the members; he or she shall have charge of the books and papers as the board of directors may determine; and he or she shall, in general, perform all duties incident to the office of secretary of a *[corporation not for profit]* organized under the laws of the State of Florida.

Section Seven. Treasurer. The treasurer shall have responsibility for the funds and securities of the corporation, for keeping full and accurate accounts showing all receipts and disbursements, and for the preparation of all necessary financial statements in accordance with generally accepted

accounting principles. He or she shall be responsible for the deposit of all moneys and other valuable effects in the name of the board of directors or managing agent, in depositories as may from time to time be designated by the board of directors, and shall, in general, perform all duties incident to the office of treasurer of a [*corporation not for profit*] organized under the laws of the State of Florida.

Section Eight. Compensation. *[The salaries of all officers shall be fixed by the board of directors, and the fact that any officer is a member of the board shall not preclude him or her from receiving his or her salary or from voting on any resolution providing for the same/no officer shall receive any compensation from the corporation for acting as such. However, nothing contained herein shall be construed to preclude any officer from serving the corporation in any other capacity, and receiving compensation therefor.]*

## ARTICLE SIX. OPERATION AND MANAGEMENT OF PROPERTY

Section One. Determination of Common Expenses and Common Charges; Budget. The board of directors or manager shall from time to time, and at least annually, prepare a budget for the corporation. This budget shall include projections of common expenses, common revenues (from sources other than assessments of members), the amount of common charges required to meet the excess of the former over the latter, and an allocation and assessment of such common charges against members. If the budget is prepared by the manager, it shall be approved by the board of directors before being distributed as set forth below.

As used in these bylaws, the term “common expenses” or “common charges” shall mean expenses or charges for which members are proportionately liable, and shall include, but shall not be limited to, the following:

- (a) all expenses of the board of directors incurred for the administration of the corporation;
- (b) management fees;
- (c) all expenses for operation, maintenance, repair, and replacement of the common elements;
- (d) rent for recreational and other commonly used facilities;
- (e) taxes on corporation property;

- (f) taxes on leased areas;
- (g) insurance premiums on all policies of insurance obtained by the board of directors, managing agent, or manager;
- (h) security expenses;
- (i) working capital reserve;
- (j) general operating reserve;
- (k) repair and replacement reserve;
- (l) reserve for deficits accrued in prior years;
- (m) reserve for acquisition or lease of units, the members of which have elected to sell or lease the same, or that may become available at a trustee's sale or at foreclosure or other judicial sale;
- (n) utility expenses for water and gas, and related sewer rents;
- (o) utility expenses for electricity serving the common elements, *[other than leased portions thereof]* which shall be separately metered;
- (p) fees payable to the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business Regulation;
- (q) all costs of carrying out the powers and duties of the corporation;
- (r) all other amounts that the members may agree on or that the board of directors may deem necessary or appropriate for the operation, administration, and maintenance of the corporation;
- (s) all other amounts designated common expenses by the cooperative documents, by these bylaws, or by law;
- (t) any income or excise tax or fees which may accrue to the corporation; and
- (u) any other expense or cash outlay which accrues, directly or indirectly, to the benefit of the members of the corporation.

Section Two. Budget Procedures. The board of directors shall mail a copy of the proposed annual budget of common expenses to members not less than 30 days prior to the meeting at which the budget shall be considered, together with a

written notice of the time and place at which the meeting of the board of directors to consider the budget shall be held, which meeting shall be open to the members. A final budget shall be adopted by the board at the meeting, subject to the rights of members provided by law in the case of any budget requiring an assessment against members in an amount exceeding 115% of the assessment for the preceding year.

Section Three. Collection of Assessments. The board of directors shall assess common charges against the members from time to time, and at least quarterly, and shall advise each member in writing of the amount of common charges payable by him or her. If any common charge remains unpaid for more than *[thirty days from the date due, the board of directors shall take prompt action to collect the same]*.

Section Four. Common Surplus. If in any taxable year, the net income of the members from assessments and all other sources except casualty insurance proceeds and other nonrecurring items exceeds the sum of: (a) total common expenses for which payment has been made or liability incurred within the taxable year; and (b) reasonable reserves for common expenses in the next succeeding taxable year as may be determined by the board of directors, the excess shall be credited immediately to the members, the share of each being in proportion to the amount of assessments for common expenses paid by him or her within the taxable year.

Section Five. Liability for Assessments. All members are obligated to pay the common charges assessed by the board of directors at such times as the board may determine, but not less frequently than quarterly. No member may exempt himself or herself from liability for any assessment for common charges by waiver of the use or enjoyment of any of the common elements or by abandonment of his or her unit. However, no member shall be liable for any assessment for common charges against his or her unit subsequent to a sale, transfer, or other conveyance by him or her of his or her membership. On the voluntary sale or conveyance of an unit, all unpaid assessments against the seller for common expenses shall first be paid from the proceeds of sale or by the purchaser in preference to any other assessments or charges of whatever nature except: (a) assessments, liens, and charges in favor of the United States, an agency or dependent of the United States, or the State of Florida or any political subdivision thereof for taxes past due and unpaid

on the unit; or (b) amounts due under mortgage or deed of trust instruments duly recorded. Any payment by a purchaser shall be without prejudice to the right of the purchaser to recover over from his or her seller any amounts for which he or she was not liable under his or her contract of sale. Additionally, any purchaser or mortgagee or trust deed beneficiary shall be entitled to a statement from the board of directors setting forth the amount of unpaid common charges due the corporation from any seller, and shall be entitled to rely on the statement. Such purchaser, mortgagee, or beneficiary shall not be liable, nor shall the subject unit be subject to a lien, for any unpaid common charges in excess of the amount set forth in the statement. A mortgagee, trust deed beneficiary, or other purchaser of an unit at a trustee's sale, or at a foreclosure or other judicial sale, shall not be liable for nonpayment of any common charges assessed prior to the date of the sale, and the unit shall not be subject to a lien for nonpayment of the charges. The transfer, however, will remain personally liable until all charges assessed, up until the time of the transfer, are paid.

**Section Six. Default in Payment of Common Charges.** In the event that any member fails, for [*thirty*] days following the due date, to pay to the board of directors the common charges assessed against his or her unit, that member shall be deemed in default, and shall be obligated to pay interest at the legal rate or at the rate set by the board of directors, which shall not be higher than the maximum rate allowed by law, on the common charges from the due date of the common charges, together with all expenses, including reasonable attorney's fees, incurred by the board of directors in any proceeding brought to collect the same, or to foreclose the lien for nonpayment of the common charges assessed against his or her unit.

**Section Seven. Foreclosure of Liens for Unpaid Common Charges.** It shall be the right and duty of the board of directors to attempt to recover unpaid common charges, together with interest and expenses of the proceeding, including reasonable attorney's fees, by an action brought against any member in default on his or her obligation to pay the same, or by foreclosure of the lien on any unit in respect to which the default has occurred. Any such lien may be foreclosed in the same manner as a mortgage on real property. The board of directors, as plaintiff in the foreclosure, shall be entitled

to the appointment of a receiver to collect the same. The board of directors, acting on behalf of all members, shall have power to bid on and purchase any such unit, and to acquire, hold, lease, encumber, convey, or otherwise deal with it. Suit to recover a money judgment for unpaid common charges shall be maintainable without foreclosing or waiving the lien securing the same, and foreclosure shall be maintainable notwithstanding the pendency of a suit to recover a money judgment. The members in default shall be personally liable for any deficiency in proceeds of the foreclosure action and the board may bring suit for a deficiency judgment if the proceeds of the foreclosure action do not cover the amount due.

Section Eight. Maintenance and Repair.

(a) Each owner shall promptly perform all maintenance and repair work within his or her own unit, which if omitted would affect any common element, any portion of the property belonging to other members, or the corporation as a whole, being expressly responsible for all damages and liabilities that any failure to repair or maintain may cause.

(b) All maintenance, repairs, and replacements to the common elements, whether located inside or outside individual units, shall be the responsibility of the board of directors and shall be charged to all members as common expenses, unless the maintenance, repairs, or replacements are necessitated by the negligence or misconduct of individual members, in which case the expenses shall be the responsibility of and shall be charged to the individual members.

(c) Each member shall be responsible for and reimburse the corporation for any expenditures incurred in repairing or replacing any common element damaged through his or her fault under the house rule, or any other Rules and Regulations promulgated by the board of directors.

Section Nine. Use of Units.

(a) Units will be occupied and used by their respective members only as private dwellings for the owner, his or her family, tenants, and social guests, and for no other purpose whatsoever.

(b) No portion of an unit other than the entire unit may be rented, and no unit may be rented for hotel or transient purposes.

(c) Residents will exercise extreme care about making

noises or playing music which may disturb other residents. Residents keeping domestic animals must abide by municipal sanitary regulations, the house rule, or other rules and regulations promulgated by the board of directors.

(d) Hanging, cleaning, or beating garments, rugs, etc., from or on the windows, terraces, or facades of the building or on any common element is prohibited.

(e) Throwing garbage or trash outside disposal installations provided for such purposes is prohibited.

(f) No member, resident, or lessee will install wiring for any electrical or telephone installation, television antenna, air-conditioning unit, or machine of any kind on the exterior of the project which protrudes through the walls or the roof of the project except as authorized by *[the board of directors/a majority of members]*.

(g) Members will not take or cause to be taken within their units any action that would jeopardize the soundness or safety of any part of the corporation property or impair any easement or right appurtenant to it or affect the common elements without the unanimous consent of all members who might be affected.

(h) Members will not permit anything to be done or kept in their units that would increase the rate of insurance on it or on the corporation as a whole.

(i) No immoral, improper, offensive, or unlawful uses will be made of corporation property or any part thereof, and each member, at his or her own expense, will comply with, perform, and fully satisfy all city, state, and federal laws, statutes, ordinances, regulations, orders, or requirements affecting his or her unit.

Section Ten. Modifications by Members. No member will make any structural addition or alteration in or to his or her unit without the prior written consent of the board of directors. On request by any member for approval of a proposed addition or alteration, the board of directors will answer the same within *[number of days]* days after receipt, and failure to do so within the stipulated time will constitute a consent. Any application to any governmental authority for a permit to make any addition or alteration in or to any unit will be executed by the board of directors only. However, neither the board nor any member thereof will be liable to any contractor, subcontractor, or materialman, or to

any person claiming injury to person or property as a result of such addition or alteration or the construction thereof. The provisions of this section will not apply to units owned by developer until the units have been initially sold by developer and paid for.

Section Eleven. Right of Entry. Each member will grant to the manager, managing agent, or other person or persons authorized by the board of directors a right of entry to correct any condition threatening his or her unit or originating in his or her unit and threatening another unit or a common element; to install, alter, or repair mechanical or electrical services or other common elements located in his or her unit or elsewhere; and to correct any condition which violates the provisions of any mortgage secured by, or deed of trust covering, any other unit. Requests for entry will be made in advance and will be scheduled for times convenient to the owner except that, in case of emergencies, right of entry will be immediate, and will exist whether the member is present at the time or not.

Section Twelve. Use of Common Elements.

(a) Members will not place or cause to be placed in the lobbies, vestibules, stairways, elevators, and other common areas and facilities of a similar nature comprising either general or limited common elements, any furniture, packages, or objects of any kind. Such areas (other than lobbies) will be used for no other purpose than for normal transit through them.

(b) The corporation will have *[number]* elevators, *[number]* devoted to the transportation of the members and their guests, and *[number]* for freight service. Unit members will require their tradespeople to utilize exclusively the elevators designated for freight service when transporting packages, merchandise, or other objects that may adversely affect the comfort and well-being of passengers in elevators devoted to the transportation of members, residents, and guests.

Section Thirteen. Modifications by Board of Directors. Any additions or alterations in or to the common elements costing \$*[dollar amount]* or less may be made by the board of directors without approval of the members or of unit mortgagees or trust deed beneficiaries, and the costs of will be treated as common expenses. Whenever in the judgment of the board of directors, the common elements require addi-

tions or alterations costing in excess of *[\$dollar amount]*, the making of such additions or alterations will require approval by a majority of members, and by those mortgagees holding first mortgages, or those beneficiaries under deeds of trust, on *[number]* or more units. After approval has been obtained, the board of directors will proceed with the additions or alterations, and the costs will be treated as common expenses.

Section Fourteen. Repair or Reconstruction. In the event of any damage to or destruction of any improvements on the corporation property or any part thereof, *[including any unit therein, but excluding furniture, fixtures, decorations, equipment, or personal property installed or placed therein by members]* or to any common element or elements or any part of it, the improvements or common elements will be promptly repaired and restored by the board of directors using the proceeds of any insurance procured and maintained as provided in these bylaws. If the proceeds are inadequate to cover the cost of repair and restoration, members directly affected by the damage or destruction will be assessed therefor on an equitable basis according to the benefit to be derived by them from the repair and restoration. If any one or more of those comprising a minority of members refuses to pay the assessments, on proper resolution setting forth the circumstances of the case, the majority may proceed with the repair or restoration at the expense of the members to be benefited by it. However, if *[percentage]%* or more of the building is destroyed or substantially damaged, as shall be determined by the members, unless otherwise unanimously agreed on by the members, the board of directors will proceed to realize on the salvage value of the portion of the corporation property damaged or destroyed, by sale or otherwise, and will collect the proceeds of any insurance. Thereon the net proceeds of the sale or other disposition of the property, together with the proceeds of any insurance, after making provision for the removal of all debris and the restoration of the land to level grade, if appropriate, will be considered as one fund, and will be divided among members directly affected by the damage or destruction or their mortgagees or trust deed beneficiaries, as their interests may appear, in accordance with the percentages of their common interest as set forth in the cooperative documents.

Section Fifteen. Fire and Extended Coverage Insurance.

The board of directors, or the managing agent or manager, as the case may be, will obtain and continue in effect insurance against loss by fire and other casualties normally covered under broad-form fire and extended coverage insurance as written in Florida, covering all general and limited common elements, all structural portions of the corporation property, *[and all units, but not including furniture, fixtures, decorations, equipment, or personal property installed or placed therein by members,]* in an amount *[satisfactory to mortgagees holding first mortgages and/or beneficiaries under first trust deeds on [number] or more units, but in any event] not less than [percentage]%* of the assessed value of it. The premiums for the insurance will be a common expense to be paid by monthly assessments levied by the board of directors.

Section Sixteen. Liability Insurance. The board of directors, or the managing agent or manager, as the case may be, will obtain and continue in effect insurance against liability for personal injury and death and for damage to property arising from accidents occurring within the general and limited common elements in such amounts, satisfactory to mortgagees holding first mortgages and/or beneficiaries under first trust deeds on *[number]* or more units, as will be determined by the board of directors. The premiums for the insurance will be a common expense to be paid by monthly assessments levied by the board of directors.

Section Seventeen. Directors and Officers Insurance. The board of directors, or the managing agent or manager, as the case may be, will obtain and continue in effect insurance, for the benefit of the officers and directors of the corporation, against any money order to be paid arising out of a lawsuit or any money to be paid as a settlement in contemplation of avoiding such a suit, or any other financial injury to each and every director and officer, for acts performed or ordered in the capacity of an officer or director. The insurance shall have minimum limits of not less than \$1,000,000 for injury to one or more persons in any one accident or occurrence and \$500,000 for property damage, or any higher limits as the board of directors may from time to time establish as prudent under the circumstances then existing.

Section Eighteen. Beneficiaries of Insurance. All policies of insurance required in these bylaws to be obtained will be

written in the name of [*the corporation/[name of trustee], as trustee for all members, mortgagees, and trust deed beneficiaries*]. Even though not named in the policies, however, each member and his or her mortgagee or mortgagees, or trust deed beneficiary or beneficiaries, if any, will be a beneficiary in the percentage assigned to his or her respective unit in the declaration.

Section Nineteen. Right of Members to Insure Units. Any insurance procured or maintained by the board of directors, or managing agent or manager, as the case may be, will be without prejudice to the right of each member to procure and maintain the unit insurance as he or she sees fit.

Section Twenty. Rules and Regulations. Rules and regulations concerning the use of the common elements and of individual units may be promulgated and amended from time to time by the board of directors with the approval of a majority of members. Copies of all rules and regulations will be furnished by the board of directors to each member prior to their effective date. Initial rules and regulations, which will be effective until amended by the board of directors with the approval of a majority of members, are shown in Exhibit “[*exhibit omitted*]” attached and incorporated by reference.

Section Twenty-One. Abatement of Violations. Violation of any provision of the declaration, of these bylaws, or of any rule or regulation adopted pursuant to it will give the board of directors, acting on behalf of all members, the right, in addition to any other rights set forth in these bylaws:

- (a) to enter any unit in or as to which the violation or breach exists and to summarily abate and remove, at the expense of the defaulting member, any thing or condition constituting the violation or breach, and the board of directors will not be deemed guilty of trespass in so doing; or
- (b) to enjoin, abate, or remedy the continuance of the violation or breach by appropriate legal proceedings, or to bring an action for recovery of damages.

Section Twenty-Two. Arbitration. In the event of internal disputes arising from the operation of the corporation among members, corporations, agents, and assigns, there shall be mandatory nonbinding arbitration conducted by the Division of Florida Land Sales, Condominiums, and Mobile Homes of

the Department of Business Regulation in accordance with the provisions of Fla. Stat. Ann. § 719.1255.

#### ARTICLE SEVEN. FORM OF LEASE

Section One. Form of Lease. The board of directors shall adopt a formal proprietary lease to be used by the corporation for the leasing of all units in the building or buildings of the corporation to be leased to members under proprietary leases. The proprietary leases shall be for such terms, with or without provisions for renewals, and shall contain any restrictions, limitations, and provisions in respect to the assignment thereof, the subletting of the premises thereby leased, and the transfer of the memberships in the corporation to which the leases are appurtenant, as well as any other terms, provisions, conditions, and covenants as the board of directors may determine.

After a proprietary lease in the form so adopted by the board of directors has been executed and delivered by the corporation, all proprietary leases (as distinct from house rules) subsequently executed and delivered shall be in the same form, except with respect to *[amount of rent payable thereunder, proportionate share of common expenses for which the lessee will be subject to assessment, use of the premises, and date of commencement of the lease term]*, unless any change or alteration is approved by members entitled to at least *[two-thirds]* of the then authorized membership votes in the corporation.

#### Section Two. Rents and Assessments.

(a) The board of directors is responsible for fixing the amount payable by the lessee of each unit, *[which amount, when determined, may be adjusted only at [number]-year intervals]*. The determination of the amount shall be based on: (1) *[list expenses]*; and (2) the proportionate share of common expenses, as defined elsewhere in these bylaws, allocated to the particular unit. Rent for each unit shall be payable monthly in advance.

(b) The board of directors is also responsible for determining the amounts to be collected from the lessee of each unit by way of assessment for common expenses. Overall requirements for common expenses will be established on adoption of the budget of common expenses for that year, as provided elsewhere in these bylaws.

Assessments will be made [*quarterly*], based on the proportionate share of common expenses allocated to each unit. One-third of each assessment will be payable monthly in advance.

(c) The “proportionate share of common expenses” corresponding to any unit shall be based on [*the market value of the unit at the time of its first occupancy/the square footage of the unit as a percentage of the total occupied square footage of the building/the predetermined percentage in the proprietary lease*]. Although the amount of each proportionate share may vary from year to year, the proportion itself will be fixed except as otherwise provided in these bylaws. [*Included as appendix [specify] of these bylaws is a current listing showing, with respect to each unit, the market value at the time of first occupancy, the proportionate share of common expenses, real estate taxes and payments on secured indebtedness, both on a cost per month basis, [add other expenses, as applicable]*.]

(d) The board of directors is also responsible for determining the amounts to be collected from the lessee of each unit by way of reserves. The board may, from time to time, establish one or more reserves as are necessary for the operation and improvement of the buildings and property of the corporation by including amounts intended for such purpose in the corporation’s budget, or by levying assessments upon all of the lessees allocated among lessees in the manner set forth in Section 2(c) above of this Article, in any amounts as may be used to pay any extraordinary expenses for which they were established or intended, allocated to reserve accounts which were established for different purposes, or used to meet any deficiencies in operating funds, as the case may be, from time to time resulting from delinquencies by lessees in the payment of any assessments, or otherwise, provided, however, that the existence of such reserves shall not operate to exempt any lessee from his or her obligation to contribute his or her proportionate share of the common expenses or to pay any assessments for them. Any funds used from any of the reserves to meet any deficiencies in operating or maintenance funds resulting from a lessee’s delinquencies shall promptly be replaced on the payment of the delinquent assessment(s)

by that lessee. The interest of each lessee in the reserves and any other funds being held by the corporation shall not be withdrawn or assigned separately, but shall be deemed to be transferred with his or her proprietary lease or occupancy agreement, even though not mentioned or described expressly in the instrument of transfer. If the corporation is ever dissolved, all such funds remaining after full payment of all common expenses shall be distributed in equal amounts to all then-existing lessees.

Section Three. Assignment. Proprietary leases shall be assigned or transferred only in compliance with, and shall never be assigned or transferred in violation of, the terms, conditions, or provisions of the proprietary leases. A duplicate original of each proprietary lease shall always be kept on file in the principal office of the corporation or with the managing agent of the apartment building.

No assignment of any lease or transfer of membership in the corporation shall take effect as against the corporation for any purpose until:

- (a) a proper assignment has been delivered to the corporation;
- (b) the assignee has assumed and agreed to perform and comply with all the covenants and conditions of the assigned lease or has entered a new lease for the remainder of the term;
- (c) the membership to which the lease is appurtenant has been transferred to the assignee;
- (d) all sums due have been paid to the corporation; and
- (e) all necessary consents have been obtained.

Action of the board of directors with respect to the written application for consent to a proposed assignment or sublease must be taken within [*number of days*] days after receipt of the written application.

Where either [*name of developer*], a Florida corporation with offices at [*address*], referred to below as the “developer,” or a nominee of the developer is a lessee, consent to an assignment or transfer of its, his, or her lease and the membership to which it is appurtenant will be required only from the managing agent of the building, who shall consent to the

assignment or transfer only when the assigning of transferee is a reputable person of good financial standing.

No person to whom the interest of a lessee or member may pass by law shall be entitled to sign any lease, transfer a membership, or sublet or occupy an apartment, except on compliance with requirements of the lease and these bylaws.

Section Four. Fee on Assignment. The board of directors shall have authority, before any assignment of a proprietary lease takes effect as against the corporation as lessor, to charge a fee to cover actual expense, including but not limited to expenses related to investigation of the transferee's credit worthiness, but not to exceed \$100, and to impose any other conditions as it may determine, in connection with each proposed assignment.

Section Five. Lost Proprietary Leases. In the event that any proprietary lease in force is lost, stolen, destroyed, or mutilated, the board of directors may authorize the issuance of a new proprietary lease, and require the holder of it, or the legal representative of the holder, to make an affidavit or affirmation setting forth such facts as to the loss, destruction, or mutilation as it deems necessary, and to give the corporation a bond, in any reasonable sum as it directs, indemnifying the corporation against any liability or loss that is sustained by the issuance of the new proprietary lease.

Section Six. Corporation's Lien. The corporation shall at all times have a lien on each "cooperative parcel," which is a unit together with its undivided share in the corporate assets appurtenant to that unit, for all unpaid rent and assessments, and interest, due the corporation from the member holding the proprietary lease covering such unit *[and for reasonable attorney's fees incurred by the corporation incident to the collection of such amounts for enforcement of such lien].* Unless and until the member or lessee defaults in the payment of any rent, assessment, or any other indebtedness or obligation, the proprietary lease shall continue to stand in the name of the member on the books of the corporation, and the member shall be entitled to exercise all membership rights as though the lien did not exist. On default of the payment of any such obligation, however, the corporation shall have the right to foreclose the lien in the manner provided by statute, in addition to other remedies available to it by law or under these bylaws.

### ARTICLE EIGHT. EMINENT DOMAIN

Section One. Condemnation of Common Elements. If all or any part of the general or limited common elements is taken, injured, or destroyed by eminent domain, each member will be entitled to participate, through the corporation, in the proceedings incident to it. However, any damages shall be for the taking, injury, or destruction as a whole, and will be collected by the board of directors. If those members entitled to exercise *[percentage]*% or more of the total voting power of the corporation duly and promptly approve the repair and restoration of the general or limited common elements, the board of directors will contract for repair and restoration, and will disburse the proceeds of the award in appropriate progress payments to contractors engaged in repair and restoration. If the proceeds of the award are insufficient to defray the entire expense of repair and restoration, the excess of the expense over the proceeds will be treated as a common expense or limited common expense. In the event that those members entitled to exercise *[percentage]*% or more of the total voting interests in the corporation do not duly and promptly approve the repair and restoration of the common elements, the net proceeds will be divided by the board of directors among all members in proportion to their respective general or limited common interests, as the case may be, paying out of the share of each member the amount of any unpaid liens on his or her unit, in the order of priority of the liens, to the lienholder.

Section Two. Condemnation of Units. If all or any part of any unit or units, other than the undivided interest or interests in the general and limited common elements appurtenant to it, is taken, injured, or destroyed by eminent domain, each member so affected will be entitled to participate directly in the proceedings incident to it. Any damages will be payable directly to the member or members.

### ARTICLE NINE. SEAL

The seal of the corporation will be circular in form and have inscribed on it the name of the corporation, the year of its organization, and the words "corporate seal" and "Florida."

### ARTICLE TEN. NEGOTIABLE INSTRUMENTS; SAFE DEPOSIT BOXES

Section One. Signatures on Checks, Etc. All checks,

drafts, orders for payment of money, and negotiable instruments will be signed by two persons, one of whom must be an officer of the corporation; the second signatory must be either an employee manager, managing agent, or officer.

Section Two. Signatures on Securities. Endorsements or transfers of membership certificates, bonds, or other securities will be signed by the president or any vice president and by the treasurer or an assistant treasurer or the secretary or an assistant secretary unless the board of directors, by special resolution in one or more instances, prescribes otherwise.

Section Three. Safe Deposit Boxes. Officer or officers as will from time to time be designated by the board of directors shall have access to any safe of the corporation in the vault of any safe deposit company.

Section Four. Securities. An officer or officers as will from time to time be designated by the board of directors shall have power to control and direct the disposition of any bonds or other securities or property of the corporation deposited in the custody of any trust company, bank, or custodian.

#### ARTICLE ELEVEN. RECORDS

Section One. Records; Certification by Certified Public Accountants. The manager, managing agent, and board of directors will keep detailed records of all actions of the manager, managing agent, and board of directors, as well as minutes of the meetings of the board of directors, minutes of the meetings of the members, and financial records and books of account for the corporation, including a chronological record of all receipts and disbursements. A separate account will also be kept for each unit containing, among other things, the amount of each assessment against the unit, the date when due, amounts paid, and the balance remaining due. The board of directors will also prepare a quarterly written report summarizing receipts and disbursements of the corporation, copies of which will be made available to all members. Additionally, an annual report of receipts and disbursements of the corporation, reviewed or certified by an independent certified public accountant, will be rendered by the board of directors to all members, mortgagees, and trust deed beneficiaries requesting it, promptly after the end of each fiscal year.

### ARTICLE TWELVE. FISCAL YEAR

The fiscal year of the corporation will be the calendar year unless otherwise determined by resolution of the board of directors.

### ARTICLE THIRTEEN. MISCELLANEOUS

Section One. Notices. All notices required or permitted to be sent to the board of directors will be sent by registered or certified mail in care of the manager or managing agent, or if there is no manager or managing agent, to the office of the board of directors at *[address]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida, or to any other address as the board may from time to time designate. All notices required or permitted to be sent to any member will be sent by registered or certified mail to the member or to any other address as the owner may have designated in writing to the board of directors. All notices to unit mortgagees or trust deed beneficiaries will be sent by registered or certified mail to their respective addresses, as maintained by the secretary in the book entitled "Mortgagees of Units." All notices will be deemed to have been given when received.

Section Two. Waiver. No restriction, condition, obligation, or provision contained in these bylaws will be deemed to have been abrogated or waived by reason of any failure to enforce it, irrespective of the number of violations and failures to enforce that may occur.

Section Three. Invalidity. If any provision or provisions of these bylaws is or are declared invalid, the invalidity will in no way impair or affect the validity, enforceability, or effect of the remaining provisions of these bylaws.

Section Four. Captions. Captions are inserted in these bylaws for convenience and reference only, and will not be taken in any way to limit or describe the scope of these bylaws or any provision of them.

### ARTICLE FOURTEEN. AMENDMENTS

Section One. Amendments. These bylaws may be amended or supplemented by the vote of not less than two-thirds of the voting interests in the corporation, at a meeting duly called for that purpose. Proposals to amend the existing bylaws shall contain the full text of the bylaws to be amended; new words shall be inserted in the text

underlined and words to be deleted shall be lined through with hyphens. However, if the proposed change is so extensive that this procedure would hinder, rather than assist, the understanding of the proposed amendment, it is not necessary to use underlining and hyphens as indicators of words added or deleted, but, instead, a notation must be inserted immediately preceding the proposed amendment in substantially the following language: "Substantial rewording of bylaw. See bylaw [*specify*] for present text." No bylaw shall be revised or amended by reference to its title or number only.

## ARTICLE FIFTEEN. CONFLICTS

These bylaws are intended to comply with the requirements of, and are written according to the provisions of, Chapter 719 of the Florida Statutes. If these bylaws or any provisions of them are so construed as to be in conflict with the provisions of the statutes or of the articles of incorporation, the provisions of the statutes or of the articles of incorporation, as the case may be, will control.

## NOTES TO FORM

### Drafter's Notes

Fla. Stat. Ann. § 719.106 contains detailed provisions as to the bylaws of a cooperative. The reader would be well advised to carefully review the statute before drafting bylaws.

For discussion of pertinent background and drafting principles, see § 8:4.

For checklist in drafting bylaws, see § 8:20.

### Article Seven

#### Drafter's Notes

For bylaw requirements as to common expenses, see Fla. Stat. Ann. § 719.106(1)(g).

For bylaw requirement as to transfer fees, see Fla. Stat. Ann. § 719.106(1)(i).

For discussion of the proprietary lease, see § 8:6.

### Article Fourteen

#### Drafter's Notes

For requirements as to amendment of the bylaws, see Fla. Stat. Ann. § 719.106(l)(h).

#### Tax Notes

The language of Article Two is based on the requirement of the Internal Revenue Code that an exempt cooperative housing corpora-

tion provide leases to its members so the units may be used as dwellings. I.R.C. § 216(b)(1)(B). This compliance is amplified by Article Seven, which deals with the required leases. Article Three requires that only one class of membership be available, which is another requirement for tax exemption. I.R.C. § 216(b)(1)(A).

Not all the qualifications can be met through bylaw terms, however. Requirements that at least 80% of the revenues come from tenant-stockholders or that the members not share in the earnings of the corporation, for example, must be met as factual matters. See I.R.C. § 216(b).

**§ 8:26 Bylaw provision—Membership and membership certificates****MEMBERSHIP**

Section One. Membership Restricted to Proprietary Leases. No membership in the corporation shall be authorized except in connection with the execution by the member and delivery by the corporation of a proprietary lease of an apartment dwelling in a building owned or leased by the corporation. Membership shall entitle the member to occupy the apartment for the purposes specified in the proprietary lease appurtenant to the membership, subject to the provisions, covenants, and agreements contained in the proprietary lease, and the house rules promulgated from time to time by the board of directors.

Section Two. Issuance of Certificates. The membership to which each proprietary lease is appurtenant shall be represented by a single certificate. The certificate shall indicate that the holder of the membership is entitled to exercise *[one]* vote in the corporation, and shall set forth the proportionate share of common expenses for which the holder shall be liable by way of assessment.

Section Three. Form and Membership Register. Membership certificates shall be in the form adopted by the board of directors, shall be signed by the president or a vice president, and the secretary or an assistant secretary or the treasurer or an assistant treasurer, shall be sealed with the seal of the corporation, and shall be numbered in the order in which issued. Such signatures and seal may be facsimiles, as permitted by applicable statutory provisions. Certificates shall be issued in consecutive order, and there shall be recorded the name of the person holding the membership, the proportionate share of common expenses for which the holder will be liable, and the date of issue. Each certificate

exchanged or returned to the corporation shall be canceled, the date of cancellation shall be indicated on the face, and the certificate shall be retained in the corporate records.

Section Four. Transfers. Transfers of membership shall be made on the books of the corporation by the holder in person or by power of attorney, and shall be duly executed and filed by the secretary of the corporation, on the surrender of the certificate for membership, except that any membership sold to satisfy any lien that it holds on the proprietary lease appurtenant to the certificate may be transferred without the surrender of the certificate representing membership.

Section Five. Lost Certificates. In the event that any membership certificate is lost, stolen, destroyed, or mutilated, the board of directors may authorize the issuance of a new certificate substantially similar in lieu of the original. The board may, at its discretion, before the issuance of any new certificate, require the owner of the lost, stolen, destroyed, or mutilated certificate, or the legal representative of the owner, to make an affidavit or statement affirming the loss, destruction, or mutilation as it deems necessary, and to give the corporation a bond in any reasonable amount as it may direct, indemnifying the corporation against any liability or loss it may sustain by reason of the issuance of the new certificate.

Section Six. Legend on Membership Certificates. Certificates representing membership in the corporation shall bear a legend reading as follows:

The rights of any holder of the certificate are subject to the provisions of the bylaws of [*name of corporation*], and to all the terms, covenants, conditions, and provisions of a certain proprietary lease made between the person in whose name the certificate is issued, as lessee, and [*name of corporation*], as lessor, for an apartment in the premises known as [*name of premises*], located at [*address*], in the City of [*name of city*], County of [*name of county*], State of Florida, which lease limits and restricts the title and rights of any transferee of the instrument. The membership represented by this certificate is transferable only as an entirety and only to an approved assignee of such proprietary lease. Copies of the proprietary lease and the bylaws are on file and are available for inspection at the office of [*name of corporation*] at [*address*], in the City of [*name of city*], County of

[name of county], State of Florida. The directors of this corporation may refuse to consent to the transfer of the membership represented by this certificate until any indebtedness of the member to the corporation is paid. The corporation, by the terms of the bylaws and proprietary lease, has a first lien on the proprietary lease to which the holder of the lease is entitled for all sums due and to become due under the proprietary lease.

#### NOTES TO FORM

##### Research References

###### *Treatises and Practice Aids*

The corporation may issue membership certificates, but it need not do so. In the latter case, all rights of the member-lessee are set forth in the proprietary lease. See Florida Real Property Practice II (CLE), Cooperative Apartments §§ 19:28, 19:29 (1975 Ed.)

### § 8:27 Regulatory agreement—By corporation and FHA

#### REGULATORY AGREEMENT

Agreement dated this [ordinal number] day of [month], by and between [name of mortgagor], referred to below as mortgagor, at [address], in the City of [name of city], County of [name of county], State of Florida, and [name of commissioner], as Federal Housing Commissioner, referred to below as Commissioner, acting pursuant to authority granted by the National Housing Act, as amended, referred to below as the Act.

#### RECITALS

1. Mortgagor is the owner of certain premises on which is to be erected, or has been erected, a cooperative housing project, designated as FHA Project No. [specify] and has requested [name of mortgagee], referred to below as mortgagee, to lend the sum of \$[dollar amount] to be secured by a certain note and mortgage, referred to below as the mortgage.
2. The premises encumbered, or to be encumbered, by the mortgage are located at [address], in the City of [name of city], County of [name of county], State of Florida, and are more particularly described in attached Exhibit “[exhibit omitted],” and incorporated by reference.

3. Mortgagor and mortgagee have requested the Commissioner to endorse the note for mortgage insurance, pursuant to Section 213 of Title II of the Act.

4. Mortgagee is unwilling to lend the money to mortgagor without a contract of mortgage insurance evidenced by the endorsement, and the Commissioner is unwilling to endorse the note for mortgage insurance unless and until mortgagor will, by entering into the covenants and agreements set forth below, consent to be regulated and restricted by the Commissioner as provided in the Act.

In consideration of the sum of One Dollar (\$1) in hand paid, and other good and valuable consideration by each party to the other, the receipt of which is acknowledged, and in order to induce the Commissioner to endorse for mortgage insurance the note secured by the mortgage, and in order that mortgagor may be regulated and restricted by the Commissioner as provided for in Section 213 and the applicable rules, the parties to this agreement agree as follows: that as long as the contract of mortgage insurance continues in effect, and during the further period of time as the Commissioner will be the owner, holder, or reinsurer of the mortgage, or during any time the Commissioner is obligated to insure a mortgage on the mortgaged property:

1. Mortgagor will promptly make all payments due under the note and mortgage.

2. Commencing on the date of the first payment towards amortization of the principal of the mortgage insured by the Commissioner, mortgagor will establish and maintain a reserve fund for replacements by depositing to the reserve fund an amount equal to *[\$/dollar amount]*, and a like amount monthly after that, in a separate account with mortgagee or in a safe and responsible depository designated by mortgagee. The fund may be in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America, and will at all times be under the control of mortgagee. The fund is for the purpose of replacing structural elements and mechanical equipment of the project and for other purposes as may be agreed to in writing by the Commissioner. Disbursements from the fund may be made only after receiving the consent in writing of the Commissioner.

3. Commencing with occupancy, mortgagor, by depositing a monthly sum equivalent to not less than [percentage]% of the monthly amount charged to the members pursuant to their occupancy agreements, will establish and maintain a general operating reserve account. On accrual in the account of an amount equal to [percentage]% of the current annual amount charged to the members pursuant to their occupancy agreements, the rate of the monthly allocations may, by appropriate action of mortgagor, be reduced from [percentage]% to [percentage]%, provided, however, that in the event withdrawals from the account reduce it below the [percentage]% accrual, the rate of the monthly deposits will immediately be restored to [percentage]%. At any time after that, on accrual in the general operating reserve account of an amount equal to [percentage]% of the current annual amount charged to the members pursuant to their occupancy agreements, the monthly deposits may, by appropriate action of mortgagor, be discontinued and no further deposits need be made into the reserve so long as the [percentage]% level is maintained and provided, further, that on any reduction of the reserve below the [percentage]% level, monthly deposits will immediately be made at the [percentage]% rate until the [percentage]% level is restored. The reserve will remain in a special account and may be in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America, and will at all times be under the control of mortgagor. The cumulative reserve is intended to provide a measure of financial stability during periods of special stress and may be used to meet deficiencies from time to time as a result of delinquent payments by individual cooperators, to provide funds for the repurchase of stock of withdrawing members, and other contingencies. Disbursements totaling in excess of [percentage]% of the total balance in the reserve at the close of the preceding annual period may not be made during any annual period without the consent of the Commissioner. Reimbursement to the account will be made on payment of delinquencies or sale of stock for which funds were withdrawn from the reserve.

4. Mortgagor will establish and collect monthly carrying charges pursuant to the conditions set forth in this agreement. Monthly carrying charges charged to members

during the initial occupancy period will be made by mortgagor in accordance with a schedule of charges filed with and approved in writing by the Commissioner prior to the opening of the project for occupancy. The charges will be in an amount sufficient to meet the FHA estimate of cooperative management expense, operating and maintenance expense, debt service, taxes, special assessments and ground rents, if any, reserves, and all other expenses of mortgagor. Subsequent to the initial occupancy period, charges made by mortgagor for its accommodations will be in accordance with a schedule of charges filed with and approved in writing by the Commissioner and will be in amounts sufficient to meet mortgagor's estimate of expenses set forth in an operating budget, which will be prepared and submitted to the FHA [*number of days*] days prior to the beginning of each fiscal year. The operating budget will set forth the anticipated income of the project and a sufficiently detailed estimate of expenses that will include separate estimates for administration expense, operating expense, maintenance expense, utilities, hazard insurance, taxes and assessments, ground rents, interest and amortization, mortgage insurance premium, replacement reserve, and operating reserve. Mortgagor will not permit occupancy of its accommodations except in accordance with a schedule of charges approved by the Commissioner, and the schedule will not be changed except with the written approval of the Commissioner; nor will mortgagor permit occupancy except on the execution of an occupancy agreement in a form approved by the Commissioner. The property of mortgagor will not be rented as an entirety. Commercial accommodations and nondwelling facilities, if any, will be rented only according to a schedule of charges fixed by the directors and approved in writing by the Commissioner, and the form of lease will be subject to the written approval of the Commissioner. Mortgagor will provide for the management of the project in a manner satisfactory to the Commissioner. Any management contract entered into by the mortgagor involving the project will contain a provision that it will be subject to termination, without penalty and with or without cause, on written request by the Commissioner addressed to the mortgagor and the management agent. On receipt of the request, mortgagor will im-

mediately terminate the contract within a period of not more than *[number of days]* days and will make arrangements satisfactory to the Commissioner for continuing proper management of the project.

5. Mortgagor will not, without prior approval of the Commissioner, given in writing:

- (a) sell, assign, transfer, dispose of, or encumber any real or personal property, except as specifically permitted by the terms of the mortgage;
- (b) remodel, reconstruct, demolish, or subtract from the premises constituting the project and subject to the mortgage;
- (c) permit the occupancy of any of the dwelling accommodations of the corporation except at the charges fixed by the schedule of charges provided in this agreement;
- (d) permit occupancy of any of the dwelling accommodations of the corporation except by members of the corporation;
- (e) consolidate or merge the corporation into or with any other corporation, go into voluntary liquidation, carry into effect any plan of reorganization of the corporation, effect any changes whatsoever in its capital structure, alter or amend its certificate of incorporation, or amend its bylaws;
- (f) fail to establish and maintain the fund for replacements and general operating reserve as set forth in this agreement;
- (g) incur liabilities (direct or contingent) which will at any time exceed \$*[dollar amount]*, except the indebtedness secured by the mortgage or necessarily incidental to the execution and delivery of it;
- (h) enter into any contract or contracts for supervisory or managerial services;
- (i) invest any funds of the corporation in any property, real, personal, or mixed, except obligations of, or fully guaranteed as to principal by, the United States of America;

*[add, if applicable: (j) encumber or dispose of in any manner whatsoever any funds derived from the proceeds of its loan secured by the insured mortgage in excess of sums required to pay the applicable statutory percentage]*

*of the actual cost of legitimate obligations incurred in the construction of the physical improvements on the mortgaged property and for which mortgage funds were made available, nor fail to apply the excess funds to the reduction of the principal due under the insured mortgage;]*

*[add, if applicable: (k) fail to keep in full force and effect a contract satisfactory to the FHA covering the maintenance and replacements of parts of any elevator, air-conditioning, or related equipment, or, if such contract will be allowed to expire, then fail to accrue an additional sum in the amount as will be designated by the Commissioner to be sufficient to allow for deferred and future replacements of related parts and equipment as part of the annual reserve for replacement fund collected by the corporation.]*

6. During the period between initial and final endorsement for mortgage insurance by the Federal Housing Administration, no compensation or fee will be paid nor obligation incurred by mortgagor except with the prior written approval of the Commissioner. After that, no compensation or fee will be paid by mortgagor except for necessary services and except at a rate as is fair and reasonable in the locality for similar services; nor, except with the prior written approval of the Commissioner, will any compensation be paid by the mortgagor to its officers, directors, or members, or to any person or corporation, for supervisory or managerial services; nor will any compensation be paid by the corporation to any employee in excess of *[\$dollar amount]* per year, except with prior written approval. No officer, director, member, agent, or employee of mortgagor will in any manner become indebted to mortgagor, except on account of approved occupancy charges.

7. Mortgagor will maintain its project, the grounds, buildings, and equipment appurtenant to it in good repair and in such condition as will preserve the health and safety of its occupants.

8. Mortgagor, its property, equipment, buildings, plans, office, apparatus, devices, books, contracts, records, documents, and papers will be subject to inspection and examination by the Commissioner or Commissioner's duly authorized agent at all reasonable times.

9. The books and accounts of mortgagor will be kept in

accordance with the uniform system of accounting prescribed by the Commissioner. Mortgagor will file with the Commissioner and mortgagee the following reports verified by the signature of the officers of mortgagor as may be designated and in the form as may be prescribed by the Commissioner:

- (a) monthly or quarterly operating reports, when required by the Commissioner;
- (b) semiannual financial statements within *[number of days]* days after each semiannual period, when required by the Commissioner;
- (c) annual audited reports prepared by a certified public accountant or other person acceptable to the Commissioner, within *[number of days]* days after the end of each fiscal year;
- (d) specific answers to questions on which information is desired from time to time relative to the operation and condition of the property and the status of the mortgage; and
- (e) copies of minutes of all *[members']* meetings certified to by the secretary of the mortgagor within *[number of days]* days after the meetings, and, when required by the Commissioner, copies of minutes of directors' meetings.

10. Mortgagor will not execute or file for record any instrument that imposes a restriction on the sale, leasing, or occupancy of the property subject to the insured mortgage, or any part of it, on the basis of race, color, religion, sex, handicap, familial status, or natural origin, in accordance with the Civil Rights Act of 1918, as amended.

11. No litigation seeking the recovery of a sum in excess of *[\$/dollar amount]*, nor any action for specific performance or other equitable relief, will be instituted nor will any claim for a sum in excess of *[\$/dollar amount]* be settled or compromised by mortgagor unless prior written consent has been obtained from the Commissioner. Consent may be subject to terms and conditions as the Commissioner may prescribe.

12. Mortgagor agrees to observe and perform each and every one of the covenants and provisions required to be observed and performed under or pursuant to the terms of the mortgage, or of the building loan agreement referred to

in the mortgage, or of the construction contract for the construction of the project, or of any rent supplement contract executed by mortgagor and the Commissioner or of any modifications of it. Any rent supplement contract executed by mortgagor and the Commissioner is incorporated in this agreement by reference.

13. As security for the payment due under this agreement for the reserve fund for replacements, and to secure the Commissioner because of the Commissioner's liability under the endorsement of the note for insurance, and as security for the other obligations under this agreement, mortgagor assigns, pledges, and mortgages to the Commissioner its rights to the rents, profits, income, and charges of whatever sort which it may receive or be entitled to receive from the operation of the mortgaged property, subject, however, to any assignment of rents in the insured mortgage referred to in this agreement; provided, however, that permission is granted to mortgagor to collect and retain under the provisions of this agreement the rent, profits, income, and charges during any period or periods of time for which the Commissioner has not declared a default. On declaration by the Commissioner of a default, permission is terminated and will not be deemed to be reinstated until the Commissioner has declared the default to be cured.

14. On a violation of any of the above provisions of this agreement by mortgagor, the Commissioner may give written notice thereof to mortgagor, by registered or certified mail, addressed to the addresses stated in this agreement. If the violation is not corrected to the satisfaction of the Commissioner within *[number of days]* days after the date such notice is mailed or within the additional period of time as is set forth in the notice, or where mortgagor proceeds immediately and diligently within the further time as the Commissioner determines is necessary to correct the violation, the Commissioner may without further notice declare a default under this agreement, and on the default, the Commissioner may:

- (a) if the Commissioner holds the note, declare the whole of the indebtedness immediately due and payable and then proceed with the foreclosure of the mortgage; or if the note is not held by the Commissioner, notify the holder of the note of the default, and the holder, with the prior written consent of the Commissioner, may

declare the whole indebtedness due, and then proceed with foreclosure of the mortgage, or assign the note and mortgage to the Commissioner as provided in the regulations;

- (b) collect all rents and charges in connection with the operation of the project and use such collections to pay mortgagor's obligations under this agreement and under the note and mortgage and the necessary expenses of preserving the property and operating the project;
- (c) take possession of the mortgaged property, bring any action necessary to enforce any rights of mortgagor of the project and any rights of the Commissioner, arising by reason of the agreement, and operate the project in accordance with the terms of this agreement until such time as the Commissioner in the Commissioner's discretion determines that mortgagor is again in a position to operate the project in accordance with the terms of this agreement and in compliance with the requirements of the note and mortgage; and
- (d) apply to any court, state or federal, for specific performance of this agreement, for an injunction against any violation of the agreement, for the appointment of a receiver to take over and operate the project in accordance with the terms of the agreement, or for any other relief as may be appropriate, because the mortgagor stipulates the injury to the Commissioner arising from a default under any of the terms of this agreement would be irreparable and the amount of damage would be difficult to ascertain.

15. This regulatory agreement and its covenants and agreements will be of no effect as to any property released from the blanket mortgage of mortgagor.

16. As used in this agreement the term:

- (a) "mortgage" will include "deed of trust;"
- (b) "note" will include "bond;"
- (c) "mortgagor" will include "grantor" under any deed of trust;
- (d) "mortgagee" will include the "beneficiary" under mortgage or deed of trust however designated;
- (e) "default" means a default declared by the Commis-

sioner when a violation of this agreement is not corrected to the Commissioner's satisfaction within the time allowed by this agreement or such further time as may be allowed by the Commissioner after written notice; and

(f) "stock" will include membership certificates or other forms designating member ownership.

17. This instrument will bind, and the benefits will inure to, the respective parties to it, their legal representatives, executors, administrators, successors in office or interest, and assigns.

18. The invalidity of any clause, part, or provision of this agreement will not affect the validity of the remaining portions of it.

19. The mortgagor agrees and assumes the obligation to have this agreement recorded in the appropriate land records office in the jurisdiction in which the real property described in this agreement is situated; and in the event of failure to do so, it is agreed that the Commissioner may have the same recorded at the expense of mortgagor.

20. It is specifically agreed between the parties to this agreement that the breach of any of the terms of this agreement by mortgagor will substantially damage and injure the Commissioner in the proper performance of the Commissioner's duties under the provisions of the Act, and will impede and injure the proper operations intended under the Act; that the damage will be irrespective of and in addition to any damage to the security of the mortgaged premises or to any financial damage the Commissioner may suffer as insurer; and that, except for the agreements contained in this agreement, the Commissioner would not lend the sum above-mentioned on the security of the mortgage unless the same were insured by the Commissioner.

In witness, the parties to this agreement have duly executed this agreement at [*designate place of execution*] on the day and year first written above.

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[Signatures]

*[Acknowledgment by mortgagor]*

*[Exhibit “[identify]”—legal description of mortgaged property]*

#### NOTES TO FORM

##### Drafter's Notes

A tenant-owned apartment corporation may contract with the FHA for mortgage insurance by using a regulatory agreement. For in-depth discussion of the procedures, see HUD Pub. No. 4550.1 (Basic Cooperative Housing Insurance), and the forms available in that publication. HUD-FHA publications and forms are available on their websites at <http://www.hud.gov> and <http://www.hudclips.org>.

FHA publications are revised frequently and the practitioner is therefore advised to check with the Federal Housing Authority to see whether the number and provisions of a particular publication are current.

##### Tax Notes

Amounts received by a corporation from its tenant-stockholders for general operating reserves required by the FHA are treated as income to the co-op. *Concord Village, Inc. v. Commissioner of Internal Revenue*, 65 T.C. 142, 1975 WL 3188 (1975), recommendation regarding acquiescence, AOD-1976-329, 1976 WL 39554 (I.R.S. AOD 1976).

See 12 U.S.C.A. § 1715e.

##### Paragraph 14

###### Research References

*Legal Encyclopedias*

Am. Jur. 2d, Foreclosure of mortgage on apartment cooperative, Condominiums and Cooperative Apartments § 87.

#### § 8:28 Notice of conversion of existing improvements to ownership as residential cooperative

To: \_\_\_\_\_ [Name]  
\_\_\_\_\_ [address]

Apartment No. \_\_\_\_\_

#### NOTICE OF CONVERSION OF EXISTING IMPROVEMENTS TO OWNERSHIP AS A RESIDENTIAL COOPERATIVE

These apartments are being converted to cooperative by [name of developer], the developer.

1. YOU MAY REMAIN AS A RESIDENT UNTIL THE EXPIRATION OF YOUR RENTAL AGREEMENT. FUR-

THER, YOU MAY EXTEND YOUR RENTAL AGREEMENT AS FOLLOWS:

a. If you have continuously been a resident of these apartments during the last 180 days and your rental agreement expires during the next 270 days, you may extend your rental agreement for up to 270 days after the date of this notice.

b. If you have not been a continuous resident of these apartments for the last 180 days and your rental agreement expires during the next 180 days, you may extend your rental agreement for up to 180 days after the date of this notice.

c. IN ORDER FOR YOU TO EXTEND YOUR RENTAL AGREEMENT, YOU MUST GIVE THE DEVELOPER WRITTEN NOTICE WITHIN 45 DAYS AFTER THE DATE OF THE LEASE NOTICE.

2. IF YOUR RENTAL AGREEMENT EXPIRES IN THE NEXT 45 DAYS, you may extend your rental agreement for up to 45 days after the date of this notice while you decide whether to extend your rental agreement as explained above. To do so, you must notify the developer in writing. You will then have the full 45 days to decide whether to extend your rental agreement as explained above.

3. During the extension of your rental agreement you will be charged the same rent which you are now paying.

4. YOU MAY CANCEL YOUR RENTAL AGREEMENT AND ANY EXTENSION OF THE RENTAL AGREEMENT AS FOLLOWS:

a. If your rental agreement began or was extended or renewed after May 1, 1980, and your rental agreement, including extensions and renewals, has an unexpired term of 180 days or less, you may cancel your rental agreement on 30 days' written notice and move. Also, on 30 days' written notice, you may cancel any extension of the rental agreement.

b. If your rental agreement was not begun or was not extended or renewed after May 1, 1980, you may not cancel the rental agreement without the consent of the developer. If your rental agreement, including extensions and renewals, has an unexpired term of 180 days or less, you may, however, on 30 days' written notice, cancel an extension of the rental agreement.

5. All notices must be given in writing and sent by mail, return receipt requested, or delivered in person to the developer at *[address of developer]*.

6. If you have continuously been a resident of these apartments during the last 180 days:

a. You have the right to purchase your apartment and will have 45 days to decide whether to purchase it. If you do not buy the unit at that price and the unit is later offered at a lower price, you will have the opportunity to buy the unit at the lower price. However, in all events your right to purchase the unit ends when the rental agreement or an extension of the rental agreement ends or when you waive this right in writing.

b. Within 90 days, you will be provided purchase information relating to your apartment, including the price of your unit and the condition of the building. If you do not receive this information within 90 days, your rental agreement and an extension will be extended one day for each day over 90 days until you are given the purchase information. If you do not want this rental agreement extension, you must notify the developer in writing.

7. If you have any questions regarding the conversion or the Cooperative Act, you may contact the developer or the state agency that regulates cooperatives: The Division of Florida Land Sales, Condominiums, and Mobile Homes: *[Tallahassee address and telephone number of division]*.

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*[Signature]*

#### NOTES TO FORM

##### Drafter's Notes

This Notice conforms to the form required by Fla. Stat. Ann. § 719.608(2), and must be given prior to or simultaneous with the first offering of individual units to all tenants of existing improvements being converted to residential cooperatives. See Fla. Stat. Ann. § 719.608(1).

The parts of the above notice that appear in upper case must be printed in upper case, in conspicuous type. Fla. Stat. Ann. § 719.608(2)(a).

As to what constitutes conspicuous type, see Fla. Stat. Ann. § 719.103(11).

**§ 8:29 Notice of conversion of existing improvements to ownership as residential cooperative—  
Provision—Developer offers tenants optional tenant relocation payment**

If you have been a continuous resident of these apartments for the last 180 days and your lease expires during the next 180 days: [*you may extend your rental agreement for up to 270 days/you may extend your rental agreement for up to 180 days and receive a cash payment at least equal to one month's rent*]. You must make your decision and inform the developer in writing within 45 days from the date of this notice.

**NOTES TO FORM****Drafter's Notes**

This provision must be included in the notice of conversion of existing improvements to ownership as a residential cooperative when a developer offers tenants an optional tenant relocation payment pursuant to Fla. Stat. Ann. § 719.606(4).

This provision conforms to the requirement in Fla. Stat. Ann. § 719.606(4).

**§ 8:30 Notice of conversion of existing improvements to ownership as residential cooperative—  
Provision—Where county adopts ordinance or other measure extending extension period**

[*In lieu of the statement contained in Paragraph 1, subparagraphs a and b of § 8:28, insert the following:*]

1. YOU MAY REMAIN AS A RESIDENT UNTIL THE EXPIRATION OF YOUR RENTAL AGREEMENT. FURTHER, YOU MAY EXTEND YOUR RENTAL AGREEMENT AS FOLLOWS:

a. If you have continuously been a resident of these apartments during the last 180 days and your rental agreement expires during the next 360 days, you may extend your rental agreement for up to 360 days after the date of this notice.

b. If you have not been a continuous resident of these apartments for the last 180 days and your rental agreement expires during the next 270 days, you may extend your rental agreement for up to 270 days after the date of this notice.

**NOTES TO FORM****Drafter's Notes**

This statement must be included in the notice of conversion of existing improvements to ownership as a residential cooperative when the rental agreement extension provisions of Fla. Stat. Ann. § 719.606(6) are applicable; that is, whenever a county determines that there exists within the county a vacancy rate in rental housing of 3% or less, and the county has adopted an ordinance or other measure extending the 270-day extension period described in Fla. Stat. Ann. § 719.606(1)(a) and the 180-day extension described in Fla. Stat. Ann. § 719.606(1)(b).

This form conforms to the requirement of Fla. Stat. Ann. § 719.608(2)(c).

**III. OPERATIONAL DOCUMENTS****A. COMPLETE INSTRUMENTS****§ 8:31 Membership purchase agreement**

ORAL REPRESENTATIONS CANNOT BE RELIED ON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. FOR CORRECT REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THIS CONTRACT AND THE DOCUMENTS REQUIRED BY SECTION 719.503, FLORIDA STATUTES TO BE FURNISHED BY A DEVELOPER TO A BUYER OR LESSEE.

*[If the contract allows use of any advance payments for construction purposes, add the following: ANY PAYMENT IN EXCESS OF 10% OF THE PURCHASE PRICE MADE TO DEVELOPER PRIOR TO CLOSING PURSUANT TO THIS CONTRACT MAY BE USED FOR CONSTRUCTION PURPOSES BY THE DEVELOPER.]*

Agreement made on [date], between [name of applicant] of [address], referred to below as "applicant;" [name of developer], a Florida corporation with offices at [address], referred to below as "developer;" and [name of corporation], a Florida corporation not for profit with offices at [address], referred to below as the "corporation."

**RECITALS**

A. Developer is the [owner/lessee] of certain land, located in the City of [name of city], County of [name of county], Florida, on which an apartment building [has been/is being] erected. The address of the building is [address].

B. Developer has prepared a cooperative plan under which the land and apartment building, and certain other improvements, are to be transferred to the corporation if a sufficient number of memberships in the corporation are sold, as is more fully outlined in this agreement. This plan is reflected in a prospectus, together with the exhibits to it, prepared by developer. A copy of the prospectus and its exhibits, herein collectively referred to as the prospectus, is attached and made a part of this agreement. Developer also has available for inspection at *[location convenient to construction site]*, complete plans and specifications for the building, all units to be included in it, and all common areas and improvements appurtenant to the units.

C. Applicant has read and approved the prospectus and all sales information concerning the project, has been afforded a full and free opportunity to investigate and examine all facts and documents referred to in it, and has been advised that no one has been authorized to make, and warrants that no one has made, any representations or warranties not specifically set forth therein.

D. Applicant desires to acquire, and developer desires to sell, the membership in the corporation allocated to apartment No. *[identify]*, referred to below as the "unit," as more fully described in the prospectus and in the floor plan of the unit, which is attached and made a part of this agreement. It is understood that, at the time applicant will take possession of the unit, it will not have been occupied at any time.

#### THE UNIT IS SUBJECT TO A LEASE

In consideration of the premises and of the mutual promises of other applicants who have executed or will execute agreements similar to this one, and for other good and valuable consideration, the parties agree as follows:

1. Application. By executing this agreement, applicant applies for membership in the corporation. For this purpose, applicant has filled out a standard application form which is attached and made a part of this agreement. Applicant understands that *[he/she]* will be investigated the same as all other applicants, as set forth in the bylaws of the corporation, and that *[his/her]* application may be disapproved. In the latter event, applicant agrees that neither developer nor the corporation will be liable to ap-

plicant in connection with the disapproval, except as to the deposit payable under this agreement, *[with interest at [rate]]*.

2. Purchase price; Payment. The purchase price of the membership applied for hereunder is *[\$dollar amount]*. A deposit of *[\$dollar amount]* shall be payable to the developer on execution of this agreement. *[Of the amount of this deposit, [\$dollar amount], which is 10% of the total purchase price, will be deposited in an escrow account with [name of escrow agent], hereinafter called "escrow agent," to be turned over to developer or returned to applicant as hereinafter set forth or as provided by law. The balance of the deposit, [\$dollar amount], will be held by developer in a special account and may be withdrawn by developer for purposes of construction and development of the cooperative project as provided by law, unless it is returned to applicant as hereinafter set forth.]*

THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER, AND RECEIPT BY BUYER OF ALL OF THE ITEMS REQUIRED TO BE DELIVERED TO HIM OR HER BY THE DEVELOPER UNDER SECTION 719.503, FLORIDA STATUTES. THIS AGREEMENT IS ALSO VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF RECEIPT FROM THE DEVELOPER OF ANY AMENDMENT WHICH MATERIALLY ALTERS OR MODIFIES THE OFFERING IN A MANNER THAT IS ADVERSE TO THE BUYER. ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 15 DAYS AFTER THE BUYER HAS RECEIVED ALL OF THE ITEMS REQUIRED. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

The entire deposit shall be returned to applicant, with any interest earned, on applicant's: (1) cancellation of this agreement as provided by law; (2) receipt of notice that *[his/her]* application for membership in the corporation has been disapproved; or (3) receipt of notice that this

agreement has been declared or has become ineffective before closings.

The balance of the purchase price, *[\$/dollar amount]*, shall be payable by certified check to the order of developer at the closing.

3. Closing. Closing under this agreement shall be at such place and at such time, not less than *[number of days]* nor more than *[number of days]* days after applicant receives from developer notice that: (1) applicant's application for membership has been approved; and (2) this agreement has become or has been declared effective, as developer shall determine. At closing, applicant will become a member entitled to exercise *[one]* vote in the corporation *[and shall receive from the corporation a certificate representing such membership]*. Applicant shall also execute: (1) duplicate copies of the proprietary lease for the unit, a copy of which is attached to this agreement; (2) *[instructions to escrow agent to turn over to developer the sum in the escrow account credited to applicant]*; and *[specify]*.

The escrow agent is *[name of escrow agent]*, whose address is *[address]*. On request, the purchaser may obtain a receipt for *[his/her]* deposit from the escrow agent.

4. Effective date of agreement. The following provisions will determine whether and when this agreement will become effective:

(a) if, on or before *[date]*, approved applicants have executed purchase agreements covering at least *[number]* units in the building, a developer may, at its option declare this agreement effective;

(b) if, on or before *[date]*, approved applicants have executed purchase agreements covering *[number]* or more units in the building, developer must declare this agreement effective;

(c) if the agreement has not been declared effective as set forth above, it shall be deemed ineffective and void; and

(d) developer may declare all agreements ineffective for any reason whatsoever before agreements to purchase memberships covering the requisite number of units have been sold. However, once this agreement has been declared effective, it may not be declared ineffec-

tive, except as a result of [*a defect in title that cannot reasonably be cured*]. Developer shall have no obligation to incur expense or engage in litigation to [*cure title defects*].

5. Unsold memberships. Developer agrees that if, by the closing date, the memberships allocated to all units have not been sold and fully paid for, developer will produce on the closing date an individual person or persons, resident of the State of Florida, hereinafter referred to as “holders of unsold memberships,” to whom all of the unsold memberships will be issued, and who will enter into proprietary leases for the units appurtenant to such memberships.

Developer further agrees that if any holder of an unsold membership fails to fulfill his or her obligations under his or her proprietary lease, including the payment of all charges thereunder, then developer will be liable for such obligations, and the corporation will have a lien on the unit described in such lease, and its appurtenances, to secure the payment of all obligations of the defaulting holder. Any unsold membership and lease acquired by a holder of one or more unsold memberships may be sold or assigned by the party, and the holder may sublet his or her unit, subject only to the consent of the managing agent, which consent may not be unreasonably withheld.

6. Obligations under prospectus. Developer and the corporation agree to comply with and fully perform all terms and conditions, and to fulfill all obligations that are provided in the prospectus and are applicable respectively to developer and the corporation.

7. Brokers. Applicant represents and warrants that [*he/she*] has not negotiated nor had any dealings with any broker [*other than [name of broker]*] in connection with acquisition of the membership and lease of the unit as provided herein.

8. Assignments; Modifications. Applicant may not assign this agreement without the written consent of developer, and any alteration of this agreement shall be in writing, signed by both applicant and developer.

9. Entire agreement. This agreement contains the entire understanding of the parties, and supersedes all prior and contemporaneous understandings, written or oral.

Executed at *[designate place of execution]* on the date first written above.

*[ANY PAYMENT IN EXCESS OF 10% OF THE PURCHASE PRICE MADE TO DEVELOPER PRIOR TO CLOSING PURSUANT TO THIS CONTRACT MAY BE USED FOR CONSTRUCTION PURPOSES BY THE DEVELOPER.]*

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*[Signatures]*

*[Acknowledgments]*

Receipt of deposit of *[\$dollar amount]* acknowledged, subject to collection.

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*[Signature of Developer]*

By: \_\_\_\_\_

*[Attach prospectus, exhibits, proprietary lease, etc.]*

#### NOTES TO FORM

##### Drafter's Notes

For purposes of this form, it is assumed that the developer has had to prepare a prospectus in connection with the project (see Fla. Stat. Ann. § 719.504), and that the lease to be executed pursuant to the agreement will have an unexpired term of more than five years (see Fla. Stat. Ann. § 719.503(1)(a)). Note, however, that even if a prospectus is not required, considerable information must still be delivered to the prospective lessee (see Fla. Stat. Ann. § 719.503(1)(b)).

Fla. Stat. Ann. § 719.503(1)(a)(6) further requires a conspicuous statement within the text of the contract in the event that the unit is subject to a lien for rent payable under a lease of a recreational facility or other common area.

Fla. Stat. Ann. § 719.503(1)(a)(4) requires a conspicuous statement within the text if the contract is for the sale or transfer of a unit subject to a lease, and in addition, the contract must include as an exhibit a copy of the executed lease. If the unit has been occupied by someone other than the buyer, a statement that the unit has been occupied should also be included (see Fla. Stat. Ann. § 719.503(1)(a)(3)).

The contract must state the name and address of the escrow agent

required by Fla. Stat. Ann. § 719.202 and must state that the purchaser may obtain a receipt for his or her deposit from the escrow agent, on request. Fla. Stat. Ann. § 719.503(1)(a)(7).

In addition to furnishing copies of documents required by Fla. Stat. Ann. § 719.503(1)(b) to the prospective buyer or lessee, there are other disclosures that a developer is obliged to make (see Fla. Stat. Ann. § 719.503(3)).

As to the contents of a prospectus or offering circular, see Fla. Stat. Ann. § 719.504.

For discussion of the purchase agreement, see § 8:5.

**§ 8:32 Proprietary lease****PROPRIETARY LEASE**

Contents, by section number and heading:

1. Parties
2. Lease of premises; term
3. Rent and assessments
4. Repairs by lessor
5. Services by lessor
6. Damage to building or apartment
7. Books of account
8. Changes in terms and conditions of proprietary leases
9. Quiet enjoyment
10. Payment of rent
11. Use of premises
12. Subletting
13. Assignment
14. Pledge of shares and lease
15. Repairs by lessee
16. Lessor's remedies on default
17. Increase in rate of fire insurance
18. Alterations
19. Cooperation
20. Right of entry
21. Reimbursement of lessor's expenses
22. Termination of lease by lessor
23. Lessor's rights on lessee's default
24. Surrender of possession
25. Lessee's option to cancel
26. Extension of option to cancel

27. Termination of all leases under certain circumstances
28. Procedure on termination of all proprietary leases
29. Applicability of covenants
30. Lessor's additional remedies
31. Waivers
32. Notices
33. Lessee more than one person
34. Partial invalidity; effect
35. Headings
36. Oral modifications

1. Parties. Proprietary lease made by and between [*name of lessor*], a Florida corporation with offices at [*address*] in the City of [*name of city*], County of [*name of county*], State of Florida, referred to below as "lessor," and [*name of lessee*], of [*address*], in the City of [*name of city*], County of [*name of county*], State of Florida, referred to below as "lessee."

Lessor is the [*owner/lessee*] of the land and the building erected thereon known by name as [*specify name*] and located at [*location*], in the City of [*name of city*], County of [*name of county*], State of Florida, referred to below as "building." The land is described with particularity in attached Exhibit "[*exhibit omitted*]," and made a part of this lease.

Lessee holds a membership in lessor, and this lease is appurtenant to such membership.

2. Lease of premises; Term. In consideration of the mutual covenants and subject to the terms and conditions set forth below, lessor leases to lessee, and lessee leases from lessor, Apartment No. [*specify*] in the building, referred to below as the "unit," more particularly described in Exhibit [*exhibit omitted*] attached to this lease, for a term from [*date*] until [*date*], unless sooner terminated as provided in this lease. As used in this lease, "the unit" means the rooms in the building designated by the above-stated apartment number as partitioned on the date of execution of this lease, together with their appurtenances and fixtures, and any closets, terraces, balconies, roofs, or portions of it that are outside the partitioned rooms and are allocated exclusively to the occupant of the unit.

3. Rent and assessments.

(a) During the continuance of this lease, lessee shall be liable for both rent and amounts by way of assessment determined by the board of directors of lessor in the manner set forth in the bylaws of lessor.

(b) Rent for the unit is *[\$/dollar amount]* per month, due and payable in advance on the *[ordinal number]* day of each month. Increases in the amount of rent due under this lease (and under other proprietary leases) may be made only at *[ten-year]* intervals as the board of directors may determine.

(c) Assessments will be made against the unit on the basis of the proportionate share of common expenses allocated to the unit which, expressed as a percentage of the overall annual budget of common expenses for each years, is *[percentage]%*. Although the amounts required to be funded by assessment will be determined on a yearly basis, the actual assessments for the unit will be made *[quarterly]*, covering the next succeeding *[three months]*. *[One-third]* of the amount so determined shall be due and payable in advance on the *[ordinal number]* day of each month. Lessee shall also pay promptly when due such additional assessments as may be provided for in this lease.

(d) As used in this lease, “proportionate share of common expenses” has the meaning set forth in the bylaws of lessor. In every proprietary lease heretofore executed by lessor there has been specified, and in every proprietary lease after that to be executed by lessor there will be specified, the proportionate share of common expenses allocated to the apartment or other space described in the lease.

4. Repairs by lessor. Lessor shall at its own expense keep in good repair all of the building including all units, the sidewalks and courts surrounding the building, and its equipment and apparatus, excepting only those portions the maintenance and repair of which are expressly stated to be the responsibility of lessee in Section 15.

5. Services by lessor. Lessor shall maintain and manage the building as a first-class apartment building, and shall keep the elevators, public halls, stairways, and basements clean and properly lighted and heated, and shall provide the number of attendants necessary, in the judgment of the directors, for the proper care and service of the building. Lessor shall provide the unit with a proper and sufficient supply of *[hot and]* cold water *[and with heat and air*

*conditioning when deemed appropriate by the directors].* Covenants of lessor contained herein are subject to the discretionary power of the directors to determine from time to time what services, attendants, and manner of maintaining and operating the building are proper, and what existing services should be increased, reduced, or otherwise modified or terminated.

6. Damage to building or apartment.

(a) Insured losses. If the building or any part thereof, including the unit and the means of access to the building, is damaged by fire or other cause covered by multiperil policies commonly carried by owners of unit buildings in [location], lessor will, with due diligence after receipt of notice of such damage, carry out or cause to be carried out replacements and/or repairs as appropriate. All such replacements and repairs shall be at the expense of lessor and shall use materials of a kind and quality then customary in structures of the same type. Included within the scope of lessor's obligation is replacement or repair of walls, floors, ceilings, pipes, wiring, and conduits in the unit. Any other damage is to be repaired by lessor or lessee pursuant to Sections 4 and 15, as the case may be. However, anything in this section or Section 4 to the contrary notwithstanding, lessor shall not be required to repair or replace, or cause to be repaired or replaced, equipment, fixtures, furniture, furnishings, or decorations installed by lessee or lessor's or lessee's predecessors in title, nor shall lessor be obligated to repaint or to replace wallpaper or other decorations in units.

(b) Abatement of rent and assessments. If damage resulting from fire or other cause is so extensive as to render the unit partly or completely unfit for occupation, or if the means of access to the unit is destroyed, the rent and current assessment hereunder will proportionately abate until the unit is again rendered wholly habitable or the means of access is restored. However, if the damage is the result of the act or negligence of lessee or one or more agents, employees, guests, or members of the family of lessee or any occupant of the unit, the rent and assessment shall abate only to the extent of any rental value insurance collected by lessor with respect to the unit.

(c) Determination not to repair. If the directors determine that: (1) the building is totally destroyed by fire or

other cause; (2) the building is so damaged that it shall not be possible to repair it within a reasonable time after the loss has been adjusted with the insurance carriers; or (3) the destruction or damage was caused by hazards not covered by lessor's insurance policies then in effect; and if in any such case, the record holders of at least [*two-thirds*] of the issued shares, at a members' meeting duly called for that purpose and held within [*number of days*] days after the determination by the directors, vote not to repair, restore, or rebuild, then on the giving of notice pursuant to Section 23 hereof, this lease and all other proprietary leases, and all right, title, and interest of the parties thereunder and the tenancies thereby created, shall terminate. Rent and assessment shall be payable to the date of such destruction or damage.

7. Books of account. Lessor shall keep full and accurate books of account at its principal office or at such other place as the directors may from time to time determine, and the books shall be open to inspection by lessee or lessee's representative during all reasonable hours. Within a reasonable time after the end of each fiscal year, lessor shall deliver to lessee an audited annual report of corporate financial affairs, including a balance sheet and a statement of income and expenses, certified by an independent certified public accountant.

8. Changes in terms and conditions of proprietary leases. Each proprietary lease shall be in the form of this lease unless a variation of any lease is authorized by lessees owning at least [*two-thirds*] of lessor's shares then issued and outstanding and is executed by lessor and the lessee affected. The form and provisions of all proprietary leases then in effect and thereafter to be executed may be changed by approval of lessees owning at least [*two-thirds*] of lessor's shares then issued and outstanding, and the changes shall be binding on all lessees even if they did not vote for the changes, except that the proportionate share of rent or cash requirements payable by any lessee may not be increased, nor may a lessee's right to cancel a lease under the conditions set forth in Section 25 be eliminated or impaired, without lessee's express consent. Approval by lessees as provided for herein shall be evidenced by written consent or by affirmative vote taken at a meeting called for such purpose.

9. Quiet enjoyment. On paying the rent, performing the covenants, and complying with the conditions set forth herein, lessee shall at all times during the term here stated quietly have, hold, and enjoy the unit without any suit, trouble, or hindrance from lessor; subject, however, to the rights of present tenants or occupants of the unit, and to any and all trust deeds, mortgages, and underlying leases of the land and buildings.

10. Payment of rent and assessments. Lessee shall pay the rent and assessments to lessor on the terms and at the times herein provided, without any deduction on account of any setoff or claim that lessee may have against lessor. If lessee fails to pay any installment of rent or assessments promptly when due, lessee shall pay interest on the amount at the maximum legal rate from the due date of the installment to the date of payment, and such interest shall be deemed additional rent or assessment hereunder.

11. Use of premises. Lessee shall not, without the written consent of lessor on such conditions as lessor may prescribe, occupy or use the unit, or permit the same or any part thereof to be occupied or used, for any purpose other than as the private dwelling for lessee and lessee's spouse, their children, grandchildren, parents, grandparents, brothers and sisters, and domestic employees. In no event shall more than one married couple occupy the unit without the written consent of lessor. Notwithstanding the foregoing restrictions, the unit may be occupied from time to time by guests of lessee for a period not exceeding one month, or such longer period as may be approved in writing by lessor; however, unless consented to in writing by lessor, no guests may occupy the unit unless one or more of the permitted adult residents are then in occupancy.

12. Subletting.

(a) Lessee shall not sublet the unit, in whole or in part, or renew or extend any previously authorized sublease without the consent of the directors or, if the directors fail or refuse to give consent, the consent of lessees owning at least a majority of the then issued shares of lessor. Consent of the directors shall be evidenced by resolution or by a writing executed by a majority of directors. Consent by lessees shall be evidenced by written consent or by affirmative vote taken at a meeting called for such purpose. Any consent to subletting may be subject to such reasonable conditions as the directors or lessees may impose.

(b) If lessee at any time sublets the unit and defaults in the payment of any maintenance or additional maintenance, lessor may, at its option, so long as such default continues, demand and receive from the subtenant the maintenance due or becoming due from such subtenant to lessee, and apply such maintenance to pay sums due and to become due from lessee to lessor. Any payment by a subtenant to lessor shall constitute a discharge of the obligation of such subtenant to lessee to the extent of the amount so paid. The acceptance of maintenance from any subtenant shall not be deemed a consent to or approval of any subletting or assignment by lessee, or a release or discharge of any of the obligations of lessee hereunder.

13. Assignment.

(a) Lessee shall not assign this lease or transfer the membership or any interest to which it is appurtenant and no such assignment or transfer shall take effect as against lessor for any purpose until:

- (1) an instrument of assignment in a form approved by lessor, executed and acknowledged by the assignor, is delivered to lessor;
- (2) an agreement in a form approved by lessor, executed and acknowledged by the assignee, assuming and agreeing to be bound by all the covenants and conditions of this lease as of the date of the assignment, is delivered to lessor or, at the request of lessor, the assignee surrenders the assigned lease and enters into a new lease in the same form as this lease for the remainder of the term hereof, in which case lessee's lease shall be cancelled as of the effective date of the assignment;
- (3) all shares of lessor to which this lease is appurtenant have been transferred to assignee;
- (4) all sums due from lessee have been paid to lessor, together with a sum to be fixed by the directors to cover reasonable legal and other expenses of lessor and its managing agents in connection with the assignment and transfer of shares;
- (5) a search or certification from a title or abstract company, as the directors may require, is provided; and
- (6) except in the case of an assignment, transfer, or

bequest to lessee's spouse, consent to the assignment has been authorized by the directors, or, if the directors have failed or refused to give such consent within *[number of days]* days after submission of references to them or lessor's agent, by lessees owning of record at least a majority of the then authorized votes in lessor. Consent of the directors shall be evidenced by a resolution or by a writing executed by a majority of directors. Consent of members shall be evidenced by written consent or by affirmative vote taken at a meeting called for such purpose in the manner provided in the bylaws.

(b) If lessee dies, consent shall not be unreasonably withheld to an assignment of the lease and membership to a financially responsible member of lessee's family (other than lessee's spouse as to whom no consent is required).

(c) On assignment of this lease in compliance with the terms hereof, lessee-assignor shall have no further liability on any of the covenants hereof to be performed after the date of assignment.

(d) Regardless of any prior consent given, neither lessee, nor lessee's executor or administrator, nor any trustee or receiver of the property of lessee, nor anyone to whom the interests of lessee may pass by law, shall be entitled further to assign this lease, or to sublet the unit or any part thereof, except on compliance with the conditions of this lease.

(e) At any time at which this lease is in force and effect, lessor will, promptly on the request of lessee, deliver to the assignee a written statement that this lease remains in force and effect as of the date of the statement. However, no such statement shall be deemed an admission that there is no default under the lease.

14. Pledge of shares and lease.

(a) A pledge of this lease shall not constitute a violation of this lease. However, neither the pledgee nor any transferee of the pledged security shall be entitled:

- (1) to have the membership transferred of record on the books of lessor;
- (2) to exercise the membership vote to which lessee is entitled;
- (3) to occupy the unit or permit its occupancy by others; or

- (4) to assign this lease, without first obtaining the consent of lessor in accordance with and after complying with all the provisions of Sections 11, 12, or 13 as the case may be.

The acceptance by lessor of payments by the pledgee or any transferee of the pledged security on account of rent or additional rent shall not constitute a waiver of the provisions stated herein. The provisions of this subsection shall be subject to subsection (b), below.

(b) Lessee may pledge and assign this lease and the shares of lessor allocated to the unit as security for a loan made to lessee by a bank, trust company, insurance company, or other recognized institutional lender (sometimes herein called lender). In the event of any default by lessee hereunder, lessor shall give written notice of the default to lender, if written notice of the name and address of lender has been given by registered or certified mail to lessor prior to the date of any default.

If lessee fails to cure the default within the time and in the manner provided in this lease, lender shall have an additional period of time equal to the time originally given to lessee to cure the default, and lessor shall not act on the default until the time for lender to cure the default has elapsed. In the event of a default by lessee hereunder or in any of lessee's obligations to lender after written notice thereof is received from lender, lessor shall exercise the right of termination of this lease granted to it pursuant to Section 22 hereof. If lessee fails to vacate the unit, lessor shall institute forcible detainer or other appropriate proceedings against lessee and take all steps thereafter required to obtain possession of the unit, all at the expense of lender, and lender shall pay all maintenance charges and other charges due under this instrument until this lease and the shares allocated to the unit are acquired for personal occupancy.

If lessor fails to exercise its right to terminate, to commence forcible detainer or other appropriate proceedings, or to take any other steps required hereunder, lessor shall execute and deliver to lender a power of attorney coupled with an interest to act in the name of lessor in any of the ways herein provided at lender's sole expense. Lessee agrees that, until the loan is repaid to lender in full with interest, lessee shall have no right to

cancel this lease as provided in Section 25 hereof, and lessor agrees that, until it receives written notice from lender that the full amount of the loan with interest has been paid in full or discharged, lessor shall not accept any surrender of this lease by lessee under Section 25 hereof. If this lease is terminated at lender's request by reason of a default by lessee in the performance of any obligation of lessee to lender, lender may sell and assign the shares of lessor allocated to the unit and its lease, or sublet the unit for the account of lender to a reputable person, subject only to the approval of the then managing agent of lessor, which approval shall not be unreasonably withheld or delayed. If written notice of any loan has been given to lessor as described in this section, lender may assign all its rights and shares of lessor allocated to the unit and this lease by giving written notice to lessor by certified or registered mail setting forth the name and address of the assignee. Such assignee and any subsequent assignee or assignees shall thereon have all the rights of lender under this subsection.

15. Repairs by lessee.

(a) Lessee shall keep the interior of the unit, including interior walls, floors, and ceilings, but excluding windows, window panes, window frames, sashes, sills, entrance and terrace doors, frames, and saddles in good repair. Lessee shall do all painting and decorating required in the unit, including the interior of window frames, sashes, and sills, and shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas, and heating fixtures and equipment, and refrigerators, dishwashers, removable and through-the-wall air conditioners, washing machines, ranges, and other appliances as may be in the unit. "Plumbing, gas, and heating fixtures" as used herein includes exposed gas, steam, and water pipes attached to fixtures, appliances, and equipment, and to fixtures, appliances, and equipment to which they are attached, as well as any special pipes or equipment that lessee may install within the wall or ceiling, or under the floor. The term shall not include gas, steam, water, or other pipes or conduits within the walls, ceilings, or floors, or air-conditioning or heating equipment that is part of the standard building equipment. Lessee shall be solely responsible for the maintenance, repair, and replacement of all light-

ing and electrical fixtures, appliances, and equipment, and all meters, fuse boxes or circuit breakers, and the electrical wiring and conduits from the junction box at the riser into and through lessee's unit. Any ventilator or air-conditioning device visible from the outside of the building shall be at all times painted by lessee in a standard color which lessor shall select for the building.

(b) Lessee shall not permit unreasonable cooking or other odors or smoke to escape into the building. Lessee shall not permit any unreasonable noises or vibrations or anything else that would interfere with the rights of or unreasonably annoy other lessees, and lessee shall not obstruct the public halls or stairways.

(c) If, in lessor's sole judgment, any of lessee's equipment or appliances result in or present a substantial danger of damage to the building, or poor quality or interruption of service to other portions of the building, or overloading of or damage to facilities maintained by lessor for supplying water, gas, electricity, or air-conditioning to the building, or if any appliances visible from the outside of the building become rusty or discolored, lessee will, promptly on notice from lessor, remedy the condition, and pending such remedy, shall cease using any appliance or equipment creating the objectionable condition or danger.

(d) Lessee shall comply with all requirements of the National Board of Fire Underwriters, or its successor insurance authorities, and all governmental authorities, and with all laws, ordinances, rules, and regulations with respect to the occupancy or use of the unit. If any mortgage affecting the land or the building contains any provisions pertaining to the right of lessee to make changes or alterations in the unit, or to remove any fixtures, appliances, equipment, or installations, lessee shall comply with the requirements. On lessee's written request, lessor shall furnish to lessee copies of applicable provisions of each and every such mortgage.

16. Lessor's remedies on default. If lessee fails for *[number of days]* days after notice to make repairs to any part of the unit or its fixtures or equipment, as required herein, or fails to remedy any condition that has become objectionable to lessor for any of the reasons set forth above, or if lessee or any person dwelling in the unit requests lessor or its agents or employees to perform any act not herein required to be

performed by lessor, lessor may make or cause to be made the repairs, and may remove the objectionable condition, without incurring any liability. If, in the sole judgment of lessor, the condition requires prompt action, notice of less than *[number of days]* days may be given, and if, in the sole judgment of lessor, an emergency exists, no notice need be given. In all actions taken or caused to be taken by lessor hereunder, lessor and its agents, employees, and contractors shall be conclusively deemed to be acting as agents of lessee, and all contracts entered into by lessor pursuant to this section shall be lessee's legal responsibility whether or not contracts are made in the name of lessee. If lessee fails to perform or comply with any of the other covenants or provisions of this lease within a time, not less than *[number of days]* days, as may be required by a notice from lessor, then lessor may, but need not, enter the unit of lessee and remedy the infraction. Lessor shall be entitled to recover from lessee all expenses incurred by lessor, lessor's agents, employees, or contractors when curing the default, and the expenses shall be payable by lessee on demand as additional assessment.

17. Insurance in rate of fire insurance. Lessee shall not permit anything to be done or kept in the unit that would increase the rate of fire insurance on the building or the contents thereof. If, by reason of the occupancy or use of the unit by lessee, the rate of fire insurance on the building or any unit therein or the contents of either is increased, lessee will, if the objectionable occupancy or use continues for more than *[number of days]* days after written notice thereof is given by lessor, become liable for the additional insurance premiums incurred by lessor or any lessee or lessees of units in the building on all policies so affected. Lessor shall have the right to collect the additional premiums for lessor or any affected lessee or lessees as additional assessment for the unit, due on the first day of the calendar month following written demand therefor by lessor.

18. Alterations.

(a) Lessee shall not, without first obtaining the written consent of lessor, which consent shall not be unreasonably withheld, make in the unit or building, or on any roof, penthouse, terrace, or balcony appurtenant thereto, any alteration, enclosure, or addition, or any alteration of or addition to the water, gas, or steam risers or pipes, heat-

ing or air-conditioning system or units, electrical conduits, wiring or outlets, plumbing fixtures, intercommunication or alarm systems, or any other installation or facility in the unit or building. Performance by lessee of any work in the unit shall be in accordance with any applicable rules and regulations of lessor and governmental agencies as may have jurisdiction thereof. Lessee shall not in any case install any appliance that would overload the existing wiring or equipment in the building.

(b) Lessee shall not, without lessor's written consent, remove any fixtures, appliances, additions, or improvements from the unit except as herein provided. If lessee or a prior lessee has placed or installed, or if lessee places or installs in the unit, at lessee's own expense, any additions, improvements, appliances, or fixtures, including but not limited to fireplace mantels, lighting fixtures, refrigerators, air conditioners, dishwashers, washing machines, ranges, woodwork, wall paneling, ceilings, special doors or decorations, special cabinet work, or special stair railings or other built-in ornamental items, which can be removed without structural alterations or permanent damage to the unit, herein called additions, then title of additions shall remain in lessee, and lessee shall have the right, prior to the termination of this lease, to remove additions at lessee's own expense if certain conditions are satisfied. The conditions are that:

- (1) at the time of the removal, lessee is not in default in the payment of rent or in the performance or observance of any other covenants or conditions of this lease;
- (2) prior to the termination of this lease, lessee repairs at lessee's own expense all damage to the unit caused either by the installation or removal of any of additions;
- (3) in the event that lessee has removed from the unit any articles or materials owned by lessor [*or its predecessor in title*], or any fixtures or equipment necessary for the use of the unit, lessee either restores such articles, materials, fixtures, and equipment, and repairs any damage resulting from their removal and restoration, or replaces them with others of a kind and quality customary in comparable buildings and satisfactory to lessor; and

(4) in the event that any secured lender has acquired a lien on any of the property prior to the execution of this lease, lessee first procures from the lender its written consent to remove the additions.

(c) On expiration or termination of this lease, lessee shall surrender to lessor possession of the unit with all additions, improvements, appliances, and fixtures then included therein, except as herein provided. Any additions, improvements, fixtures, or appliances not removed by lessee on or before the expiration or termination will, at the option of lessor, be deemed abandoned, and shall become the property of lessor, and may be disposed of by lessor without liability or accountability to lessee.

19. Cooperation. Lessee shall always in good faith endeavor to observe and promote the purposes for the accomplishment of which lessor is incorporated.

20. Right of entry. Lessor, its agents, and their authorized workmen shall be permitted to visit, examine, or enter the unit and any storage space assigned to lessee, at any reasonable hour of the day on notice, or at any time and without notice in case of emergency, to make or facilitate repairs in any part of the building, or to cure any default by lessee. Such persons shall also be permitted to remove such portions of the walls, floors, and ceilings of the unit and storage space as may be required for any repair or emergency, provided that lessor shall restore the unit and storage space to its proper and usual condition at lessor's expense if the repairs are the obligation of lessor, or at lessee's expenses if the repairs are the obligation of lessee or are caused by the act or omission of lessee or any of lessee's family, guests, agents, employees, or subtenants.

In order that lessor may at all times have access to the unit and storage rooms for the purposes provided in this lease, lessee shall provide lessor with a key to each lock providing access to the unit and storage rooms, and if any lock is altered or a new lock installed, lessee shall provide lessor with a new key immediately on installation. If lessee is not personally present to open and permit an entry at any time when an entry is necessary or permissible hereunder, and has not furnished a key to lessor, lessor or the agents of lessor may forcibly enter the unit or storage space without liability for damages by forced entry, and without in any manner affecting the obligations and covenants of this lease;

provided that except in case of emergency, entry shall require the authorization of an officer of lessor or an officer of the managing agent, and provided further that during any such entry lessor shall accord reasonable care to lessee's property. The right and authority of lessor stated in this section does not impose, nor does lessor assume by reason thereof, any responsibility or liability for the care or supervision of the unit, or any of the pipes, fixtures, appliances, or appurtenances therein contained, except as herein specifically provided.

21. Reimbursement of lessor's expenses. If lessee is at any time in default hereunder, and lessor incurs any expenses (whether actually paid or not) in performing acts that lessee is required to perform, or in instituting any action or proceeding based on such default, or in defending or asserting a counterclaim in any action or proceeding brought by lessee, the expense, including reasonable attorney's fees and disbursements, shall be paid by lessee to lessor, on demand, as additional assessment.

22. Termination of lease by lessor. On, or at any time after, the happening of any one of the events mentioned in subsections (a) to (h) of this section, lessor may give notice to lessee that the term of this lease shall expire on a date not less than *[number of days]* days after the date of the notice, and the term of this lease shall expire on the date so fixed. All right, title, and interest of lessee hereunder shall on the fixed date be wholly forfeited and lessee shall immediately quit and surrender the unit to lessor, it being the intention of the parties to create a conditional limitation. Thereon, lessor shall have the right to re-enter the unit and to remove all persons and personal property therefrom, either by forcible detainer proceedings, or by any suitable action or proceeding at law or in equity, or by force or otherwise, and to repossess the unit as of its former estate as if this lease had not been made. Lessor shall also have the right to enforce its lien as landlord by distress or other appropriate proceeding. Lessor is free from any liability whatsoever when exercising the right of reentry, repossession, and removal herein granted and reserved.

- (a) Lessee becomes bankrupt. This lease may be terminated if at any time during the term hereof:
  - (1) the then holder of shares is declared bankrupt under the laws of the United States;

- (2) a receiver of all of the property of the holder or of this lease is appointed under any provision of the laws of any state, or of the United States, and the order appointing the receiver is not vacated within *[number of days]* days;
  - (3) the holder makes a general assignment for the benefit of creditors; or
  - (4) this lease or the membership in lessor to which it is appurtenant passes by operation of law or otherwise to anyone other than lessee or a person to whom lessee has assigned this lease in the manner herein permitted, provided that this subparagraph (4) shall not be applicable if this lease devolves on the executors or administrators of lessee and within *[number]* months (which period may be extended by the directors) after the death of lessee, this lease and the membership to which it is appurtenant are transferred to any assignee in accordance with Section 13 hereof.
- (b) Unauthorized assignment, sublease, or occupancy. If this lease is assigned, or if there is any subletting hereunder without full compliance with the requirements of Sections 12 or 13 hereof, or if any person not authorized by Section 11 is permitted to use or occupy the unit, and lessee fails to cause the unauthorized person to vacate the unit within *[number of days]* days after written notice from lessor, this lease may be terminated.
- (c) Default in payment in rent. If lessee remains in default for a period of *[number of days]* days in the payment of any rent or additional rent, or of any installment thereof, and fails to cure the default within *[number of days]* days after written notice from lessor, this lease may be terminated.
- (d) Default in performance of covenants. If lessee is in default in the performance of any covenant or provision hereof, other than the covenant to pay rent, and the default continues for *[number of days]* days after written notice thereof from lessor, this lease may be terminated.
- (e) Objectionable conduct. If at any time lessor determines, on the affirmative vote of *[two-thirds]* of its then board of directors at a meeting duly called for that purpose, that because of objectionable conduct on the part of lessee or of any person dwelling or visiting in the unit, repeated

after written notice from lessor, the continued tenancy of lessee is undesirable, this lease may be terminated.

(f) Termination of all proprietary leases. If at any time lessor determines, on the affirmative vote of [*two-thirds*] of its then board of directors at a meeting of the directors duly called for that purpose, and the affirmative vote of members entitled to exercise at least [*three-fourths*] of the then authorized vote in lessor, at a members' meeting duly called for that purpose, to terminate all proprietary leases, this lease may be terminated.

(g) Destruction of building. If the building is destroyed or damaged and the members decide not to repair or rebuild as provided in Section 6 hereof, this lease may be terminated.

(h) Condemnation. If at any time the building or a substantial portion thereof is taken by condemnation proceedings, this lease may be terminated.

23. Lessor's rights on lessee's default.

(a) If lessor resumes possession of the unit, by any legal means available to it or on expiration of the term pursuant to a notice given as provided in Section 22 hereof concerning any event specified in subparagraphs (a) through (e) inclusive of that section, lessee shall continue to remain liable for payment of a sum equal to the rent that would have become due hereunder, and shall pay the amount in installments at the time the rent would be due hereunder. Suit brought to recover any installment of rent or additional rent shall not prejudice the right of lessor to recover any subsequent installment.

After resuming possession, lessor may, at its option, from time to time: (1) relet the unit for its own account; or (2) relet the unit as agent of lessee, in the name of lessee or lessor, for a term or terms less than, equal to, or greater than the period that would otherwise have constituted the balance of the term of this lease, and may grant concessions or free rent, in its discretion. Any reletting of the unit shall be deemed for the account of lessee unless, within [*number of days*] days after such reletting, lessor notifies lessee that the premises have been relet for lessor's own account. The fact that lessor may have relet the unit as agent for lessee shall not prevent lessor from thereafter notifying lessee that it proposes to relet the unit for its own account. If lessor relets the unit as agent for les-

see, it will, after reimbursing itself for its expenses in connection with reletting, including leasing commissions and a reasonable amount for attorney's fees and expenses, and decorations, alterations, and repairs in and to the unit, apply the remaining proceeds of the reletting against lessee's continuing obligation hereunder. There shall be a final accounting between lessor and lessee as per subsection (c) below.

(b) On termination of this lease under the provisions of subsections (a) through (e) inclusive of Section 22 hereof, lessee shall surrender to lessor the proprietary lease [*and the certificate representing the membership to which the lease is appurtenant*]. Whether or not the [*lease is/lease and certificate are*] surrendered, however, lessor may issue a new proprietary lease for the unit [*and a new membership certificate*] when a purchaser therefor is obtained, provided that the issuance of such lease [*and certificate*] to the purchaser is authorized by resolution of the directors, or by a writing signed by a majority of the directors, or by members entitled to vote at least a majority of the then authorized membership votes in lessor. On such issuance, the lease [*and certificate*] held by lessee shall be automatically canceled and rendered null and void. Lessor shall apply the proceeds received for the issuance of the new lease toward the payment of lessee's indebtedness hereunder, including interest, attorney's fees, and other expenses incurred by lessor. If the proceeds are sufficient to pay the indebtedness, lessor shall pay over any surplus to lessee; if the proceeds are insufficient, lessee shall remain liable for the balance of the indebtedness.

On issuance of any such new proprietary lease [*and certificate*], lessee's future liability hereunder shall cease, and lessee shall only be liable for rent and expenses accrued to that time. Lessor shall not, however, be obligated to sell such membership and appurtenant lease or otherwise make any attempt to reduce damages.

(c) There shall be a final accounting between lessor and lessee on the earliest of the four following dates:

- (1) the date of expiration of the term of this lease as stated in Section 2 hereof;
- (2) the date as of which a new proprietary lease covering the unit becomes effective;

- (3) the date lessor gives written notice to lessee that it has relet the unit for its own account; or
- (4) the date on which all proprietary leases of lessor terminate.

From and after the date on which lessor becomes obligated to account to lessee as above provided, lessor shall have no further duty to account to lessee for any proceeds of reletting, and lessee shall have no further liability for sums thereafter accruing hereunder, but such termination of lessee's liability shall not affect any liabilities theretofore accrued.

24. Surrender of possession. On termination of this lease under the provisions of subsections (a) through (e) inclusive of Section 22 hereof, lessee shall remain liable as provided in that section. On termination of this lease under any other of its provisions, lessee shall be and remain liable to pay all rent, additional rent, and other charges due or accrued, and to perform all covenants and agreements of lessee up to the date of termination. On or before any such termination, lessee shall vacate the unit and surrender possession thereof to lessor or its assigns, and on demand of lessor or its assigns, shall execute, acknowledge, and deliver to lessor or its assigns any instrument reasonably required to evidence the surrendering of all estate and interest of lessee in the unit, or in the building of which it is a part.

25. Lessee's option to cancel. This lease may be cancelled by lessee on any *[specify date]* after the *[ordinal number]* anniversary of the execution hereof, on complying with all the provisions herein set forth. Irrevocable written notice of cancellation must be given by lessee to lessor on or before *[date]* of the calendar year in which such cancellation is to occur.

- (a) Deposits required. At the time of the giving of the notice specified above, lessee shall give lessor:
  - (1) lessee's copy of this lease with a written assignment in form required by lessor, in blank, effective as of *[date]* of the year of cancellation, free from all subleases, tenancies, liens, encumbrances, and other charges;
  - (2) lessee's membership certificate, endorsed in blank for transfer; and
  - (3) a written statement setting forth in detail those ad-

ditions, improvements, fixtures, or equipment, that lessee has the right to remove under the terms of this lease, and intends to remove.

(b) Removal of fixtures. All additions, improvements, appliances, and fixtures that are removable under the terms of this lease, and that are enumerated in the statement made as provided in subsection (a)(3) above, shall be removed by lessee prior to [date] of the year of cancellation. On or before such [date], lessee shall deliver possession of the unit to lessor in good condition with all required equipment, fixtures, and appliances installed and in proper operating condition. The unit shall be free from all subleases and tenancies, liens, encumbrances, and other charges, and lessee shall pay to lessor on or before such [date] all rent, additional rent, and other charges payable under this lease up to and including the following [date].

(c) Permission to show and occupy premises. At all reasonable times after receipt of notice of lessee's cancellation, lessor and its agents may show the unit to prospective lessees, contractors, and architects. After [date] or the earlier vacating of the unit, lessor and its agents, employees, and lessees may enter the unit, occupy the same, and make any alterations and additions therein as lessor may deem necessary or desirable, without diminution or abatement of the rent due hereunder.

(d) Effective date of cancellation. If lessee is not otherwise in default hereunder, and if lessee has timely complied with all the provisions of subsections (a) and (b) above, then this lease shall be cancelled, and all rights, duties, and obligations of the parties hereunder (other than the obligation of lessee to pay any indebtedness owing to lessor on such date) shall cease as of the date fixed in the notice of cancellation, and the membership in lessor to which this lease is appurtenant shall become the absolute property of lessor.

(e) Rights on lessee's default. If lessee gives the notice specified in this section, but fails to comply with any of the other provisions of this section, lessor shall have the option, at any time prior to [date], to: (1) return to lessee the lease, membership certificate, and other documents deposited, in which case lessee shall be deemed to have withdrawn the notice of intention to cancel; or (2) treat this lease as cancelled as of the date named in the notice

as the date of cancellation of the lease, and to bring such proceedings or actions as it may deem best to enforce the covenants of lessee, and to collect from lessee the payments lessee is required to make hereunder, together with reasonable attorney's fees and expenses.

26. Extension of option to cancel. If on *[date]* in any year, the total number of membership interests owned by lessees holding proprietary leases who, pursuant to Section 25, have given notice of intention to cancel the leases on *[date]* of such year, is a total of *[percentage]%* or more of lessor's outstanding memberships, lessor will, prior to *[date]* in such year, give written notice to the authorized membership of lessor, stating the total number of memberships then outstanding and in its records and the total number of memberships holding proprietary leases who have given notice of intention to cancel. Proprietary lessees to whom such notice has been given shall have the right to cancel their leases in compliance with provisions of Section 25 hereof, provided only that written notice of intention to cancel such leases is given on or before *[date]* instead of *[date]*.

27. Termination of all leases under certain circumstances. If lessees owning at least *[percentage]%* of the then authorized membership of lessor exercise the option to cancel their leases in any one year, then this and all other proprietary leases shall terminate on *[date]* of the year in which the options are exercised as though every lessee had exercised such option. In such event, none of the lessees shall be required to surrender their memberships to lessor, and all certificates of memberships delivered to lessor by those who had, during that year, served notice of intention to cancel their leases under the provisions hereof, shall be returned to such lessees.

28. Procedure on termination of all proprietary leases. No later than *[number of days]* days after the termination of all proprietary leases, whether by expiration of their terms or otherwise, a special meeting of members of lessor shall be held to determine whether: (a) to continue to operate the building as a residential unit building; (b) to alter, demolish, or rebuild the building or any part thereof; or (c) to sell the building and liquidate the assets of lessor. The directors shall carry out the determination made at the meeting, and all holders of the then issued and outstanding membership interests of lessor shall have such rights as do shareholders of corporations having title to real estate.

29. Applicability of covenants. As used herein, the term "lessor" shall include the successors and assigns of lessor. As used herein, the terms "lessee" and "members of lessor" shall include the executors, administrators, legal representatives, legatees, distributees, and assigns of lessee and such members. The covenants herein contained shall apply to, bind, and inure to the benefit of lessor, lessee, and members of lessor, except as herein specifically provided.

30. Lessor's additional remedies. In the event of a breach or threatened breach by lessee of any provision hereof, lessor shall have the right of injunction, and the right to invoke any remedy at law or in equity, in addition to reentry, forcible entry and detainer, and other remedies herein provided for. The election of one or more remedies shall not preclude lessor from any other remedy.

31. Waivers. Failure of lessor to insist, in any one or more instances, on strict performance of any of the provisions of this lease, or to exercise any right or option herein contained, or to serve any notice, or to institute any action or proceeding, shall not be construed as a waiver or a relinquishment for the future of any provisions, options, or rights. Receipts by lessor of rent, with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of the breach, and no waiver by lessor of any provision hereof shall be deemed to have been made unless in writing expressly approved by the directors.

32. Notices. Any notice by or demand from either party to the other required or permitted to be given hereunder shall be deemed duly given only if in writing and sent by registered mail. A notice by lessee shall be addressed to lessor at the building, with a copy sent by regular mail to lessor's managing agent; a notice to lessee shall be addressed to the building. Either party may, by notice served in accordance herein, designate a different address for service of such notice or demand. Notices or demands shall be deemed given on the date mailed.

33. Lessee more than one person. If more than one person is named as lessee herein, lessor may require the signatures of such persons in connection with any notice to be given or action to be taken by lessee hereunder, including without limitation, the surrender or assignment of this lease, or any request for consent to assignment or sublease. Each person named as lessee shall be jointly and severally liable for all of

lessee's obligations hereunder. Any notice by lessor to any person named as lessee shall be sufficient, and shall have the same force and effect as though given to all persons named as lessee.

34. Partial invalidity; Effect. If any clause or provision herein contained is adjudged invalid, such judgment shall not affect the validity of any other clause or provision of this lease, or constitute a cause of action in favor of either party against the other.

35. Headings. Headings preceding sections and subsections of this lease are not to be considered a part of this lease, and are in no way intended to limit or fully describe the contents of the sections or subsections they precede.

36. Oral modifications. The provisions of this lease may not be changed orally.

Executed on [date], at [designate place of execution].

---

[Signatures and titles as appropriate]

Executed in the presence of \_\_\_\_\_

[Signatures]

[Acknowledgment]

This instrument was prepared by

\_\_\_\_\_  
[Name]

\_\_\_\_\_  
[Address]

#### NOTES TO FORM

##### Drafter's Notes

The listing of contents by section number and heading at the beginning of the form is included for convenience in using the form. If desired, however, a listing of this type may be included in a propri-

etary lease being prepared. In this event, page references to the lease, as drafted, should also be included.

#### Tax Notes

Though the property is owned by the lessor corporation, and the lessee is technically occupying it as a tenant, for tax purposes the lessee is treated as the owner of the property. A stockholder in a cooperative corporation must have the right to occupy, as a dwelling, a unit of the property owned by the corporation. I.R.C. § 216. (The Code requires "proprietary lease or right of tenancy.") This requirement has led to the proprietary lease under which the tenant-stockholder occupies his or her dwelling.

Under the provisions governing cooperative housing corporations and their tenant-stockholders, occupancy under a proprietary lease is considered the same as ownership of the property. A tenant-stockholder is subject to the same tax rules that apply to taxpayer holding residences directly.

For discussion concerning proprietary leases, see § 8:6.

See the more detailed discussion of this subject commencing at § 8:16.

For pertinent checklist, see § 8:21. As to formal requirements in execution of the lease, see § 8:8.

Optional provisions appropriate under various circumstances for inclusion in this lease are set forth in §§ 8:40 to 8:49.

#### Section 25

##### Drafter's Notes

This section provides tenant-members with a "bail-out" in case of a drastic change in the economic climate or real estate market. The lessee may surrender the lease and be relieved of all obligations thereunder, but may not receive any compensation from the corporation for such surrender.

#### **§ 8:33 Agreement for assignment of proprietary lease and membership**

Assignment agreement made by and between [*name of assignor*], of [*address*], in the City of [*name of city*], County of [*name of county*], State of Florida, referred to below as "assignor," and [*name of assignee*], of [*address*], in the City of [*name of city*], County of [*name of county*], State of Florida, referred to below as "assignee."

1. Items assigned. Subject to the terms and conditions of this agreement, assignor agrees to assign, and assignee agrees to accept assignment of, the following:

(a) Proprietary lease. Assignor's entire right, title, and interest in a proprietary lease, hereinafter called the proprietary lease, between [*name of corporation*], a Florida

corporation not for profit, as lessor, and *[assignor or assignor's predecessor in interest]* as lessee. The lease covers Apartment No. *[specify]*, hereinafter called the "unit," in an apartment building owned by *[name of corporation]* and known by the name *[specify name]*, and by street address as *[address]*, City of *[name of city]*, County of *[name of county]*, State of Florida.

(b) Fixtures and equipment. Assignor's right, subject to the provisions of the proprietary lease, in and to all fixtures, equipment, and personal property now contained in the unit, excepting only furniture, furnishings, and personal effects. No additional equipment or fixtures are to be installed by assignor or the corporation.

(c) Memberships rights. All of assignor's rights of membership in *[name of corporation]*, which membership includes the right to receive the proprietary lease and the right to exercise *[one membership vote]*.

2. Payments by assignee. In consideration of the assignment of assignor's interests as set forth above, assignee shall pay a total purchase price of *[\$dollar amount]*, as follows:

(a) the sum of *[\$dollar amount]* on the signing of this agreement, receipt of which is acknowledged subject to collection; and

(b) the sum of *[\$dollar amount]* in cash, certified check, or cashier's check payable to the order of seller, to be delivered at the closing.

3. Assignment as is. Assignee acknowledges that assignee has inspected the unit and agrees to accept assignment of assignor's interest therein with the unit in its present condition, making due allowance for wear and tear and damage normally incident to removal of fixtures and other property not included in the assignment.

4. Inspection of corporate documents. Assignee acknowledges that assignee has examined the proprietary lease, and the articles of incorporation, the bylaws, and the house rules *[and [specify other]]* of *[name of corporation]*, and further acknowledges that assignee is familiar with the terms of the documents and understands that this assignment is subject to such terms.

5. Assignor's warranty. Assignor warrants, covenants, and represents that assignor is the lessee under the proprietary lease, and that assignor is the holder of the member-

ship in [*name of corporation*], and is the owner of the fixtures, equipment, and personal property hereinabove described, free and clear of all liens, claims, and encumbrances, other than such liens and mortgages as may exist on the real property of which the unit is a part.

6. Assignor to procure assignments and consents. Assignor shall execute all assignments and shall procure all consents, duly executed, necessary to the effective transfer of the proprietary lease and the membership in the corporation appurtenant thereto, in compliance with the terms of the proprietary lease and with the bylaws of the corporation.

7. Date of transfer. Assignment of the proprietary lease shall become effective on [*date*]. All amounts due under the proprietary lease shall be apportioned as of that date; assignor shall pay all charges accruing up to that date and assignee shall pay all charges accruing on that date and thereafter.

8. Closing. Transfer of title hereunder shall be closed, papers shall be delivered, and payments and adjustments made at [*address*], in the City of [*name of city*], County of [*name of county*], State of Florida, on [*date*], at [*time*].

9. Assignor to deliver documents. Assignor shall deliver the following documents to assignee on or before the closing:

(a) Proprietary lease. The original proprietary lease referred to in Section 1(a) above, together with the assignments and consents as may have been necessary to transfer to assignor the interest of the lessee named therein and any other predecessors in title of assignor.

(b) Assignment of membership and proprietary lease. An assignment of membership and the proprietary lease, in a form approved by [*name of corporation*], conveying to assignee all of assignor's right, title, and interest in and to the proprietary lease, as a member of [*name of corporation*], and containing a warranty and covenant to the effect that good and valid title is being transferred. Assignor shall also deliver a copy of this assignment to [*name of corporation*].

(c) Consent of corporation. The consent of [*name of corporation*] to the transfer to assignee of the proprietary lease and the membership in the corporation to which it is appurtenant, or in the alternative, a certificate by an officer of the corporation that a consent to such assignment and transfer is on file with the corporation.

(d) Statement that proprietary lease in effect. A statement executed by the corporation to the effect that the proprietary lease is in full force and effect, it being understood that unless specifically stated therein, such statement shall not constitute a warranty or representation by the corporation that no default exists under the proprietary lease.

10. Assignee to deliver document. On or before the closing date, assignee shall deliver to assignor copies of an agreement, in a form approved by the corporation, signed and acknowledged by assignor, assuming and agreeing to be bound by all the covenants and conditions of the proprietary lease as of the effective date of the transfer as set forth in Section 7 above.

If so requested by the corporation, assignee agrees to surrender the assigned proprietary lease, and to execute a new lease covering the unit in the same form as the proprietary lease, for the full unexpired term thereof.

11. References. Assignee agrees to submit to the corporation or its managing agent, expeditiously on the execution of this agreement, adequate references as to assignee's financial and social reputation, and thereafter to cooperate with any reasonable requests of the corporation pursuant to a determination of assignee's fitness as a tenant of the corporation.

12. Delivery of possession. Assignor agrees, as of the closing date, to vacate the unit, and to deliver possession of and keys to the unit to buyer.

13. Termination of agreement. If any of the following conditions occur prior to closing, this agreement shall terminate and neither party shall have any rights hereunder, except that assignee shall have the right to recover, and assignor shall be obligated to refund, the deposit paid by assignee under Section 2(a) hereof:

(a) Assignor's inability to perform. If assignor is unable, except by willful default, to deliver any of the documents specified in Section 9 hereof, except that if seller is unable to deliver the consent of *[name of corporation]* required in Section 9(c) hereof, and such failure is the result of buyer's willful default in the performance of buyer's obligations under Section 11 hereof, seller shall have all the rights specified in Section 14 hereof.

(b) Cancellation of proprietary lease. If *[name of corpora-*

*tion] elects to cancel the proprietary lease under any right or privilege contained therein.*

(c) Casualty losses. If the unit is destroyed or so injured by fire or other casualty as to render it unfit for occupation.

14. Assignee's default. If, on the closing date, assignee fails to take title to the proprietary lease and to assume the membership in *[name of corporation]* to which it is appurtenant, and to pay to assignor the balance of the purchase price and the adjustments as may be payable under Section 7 hereof, and if such failure is for any reason other than those set forth in Section 13, subsections (b) and (c) hereof, assignor may, at assignor's option, treat the amount paid by assignee under Section 2(a) as liquidated damages, in which event neither party shall have any further rights against the other under this agreement. The preceding privilege shall not be construed as a waiver of any claim assignor may have against assignee because of any such default, however, and assignor may elect to pursue any such claim in the absence of a specific exercise of the privilege set forth in this section.

15. Brokers. Assignee represents and warrants to seller that buyer did not negotiate with any broker in connection with this sale *[other than [name of broker]]. [In reliance on such representation, assignor agrees to pay the broker a commission pursuant to a separate agreement with the broker.]*

16. Assignor's representation as to rent. Assignor represents that the annual rent for the unit at the present time is *[\$dollar amount]*.

17. Time of the essence. Time is of the essence of this agreement. However, a reasonable postponement of the closing shall be allowed in the event of any delay in obtaining the consent of the corporation as required by Section 6 of this agreement.

18. Entire agreement. This writing contains the entire agreement of the parties, and supersedes all prior and contemporaneous agreements, written and oral. This agreement cannot be changed orally.

19. Assignment of agreement. Assignee shall not assign this agreement or any of assignee's rights hereunder. Subject to this limitation, this agreement shall bind and inure to the benefit of the parties, their personal representatives, and successors in interest.

Executed at *[designate place of execution]*, in the City of

[name of city], County of [name of county], State of Florida  
on [date].

---

[Signatures]

Executed in the presence of \_\_\_\_\_

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[Signatures]

[Acknowledgments]

This instrument was prepared by

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[Name]

---

[Address]

#### **NOTES TO FORM**

##### **Tax Notes**

For both legal and tax purposes, this is the cooperative housing equivalent of a real estate sales contract. The tax consequences to the parties will be the same as if the property had been a single-family residence owned in fee simple.

As to transfers of cooperative interests, generally, see § 8:7; as to formal requirements for such transfers, see § 8:8.

##### **Section 9(d), (e)**

##### **Drafter's Notes**

For form of corporation's consent to assignment, see § 8:34.

For forms and materials related to assignments, see Assignments (Ch 23).

##### **Section 10**

##### **Drafter's Notes**

For form of assignee's agreement to assume and be bound by covenants and conditions of proprietary lease, see § 8:36.

**§ 8:34 Consent of corporation to assignment of proprietary lease and membership****CONSENT TO ASSIGNMENT**

A. *[Name of corporation]*, a Florida corporation (referred to below as the “corporation”), is the lessor of a certain unit, known as Unit No. *[specify]* (referred to below as the “unit”) in a building owned by lessor, known by name as *[specify name]* at *[address]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida.

B. The unit is held by *[name of assignor]*, of *[address]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida (referred to below as “assignor”), under a proprietary lease (referred to below as the “lease”) executed on *[date]*, by and between the corporation as lessor and assignor or assignor’s predecessor in interest as lessee. Assignor is also a member of record of the corporation to which membership the lease is appurtenant.

C. Assignor has notified the corporation of assignor’s desire to assign assignor’s interest under the proprietary lease and assignor’s membership in the corporation to *[name of assignee]* of *[address]*, in the City of *[name of city]*, County of *[name of county]*, State of Florida (referred to below as “assignee”), and has requested pursuant to the lease that the corporation consent to the assignment.

Pursuant to its obligations under the lease, the corporation consents to the assignment of the lease and the membership to which it is appurtenant from assignor to assignee, and certifies as follows:

1. The previously mentioned consent has been approved in compliance with all the terms and conditions of the proprietary lease.
2. The lease is in full force and effect.
3. The membership in the corporation to which the lease is appurtenant appears in the name of assignor on the books of the corporation. However, the corporation makes no further representation as to the right of assignor to transfer the membership or to assign the lease appurtenant thereto.
4. The corporation has not been notified of any prior assignment or pledge of the lease by the assignor, or of any lien on the lease.

5. The corporation is not informed of any default in respect to any of the terms, covenants, and conditions of the lease.

The previously mentioned consent is given on the understanding and condition that the corporation has no obligation to install or remove any fixtures or equipment in the unit. The corporation makes no representation as to the physical condition of the unit, or as to compliance with any laws, ordinances, rules, and regulations of any governmental authority.

Executed at [*designate place of execution*], in the City of [*name of city*], County of [*name of county*], State of Florida, on [*date*].

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[Signature and title]

[Acknowledgment]

#### NOTES TO FORM

##### Drafter's Notes

Many proprietary leases require that the assignor procure the consent of the corporation to the transfer. For discussion of transfers of cooperative interests generally, see § 8:7.

#### § 8:35 Transfer of membership agreement

Memorandum of agreement and transfer between [*name of member*], referred to below as “transferor,” residing at [*address*], in the City of [*name of city*], County of [*name of county*], State of Florida, and [*name of transferee*], referred to below as “transferee,” residing at [*address*], in the City of [*name of city*], County of [*name of county*], State of Florida.

#### RECITALS

1. Transferor is a member of [*name of cooperative apartment corporation*], the owner and holder of membership certificate No. [*identify*] issued by the corporation, the occupant under that certain proprietary lease with the corporation dated [*date*], and in possession and use, with transferor’s family, of dwelling unit Number [*identify*], referred to and described in the proprietary lease.
2. Transferor desires to retire from the cooperative of

which the dwelling unit is a part and to sell transferor's membership, and transferee desires to purchase the same.

3. Transferor has notified the corporation of transferor's desire and intention to leave the cooperative apartment corporation and to sell transferor's interest therein [*and the corporation has waived in writing its right to purchase transferor's membership/and more than [number of days] days have elapsed without the exercise of the corporation's option to purchase the membership*].

4. The corporation has approved the transferee as a member and occupant of the dwelling unit in place of transferor.

In consideration of the reciprocal promises and agreements of the parties hereto, it is agreed:

1. Transferor shall and does assign, transfer, set over, and confirm unto transferee, and transferee accepts and takes from transferor, all the following:

- (a) membership certificate No. [*specify*] in [*name of corporation*], a corporation;
- (b) all right and interest of transferor in and under that certain proprietary lease executed by the corporation and transferor under date of [*date*];
- (c) all right and interest of transfer or in and to dwelling unit No. [*specify*] as referred to and described in the proprietary lease, and in and to all other property of the corporation;
- (d) all right and interest of transferor as assured under fire and extended coverage and other casualty policies on or relating to the dwelling unit, being policy Nos. [*specify*] with [*name or names of insurance companies*]; and
- (e) equipment, fixtures, and furnishings in the dwelling unit more fully described in Exhibit "[*exhibit omitted*]," attached and incorporated herein by reference.

2. The purchase price for the property herein sold and transferred shall be the sum of \$[*dollar amount*], payable as follows: [*specify manner of payment, with dates and amounts as applicable*].

3. Transferor shall vacate the dwelling unit and give possession of the unit [*and of the personal property described in Exhibit "[exhibit omitted]"*] to transferee on or before [*date*].

4. Transferee shall enter into and execute a new propri-

etary lease with the corporation, in a form approved by the corporation [*and the Federal Housing Administration*] not later than [*date*], so that transferor may secure a general release from the corporation of all transferor's obligations as a member thereof, pursuant to the bylaws.

5. The parties shall execute all further instruments necessary or appropriate to the carrying into effect of the provisions of this instrument, or to comply with the requirements of the corporation [*and the Federal Housing Administration*].

In witness, the parties have executed this instrument at [*designate place of execution*], in the City of [*name of city*], County of [*name of county*], State of Florida, on [*date*].

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[Signatures]

The preceding agreement and transfer of the membership and all membership rights by [*name of transferor*] to [*name of transferee*] is approved, and [*name of transferee*] is accepted as a member of the tenant-owned unit project owned and conducted by the undersigned corporation, this [*ordinal number*] day of [*month*], [*year*].

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[Name of corporation]

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[Signatures of corporate officers]

[Acknowledgment]

#### NOTES TO FORM

##### Research References

###### *Legal Encyclopedias*

Am. Jur. 2d, Restrictions and conditions on transfers of interests in unit cooperative, Condominiums and Cooperative Apartments § 83.; Reasons for controlling transfer of membership interests in cooperative, Condominiums and Cooperative Apartments § 83.

**§ 8:36 Assumption of proprietary lease****ASSUMPTION OF LEASE**

*[Name of assignee], of [address], in the City of [name of city], County of [name of county], State of Florida, referred to below as "assignee," is the assignee named in a certain instrument of assignment executed on [date] by [name of assignor], of [address], in the City of [name of city], County of [name of county], State of Florida, referred to below as "assignor." By such instrument, assignor assigns to assignee all of assignor's interest under a certain proprietary lease, referred to below as the "lease," dated [date], made by and between [name of corporation], a Florida corporation not for profit with offices at [address], in the City of [name of city], County of [name of county], State of Florida, as lessor, and assignor, or assignor's predecessor in interest, as lessee, and covering Unit No. *[identify]* in premises known by name as [name of premises] at [address], in the City of [name of city], County of [name of county], State of Florida.*

Under the terms of the lease, no assignment or transfer thereof shall take effect as against the corporation for any purpose until an agreement in form approved by the corporation is executed and acknowledged by the assignee, assuming and agreeing to be bound by all the covenants and conditions of the lease.

In compliance with the terms of the lease, and in order to render effective the assignment thereof, assignee accepts the assignment of the lease, and agrees with assignor and the corporation, from and after the effective date of the assignment, to pay promptly when due all rent, assessments, and additional rent payable by the lessee under the lease, and to perform and observe all covenants and conditions required to be performed and observed by the lessee under the terms of the lease.

Dated [date].

---

*[Signature]*

*[Acknowledgment]*

**NOTES TO FORM****Drafter's Notes**

The proprietary lease typically requires that an assignee either execute an assumption of the lease or execute a new lease, at the option of the corporation.

For discussion of transfers of cooperative interests, see § 8:7.

**§ 8:37 Sublease of cooperative apartment**

This agreement is made on [date] between [name of sublessor], with an address of [address], [city], Florida (referred to here as "Sublessor"), and [name of sublessee], with an address of [address], [city], Florida (referred to here as "Sublessee").

**RECITALS:**

A. Sublessor is a member of [name of cooperative apartment association] (referred to here as the "Cooperative") and leases from [name of cooperative apartment association] a cooperative apartment, unit number [specify], located at [address], [city], Florida.

B. Sublessor now desires to sublease [his/her] cooperative apartment to Sublessee, and Sublessee desires to lease the cooperative apartment from Sublessor.

1. PREMISES; TERM OF SUBLEASE. Sublessor subleases to Sublessee, on the terms and conditions set forth in this Sublease, the residential premises located in the building of the Cooperative at [address], unit number [identify], [city], Florida, for a term of [number] [months/years], with the term beginning on [date] and ending on [date].

2. RENT. Sublessee shall pay a rental price of \$[dollar amount] per month, to be paid in advance to [specify] at [address] on or before the first day of each month during the term.

3. SECURITY DEPOSIT. Sublessee shall deposit with Sublessor upon execution of this sublease the sum of \$[dollar amount] as security for Sublessee's faithful performance of Sublessee's obligations under this sublease. If Sublessee fails to pay rent or other charges when due under this Sublease, or fails to perform any of its other obligations under this sublease, Sublessor may use or apply all or any portion of the security deposit for the payment of any rent or other amount then due under this

sublease and unpaid, for the payment of any other sum for which Sublessor may become obligated by reason of Sublessee's default or breach, or for any loss or damage sustained by Sublessor as a result of Sublessee's default or breach. If Sublessor so uses any portion of the security deposit, Sublessee shall, within [*number of days*] days after written demand by Sublessor, restore the security deposit to the full amount originally deposited, and Sublessee's failure to do so shall constitute a default under this sublease. Sublessor shall not be required to keep the security deposit separate from its general accounts, and shall have no obligation or liability for payment of interest on the security deposit. Within [*number of days*] days after the term of this sublease has expired, or Sublessee has vacated the premises, whichever shall last occur, and provided Sublessee is not then in default of any of its obligations under this sublease, the security deposit, or so much of it as had not already been applied by Sublessor, shall be returned to Sublessee.

4. COVENANTS OF SUBLESSEE.

a. Sublessee agrees to:

- (i) take occupancy and occupy the premises for the stated term;
- (ii) use the premises for residential occupancy and for no other purpose;
- (iii) pay the full rental price when it becomes due, without demand;
- (iv) pay the utility bills for the premises when and as they become due; and
- (v) maintain the premises free from disrepair.

b. Sublessee agrees not to:

- (i) paint the walls or any other part of the unit, or remodel any part of the unit, or make any other such change to or in the premises without the prior written consent of Sublessor and the Cooperative;
- (ii) use the premises or permit them to be used for any purpose that violates any local, state, or federal law or ordinance;
- (iii) use the premises or allow the premises to be used in any manner that disturbs the quiet enjoyment of any other resident of the building; and
- (iv) keep or allow to be kept any explosive substance or hazardous material on the premises.

5. COMPLIANCE WITH RULES AND BYLAWS. Sublessee shall comply with the bylaws and rules and regulations of the Cooperative now existing, or enacted by the Cooperative during the tenancy of Sublessee, and subject to all the terms of the occupancy agreement made between the Cooperative and Sublessor. In the event that Sublessee is adjudicated bankrupt, or makes an assignment for the benefit of creditors, this agreement, at the option of Sublessor, shall terminate, and the premises shall be surrendered to Sublessor, who reserves the right in either of those events to re-enter and repossess the premises.

6. RIGHTS AND DUTIES OF SUBLLESSOR AND COOPERATIVE.

a. Sublessor and/or the agents of the Cooperative shall deliver possession of the premises to Sublessee on the date of the commencement of the lease term.

b. With *[number]* *[hours/days]* prior written notice to Sublessee, Sublessor and/or agents of the Cooperative may enter into and on the premises to make necessary repairs, to protect the property from damage, and for all similar purposes.

7. SURRENDER OF PREMISES. Sublessee agrees to surrender the premises at the end of the sublease term in the same good condition as when Sublessee took occupancy, except for ordinary wear and tear, and except for damage by fire and other casualties not occurring through the negligence of Sublessee or of Sublessee's guests.

8. EFFECT OF UNINHABITABILITY OF PREMISES. It is further agreed that if the premises become uninhabitable by reason of fire not caused by the negligence of Sublessee, or of Sublessee's agents, employees, or guests, the rental reserved shall be suspended until the premises have been restored to a habitable condition, Sublessor not being obliged, however, to rebuild or restore the premises.

9. EFFECT OF BREACH BY LESSEE OR BANKRUPTCY; RIGHT OF REENTRY. It is further agreed that, on the breach by Sublessee of any agreement or covenant contained in this sublease, or if Sublessee is adjudged bankrupt or makes an assignment for the benefit of creditors, Sublessor may, without notice, re-enter and repossess the premises, and exercise general supervision and control over the premises for the balance of the term, and that no re-entry or reletting or exercise of right or control

over the premises by Sublessor shall be construed as a surrender or acceptance of a surrender of the premises by Sublessee, but shall be an option granted Sublessor and reserved by Sublessor to protect Sublessor's rights and those of the Cooperative. No re-entry, substitution of tenants, or reletting of the premises shall be construed as an abatement of the rent agreed to be paid, or as a waiver of Sublessee's liability; provided, however, that any amount received from any substituted tenant, after deducting all proper charges, costs, expenses, and damages, including any proper attorney's fees, incurred by Sublessor, shall be credited to Sublessee, who shall remain liable for the full term and for the full amount of rent.

10. COOPERATIVE'S CONSENT TO SUBLICENSE; RIGHT TO TERMINATE. This sublease requires the consent of the Cooperative and will not become effective until the required consent has been obtained by the parties. The Cooperative may terminate this sublease at any time in the event of default by Sublessee of any of the terms of this sublease.

11. FURTHER ASSIGNMENT AND SUBLETTING. Sublessee shall not to assign this sublease or sublet the premises or any part of the premises without the prior written consent of Sublessor and the Cooperative. Sublessor and the Cooperative each have the right to without their consent on any such assignment or further sublet at their sole discretion for any reason.

12. ATTORNEYS FEES. If Sublessor, Sublessee, or the Cooperative shall commence an action against the other arising out of or in connection with this sublease, the prevailing party shall be entitled to recover its court costs and reasonable attorney's fees.

IN WITNESS OF THE ABOVE, the parties to this agreement have caused it to be executed on the date indicated below.

Dated: *[date]*

---

*[Signatures]*

COOPERATIVE'S CONSENT TO SUBLICENSE  
The undersigned, on behalf of the Cooperative, consents to

the foregoing sublease between [*name of sublessor*] as Sublessor and [*name of sublessee*] as Sublessee for the term specified in the sublease. The Cooperative's consent to this sublease shall not be considered a waiver of any restriction on assignment or subletting contained in the occupancy agreement between the Cooperative and Sublessor. Nor shall this consent be deemed a consent to any extension of this sublease or any further or future assignment or subletting by Sublessor. During the term of this sublease, the occupancy agreement between Sublessor and the Cooperative shall remain in full force and effect.

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[Signature]

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[Printed Name]

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[Title]

**§ 8:38 Notice to lessee—Termination of proprietary lease**

To: \_\_\_\_\_ [*lessee*]  
\_\_\_\_\_ [*address*]

**NOTICE OF TERMINATION**

Notice is given, pursuant to Section [*specify*] of the proprietary lease entered into between you as lessee and the undersigned as lessor, that the term of your lease shall expire, and all of your right, title, and interest under the lease shall be wholly forfeited on [*date*]. On or before that date, you shall quit and surrender the unit to the undersigned, and the undersigned shall have the right to re-enter the unit and to remove all persons and personal property therefrom, either by summary proceeding, by any other suitable action or proceeding at law or in equity, or by force or otherwise, and to repossess the unit as of the former estate of the undersigned as if such lease had not been made. No liability whatsoever shall attach to the undersigned by exercising this right of reentry.

The proprietary lease is being terminated for the following reason specified in Section [specify] of the lease: [specify reason for termination].

Dated [date].

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[Signature and title]

cc: [Secured lender]

**§ 8:39 Notice to lessor—Exercise of option to cancel**

To: \_\_\_\_\_ [lessor]  
\_\_\_\_\_ [address]

**EXERCISE OF OPTION TO CANCEL**

Notice is given, pursuant to Section [identify] of the proprietary lease entered into between the undersigned as lessee and you as lessor, that the undersigned exercises the option to cancel granted in Section [identify] of the lease, and shall deliver possession of the unit to you, free and clear of all liens, encumbrances, and other charges, in good condition with all required equipment, fixtures, and appliances installed and in proper operating condition, on or before [date], the surrender date.

Notice is further given that the following additions, improvements, appliances, and fixtures which are removable under the terms of the proprietary lease shall be removed by the undersigned on or before the surrender date: [specify additions].

Enclosed herein please find copies of the following documents, deposited in accordance with the provisions of Section [specify] of the proprietary lease: (1) lessee's copy of the proprietary lease with a written assignment, in blank, effective as of the surrender date, free from all subleases, tenancies, liens, encumbrances, and other charges; and (2) lessee's membership certificate for cancellation and issuance of a new one.

Dated [date].

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[Signature]

**B. OPTIONAL LEASE PROVISIONS****§ 8:40 Waiver of subrogation**

Lessor shall use its best efforts to obtain a provision in all insurance policies carried by it waiving the right of subrogation against lessee. To the extent any loss or damage is covered by any insurance policies which contain such waiver of subrogation, lessor releases lessee from any liability with respect to such loss or damage. In the event that lessee suffers loss or damage for which lessor would be liable, and lessee carries a policy or policies of insurance covering such loss or damage and containing a waiver of subrogation against the landlord, lessee releases lessor from any liability with respect to such loss or damage.

**§ 8:41 Terraces, balconies, and penthouses**

If the unit includes a terrace, balcony, or a portion of the roof adjoining a penthouse, lessee shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse, subject to such regulations as may, from time to time, be prescribed by the directors, and subject further to the applicable provisions of this lease and to the use of the terrace, balcony, or roof by lessor to the extent herein permitted. Lessor shall have the right to install equipment on the roof, including radio and television antennas, for its use and for the use of all lessees in the building, and shall have a right of access to the roof for such installations, and for the repair and maintenance thereof. Lessee shall keep the terrace, balcony, or the portion of the roof appurtenant to the unit clean and free from snow, ice, leaves, and other debris, and shall maintain all screens and drain boxes in good condition. No planting, fences, structures, or lattices shall be erected or installed on the terraces, balconies, or roof of the building without the prior written approval of lessor. No cooking shall be permitted on any terraces, balconies, or the roof of the building, nor shall the walls thereof be painted by lessee without the prior written approval of lessor. Any planting or other structures erected by lessee or lessee's predecessor in interest may be removed and restored by lessor at the expense of lessee for the purpose of repair, upkeep, or maintenance of the building.

**§ 8:42 Assignment of lessor's rights against occupant**

If at the date of commencement of this lease, any third party is in possession or has the right to possession of the unit, lessor assigns to lessee all of lessor's rights against the third party from and after the date of commencement hereof, and lessee by the execution hereof assumes all of lessor's obligations to the third party from such date. Lessor agrees to cooperate with lessee, but at lessee's expense, in the enforcement of lessee's rights against the third party.

**§ 8:43 Supersession of prior tenancies**

If at the date of commencement of this lease, lessee has the right to possession of the unit under any agreement or statutory tenancy, this lease will, as of the date of its commencement, supersede such agreement or statutory tenancy, which shall be of no further effect except as to claims arising before the commencement date of the lease.

**§ 8:44 House rules**

Lessor has adopted house rules that are attached to this lease, and the directors may add to, amend, or repeal the house rules. This lease shall be subject to the house rules, and house rules shall be taken to be a part of the lease. Lessee covenants to comply with all the rules and to see that they are faithfully observed by lessee's family, guests, employees, and subtenants.

Breach of a house rule shall constitute a default under this lease. Lessor shall not be responsible to lessee for the nonobservance or violation of house rules by any other lessee or person.

**NOTES TO FORM****Drafter's Notes**

For a form of house rules readily adaptable for use by a tenant-owned unit corporation, see Condominiums (Ch 7).

**§ 8:45 Subordination to trust deeds, mortgages, and ground leases**

This lease is and shall be subject and subordinate to all present and future ground or underlying leases, and to any mortgages now or in the future constituting liens on the

leases or on the land and building, or buildings, and to any and all extensions, modifications, consolidations, renewals, and replacements of the land and/or building. This clause shall be self-operative, and no further instrument of subordination shall be required by any such lessor or secured lender. In confirmation of the subordination, lessee shall at any time, on demand, execute any instruments that may be required by any such secured lender or lessor, for the purpose of more formally subjecting this lease to the lien of any such mortgage or mortgages, or ground or underlying leases. The duly elected officers of lessor are, and each of them is, irrevocably appointed attorney in fact and agent of lessee to execute such instruments on such demand, and lessee ratifies any such instrument hereafter executed by virtue of the power of attorney given.

In the event that a ground or underlying lease is executed and delivered to the holder of a mortgage on the ground or underlying lease, or to a nominee or designee of or a corporation formed by or for the benefit of such holder, lessee hereunder shall attorn to such holder or the nominee or designee of such holder, or from any corporation formed by or for the benefit of the holder.

**§ 8:46 Discharge of mechanics' liens**

In the event that a notice of mechanic's lien against the building is filed for labor or material furnished or delivered at the building or the unit to or for lessee, or anyone claiming under lessee, lessee shall immediately cause the lien to be discharged by payment, bonding, or otherwise. If lessee fails to do so within *[number of days]* days after notice from lessor, lessor may cause the lien to be discharged by payment, bonding, or otherwise, without investigation as to the validity of the claim, or of any offsets or defenses thereto, and shall have the right to collect, as additional rent, all amounts paid and all costs and expenses paid or incurred in connection with the lien, including reasonable attorney's fees, together with interest from the time or times of payment.

**§ 8:47 Indemnification of lessor**

Lessee shall indemnify lessor from and against any and all liability, loss, damage, and expense, including reasonable

attorney's fees and disbursements: (1) arising from injury to person or property occasioned by the failure of lessee to comply with any provision hereof; (2) occasioned in whole or in part by any act or omission of lessee or any person residing or visiting in the unit; or (3) occasioned by any act or omission of lessor, its agents, servants, or contractors when acting as agent for lessee as provided herein. However, this clause shall not apply to any loss or damage covered by insurance that provides for waiver of subrogation against lessee.

**§ 8:48 Lessor's immunities**

(a) Lessor shall not be liable, except by reason of lessor's negligence, for any failure or insufficiency of heat or air-conditioning (where air-conditioning is supplied or air-conditioning equipment is maintained by lessor), water supply, electricity, gas, telephone, elevator service, or other service to be supplied by lessor hereunder, or for interference with light, air, view, or other interests of lessee. No discontinuation of rent or other compensation or claim of eviction shall be made or allowed because of the making, failure to make, or delay in making any repairs, alterations, or decorations to the building, or any fixtures or appurtenance therein, or for space taken to comply with any law, ordinance, or governmental regulation, or for any interruption or curtailment of any service agreed to be furnished by lessor, due to accidents, alterations, or repairs, or to difficulty or delay in securing supplies or labor or other cause beyond lessor's control, unless due to lessor's negligence.

(b) If lessor furnishes to lessee any storage bins or space, the use of a laundry, or any facility outside the unit, including but not limited to a television antenna, the items or facilities shall be deemed to have been gratuitously furnished by lessor under a revocable license. Lessee shall not use the storage space for the storage of valuable or perishable property, and any storage space assigned to lessee shall be kept clean and free of combustibles by lessee. If washing machines or other equipment are made available to lessee, lessee shall use the items on the understanding that the machines or equipment may or may not be in good order and repair, and that lessor is not responsible for the equipment, nor for any damage caused to the property of lessee resulting from lessee's use thereof, and that any use lessee may make of any

such equipment shall be at lessee's own cost, risk, and expense.

(c) Lessor shall not be responsible for any damage to any automobile or other vehicle left by lessee in the care of any employee or agent of lessor, and lessee agrees to indemnify lessor against any liability arising from injury to person or property caused by or with any such automobile or other vehicle while in the care of an employee or agent. Lessor shall not be responsible for any property left with or entrusted to any employee or agent of lessor, or for loss of or damage to any property within or without the unit by theft or otherwise.

**§ 8:49 Waiver of jury trial**

To the extent permitted by law, the respective parties in this instrument agree to and do waive trial by jury in any action, proceeding, or counterclaim brought by either of the parties against the other on any matters whatsoever arising out of or in any way connected with this lease, lessee's use or occupancy of the unit, or any claim of damage resulting from any act or omission of the parties or either of them in any way connected with this lease or the unit.

# Chapter 9

## Management of Real Property

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- § 9:2 General background

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- § 9:4 Necessity for written instrument
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- § 9:71.50 Special power of attorney—Entry onto property and dealings with utility companies
- § 9:71.60 Collection and disbursement of rents
- § 9:71.70 Advertisement and legal proceedings
- § 9:71.80 Term of management agreement

### **Scope**

This chapter contains forms relating to management of real property. The chapter also contains a discussion of legal principles, including tax aspects, and checklists that should be consulted when drafting such instruments.

### **Treated Elsewhere**

Chapters that contain related text and form material are Condominiums (see Ch 7), Cooperative Apartments (see Ch 8), Real Property (see Ch 16A), Employment Contracts (see Ch 20), and Powers of Attorney (see Ch 21).

### **Research References**

The material cited below is generally applicable to real property management. Material that is applicable to particular aspects of the topic is cited in footnotes throughout the chapter, and in Tax Notes and Drafter's Notes following particular forms.

#### *West's Key Number Digest*

Condominium ¶6 to 13; Contracts ¶1 to 91; Landlord and Tenant ¶150 to 159, 357; Principal and Agent ¶1 to 182

#### *A.L.R. Library*

Liability of Building Owner, Lessee, or Manager for Injury or Death Resulting from Use of Automatic Passenger Elevator, 99 A.L.R. 5th 141

Individual liability of supervisors, managers, officers or co-employees for discriminatory actions under state civil rights act, 83 A.L.R. 5th 1

Right of condominium association's management or governing body to inspect individual units, 41 A.L.R. 4th 730

Right to private action under state statutes or regulations governing real-estate brokers or salesmen, 28 A.L.R. 4th 199

Right of attorney, as such, to act or become licensed to act as real-estate broker, 23 A.L.R. 4th 230

## MANAGEMENT OF REAL PROPERTY

- Revocation or suspension of real-estate broker's license for conduct not connected with business as broker, 22 A.L.R. 4th 136
- Construction of contractual or state regulatory provisions respecting formation, composition, and powers of governing body of condominium association, 13 A.L.R. 4th 598
- Award of Punitive Damages to Prevailing Plaintiffs in Actions Brought Pursuant to § 813 of Fair Housing Act (42 U.S.C.A. § 3613(c)), 175 A.L.R. Fed. 405
- Private entity's status as owner or operator under § 107(a)(1, 2) of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.A. § 9607(a)(1, 2)) (CERCLA), 140 A.L.R. Fed. 181
- Time for bringing private civil action for discrimination in housing under §§ 810 and 812 of Fair Housing Act (42 U.S.C.A. §§ 3610 and 3612), 62 A.L.R. Fed. 267
- What constitutes "pattern or practice" of racial discrimination in sale or rental of housing within meaning of provision of Fair Housing Act of 1968 (42 U.S.C.A. § 3613) authorizing Attorney General to bring civil action for preventive relief against such conduct, 13 A.L.R. Fed. 285

### *Legal Encyclopedias*

- Fla. Jur. 2d, Agency and Employment; Brokers  
Am. Jur. 2d, Federal Taxation

### *Treatises and Practice Aids*

- RIA Federal Tax Coordinator 2d, Income  
Principles of Real Estate Management (Institute of Real Estate Management), Principles of Real Estate Management  
Tax Aspects of Real Estate Investments: A Practical Guide for Structuring Real Estate Transactions

### *Trial Strategy*

- Landlord's Liability for Lead-based Paint Hazard in Residential Dwelling, 35 Am. Jur. Proof of Facts 3d 439  
How to Survive Legally as a Landlord, 83 Am. Jur. Trials 385

### *Forms*

- Federal Tax Guide To Legal Forms, Employment and Retirement Agreements (Ch 7)  
Federal Tax Guide To Legal Forms, Real and Personal Property Interests (Ch 4)  
Am. Jur. Pleading and Practice Forms, Brokers (Ch 46)

### *Law Reviews and Other Periodicals*

- Brown and Grohman, 2000 Survey of Florida Law: Real Property, 25 Nova L. Rev. 115 (2000)  
Brown and Grohman, Property Law: 1998 Survey of Florida Law, 23 Nova L. Rev. 229 (1998)

## FLORIDA JUR FORMS—LEGAL AND BUSINESS

- Brown and Grohman, *Property Law: 1997 Survey of Florida Law*, 22 Nova L. Rev. 269 (1997)
- Brown and Grohman, *Property Law: 2001 Survey of Florida Law*, 26 Nova L. Rev. 109 (2001)
- Brown and Grohman, *Survey of Florida Law: Real Property*, 24 Nova L. Rev. 267 (1999)
- Flank and Connelly, *Wage-Hour Blues for Real Estate Management Agents*, 16 Real Est. L.J. 313 (1988)
- Hollyfield, *How to Draft a Real Estate Management Agreement (With Form)*, 37 No. 8 Prac. Law. 31 (Dec. 1991)
- Jablow, *The ABCs of Florida Corporate Income Tax*, 76 Fla. B.J. 82 (2002)

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

### I. GENERAL CONSIDERATIONS

#### A. INTRODUCTION

##### **§ 9:1 Definitions**

The phrase “real property management” refers to the application of sound commercial practices by a real property manager to real property for the purpose of producing economic gain for the owner. A real property manager is usually a professional, licensed to conduct real estate transactions and particularly skilled for efficient operation of income-producing property.

##### **§ 9:2 General background**

The basic instrument in the real estate management field is the management agreement between the owner and the manager. In the agreement, the manager will usually obligate himself or herself to secure leases for the property, make or arrange for necessary repairs, handle tenant grievances, and collect rent. The emphasis on these particular duties will vary with the nature of the property. For example, deteriorated property will require major attention to rehabilitation.

When negotiating a real property management contract with a manager, an owner will be concerned about the

qualifications of prospective managers and their plans for management of the property. A manager will usually offer a tailor-made plan as part of the precontract negotiations. Such plans are highly individualistic, their contents depending on the type of property to be managed. Usually the plan will aim for the method of management producing the best economic return and will reflect a decision to continue the present operation of the property or a decision to alter its operation by changing the commercial nature, by modernizing or by rehabilitating. For assistance in understanding a manager's qualifications and for evaluating the completeness of the management plan pertinent checklists follow.<sup>1</sup>

## B. FORM DRAFTING PRINCIPLES

### § 9:3 In general

As in the case of all contracts, the management agreement is governed by general contract principles respecting formation, validity, and enforcement. Such principles include the requisites of capacity of the parties, offer and acceptance, lawful object, consideration, and compliance with statutory requirements.<sup>1</sup>

In addition, the liability for and the procedure for payment of taxes may influence the choice of particular provisions in the agreements.<sup>2</sup>

### § 9:4 Necessity for written instrument

If the initial term of a management contract is not to be completed within one year, the contract must be in writing if

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#### [Section 9:2]

<sup>1</sup>See §§ 9:36, 9:37, 9:38.

#### [Section 9:3]

<sup>1</sup>Statutes directly affecting the provisions of a management agreement are noted in §§ 9:3 to 9:10.

For discussion of, and forms relating to, employment contracts, generally, see Employment (Ch 20).

**Legal Encyclopedias:** For a discussion of the formation of contracts, see Fla. Jur. 2d, Contracts §§ 11 et seq.

<sup>2</sup>For discussion of tax considerations, see §§ 9:8, 9:9.

it is to be enforceable.<sup>1</sup> Otherwise, there is no express requirement that a written instrument be used. However, the intricacies of, and important legal consequences that flow from, the hiring of a real property manager dictate that management contracts be expressed in writing. Such writing should be as clear as possible, and should be as concise as is consistent with the need to set forth all important aspects of the relationship being created.

#### § 9:5 Scope and description of manager's duties

The scope and description of a manager's duties depend on the type of property and the services required by the owner. To minimize disagreements subsequent to execution of an agreement, all essential duties of the manager should be clearly stated. As to each duty, such statement should specify the action to be taken by the manager and the procedure to be followed, if any, and it should designate the party responsible for related costs. For example, if the manager is required to use attorney's services for the collection of rent or other tenant matters, the agreement should specify if the owner desires to approve the selection of the attorneys and should indicate responsibility for payment of attorney's fees.

Another managerial duty that should be carefully delineated concerns repairs. The repair clause should state the necessity or lack of necessity for prior owner approval of repairs. If owner approval is required, the agreement should define emergency repairs that do not need such approval. Of course, the agreement should specify the manner in which costs for repairs will be paid.

The manager's relationship with and duties concerning building personnel should also be carefully described. Responsibility for supervision, hiring, firing, payment of wages, deduction of payroll taxes, and procurement of worker's compensation should be stated.<sup>1</sup> It should also be noted that the management agreement may make payment of certain taxes a managerial duty. Frequently, such agree-

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#### [Section 9:4]

<sup>1</sup>Fla. Stat. Ann. § 725.01.

#### [Section 9:5]

***Treatises and Practice Aids:*** For a discussion of the description of a manager's duties, see Principles of Real Estate Management (Institute

ments provide that the manager shall withhold income and social security taxes of employees even though the owner retains the status of employer. Another frequent provision is that the manager be responsible for the payment of property taxes.<sup>2</sup>

If a manager is to be given authority to execute on behalf of the owner leases for a term of one year or longer, the power of attorney granting such authority should be acknowledged and recorded, in order to make the lease good or effectual against creditors or subsequent purchasers for a valuable consideration and without notice.<sup>3</sup>

### § 9:6 Duration of contract

Several factors influence the duration of a real property management agreement. First, if the property is beginning its commercial life, a lengthy period may be required to enable a manager to establish effective management, lease available units, and recoup starting-up costs. Second, the property may need modernization, rehabilitation, or repair requiring an initial expenditure by the manager which will not be offset by anticipated receipts for a long period of time. Conversely, property that is fully operative at the outset of the agreement may be managed profitably for both parties for a shorter or indefinite term. Sale of the property will also affect the duration of the agreement. To protect the interests of both parties, termination due to sale should be conditioned on the manager's being given notice of sale and the transfer of title to the property.<sup>1</sup>

Termination for cause should also be written into the

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of Real Estate Management), The Real Estate Management Department, Management Contracts and Fees, Ch VI.

<sup>2</sup>**Treatises and Practice Aids:** Principles of Real Estate Management (Institute of Real Estate Management), Principles of Real Estate Management, Tax Service and Research, Ch XXIX.

<sup>3</sup>Fla. Stat. Ann. §§ 695.01, 695.03.

For discussion of, and forms relating to, powers of attorney, see Powers of Attorney (Ch 21).

#### [Section 9:6]

<sup>1</sup>**Treatises and Practice Aids:** For discussion of considerations affecting the contract period, see Principles of Real Estate Management (Institute of Real Estate Management), The Real Estate Management Department, Management Contracts and Fees, Ch VI.

contract. If the manager is a resident manager, the tenancy should be contingent on the employment agreement. The resident manager/tenant should be given no more than 72 hours to vacate the unit after termination of his employment.

### § 9:7 Method of compensation; enforcement

Usually, management compensation is based on either a percentage of the gross lease income or a flat fee, payable for the life of the lease or contract term. Such compensation is usually meant to cover all management services. However, the method of compensation may vary with changes of emphasis in the property manager's services. For example, if the manager assumes operation of vacant rental property, his or her major effort will be to secure and maintain leases. In such case, to encourage the manager to procure remunerative long-term leases and to protect such manager in case of cancellation of the agreement, it may be desirable to provide for additional compensation payable on cancellation. The amount of such compensation should be based on the value, at the time of cancellation, of: (1) leases negotiated by the manager; and (2) leases renewed by him or her on designated favorable terms. In addition, the manager may desire to provide for extra compensation for such additional responsibilities as supervision of construction or rehabilitation, carrying out major repairs, or the like.<sup>1</sup>

It is not expressly required that a real estate manager be a registered broker or sales associate. However, some of the activities normally carried out by a manager, such as renting or leasing real property of others or any interest in or concerning the same, are within the statutory definition of the term "broker,"<sup>2</sup> and the law requires that persons carrying on such activities must be licensed.<sup>3</sup> No contract for a commission or compensation for any act or service enumer-

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#### [Section 9:7]

<sup>1</sup>As to tax consequences of the method of compensation, see § 9:8.

**Treatises and Practice Aids:** For additional discussion of compensation, see Principles of Real Estate Management (Institute of Real Estate Management), The Real Estate Management Department, Management Contracts and Fees, Ch VI.

<sup>2</sup>Fla. Stat. Ann. § 475.01(1)(a).

<sup>3</sup>Fla. Stat. Ann. § 475.181; Fla. Stat. Ann. § 475.42(1).

ated within the statute defining a “broker” is valid unless the broker or sales associate has complied with the provisions of law in regard to issuance and renewal of the license at the time the act or service was performed.<sup>4</sup> However, the law does not apply to any individual, corporation, partnership, trust, joint venture, or other entity who leases its own real property,<sup>5</sup> to any employee of an owner, or of a registered broker for an owner, of an apartment community who works in an onsite rental office of the apartment community in a leasing capacity,<sup>6</sup> or to any person employed for a salary as, or acting in the capacity of a manager of a condominium or cooperative apartment complex as a result of any activities or duties which he or she may have in relation to the renting of individual units within such condominium or cooperative apartment complex if rentals arranged by him or her are for periods no greater than one year.<sup>7</sup>

### C. TAX ASPECTS

#### § 9:8 Improvement, repair, and maintenance of real property

Two major tax distinctions are imposed on real estate expenditures. The first establishes a difference between personal use property, on the one hand, and business and income-producing property on the other. The second distinction is between expenditures to maintain and repair property and expenditures to acquire and improve property.

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**A.L.R. Library:** Licensed real-estate broker's right to compensation as affected by lack of license on the part of partners, coadventurers, employees, or other associates, 8 A.L.R. 3d 523.

**Legal Encyclopedias:** License and registration; in general, Fla. Jur. 2d, Brokers § 15.

<sup>4</sup>Fla. Stat. Ann. §§ 475.01(1)(a), (3), 475.41.

<sup>5</sup>Fla. Stat. Ann. § 475.011(2).

<sup>6</sup>See Fla. Stat. Ann. § 475.011(4).

<sup>7</sup>Fla. Stat. Ann. § 475.011(5).

**Legal Encyclopedias:** Exceptions to license and registration requirements, Fla. Jur. 2d, Brokers §§ 21 et seq.

*Personal use property.* The basic rule is that expenditures made on property held for personal use are not deductible.<sup>1</sup> The most common example are expenses of a personal residence. The rule applies regardless of the purpose for the expenditure. Neither the cost of a residence nor the expenses of maintaining the residence is deductible, either as a deduction or through depreciation or amortization.

Two major exceptions exist to this basic rule. The first applies to state and local real estate taxes paid on the property. If a taxpayer itemizes his or her deductions, these taxes are deductible even though they apply to a personal residence or other property used for personal purposes.<sup>2</sup>

The second is for qualified residence interest. Here again, the basic rule is that interest incurred for personal purposes is not deductible.<sup>3</sup> However, the Code provides an exception for interest on a debt secured by a personal residence.<sup>4</sup> This debt is subject to various restrictions, including one that limits the debt to \$1 million if incurred to buy or improve the residence<sup>5</sup> and to \$100,000 if incurred for any other purpose.<sup>6</sup> In addition, the loan cannot exceed the net equity of the taxpayer in the property, the value of the property after deducting any mortgage on it.

*Business and investment property.* If property is not used for personal purposes, the second tax distinction must be considered. Operating expenses of property held for income-or profit-making purposes are deductible,<sup>7</sup> but not the cost of developing or improving the property.<sup>8</sup> The same rule applies to property used for business.<sup>9</sup> The cost of acquiring or improving property must be capitalized and recovered through depreciation or amortization. Included in this cost

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**[Section 9:8]**

<sup>1</sup>I.R.C. § 262.

<sup>2</sup>I.R.C. § 164(a).

<sup>3</sup>I.R.C. § 163(h)(1).

<sup>4</sup>The residence may be either the principal residence of the taxpayer or a second residence. I.R.C. § 280A(d).

<sup>5</sup>I.R.C. § 163(h)(3)(B).

<sup>6</sup>I.R.C. § 163(h)(3).

<sup>7</sup>I.R.C. § 162.

<sup>8</sup>I.R.C. § 263.

<sup>9</sup>I.R.C. § 212.

are such incidental expenses as legal and accounting fees, rezoning expenses, brokerage commissions, loan costs, and similar outlays.<sup>10</sup> These, too, must be capitalized.

Two major exceptions exist to the capitalization requirement. The first is for up to \$17,500 of new tangible property that is used in a business.<sup>11</sup> That much may be deducted each year as an expense. This allowance is reduced, dollar for dollar, by the cost of personal property placed in service during the year that exceeds \$200,000 (\$400,000 in the case of taxable years beginning after 2002 and before 2006).<sup>12</sup> The second exception applies to start-up expenses of a business or profit-seeking venture. A taxpayer may amortize these expenses over a period of not less than 60 months.<sup>13</sup> Interest, taxes, and research and experimental expenses are not included.<sup>14</sup>

The cost of repairing a structure is deductible,<sup>15</sup> but not an expenditure that adds materially to the value of the property or appreciably lengthens its life. Improvements to property are therefore not deductible. The repairs must also meet the ordinary and necessary criteria imposed by the Code in order to be deductible.<sup>16</sup>

*Management expenses.* Expenses for the management of property follow the same principles outlined above. Normally, a professional manager is retained only for business or income-producing property and therefore the expense of the manager is deductible. Duties of a manager are normally limited to operating and maintaining property, not to improving it. The cost of the manager is therefore deductible as an ordinary and necessary business expense.<sup>17</sup>

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<sup>10</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶¶ 16100 et seq.

<sup>11</sup>I.R.C. § 179(a). This applies only to property used in business, not to property held for the production of income.

<sup>12</sup>I.R.C. § 179(b)(2). Nor can the deduction exceed the business income.

<sup>13</sup>I.R.C. § 195(b)(1).

<sup>14</sup>I.R.C. § 195(c)(1).

<sup>15</sup>26 C.F.R. § 1.162-4.

<sup>16</sup>I.R.C. § 162(a), I.R.C. § 212.

<sup>17</sup>26 C.F.R. § 1.162-7.

**§ 9:9 Manager taxation**

Payment received for services as a manager of real estate is taxable as ordinary income.<sup>1</sup> It is either salary—for those employed by the property owner—or business income—for those engaged as independent contractors in managing property.

If the manager is an employee, his or her position does not differ from that of any other employee, except perhaps in one respect. Managers sometimes receive free lodging as part of the compensation package. Unless the lodging is provided “for the convenience of the employer,” the value of the lodging is additional income to the employee.<sup>2</sup> To avoid taxation on the value of the lodging, the employment contract must also require the manager to live in the quarters, which must be on the business premises.

An independent manager is in the business of providing management services and all reasonable and ordinary expenses of the business are therefore deductible.<sup>3</sup> Included are such items as salaries, depreciation on equipment, insurance, interest on loans, and similar expenses.

**§ 9:10 State tax consequences**

The State of Florida imposes a tax on the net income of corporations and similar organizations for the privilege of conducting business, earning or receiving income in the state, or being a resident or citizen of the state.<sup>1</sup> Since “net income” is defined under the code in terms of “taxable income” as determined for federal tax purposes,<sup>2</sup> the discussion in the preceding two sections<sup>3</sup> also applies to state tax liability of incorporated and certain other organized property owners and property management firms.

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**[Section 9:9]**

<sup>1</sup>I.R.C. § 61(a).

<sup>2</sup>I.R.C. § 119(a).

<sup>3</sup>I.R.C. §§ 162, 212.

**[Section 9:10]**

<sup>1</sup>Fla. Stat. Ann. §§ 220.02, 220.03(1)(b), (n), 220.11.

<sup>2</sup>Fla. Stat. Ann. §§ 220.12, 220.13.

<sup>3</sup>See §§ 9:8, 9:9.

**D. CHECKLISTS****§ 9:11 Checklist—Choosing managing agent or firm**

1. Information as to previously or presently managed property.
  - a. Default history.
  - b. Mortgage relief history.
  - c. Foreclosure history.
2. Description of management firm.
  - a. Number of personnel employed in supervisory, clerical, and maintenance capacities.
  - b. Type of organization.
    - (1) If corporation, identification of principal stockholders.
    - (2) If partnership, identification of partners.
3. Distance in miles from management home office to the property to be managed.
4. Description of business practices.
  - a. Accounting system.
  - b. Rent-up procedure.
  - c. Rent-collection policy.
  - d. Preventive maintenance program.
  - e. Advertising practices.
5. Description of the frequency and type of direct supervision to be given by management firm to the resident manager, if applicable.
6. Appraisal of financial stability of management firm or agent, and description of financial resources.

**§ 9:12 Checklist—Property management plan**

1. Owner's responsibilities, and relationship with manager.
  - a. Relationship between manager and owner as
    - (1) Employee-employer; or
    - (2) Independent contractor—employer.
  - b. Listing of respective responsibilities of owner and manager.
  - c. Accountability of persons responsible for day-to-day operation of the property.

- d. Conditions under which manager must consult owner before taking action.
- e. Areas in which manager may make decisions without consulting owner.
- f. Owner's representative for contact with manager.
  - (1) Powers exercisable by owner's representative.
- g. Listing of expenses to be paid for by manager out of his or her fee or out of rental income.
2. Personnel policy and staffing arrangements.
  - a. Projected staffing needs for managing the property, including a breakdown of jobs and salary schedules.
  - b. Lines of authority, responsibility, and accountability within the management organization.
3. Plans and procedures for achieving and publicizing occupancy.
  - a. Description of planned affirmative marketing practices.
  - b. Time table for occupancy of units.
4. Procedures for determining tenant eligibility.
  - a. Person responsible for determining tenant eligibility.
  - b. Delineation of procedures in connection with such determination.
5. Plans for effective maintenance and repair, and, if appropriate, rehabilitation or modernization.
  - a. Procedures to inventory and service appliances and mechanical equipment.
  - b. Procedures for inspection and carrying out of maintenance activities in units prior to a move out or to re-renting a unit.
  - c. Schedule for interior and exterior painting and redecorating.
  - d. Procedure for garbage and trash removal.
  - e. Procedure respecting major repairs.
  - f. Description of planned grounds upkeep and maintenance.
  - g. Schedules for cleaning entry ways, halls, and other common areas.
  - h. Procedures for instructing tenants as to method of reporting minor maintenance needs.

6. Rent collection policies and procedures.
  - a. Provision for onsite rent collection.
  - b. Acceptability of partial payments or prepayments.
  - c. Assessment of late fees for delinquencies.
  - d. Arrangements respecting missed rent payments.
  - e. Eviction policies and procedures.
  - f. Manner of recording and depositing rent payments.
7. Program for maintaining adequate accounting records and handling necessary forms and vouchers.
8. Plans for tenant-management relations.
  - a. Policies and procedures governing tenant grievances.
  - b. Policies and procedures governing servicing of tenant requests.
  - c. Leasing policies and procedures.
  - d. Availability of leases in foreign languages.
  - e. Attached copy of proposed lease form.
9. Proposed operating budget to accommodate various elements of the management plan.

**§ 9:13 Checklist—Drafting management agreement with an independent contractor**

1. Parties and property.
  - a. Owner: name and address.
  - b. Manager: name and address.
  - c. Identification of property.
    - (1) Common name or address.
    - (2) General description.
2. Appointment of manager.
  - a. Exclusive management rights.
    - (1) Rights reserved to owner.
  - b. All expenses of building payable by owner.
    - (1) No obligation of manager.
    - (2) Tax returns, withholding, and all other government reporting to be filed by owner.
  - c. Space or apartment on premises for manager.
  - d. Manager an independent contractor.
    - (1) Not a partner or employee of owner.

3. General duties of manager.
  - a. Lease units.
  - b. Collect rents.
  - c. Maintain and repair property.
  - d. Pay expenses of property.
  - e. Maintain adequate books and records for property.
  - f. Insure property.
  - g. Prepare budget and cash flow.
  - h. Provide owner with financial statements.
  - i. Hire, fire, pay, and supervise building employees.
4. Restrictions on manager's authority.
  - a. Leases signed by owner.
  - b. Terms of lease, including rent, set by owner.
  - c. No contracts for maintenance or repairs in excess of stated amount without owner's approval in writing.
    - (1) Exception for emergency.
      - (a) Immediate notification of owner.
    - d. Deposit all collections in designated bank account.
    - e. Withdraw funds only for operating expenses.
      - (1) Including payment of building employees.
    - f. Insurance coverage only on terms and with carriers approved by owner.
    - g. All operations done in compliance with laws, ordinance, or insurance regulations.
    - h. All activities in accordance with property management plan and instructions of owner.
  5. Payment of agent.
    - a. Percentage of rents collected.
    - b. Monthly fee.
    - c. Payments made from building account.
    - d. Reimbursement for advances made on behalf of owner.
    - e. Complete payment for all services of manager.
      - (1) Expenses of manager in fulfilling duties not an obligation of owner.
        - (a) Manager's expenses not include advertising, building employees, and other direct expenses of building.

6. Term of agreement.
  - a. Duration.
  - b. Beginning and ending dates.
  - c. Prior termination.
    - (1) Number of days notice by either party.
    - (2) Immediate termination on bankruptcy, insolvency, or failure of party to pay bills.
    - (3) Failure to comply with terms of agreement.
    - (4) Sale or condemnation of property.
7. Indemnification against loss resulting from building operations.
  - a. Each party to indemnify other for losses resulting from his action or lack of action.
  - b. Insurance coverage for workers compensation, public liability, and matters covered by owners, landlords and tenants coverage.
  - c. Each party listed as an insured.
8. General
  - a. Entire agreement between parties.
  - b. No amendment except in writing signed by parties.
  - c. Binding on heirs, successors and assigns.
  - d. No right of manager to assign contract.
  - e. Date and signatures of parties.

## II. MANAGEMENT AGREEMENTS

### A. COMPLETE INSTRUMENTS

#### § 9:14 Agreement for management of property—General form

Agreement made on [date], between [name of owner], a corporation organized under the laws of the State of Florida, having its principal office at [address of owner], referred to below as "owner," and [name of agent], a corporation organized under the laws of the State of Florida, having its principal office at [address of agent], referred to below as "agent."

#### RECITALS

1. Owner holds title to the following-described real property: [describe property], herein referred to as the "property."

2. Agent is experienced in the business of operating and managing real estate similar to the above-described property.

3. Owner desires to engage the services of agent to operate the property, and agent desires to provide such services on the terms and conditions set out in this agreement.

In consideration of the mutual covenants set forth below, owner and agent agree as follows:

#### SECTION I. EMPLOYMENT OF AGENT

Agent shall act as the exclusive agent of owner with regard to the management and maintenance of the property.

#### SECTION II. BEST EFFORTS OF AGENT

On assuming the management of the property, agent shall thoroughly inspect the property and submit a written report to owner. The written report shall contain the opinion of agent concerning the present degree of efficiency under which the property is being operated, and recommended changes, if necessary, in the management structure of the property, in the rehabilitation of the property, and in any other areas that will improve the efficient management of the property. After conferring with owner and obtaining approval to make any necessary improvements, agent shall undertake completion of the improvements.

#### SECTION III. LEASING OF PROPERTY

Agent shall make reasonable efforts to lease available space on the property, and shall be responsible for all negotiations with prospective tenants. Agent shall also have the right to execute and enter into, on behalf of owner, month-to-month tenancies of units on the property. Agent may negotiate all extensions and renewals of such month-to-month tenancies and leases. Agent shall not, without the prior written consent of owner, enter into any lease for a term less than *[number]* months or more than *[number]* months. Agent shall have the right to make concessions within guidelines established by owner, including rental concessions, as inducements to prospective tenants to occupy the property.

#### SECTION IV. ADVERTISING AND PROMOTION

Agent shall advertise vacancies by all reasonable and proper means; provided, agent shall not incur expenses for

advertising in excess of *[\$/dollar amount]* during any calendar quarter without the prior written consent of owner.

#### SECTION V. MAINTENANCE, REPAIRS, AND OPERATIONS

Agent shall use its best efforts to insure that the property is maintained in an attractive condition and in a good state of repair. In this regard, agent shall use its best skills and efforts to serve the tenants of the property and shall purchase necessary supplies, make contracts for, or otherwise furnish, electricity, gas, fuel, water, telephone, window cleaning, refuse disposal, pest control, and any other utilities or services required for the operation of the property. Agent shall make or cause to be made and supervise necessary repairs and alterations and shall decorate and furnish the property. Expenditures for repairs, alterations, decorations, or furnishings in excess of *[\$/dollar amount]* shall not be made without prior written consent of owner, except in the case of emergency, or if agent in good faith determines that such expenditures are necessary to protect the property from damage, to prevent injury to persons or loss of life, or to maintain services to tenants.

#### SECTION VI. EMPLOYEES

Agent shall employ, discharge, and supervise all onsite employees or contractors required for the efficient operation and maintenance of the property. All onsite personnel, except independent contractors and employees of independent contractors, shall be the employees of agent. Agent shall pay the salaries of such onsite employees and, to the extent there are revenues from the property available, pay all charges for services rendered by independent contractors and the employees of independent contractors.

All salaries (including all contributions of employer not listed in the paycheck) of such onsite employees shall be charged to owner. To the extent there are insufficient funds available from revenues received from the operation of the property to reimburse agent for such salaries, owner shall directly reimburse agent within *[number]* days after demand by agent for reimbursement. Agent shall not be responsible or liable to owner for any act, default, or negligence of onsite personnel, or for any error of judgment or mistake of law or fact in connection with their employment, conduct, or dis-

charge except that agent shall be responsible for any such act, default, or negligence that is due directly or indirectly to its own negligent act or omission in the hiring or supervision of any such onsite personnel.

Onsite personnel shall include all resident personnel, including, but not limited to, managers and maintenance personnel, all recreational personnel (whether part-time or full-time), day center personnel, and all other individuals located, rendering services, or performing activities on the property in connection with its operation.

#### SECTION VII. GOVERNMENT REGULATIONS

Agent shall manage the property in full compliance with all laws and regulations of [city], [county] County, and the State of Florida.

#### SECTION VIII. INSURANCE

Agent shall obtain the following insurance at the expense of owner, and such insurance shall be maintained in force during the full term of this agreement:

- (a) Comprehensive public liability property insurance of *[\$/dollar amount]* single limit for bodily injury, death, and property damage;
- (b) Comprehensive automobile insurance of *[\$/dollar amount]* single limit for bodily injury, death, and property damage;
- (c) Fire and extended coverage hazard insurance in an amount equal to the full replacement cost of the structure and other improvements situated on the property; and
- (d) A fidelity bond in the amount of *[\$/dollar amount]* on each employee who handles cash, and workers' compensation and employer liability insurance to cover the agents and employees of both employer and agent.

All of the policies shall name agent and owner as coinsureds as their respective interests may appear. Agent shall deliver certificates evidencing such insurance coverage to owner within *[number]* days from the issuance and renewal of the policies. Owner shall cooperate with agent and any insurer in the making and delivery of all reports, notices, and other items required in connection with any of the insurance policies.

**SECTION IX. COLLECTION OF INCOME; INSTITUTION  
OF LEGAL ACTION**

Agent shall use its best efforts to collect promptly all rents and other income issuing from the property when such amounts become due. It is understood that agent does not guarantee the collection of rents.

Agent shall, in the name of owner, execute and serve such notices and demands on delinquent tenants as agent may deem necessary or proper. Agent, in the name of owners, shall institute, settle, or compromise any legal action and make use of such methods of legal process against a delinquent tenant or the property of a delinquent tenant as may be necessary to enforce the collection of rent or other sums due from the tenant, to enforce any covenants or conditions of any lease or month-to-month rental agreement, and to recover possession of any part of the property. No other form of legal action will be instituted and no settlement, compromise, or adjustment of any matters involved therein shall be made without the prior written consent of owner, except when agent determines that immediate action is necessary.

**SECTION X. BANK ACCOUNTS**

Agent shall deposit (either directly or in a depository bank for transmittal) all revenues from the property into the general property management trust fund of agent, herein referred to as the trust account. The trust account shall be maintained at all times in a national or state member bank that is a member of the Federal Deposit Insurance Corporation. Agent shall not commingle any of the above-described revenues with any funds or other property of agent. From the revenues deposited in the trust account, agent shall pay all items with respect to the property for which payment is provided in this agreement, including the compensation of agent and deposits to the reserve accounts as provided for in Section XI. After such payments, agent shall remit any balance of any monthly revenues to owner concurrently with the delivery of the monthly report referred to in Section XII.

**SECTION XI. RESERVE ACCOUNT**

Agent shall establish a reserve account for the following items: taxes, assessments, debt service, insurance premiums, repairs (other than normal maintenance), replacement of

personal property, and refundable deposits. Agent shall use its best judgment in transferring adequate funds from the trust account to the reserve account in order to pay the above items without incurring late pay interest fees, cancellations, or forfeitures. If the reserve account contains inadequate funds to pay any of the above items, agent must obtain approval from owner before paying the items directly from the trust account. If owner determines that the funds in the reserve account are excessive, owner shall direct that agent return such excess funds to the trust account. The reserve account shall be maintained in an interest-bearing savings account in a national or state bank that is a member of the Federal Deposit Insurance Corporation.

Anything herein to the contrary, agent shall not be liable for any failure or bankruptcy of any bank used as a depository of any funds maintained in the reserve account.

#### SECTION XII. RECORDS AND REPORTS

Agent will keep books, accounts, and records that reflect all revenues and all expenditures incurred in connection with the management and operation of the property. The books, accounts, and records shall be maintained in accordance with generally accepted accounting principles at the principal place of business of agent. Agent shall, during regular business hours, make the books, accounts, and records required to be maintained hereunder available to owner or the representatives of owner for examination and audit by appointment on no less than *[number]* days' notice. All such audits shall be at the expense of owner.

Agent shall furnish owner, no later than the end of the next succeeding month, a detailed statement of all revenues and expenditures for each preceding month, a summary of all current and prospective rental concessions given to induce tenants to occupy the property, the original copy of all invoices, statements, purchase orders, and billings received and paid during such preceding month, as well as such other information relating to the operation or management of the property that, in the opinion of agent, requires the attention of owner. Owner shall retain for safekeeping and storage all original invoices, statements, purchase orders, billings, and other documents delivered by agent with respect to the property. Owner, on payment of reasonable costs incurred by it, shall make available to agent copies of all or any portion

of any invoice, statement, purchase order, billing report, or other document received from agent with respect to the property.

Within *[number]* days after the end of each calendar year, agent shall prepare and deliver to owner a detailed statement of revenues received and expenditures incurred and paid during the calendar year that result from operations of the property. Within *[number]* days, following expiration or termination of this agreement, agent shall deliver to owner all books, accounts, and records pertaining to the property.

#### SECTION XIII. COMPENSATION OF AGENT

Agent shall receive a management fee equal to *[percentage]/%* of the gross receipts collected from the operation of the property. Gross receipts are defined as all revenues collected plus refundable deposits. Any management fee due agent hereunder shall be paid to agent within *[number]* days after the end of each month.

#### SECTION XIV. COMMISSIONS FOR NEGOTIATING LEASES OR MONTH-TO-MONTH RENTAL AGREEMENTS

Agent shall receive no commissions or additional compensation for negotiating leases or month-to-month rental agreements with tenants.

#### SECTION XV. OFFICE SPACE FOR AGENT

Owner shall allow agent to occupy the office numbered *[number]*, on the *[ordinal number]* floor of the property, rent-free for the duration of this agreement.

#### SECTION XVI. ADDITIONAL DUTIES AND RIGHTS OF AGENT

In addition to the foregoing, agent shall perform all services that are necessary and proper for the operation and management of the property, and shall report to owner promptly any conditions concerning the property that, in the opinion of agent, require the attention of owner.

In order to properly perform the services required by this agreement, agent is authorized to engage, on behalf of owner, any entity that is an affiliate of agent, provided that the compensation paid for the services shall be competitive with nonaffiliate entities providing the same or similar services. Before any services are engaged from an entity that is an af-

filiate of the agent, agent shall notify owner of the relationship between the agent and the affiliate.

#### SECTION XVII. TERMINATION AND RENEWAL

This agreement shall be for a term commencing on [*date*], and ending on [*date*]. At the expiration of the such term, this agreement, if not renewed in writing for an additional fixed period, and if not terminated in writing before [*number*] days prior to such expiration date, shall be renewed automatically on a month to month basis that may be terminated by either party by giving to the other party not less than [*number*] days' notice in writing, provided that, in any event, the cancellation shall be effective at the end of the calendar month during which the [*number*]-day notice period runs.

#### SECTION XVIII. TERMINATION FOR CAUSE

If agent breaches any of the terms of this agreement, owner shall give agent written notice of such breach. If agent fails to remedy the breach within [*number*] days after receiving the above-described notice, owner may terminate this agreement.

#### SECTION XIX. SALE OF PROPERTY

On the voluntary sale of the property by owner and the delivery of the deed of conveyance therefor, this agreement shall automatically terminate. Owner shall notify agent of the sale of the property as soon as such sale is negotiated.

#### SECTION XX. CONDEMNATION

This agreement shall terminate in the event of a total condemnation of the property. If there is a partial condemnation of the property, this agreement may be terminated at the option of owner. If such a partial condemnation of the property reduces the compensation of agent by more than [*percentage*]\%, agent may terminate this agreement. Owner shall be entitled to all consequential damages awarded as a result of any eminent domain proceeding.

#### SECTION XXI. BANKRUPTCY

If bankruptcy proceedings, whether voluntary or involuntary, are commenced against either owner or agent, or if either party enters into a composition agreement with its creditors, either party may terminate this agreement by giving [*number*] days' written notice to the other party.

**SECTION XXII. NO PROPERTY INTEREST CREATED**

Nothing contained in this agreement shall be deemed to create or shall be construed as creating in agent any property interest in or to the property.

**SECTION XXIII. LICENSING OF AGENT**

Agent shall at all times during the term of this agreement maintain such licenses and permits as are required for any of the various services to be performed by agent on behalf of owner.

**SECTION XXIV. AGENT AS INDEPENDENT CONTRACTOR**

Agent is an independent contractor and not an employee of owner for any purpose.

**SECTION XXV. COVENANTS AND CONDITIONS**

All of the terms and conditions of this agreement are expressly intended to be construed as covenants as well as conditions.

**SECTION XXVI. NOTICE**

All notices, requests, demands, or other communications shall be in writing, and shall be deemed to have been duly given if delivered in person, or within *[number]* days after deposited in the United States mail, postage prepaid, certified, with return receipt requested, or otherwise actually delivered to owner at *[address of owner]*, or to agent at *[address of agent]*. Either party to this agreement may change the address at which it receives written notices by so notifying the other party in writing.

**SECTION XXVII. ASSIGNMENT**

This agreement shall be binding on and inure to the benefit of the successors and assigns of the parties to it, and their respective successors and assigns; provided, however, that this agreement may not be assigned by agent without prior written consent of owner, or by owner without prior written consent of agent. Anything in the foregoing to the contrary notwithstanding, agent may, without the consent of owner, delegate the performance of (but not responsibility for) any duties and obligations of agent to any independent contractor or entity.

**SECTION XXVIII. EFFECT OF PARTIAL INVALIDITY**

Should any section or any part of any section of this agree-

ment be rendered void, invalid, or unenforceable by any court of law, for any reason, such a determination shall not render void, invalid, or unenforceable any other section or any part of any section in this agreement.

#### SECTION XXIX. CHOICE OF LAW

This agreement has been made and entered into in the State of Florida, and the laws of Florida shall govern the validity and interpretation of this agreement and the performance due under it.

#### SECTION XXX. INTEGRATION

The drafting, execution, and delivery of this agreement by the parties have been induced by no representations, statements, warranties, or agreements other than those expressed in it. This agreement embodies the entire understanding of the parties, and there are no further or other agreements or understandings, written or oral, in effect between the parties relating to its subject matter unless expressly referred to in it.

#### SECTION XXXI. ARBITRATION

In case of any dispute regarding any terms or performance of the terms of this agreement, the dispute shall be subject to arbitration in accordance with the rules and regulations then obtaining under the American Arbitration Association in the City of [city], State of Florida.

#### SECTION XXXII. ATTORNEY'S FEES

Should either party bring suit to enforce any of the terms of this agreement, the prevailing party shall be entitled to recover court costs and reasonable attorney's fees.

#### SECTION XXXIII. MODIFICATION

This agreement may not be modified unless such modification is in writing and signed by both parties to this agreement.

Executed at [place of execution] on the date written above.

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[Signatures]

**NOTES TO FORM****Drafter's Notes**

Drafting principles applicable to various aspects of management agreements are discussed in §§ 9:3 to 9:10; for pertinent checklist, see § 9:13.

Optional provisions that may be appropriate for inclusion in an agreement being drafted are set forth in §§ 9:26 to 9:71.

For discussion of, and forms relating to, employment contracts, generally, see Employment (Ch 20).

**Tax Notes**

This is an agreement with an independent contractor (Section XXIV) and therefore the consideration received for the services rendered is gross business income under I.R.C. § 61(a)(2). Against this income the agent may deduct the ordinary and reasonable expenses of fulfilling its obligation under the agreement, including the salaries paid to those employed who manage the building. I.R.C. § 162(a).

Amounts collected by the agent as rent from the building are not income to the agent as they belong to the owner, who is responsible for reporting and paying tax on this revenue. Against this income, the owner may deduct the amount paid to the agent as compensation for its services in operating the building. Am. Jur. 2d, Federal Taxation ¶¶ 8575 et seq.

**Section XIII****Drafter's Notes**

For optional provisions concerning compensation of manager, see §§ 9:26 to 9:30.

**§ 9:15 Agreement for management of property—  
General form—Self-renewing from year to  
year**

This Property Management Agreement (referred to here as this “Agreement”) is made as of *[date]*, between *[name of owner]*, a *[state]* corporation and its successors/assigns (referred to here as the “Owner”) and *[name of manager]*, a *[state]* corporation (referred to here as the “Manager”).

In consideration of the mutual covenants contained here, the Owner and Manager agree as follows:

1. Employment of Manager. Owner employs Manager, as an independent contractor and not as an agent, to act as sole and exclusive Manager in the management, leasing and operation of the property known as the *[name of building or project]*, consisting of *[number]* rentable square feet, being situated on *[number]* square feet of land, and having an address of *[address of project]* (referred to here as the “Project”) and the Manager accepts such employment on the terms and conditions set forth in this Agreement.

2. Term. This Agreement shall take effect on *[date]* and shall continue in full force and effect for a term of *[specify, such as: one]* year therefrom, ending the last day of the twelfth (12th) full calendar month after that, and self-renewing from year to year after that; provided, however, that this Term shall be subject to earlier termination as provided for in this Agreement.

3. Duties of Manager.

(a) Manager accepts this appointment for and in consideration of the compensation provided in this Agreement, and Manager agrees to devote its time, attention, skill, experience and best efforts to the management, leasing, operation and supervision of the Project. Services to be performed by Manager under this Agreement shall include the following:

- (1) Prepare an annual operating budget within *[number]* days of the end of each year, which will include:
  - (i) a breakdown of all operating expenses;
  - (ii) a rent roll in a form approved by Owner that includes a list of all rentable areas subject to leases and lists all currently vacant space;
  - (iii) review and updating of standard lease forms; and
  - (iv) review and recommendations of all insurance policies.

(2) Make repairs and perform all maintenance necessary or desirable with respect to the Project.

(3) Comply fully with all federal, state, local and municipal laws, ordinances, rules, regulations and orders relative to the use, repair, and maintenance of the Project and with all rules, regulations, directives and orders of the local board of fire underwriters or similar bodies. Manager agrees to notify Owner within *[number]* hours of obtaining notice of such violations.

(4) Administer and supervise existing service contracts, and make new contracts as necessary. Owner may direct Manager to make payment on its behalf of all real estate taxes, ground lease or other property rentals, mortgage interest and amortization, insurance premiums on insurance which Owner may obtain for the Project and other similar costs as Owner may direct.

(5) Purchase all supplies and equipment which may be necessary in order to properly maintain and operate

the Project, including supplies and equipment to be used or consumed in connection with any of the services furnished under any of the provisions of this Agreement. Repairs, replacements, supplies or equipment costs which exceed monthly budgeted amounts in accordance with Paragraph 3.a.(1) of this Agreement shall first be approved by Owner.

(6) Pay all bills for work and supplies and equipment ordered in connection with the maintenance and operations of the Project, after ascertaining the correctness thereof. Any rebate or discount obtained by Manager shall be deducted from the amount of any bill paid by Manager or to be paid by Owner.

(7) Request, demand, collect, receive and receipt for any and all rents and other charges which may at any time be or become due to Owner or Manager from any tenant or other person in respect to the Project or any part of the Project.

(8) Administer leases.

(9) Remove any lien or encumbrance on the Project created as a result of performance or nonperformance by Manager of its obligations under this Agreement, as promptly as possible consistent with law, and keep Owner fully and promptly advised as to all matters coming to the attention of Manager which might cause a breach of this Agreement or of Owner's obligations under any leases to others, to the extent Manager has knowledge of the contents of any such matters.

(10) Employ all persons necessary to manage, supervise, maintain and operate the Project.

(11) Prepare and file all returns and other documents required under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, or any similar federal or state legislation, and all withholding tax returns required for employees of Manager. Manager shall pay all amounts required to be paid under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, or any similar federal or state legislation.

(12) To prepare and submit to Owner on a quarterly basis, and more frequently if required by any mortgagee of the Project, either cash or accrual basis property

management accounting statements (as directed by Owner) consisting of actual revenues and expenses and as compared to the budgets prepared in accordance with Paragraph 3.a(1) of this Agreement.

(b) Any of the services to be performed under the Agreement may be performed directly by employees of Manager, or Manager may, in the exercise of its sound good faith discretion, contract the same with third-party contractors, for which the use of affiliates or otherwise related entities of Manager are now specifically approved, provided they provide the services at competitive costs and prices. It is understood, however, that any such contracts will be in the name of the Manager, which will be solely responsible for administering and supervising such contracts.

(c) Notwithstanding that Manager's authority in respect to any of the matters covered in this Agreement is limited by the necessity of getting the consent or authorization of Owner as required by this Agreement, Manager will, nevertheless, be expected to initiate, by calling the same to the attention of Owner, any change or improvements which it believes would, if adopted, result in the improved general operation of the Project.

4. Additional Services. Manager, to the extent required of Owner under the terms of any and all lease agreements with tenants, to the extent requested by Owner or to the extent not otherwise provided by third-party contract as referenced in Paragraph 3 of this Agreement, will at competitive costs and prices for the level of service being provided:

- (a) furnish all cleaning, porter, security and janitorial service in the Project;
- (b) operate and maintain all of Owner's equipment and systems in the Project including, but not limited to, elevators, plumbing, heating, air conditioning and wiring;
- (c) furnish routine maintenance and repair of the Project and make alterations and decorations in the Project:
  - (1) to which tenants are entitled under their leases;
  - (2) which Owner may request;
  - (3) which are required in order to comply with any orders or violations placed or filed against any part of the Project by any federal, state or municipal authority having jurisdiction; or

- (4) to comply with any order of any board of fire underwriters or similar body;
- (d) furnish to tenants, at tenant's expense, any alteration, decoration, maintenance and other services beyond those required by lease, at appropriate prices.

5. Independent Contractor. Notwithstanding anything to the contrary contained in this Agreement, it is the intention of the parties that the Manager shall be an independent contractor with regard to any and all acts and operations performed and conducted by it under and pursuant to the terms of this Agreement. In this capacity, Manager shall be solely and directly responsible for its performance under this Agreement including all management decisions made by it in the course of its performance under this Agreement. Manager will not be treated as an employee of Owner with respect to its services under this Agreement for federal tax purposes.

6. Insurance.

(a) Owner, at its cost and expense, agrees to take out and maintain in effect comprehensive general public liability insurance, including but not limited to bodily injury liability, property damage liability, personal injury liability with respect to the Project, naming as insured parties the Owner, Manager and if necessary, other parties as Owner may direct. The insurance coverage shall be in primary amount of *[\$/dollar amount]* in respect of bodily injury or death to any number of persons in any one occurrence, and in an equal amount for property damage. It is understood and agreed, however, that Manager shall obtain and maintain insurance that will fully protect Manager from any and all claims under any Workers Compensation laws, or other employer's liability laws. Pursuant to this, Manager shall indemnify and hold Owner harmless against loss resulting from any injury to or damage to the property or any employee of Manager due to the performance or nonperformance by Manager of its obligations under this Agreement to the extent this kind of loss is not insured pursuant to this Paragraph.

(b) Manager and Owner agree to provide each other with respective certificates evidencing the required insurance coverage within *[number]* days after the commencement date of this Agreement and promptly on each re-

newal of the insurance. Manager further shall promptly notify Owner of any fire or other serious damage or injury for reporting purposes pursuant to the insurance.

(1) Notwithstanding anything to the contrary contained in this Agreement, it is understood and agreed that to the extent not insured pursuant to other provisions of this Agreement, Owner shall not be under any obligations to provide Manager with insurance coverage for Manager or indemnify and save harmless Manager with respect to any damages, claims, costs, penalties and suits occasioned by Manager's violation of laws or legal requirements, bad faith or conduct constituting a breach of this Agreement.

(2) All policies carried by either Owner and Manager in respect to the Project or its operation shall contain appropriate clauses waiving the right of subrogation as against Owner and Manager.

Owner and Manager waive any claims that either may have against the other for loss or damage resulting from perils covered by standard forms of fire, extended coverage, special extended coverage (all risk) and boiler and machinery insurance, to the extent that insurance payments are made, under the policies that shall be in effect from time to time in the State of Florida, it being expressly understood that this waiver is intended to extend to all such loss or damage whether or not the same is caused by the fault or neglect of either Owner or Manager.

7. Compensation of Property Manager. As full compensation and reimbursement for performing the services provided for here, Owner agrees to pay Manager:

(a) As a Management Fee:

A base monthly fee of *[\$/dollar amount]* plus an amount equal to *[percentage]%* of the Gross Revenues of the Project to also be paid monthly and based on collections. Gross Revenues of the Project as used in this Agreement shall mean all rentals and other fees received by or credited to Owner, from any source with respect to the Project, for each calendar year, including, but not limited to the following:

- (1) forfeited deposits of tenants;
- (2) lease cancellation fees payable only as the fees are collected by Owner;

- (3) late charges and interest on rentals;
  - (4) increased rentals based on a price index, sales volume or other escalation provisions;
  - (5) rentals for, or reimbursement of, operating expenses, including but not limited to real estate taxes;
  - (6) additional rentals based on coverage, percentage or other similar rental provisions;
  - (7) any other rental adjustments or consideration in the nature of rental;
  - (8) rental value and business interruption insurance proceeds received by Borrower; and
  - (9) parking revenues.
- (b) As reimbursement:
    - (1) an amount equal to the total cost of all other obligations and expenses incurred by Manager in the performance of the terms of this Agreement;
    - (2) routine advertising and legal fees in connection with services performed pursuant to this Agreement; and
    - (3) Manager's signage costs as first approved by Owner.
  - (c) Manager will use its good faith efforts to limit the cost to Owner of reimbursable expenditures described in Paragraph 8(c). above. Reimbursement shall not be made for matters involving violations of laws, ordinances, orders, rules, or regulations where failure to comply with the same is a direct result of Manager's negligence.

8. Recordkeeping.

(a) Manager will keep or cause to be kept, at its own expense, full and detailed accounts and records in accordance with accepted accounting principles consistently applied and sufficient to enable the receipts and disbursements with respect to the services rendered by Manager to be ascertained and distinguished from any other receipts or disbursements of Manager. The system for the keeping of the accounts and records shall be as established by Manager and the accounts and records shall be open for audit and inspection by Owner or by independent certified public accountants designated by Owner, or any regulatory body or agency having jurisdiction, at all reasonable times. In the event independent certified public accountants shall be designated by Owner for that purpose at any time, or from time to time, the charges of the ac-

countants for services rendered by them shall be for the account of Owner and, if paid by Manager shall be considered to be part of the costs to be reimbursed to Manager.

(b) Manager will render to Owner quarterly statements as to receipts and disbursements incurred by Manager in rendering services under this Agreement.

(c) The quarterly statements shall be rendered not later than the 30th day of January, April, July and October of each year throughout the entire period of this Agreement.

#### 9. Notices

(a) Except as otherwise specifically required under this Agreement, notices, demands, requests and communications which may be sent or are required shall be deemed to have been properly given, served, or sent by mailing by certified or registered mail, return receipt requested, with postage prepaid, addressed to:

(1) If intended for Manager:

*[Name of manager]*

*[Address of manager]*

(2) If intended for Owner:

*[Name of owner]*

*[Address of owner]*

(b) Either party may designate by notice a new address to which any notice, demand, request or communication subsequently may be given or sent. Except as otherwise specifically required under this Agreement, each such notice, demand, request or communication which is mailed by certified or registered mail, return receipt requested in the manner described above shall be deemed sufficiently served or sent at the time the notice, demand, request or communication is received for by the other party.

#### 10. Termination.

(a) This Agreement shall continue in full force and effect after the stated termination date as defined in Paragraph 2 from year to year unless either party shall serve written notice of cancellation at least *[number]* days prior to the stated termination date of this Agreement, personally or by registered mail at the address mentioned above, in which event this Agreement shall terminate as of the termination date.

(b) Anything in this Agreement to the contrary notwithstanding, in the event: (i) this Agreement is transferred by Owner due to foreclosure of Owner's interest in the Project or a transfer in lieu of foreclosure; or (ii) Owner transfers, sells or otherwise assigns its interest in the Project to an unrelated, non-controlled group or entity, either party may terminate this Agreement on not less than [number] days' notice served in the manner set forth above.

(c) In the event a petition in bankruptcy is filed by or against any general partner of the Owner, or Manager, or in the event that any of party shall make an assignment for the benefit of creditors or take advantage of any insolvency act, either party may immediately terminate this Agreement on not less than [number] days' notice served in the manner set forth above.

(d) In the event of a breach of the terms and provisions of this Agreement by either party, the other party may terminate this Agreement on not less than [number] days' written notice served in the manner set forth above. Unintentional errors and action taken in good faith or taken on information believed to be true and accurate, although later proven untrue or inaccurate, by either party shall not constitute grounds for termination pursuant to this Paragraph.

(e) Upon and after the termination of this Agreement in any of the manners provided here, Manager shall make a full accounting to Owner of its actions under this Agreement, including a breakdown of income and expenses for the Project through the date of termination, and Manager shall turn over to Owner all monies held by Manager, as well as books, records and other documentation maintained by Manager pursuant to this Agreement.

11. Applicable Law; Implied Covenants. This Agreement shall be interpreted in accordance with the laws of the State of Florida. No presumption shall be deemed to exist in favor of or against either party as a result of the negotiation or preparation of this Agreement, and no inference or covenant shall be implied as against either party, the full contractual obligations and covenants of each party being fully set forth and expressed here.

12. Assignment. This Agreement shall be fully assignable and shall be binding on the parties, their heirs, legal representatives, successors and assigns.

The parties have executed this Agreement as of the day and year first above written.

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[Signatures]

#### NOTES TO FORM

##### Drafter's Notes

Drafting principles applicable to various aspects of management agreements are discussed in §§ 9:3 to 9:10; for pertinent checklist, see § 9:13.

Optional provisions that may be appropriate for inclusion in an agreement being drafted are set forth in §§ 9:26 to 9:71.

For discussion of, and forms relating to, employment contracts, generally, see Employment (Ch 20).

##### Tax Notes

See tax notes following §§ 9:14, 9:16.

### § 9:16 Agreement for management of single-family residence—Between owner and management agent

Agreement made on [*date*], between [*name of owner*], of [*address of owner*], referred to below as “owner,” and [*name of agent*], of [*address of agent*], referred to below as “agent.”

In consideration of the mutual covenants set forth below, owner and agent agree as follows:

#### SECTION I. APPOINTMENT OF AGENT; DESCRIPTION OF PROPERTY

Agent is appointed owner’s exclusive agent and representative to manage for the account of owner a single-family residence described as follows: [*legal description of residence*], known as [*address of residence*].

#### SECTION II. DUTIES OF AGENT

In managing the above-described property, agent shall have the following duties and responsibilities:

A. *Collection of revenue.* Agent shall collect and enforce the collection of all rentals and other charges due owner from tenant(s) of the above-described property.

B. *Expenses and mortgages.* From gross revenues collected from the property, agent shall:

(1) pay all operating expenses and such other expenses as may be authorized by owner; and

(2) pay to any lender designated by owner all sums that may become due on loans affecting the property.

C. *Taxes.* Agent shall pay property taxes assessed against the property. Agent shall withhold from gross revenues an amount equal to the estimated annual taxes and shall pay such taxes from this reserve prior to delinquency.

D. *Inspection and repairs.* Agent shall do everything reasonably necessary for proper maintenance of the property. Such duty includes, without limitation, making or arranging for periodic inspections, and arranging for and supervising all required maintenance and repairs. Agent shall also be responsible for such improvements, alterations, and repairs as may be required by owner. No maintenance, repairs, or other work costing more than *[\$/dollar amount]* shall be performed by agent without the prior written authorization of owner. In case of an emergency that requires immediate repairs or maintenance, agent shall use *[his/her]* own discretion if owner is not readily available for consultation.

E. *Negotiation of leases.* Agent shall have the authority and exclusive right to negotiate leases and month-to-month tenancies with existing and prospective tenants on terms approved by owner. All leases shall be signed by owner.

F. *Employees.* Agent shall have authority to hire, supervise, and terminate on behalf of owner all independent contractors and employees, if any, reasonably required in the management and operation of the property, but all such employees are employees of owner and not employees of agent. Where applicable, agent shall prepare for owner payroll tax returns and make payments of such taxes to appropriate agencies out of gross revenues.

G. *Tenants.* Agent shall handle all tenant requests and negotiations that may arise from time to time.

H. *Legal assistance.* Inasmuch as agent is not authorized to practice law, where legal assistance is needed for such matters as enforcing the collection of rent or eviction of a tenant, such action shall be through counsel designated or approved by owner. The expenses for such counsel shall be borne by owner.

I. *Records.* Agent shall maintain accurate records of all monies received and disbursed in connection with the management of the property. Such records shall be open for inspection by owner at all reasonable times. Agent shall also render to owner a [specify, such as: monthly] statement showing all receipts and disbursements, together with supporting vouchers. Upon termination of the agreement, agent shall transmit all records pertaining to the property to owner.

J. *Payment to owner.* After agent deducts all authorized expenses and reserves relating to the operation and management of the property from the funds collected for the account of owner, agent shall deposit the net amount of such funds to the account of owner in a bank designated by owner, or make payments as owner may otherwise designate in writing. Agent shall maintain a separate escrow account for any deposit money or advance rent received from tenant(s).

### SECTION III. RESPONSIBILITIES OF OWNER

Owner assumes the following responsibilities:

A. *Furnishing of documents.* Owner shall promptly furnish agent all documents and records required for proper management of the property, including but not limited to, the current lease (including amendments and pertinent correspondence relating thereto), status of rental payments, loan payment information, and copies of existing service contracts.

B. *Insurance policies.* Owner shall furnish agent copies of all insurance policies that concern the property or agent's management activities and that are carried by owner during the term of this agreement. Owner shall also furnish agent a copy of the endorsement required hereunder.

C. *Reimbursement of advances by agent.* On demand, owner shall reimburse agent to the full extent of all funds advanced by agent for the account of owner in carrying out this agreement. It is understood that agent is not obliged to make such advances.

D. *Compensation of agent.* Owner shall pay agent for management services [\$[dollar amount] per month / [percentage]% of the gross monthly collections and income from the property]. This amount shall be deducted by agent from the gross monthly collection.

E. *Conformity with law.* Owner agrees that agent shall manage the property in full compliance with the requirements of all applicable laws, and that agent is authorized to take such action as agent deems appropriate to comply with such laws.

#### SECTION IV. INSURANCE

On execution of this agreement, owner shall review existing coverages with his insurance broker to determine adequacy of coverage. Owner agrees to carry bodily injury, property damage, and personal injury public liability insurance in limits of amounts not less than the following: *[specify]*. During continuance of this agreement, all insurance coverage carried by owner on or related to the property shall be extended at the expense of owner to insure and indemnify agent as well as owner by the appropriate endorsement of all policies evidencing such insurance, as follows: “[name of agent] is named as an additional insured, and [name of insurer] agrees that this policy shall be primary in respect to any coverage carried by [agent].”

#### SECTION V. INDEMNITY

Except with respect to negligence and willful misconduct of agent, owner shall indemnify agent against all costs, expenses, attorney's fees, suits, liabilities, and damages from or connected with management of the property by agent or the performance of any of the duties or obligations, or exercise of any of the powers contained in this agreement.

#### SECTION VI. TERM OF AGREEMENT

The term of this agreement shall commence on *[date]*, and end on *[date]*. At the expiration of such term, this agreement, if not renewed in writing for an additional fixed period and if not terminated in writing before *[number]* days prior to the termination date, shall be deemed a month-to-month agreement cancelable by either party on not less than *[number]* days' written notice, which notice may be given at any time during the month, provided that in any event the cancellation shall be effective at the end of the calendar month during which the *[number]* day notice period runs.

#### SECTION VII. NOTICES

For purposes of this agreement, and until changed by written notice, the mailing addresses of owner and agent shall,

for all purposes, be [*the addresses set forth in the first paragraph of this agreement*].

Executed at [*place of execution*] on the date first above written.

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[Signatures]

#### NOTES TO FORM

##### Drafter's Notes

Drafting principles applicable to various aspects of management agreements are discussed in §§ 9:3 to 9:10; for pertinent checklist, see § 9:13.

Optional provisions that may be appropriate for inclusion in an agreement being drafted are set forth in §§ 9:26 to 9:71.

##### Tax Notes

The building that is the subject of the above agreement is a single-family residence that is obviously being used by its owner as rental income property. Though it may have originally been a personal residence for its owner, its conversion to income-producing property permits the owner to deduct the expenses of owning and managing the property, including the amount paid to the managing agent under this agreement. 26 C.F.R. § 1.212-1(h). Though depreciation was not deductible on the property when it was used for personal purposes, a change in its character to income property permits depreciation to be taken on a straight-line basis. If the value of the property at the time of conversion is less than the taxpayer's basis, the value is used instead of the basis for depreciation purposes and for determining gain or loss on a later sale. 26 C.F.R. § 1.167(f)-1. Otherwise, the basis in the property is used to determine depreciation and gain or loss. Am. Jur. 2d, Federal Taxation ¶ 11504.

See Tax Notes following § 9:14.

##### Section I

##### Drafter's Notes

For discussion of, and forms relating to, powers of attorney, see Powers of Attorney (Ch 21).

##### Section II E

##### Drafter's Notes

For discussion of, and forms relating to, leases, see Leases, Real Property (Ch 16A).

##### Section II F

##### Drafter's Notes

For discussion of, and forms relating to, employment, see Employment (Ch 20).

**Section III D****Drafter's Notes**

For optional provisions concerning compensation of manager, see §§ 9:26 to 9:30.

**§ 9:17 Agreement for management of apartment complex—Between corporate owner and management firm**

Agreement made on [date], between [name of owner], a corporation organized under the laws of the State of Florida, having its principal office at [address of owner], referred to below as "owner," and [name of agent], a corporation organized under the laws of the State of Florida, having its principal office at [address of agent], referred to below as "agent." In consideration of the mutual covenants set forth below, agent and owner agree as follows:

**SECTION I. APPOINTMENT OF AGENT**

Owner appoints agent as the exclusive representative of owner to manage and operate [name of project], owned by owner and located in [address of project], and more particularly described as follows: [description of project]. The project consists of [specify, such as: a multi-story apartment building containing [number] units].

**SECTION II. MANAGEMENT DUTIES OF AGENT**

Management duties will be performed by agent as follows:

A. *Leasing of units.* Agent shall use due diligence to attract and retain lessees of the apartment units.

B. *Collection of rents.* Agent shall take reasonable steps to collect all rent due, or enforce collection thereof, and shall perform all reasonable acts on behalf and for the protection of owner in the collection of such amounts.

C. *Management practice.* Agent shall manage the apartment complex according to sound commercial practices and in conformity with the bylaws, regulations, code of ethics and official pledge of the Institute of Real Estate Management.

D. *Enforcement of warranties.* Agent, acting in owner's name, shall take such actions as may be necessary to enforce all warranties given in connection with construction of the apartment project or with manufactured items included therein. Owner shall furnish all necessary documents pursuant to the enforcement of these warranties.

E. *Employees.* Agent shall employ, direct, control, and discharge all persons performing regular services on the premises. All such persons are and shall be employees of owner.

F. *Expenses.* From the rental proceeds, agent shall:

- (1) pay for advertising;
- (2) pay all utility and customary service bills;
- (3) pay salaries of persons employed on the premises, including but not limited to resident managers and assistants, clerks, and maintenance personnel;
- (4) purchase supplies; and
- (5) cause to be made and pay for such maintenance, repairs, and alterations as may be required for proper operation of the apartment complex.

G. *Mortgages, taxes, other expenses.* To the extent made possible by owner, agent shall service all loans and mortgages on the property, pay all applicable real estate and personal property taxes, licenses, fees, and payroll taxes, and maintain payroll records and make all necessary returns required by law.

### SECTION III. ACCOUNTING AND ACCOUNTS

A. *Accounting statements.* Agent shall maintain books of account of all receipts and disbursements incurred in management of the property, which records shall be in accordance with generally accepted accounting principles and be open to inspection by owner at all reasonable times. Agent shall render monthly statements to owner, showing all receipts and disbursements.

#### B. *Bank accounts.*

(1) Agent shall establish and maintain in a bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, a separate trust account for the deposit of rentals. Agent shall have the authority to draw on this account for any payments that agent must make to discharge any liabilities or obligations incurred pursuant to this agreement, and for the payment of the fee of agent. All such payments shall be subject to the limitations of this agreement.

(2) Agent shall establish and maintain in a Florida banking institution or savings and loan association, the deposits of which are insured by the Federal Deposit Insurance Corporation, a trust account bearing

interest at the rate currently paid by such institutions or associations on time or saving deposits, for the deposit of any money or other form of security deposited or advanced on a contract, lease, or license agreement for the use or rental of real property.

#### SECTION IV. COMPENSATION OF AGENT

Owner agrees to pay agent as compensation for the services described above [*percentage*]% of the gross revenue actually received from the property. The compensation is due and payable on the [*ordinal number*] day of each month, the amount of each monthly payment to be calculated with respect to the gross revenues actually received during the previous month. The amount due agent for each month may be withdrawn by agent from the rental account on the [*ordinal number*] day of the following month.

#### SECTION V. PAYMENTS TO OWNER

Agent shall remit to owner at intervals of not more than [*number*] months, the check of agent for the net amount due owner. A sum to be determined by agent, with the approval of owner, shall be retained by agent for the account of owner as a reserve for mortgage payments and the payment of taxes, licenses, insurance, repairs, and other expenses that may be anticipated, but that are not due at the time of the remittance to owner.

#### SECTION VI. INSURANCE

Owner and agent shall be responsible for maintaining compensation insurance and fidelity bonds covering their respective personnel who are engaged in the operation of the property. Owner shall also maintain public liability insurance in the amount of \$[*dollar amount*] for any single occurrence of bodily injury or property damage. Owner shall name agent as coinsured in the public liability insurance policy. Maintenance of other insurance in connection with the property shall be the responsibility of owner. Maintenance of other insurance in connection with the activities and duties of agent shall be the responsibility of agent.

#### SECTION VII. REIMBURSEMENT OF AGENT

Owner shall reimburse agent for the amount of any

charges paid by agent and required for proper operation of the apartment project if necessary funds are not available to agent from revenues received from the project or are not otherwise made available by owner.

#### SECTION VIII. INDEMNIFICATION OF AGENT

Subject to the limitation below, owner shall indemnify agent against all liability of any nature whatsoever in connection with management and operation of the property, and against all liability for injury or death of employees, or any other persons, resulting directly from the management and operation of the property. This section shall not impose any obligation on owner to indemnify agent against the willful misconduct or negligent acts or omissions of agent or the agents or employees of agent.

#### SECTION IX. TERM AND TERMINATION

The term of this agreement shall commence on *[date]*, and shall end on *[date]*, unless sooner terminated by either party. Termination may be effected at any time by either party on *[number]* days' prior written notice.

#### SECTION X. NOTICE

Any notice required by this agreement shall be delivered by certified mail, addressed to owner at *[address of owner]*, and addressed to agent at *[address of agent]*.

#### SECTION XI. ATTORNEY'S FEES

In the event of any suit, controversy, claim, or dispute between owner and agent, arising out of or relating to performance or breach of this agreement, the prevailing party shall be entitled to recover reasonable expenses, attorney's fees, and costs.

Executed at *[place of execution]* on the date written above.

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*[Signatures]*

#### NOTES TO FORM

##### Drafter's Notes

This form was drafted for execution by an owner and a management firm. Many of the specific duties regarding such matters as

procedures for the collection of rent and the methods of maintenance are purposefully omitted because it is assumed that such matters will be adequately dealt with by a management firm. The next form, also intended for use in connection with management of an apartment building [see § 9:18], was drafted for execution by an owner and a resident manager; it deals more specifically with the types of procedures and methods that the resident manager is to follow.

For optional provisions respecting duties of agents, see §§ 9:44 to 9:62.

**Tax Notes**

See Tax Notes following §§ 9:14, 9:16.

**§ 9:18 Employment agreement—For resident apartment manager**

This agreement made on [*date*], between [*name of owner*], of [*address of owner*], referred to below as owner, and [*name of manager*], of [*address of manager*], referred to below as manager.

**SECTION I. EMPLOYMENT OF MANAGER**

Employer employs manager as the resident manager of an apartment building located at [*address of apartment building*] and comprising [*number*] residential apartments. In consideration of the compensation to be paid as set forth below, manager accepts the employment which comprises specific duties as set forth below.

**SECTION II. COMPENSATION OF MANAGER**

Manager shall receive a total monthly compensation of *[\$/dollar amount]*. Part of the compensation shall be in the form of a rent credit for apartment No. [*number*] in the building, which manager must occupy as a condition of employment. The value of the rent credit is *[\$/dollar amount]* per month, of which sum *[\$/dollar amount]* is the fair monthly rental value of the apartment and *[\$/dollar amount]* is the agreed monthly cost of [*specify, such as: electricity, water, and garbage services*], which are furnished with the apartment. The balance of manager's compensation shall be paid on the [*ordinal number*] and [*ordinal number*] day of each month [*if needed, add: by check*].

**SECTION III. HOURS OF WORK; WORK WEEK**

Manager shall not work more than [*number*] hours per day and not more than [*number*] days in any one week. The work week for manager shall consist of [*number*] days, com-

mencing on *[day]* and ending on *[day]*. Manager agrees to furnish owner on the *[specify, such as: first Friday of each month]* a complete and accurate report of the number of hours worked during the preceding *[specify, such as: month]*. Manager shall not work any hours in excess of the above specified number without the written permission of owner.

Manager shall notify owner at least *[number]* hours in advance of any intentions to be away from the premises on days off and after the number of hours required to be on duty.

#### SECTION IV. RESPONSIBILITIES OF MANAGER

Manager shall be responsible for proper management and maintenance of the apartment building. Required duties shall include, but not be limited to:

- (a) tenant screening and selection;
- (b) leasing of new and turnover apartments;
- (c) collection of rent, including the issuance of legal late-rent notices and their follow-up in cases of non-payment of rent;
- (d) maintenance of an occupancy rate of not less than *[percentage]%*, computed on the basis of *[specify, such as: the total number of apartments]*;
- (e) development of janitorial schedules, and the supervision of janitorial personnel, to ensure proper cleanliness and maintenance of common spaces, sidewalks, parking lots, and grounds;
- (f) writing or taking work or service requests for minor repairs and maintenance of apartments, common spaces, structures, and grounds;
- (g) assignment of such work orders to maintenance personnel, with follow-up sufficient to insure proper completion in a reasonable length of time;
- (h) frequent inspection of grounds, parking lots, common spaces, and apartments for proper cleanliness and maintenance;
- (i) negotiation and, after owner's approval, contracting for and supervising performance of all necessary maintenance contracts;
- (j) purchase, after competitive pricing, of all necessary

- materials and supplies, using purchase order forms approved by owner;
- (k) maintenance and security, in a supply room, of a small inventory of supplies necessary for ongoing maintenance;
  - (l) keeping of an inventory of all capital and noncapital items of personal property that have a value of *[\$/dollar amount]* or more. Such listing shall include description, with model and serial numbers where appropriate, value, condition, and location;
  - (m) establishment and maintenance of a bookkeeping system on an accrual basis that includes a journal, a ledger, and a rent-roll control system. Such system should be adjusted to the needs of a certified public accountant for the yearly audit;
  - (n) development of yearly operating budgets;
  - (o) yearly inspection of the structures, grounds, and apartments for necessary repairs, preventative maintenance, and housekeeping evaluation; and
  - (p) establishment of separate accounts for rental income and security deposits and compliance with applicable law respecting such deposits. The rental account shall be established as a joint account in the names of owner and manager.

#### SECTION V. PERSONNEL

Manager shall supervise and, with the approval of owner, hire and fire all personnel needed in the proper management of the apartment building. All such personnel shall be the employees of owner. Owner shall be responsible for payment of wages and procurement of appropriate employee insurance.

#### SECTION VI. TERM OF AGREEMENT

This agreement shall be in effect from *[date]*, to *[date]*, unless sooner terminated by either party as provided in Section VII.

#### SECTION VII. TERMINATION

Either party may terminate this agreement by giving *[number]* days' written notice to the other. In the event that owner sells the apartment building, this agreement shall

terminate on the last day of the month in which owner transfers title to the property.

### SECTION VIII. NOTICES

Any notice required to be given pursuant to this agreement shall be mailed to owner at [*the address set forth above*] and to manager at [*his/her*] apartment.

Executed at [*place of execution*] on the date written above.

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[Signatures]

### NOTES TO FORM

#### Drafter's Notes

See Drafter's Notes following § 9:17.

#### Tax Notes

Under I.R.C. § 119, three requirements must be met before lodging furnished to an employee is considered nontaxable as additional compensation. The lodging must be for the benefit of the employer; it must be on the business premises of the employer; and the employee must be required to occupy the lodging as a condition of employment.

Though the agreement seems to comply with the last two requirements, the recitals in this agreement work against compliance with I.R.C. § 119. The agreement specifically states that part of the manager's compensation is the apartment itself. It then details the value of the apartment and the services furnished to the manager. These tend to show that the apartment is not a condition of employment, but rather a form of compensation for the manager. Nor does the agreement recite that the occupancy is for the benefit of the employer. Though this is probably not essential, in light of the other provisions its inclusion would be desirable.

In short, if the value of the apartment is to be excluded from the income of a manager, different contract provisions should be employed from those in this agreement.

See Tax Notes following § 9:14.

### § 9:19 General management agreement—Shopping center—Short form

This management agreement made on [*date*], between [*name of agent*] of [*address of agent*], a Florida corporation and a licensed real estate broker, referred to below as "agent," and [*name of owner*], a Florida corporation with its principal place of business at [*address of owner*], referred to below as "owner."

**RECITALS**

A. Owner owns the real estate described as: *[legal description]*.

B. Owner is desirous of vesting in agent the rights and obligations to construct, lease, and manage a shopping center on such real estate.

C. Agent is desirous of performing the above-described functions as agent for owner.

In consideration of the mutual covenants set forth herein, owner and agent agree as follows:

**SECTION I. EMPLOYMENT OF AGENT**

Owner retains and employs agent for the term of all original leases granted in the shopping center and of any and all assignments and renewals thereof, to act as sole and exclusive leasing and management agent of the shopping center, and agent agrees to accept such obligation.

**SECTION II. DUTIES OF AGENT**

Agent shall have full power and authority, subject to the approval of the board of directors of owner:

- (a) to make, execute, and deliver all leases of any space in the shopping center as agent may deem suitable and proper;
- (b) to collect, receive, and issue receipts for all the gross rentals that become due or payable in connection with the shopping center, and to deduct from such gross rentals the commission and other expenses hereinafter provided;
- (c) to pay all sums that agent may deem necessary or proper for the maintenance of buildings, including water, insurance, heat, light, payrolls, repairs, and the like;
- (d) to apply the net rental then remaining to the payment of all taxes, both general and special, due or to become due on the properties, during the term of this agreement; and
- (e) to pay principal and interest due or to become due on such note or notes as are secured by mortgages on the property, and also to pay the expenses of any improvements to the property.

Agent is under no obligation or responsibility for the payment of the foregoing items, or any part thereof, except to the extent of the gross rentals collected by agent and remaining after the deduction therefrom of the commissions and expenses of agent as hereinafter provided.

### SECTION III. BEST EFFORTS

Agent shall devote its best efforts to the fulfillment of the duties outlined in Section II. Agent shall also exert its best efforts to obtain necessary financing required by owner.

### SECTION IV. ACCOUNTING

Agent shall furnish to owner monthly statements in accordance with generally accepted accounting principle, of all rents collected by agent and all deductions and disbursements made therefrom for the above-described purposes, and shall pay to owner the net rentals, if any remain after the payment of all the above items.

### SECTION V. COMPENSATION AND REIMBURSEMENT

For the performance of the duties outlined above, agent shall receive a management fee of *[percentage]*% of all gross rents. In the event there is a cooperating broker employed for a part or all of a development, the fee of agent shall be increased to cover the fee of the cooperating broker to the extent of the participation of the broker in the development, but in no event shall the fee be more than a total of *[percentage]*% of the gross rent to be derived from the development.

In determining the reimbursable expenses of agent, it is understood that agent is to be reimbursed for all expenses, direct or indirect, previously approved by the board of directors of owner, incurred by agent on behalf of owner for the purpose of procuring leases in the shopping center. It is further understood that agent shall have no right to reimbursement for office expenses not incurred in connection with leasing operations. Agent shall also be reimbursed for maintenance expenses incident to the operation of the shopping center.

### SECTION VI. TERMINATION

Owner shall have the right, at any time, on *[number]* days' notice in writing, to terminate this management agreement on payment to agent of *[percentage]*% of the gross rents due or to become due for the balance of the term of the existing

leases. In the event cooperating brokers participate in the fee of agent as outlined in Section V, then such payments shall be increased to cover the fee of the broker, but in no event shall the fee be more than a total of *[percentage]*% of the gross rents due or to become due from the shopping center development. In the event that percentage leases are so terminated, the anticipated gross rentals shall be determined by agreement between the parties, based on the experience in the shopping center with the percentage leases. In the event the parties cannot agree as to the proper figure, the disagreement shall be submitted to arbitration with each party designating an arbitrator and the two chosen arbitrators designating a third. The decision of the board of arbitrators shall be final and binding on the parties. In the event the two chosen arbitrators cannot agree on a third impartial arbitrator, a third arbitrator shall be appointed by the American Arbitration Association.

#### SECTION VII. SUPERVISION OF CONSTRUCTION

Agent shall supervise to completion all the construction activities of owner and exert the best efforts of agent in the fulfillment of such activities, furnishing to owner statements as required by owner of all activities performed in this connection.

As compensation for supervision of construction activities, agent shall receive a sum equal to *[percentage]*% of the cost of construction of the shopping center.

The cost of construction means the actual cost of building the improvements on the land, but does not include the cost of the land or the costs incident to the acquisition of the land or financing costs. Agent shall have no right to reimbursement for office expenses incurred in connection with its own personal services in construction activities.

#### SECTION VIII. ENTIRETY, ALTERATION; BINDING EFFECT

This agreement constitutes the entire agreement of the parties respecting the subject matter. The parties may not alter, amend or modify it except by an instrument in writing executed by both. It includes all representations of every kind and nature made by either party to the other and shall be binding on the successors and assigns of the parties.

Executed at *[place of execution]* on the date written above.

[Signatures]

#### NOTES TO FORM

##### Tax Notes

See Tax Notes following § 9:14.

#### § 9:20 General management agreement—Shopping center—Long form

#### PROPERTY MANAGEMENT AGREEMENT

This Property Management Agreement (“Agreement”) is made as of [date] by and between [name of owner], a [state] [specify entity, such as: partnership] (“Owner”) and [name of property management company], a [state] [specify entity, such as: corporation] (“Agent”).

#### BACKGROUND

A. Owner is the owner of the land and improvements known as [name of shopping center], located at [address of shopping center] (the “Property”).

B. Owner desires to retain Agent as its exclusive agent for the purposes of leasing and managing the Property on behalf of Owner, and Agent is willing to act as agent for Owner with respect to the Property on the terms and conditions of the Agreement as more fully set forth here.

NOW, THEREFORE, in consideration of the agreements and covenants contained in this Agreement, and intending to be legally bound by them, Owner and Agent agree as follows:

1. Owner employs Agent to manage and lease, as the exclusive broker, the property on the terms and conditions set forth in this Agreement for an initial term of [number] years from the date of the execution of this Agreement unless otherwise extended, renewed or terminated as set forth below.
2. Agent agrees to perform the following:
  - 2.1. Use its best efforts to lease or cause brokers or other agents to lease on behalf of Owner all available space in the Property.

2.2. Diligently to collect rents, additional rents, and all other sums due from tenants when due and, where necessary or appropriate, and except as directed otherwise by Owner (in which event Owner shall bear the administrative costs of relieving Agent of the duty or duties), take all actions that Agent shall deem necessary or advisable to enforce all rights and remedies of Owner under the leases relating to the Property (the "Leases") or to protect the interest of Owner, including, without limitation, the preparation and delivery to tenants under the Leases ("Tenants") of all late payments, defaults, and other appropriate notices, requests, bills, demands, and statements. After notification to Owner, Agent may retain counsel, collection agencies, and other persons and firms that Agent shall deem appropriate or advisable to enforce, by legal action, the rights and remedies of Owner against any Tenant who has defaulted in the performance of its obligations under a Lease. Agent shall promptly notify Owner of the progress of any such legal action.

2.3. To pay from the operating funds of the Property or such other funds as are provided by Owner bills and expenses for the maintenance, repair and operation of the Property, provided, however, that all expenditures in excess of *[\$/dollar amount]* in any single transaction or more than *[\$/dollar amount]* in the aggregate in any period of *[number]* consecutive months shall be subject to Owner's approval unless the expenditure is included in the operating budget for the Property that has been approved by Owner, and provided further that Agent shall notify Owner of any budget expenditures cumulatively exceeding *[percentage]%* of any approved annual budget.

2.4. To establish and maintain such books of account, records, and other documentation pertaining to the operation and maintenance of the Property that are customarily maintained by managing agents of properties similar in location and size to that of the Property. Agent shall prepare or cause to be prepared and file all returns and other reports relating to the Property, other than income tax returns and any reports or returns that may be required of any foreign owner of U.S. real property, as may be required by any governmental authority or

otherwise under this Agreement. Agent shall periodically report to Owner on the general operations, occupancy, physical condition, disbursements, delinquencies, uncollectible accounts, and other matters relating to the Property. Agent shall prepare and forward to Owner a written report each month showing the receipts and expenditures for that month, the receipts and expenditures year-to-date and the variations from the agreed upon budget. These statements shall, at Owner's request, be accompanied by appropriate documentation of all expenditures made by Agent under this Agreement. As soon as practicable after the end of each calendar year and after the expiration or termination of this Agreement, Agent shall use reasonable efforts to prepare and deliver to Owner statements pertaining to the operation and maintenance of the Property during the preceding calendar year. Agent shall prepare and submit to Owner for its approval no later than December 1st of each calendar year (or a later date to which the parties agree) a proposed pro forma budget for all costs pertaining to the operation and maintenance of the Property during the ensuing calendar year. Each such budget shall be substantially in the same form as the approved budget in effect for the prior calendar year, shall set forth expenditures on an annual and a monthly basis, and shall not, except for informational purposes, include estimates for costs and expenses for which Owner will be reimbursed by Tenants under the Leases. Agent shall make such reasonable modifications to each proposed pro forma budget it prepares in accordance with this section until Owner shall have approved this budget in writing, which approval shall not be unreasonably withheld or delayed. The budget and revisions shall be deemed to be accepted and approved by Owner unless specifically rejected or accepted within *[number]* days of submission.

- 2.5. To account for all advance deposits of Tenants.
- 2.6. To refund to Tenants from escrow accounts, funds of the Property or funds provided by Owner, as appropriate, pro-rated rents, rebates, allowances, advance deposit refunds, and such other amounts as are legally due Tenants.
- 2.7. To collect from Tenants all insurance policies, Tenant insurance certificates, or other evidence of insur-

ance required to be carried by Tenants.

2.8. Unless otherwise instructed by Owner, to secure for and on behalf of and at the expense of Owner insurance that may be deemed by Owner (or any mortgagees) to be necessary or appropriate (including without limitation employee dishonesty insurance, fire and extended coverage property insurance, public liability insurance and workers' compensation insurance) in the amounts satisfactory to Owner and Agent and naming Owner and Agent as coinsureds and in form and substance satisfactory to Owner, Agent and any mortgagees; provided, however, that if Agent promptly notifies Owner of the insurance so secured on behalf of Owner, and promptly complies with Owner's instructions regarding the insurance, Owner releases and holds Agent harmless of and from any claims, loss, damages and liability of any nature whatsoever based on or in any way relating to Agent's securing or failure to secure any insurance, or any decision made by Agent with respect to the amount or extent of coverage of the insurance or the company or companies issuing, brokering or negotiating the insurance.

2.9. To respond to complaints and inquiries by Tenants, prospective tenants and others, and to take corrective actions that Agent deems appropriate.

2.10. To contract on behalf of and at the expense of Owner for supplies and services in reasonable quantities and at reasonable prices that may be appropriate with respect to the Property, and to supervise and administer such contracts, including, without limitation, contracts for mechanical maintenance (including preventative maintenance), window and facade maintenance and cleaning, metal maintenance, pest control, trash removal, janitorial and maintenance supplies, building security, public relations, collection and credit reporting, legal and accounting services, computer services, architectural and engineering services, laundry services, and janitorial or cleaning services. In so contracting, Agent may contract with entities or persons affiliated with it, provided, however, that the rates and charges of the affiliated entity or person are generally competitive and consistent with rates and charges by nonaffiliated entities and will obtain a minimum of two competitive bids from nonaffiliated contractors respecting any

contract exceeding *[\$/dollar amount]*.

2.11. To negotiate on behalf of Owner any applicable labor or collective bargaining agreements related to employees of Owner at the Property.

2.12. To hire, discharge, promote or demote, and supervise the onsite employees of Owner, if any, which employees may include, but are not necessarily limited to, a building executive director or supervisor, building manager, leasing specialist or leasing agent, secretarial and clerical staff, maintenance personnel, porters, laborers, and security guards; provided, however, that any personnel hired by Agent whose wages are not provided for in the approved budget, or otherwise approved by Owner and shall be employees of Agent, and their wages and fringe benefits shall be paid by Agent without reimbursement by Owner.

2.13. To supervise and coordinate the moving in and moving out of Tenants to accomplish efficient and time saving use of personnel and elevators and maintain appropriate public relations with Tenants and prospective tenants.

2.14. To prepare and file and/or cause to be prepared and filed on behalf of Owner necessary forms for insurance, hospitalization, benefits, social security taxes, union dues and contributions and other forms, documents and returns that may be required by any governmental authority, a collective bargaining agreement, or otherwise with respect to employees of Owner at the Property.

2.15. To prepare and file or cause to be prepared and filed on behalf of Owner applications for permits, and/or licenses that may be required for the operation of the Property.

2.16. To prepare payroll records, accounting reports, vacancy and occupancy reports, delinquency reports, cash flow reports, and disbursement ledgers. Agent may contract with others, including but not limited to entities or persons affiliated with it, or provide its own personnel for the performance of accounting, bookkeeping and computer services in connection with the preparation, all without any additional charge to Owner.

2.17. To institute and prosecute on behalf of Owner

legal actions or proceedings that the Agent deems appropriate; to collect sums due Owner; with Owner's approval, to evict a Tenant, former Tenant or occupant of the Property; to regain possession of the Property or any part of the Property; to contest any bill or charge asserted against or with respect to the Property; to defend any administrative or legal action brought against Agent and/or Owner with respect to the Property; with Owner's approval, to commence litigation pertaining to any labor or employment related dispute; to administratively process or litigate any tax related issue or other issues relating to the Property; to appeal all such proceedings and law suits; and to settle or compromise any claims, law suits, judgments and proceedings relating to the Property, provided however that Agent shall first notify Owner of any compromise which would result in an expenditure by or loss to Owner in excess of *[\$/dollar amount]*.

2.18. To maintain bank accounts or similar accounts on behalf of Owner that are necessary or appropriate in the operation of the Property, including reserve, investment, security, escrow and other accounts.

2.19. To open and maintain accounts on behalf of Owner with suppliers and vendors that are necessary or appropriate for the efficient operation of the Property.

2.20. Subject to the approval by the Owner, to join and participate on Owner's behalf in professional, trade or industry organizations and associations relating to office buildings as necessary or appropriate with respect to the operation of the Property.

2.21. To notify Owner of any violations of any laws, orders, rules, or determinations of any governmental authority or agency affecting the Property promptly after each such occurrence is known to Agent.

2.22. To notify Owner of any catastrophe or major loss or damage or other material adverse change with respect to the property, and to similarly notify all appropriate insurance authorities of the same, promptly upon Agent's knowledge of the same.

2.23. To supervise and arrange for all construction work performed on behalf of Owner at, in or about the Property; provided, however, that with respect to any

construction work in excess of *[\$/dollar amount]*, Agent shall be paid a construction supervision fee in the amount of *[percentage]%* of the total construction costs or a greater amount that may be negotiated and agreed on by Agent and Owner.

2.24. Upon request of Owner, to provide or arrange for engineering, architectural, design or consulting services with respect to construction, rehabilitation or decorating work or proposed construction, rehabilitation or design work at the Property, all such services to be paid for by Owner.

2.25. To handle on behalf of Owner the submission to appropriate insurance officials of insurance claims and the settlement of insurance claims; provided however, that with respect to any proceeds or reimbursements with respect to an insurance claim which is in excess of *[\$/dollar amount]*, Agent shall be paid a processing fee, in addition to all other fees set forth in this Agreement, in an amount equivalent to *[percentage]%* of the amount received by the Owner with respect to that claim.

2.26. To prepare reports, data, presentations, market surveys or other material that Owner requests in connection with the sale, refinancing, disposition or master leasing of the Property.

2.27. To institute at Owner's expense advertising, marketing and public relations campaigns pertaining to the Property.

2.28. To recommend to Owner, where Agent deems it appropriate, programs for the rehabilitation, remodeling, repairs and marketing of the Property.

2.29. To perform other services on behalf of Owner with respect to the Property customarily performed by agents within the Property's geographical area that shall be reasonably requested from time to time by Owner. If Owner and Agent disagree as to which services are customarily performed by agents within the Property's geographical area, Agent shall not be required to perform that service until resolution of the dispute, and Agent's nonperformance shall not be the basis of termination of this Agreement by Owner.

3. Owner expressly withdraws from Agent any power or authority to make any structural changes in any building

or to make any other major alterations or additions in or to any such building or equipment in any such building, or to incur any expense chargeable to Owner other than expenses related to exercising the express powers above vested in Agent without the prior written direction of Owner (or any party that Owner shall direct), except for emergency repairs that may be required because of danger to life or property, or that are immediately necessary for the preservation and safety of the Property or the safety of the occupants of the Property, or that are required to avoid the suspension of any necessary service to the Property.

3.1. Agent agrees to remit promptly to the account designated by Owner all receipts received in the prior calendar month with respect to the Property in excess of budgeted operating expenses and reserves.

4. Owner shall, at all times, provide necessary funds to maintain and operate the Property as efficiently as possible and in a first class manner in keeping with the standards of operations for similarly situated shopping centers in the area. Owner shall advance the funds to Agent no later than *[number]* days after Owner receives from Agent notice of the necessity for the advance. Owner agrees to provide any anticipated cash deficits *[number]* days prior to its occurrence.

5. Except as otherwise provided for in this Agreement, Owner shall pay to Agent a property management fee in an amount equal to *[percentage]%* of the gross receipts of the Property. This fee shall be payable in monthly installments from the operating accounts maintained pursuant to Section 2.17 of this Agreement. Gross receipts of the Property shall include all rents, percentage rents, tenant charges, reimbursements from Tenants for common area maintenance charges, insurance, utilities and real estate taxes and all other amounts that are collected from Tenants. Gross receipts of the Property shall exclude the proceeds from any sale or refinancing of the Property or any portion of it, and the proceeds of any settlements, insurance award (except as provided in Section 2.24) or condemnation award. This fee does not include payment for leasing services.

5.1. Nothing contained in this Agreement shall be construed to obligate Agent to defer receipt by it of any management fee or other fees whatsoever.

5.2. Agent or its affiliate shall be the leasing agent for the Property. Owner shall pay brokerage commissions to outside brokers, if used in connection with negotiating a lease, at the following rates: *[specify rates]*. Owner shall pay Agent or its affiliate a leasing commission for each lease signed during the term of this Agreement upon occupancy by the tenant in an amount equal to *[percentage]%* of the full leasing commission; provided however, the leasing commission to Agent or its affiliate shall be reduced to *[percentage]%* of a full commission in the event that an outside broker is the procuring broker and is paid a full commission. In the event of a renewal, the commission payable to Agent shall be one-half of the commission otherwise payable. This limitation shall not apply to commissions for the expansion of an existing tenant.

5.3. Owner agrees to pay to Agent or its affiliate a sales commission equal to *[percentage]%* of the sales price of the Property, not to exceed *[\$/dollar amount]* provided that no outside broker is involved. However, if there is an outside broker involved, then Owner shall pay Agent an amount equal to one-half of the difference between *[percentage]%* of the sales price and the commission payable to the outside broker, not to exceed *[\$/dollar amount]*.

5.4. Owner agrees to pay to Agent or its affiliate a commission equal to *[percentage]%* of the principal amount of any financing/refinancing arranged for the Property, not to exceed *[\$/dollar amount]*, provided that aggregate commissions for financing to all involved parties shall not exceed *[percentage]%*.

6. Owner shall reimburse Agent for reasonable, actual out-of-pocket expenses including telephone and facsimile charges, postage and express mail service and travel and food expenses incurred by Agent in connection with Agent's on site supervision of the Property by Agent's officers and personnel, as evidenced by receipts submitted to Owner.

7. The Agent, on behalf of Owner, shall engage *[name of attorney or law firm]*, or his or her successor, as legal counsel to provide legal services for Owner and the Property. The legal services shall be provided as required and at a rate of *[\$/dollar amount]* per hour unless otherwise agreed to by Owner or Agent.

8. In performing its obligations under this Agreement, Agent shall comply with all applicable federal, state, and local laws and regulations.

9. The initial term of this Agreement shall be for a period of [number] years from the date of this Agreement, and this Agreement shall automatically renew from year to year after that unless and until terminated by either party upon [number] days' prior written notice. Notwithstanding the foregoing, Owner shall be entitled to terminate this Agreement, without additional compensation to Agent, at any time upon [number] days' notice to Agent in the event of the malfeasance or breach of this Agreement by Agent or upon the filing of a bankruptcy petition against or by Agent. This Agreement shall terminate automatically, without additional compensation to Agent, if: (i) all or substantially all of the Property is condemned or acquired by eminent domain; (ii) all or substantially all of the Property is destroyed by fire or other casualty as a result of which all or substantially all of Tenants are unable to continue the normal conduct of their business in their respective occupied spaces and are permanently released under their respective leases from the payment of all rent under their leases; (iii) all of the Property is sold to an unrelated, third-party purchaser; or (iv) in the event of the death, disability (for a period of 180 days during any 365 consecutive days), or incompetency of [name of CEO of Agent], or if [name of CEO of Agent] is no longer chief executive officer of the Agent or the Agent's permitted assign.

10. Owner shall pay or reimburse Agent for any monies due it under this Agreement for services prior to termination, notwithstanding termination of this Agreement. All provisions of this Agreement that require Owner to have insured or to defend, reimburse or indemnify Agent shall survive any termination and, if Agent is or becomes involved in any proceeding or litigation by reason of having been Owner's Agent, such provisions shall apply as if this Agreement were still in effect. Owner agrees that Agent may withhold funds for [number] days after the end of the month in which this Agreement is terminated to pay bills previously incurred but not yet invoiced, and to close accounts.

11. Owner agrees to release, indemnify, defend, and

save the Agent and its officers and employees harmless from and against all claims, disputes, losses, liabilities and suits (including but not limited to all attorney's fees and litigation expenses and Agent's costs in connection with this Agreement) in any way: (i) relating to or arising in connection with the Property and/or damage to property and injuries to or death of any employee, invitee or other person whomsoever, and/or Agent's performance of its duties under this Agreement; (ii) relating to any proceeding or suit involving an alleged violation by Owner of any law applicable to the Property or operations of the Property; and (iii) relating to obligations assumed by Agent, its officers or employees in connection with any financing or refinancing entered into in connection with the Property.

11.1. The obligations of Owner to indemnify, hold harmless, and reimburse Agent are subject to the following conditions: (i) Agent shall promptly notify Owner of any matter with respect to which Owner is required to indemnify, hold harmless, or reimburse Agent; and (ii) Agent shall not take or fail to take any actions, including an admission of liability, which would bar Owner from enforcing any applicable coverage under policies of insurance held by Owner, or which would prejudice any defense of Owner in any appropriate legal proceedings pertaining to any such matter or otherwise prevent Owner from defending itself with respect to any such matter, provided such action or failure to act resulted from the gross negligence or willful malfeasance of Agent. Notwithstanding the foregoing, Owner shall not be required to indemnify, hold harmless, or reimburse Agent with respect to any matter to the extent the same resulted from the gross negligence or willful malfeasance of Agent or actions taken by Agent outside of the scope of Agent's authority under this Agreement or any express or implied direction of Owner. The provisions of this section shall survive the expiration and any termination of this Agreement.

12. Owner and Agent each waive any claim for loss or damage against the other and mutually agree to hold each other harmless for loss to the Property to the extent that either party is reimbursed or indemnified by insurance coverage.

13. Agent will promptly notify Owner of any violations of any requirements of any statute, ordinance, law or

regulation of any governmental body or any public authority or governmental official having jurisdiction. Agent shall promptly take all actions necessary to cure such violations and to prevent any civil or criminal liability from being imposed.

14. In the event that it is alleged or charged that the Property or any equipment on the Property or any act or failure to act by the Owner or its agents with respect to the Property or the sale, rental, or other disposition of the Property fails to comply with, or is in violation of, any of the requirements of any provision, statute, ordinance, law, or regulation of any governmental body or any order or ruling of any public authority or governmental official having or claiming to have jurisdiction over the Property, and Agent, in its sole and absolute discretion, considers that the action or position of Owner may result in damage or liability to Agent, Agent shall have the right to cancel this Agreement at any time by giving not less than [number] days' prior written notice to Owner of its election so to do, which cancellation shall be effective upon the service of notice. The notice may be served personally or by United States certified mail, and if served by mail shall be deemed to have been served when deposited in the United States mail system. Such cancellation shall not release the indemnities of Owner and Agent set forth in this Agreement and shall not terminate: (i) any liability or obligation of Owner to Agent for any payment, reimbursement, or other sum of money then due and payable to Agent under this Agreement as of the date of cancellation; or (ii) any obligation of Agent to remit moneys to Owner or to complete its obligations under this Agreement through to the date of the cancellation. Agent shall cooperate with Owner to ensure a smooth and efficient transition to a new managing agent, including but not limited to, prompt delivery of files relating to the Property.

15. Agent agrees to release, indemnify, defend and save Owner harmless from and against all claims, disputes, losses, liabilities and suits (including but not limited to all attorney's fees and litigation expenses and Owner's costs in connection therewith) in any way resulting from the gross negligence or willful malfeasance of Agent, or its employees: (i) relating to or arising in connection with the Property and/or damage to property and injuries to or

death of any employee, invitee or other person whomsoever, and/or Agent's performance of its duties under this Agreement; and (ii) relating to any proceeding or suit involving an alleged violation by Agent of any law applicable to the Property or operations of the Property.

16. It is expressly agreed by the parties that:

16.1. The parties have entered into this Agreement without any inducements, representations, statements, warranties or agreements made by either party other than those expressly stated in this Agreement.

16.2. This Agreement embodies the entire understanding of the parties with respect to the subject matters stated in this Agreement, and there are no other understandings or undertakings related to the within subject matters. This Agreement may be modified only by a written agreement signed by the parties.

16.3. The provisions of this Agreement are severable, and to the extent that any provision of this Agreement is determined by court order, law or rule to be invalid, such invalidity shall in no way affect nor invalidate the other provisions of this Agreement.

16.4. This Agreement shall be governed by and construed in accordance with the laws of the State of Florida.

16.5. With respect to any and all disputes under or relating to this Agreement, the parties consent to the exclusive jurisdiction and venue of the courts of [*county*] County, Florida.

16.6. The parties agree that in any litigation or proceeding commenced by either party against the other, service of process shall be deemed to be effective either by hand delivery or by mailing via certified mail, postage prepaid, with a proof of mailing receipt validated by the U.S. Postal Service constituting the sufficient evidence of service of process.

16.7. With respect to any notices that are required or permitted to be made pursuant to this Agreement, they shall be in writing and either delivered personally or sent by United States mail addressed as follows:

As to Owner:  
[*Name of owner*]

[Address of owner]

As to Agent:

[Name of agent]

[Address of agent]

16.8. This Agreement may not be assigned by Agent without the prior written consent of Owner, provided, however, that Owner consents to Agent's designating a subsidiary or affiliate of Agent to act on behalf of Agent as leasing and rental agent for the Property. This Agreement shall be binding on and benefit the parties and their respective successors and permitted assigns.

17. Owner expressly consents to the assignment of Agent's rights and obligations under this Agreement to [name of agent].

IN WITNESS, and intending to be legally bound, the parties have executed this Property Management Agreement as of the day and year first set forth above.

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[Signature of Agent]

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[Signature of Owner]

#### NOTES TO FORM

##### Drafter's Notes

Drafting principles applicable to various aspects of management agreements are discussed in §§ 9:3 to 9:10; for pertinent checklist, see § 9:13.

Optional provisions that may be appropriate for inclusion in an agreement being drafted are set forth in §§ 9:26 to 9:71.

For discussion of, and forms relating to, employment contracts, generally, see Employment (Ch 20).

##### Tax Notes

See tax notes following §§ 9:14, 9:16.

#### § 9:21 General management agreement—Hotel

This agreement made and entered into on [date], by and between [name of owner], a [state] corporation having an office at [address of owner], referred to as Owner, and [name of manager], a [state] corporation, with its principal place of business at [address], and duly authorized to transact busi-

ness within the State of [*state*], referred to as Manager. The agreement described above is referred to as the Agreement.

#### RECITALS

Since Owner is operating a motor hotel at [*address of hotel*] referred to as the Motor Hotel, adequate to accommodate [*number*] guest rental units, fully equipped with furniture and fixtures; and

Since Manager represents that it is qualified in the supervision, operation and management of motor hotels; and

Since Owner desires to employ Manager to act as its manager in supervising, administering and managing the motor hotel; and

Since Manager desires to furnish those services, all subject to the terms and conditions set forth in this Agreement;

Therefore, in consideration of the mutual covenants contained below, Owner and Manager agree as follows:

1. *Appointment by Owner of Manager of Motor Hotel.*

(a) Owner here appoints Manager for the term of this Agreement as its sole and exclusive manager to supervise and administrate, for and at the expense of Owner, the management and operation of the Motor Hotel, including the management of any ancillary facilities as Owner shall specifically direct, upon the terms and conditions stated below, this appointment to be effective as of the date of execution of this Agreement and to continue in force afterwards for the period specified in Paragraph 9 below.

(b) Manager shall manage, operate, and maintain the Motor Hotel in an efficient and satisfactory manner. Manager shall act in a fiduciary capacity with respect to the proper protection of and accounting for Owner's assets. In this capacity, Manager shall serve Owner's interests at all times.

2. *Management and Operation Services.* Manager here accepts the appointment under the terms and conditions here set forth, and in connection with the supervision, administration, and management, Manager shall perform the following services:

(a) *General Operation.* Operate the Motor Hotel in the same manner as is customary and usual in the operation of comparable facilities for the account of Owner, and so far as is economically and legally possible, in accordance

with the same procedures, practices, management techniques and other rules of operation used by similar Motor Hotels and those managed by Manager for the account of others (except where this Agreement shall specifically provide a different procedure, practice, and so forth).

(b) *Employees; Independent Contractor.* Manager shall have in its employ at all times a sufficient number of capable employees to enable it properly, adequately, safely and economically to manage, operate, maintain, and account for the Motor Hotel. All matters pertaining to the employment, supervision, compensation, promotion and discharge of such employees are the responsibility of Manager, which is in all respects the employer of such employees. Notwithstanding anything to the contrary, Owner shall be notified at least five days prior to the proposed replacement of the Motor Hotel's general manager. The replacement of any general manager will be subject to the review and approval of Owner. Manager will negotiate with any union lawfully entitled to represent such employees and may execute in the name of the Motor Hotel, any resulting collective bargaining agreements or labor contracts. Manager shall fully comply with all applicable laws and regulations having to do with worker's compensation, social security, unemployment insurance, hours of labor, wages, working conditions, and other employer-employee related subjects. Manager represents that it is and will continue to be an equal opportunity employer and must advertise as such. This Agreement is not one of agency by Manager for Owner, but one with Manager engaged independently in the business of managing properties on its own behalf as an independent contractor. All employment arrangements are therefore solely Manager's concern and Owner shall have no liability with respect to those arrangements.

(c) *Schedule of Employees.* Manager shall provide a schedule of employment positions, in the format of Schedule A attached, to be staffed "onsite" for conducting the direct management of the Motor Hotel. This schedule shall include the number of employment positions, together with titles and applicable salary ranges, and shall also indicate which employment positions are to be bonded or are covered under Manager's comprehensive crime insurance policy. Manager shall identify in the same manner those

additional employment positions for which salaries may from time to time be charged pro rata to the Motor Hotel for direct services rendered. Employees whose salaries may not be charged pro rata include, but are not limited to, general management personnel, accountants and auditors. Schedule A may be amended from time to time by mutual agreement. Manager may substitute members of its home office staff, on a temporary basis from time to time, to perform in designated employment positions, provided Owner's written approval shall have first been obtained.

(d) *Income.* The establishment of all prices, price schedules, rates and rate schedules shall be subject to Owner's prior written approval, and in this connection Manager shall use diligent efforts to collect all income of any type and nature which may become due from time to time or at any time for goods and services provided in connection with the Motor Hotel or any portion of it. Manager shall collect and identify any income due Owner from all services including, but not limited to, room rental, food and beverage sales, coin-operated machines of all types, including vending machines, pay telephones and so forth. All monies so collected shall be deposited in the Operating Accounts, as defined below. In connection with any collection efforts, only legal counsel or a collection firm approved by Owner shall be retained. All legal expenses incurred in bringing such approved suit or proceeding shall be submitted to Owner for its prior approval. Manager shall not write off any income items without the prior approval of Owner.

(e) *Repairs.* Subject to the Approved Operating Budget as defined below, the making of such repairs, alterations and decorations for the Motor Hotel as Manager may deem reasonable and necessary for the proper maintenance and operation thereof. However, no contract for repairs, alterations or decorations involving a single expenditure in excess of \$[*dollar amount*] shall be entered into without written notice to and written approval of Owner having first been obtained. In the event of an emergency requiring prompt action for the protection or safety of the Motor Hotel or to its occupants, Manager shall be empowered to take necessary action without prior approval, after which a written report of the occasion for such action and the action taken shall immediately be made to Owner.

(f) *Concessions.* Subject to Part (m) below, the obtaining and granting of concessions and licenses for concessions including but not limited to cigar stands, newsstands, and other concessions as Manager may deem reasonably necessary or desirable in connection with the operation of the Motor Hotel. Except as otherwise directed by Owner in a particular case, all such concessions and licenses shall be in Manager's own name as manager for Owner and not in the name of Owner.

(g) *Accounting.* The installation of accounting and internal auditing systems shall be in accordance with Paragraph 3 below.

(h) *Service Agreements.* Generally, the negotiation of service and other contracts reasonably necessary or desirable in connection with the operation of the Motor Hotel in the usual course of business, except that Manager shall not enter into any contract for cleaning, maintaining, repairing or servicing of the Motor Hotel or any of the constituent parts that requires annual payments in excess of *[\$/dollar amount]* without the prior written consent of Owner. As a condition to obtaining that consent, Manager shall supply Owner with a copy of any such proposed contract and shall state to Owner the relationship, if any, between Manager (or the person or persons in control of Manager) and the party proposed to supply such goods or services, or both.

All service contracts shall:

- (i) be in the name of Manager;
- (ii) be assignable, at Owner's option, to Owner or Owner's nominee;
- (iii) include a provision for cancellation by Owner or Manager upon not less than 30 days written notice; and
- (iv) shall require that all contractors provide evidence of sufficient insurance. If this Agreement is terminated pursuant to Paragraph 9, Manager shall, at Owner's option, assign to Owner or Owner's nominee all service agreements pertaining to the Motor Hotel.

(i) *Inventory, Etc.* Subject to the Approved Operating Budget, the purchasing of any inventories, provisions, supplies and equipment as Manager may deem reasonably necessary in order properly to maintain and operate the Motor Hotel.

(j) *Advertising.* Manager shall prepare advertising plans and promotional materials to be used to further room rentals. Such plans or materials shall only be used if approved in advance in writing by Owner and in conformity with that approval. Manager shall not use Owner's name in any advertising or promotional materials without Owner's prior written approval in each instance. Advertising and promotional materials shall be prepared in full compliance with federal, state and local fair housing laws, ordinances, regulations and orders.

(k) *Compliance With Laws, Mortgages, Etc.* Manager shall be responsible for full compliance with federal, state and municipal laws, ordinances, regulations and orders relating to the renting, use, operation, repair and maintenance of the Motor Hotel and with the rules, regulations or orders of the local board of fire underwriters or other similar body. Manager shall promptly remedy any violation of any such law, ordinance, rule, regulation or order which comes to its attention.

Expenses incurred in remedying violations may be paid from the Operating Accounts, provided those expenses do not exceed \$/[dollar amount] in any one instance. When more than such amount is required or if the violation is one for which Owner or other title holder might be subject to penalty, Manager shall notify Owner within three business days to the end that prompt arrangements may be made to remedy the violation, provided that any and all costs, fines and penalties payable as a result of such violation accruing between the date of Manager's first receiving actual notice of such violation and the date Manager gives notice to Owner shall be borne by Manager.

(l) *Taxes; Mortgages.* Manager shall, if so requested, obtain and verify bills for real estate and personal property taxes, improvement assessments and other like charges which are or may become liens against the Motor Hotel and may recommend payment or appeal as in its best judgment it may decide. Manager shall forward such bills to Owner for payment by Owner in such time to permit Owner to avoid penalty for late payment or to permit Owner to take advantage of discounts. Manager shall not make any payments on account of any ground lease, mortgage, deed of trust, or other security instrument, if any, affecting the Motor Hotel.

(m) *Leasing.* Manager shall make every reasonable effort to obtain and keep desirable tenants for any commercial space in the Motor Hotel. Manager shall, so far as possible, procure references from prospective tenants, investigate such references, and use its best judgment in the selection of prospective tenants. Immediately following any vacancy, Manager will prepare adequate rental listings and promptly distribute them to reputable and active real estate brokers. All terms and conditions of each listing agreement shall be subject to Owner's review and written approval prior to such distribution. After a vacancy is so listed, Manager will cooperate with any of such brokers in any manner likely to aid in successfully filling the vacancy. Manager agrees to perform whatever service may be required in connection with the negotiation or leases or renewals, extensions, modifications, or cancellations thereof. Leasing commissions approved by Owner will be paid from the Operating Accounts.

All leases are to be prepared by Manager in accordance with the leasing guidelines established by Owner with respect to the Motor Hotel. The guidelines are attached to this Agreement as Schedule B but may be revised at any time by Owner on written notice to Manager. Except as otherwise directed by Owner in a particular case, all leases shall be in Manager's own name as property manager for Owner and not in the name of Owner.

(n) *General.* Subject to the terms and conditions of this Agreement, Manager shall perform all acts reasonably necessary in connection with the operation of the Motor Hotel in an efficient and proper manner and in accordance with standards and policies established or to be established by Manager for the operation of a first-class Motor Hotel.

### 3. *Accounts and Records, Etc.*

(a) *Inspection.* All books, accounts and records maintained for the operation of the Motor Hotel shall be open at all reasonable hours for inspection and audit by Owner or any qualified and experienced hotel accountant selected by Owner for that purpose. In all cases, proper identification must be given to the general manager in charge of the Motor Hotel before inspection will be granted. Within 60 days after the close of each fiscal year an audit shall be made of the books and accounts by independent auditors, satisfactory to Owner, which shall be an expense of operat-

ing the Motor Hotel and not the responsibility of Manager. A copy of such audit shall be furnished to each of the parties to this agreement immediately upon completion.

(b) *Books of Accounts.* Manager, in the conduct of its responsibilities to Owner, shall maintain adequate and separate books and records for the Motor Hotel. Such books and records shall be maintained in accordance with Owner's specified accounting system and chart of accounts for hotels to be furnished by Owner to Manager. Manager shall ensure such control over accounting and financial transactions as is reasonably required to protect Owner's assets from theft, error, or fraudulent activity on the part of Manager's employees or other agents. Losses arising from such instances are to be borne by Manager and shall include but not be limited to:

- (i) theft of assets by Manager's employees or other agents;
- (ii) penalties, interest, or loss of vendor discounts due to delay in payment of invoices, bills, or other similar charges;
- (iii) overpayment, nonpayment, or duplicate payment of invoices arising from either fraud or error;
- (iv) overpayment of labor costs arising from either fraud or error;
- (v) a sum equal to the value of any form of payment from purveyors to Manager's employees or affiliates arising from the purchase of goods or services for the Motor Hotel; and
- (vi) unauthorized use of facilities by Manager's employees or associates.

(c) *Financial Reports.* Manager shall furnish preliminary reports each month of all transactions occurring from the first day of the prior month to the last day of the prior month. These preliminary reports are to be received by [name of owner] no later than 10 calendar days after the end of the accounting period and must show all collections, monthly delinquencies, uncollectible items, vacancies, and other matters pertaining to the management, operation, leasing, and maintenance of the Motor Hotel during the subject month. These reports shall contain a comparison of monthly and year-to-date actual income and expenses with the approved budgets (as provided in Paragraph 4) for the Motor Hotel.

4. *Budgets and Operations.* Within 60 days after signing this Agreement, and no less than 90 days prior to each ensuing annual calendar year, Manager shall submit to Owner a proposed operating budget and a proposed capital budget setting forth in detail an estimated profit-and-loss statement for the next four quarterly periods including a schedule of Motor Hotel room rentals and other rentals and revenues. Each such budget shall also include a detailed management and marketing plan and (to the extent available) ground rents, mortgage payments, insurance premiums, taxes, management fee and all other expenses and operating costs incurred in the operation of the Motor Hotel.

Owner will consider each proposed budget and then will consult with Manager in the intervening period prior to the commencement of the ensuing calendar year in order to agree on an "Approved Operating Budget" and an "Approved Capital Budget."

Manager agrees to use diligence and to employ all reasonable efforts to ensure that the actual costs of maintaining and operating the Motor Hotel shall not exceed either the Approved Budget in total or in any one accounting category. All expenses must be charged to the proper account as specified in the approved chart of accounts, and no expense may be classified or reclassified for the purpose of avoiding an excess in the annual budgeted amount of an accounting category. Manager shall secure Owner's prior written approval for any expenditure that will result in an excess of the greater of *[\$/dollar amount]* or *[percentage]%* of the annual budgeted amount in any one accounting category of the approved operating budget, and shall secure Owner's written approval for any expenditure that will result in any increase in any annual budgeted account in any accounting category of the approved capital budget.

During the calendar year Manager shall inform Owner of any major increases in costs and expenses that were not foreseen during the budget preparation period and thus were not reflected in either approved budget.

5. *Disposition of Funds from Motor Hotel Operations.* Funds originating from the Motor Hotel's operation or from Owner and coming into Manager's possession shall be received, handled and disposed of as follows:

(a) *Separate Operating Accounts.* All funds received in

the operation of the Motor Hotel, including any working capital furnished by Owner shall be funds of Owner and shall be deposited by Manager in a reputable banking institution or institutions approved by Owner in the name of Manager, as Manager of the Motor Hotel. All such funds shall be deposited in a separate special account or accounts, referred to as Operating Accounts. The bank or banks shall be informed in writing that the funds are held in trust for Owner. If more than one Operating Account is necessary to operate the Motor Hotel, each Operating Account must have a unique name. Manager shall be under no liability or responsibility for any loss resulting from the insolvency of any bank or banks in which funds are deposited.

(b) *Payment of Expenses.* Manager shall pay out of such Operating Accounts all operating expenses and expenses of operation of the Motor Hotel, subject to Paragraphs 4 and 7, and shall make other payments permitted by this Agreement, including Manager's compensation and reimbursements, all in accordance with the terms and conditions of this Agreement.

(c) *Payment to Owner.* Except as otherwise provided below, Manager shall remit monthly to Owner such funds in the Operating Accounts which are in excess of the normal operating capital and replacement reserve requirements of the Motor Hotel, as may be determined and modified from time to time by Owner. Manager is here authorized and shall have the right, but not the obligation, to make such advances of money as may be necessary to make payments of expenses when there are inadequate funds in the Operating Accounts, which advances shall be added to and paid with Manager's next accruing fee.

(d) *Change of Banks.* Owner may direct Manager to change a depository bank or the depository arrangements.

(e) *Access to Operating Accounts.* Through the use of signature cards, authorized representatives of Owner shall be permitted access to any and all funds in the Operating Accounts. Manager's authority to draw against the Operating Accounts may be terminated at any time by Owner without notice to Manager.

6. *Manager Not to Pledge Owner's Credit.* Manager shall not pledge the credit of Owner nor shall Manager in the name of, or on behalf of, Owner borrow any money or execute any promissory note, bill of exchange or other obligation.

7. *Reimbursement for Expenses.* Everything done by Manager in the proper performance or its obligations and all permitted expenses incurred by it under this Agreement shall be for and on behalf of Owner and for Owner's account. After initial payment by Manager, Manager may be reimbursed out of the Operating Accounts for costs of the gross salary and wages or pro rata share, payroll taxes, insurance, workers' compensation and other benefits of Manager's employees required to properly, adequately, safely and economically manage, operate and maintain the Motor Hotel, provided that the employment positions occupied by such employees have been identified and enumerated on Schedule A of this Agreement.

(a) *Costs Eligible for Payment from Operating Accounts.* Manager may pay the following expenses directly from the Operating Accounts subject to all the terms and conditions contained in this Agreement:

- (i) cost to correct any violation of federal, state and municipal laws, ordinances, regulations and orders relating to the renting, use, repair and maintenance of the Motor Hotel, or relating to the rules, regulations or orders of the local Board of Fire Underwriters or other similar body, provided such cost is not the result of Manager's negligence;
- (ii) actual and reasonable cost of making all repairs, decorations and alterations provided such cost is not the result of Manager's negligence;
- (iii) costs incurred by Manager in connection with all service agreements approved by Owner;
- (iv) legal fees of attorneys provided such attorneys have been approved by Owner in writing in advance of retention and the specific amount of such attorney's fee has been approved by Owner in writing in advance of payment;
- (v) cost of capital expenditures subject to the restrictions in Paragraph 2(e) and the approved capital budget;
- (vi) cost of printed checks for each bank account required by Owner;
- (vii) cost of cash register, adding machines and other equipment of such type and use (excluding any and all electronic data processing equipment) located at

the Motor Hotel and owned by Owner for exclusive use in operation of the Motor Hotel;

- (viii) leasing commissions payable to third parties;
- (ix) cost of service contracts approved by Owner and cost of utilities;
- (x) cost of Owner-approved advertising;
- (xi) cost of printed forms and supplies required for use at the Motor Hotel; and
- (xii) cost of inventories, provisions, supplies, and equipment.

(b) *Nonreimbursable Costs.* The following expenses or costs incurred by or on behalf of Manager in connection with the management of the Motor Hotel shall be at the sole cost and expense of Manager and shall not be reimbursed by Owner:

- (i) cost of gross salary and wages, payroll taxes, insurance, worker's compensation, and other benefits of Manager's office personnel occupying employment positions not identified on Schedule A;
- (ii) general accounting and reporting services which are considered to be within the reasonable scope of Manager's responsibility to Owner;
- (iii) cost of forms, papers, ledgers, and other supplies and equipment used in Manager's office at any location other than the Motor Hotel;
- (iv) cost of electronic data processing equipment, personal computers, or any pro rata charge on them whether or not located at Manager's office;
- (v) cost or any pro rata charge of electronic data processing, personal computers, or data processing provided by computer-service companies;
- (vi) political or charitable contributions;
- (vii) cost attributable to losses arising from negligence or fraud on the part of Manager, Manager's affiliates, or Manager's employees;
- (viii) cost of comprehensive crime insurance or fidelity bond purchased by Manager for its own account;
- (ix) training expenses not in the Approved Operating Budget or the Approved Capital Budget;
- (x) employment fee unless specifically approved by Owner;
- (xi) cost of advances made to employees and cost of

personal travel by Manager's home office employees or agents to and from the Motor Hotel, except for travel costs of home office employees temporarily substituted, with Owner's prior written consent, for employment positions designated on Schedule A; and

- (xii) cost of travel by all corporate and regional officers of Manager, except for travel costs of corporate and regional officers of Manager temporarily substituted, with Owner's prior written consent, for employment positions designated on Schedule A.

8. *Insurance.*

(a) *Owner's Insurance.* Owner, at its expense, will obtain and keep in force adequate insurance against physical damage, that is, fire with extended coverage endorsement, boiler and machinery, etc., and against liability for loss, damage or injury to property or persons which might arise out of the occupancy, management, operation or maintenance of the Motor Hotel. Manager will be covered as an insured in all liability insurance maintained with respect to the Motor Hotel. Owner shall save Manager harmless from any liability on account of loss, damage or injury actually insured against by Owner provided Manager:

- (i) notifies Owner and the insurance carrier within 24 hours after Manager receives notice of any such loss, damage or injury;
- (ii) takes no action (such as admission of liability) which might bar Owner from obtaining any protection afforded by any policy Owner may hold or which might prejudice Owner in its defense to a claim based on such loss, damage or injury; and
- (iii) agrees that Owner shall have the exclusive right, at its option, to conduct the defense to any claim, demand or suit within limits prescribed by the policy or policies of insurance; and
- (iv) has not acted negligently and any liability results from such negligence.

Nothing here shall be construed as indemnifying Manager or its employees, contractors or agents against any act or omission for which insurance protection is not available; neither is the preceding intended to affect the general requirement of this Agreement that the Motor Hotel shall be man-

aged, operated and maintained in a safe condition and in a proper and careful manner. Manager shall furnish whatever information is requested by Owner for the purpose of establishing the placement of insurance coverages and shall aid and cooperate in every reasonable way with respect to such insurance and any loss thereunder. Owner shall include in its hazard policy covering the Motor Hotel, Owner's personal property, fixtures and equipment located on it, and Manager shall include in any fire policies for its furniture, furnishings or fixtures situated at the Motor Hotel, appropriate clauses pursuant to which the respective insurance carriers shall waive all rights of subrogation, if any, with respect to losses payable under such policies.

(b) *Additional Insurance.* Manager must furnish a certificate evidencing Workers' Compensation and crime insurance in a form acceptable to Owner. Crime insurance shall be for an amount not less than *[\$/dollar amount]* per occurrence. The certificate shall have attached an endorsement that Owner will be given at least 10 days' prior written notice of cancellation of or any material change in the policy. Owner will not reimburse Manager for the cost of such insurance, or for any and all coverages that Manager obtains for its own account.

(c) *Subcontractor's Insurance.* Manager shall require that all subcontractors brought onto the Motor Hotel have insurance coverage at the subcontractor's expense, in the following minimum amounts:

- (i) Worker's Compensation in the statutory Amount;
- (ii) Employer's Liability (in those states where it is required) in the minimum amount of *[\$/dollar amount]*; and
- (iii) Comprehensive General Liability in the amount of *[\$/dollar amount]*, combined single limit.

Manager must obtain Owner's permission to waive any of the above requirements. Higher amounts may be required if the work to be performed is sufficiently hazardous. Manager shall obtain and keep on file a certificate of insurance which shows that the subcontractor is so insured. Owner shall be named as an additional insured on the Certificate.

9. *Term of Agreement.* The original term shall be one year commencing *[date]*, and ending *[date]*.

- (a) Either party to this Agreement may terminate this

Agreement with or without cause by giving 30 days' prior notice in writing to the other party.

(b) Upon termination of this Agreement all sums due Manager from Owner, whether evidenced by notes or otherwise, shall become immediately due and payable.

(c) In addition to other termination rights provided here, this Agreement shall terminate automatically and immediately upon sale of the Motor Hotel by Owner or upon termination of Owner's rights to collect rents from the Motor Hotel. Owner agrees to give Manager prior notice of sale.

*10. Compensation of Manager.*

(a) *Terms.* As used in this Agreement, the terms listed below shall have the meanings set forth and are intended to be applied in a consistent manner:

(i) "Gross Operating Profit" (GOP) means "Gross Revenues" less operating expenses exclusive of taxes and insurance, land rent, replacement reserve, debt services, and capital charges.

(ii) "Gross Revenues" means all revenues and income of any kind derived directly or indirectly from the Motor Hotel (including, but not limited to, store and building rentals, and rentals or other payments from sublessees and concessionaires), whether on a cash basis or on credit, paid or unpaid, collected or uncollected, determined in accordance with generally accepted Motor Hotel accounting principals applied on a basis consistent with that of the preceding fiscal year, excluding, however:

- (A) federal, state, and municipal excise, sales, use, or rent taxes collected directly from patrons or guests or as a part of the sales price of any goods, services or displays, such as gross receipts, admission, cabaret or similar or equivalent taxes;
- (B) proceeds of claims under any insurance policies;
- (C) gains arising from the sale or other disposition of capital assets;
- (D) any reversal of any contingency or tax reserve;
- (E) any proceeds from sales of any of the Motor Hotel real or personal property, including any proceeds resulting from condemnation proceedings or the threat of condemnation;

(F) any security deposits of Motor Hotel tenants, subtenants, or concessionaires and any payments by such tenants, subtenants, and concessionaires for rental tax, repairs, maintenance, and utilities of the Motor Hotel;

(G) gratuities collected and retained by Motor Hotel employees or paid to the Motor Hotel for distribution to such employees;

(H) delivery charges billed to and collected from customers; and

(I) discounts, allowances, and refunds or credits to customers.

(b) *Compensation.* As compensation for its services, Manager shall be paid a management fee for the term of this Agreement of [percentage]% of Gross Revenues or [percentage]% of Gross Operating Profit, whichever is greater.

(c) *Payment.* The management fee for each fiscal year shall be paid in monthly installments on or about the 10th day of each month.

(d) *Adjustments.* If the total monthly installments shall be greater or less than the amount for the entire fiscal year, Manager or Owner, as the case may be, shall pay to the other the amount of the underpayment or overpayment immediately upon receipt of the annual audit for that fiscal year.

11. *Indemnification.* Manager shall not be liable to Owner or to any other person for any obligation of Owner or any contractual obligation that arises in the course of the business of the Motor Hotel and Owner shall indemnify and hold Manager harmless any such obligation. With respect to any act or omission of any agent or employee of Owner, Owner shall indemnify Manager and hold it harmless from all liability, loss, damage, cost or expense by reason of any such act or omission. With respect to any act or omission of any agent or employee of Manager, Manager shall indemnify Owner and hold it harmless from all liability, loss, damage, cost or expense by reason of any such act or omission. In no event shall Owner make any claims against Manager on account of any alleged errors of judgment made in good faith in determining the operating policies of the Motor Hotel.

12. *Sale of Motor Hotel.* If [name of owner] executes a listing agreement with a broker for sale of the Motor Hotel, Manager shall cooperate with such broker to the end that

the respective activities of Manager and broker may be carried on without friction. Manager will permit the broker to exhibit the Motor Hotel during reasonable business hours provided the broker has secured Manager's permission in advance. Sale of the Motor Hotel by Owner is important. Manager agrees that failure on its part to extend cooperation to a broker desiring to show the Motor Hotel is a material default on its part under this Agreement and is grounds for immediate termination of this Agreement.

13. *Subsidiaries and Affiliates.* On Schedule C, Manager has set forth all of its subsidiary corporations, if any, and all persons, corporations or other entities, if any, which control Manager. During the continuance of this Agreement, Manager shall promptly notify Owner of any changes or additions to the information required to be set forth on Schedule C. Any contract or lease of any kind whatsoever between Manager and any person, corporation or other entity listed or to be listed on Schedule C shall be subject to the prior written approval of Owner, which approval shall not be unreasonably withheld.

14. *Working Capital.* Owner shall make available to Manager for operating capital the sum of *[\$/dollar amount]* per room, 30 days prior to the opening of the Motor Hotel to the public (or if already open, upon execution of this agreement), all or portions of which balance shall be replenished by or remitted to Owner as specified in this Agreement. The initial operating capital as well as all requests for additional and/or increased operating capital as are necessary to maintain the operating capital requirement as here provided shall be remitted by Owner to Manager within 15 days after written request by Manager, which request shall set forth in detail the reasons why such additional and/or increased operating capital is necessary.

15. *Replacement Reserve.* The amount of *[\$/dollar amount]* per room shall be set up and available to Manager at the beginning of each fiscal year as a replacement reserve.

16. *Notices.* Any notice, statement or demand required or permitted by this Agreement to be given by Manager to Owner shall be in writing, and shall be sent by registered or certified mail to Owner at *[address of owner]*, or at such other address as Owner may from time to time designate to Manager in writing. Any notice required or permitted by this Agreement to be given by Owner to Manager shall be in

writing and shall be sent by registered or certified mail to Manager at [*address of manager*], or such other address as Manager may, from time to time, designate to Owner in writing. Any such notice shall be deemed given as of the date of its receipt at the address to which such notice is so directed regardless of any other date that may appear there.

17. *Assignability of Agreement.* Subject to at least 30 days' prior written notice to and approval by Owner, Manager may assign its respective rights, interests, and obligations under this Agreement to any subsidiary, or to any corporation with which it merges or is consolidated or to which it sells the majority of its assets. No other assignment of this Agreement or the rights under it by Manager shall be permitted.

Owner shall have the right to assign this Agreement to any purchaser, lessee, or other transferee of substantially all of the assets comprising the Motor Hotel, provided such purchaser, lessee, or transferee expressly assumes by a writing delivered to Manager all of the obligations of Owner under this Agreement.

18. *Competitive Bidding.* All contracts for repairs, capital improvements, goods, and services exceeding *[\$/dollar amount]* shall be awarded on the basis of competitive bidding, solicited in the following manner:

- (a) a minimum of [*number*] written bids shall be obtained for each purchase up to *[\$/dollar amount]*. Purchases over *[\$/dollar amount]* will require a minimum of [*number*] bids;
- (b) each bid will be solicited in a form prescribed by [*name of owner*] so that uniformity will exist in the bid quotes;
- (c) unless otherwise directed by [*name of owner*], Manager may accept a low bid without prior approval from Owner if the expenditure is for a budget-approved item and will not result in an excess of the annual budgeted accounting category of the applicable approved operating or capital budget, provided however that if Manager advises acceptance by of other than the lowest bidder, Manager shall adequately support, in writing, any such recommendation to Owner;
- (d) Owner shall be free to accept or reject any and all bids;

- (e) Manager may request that Owner waive the competitive bidding rules on a case-by-case basis; and
- (f) Owner may pay for the expenses of such contracts from its own resources or may authorize payment by Manager out of the Operating Accounts.

19. *Franchise Agreement.* Manager shall fully comply with and perform the terms and conditions of any franchise agreement with any motel or hotel chain which may now or in the future be in effect at the Motor Hotel, and a default under that agreement shall constitute a default hereunder.

20. *Final Accounting.* Upon termination of this Agreement for any reason, Manager shall promptly deliver to Owner the following with respect to the Motor Hotel:

- (a) a final accounting, reflecting the balance of income and expenses of the Motor Hotel, as of the date of termination or withdrawal, to be delivered within 30 days after such termination or withdrawal;
- (b) any balance or monies of Owner or tenant security deposits, or both, held by Manager with respect to the Motor Hotel, to be delivered immediately upon such termination or withdrawal;
- (c) all records, contacts, bookings, leases, reservation books, receipts for deposits, unpaid bills, and other papers or documents which pertain to the Motor Hotel, to be delivered immediately upon such termination or withdrawal. Upon such termination or withdrawal, Owner shall assume responsibility for payment of all approved or authorized unpaid bills; and
- (d) a complete inventory of the assets of Owner, including, but not limited to, personal property, equipment, inventory, and consumables.

21. *Indemnification by Manager.* Manager shall indemnify, defend, and hold Owner harmless from any and all uninsured claims, demands, causes of action, losses, damages, fines, penalties, liabilities, costs, and expenses, including attorney's fees and court costs, sustained or incurred by or asserted against Owner by reason of or arising out of Manager's (or its employees' or agents') negligence in performing or failing to perform the duties and obligations required by this Agreement to be performed by it. Notwithstanding the foregoing, to the extent that Owner is not fully covered by insur-

ance, Manager will, to the extent set forth below, indemnify Owner and hold it harmless from any damages, fines, penalties, liability, cost, claim, or expense, including attorney's fees, arising out of or in connection with the operation of the Motor Hotel or Manager's operations other than at the Motor Hotel. The costs of such indemnity shall be borne as follows:

- (a) if the damage, liability, cost, claim, or expense is attributable to: (i) Manager's acts which are negligent; or (ii) Manager's breach of this Agreement, the cost of such indemnification shall be borne solely by Manager; and
- (b) if the damage, liability, cost, claim, or expense is attributable to any other reason or cause, the cost of such indemnification shall be reimbursed by Owner to Manager within 30 days following receipt by Owner from Manager of proof of the payment by Manager of such cost and shall to the extent possible be charged against the Operating Accounts of the Motor Hotel.

22. *Enforceability.* If any provision of this Agreement or the application of any provision to any person or circumstances is held invalid or unenforceable, the remainder of the Agreement and the application of such provision to other persons or circumstances shall remain valid and enforceable.

23. *Waiver of Provisions.* None of the conditions or provisions of this Agreement shall be held to have been waived by any act of knowledge of Manager, its agents, or employees, but only by an instrument in writing, signed by an officer of Manager.

24. *Entire Agreement.* This Agreement shall constitute the entire agreement between the parties relative to the subject matter of the Agreement, notwithstanding any oral statements to the contrary, and this Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement cannot be changed or terminated orally, but only by writing signed by the party against whom such change or termination is asserted.

25. *Burdens and Benefits.* This Agreement shall be binding upon and shall inure to the benefit of the respective legal representatives, successors and assigns of Manager, Owner, and any future owner or lessee of the Motor Hotel.

26. *Governing Law.* This Agreement shall be interpreted under and governed by the laws of the State of Florida.

27. *Headings.* All headings herein are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Agreement.

28. *Representation.* Manager represents and warrants that it is fully qualified and licensed, to the extent required by law, to manage real estate and Motor Hotels and perform all obligations assumed by Manager under this Agreement. Manager agrees to comply with all such laws now or afterwards in effect.

The parties to this Agreement have signed the Agreement as of the date first written above.

ATTEST:

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\_\_\_\_\_  
[Name of owner]  
Owner  
By: \_\_\_\_\_  
[Signature of authorized individual]  
Its: \_\_\_\_\_  
[Title of authorized individual]

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\_\_\_\_\_  
[Name of manager]  
Manager  
By: \_\_\_\_\_  
[Signature of authorized person]  
Its: \_\_\_\_\_  
[Title of authorized person]

#### SCHEDULE A

#### SCHEDULE OF EMPLOYMENT POSITIONS

Name	Position	Salary Range (Full-Time or Pro-Rated)	Bonded/Insured Under Crime Policy
[name1]	[position1]	[specify]	[number1]

Name	Position	Salary Range (Full-Time or Pro-Rated)	Bonded/Insured Under Crime Policy
[name2]	[position2]	[specify]	[number2]
[name3]	[position3]	[specify]	[number3]

**SCHEDULE B**  
**LEASING GUIDELINES**

Except as may be otherwise directed in writing, lease negotiations will be carried out under the following terms and conditions:

1. All leases shall be in Manager's name as Property Manager for Owner.
2. No lease shall have a term of less than one year, nor more than five years, including renewal options.
3. The rent for all leases must be approved in advance by Owner.
4. The first month's rent and security deposit, when required, are to be collected upon execution of each lease. All such advance rents and security deposits are to be deposited in the Operating Accounts as provided in Paragraph 5, or in a special security deposit account, if required by applicable law, to be established in a manner satisfactory to Owner.
5. No obligation of a prospective tenant relative to an existing lease will be assumed.
6. No existing lease shall be canceled, modified, assigned, sublet, or altered in any respect (other than increasing the square-foot area covered by the lease) without the prior written approval of Owner.
7. All leases are to provide for tenant participation in increased costs above the base year for all taxes, special assessments, insurance, utilities, and operating expenses.
8. The standard lease form approved by Owner is to be used. Use of other lease forms or any changes, additions, or deletions in the standard lease form are subject to the prior written approval of Owner.
9. Owner is to be immediately furnished an executed copy of all leases executed on its behalf.

10. Any lease which requires the expenditure of more than *[\$dollar amount]* per square foot to refurbish, rehabilitate, remodel, or otherwise prepare the leased premises must be submitted along with the estimated costs for such work to Owner for written approval prior to execution of the lease.

11. Neither Owner nor any of its subsidiaries or affiliates nor any other entity specified by Owner shall be a tenant without the prior written approval of Owner.

12. Any lease not complying with all of the foregoing conditions shall be submitted to Owner for approval prior to execution.

#### SCHEDULE C

##### SUBSIDIARIES AND AFFILIATES OF MANAGER

*[Schedule omitted]*

#### § 9:22 General management agreement—Self-storage facilities—Multiple managers at multiple locations

##### PROPERTY MANAGEMENT AGREEMENT

This property management agreement (“agreement”) is entered into on *[date]* among *[name of property owner]*, a *[state]* corporation, with its principal place of business at *[address of property owner]* (“owner”), and *[name of property manager]*, a *[state]* corporation, with its principal place of business at *[address of property manager]* (“manager”).

##### RECITALS

A. Owner owns the real property and self-storage related improvements on the property located at the following addresses: *[specify]* (the “property”).

B. Owner intends that the property be rented on a space-by-space retail basis to corporations, partnerships, individuals, and/or other entities for use as self-storage facilities.

C. Owner desires that manager manage the property and manager desires to act as the property manager for the property, all in accordance with the terms and conditions of this agreement.

Now, therefore, in consideration of the mutual covenants

contained in this agreement, owner and manager agree as follows:

1. Employment.

(a) Owner retains manager, and manager agrees to act as manager of the property, on the terms and conditions set forth below.

(b) Owner acknowledges that manager, and/or manager affiliates, is in the business of managing self-storage facilities, both for its own account and for the account of others. It is expressly agreed that, notwithstanding this agreement, manager and the affiliates may continue to engage in those activities, may manage facilities other than those presently managed by manager and its affiliates (whether or not the other facilities may be in direct or indirect competition with owner), and may in the future engage in other business which may compete directly or indirectly with owner's activities.

(c) In the performance of their respective duties under this agreement, each manager shall occupy the position of an independent contractor with respect to owner. Nothing contained in this agreement shall be construed as making the parties to this agreement (or any of them) partners or joint venturers, nor (except as expressly otherwise provided for here) construed as making manager an agent or employee of owner or of any other manager under this agreement.

2. Duties and Authority of Manager.

(a) GENERAL DUTIES AND AUTHORITY. Subject only to the restrictions and limitations provided in Paragraphs (o) and (p) of this Section 2 and the right of owner to terminate this agreement as provided in Section 6 of this agreement, manager shall have the sole and exclusive authority to fully manage the property and supervise and direct the business and affairs associated or related to the daily operation of the property, and, to that end on behalf of owner, to execute the documents and instruments as, in manager's sole judgment, are reasonably necessary or advisable under the circumstances to fulfill manager's duties under this agreement. Manager's duties and authority shall include, without limitation, those set forth below.

(b) RENTING OF THE PROPERTY. Manager shall establish policies and procedures for the marketing

activities for the property, and may advertise the property through any media as manager deems advisable, including, without limitation, advertising with the Yellow Pages. Manager shall have the sole discretion, which discretion shall be exercised in good faith, to establish the terms and conditions of occupancy by the tenants of the property, and manager is authorized to enter into rental agreements on behalf and for the account of owner with the tenants and to collect rent from the tenants. Manager may jointly advertise the property with other properties owned or managed by manager, and in that event, manager shall reasonably allocate the cost of the advertising among the properties.

(c) REPAIR, MAINTENANCE, AND IMPROVEMENTS. Manager shall make, execute, supervise, and have control over the making and executing of all decisions concerning the acquisition of furniture, fixtures, and supplies for the property, and may purchase, lease, or otherwise acquire the same on behalf of owner. Manager shall make and execute, or supervise and have control over the making and executing of, all decisions concerning the maintenance, repair, and landscaping of the property. Manager shall, on behalf of owner, negotiate and contract for and supervise the installation of all capital improvements related to the property; provided, however, that manager agrees to secure owner's prior written approval on all the expenditures in excess of *[\$/dollar amount]* for any one item, except monthly or recurring operating charges and/or emergency repairs if in the opinion of manager any emergency-related expenditures are necessary to protect the property from damage or to maintain services to the tenants as called for in their respective leases.

(d) PERSONNEL. Manager shall select all vendors, suppliers, contractors, subcontractors, and employees with respect to the property and shall hire, discharge, and supervise all labor and employees required for the operation and maintenance of the property. Any employees so hired shall be employees of manager, and shall be carried on the payroll of manager. Employees may include, but will not be limited to, onsite resident

managers, onsite assistant managers, and relief managers located, rendering services, or performing activities on the property in connection with its operation and management. The cost of employing the persons shall not exceed prevailing rates for comparable persons performing the same or similar services with respect to real estate similar to the property.

(e) AGREEMENTS. Manager shall negotiate and execute on behalf of owner any agreements which manager deems necessary or advisable for the furnishing of utilities, services, concessions, and supplies for the maintenance, repair, and operation of the property, and any other agreements which may benefit the property or be incidental to the matters for which manager is responsible under this agreement.

(f) OTHER DECISIONS. Manager shall make all decisions in connection with the daily operation of the property.

(g) REGULATIONS AND PERMITS. Manager shall comply in all material respects with any statute, ordinance, law, rule, regulation, or order of any governmental or regulatory body having jurisdiction over the property, respecting the use of the property or the maintenance or operation of the property. Manager shall apply for and attempt to obtain and maintain, on behalf of owner, all licenses and permits required or advisable (in the sole judgment of manager) in connection with the management and operation of the property.

(h) RECORDS AND REPORTS OF DISBURSEMENTS AND COLLECTIONS. Manager shall establish, supervise, direct, and maintain the operation of a system of record keeping and bookkeeping with respect to all receipts and disbursements in connection with the management and operation of the property. The books, records, and accounts shall be maintained at the manager office or at any other location as manager shall determine, and shall be available and open to examination and audit quarterly by owner, its representatives, any mortgagee of the property, and the mortgagee's representative. On or before [number] days after the close of each quarter, manager shall cause to be prepared and delivered to Owner a

monthly statement of receipts, expenses, and charges, together with a statement of the disbursements made by manager during the period on owner's behalf.

(i) **COLLECTION.** Manager shall be responsible for the billing and collection of all accounts receivable and for payment of all accounts payable with respect to the property and shall be responsible for establishing policies and procedures to minimize the amount of bad debts.

(j) **LEGAL ACTIONS.** Manager shall cause to be instituted, on behalf and in the name of owner, any and all legal actions or proceedings manager deems necessary or advisable to collect charges, rent, or other income due to owner with respect to the property and to oust or dispossess tenants or other persons unlawfully in possession under any lease, license concession agreement, or otherwise, and to collect damages for breach or default of the lease, license concession agreement, or otherwise by any tenant, licensee, concessionaire, or occupant.

(k) **INSURANCE.** Manager shall use its best efforts to assure that there is obtained and maintained in force fire, comprehensive liability, and other insurance policies in amounts generally carried with respect to similar facilities. Manager may in its discretion obtain employee theft or similar insurance in amounts and with any deductibles as manager deems appropriate. Manager shall promptly provide owner with certificates of insurance as owner may reasonably request in writing, evidencing the insurance coverage.

(l) **TAXES.** During the term of this agreement, manager shall pay from owner's funds, prior to delinquency, all real estate taxes, personal property taxes, and all other taxes assessed to, or levied on, the property. If required by the holder of any note secured by the property, manager will set aside, from owner's funds, a reserve from each month's rent and other income collected, in an amount required by the holder for purposes of payment of real property taxes.

(m) **RESTRICTIONS.** Notwithstanding anything to the contrary set forth in this Section 2, manager shall not be required to do, or cause to be done, anything for the account of owner: (i) which may make manager

liable to third parties; (ii) which may not be commenced, undertaken, or completed because of insufficient funds of owner; or (iii) which may not be commenced, undertaken, or completed because of acts of God, strikes, governmental regulations of laws, acts of war, or other types of events beyond the control of manager, whether similar or dissimilar to the foregoing.

(n) LIMITATIONS ON MANAGER'S AUTHORITY. Notwithstanding anything to the contrary set forth in this Section 2, manager shall not, without obtaining owner's prior written consent:

- (i) rent storage space in the property by written lease or agreement for a stated term in excess of [number] year;
- (ii) alter the building or other structures of the property in any material manner;
- (iii) make any other agreements which exceed a term of [number] year and are not terminable on [number] days' notice at the will of owner, without penalty, payment, or surcharge;
- (iv) act in violation of any law; or
- (v) act in violation of any duty or responsibility of owner under any mortgage loan secured by the property.

(o) SHARED EXPENSES. Owner acknowledges that certain economies may be achieved with respect to certain expenses to be incurred by manager on behalf of owner under this agreement if materials, supplies, insurance, or services are purchased by manager in quantity for use not only in connection with the property but in connection with other properties owned or managed by manager or its affiliates. Manager shall have the right to purchase the materials, supplies, insurance, and/or services in its own name and charge owner a pro rata allocable share of the cost of the foregoing; provided, however, that the pro rata cost of the purchase to owner shall not result in expenses greater than would otherwise be incurred at competitive prices and terms available in the area where the property is located; and provided further, manager shall give owner access to records so owner may review any such expenses incurred.

(p) DEPOSIT OF GROSS REVENUES. All gross revenues (as defined below) shall be deposited into a trust bank account maintained by manager (or its parent company) as trustee for the benefit of the owner. To the extent that the gross revenues are deposited into a collective trust account maintained by manager (or its parent company) for the benefit of multiple property owners, the trust account will clearly identify the beneficiaries and manager (or its parent company) shall reconcile the account daily and maintain the records as shall clearly identify each day the respective interest of each beneficiary in the collective trust account. Gross revenues of the owner shall be applied first to the repayment of owner's senior debt with respect to the property, and then to manager in reimbursement of expenses and for management fees as provided under Section 4 below.

3. Duties of Owner.

Owner agrees to cooperate with manager in the performance of manager's duties under this agreement and to that end, on the request of manager, to provide, at the rental charges, if any, as are deemed appropriate, reasonable office space for manager employees on the premises of the property and to give manager access to all files, books, and records of owner relevant to the property. Owner shall not unreasonably withhold or delay any consent or authorization to manager required or appropriate under this agreement.

4. Compensation of Manager.

(a) MANAGEMENT FEE. Owner shall pay to manager as the full amount due for the services described here a fee (the "management fee") equal to *[percentage]*% of the "gross revenue" derived from or connected with the property so managed by manager under this agreement. The term "gross revenue" shall mean all receipts (excluding security deposits unless and until owner recognizes the same as income) of owner (whether or not received by manager on behalf or for the account of owner) arising from the operation of the property, including without limitation, rental payments of lessees of space in the property, vending machine or concessionaire revenues, maintenance charges, if any, paid by the tenants of the property in

addition to basic rent, parking fees, if any, and all monies whether or not otherwise described in this agreement paid for the use of the property. “Gross revenue” shall be determined on a cash basis. The management fee shall be paid promptly at the end of each calendar quarter and shall be calculated on the basis of the “gross revenue” of the preceding quarter. The management fee shall be paid to each manager property manager identified in this agreement based on the gross revenue of each respective property for which the property manager is responsible as set forth on [*specify exhibit*]. Each property manager agrees that its monthly management fee shall be subordinate to that month’s principal balance and interest payment on any first lien position mortgage loan on the property. It is understood and agreed that the management fee will not be reduced by the cost to owner of those employees and independent contractors engaged by or for owner, including but not limited to the categories of personnel specifically referred to in Section 2(d). Except as provided in this Section 4, it is further understood and agreed that manager shall not be entitled to additional compensation of any kind in connection with the performance by it of its duties under this agreement.

(b) REIMBURSEMENT OF CERTAIN EXPENSES. In addition to the management fee described above, manager shall be entitled to reimbursement from owner, on a quarterly basis, for all out-of-pocket expenses incurred by manager under this agreement in connection with the management and operation of the property, including, without limitation, taxes, insurance, operational expenses, overhead, litigation, and dispute resolution related expenses, capital improvement expenses, and costs of sales.

5. Use of Trademarks, Service Marks, and Related Items.

Owner acknowledges the significant value of the “[corporate name of manager]” name in the operations of owner’s property and it is therefore understood and agreed that the name, trademark, and service mark, “[corporate name of manager],” and related marks, slogans, caricatures, designs, and other trade or service items shall be utilized

for the nonexclusive benefit of owner in the rental and operation of the property, and in comparable operations elsewhere. It is further understood and agreed that this name and all such marks, slogans, caricatures, designs, and other trade or service items shall remain and be at all times the property of manager and its affiliates, and that, except during the term of this agreement and as expressly provided in this agreement, owner shall have no right whatsoever in them. Owner agrees that during the term of this agreement the sign faces at the property will have the name “[name of corporate manager].” The “[name of corporate manager]” sign faces will be paid for by owner. On termination of this agreement at any time for any reason, all such use by and for the benefit of owner of any such name, mark, slogan, caricature, design, or other trade or service item in connection with the property shall, in any event, be terminated and any signs bearing any of the foregoing shall be removed from view and no longer used by owner. In addition, on termination of this agreement at any time for any reason, owner shall not enter into any new leases of property using the manager lease form or use other forms prepared by manager. It is understood and agreed that manager will use and shall be unrestricted in its use of such name, mark, slogan, caricature, design, or other trade or service item in the management and operation of other storage facilities both during and after the expiration or termination of the term of this agreement.

#### 6. Termination.

Owner or manager may terminate this agreement with or without cause by giving not less than [number] days' written notice to the other party pursuant to Section 11 of this agreement. In addition, if owner fails to pay manager any amounts owed under this agreement when due, manager may terminate this agreement by giving owner not less than [number] days written notice pursuant to Section 11 of this agreement. Notwithstanding the above, however, manager shall not resign as property manager of the property until a nationally recognized and reputable successor property manager is available and prepared to assume property management responsibilities with respect to the property in question. On termination of this agreement, manager shall promptly return to owner all monies, books, records, and other materials held by

manager for or on behalf of owner. In addition, if manager has contracted to advertise the property in the Yellow Pages, owner shall, at the option of manager, continue to be responsible for the cost of the advertisement and shall either: (i) pay manager the remaining amount due under the contract in a lump sum; or (ii) pay manager monthly for the amount due under the contract.

7. Indemnification.

Owner agrees to indemnify and hold each of manager, all persons and companies affiliated with manager, and all officers, shareholders, directors, employees, and agents of manager and of any affiliated companies or persons (collectively, the “Indemnified Persons”) harmless from any and all costs, expenses, attorney’s fees, suits, liabilities, judgments, damages, and claims in connection with the management of the property (including the loss of use thereof following any damage, injury, or destruction) arising from any cause except for the willful misconduct or gross negligence on the part of the Indemnified Persons. In addition, no Indemnified Person shall be liable for any error of judgment or for any mistake of fact or law, or for anything which it may do or refrain from doing hereafter, except in cases of willful misconduct or gross negligence. Manager agrees to indemnify and hold owner harmless from any and all costs, expenses, attorney’s fees, suits, liabilities, judgments, damages, and claims in connection with the management of the property arising from the willful misconduct of, gross negligence of, or breach of this agreement by the Indemnified Persons. In addition, manager shall not be liable to owner for the acts or omissions of manager’s officers, shareholders, directors, employees, and agents except for manager’s own gross negligence or willful misconduct.

8. Assignment.

This agreement may be assigned by owner in connection with any mortgage loan on the property, whether pursuant to a conditional or unconditional, absolute assignment. Manager shall have the right to assign this agreement to an affiliate or a wholly or majority owned subsidiary; provided, however, any such assignee must assume all obligations of manager under this agreement, owner’s rights under this agreement will be enforceable against any assignee, and manager shall not be released from its

liabilities under this agreement unless owner shall expressly agree to the release in writing.

9. Headings.

The headings contained in this agreement are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this agreement.

10. Governing Law.

The validity of this agreement, the construction of its terms, and the interpretation of the rights and duties of the parties shall be governed by the internal laws of the State of Florida.

11. Notices.

Any notice required or permitted in this agreement shall be in writing and shall be personally delivered or mailed first class postage prepaid or delivered by an overnight delivery service to the respective addresses of the parties set forth below their signatures on the signature page thereof, or to any other address as any party may give to the other in writing. Any notice required by this agreement will be deemed to have been given when personally served or [number] day(s) after delivery to an overnight delivery service or [number] days after deposit in the first class mail.

12. Severability.

Should any term or provision of this agreement be deemed invalid, void, or unenforceable either in its entirety or in a particular application, the remainder of this agreement shall nonetheless remain in full force and effect and, if the subject term or provision is deemed to be invalid, void, or unenforceable only with respect to a particular application, the term or provision shall remain in full force and effect with respect to all other applications.

13. Successors.

This agreement shall be binding on and inure to the benefit of the respective parties to this agreement and their permitted assigns and successors in interest.

14. Attorney's Fees.

If it shall become necessary for any party to this agreement to engage attorneys to institute legal action for the purpose of enforcing their respective rights under this agreement or for the purpose of defending legal action

brought by the other party to this agreement, the party or parties prevailing in the litigation shall be entitled to receive all costs, expenses, and fees (including reasonable attorney's fees) incurred by it in the litigation (including appeals).

15. Counterparts.

This agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

16. Scope of Property Manager Responsibility.

The duties, obligations, and liability of each property manager identified in this agreement shall extend only so far as to relate to the property for which the property manager is managing located in the domicile state of the property manager, as more specifically described on *[specify exhibit]*, and no individual property manager shall be liable for the acts or omissions of any other property manager. Each property manager shall use its best efforts to assist owner in fulfilling owner's obligations arising under any loan to owner that is secured by the property, including but not limited to preparing and providing financial and accounting reports, and maintaining the property. Each property manager agrees that it will perform its obligations under this agreement according to reasonable industry standards, in good faith, and in a commercially reasonable manner. Manager agrees that, in discharging its duties under this agreement, it will not have any relationship with any of its affiliates that would be less favorable to owner than would reasonably be available in a transaction with an unaffiliated party.

The parties execute this agreement as of the date first above written.

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*[Signatures]*

**NOTES TO FORM**

**Drafter's Notes**

Regarding commercial leases for self-storage spaces, see §§ 16A:40, 16A:78.

**§ 9:23 General management agreement—Between real estate limited partnership and management firm**

This management agreement made on *[date]*, between *[name of agent]* of *[address of agent]*, a Florida corporation and a licensed Florida real estate broker, referred to below as “agent,” and *[name of fund]*, a limited partnership, of *[address of fund]*, referred to below as “fund.”

In consideration of the mutual covenants set forth in this agreement, fund and agent agree as follows:

**SECTION I. APPOINTMENT OF AGENT**

Fund employs agent to manage fund’s assets and to rent, lease, operate, and manage all income producing properties that fund acquires.

**SECTION II. DURATION OF AGREEMENT**

This agreement shall commence as of the date on which fund acquires the first property, and shall continue for a term of *[number]* year(s) from that date. This contract shall be deemed renewed from year to year thereafter unless either party terminates it as hereinafter provided. This agreement is terminable at any time after the expiration of the original term by either party on *[number]* day’s written notice to the other, provided, however, that this agreement is terminable without advance notice by fund within *[number]* days of a new general partner of the fund.

**SECTION III. DUTIES OF AGENT**

Agent accepts this employment and agrees:

- (a) to diligently manage fund’s assets in furtherance of fund’s investment objectives listed in the offering circular of which this agreement is a part;
- (b) to use due diligence in the management of the properties for the period and on the terms herein provided, and to furnish the services of its organization for the renting, leasing, operating, and managing of the properties;
- (c) to furnish monthly statements of receipts, expenses, and charges, and to remit to fund receipts less disbursements. Evidence of all payments and receipts shall be maintained by agent during the term thereof

and shall be available for fund's inspection at all reasonable times;

- (d) to deposit all receipts collected for fund (less any sums properly deducted or otherwise provided in this agreement) in a separate trust account which shall be maintained in a national or state banking institution separate from agency's personal accounts; and
- (e) to bond those employees of agent who handle or are responsible for fund's moneys by a fidelity bond in an amount of not less than *[\$/dollar amount]*.

#### SECTION IV. AUTHORITY AND POWERS OF AGENT

Fund grants agent the following authority and powers and agrees to assume the expenses in connection therewith:

- (a) to advertise the availability for rental of space or units of the subject property and to display "for rent" signs thereon;
- (b) to sign, renew, and/or cancel leases for such space or units, collect rents due or to become due and give receipts therefor, terminate tenancies and to sign and serve in the name of fund such notices as are appropriate, institute and prosecute action, evict tenants and recover possession of space or units, sue for and recover, in the name of fund, rents and other sums due and, when expedient, to settle, compromise, and release such actions or suits or reinstate such tenancies;
- (c) to hire, discharge, and supervise all labor and employees required for operation and maintenance of the premises, it being agreed that all employees shall be deemed employees of fund and not employees of agent;
- (d) to make contracts for electricity, gas, fuel, water, telephone, window cleaning, trash or rubbish hauling, and other services or such of them as agent shall deem advisable, fund to assume the obligations of any such contracts. Agent agrees that all purchase and service contracts will be entered into at the most favorable prices and terms available and that such prices and terms shall inure solely for the benefit of fund. Agent shall be under a duty to secure for and credit to fund any discount, commissions, or rebates obtainable as a result of such contracts; and

- (e) to establish tenant qualifications, determine the dollar amount of security deposits and the dollar amount of cleaning deposits, approve credit standing, job stability, and references, and determine the form of rental agreement to be executed by tenants.

#### SECTION V. INDEMNIFICATION OF AGENT

Fund shall indemnify agent against all liability, except for willful misconduct or negligence, incurred in connection with management of the properties, including liability for injury suffered by any person. Fund shall, at its expense, carry necessary public liability and worker's compensation insurance adequate to protect the interests of the parties hereto, which policy shall be so written as to protect agent in the same manner and to the same extent as it protects fund, and will name agent as co-insured.

#### SECTION VI. AGENT'S REPORTS

Agent shall furnish fund with a monthly profit and loss statement, a monthly vacancy report, and a monthly rental delinquency report showing delinquencies in payment, tenant by tenant. Agent shall also furnish fund with an annual profit and loss statement at the end of each fiscal year during the term hereof.

#### SECTION VII. INSPECTION OF PROPERTY BY AGENT

Agent shall regularly inspect the subject property relative to both operation and maintenance and shall consult with fund with respect to the establishment of any necessary programs for preventative maintenance or required capital expenditures.

#### SECTION VIII. COMPENSATION OF AGENT

Fund agrees to pay agent compensation for services rendered under this agreement as follows:

- (a) for continuing property management services, a percentage of gross receipts equal to the prevailing and customary rates for the types of services performed on each particular property. In no event, however, shall such payment exceed *[percentage]*% of gross receipts. This amount shall be due and payable monthly and may be deducted by agent from receipts; and,
- (b) for its services in managing fund's assets and related services, up to *[percentage]*% (less commissions for

commission-type fees paid to outside real estate brokers in connection with acquisitions) of the total cost of properties acquired by fund.

#### SECTION IX. MAINTENANCE OF REAL ESTATE BROKER'S LICENSE

Agent shall at all times during the term of this agreement maintain a real estate broker's license in conformity with the laws of the State of Florida.

#### SECTION X. ATTORNEY'S FEES AND COSTS

In the event that legal action is instituted to enforce this agreement, the prevailing party shall be entitled to reasonable attorney's fees and actual costs in connection with such action.

#### SECTION XI. ASSIGNMENT

Agent may only assign its rights and obligations hereunder to a subsidiary corporation or other similarly related entity, provided that written notice of such assignment is given to fund *[number]* days prior to the effective date of such assignment.

#### SECTION XII. ENTIRETY; ALTERATION; BINDING EFFECT

This agreement constitutes the entire agreement of the parties respecting the subject matter. The parties may not alter, amend, or modify it except by an instrument in writing executed by both. It includes all representations of every kind and nature made by either party to the other and shall be binding on the successors and assigns of the parties.

Executed at *[place of execution]* on the date written above.

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*[Signatures]*

#### NOTES TO FORM

##### Tax Notes

See Tax Notes following § 9:14.

For discussion of real estate syndications, see Syndication—Limited Partnerships (Ch 14) and Syndication—Investment Trusts (Ch 15).

**§ 9:24 Assignment of property management agreement—With property owner's consent****ASSIGNMENT**

This Assignment is made as of *[date]*, by and between *[name of assignor]*, a *[state]* corporation, having a principal place of business at *[address of assignor]* (referred to here as the "Assignor") and *[name of assignee]*, a *[state]* corporation, having a principal place of business at *[address of assignee]* (referred to here as the "Assignee").

**RECITALS:**

- A. Assignor entered into that certain Property Management Agreement dated *[date]* with *[name of property owner]* (the "Agreement");
- B. Assignor desires to assign its rights, duties, and obligations under the Agreement to Assignee; and
- C. Assignee desires to accept the assignment and assume Assignor's duties and obligations under the Agreement, as assigned.

NOW, THEREFORE, the parties agree as follows:

1. Assignment. Assignor assigns and transfers to Assignee all of Assignor's rights, title, and interest in, to, and under the Agreement as assigned. Any funds or property of *[name of property owner]* in Assignor's possession shall be, or have been, delivered to Assignee upon the full execution of this Assignment.
2. Acceptance and Assumption. Assignee accepts the foregoing assignment and further assumes and agrees to perform, from and after *[date]*, all duties, obligations, and responsibilities of the property manager arising under the Agreement.
3. Representations.
  - (a) Assignor represents and warrants to Assignee:
    - (i) that the Agreement is in full force and effect;
    - (ii) that Assignor has fully performed all of its duties under the Agreement through the date of this Assignment;
    - (iii) that Assignor has no notice or knowledge of any claim, cost, or liability (other than as specifically contemplated under the Agreement, all of which have been satisfied or

discharged) which arose under the Agreement or which may arise after the date of this Assignment; and

- (iv) that this Assignment has been duly authorized by all requisite corporate action and has been properly executed by a duly authorized officer of Assignor.

(b) *[Name of property owner]* hereby represents and warrants to Assignee that the Agreement is in full force and effect, and that no defaults or violations of such Agreement exist as of the date of this Assignment.

IN WITNESS, this Assignment is executed the date above first written.

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*[Signature of Assignor]*

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*[Signature of Assignee]*

#### CONSENT AND JOINDER

*[Name of property owner]* consents to the foregoing Assignment and joins in such Assignment for the purpose of making the representations set forth in Subparagraph 3(b) of the Assignment.

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*[Signature of property owner]*

#### § 9:25 Extension of property management agreement

##### EXTENSION OF PROPERTY MANAGEMENT AGREEMENT

This agreement (the “extension agreement”) made on *[date]*, by and between *[name of real property owner]*, a *[state]* *[specify, such as: corporation or partnership]* (“owner”), and *[name of property management company]*, a Florida *[specify, such as: corporation or partnership]* (“management company”).

##### RECITALS

A. Owner and management company have previously

entered into that certain management agreement (the “management agreement”) dated [date], for the property management of the [*describe property*] known as the [*specify name of building*] located at [*address of property*].

B. The management agreement by its term originally expired on [date].

C. The owner and management company desire to further extend the term of the management agreement as provided below.

Now therefore, the parties agree as follows:

1. The management agreement is extended for an additional [*number*]-year period to expire on [date], subject to the provisions for termination prior to the expiration of the term as provided in [*specify section*] of the management agreement.

2. In securing tenants for the property, the management company is authorized to employ, on behalf of the owner, the services of unaffiliated real estate brokers and other similar tenant referral professionals when the management company deems it reasonably necessary. Commissions paid to any such brokers or professionals (which shall in no event exceed those reasonably customary for similar services in the locality where the property is located) for tenant referrals shall be at owner’s expense.

3. Except as modified by this agreement, all of the terms and provisions of the management agreement shall remain in full force and effect.

4. The mailing address for notices to both owner and owner’s representative is: [*street address of owner*], [*city*], [*state*] [*zip code*].

The parties to this agreement have signed this agreement or caused it to be signed by their proper corporate officers and caused their proper corporate seal to be affixed to it on [date].

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[Signatures]

**B. OPTIONAL PROVISIONS**

## 1. Compensation

**§ 9:26 Compensation for other real estate services**

Agent shall be separately compensated for special services required by owner, and not specifically included in this agreement. “Special services” as used in this agreement includes, without limitation, services in connection with sales and acquisitions, appraisals, and financing.

**§ 9:27 Compensation for mortgage servicing activities**

Mortgage servicing activities by agent on behalf of owner shall be compensated as follows: *[percentage]*% per month of the principal amount of each obligation secured by a mortgage serviced by agent as of the *[ordinal number]* day of each month, which fee is payable on the *[ordinal number]* day of the following month.

**§ 9:28 Compensation and reimbursement in connection with management of shopping center**

Agent shall receive a management fee of *[percentage]*% of all gross rents. In the event that agent employs a cooperating broker to rent part or all of the shopping center, the fee of agent shall be increased to cover the fee of the cooperating broker to the extent of the participation of the broker in such activity, but in no event shall the total fee be more than *[percentage]*% of the gross rent to be derived from the shopping center.

Agent shall be reimbursed for all expenses, direct or indirect, previously approved by owner, incurred by agent on behalf of owner for the purpose of procuring leases in the shopping center and for all maintenance expenses incident to the operation of the center. Agent shall not be reimbursed for office expenses not incurred in connection with leasing operations.

**§ 9:29 Commissions for negotiating leases**

Agent shall be compensated for negotiating term leases and month-to-month tenancy agreements with tenants on

the consummation of each transaction. The commissions shall be based on the schedule of lease commissions attached to this agreement and made a part of it by this reference as though fully set forth. The commissions that shall be paid in connection with any renewals of leases that are in existence on the date of commencement of this agreement or that are negotiated by agent as to leases that were originally negotiated by agent shall be *[specify, such as: one-half]* the rates shown on the attached schedule. A full commission shall be due to the extent that any existing tenant acquires additional space and pays additional rental for the space. It is further agreed that unless agent has originally negotiated the lease, no leasing commission shall be due in the event an existing tenant exercises an option under its lease to extend the term of the lease.

#### NOTES TO FORM

##### Tax Notes

Brokerage commissions paid by a lessor to obtain a tenant must be amortized over the life of the lease, whether the lessor is on the cash or accrual basis. Commissions paid by a tenant to obtain a subtenant are deductible over the life sublease. Bonwit Teller & Co. v. Commissioner of Internal Revenue, 53 F.2d 381, 82 A.L.R. 325 (C.C.A. 2d Cir. 1931).

#### § 9:30 Free lodging as part of manager's compensation

Manager shall *[receive / have the option of receiving]* part of *[his / her]* compensation in the form of free rent of apartment No. *[number]*, which is located in the apartment building. The total value of this apartment is *[\$/dollar amount]* per month, of which sum *[\$/dollar amount]* is the fair monthly rental value of the apartment and *[\$/dollar amount]* is the agreed monthly cost of *[specify, such as: electricity, water, and garbage services]*, which are furnished with the apartment.

Manager understands that this apartment is *[furnished / made available]* for manager's convenience in that *[he / she]* will be subject to call and must respond to emergencies at any time they occur in the apartment complex. *[If occupancy of apartment is a condition of employment, add: However, manager also understands that [his / her] occupancy of apartment No. [number] is required under this agreement and is expressly made a condition of employment.]*

**NOTES TO FORM****Tax Notes**

If the manager is given the option to receive compensation in the form of free rent, it is likely the rent will be taxed as ordinary income to him or her. That is particularly likely with this form since it recites that the apartment is furnished for the manager's convenience.

**2. Insurance and Taxes****§ 9:31 Insurance to be procured by agent upon owner's instructions and at owner's expense**

Owner shall inform agent of insurance to be carried with respect to the property and its operations. Agent shall cause the insurance to be placed and kept in effect at all times. Agent shall pay premiums out of the rental income from the property, and the premiums will be treated as operating expenses. All insurance will be placed with the companies, on the conditions, in the amounts, and with the beneficial interests appearing on them as shall be acceptable to owner [*if applicable, add: and shall be otherwise in conformity with the mortgage*]. It is provided, however, that the insurance will include public liability coverage, with agent designated as an insured, in amounts acceptable to agent as well as owner.

Agent will investigate and furnish owner with full reports as to all accidents, claims, and potential claims for damage relating to the property, and will cooperate with owner's insurers in connection with that.

**NOTES TO FORM****Tax Notes**

Premiums on fire, theft, casualty, fidelity, and other (nonlife) insurance are normally deductible if paid in connection with property used in a trade or business or held for the production of income. 26 C.F.R. § 1.162-1(a), 26 C.F.R. § 1.212-1(b). Not deductible are premiums on a taxpayer's residence or other personal use property. Nor are these premiums deductible when paid for property insurance (including public liability and workers compensation insurance) during building construction since those expenses must be capitalized. Premiums for title insurance are also capital expenditures. Revenue Ruling, 1966-2 C.B. 103, Rev. Rul. 66-373, 1966 WL 15315 (1966).

**§ 9:32 Insurance to be procured by agent upon owner's instructions and at owner's expense—Alternate form**

Agent shall obtain, at owner's expense, policies of insur-

ance with respect to the property, providing the following coverage:

- (1) fire and extended coverage insurance on the property, including vandalism and malicious mischief endorsement, in the amount of *[\$/dollar amount]*;
- (2) comprehensive general liability insurance insuring against all damages related to the property, in the amount of *[\$/dollar amount]* for injuries to any one person arising out of a single occurrence, *[\$/dollar amount]* for injuries to all persons arising out of a single occurrence, and *[\$/dollar amount]* for property damages arising out of a single occurrence; and
- (3) workers' compensation insurance for employees of the agent employed on the property as required by the State of Florida.

Upon giving written notice to the agent, owner may obtain the policies specified in Items 1 and 2 of this section and, in such event, the policies shall contain endorsements waiving subrogation against agent. The policies described in Items 2 and 3 of this section shall name the owner as an additional assured.

When either party obtains policies of insurance as provided in this agreement, the party obtaining the policies shall cause certificates of insurance to be furnished by the insured to the other party, the certificates to provide that the described policies may not be canceled except on *[number]* days written notice to the party to whom the certificate is furnished.

Policies of insurance to be obtained by agent under this agreement may be provided through the master package policies maintained by the agent.

#### NOTES TO FORM

##### Tax Notes

See Tax Notes following § 9:31.

#### § 9:33 Insurance to be recommended and placed by agent as broker

Agent, as owner's broker, will survey and recommend and, on the approval of the recommendations, will place agreed on insurance coverage for the subject property. As the insurance broker, agent will be responsible for offering owner in-

surance coverage normally available for the property involved, with reliable companies, as well as for expediting loss adjustments and maintaining records of insurance requirements of tenants. In addition, agent will act on behalf of owner in attempting to conclude claims or disputes with insurance companies. An engineering inspection for the safety and protection of owner's property shall be arranged whenever possible with the insurance carrier, at no cost to owner. Owner agrees to consider all reasonable recommendations as a result of the inspection to minimize both the cost of insurance and the possibility of bodily injury, personal injury, property damage, and loss of rental income.

**NOTES TO FORM****Tax Notes**

See Tax Notes following § 9:31.

**§ 9:34 Taxes to be paid by owner**

Owner shall pay all real property and other taxes levied and assessed against the property, and agent shall have no responsibility for payment of same.

**NOTES TO FORM****Tax Notes**

State and local real property and personal property taxes are deductible against a taxpayer's ordinary income. The deduction is available whether the tax is incurred on business property, investment property, or personal use property. I.R.C. § 164(a). If incurred for business or income-producing property, the taxes are a deduction against the revenue from the business or property. Taxes on personal use property are deductible only if the taxpayer itemizes his or her deductions. Otherwise, the taxes are included as a portion of the standard deduction available to the taxpayer. Am. Jur. 2d, Federal Taxation ¶¶ 18100 et seq.

**§ 9:35 Taxes to be paid by agent—Funds supplied by owner**

Agent shall pay all real property and other taxes levied and assessed against the property subject to the condition that agent shall notify owner not less than [number] days prior to the date on which each installment of the taxes becomes delinquent and of the full amount required to pay the installment, and owner shall then promptly make available to agent the funds necessary to pay it.

**NOTES TO FORM****Tax Notes**

See Tax Notes following § 9:34.

**§ 9:36 Taxes to be paid by owner—Funds withheld from gross revenues**

Agent shall pay real property taxes and other taxes levied and assessed against the property. Agent shall withhold from gross revenues an amount equal to the estimated annual taxes and then pay the taxes from this reserve prior to delinquency.

**NOTES TO FORM****Tax Notes**

See Tax Notes following § 9:34.

**§ 9:37 Payment of taxes required to be withheld with respect to salaries or wages**

Agent shall withhold and pay over to owner all amounts that are required by any law to be withheld with respect to the salaries or wages of agent and other personnel (including, but not limited to, federal, state, and local income taxes, social security taxes, and state unemployment taxes or disability fund payments, if any). Owner will file the necessary returns and remit amounts collected from agent to the proper taxing authorities and will also pay to such authorities the additional taxes, contributions, and moneys due by owner with respect to agent and other personnel in owner's capacity as employer.

**§ 9:38 Duties of agent concerning multiple buildings—Review of insurance**

It shall be the duty and responsibility of the manager to periodically review all hazard, liability, and other insurance carried for the account of the corporation in connection with the properties and to maintain in force and effect such insurance coverage as the manager reasonably deems necessary to protect the interests of the corporation, but not less than the coverage and limits of liability specified in the approved budget.

3. Personnel

**§ 9:39 Hiring of personnel by agent—Distinction between employees of agent and owner**

Agent shall hire in its own name all managerial and clerical personnel necessary for the efficient discharge of management duties pursuant to this agreement, including the resident manager who shall be under the direct supervision of agent. The compensation for services of the employees shall be the responsibility of agent. All other personnel such as janitors, maids, and repairmen shall be hired, supervised, and discharged by agent but shall be employees of owner. The compensation for services of the employees shall be the responsibility of owner.

**§ 9:40 Hiring of personnel by agent—Personnel to be employees of owner**

On the basis of an operating schedule, job standards, and wage rates to have been previously approved by owner on the recommendation of agent or resulting from wage negotiations, agent shall investigate, hire, pay, supervise, and discharge such personnel as are necessary for proper operation and maintenance of the property. Persons so hired shall in every instance be employees of owner, and not of agent. Compensation for the services of the employees, as evidenced by certified payrolls, shall be considered an operating expense of the property.

**§ 9:41 Hiring of employees—Multiple buildings**

It shall be the duty and responsibility of manager to hire, discharge, and supervise all persons employed to carry out manager's duties under this agreement. Manager agrees to use reasonable care in the selection of employees and not to pay salaries or benefits to employees in excess of those specified in the approved budget for each category of employee without the corporation's prior written authorization. It is expressly understood and agreed that all employees shall be employees of the corporation and not employees of manager.

**§ 9:42 Hiring of resident managers—Multiple buildings**

It shall be the duty and responsibility of agent to have

employed at all times a resident manager for each apartment building or apartment complex having more than [*number*] residential units. Agent agrees to use reasonable care in the selection of the resident managers and not to pay salaries or benefits, including the rental values of the units occupied by the resident managers, in excess of those specified in the approved budget for each building or complex for which a resident manager is required without the corporation's prior written authorization. It is expressly agreed and understood that all resident managers shall be employees of the corporation and not employees of agent.

#### **§ 9:43 Supervision of resident managers—Multiple buildings**

It shall be the duty of agent to supervise all resident managers. In so doing, agent shall inspect their books and records at such intervals as agent deems appropriate, but at least [*specify, such as: monthly or quarterly*]. Agent shall provide appropriate forms of rental applications and of leases or rental agreements. Agent shall ensure that sufficient investigation of prospective tenants is conducted and establish guidelines for the acceptance of tenant applications, which guidelines shall be in accord with sound business practice and with all applicable fair housing laws. Agent shall also have final approval of tenants. Furthermore, agent shall inspect the premises regularly to ensure that they are being properly maintained and that the resident managers are promptly reporting any major repairs needed.

##### 4. Duties of Agent

#### **§ 9:44 Responsibility for rental to tenants**

It shall be the duty and responsibility of the agent to use its best efforts to rent space now or hereafter becoming vacant to desirable tenants on terms and conditions satisfactory to the corporation.

#### **§ 9:45 Responsibility for rental to tenants—Office leasing guidelines**

Except as may be otherwise directed in writing, lease negotiations shall be carried out under the following terms and conditions:

1. All leases shall be in Owner's name and shall be executed by Owner.

2. All leases shall be in Manager's name, unless Manager is otherwise notified in writing by Owner. All leases will be executed by Manager in the following manner: “[name of manager], as property manager for the [specify] Building.”
3. No lease shall have a term of less than one year nor more than five years including renewal options.
4. No lease shall cover building space in excess of [number] square feet.
5. No lease shall provide for an annual rental less than \$[dollar amount].
6. The first month's rent and the security deposits, when required, are to be collected upon execution of each lease. All advance rents and security deposits are to be deposited in the Operating Account or Security Deposit Account as provided in the Management Agreement.
7. No obligation of a prospective tenant relative to an existing lease shall be assumed.
8. No existing lease shall be canceled, modified, assigned, sublet, or altered in any respect (other than increasing the square foot area covered by the lease but not in excess of [number] square feet), without prior written approval of Owner.
9. All leases are to provide for tenant participation in increased costs above the base year for all taxes, special assessments, insurance, utilities, and operating expenses.
10. The standard lease form approved by Owner is to be used. Use of other lease forms or any changes, additions, or deletions in the standard lease form are subject to prior written approval of Owner.
11. Any lease which requires the expenditure of more than \$[dollar amount] per square foot to refurbish, rehabilitate, remodel, or otherwise prepare the leased premises must be submitted along with the estimated costs for such work to Owner for written approval prior to execution of the lease.
12. Neither Owner nor any of its subsidiaries nor any other entity specified by Owner shall be a tenant without prior written approval of Owner.
13. Any lease not complying with all of the foregoing conditions shall be submitted to Owner for approval prior to execution.
14. Owner is to be immediately furnished an executed copy of all leases executed on its behalf.

**§ 9:46 Responsibility for maintenance and repair**

Agent shall maintain and repair the property in accordance with sound management practices and local codes. Such maintenance and repair shall include, without limitation, cleaning, painting, decorating, plumbing, carpentry, grounds care, and such other maintenance and repair work as may be necessary, subject to any limitation imposed by owner in addition to those contained in this agreement.

Incident to the maintenance and repair, the following provisions will apply:

1. Special attention will be given to preventative maintenance. To the greatest extent feasible, the services of regular maintenance employees will be used.
2. Subject to owner's prior approval, agent will contract with qualified independent contractors for the maintenance and repair of air-conditioning systems and elevators, and for extraordinary repairs beyond the capability of regular maintenance employees.
3. Agent will systematically and promptly receive and investigate all service requests from tenants, take any actions that may be justified, and keep records of them. Emergency requests will be received and serviced on a round-the-clock basis. Complaints of a serious nature will be reported to owner after investigation.
4. Agent is authorized to purchase all materials, equipment, tools, appliances, supplies, and services necessary to proper maintenance and repair.
5. Notwithstanding any of the above-mentioned provisions, the prior approval of owner will be required for any expenditure that exceeds *[\$/dollar amount]* in any one instance for labor, materials, or otherwise in connection with the maintenance and repair of the property, except for recurring expenses within the limits of the operating budget or emergency repairs involving manifest danger to persons or property, or required to avoid suspension of any necessary service to the property. In the latter event, agent will inform owner of the facts as promptly as possible.

**§ 9:47 Responsibility for maintenance of security**

It shall be the duty of agent to maintain security at all buildings, either by engaging the services of an independent

security company or by hiring qualified security personnel. The decision as to which course of action to pursue shall be made in agent's discretion, giving due consideration to effectiveness and to cost; provided, however, that in either event the cost shall not exceed that specified in the approved budget for each building or complex without the corporation's prior written authorization. It is expressly agreed and understood that all security personnel hired by agent shall be employees of the corporation and not employees of agent. It is also expressly agreed and understood that, in hiring any such personnel, agent shall use such skill and care in their selection as is commensurate with the degree of risk involved in the performance of their duties and with the responsibility for the safe performance of those duties.

It shall also be the duty of agent to be informed of current developments in the field of security and to recommend to the corporation any new devices, methods, and equipment as may be suitable for installation or institution at each or any of the buildings managed.

#### **§ 9:48 Responsibility for maintenance of bank accounts**

All moneys received by agent for or on behalf of owner shall be deposited in a special account to be maintained by agent with [*name of bank*]. Agent shall remit to owner [*specify, such as: monthly*], on or before the [*ordinal number*] day of each month, all funds (other than security deposits and other refundable deposits) held by agent for owner's account and not applied to the payment of owner's expenses as provided for in this agreement after: (a) deduction of the monthly management fee due to agent pursuant to this agreement; and (b) retention in the special account of any reserves as owner may authorize for working capital and other contingencies. If the security deposits or other funds are required by law to be held in a segregated account and are, by law, allowed to be held by agent, such deposits or funds shall be held in a special separate account at [*name of bank*]. Moneys held by agent for owner's account shall in no event be commingled with agent's own funds or with funds held by agent for the account of other parties, and all such funds so held for owner's account shall be trust funds in the hands of agent.

**§ 9:49 Responsibility for preparation and filing of statutory forms**

It shall be the duty and the responsibility of agent to prepare and file all forms for withholding taxes, unemployment insurance, workers' compensation, social security taxes, and all other forms required by federal, state, or municipal authorities in connection with employees employed in the operation of the properties.

**§ 9:50 Agent to credit owner's account for rebates**

Agent will obtain contracts, materials, supplies, utilities, and services on the most advantageous terms to the property, and is authorized to solicit bids, either formal or informal, for those items that can be obtained from more than one source. Agent will secure and credit to owner all discounts, rebates, or commissions obtainable with respect to purchases, service contracts, and all other transactions on owner's behalf.

**§ 9:51 Compliance with governmental orders**

Agent will take any actions as may be necessary to comply promptly with any and all governmental orders or other requirements affecting the property, whether imposed by federal, state, county, or local authority. Nevertheless, agent shall take no such action so long as owner is contesting, or has affirmed its intention to contest, any such order or requirement. Agent will notify owner in writing of all notices of any orders or other requirements within *[number]* hours from the time of their receipt.

**§ 9:52 Agent to procure fidelity bond**

Agent will furnish, at its own expense, a fidelity bond in the principal sum of *[\$dollar amount]*, conditioned to protect owner against misapplication of income from the property by agent or any employee of agent. The other terms and conditions of the bond, and the surety thereon, will be subject to approval of owner.

**NOTES TO FORM****Drafter's Notes**

For forms and materials concerning fidelity bonds, see Suretyship and Guaranty (Ch 25).

**Tax Notes**

The cost of the fidelity bond is a normal and reasonable operating expense of the agent and is therefore deductible under I.R.C. § 162(a) as an offset against compensation received for his or her services. Am. Jur. 2d, Federal Taxation ¶ 16326.

**§ 9:53 Responsibilities as to records and reports**

Agent shall be responsible for records and reports as follows:

1. Agent shall establish and maintain a comprehensive system of records, books, and accounts in a manner satisfactory to owner. All records, books, and accounts will be subject to examination at reasonable hours by any authorized representative of owner, and maintained in accordance with generally accepted accounting principles.

2. With respect to each fiscal year ending during the term of this agreement, agent will cause an annual financial report to be prepared by a certified public accountant or other person acceptable to owner, based on the preparer's examination of the books and records of owner and agent. The report will be prepared in accordance with the directives of owner, will be certified by the preparer and the agent, and will be submitted to owner within *[number]* days after the end of the fiscal year. Compensation for the preparer's services will be paid out of the rental income as an expense of the property.

3. Agent shall prepare a quarterly report comparing actual and budgeted figures for receipts and disbursements, and will submit each such report to owner within *[number]* days after the end of the quarter covered.

4. Agent shall furnish any information (including occupancy reports) as may be requested by owner from time to time with respect to the financial, physical, or operational condition of the property.

5. By the *[ordinal number]* day of each month, agent shall furnish owner with an itemized list of all delinquent accounts, including rental accounts, as of the *[ordinal number]* day of the same month.

6. By the [*ordinal number*] day of each month, agent will furnish owner with a statement of receipts and disbursements during the previous month, and with a schedule of accounts receivable and payable, and reconciled bank statements for the [*specify, such as: rental income*] account as of the end of the previous month.

7. Except as otherwise provided in this agreement, all bookkeeping, clerical, and other management overhead expenses (including but not limited to costs of office supplies and equipment, data processing services, postage, transportation for managerial personnel, and telephone services) will be borne by agent out of its own funds and will not be treated as property expenses.

#### **§ 9:54 Responsibilities as to submission of financial reports**

The manager shall prepare and furnish to the owner the following financial reports:

- (1) within [*number*] days after the end of each month, a detailed statement of all cash receipts and disbursements received and made during the preceding month in connection with the operation of the property, together with a list of all accounts payable and receivable as of the [*specify, such as: last*] day of the month and a projection of the net cash flow or deficit anticipated by the manager for the [*number*] month period following the end of the month, including a description of any anticipated expenditures in excess of those projected in the approved budget for the [*number*] month period;
- (2) within [*number*] days after the end of each [*specify, such as: calendar quarter*], a statement of income and expenses showing the results of operations for the [*specify, such as: quarter*] and cumulatively for the period from the beginning of the year through the end of the [*specify, such as: quarter*], which statement shall be prepared on a cash basis, on an accrual basis, and on a comparative basis with the corresponding periods in the preceding calendar year; and
- (3) within [*number*] days after the end of each calendar year, a statement of income and expenses showing the results of operations for the year, which statement shall be prepared on a cash basis, on an accrual basis, on a compara-

tive basis with the preceding year, and on a comparative basis with the approved budget for the year just ended.

**§ 9:55 Compliance with Fair Housing Act**

Agent shall manage the property in full compliance with the requirements of the Fair Housing Act, and agent is authorized to take those steps deemed appropriate to effectuate the purposes of the act.

**NOTES TO FORM****Drafter's Notes**

The Fair Housing Act (42 U.S.C.A. §§ 3601 et seq.) prohibits, among other things, the refusal to sell or rent after the making of a bona fide offer, or the refusal to negotiate for the sale or rental of, or otherwise making unavailable or denying, a dwelling to any person because of race, color, religion, sex, national origin, familial status, or handicap. 42 U.S.C.A. § 3604.

**§ 9:56 Compliance with wage and hour laws for personnel**

The wages paid to personnel hired by agent and their hours of work shall comply with the requirements of state or federal law where applicable.

**§ 9:57 Duties of agent concerning multiple buildings—Submission of operating budget**

It shall be the duty and responsibility of agent, on or before *[date]*, and not later than *[number]* days prior to the commencement of each *[calendar/fiscal]* year thereafter, to submit to the corporation for the corporation's approval a proposed operating budget for the properties, setting forth all estimated receipts and disbursements relating to the properties for the ensuing calendar year or, in the case of the first proposed budget, for the balance of the current calendar year. The operating budget as approved in writing by the corporation shall be referred to as the "approved budget." Except as otherwise provided in this agreement, agent shall incur no expenses in connection with the properties that are not provided for in the approved budget. In the event that a submitted budget is rejected by the corporation, agent shall operate under the last approved budget on an item by item basis until a revised budget is approved in writing by the corporation.

**§ 9:58 Duties of agent concerning multiple buildings—Advertisement**

It shall be the duty and responsibility of agent to advertise available space in the properties through the use of rental signs, plans, circulars, and other forms of advertising acceptable to the corporation.

**§ 9:59 Duties of agent concerning multiple buildings—Maintenance of files**

It shall be the duty and the responsibility of agent to establish and maintain complete and orderly files containing rent records, correspondence, payroll records, leases, insurance policies, vouchers, unpaid bills, receipts, and all other documents and papers pertaining to the properties and the management and operation of them. All of these documents shall be and remain the property of the corporation and shall be available to the corporation and its representatives for inspection at any time during regular business hours.

**§ 9:60 Duties of agent concerning multiple buildings—Maintenance of books of account**

It shall be the duty and the responsibility of agent to establish and maintain, in accordance with generally accepted accounting principles, consistently applied, accurate, and complete books of account with proper entries of all receipts, income, and disbursements pertaining to the properties, which books of account shall be and remain the property of the corporation and shall be available to the corporation and its representatives for inspection at any time during regular business hours.

**§ 9:61 Duties of agent concerning multiple buildings—Repairs**

It shall be the duty and the responsibility of agent to make or cause to be made all necessary repairs to the properties, to purchase all necessary supplies and materials, and to do all other things necessary to maintain the properties in a clean, safe, and orderly condition and to insure compliance with all federal, state, and local statutes, ordinances, rules, and regulations applicable to the operation of the properties. Unless otherwise provided for in the approved

budget for the then current year, the expenses to be incurred for any single repair or purchase shall not exceed the sum of *[\$dollar amount]* without prior written authorization by the corporation, except in the case of an emergency, in which case the agent shall promptly notify a representative of the corporation of the repair or purchase. Agent shall use its best efforts to make all repairs and to obtain all materials, supplies, and services at the lowest available cost and shall remit to the corporation any rebate, commission, or discount allowed in connection with them.

**§ 9:62 Duties of agent concerning multiple buildings—Contracting for services**

It shall be the duty and responsibility of manager to contract for electricity, gas, steam, water, telephone, window cleaning, pest control, and any other services as shall be necessary and advisable for the proper operation of the properties, provided, however, that manager shall not contract for any services whose estimated cost would exceed the cost specified for them in the approved budget without the corporation's prior written consent.

**5. Other Provisions****§ 9:63 Reservation by agent of right to use affiliates**

Agent shall have the right to use any of its affiliates to perform any of the services required by this management agreement.

**§ 9:64 Prohibition of encumbrance of property by agent**

Agent shall not execute or file for record any instrument that imposes a restriction on the sale, leasing, or occupancy of the subject property.

**§ 9:65 Power to obligate owner or bind credit of owner**

Agent has no authority and agrees not to obligate owner on any contract, warranty, or guaranty, or to bind owner's credit in any respect whatsoever, unless expressly authorized by owner in writing.

**§ 9:66 Indemnification**

1. By the Owner. The Owner releases and shall defend, indemnify, and hold harmless Manager from all claims, losses, harm, costs, liabilities, damages, and expenses (including, but not limited to, attorney's fees) arising, whether before or after the expiration or termination of this agreement, out of or in connection with: (a) Manager's management of any Property; or (b) any accident or injury or death to any person or damage to any property or to the environment occurring in or about any property or in connection with the possession, use, or occupancy of any property; provided, however, that the Owner shall have no obligation under this paragraph to release, defend, indemnify, or hold harmless Manager from any such claim, loss, harm, cost, liability, damage, or expense, if the same arises out of: (i) an act by Manager which is not taken in good faith or in a manner reasonably believed to be in the best interests of the Owner; or (ii) conduct by Manager constituting negligence, willful misconduct, or breach of any of its obligations under this Agreement.

2. Indemnification by Manager. Manager releases and shall defend, indemnify, and hold harmless Owner from all claims, losses, harm, costs, liabilities, damages, and expenses (including, but not limited to, attorney's fees) arising, whether before or after the expiration or termination of this agreement, solely out of conduct by Manager constituting negligence, willful misconduct, or breach of any of its obligations under this agreement.

**§ 9:67 Bond of agent**

On request from owner, agent agrees to furnish to owner, at owner's cost and expense, a fidelity bond of a reputable insurance company in a sum satisfactory to the owner providing for the faithful accounting of all rents collected by agent under this agreement.

**NOTES TO FORM****Tax Notes**

The owner's cost of the fidelity bond is a normal and ordinary operating expense of the property and is therefore deductible against revenue received from the property. I.R.C. § 162(a).

**§ 9:68 Sale of property not to affect property management agreement**

If the property is sold or conveyed during the term of this contract, owner agrees to make as a condition precedent to the sale or conveyance an undertaking on the part of grantee to perform the terms of this agreement and so on from grantee to grantee, to the purpose that this agreement shall remain in full force and effect and be binding on all grantees in accordance with the terms of it.

**§ 9:69 Termination of property management agreement by agent or owner**

Agent may terminate this property management agreement by giving a *[number]* days notice of termination and shall continue to perform *[his/her]* duties during such period, provided, that, on receipt by owner of notice of termination, owner may terminate agent's duties effective immediately. All compensation to agent shall cease on the lapse of the *[number]* days, or, on lapse of *[number]* days following notice to agent of immediate termination of *[his/her]* duties. On the lapse of the *[number]* days under owner's option, or lapse of the *[number]*-day period, agent will vacate the apartment unit on the date of termination without further notice of any kind from owner. In the event that agent fails to so vacate the apartment unit, agent shall be liable to owner for double the fair market rental value of the apartment unit occupied by *[him/her]*.

Owner may terminate the services of agent by written notice effective immediately. All compensation by owner shall continue for a *[number]* day period following the notice and shall terminate on the *[ordinal number]* day. Where a credit or deduction against the rental price of a dwelling unit occupied by agent and owned by owner is included as part of agent's compensation, the compensation or prorated portion of it shall continue for the *[number]* day period, and after that agent shall be liable for the full fair market rental price of the dwelling unit from the *[ordinal number]* day until the date agent vacates the dwelling unit. Owner may, at *[his/her]* option, also terminate agent's tenancy of the unit, and on service of the notice of termination, agent agrees to vacate the apartment unit within *[number]* days after that.

**§ 9:70 Termination of agreement for default—Real estate partnership**

Partnership shall give notice to agent if agent is in default in the performance of any of the duties of agent that are described in this agreement. Agent shall have [number] days from the receipt of the notice to remedy the default, and if agent cannot remedy the default within that period, partnership may terminate this agreement. The right of partnership to terminate this agreement shall not impair any other rights or remedies partnership may have against agent.

**§ 9:71 Confidential disclosure agreement**

This Agreement is made on [date], between [name of company], referred to as the Company, and [name of contract manager], referred to as the Contract Manager.

Contract Manager has previously entered into a Property Management Agreement with the Company which requires that Contract Manager have access to certain confidential and proprietary information from the Company to, among other things, manage, operate, and maintain the property in an efficient manner satisfactory to the Company.

Contract Manager acknowledges by this Agreement that this information is confidential and proprietary to the Company.

In consideration of the mutual promises of performance, the Company and Contract Manager agree as follows:

1. For purposes of this Agreement, Confidential Information is defined as: (a) the contents of the Policies and Procedures Manual (as it may be amended from time to time); (b) any data, trade secret, or information or electronic equipment or computer software from which information can be procured which is proprietary to the Company; and (c) any data, trade secret, or information or electronic equipment or computer software from which information can be procured which the Company, its subsidiaries, or affiliates is required to keep confidential pursuant to an agreement with a third party.

2. Access to the Company's Confidential Information is limited as defined in Schedule A, attached and incorporated by reference.

3. The Company shall provide access to Confidential In-

formation to Contract Manager on an “as needed” basis only when access is necessary for the purposes specified above.

4. Contract Manager agrees to pay any fees that may become due as a result of Contract Manager’s access to Confidential Information. Fees, if any, are listed on Schedule A.

5. Contract Manager agrees that, immediately on termination of any of its employees who have access to the Confidential Information, Contract Manager shall notify the Company of that event so the Company may terminate that employee’s access to the Confidential Information.

6. Contract Manager agrees not to use, copy, or permit the use or copying of any Confidential Information or materials relating to the Confidential Information, by any person, firm, or corporation. Contract Manager shall not sell, transfer, lease, license, or otherwise disseminate the Confidential Information in any manner.

7. Contract Manager agrees that it will not intentionally access any Confidential Information that is not required in connection with the above-referenced purposes and, that if it does accidentally access Confidential Information, it will immediately notify the Company of the access and take all appropriate and reasonable steps to protect and/or destroy the Confidential Information in its possession.

8. It is expressly understood and agreed that Contract Manager will defend, indemnify, and hold the Company harmless from any loss, cost, expense, damage, or liability resulting from any judicial action brought or threatened against the Company as a result of Contract Manager’s misuse of the Confidential Information to which it will have access as a result of this Agreement.

9. The obligations of Contract Manager, its employees, subsidiaries, affiliates, subcontractors, and agents to protect Confidential Information is effective as of */date* and shall continue for a period of 10 years following the termination of this Agreement.

10. The Company, at its sole discretion, reserves the right, without prior notification, to audit Contract Manager’s access to and use of the Confidential Information for the purpose of insuring compliance with the terms of this Agreement by Contract Manager.

11. Contract Manager agrees that any violation of the

restrictions contained in this Agreement shall constitute a material breach of this Agreement entitling the Company to immediate injunctive relief in addition to any other remedies the Company may have at law or equity.

12. The termination provisions of the Management Agreement between the parties apply to this Agreement. Upon termination of this Agreement or the Management Agreement or breach of any terms and conditions by Contract Manager, the Company may immediately discontinue access to Confidential Information and Contract Manager shall immediately return the Confidential Information to the Company.

13. There are no warranties expressed or implied as to the accuracy or completeness of the Confidential Information, including, but not limited to, the implied warranties of merchantability and fitness for a particular purpose. In no event will the Company be liable for any direct, indirect, incidental, special, or consequential damages or for any lost profits or other economic loss even if the Company has been advised of the possibility of damages.

14. This Agreement shall be governed by the laws of the State of Florida.

15. If applicable, Contract Manager shall insure that all Confidential Information is disclosed to only the employees who need information incidental to their employment and who have been issued a personal password by the Company. The Contract Manager shall clearly instruct employees not to violate the restrictions contained in this Agreement and Contract Manager shall take appropriate steps to insure these obligations are fulfilled. Contract Manager agrees not to disclose the Confidential Information to any of its subsidiaries, affiliates, subcontractors, or agents unless it has the prior written approval of the Company and the person to whom the Confidential Information is disclosed agrees in writing to be bound to the terms of this Agreement.

The parties have executed this Agreement in duplicate originals by their duly authorized representatives on the date above.

THE COMPANY:

---

*[Name of company]*

By: \_\_\_\_\_

[Signature of authorized person]

Its: \_\_\_\_\_

[Title of authorized person]

### CONTRACT MANAGER

\_\_\_\_\_

[Name of contract manager]

By: \_\_\_\_\_

[Name of authorized individual]

Its: \_\_\_\_\_

[Title of authorized individual]

### SCHEDE A

Contract Manager shall have access to the following Confidential Information: [list of confidential information].

#### § 9:71.50 Special power of attorney—Entry onto property and dealings with utility companies

I [name of owner], Owner of property located at [address of property]:

Do make, constitute, and appoint [name of management company] to be my true and lawful attorney for and in my name, place and stead I give and grant unto said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done as fully, to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming that the said attorney or its substitute shall lawfully do or cause to be done by virtue hereof. [Name of management company] shall be limited to the performance of the regularly customarily acknowledge property management practices, including, but not limited to, inspection and entrance onto the property and engaging in transactions with utility companies.

### NOTES TO FORM

#### Research References

Forms

Am. Jur. Legal Forms 2d, Real Property Management § 220:9

Florida Pleading and Practice Forms, Leases and Rental Agreements  
Ch 12

**§ 9:71.60 Collection and disbursement of rents**

*[Name of Manager]*, Manager, agrees to collect all rents as they become due; to render to *[Name of Owner]*, Owner, a monthly accounting of rents received and expenses paid; and to remit to Owner all income, less any sums paid out. Manager agrees to collect the rents from the Tenants and to disburse funds by ordinary mail or as instructed by the Owner on or before the *[ordinal number]* day of the current month, provided, however, that the rent has been received from the Tenants.

**NOTES TO FORM****Research References***Forms*

Am. Jur. Legal Forms 2d, Real Property Management § 220:9  
Florida Pleading and Practice Forms, Leases and Rental Agreements  
Ch 12

**§ 9:71.70 Advertisement and legal proceedings**

*[Name of Manager]*, Manager, agrees to advertise for tenants, screen tenants and select tenants of suitable credit worthiness. Manager will set rents that in the opinion of the Manager at the time of the rent negotiations with the tenant, reflect the market conditions of that time and approximate rents of comparable rental properties, unless expressly instructed in writing by *[Name of Owner]*, Owner, to the Manager to the contrary, as to the amount of the initial rent and any subsequent increases as may from time to time be appropriate. Manager agrees to rent and to lease the property; to sign, renew and to cancel rental agreements and leases for the property or any part thereof; to sue and recover for rent and for loss or damage to any part of the property and/or furnishings thereof; and, when expedient, to compromise, settle and release any such legal proceedings or lawsuits.

**NOTES TO FORM****Research References***Forms*

Am. Jur. Legal Forms 2d, Real Property Management § 220:9

Florida Pleading and Practice Forms, Leases and Rental Agreements  
Ch 12

**§ 9:71.80 Term of management agreement**

This Agreement shall be effective as of the [*ordinal number*] day of [*name of month*], [*year*] and shall expire on the [*ordinal number*] day of [*month*], [*year*]. Upon expiration of the above initial term, this Agreement shall automatically be renewed and extended for a like period of time unless terminated in writing by either party by providing written notice [*number of days*] days prior to the date for such renewal. This Agreement may also be terminated by mutual agreement of the parties at any time. Upon termination [*Name of Owner*], Owner, shall pay to [*Name of Manager*], Manager, any fees, commissions and expenses due Manager under terms of this Agreement, which are owing to Manager. In the event of the premises not renting within a [*number of days*]-day period of entering into this agreement, or of a vacancy continuing for a period of longer than [*number of days*] days, Owner reserves the right to declare this agreement void.

**NOTES TO FORM**

**Research References**

*Forms*

Am. Jur. Legal Forms 2d, Real Property Management § 220:9  
Florida Pleading and Practice Forms, Leases and Rental Agreements  
Ch 12

## **Chapter 10**

# **Agents and Brokers**

### **I. EMPLOYMENT OF BROKER OR SALES ASSOCIATE**

#### **A. GENERAL CONSIDERATIONS**

- § 10:3 Tax aspects—Capitalization of broker's fees
- § 10:4 —Information returns
- § 10:5 —Income and tax status of brokers
- § 10:6 Checklist—Drafting contract for employment of real estate sales agent by broker

#### **B. FORMS**

- § 10:7 Real estate sales associate's employment agreement—With real estate broker
  - Alternate form
  - With real estate loan broker
  - Provision—Covenant not to compete
- § 10:11 Employment agreement of real estate associate, broker associate, or broker—With real estate broker
  - Notice—Appointment of sales associate
  - Referral agreement—Commission sharing
  - Provision—New listings
  - Payment for services in specific transaction

### **II. BROKERAGE AGREEMENTS**

#### **A. GENERAL CONSIDERATIONS**

- § 10:17 Form drafting principles
- § 10:18 Tax aspects
- § 10:19 Checklist—Drafting brokerage agreement

#### **B. FORMS**

- § 10:20 Exclusive agency listing—Sale of premises

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- § 10:21 —Leasing of premises
- § 10:22 —Provision—Investigation of tenant
- § 10:23 —Between owner and broker to solicit tenants
- § 10:24 —Arbitration
- § 10:25 Exclusive listing of property
- § 10:26 —Broker to have option to purchase
- § 10:27 Description of listed property
- § 10:28 Brokerage agreement—Exchange of property
- § 10:29 —Procurement of option to purchase

C. OPTIONAL PROVISIONS

1. Types of Listings

- § 10:30 Nonexclusive listing
- § 10:31 Exclusive agency listing

2. Commissions

- § 10:32 Fixed percentage of sale price
- § 10:33 —Minimum guaranty
- § 10:34 —Option agreement
- § 10:35 Excess over stated amount

3. Scope of Authority

- § 10:36 Execution of sales contract
- § 10:37 Authority limited to receipt of offers and deposits

**Scope**

This chapter contains forms for use in drafting instruments relating to the real estate brokerage business, together with pertinent legal principles and tax aspects that should be considered in drafting such instruments.

**Treated Elsewhere**

Chapters containing related form and text material are Sales (see Ch 1), Sales and Leasebacks (see Ch 1A), Management of Real Property (see Ch 9), Acquisition for Development (see Ch 11), and Powers of Attorney (see Ch 21).

**Research References**

The material cited below is generally applicable to conveyances and acknowledgments. Material that is applicable to particular aspects of the topic is cited in footnotes throughout the chapter and in Drafter's Notes following particular forms.

*West's Key Number Digest*

Brokers 12 to 18; Factors 1 to 66; Principal and Agent 91 to 199

## AGENTS AND BROKERS

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- Insurance Agents or Brokers as Professionals or Nonprofessionals for Purposes of Malpractice Statutes of Limitations, 121 A.L.R. 5th 365
- Liability of insurance agent or broker on ground of inadequacy of liability insurance coverage procured, 60 A.L.R.5th 165
- Insurance agents' and brokers' professional liability insurance, 55 A.L.R.5th 681
- Liability of insurance agent or broker for placing insurance with insolvent carrier, 42 A.L.R.5th 199
- Liability of vendor or real-estate broker for failure to disclose information concerning off-site conditions affecting value of property, 41 A.L.R. 5th 157
- Real-estate agents' and brokers' professional liability insurance, 35 A.L.R. 5th 83
- Grounds for revocation or suspension of license of real-estate broker or salesperson, 7 A.L.R. 5th 474
- What constitutes financial ability to perform within rule entitling broker to commission for producing ready, willing, and able purchaser of real property, 87 A.L.R. 4th 11
- Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue—modern cases, 81 A.L.R. 4th 939
- Broker's liability for fraud or misrepresentation concerning development or nondevelopment of nearby property, 71 A.L.R. 4th 511
- Real-estate brokers: statute or regulation forbidding use of prizes, gifts, or premiums as inducement to secure customers, 62 A.L.R. 4th 1044
- Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold, 46 A.L.R. 4th 546
- Transactions within public security or guaranty fund designed to compensate those suffering damage or loss on account of real-estate brokers' defalcations, 38 A.L.R. 4th 792
- Right to private action under state statutes or regulations governing real-estate brokers or salesmen, 28 A.L.R. 4th 199
- Right of attorney, as such, to act or become licensed to act as real-estate broker, 23 A.L.R. 4th 230
- Revocation or suspension of real-estate broker's license for conduct not connected with business as broker, 22 A.L.R. 4th 136
- Application of state antitrust laws to activities or practices of real-estate agents or associations, 22 A.L.R. 4th 103
- Real-estate broker's rights and liabilities as affected by failure to disclose agreement to loan purchase money to purchaser, 17 A.L.R. 4th 788

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- Validity and application of regulation prohibiting licensed real-estate broker from negotiating sale or lease with owner known to have exclusive listing agreement with another broker, 17 A.L.R. 4th 763
- Duty and liability of real-estate agent or broker to purchaser with respect to procurement or transfer of insurance policy, 88 A.L.R. 3d 1077
- Necessity of having real-estate broker's license in order to recover commission as affected by fact that business sold includes real property, 82 A.L.R. 3d 1139
- Real estate broker's liability for misrepresentation as to income from or productivity of property, 81 A.L.R. 3d 717
- Procurement of real-estate broker's license subsequent to execution of contract for services as entitling broker to compensation for services, 80 A.L.R. 3d 318
- Construction of agreement between real-estate agents to share commissions, 71 A.L.R. 3d 586
- Validity, construction and effect of provision in exclusive listing agreement for payment of commission on termination by owner, 69 A.L.R. 3d 1270
- Attorney and client: Conflict of interest in real-estate closing situations, 68 A.L.R. 3d 967
- Revocation or suspension of real-estate broker's license for violation of statutes or regulations prohibiting use of unlicensed personnel in carrying out duties, 68 A.L.R. 3d 530
- Failure of real-estate broker to disclose to principal fee-splitting agreement with adverse party, or adverse party's broker, as breach of fiduciary duty barring claim for commission, 63 A.L.R. 3d 1211
- Real estate broker's right to commission for procuring lessee, where lease terminates before contemplated term, 54 A.L.R. 3d 1171
- Construction of provision in real-estate broker's listing contract that broker shall receive commission on sale after expiration of listing period to one with whom broker has "negotiated" during listing period, 51 A.L.R. 3d 1149
- Right of mortgage broker to commission where principal violated conditions of agreement, 45 A.L.R. 3d 1326
- Validity, construction, and effect of real-estate brokers' multiple-listing agreement, 45 A.L.R. 3d 190
- Right of real-estate broker to commission where listing contract is for sale of property and it is subsequently leased to one with whom broker had negotiated, 42 A.L.R. 3d 1430
- Suspension or revocation of real-estate broker's license on ground of discrimination, 42 A.L.R. 3d 1099
- Broker's right to commission from principal upon procuring third party taking an option, 32 A.L.R. 3d 321
- Sufficiency, under statute of frauds, of description or designation of property in real-estate brokerage contract, 30 A.L.R. 3d 935

## AGENTS AND BROKERS

Licensed real-estate broker's right to compensation as affected by lack of license on the part of partners, coadventurers, employees, or other associates, 8 A.L.R. 3d 523

Liability of real-estate broker or agent to principal for concealing or failing to disclose offer, 7 A.L.R. 3d 693

Private federal right of action against brokerage firm for violation of exchange or dealer association rule, 54 A.L.R. Fed. 11

Activities of real-estate agent or association as subject to federal antitrust laws, 44 A.L.R. Fed. 743

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Fla. Jur. 2d, Agency and Employment; Brokers  
Am. Jur. 2d, Agency; Brokers; Federal Taxation

### *Treatises and Practice Aids*

RIA Federal Tax Coordinator 2d, Compensation, Taxable, Deductible and Wage Withholding

RIA Federal Tax Coordinator 2d, Deductions

RIA Federal Tax Coordinator 2d, Sales and Exchanges, Capital Gains and Losses, Cost Recovery Recapture, Depreciation Recapture

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Real-Estate Broker's Liability for Nondisclosure to Seller of More Favorable Offer, or Increase in Value of Realty, 66 Am. Jur. Proof of Facts 3d 65

Real-Estate Broker's Breach of Fiduciary Duty to Seller-Principal by Failing to Disclose Material Facts About or Certain Dealings With Purchaser, 65 Am. Jur. Proof of Facts 3d 109

Liability of real estate professional for interstate real estate fraud, 51 Am Jur Proof of Facts 3d 361

Real estate broker's recovery of commission for procuring "ready, willing and able" buyer or being "procuring cause" of sale, 49 Am Jur Proof of Facts 3d 399

Resolving Real Estate Broker's Disputes, 88 Am. Jur. Trials 321

Resolving Real Estate Disputes Through Arbitration, 79 Am. Jur. Trials 159

Real Estate Brokers' Commissions, 9 Am. Jur. Trials 513

### *Forms*

Federal Tax Guide To Legal Forms, Real and Personal Property Interests (Ch 4)

Am. Jur. Pleading and Practice Forms, Agency; Brokers

Florida Pleading and Practice Forms, Real Estate Brokers Ch 8

### *Law Reviews and Other Periodicals*

Boyd, Real Estate Sales Across State Lines, 18 Real Est. L.J. 56 (1989)

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25 Nova L. Rev. 115 (2000)
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22 Nova L. Rev. 269 (1997)
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- Brown and Grohman, Survey of Florida Law: Real Property, 24  
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## I. EMPLOYMENT OF BROKER OR SALES ASSOCIATE

### A. GENERAL CONSIDERATIONS

#### § 10:3 Tax aspects—Capitalization of broker's fees

Purchases of property made through the services of a broker normally require payment of a fee or commission to the broker. A taxpayer who pays a broker's fee must capitalize it as part of the cost of the property, whether or not the taxpayer is engaged in the real estate business.<sup>1</sup> Commissions paid for the sale of real estate by a taxpayer who is not engaged in the real estate business cannot be deducted and must be offset against the selling price to determine the amount of gain or loss realized on the sale. If the seller is engaged in the real estate business, the commissions paid on property sales are fully deductible business expenses.<sup>2</sup>

#### § 10:4 Tax aspects—Information returns

A real estate broker is one of the persons charged with filing an information return on real estate transaction in which he or she is involved.<sup>1</sup> A real estate transaction for this purpose is a sale or exchange of any improved or unimproved land, including air space, and any residential, commercial, or industrial building, including condominium units and

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##### [Section 10:3]

<sup>1</sup>**Legal Encyclopedias:** The same rule applies to finders fees paid to obtain loans. The cost of the fee is deducted ratably over the term of the loan. Am. Jur. 2d, Federal Taxation ¶ 16383.

Am. Jur. 2d, Federal Taxation ¶ 16533.

<sup>2</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶ 16533.

##### [Section 10:4]

<sup>1</sup>I.R.C. § 6045.

stock in cooperative housing corporations.<sup>2</sup> Mobile homes that include wheels and axles and are not affixed to a foundation are not covered by the reporting requirement.<sup>3</sup> Property transferred through gift, bequest, or foreclosure is not covered by the reporting requirement.<sup>4</sup>

A hierarchy of responsible parties is designated, with the Code imposing the duty of making the report on the following persons in the order named:

1. The person primarily responsible for closing the transaction, usually the attorney or the title company.
2. The lender under the mortgage on the property.
3. The broker representing the seller.
4. The broker representing the buyer.

Brokers are thus placed at the end of the list of persons responsible for making the report. (Form 1099-B is used.) It includes the name, address, and taxpayer identification number of the seller, a description of the real estate, the date of closing, the gross proceeds, and information about the person filing the return. When property or services are included in the consideration, these must also be described.

#### § 10:5 Tax aspects—Income and tax status of brokers

Brokers receive special treatment under the employment tax. A “qualified real estate agent” is treated not as an employee, but as an independent contractor.<sup>1</sup> The agent must be licensed, working as a sales person, and receive substantially all income from sales, nor from time devoted to the work. The services must also be performed under a written contract that provides for the broker not to be treated as an employee for employment tax purposes.<sup>2</sup> A broker meeting these qualifications is considered an independent contractor and no withholding is made under the employment tax or for social security tax. Most brokers are employed in this way and receive their commissions free of withholding payments.

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<sup>2</sup>26 C.F.R. § 1.6045-4(b)(2).

<sup>3</sup>26 C.F.R. § 1.6045-4(c)(2)(iii).

<sup>4</sup>26 C.F.R. § 1.6045-4(c)(1).

#### [Section 10:5]

<sup>1</sup>I.R.C. § 3508.

<sup>2</sup>I.R.C. § 3508(b)(1)(C).

The brokers, not their employers, are responsible for making their income tax payment and for paying their social security tax.

The commissions and fees received come from the personal services of the broker; they are therefore taxable as ordinary income.<sup>3</sup> Against this income, the broker may deduct the ordinary and reasonable expenses of engaging in the business.<sup>4</sup> Such expenses as telephone bills, insurance, supplies, automobile expenses, and similar expenditures are all deductible.<sup>5</sup>

For many brokers, the major expense of pursuing that livelihood is the operating expense of the automobile used in showing and inspecting property. Such items as gas, oil, depreciation, insurance, repairs, parking fees, and similar costs are all deductible as business expenses when incurred in connection with the brokerage business. If the car is also used for personal purposes, the general expenses—depreciation, repairs, insurance, license fees, etc.—must be apportioned between business use and personal use.<sup>6</sup> As an alternative to itemizing these expenses individually, a broker may also use a standard mileage deduction. This rate changes periodically.

A broker must support his or her income and deductions with adequate records. They need not follow any particular form, but must be sufficient to support the deduction claimed. These records should be kept for at least three years.<sup>7</sup> Records relating to any property should be kept as long as the property is owned and for at least three years after its disposition.

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<sup>3</sup>I.R.C. § 61(a)(1). A broker who is paid a salary is taxed in the same way.

<sup>4</sup>I.R.C. § 162.

<sup>5</sup>These are also deductible by a salaried broker, but subject to the 2% of adjusted gross income limitation that applies to all miscellaneous itemized deduction. I.R.C. § 67(a), (b). The taxpayer must also itemize deductions in order to benefit from these expenses; they are not “above the line” deductions.

<sup>6</sup>Expenses directly attributable to the business—parking fees and tolls for example—need not be apportioned.

<sup>7</sup>**Legal Encyclopedias:** Am. Jur. 2d, Federal Taxation ¶¶ 6118 et seq.

**§ 10:6 Checklist—Drafting contract for employment of real estate sales agent by broker**

1. Parties.
  - a. Broker: name and address.
    - (1) Office at which agent employed.
  - b. Agent: name and address.
2. Agent's duties.
  - a. To use best efforts to sell, lease, or exchange property listed with broker.
    - (1) In compliance with all laws, ordinances, and codes of ethics.
    - (2) In compliance with broker's policies and rules.
  - b. Engage in all real estate activities through broker.
    - (1) Exclusive services to broker's clients and prospects.
    - (2) Deliver all commissions received.
  - c. Maintain license to engage in real estate activities.
  - d. Keep confidential all information about broker, broker's clients, and prospects.
    - (1) During employment.
    - (2) After termination.
3. Broker's undertakings.
  - a. Make listings available to agent.
  - b. Provide facilities for agent's activities.
    - (1) Desk space.
    - (2) Meeting rooms.
    - (3) Telephone and answering services.
4. Commissions to agent.
  - a. Payment according to schedule.
    - (1) Special payment on designated listings.
    - (2) Expenses of closing paid from commission in same proportion as participation.
  - b. Pay commissions immediately after broker receives commissions.
  - c. Broker's decisions final on participation of other agents in closing transaction.
5. Term of contract.
  - a. Beginning date.
  - b. Continuous until terminated by written notice to other party.

- c. Termination not alter commissions payable to agent.
- d. After termination close all transactions listed with broker only through broker.
- 6. Status of agent.
  - a. Independent contractor.
    - (1) Not an employee or partner of broker.
    - (2) For all purposes, including federal tax, not treat agent as employee.
  - b. Agent to pay all his or her expenses of performing under contract.
  - c. No right to bind broker in any manner.
    - (1) Agent not represent to the contrary.
- 7. General.
  - a. Entire agreement between parties.
  - b. Not assignable by either party.
  - c. Binding on heirs, successors, and assigns.
  - d. Date of contract.
  - e. Signatures.

## B. FORMS

### § 10:7 Real estate sales associate's employment agreement—With real estate broker

Agreement made on *[date]*, between *[name of broker]*, of *[address of broker]*, referred to below as "broker," and *[name of sales associate]*, of *[address of sales associate]*, referred to below as "sales associate."

#### RECITALS

A. Broker is a licensed real estate broker and is duly qualified to procure the listing of real estate for sale, lease, or rental, to seek prospective purchasers, lessees, and renters therefor, and to furnish other services;

B. Broker enjoys the goodwill of, and a reputation for fair dealing with, the public and maintains an office, properly furnished, equipped, and staffed, for the rendering of real estate brokerage services to the public; and

C. Sales associate is a *[registered/licensed/qualified]* real estate sales associate and is competent to deal with the public as such.

In consideration of the mutual covenants contained in

this agreement, broker and sales associate agree as follows:

#### SECTION I. OBLIGATIONS OF BROKER

Broker agrees to make available to sales associate [*all current listings/some listings to be exclusively [his/hers] and some listings to be available to [him/her] and to other sales associates of broker in accordance with understandings that presently exist among the sales associates in broker's office and of which sales associate is aware*]. Broker further agrees to assist sales associate in [*his/her*] work by advice, instruction, and full cooperation in every way possible.

Sales associate may share with other sales associates of broker such facilities as broker's office is able to furnish in connection with the subject matter of this contract.

#### SECTION II. DUTIES OF SALES ASSOCIATE

Sales associate covenants to work diligently and to employ [*his/her*] best efforts to sell, lease, or rent any and all real estate listed with broker, to solicit additional listings and customers for broker, and otherwise to promote broker's real estate business. Sales associate agrees to conduct [*himself/herself*] so as to maintain and increase the goodwill and reputation of broker, and to abide by the laws, rules, and regulations that are binding on or applicable to real estate brokers and sales associates.

#### SECTION III. COMPENSATION

Sales associate shall receive [*no fixed salary/a minimum guaranteed salary of \$[dollar amount] per month*]. With respect to commissions received by broker from customers assigned to sales associate, broker shall pay sales associate as follows:

- (1) [*percentage*]% of commissions for sale of real property;
- (2) [*percentage*]% of commissions for lease or rental of property;
- (3) [*percentage*]% of commissions for purchase of property; and
- (4) for other services which sales associate may be called on to perform, [*he/she*] shall receive such compensation as the parties may determine.

Notwithstanding the compensation determined above,

sales associate understands and agrees that other sales associates or employees of broker have similar rights to compensation, that broker may find it in the best interests of the business to assign more than one sales associate to a particular client or piece of property, and that this practice may result in a claim by two or more of broker's sales associates to compensation for the same commission. Sales associate agrees that:

- (1) the schedule of compensation established above shall be subject to modification in these circumstances; and
- (2) the determination by broker of the proper division of compensation payable as among several sales associates shall be final and conclusive and shall be deemed by a sales associate to be the proper compensation payable in accordance with this contract.

#### SECTION IV. WORKING HOURS

Sales associate may set *[his/her]* own hours of work. *[He/She]* shall not be required to work at any particular time, but may be prevented from working by broker whenever broker finds it necessary to divide a small amount of work among available sales associates.

#### SECTION V. RELATIONSHIP BETWEEN PARTIES

Broker shall not be liable to sales associate for any expenses incurred by sales associate or for any of *[his/her]* acts. Sales associate shall not be liable to broker for office help or expense. Sales associate shall have no authority to bind broker by any promise or representation unless specifically authorized in a particular transaction. Suits for commissions shall, in conformity with the law, be maintained only in the name of broker, and sales associate shall be construed to be a subagent only with respect to the clients and customers for whom services shall be performed, and shall otherwise be deemed to be an independent contractor and not a servant, employee, joint adventurer, or partner of broker. Broker and sales associate agree that broker is not an employee for federal tax purposes.

#### SECTION VI. UNAUTHORIZED USE OF INFORMATION

Sales associate shall not, at any time, divulge to any unauthorized person or corporation information gained by *[him/her]* from the files or business of broker. After the termination of this contract, sales associate shall not use

any such information to [*his/her*] own advantage or to the advantage of any other person or corporation.

#### SECTION VII. INDEPENDENT CONTRACTOR

The broker shall perform [*his/her*] services under this agreement not as an employee, but as an independent contractor and, for all purposes, including federal and state tax purposes, broker will not be treated as an employee with respect to such services.

#### SECTION VIII. TERMINATION

This contract, and the relationship created by it, may be terminated by either party at any time on [*number*] days' written notice to the other party. The rights of sales associate to any commissions that accrued prior to the notice shall not be divested by the termination of this contract.

In witness, the parties have executed this agreement at [*designate place of execution*] the day and year first written above.

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[Signatures]

#### NOTES TO FORM

##### Tax Notes

For federal tax purposes, most real estate agents operate as independent contractors, regardless of the status imposed on them by state law. They can do this under I.R.C. § 3508, providing they are licensed real estate agents who are paid for their services primarily through commissions, not because of hours spent on the job. In addition, to qualify, the agent must perform his or her services “pursuant to a written contract . . . [which] provides that the individual will not be treated as an employee with respect to such services for Federal tax purposes.” I.R.C. § 3508(b)(1)(C). Since this is a required provision for those seeking independent contractor status, contracts with agents almost always carry provisions similar to those found in Section I of § 10:8, below. The major advantage of the independent contractor status is that withholding is not made from payments to the agent, whether for income or social security tax purposes. The responsibility for reporting and making these payment is therefore shifted to the agent.

Agreement made on [*date*], between [*name of broker*], of [*address of broker*], referred to below as “broker,” and [*name*

*of sales associate], of [address of sales associate], referred to below as "sales associate."*

#### RECITALS

A. Broker is a licensed real estate broker and is duly qualified to procure the listing of real estate for sale, lease, or rental, to seek prospective purchasers, lessees, and renters therefor, and to furnish other services;

B. Broker enjoys the goodwill of, and a reputation for fair dealing with, the public and maintains an office, properly furnished, equipped, and staffed, for the rendering of real estate brokerage services to the public; and

C. Sales associate is a *[registered/licensed/qualified]* real estate sales associate and is competent to deal with the public as such.

In consideration of the mutual covenants contained in this agreement, broker and sales associate agree as follows:

#### SECTION I. OBLIGATIONS OF BROKER

Broker agrees to make available to sales associate *[all current listings/some listings to be exclusively [his/hers] and some listings to be available to [him/her] and to other sales associates of broker in accordance with understandings that presently exist among the sales associates in broker's office and of which sales associate is aware]*. Broker further agrees to assist sales associate in *[his/her]* work by advice, instruction, and full cooperation in every way possible.

Sales associate may share with other sales associates of broker such facilities as broker's office is able to furnish in connection with the subject matter of this contract.

#### SECTION II. DUTIES OF SALES ASSOCIATE

Sales associate covenants to work diligently and to employ *[his/her]* best efforts to sell, lease, or rent any and all real estate listed with broker, to solicit additional listings and customers for broker, and otherwise to promote broker's real estate business. Sales associate agrees to conduct *[himself/herself]* so as to maintain and increase the goodwill and reputation of broker, and to abide by the laws, rules, and regulations that are binding on or applicable to real estate brokers and sales associates.

#### SECTION III. COMPENSATION

Sales associate shall receive *[no fixed salary/a minimum*

*guaranteed salary of \$[dollar amount] per month]. With respect to commissions received by broker from customers assigned to sales associate, broker shall pay sales associate as follows:*

- (1) *[percentage]%* of commissions for sale of real property;
- (2) *[percentage]%* of commissions for lease or rental of property;
- (3) *[percentage]%* of commissions for purchase of property; and
- (4) for other services which sales associate may be called on to perform, *[he/she]* shall receive such compensation as the parties may determine.

Notwithstanding the compensation determined above, sales associate understands and agrees that other sales associates or employees of broker have similar rights to compensation, that broker may find it in the best interests of the business to assign more than one sales associate to a particular client or piece of property, and that this practice may result in a claim by two or more of broker's sales associates to compensation for the same commission. Sales associate agrees that:

- (1) the schedule of compensation established above shall be subject to modification in these circumstances; and
- (2) the determination by broker of the proper division of compensation payable as among several sales associates shall be final and conclusive and shall be deemed by a sales associate to be the proper compensation payable in accordance with this contract.

#### SECTION IV. WORKING HOURS

Sales associate may set *[his/her]* own hours of work. *[He/She]* shall not be required to work at any particular time, but may be prevented from working by broker whenever broker finds it necessary to divide a small amount of work among available sales associates.

#### SECTION V. RELATIONSHIP BETWEEN PARTIES

Broker shall not be liable to sales associate for any expenses incurred by sales associate or for any of *[his/her]* acts. Sales associate shall not be liable to broker for office help or expense. Sales associate shall have no authority to bind broker by any promise or representation unless specifically au-

thorized in a particular transaction. Suits for commissions shall, in conformity with the law, be maintained only in the name of broker, and sales associate shall be construed to be a subagent only with respect to the clients and customers for whom services shall be performed, and shall otherwise be deemed to be an independent contractor and not a servant, employee, joint adventurer, or partner of broker. Broker and sales associate agree that broker is not an employee for federal tax purposes.

#### SECTION VI. UNAUTHORIZED USE OF INFORMATION

Sales associate shall not, at any time, divulge to any unauthorized person or corporation information gained by *[him/her]* from the files or business of broker. After the termination of this contract, sales associate shall not use any such information to *[his/her]* own advantage or to the advantage of any other person or corporation.

#### SECTION VII. INDEPENDENT CONTRACTOR

The broker shall perform *[his/her]* services under this agreement not as an employee, but as an independent contractor and, for all purposes, including federal and state tax purposes, broker will not be treated as an employee with respect to such services.

#### SECTION VIII. TERMINATION

This contract, and the relationship created by it, may be terminated by either party at any time on *[number]* days' written notice to the other party. The rights of sales associate to any commissions that accrued prior to the notice shall not be divested by the termination of this contract.

In witness, the parties have executed this agreement at *[designate place of execution]* the day and year first written above.

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*[Signatures]*

#### NOTES TO FORM

##### Tax Notes

For federal tax purposes, most real estate agents operate as independent contractors, regardless of the status imposed on them by

state law. They can do this under I.R.C. § 3508, providing they are licensed real estate agents who are paid for their services primarily through commissions, not because of hours spent on the job. In addition, to qualify, the agent must perform his or her services “pursuant to a written contract . . . [which] provides that the individual will not be treated as an employee with respect to such services for Federal tax purposes.” I.R.C. § 3508(b)(1)(C). Since this is a required provision for those seeking independent contractor status, contracts with agents almost always carry provisions similar to those found in Section I of § 10:8, below. The major advantage of the independent contractor status is that withholding is not made from payments to the agent, whether for income or social security tax purposes. The responsibility for reporting and making these payment is therefore shifted to the agent.

**§ 10:8 Real estate sales associate's employment  
agreement—With real estate broker—  
Alternate form**

Agreement made on [*date*], between [*name of broker*], of [*address of broker*], referred to below as broker, and [*name of sales associate*], of [*address of sales associate*], referred to below as sales associate.

**SECTION I. STATEMENT OF EMPLOYMENT**

Effective as of the date of this agreement, broker employs sales associate as a real estate sales associate. Sales associate and broker agree sales associate is an independent contractor and not a servant, agent, or employee of broker. Sales associate and broker agree broker will not treat sales associate as an employee for federal tax purposes.

**SECTION II. DUTIES OF SALES ASSOCIATE**

Sales associate will carry on the customary activities of a real estate sales associate in [*specify locality*], including, but not necessarily limited to, the showing of parcels of real estate on which broker has listings, the sale of the property in accordance with the terms of the listings, the solicitation of new listings, and any other services pertaining to the real estate business as broker may require. Sales associate shall devote [*his/her*] entire time and attention to such duties and shall use [*his/her*] best efforts with regard to all of those duties.

**SECTION III. COMMISSIONS ON SALES**

Broker shall pay to sales associate a commission as set out in broker's sales manual as revised on [*date*], or as revised

in the future, on sales made by sales associate and completed during the effective period of this agreement. Broker shall not reduce the rate of commission paid to less than the percentage set forth in the sales manual on *[date]*. Furthermore, during the effective period of this agreement, broker will advance to sales associate against commissions to be earned the sum of *[\$/dollar amount]* per month, provided that sales associate may elect to draw commissions as earned.

#### SECTION IV. DURATION OF AGREEMENT; TERMINATION

The term of this agreement shall be for *[number]* years, commencing on the date of this agreement. Either party may terminate this agreement by *[number]* days *[if needed, add: written]* notice to the other party. If, on termination of this agreement, broker has advanced to sales associate against commissions to be earned a sum in excess of commissions actually earned by sales associate, sales associate will promptly refund the amount of the excess advances.

#### SECTION V. ACCESS TO LISTINGS AND OTHER INFORMATION

Broker will give sales associate access to its confidential files pertaining to listings of property in *[specify locality]*, prospects for the sale of the property, and other related matters. Broker shall also furnish sales associate with personal contacts with individuals or entities interested in selling or buying the property and shall generally aid sales associate in every way possible with respect to the sales and sales associate's duties under this agreement.

#### SECTION VI. LOYALTY TO BROKER'S INTEREST

Sales associate will not, during the term of this agreement, be engaged in any other business activity, whether or not pursued for gain, profit, or other pecuniary advantage, provided, however, that sales associate may invest personal assets in such form or manner as will not require *[his/her]* expenditure of any undue amount of time.

#### SECTION VII. NONDISCLOSURE OF TRADE SECRETS

Sales associate recognizes and acknowledges that the information that will be furnished to *[him/her]* concerning broker's customers, listings, holdings, investments, transactions, and other confidential matters constitutes a valuable,

special, and unique asset and trade secret of broker's business. Accordingly, sales associate will not, during or after the term of [*his/her*] employment under this agreement, disclose any such information or any part of it to any person, firm, corporation, association, or other entity for any reason or purpose whatsoever.

#### SECTION VIII. WRITTEN CONTRACT AS CONSTITUTING ENTIRE AGREEMENT

This agreement constitutes the entire contract and agreement between the parties, and there are no verbal understandings or other agreements of any nature with respect to the subject matter hereof except those contained in this agreement.

Executed at [*place of execution*] on the date written above.

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[Signatures]

#### NOTES TO FORM

##### Tax Notes

See Tax Notes following § 10:7.

#### § 10:9 Real estate sales associate's employment agreement—With real estate loan broker

Agreement between [*name of broker*], of [*address of broker*], (referred to in this agreement as "broker"), and [*name of sales associate*] of [*address of sales associate*], (referred to in this agreement as "sales associate").

#### SECTION ONE. STATEMENT OF ENGAGEMENT

Broker is in the business of brokering real estate loans and engages sales associate to perform services on a continuing basis pertaining to the business, which services are generally described as originating real estate loans. Sales associate agrees to perform the services under the terms and conditions set forth in this agreement.

#### SECTION TWO. RELATIONSHIP OF PARTIES

The parties intend and agree that sales associate is an independent contractor and not an agent or employee of broker.

Broker is interested only in the results obtained under this agreement; the manner or means of carrying out loan origination and solicitation shall be under the sole control of sales associate. Sales associate shall comply with all laws and ethical standards applicable to real estate sales associates and shall perform *[his/her]* duties in a manner consistent with generally accepted procedures for sales associate's profession. None of the benefits provided by broker to its employees, including, but not limited to, compensation insurance and unemployment insurance, are available to sales associate from broker.

### **SECTION THREE. DUTIES OF SALES ASSOCIATE**

Sales associate agrees to perform any and all services generally performed by sales associates in broker's line of business, including, but not limited to, soliciting and obtaining new loan applications, performing any other services pertaining to the loan brokering business as broker may require of sales associate, and promoting the business of serving the public in real estate loan transactions to the end that each party to this agreement may derive the greatest profit possible.

Broker shall have no right except to the extent required by law to direct or limit sales associate's activities as to hours, leads, production, prospects, reports, sales or training meeting, scheduling, time off, vacation, or other similar activities.

Sales associate agrees that any and all real estate loan applications shall be taken in the name of broker and filed with broker within *[number]* hours of receipt by sales associate. Sales associate also agrees to maintain and hold a valid real property broker's or sales associate's license.

### **SECTION FOUR. COMPENSATION**

As compensation for performance of sales associate's duties, sales associate shall be entitled to a percentage share of commissions as follows: *[percentage]%* to broker and *[percentage]%* to sales associate, or as may be subsequently set out in broker's written policy. The compensation shall be based on commissions actually collected by broker from loans originated and closed by sales associate during the effective period of this agreement and shall constitute full compensation for sales associate's services. If two or more sales associ-

ates participate in a loan origination and/or closing the available commission shall be divided between the participating sales associates according to agreement or by arbitration. In no event shall broker be liable to sales associate for sales associate's share of commissions not collected.

#### **SECTION FIVE. DURATION OF AGREEMENT; TERMINATION**

Engagement of sales associate shall commence on the date of this agreement and continue until terminated as provided in this agreement. Either party may terminate this agreement by giving the other [number] days written notice. If sales associate's engagement is terminated while transactions are pending that require further work normally performed by sales associate, broker shall make arrangements to have the work performed by another party, and the costs incurred for such substitution shall be deducted from the terminated sales associate's share of the collected commission.

On termination by the sales associate or broker, the sales associate will receive a full commission split for the first [number] calendar days after termination. From [number] to [number] calendar days, sales associate will receive [percentage]% of the commission split. From [number] to [number] calendar days, sales associate will receive [percentage]% of the commission split. After [number] calendar days, all commissions will go to broker.

#### **SECTION SIX. EXPENSES**

Sales associate shall pay for all necessary expenses incurred in performing this agreement, including, but not limited, to professional licenses and dues.

Broker shall not be required to provide sales associate with an office, nor shall broker be liable for any expenses incurred by sales associate.

#### **SECTION SEVEN. ADVANCES**

Broker may, but is not obligated to, provide advances to sales associate. If, on termination of this agreement, broker has advanced sums to sales associate against commissions to be earned, or if broker has otherwise advanced sales associate any sums with which to pay professional fees or other items or expenses in excess of commissions actually earned

by sales associate, sales associate must promptly refund the amount of the excess advances. All such advances are deemed loans to sales associate, and not as advance payment of commissions or reimbursement of expenses.

#### **SECTION EIGHT. FACILITIES; ACCESS TO LISTINGS AND OTHER INFORMATION**

Broker agrees to provide sales associate with use, equally with other sales associates, of the physical facilities of the offices now operated by broker in connection with the subject matter of this agreement. Broker will give sales associate access to its confidential files pertaining to leads and prospects for the origination of loans and other related matters. Broker shall also furnish sales associate personal contacts with persons interested in providing applicants for the loans and shall generally aid sales associate in every way possible with respect to the loans and sales associate's duties. Nothing in this agreement shall be construed to require that sales associate accept or service any particular lead or prospective lead given to sales associate.

#### **SECTION NINE. NONDISCLOSURE OF TRADE SECRETS**

Sales associate acknowledges that the information that will be furnished to sales associate concerning broker's customers, leads, prospects, holding, investments, transactions, and other confidential matters constitutes valuable, special, and unique assets and trade secrets of broker's business. Sales associate will not, during or after the term of the engagement under this agreement, disclose any such information to any other person or entity for any reason or purpose whatsoever.

#### **SECTION TEN. INDEMNIFICATION**

Sales associate agrees to indemnify broker for all claims, demands, and liabilities, including costs and attorney's fees, to which broker is subjected by reason of any action by sales associate taken or omitted pursuant to this agreement.

#### **SECTION ELEVEN. ENTIRE AGREEMENT**

This agreement constitutes the entire between the parties, and there are no verbal understandings or other agreements of any nature with respect to the subject matter except those contained in this agreement.

**SECTION TWELVE. NOTICES**

All notices between the parties shall be in writing. Notices may be delivered personally, or by mail, postage prepaid, to the respective addresses of the parties as stated in this agreement or as may be subsequently given.

Executed at *[place of execution]* on *[date]*.

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*[Signature of broker]*

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*[Signature of sales associate]*

**NOTES TO FORM**

**Tax Notes**

For employment tax purposes, a “qualified real estate agent” and a “direct seller” are both considered to be independent contractors, not employees. I.R.C. § 3508. A qualified real estate agent is one who is licensed, working as a sales person, and receiving income from sales made, not from the number of hours worked; in addition, he or she must be working pursuant to a written contract that provides he or she is not an employee. The direct seller must be selling “consumer products in the home,” and the seller must receive income from sales made, not from the hours worked.

It is doubtful that the foregoing contract with a loan broker meets the foregoing qualifications. The exclusion of I.R.C. § 3508 permit an “employer” to avoid withholding taxes on income and from paying social security tax on such income. Though the above contract seems to be patterned on contracts with real estate agents that permit this, the tax law would not seem to permit this action by the hiring broker.

**Research References**

*Legal Encyclopedias*

Fla. Jur. 2d, Nature and creation of relationship, Brokers §§ 4 et seq.

**§ 10:10 Real estate sales associate's employment  
agreement—Provision—Covenant not to  
compete**

In the event of the termination of this contract for any cause, sales associate shall not participate in the real estate brokerage business in the area of *[designate area]* for a period of *[number] [months/years]* from the date of the termination.

**NOTES TO FORM****Drafter's Notes**

Fla. Stat. Ann. § 542.335 governs valid restraints of trade or commerce and provides that enforcement of a contract that restricts or prohibits competition during or after the term of a restrictive covenant, so long as the contract is reasonable in time, area, and line of business, is not prohibited. The former statute governing restrictive covenants, Fla. Stat. Ann. § 542.33, was repealed effective July 1, 1996. However, Fla. Stat. Ann. § 542.33 continues to apply to enforcement of restrictive covenants entered into before July 1, 1996.

**§ 10:11 Employment agreement of real estate associate, broker associate, or broker—With real estate broker**

This agreement is made on *[date]* between *[name of broker]*, a Florida corporation with a principal place of business at *[address of broker]* (referred to here as "Broker"), and *[name of contractor]* (referred to here as "Contractor").

**RECITALS**

- A. Broker is duly licensed as a real estate broker in the State of Florida and maintains an office or offices in Florida; and
- B. Contractor is duly licensed by the State of Florida as a real estate *[sales associate/broker associate/broker]*, whose real estate license number is *[number]*; and
- C. Broker and Contractor desire to establish an independent contractual relationship to engage in real estate brokerage transactions for their mutual benefit, in accordance with the laws of Florida.

NOW THEREFORE, in consideration of the mutual agreements contained here, the parties agree as follows:

1. AGREEMENTS BY BROKER. Broker agrees to provide Contractor with all current listings in the office and agrees to assist the Contractor in *[his/her]* work by advice, instruction, and cooperation in compliance with the mandates of Chapter 475 of the Florida Statutes, Rules of Florida Real Estate Commission, Code of Ethics of the National Association of Realtors Board, and *[name of local board of realtors, if applicable]*. Broker agrees to provide an office or offices equipped with furnishings, staff, and support systems customary in the operation of a real estate brokerage business for the use of Contractor with others.

2. AGREEMENTS BY CONTRACTOR. Contractor agrees to conduct *[himself/herself]* in conformance with all laws, rules, and regulations of the State of Florida and Federal laws *[and the rules and regulations of local board of realtors, if applicable]*. Contractor agrees to the role as subagent to the Broker in all matters, as defined by Chapter 475 of Florida Statutes and all Rules promulgated by the Florida Real Estate Commission. Contractor agrees to keep *[his/her]* real estate license current, including attendance of continuing education, and is obligated to pay all license fees, association fees, membership fees, and costs related thereto. Contractor agrees to allow the Broker to direct any and all legal defense or legal proceedings involving the real estate related activities of Contractor. Contractor agrees to provide Broker with copies of all completion documents for postlicense educational requirements without demand. Contractor agrees to maintain automobile, public liability, and property damage insurance, at Contractor's expense, with minimum liability limits of *[\$dollar amount]* per person and *[\$dollar amount]* per incident. Contractor shall provide Broker with proof of the stated insurance coverage. Contractor agrees that he or she shall be liable for all costs incurred by Contractor, including but not limited to: the cost of advertising for listings and sales, long distance phone charges, entertainment costs, paging system, postage, courier fees, attorney's fees, abstract fees, recording costs, search fees, and appraisals. License maintenance fees and all expenses incurred by Contractor shall be paid promptly upon presentation of a monthly statement by Broker. For any delinquent amount, Broker shall deduct past due fees and expenses from incoming commissions without further notice to Contractor. Contractor shall have no authority to bind the Broker by any of his or her acts, promises, agreements, or representations or to encumber Broker or its property in any manner. In the event of any legal action to recover a commission, the suit shall be maintained in the name of the Broker, and the Contractor shall be construed to be a subagent with respect to the clients and customers for whom services were performed. Cost of any legal defense mounted for any reason shall be paid solely by Contractor or Contractors involved in the lawsuit.

3. CONTRACTOR/BROKER RELATIONSHIP. The

Contractor shall be an independent contractor, not an employee, servant, joint venturer, or partner of Broker. Contractor will not be treated as an employee for state or federal tax purposes, and Contractor agrees to pay for all federal, state, and local income and self-employment taxes and other assessments required to be paid by Contractor pursuant to law.

4. COMMISSIONS. Contractor may set the Brokerage fee charges for real estate services to be performed. After Contractor's full performance of real estate services and collection of commission fees earned, Broker shall pay to Contractor 100% of the commission minus a closing services fee as may be imposed by the Broker. Broker shall deposit all commissions in an escrow account established solely for the purpose of commissions, and commissions shall be withdrawn only for payment of commissions when due. If two or more Contractors participate in performing a real estate service, the amount of the commission shall be divided between the participating Contractors according to agreements between them, which have been previously submitted in writing to the Broker. In no event shall Broker be liable to Contractor for any commission or for any financial penalty to which the Contractor was subjected.

5. TERM. This agreement shall commence on the date of this agreement and shall remain in effect for a [number]-year period, with automatic renewal for [number]-year periods after that.

6. TERMINATION. Either party may terminate this agreement by the following: Broker may terminate Contractor immediately by a majority vote of the Board of Directors of Broker. Contractor may terminate this agreement by written resignation to the Broker, which shall be effective [number] days after Broker receives Contractor's resignation. In the event of termination, Broker may retain the security deposit and license maintenance fees until reasonable determination by Broker that all obligations of Contractor have been fully paid, but in no event shall Broker hold such monies longer than [number] days without making a full accounting to Contractor. Upon Contractor's written request, Broker shall release all "Exclusive Right to Sell" listings of Contractor to another Broker of Contractor's choice. Contractor shall be entitled to a com-

mission on a transaction only if a valid written executed sales contract exists prior to the date of termination and only if Broker collects the commission on behalf of Contractor.

7. LICENSE MAINTENANCE FEE & CLOSING SERVICES FEES. Contractor shall pay to Broker a license maintenance fee according to the fee schedule determined by the Board of Directors from time to time. Contractor shall also pay to Broker a closing services fee as may be determined from time to time by the Board of Directors.

8. GENERAL LIABILITY INSURANCE. Broker shall maintain insurance protection for the Broker and for each Contractor for claims resulting from errors or omissions or other covered acts in the performance of duties related to real estate. Contractor shall pay a fee according to a schedule of fees determined by the Board of Directors of Broker.

9. MEMBERSHIP DUES. Broker maintains membership in the *[list boards or associations of realtors]*, which membership requires similar membership by Contractor. Contractor shall promptly pay for and maintain such membership as a condition of using Broker's services.

10. INDEMNIFICATION. Contractor shall indemnify and hold Broker harmless from any and all claims, costs, liabilities, and judgments, including attorney's fees of any kind arising from the intentional, unintentional, or negligent acts of the Contractor.

11. ENTIRE AGREEMENT. The foregoing constitutes the entire agreement between the parties; all representations or understanding have been incorporated in this agreement or otherwise superseded.

12. AMENDMENTS. No change or modification of this agreement shall be valid, unless it is in writing and signed by all parties to this agreement.

13. GOVERNING LAW. This agreement shall be governed by and interpreted pursuant to the laws of the State of Florida.

IN WITNESS OF THE ABOVE, this Agreement has been executed by the parties.

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*[Signature of Contractor]*

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*[Printed Name]*

Dated: \_\_\_\_\_.

**§ 10:12 Notice—Appointment of sales associate**

Notice is given that *[name of sales associate]*, of *[address of sales associate]*, is made and appointed a sales associate to represent and act for and in behalf of the undersigned broker in performing any of the acts authorized to be performed by a licensed real estate broker.

Dated: *[date]*.

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*[Signature of broker]***§ 10:13 Referral agreement—Commission sharing**

Agreement made on *[date]*, between *[name of broker]*, of *[address of broker]*, referred to below as “broker,” and *[name of sales associate]*, of *[address of sales associate]*, referred to below as “sales associate.”

Broker agrees to pay sales associate *[percentage]%* of commissions paid to broker for sales to purchasers first brought to broker’s office by sales associate.

Sales associate agrees to introduce to broker all persons interested in purchasing property that sales associate discovers, to have no dealings whatsoever with any other real estate broker during the term of this agreement, and to accept the compensation established above as full compensation for *[his/her]* services.

This agreement is made for an indefinite term, subject to termination on *[number]* day’s written notice by either party.

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*[Signatures]***§ 10:14 Referral agreement—Provision—New listings**

Broker agrees that with respect to any property which is brought to *[his/her]* office by sales associate for listing and is

sold through [*his/her*] office by broker individually, broker will pay to sales associate [*percentage*]% of the total commission derived from the sale of such property as soon as the commission is received by broker.

**§ 10:15 Referral agreement—Provision—Payment for services in specific transaction**

Broker agrees to pay sales associate [*percentage*]% of the commission of *[\$/dollar amount]* due and payable to broker by [*name of individual1*] as soon as the commission is received by broker. The payment to sales associate is for sales associate's services in aiding broker to secure the sale of lands of [*name of individual1*] under the terms of a real estate sales contract executed on [*date*] between [*name of individual1*] and [*name of individual2*].

**II. BROKERAGE AGREEMENTS**

**A. GENERAL CONSIDERATIONS**

**§ 10:17 Form drafting principles**

A brokerage agreement should be carefully drafted to include specific reference to covenants on the part of the broker. Since the broker's powers are limited by the terms of the agreement, the broker's authority should be clearly delineated.<sup>1</sup>

As in other forms of this nature, the brokerage agreement should be in writing and should identify the land involved.<sup>2</sup>

The agreement should outline the limits of the broker's authority in dealing with the specified real estate. This would include, among other things, the broker's authority to advertise the sale of the real estate, to show the property to prospective purchasers, to make representations regarding the property, to accept deposits toward the purchase price, and to execute the contract of sale. The agreement should

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[Section 10:17]

<sup>1</sup>**Legal Encyclopedias:** For discussion of broker's rights and powers, see Fla. Jur. 2d, Brokers §§ 51 et seq.

<sup>2</sup>See § 10:2.

also set forth the specific acts required to be performed by the broker in the course of his or her dealings.<sup>3</sup>

A brokerage agreement should also clearly set forth the broker's commission. In brokerage agreements, clauses that entitle sales persons to commissions only after the sales have actually closed are standard, and such clauses have been upheld by the courts.<sup>4</sup>

### **§ 10:18 Tax aspects**

A real estate broker is engaged in a trade or business and can deduct from his or her gross income all of the ordinary and necessary expenses relating to the purchase, sale, rental, and management of real estate.<sup>1</sup>

### **§ 10:19 Checklist—Drafting brokerage agreement**

1. Names and addresses of parties.
2. Duration of listing.
  - a. Date of commencement.
  - b. Date of termination.
  - c. Extensions.
3. Description of property.
  - a. Nature and extent of owner's interest.
    - (1) Marketable title.
  - b. Improvements and fixtures.
    - (1) Personal property included.
  - c. Easements and encumbrances.
    - (1) Whether to be assumed by buyer.
  - d. Zoning restrictions.
    - (1) Whether to be assumed by buyer.
4. Date on which possession available.

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<sup>3</sup>See Checklist, § 10:19.

<sup>4</sup>Scott v. Simpson, 774 So. 2d 881 (Fla. Dist. Ct. App. 4th Dist. 2001), holding that a real estate salesman was not entitled to commissions on the condominium units for which he procured buyers and obtained contracts, either under the contract or on a theory of quantum meruit, because the real estate brokerage agreement expressly stated that the salesman was entitled to commissions only after the sales actually closed.

[Section 10:18]

<sup>1</sup>I.R.C. § 162(a).

5. Sale of property.
  - a. Price range.
  - b. Deposit.
  - c. Down payment.
  - d. Acceptance of second mortgage.
6. Lease of property.
  - a. Amount of rent.
  - b. Deposits.
  - c. Terms of lease.
  - d. Option to purchase.
7. Authority of broker.
  - a. Advertising.
  - b. Showing premises.
  - c. Representation.
  - d. Acceptance of deposits.
  - e. Execution of contract of sale.
8. Recital of specific acts to be performed by broker.
9. Character of listing.
  - a. Nonexclusive.
  - b. Exclusive agency.
  - c. Exclusive right to sell.
10. Broker's commission.
  - a. Flat fee.
  - b. Fixed percent.
  - c. All sums in excess of stated amount.
  - d. Minimum guaranty.
  - e. Lien of property or proceeds.
11. Stage at which broker's right to commission is perfected.
  - a. Procurement of ready, willing, and able purchaser.
  - b. Acceptance of offer.
  - c. Execution of sales contract.
  - d. Sale.
12. Time and manner of payment of commission.
13. Right to commission under particular circumstances.
  - a. Default by owner or purchaser.
  - b. Misrepresentation by owner.
  - c. Sale after termination of agreement.

- d. Sale to prospect with whom owner had previous dealings.
  - e. Sale of part of property.
  - f. Broker's failure to perform in accordance with his covenants.
  - g. Premature termination of listing.
14. Liabilities of parties.
    - a. Deposits and other funds received.
    - b. Misrepresentations.
  15. Termination of listing by owner.
  16. Binding on heirs, executors, and assigns.
  17. Agreement amended only in writing signed by parties.
  18. Date of agreement.
  19. Signatures.

## B. FORMS

### § 10:20 Exclusive agency listing—Sale of premises

This instrument was prepared by *[name of preparer]* of *[address of preparer]*.

#### EXCLUSIVE AGENCY LISTING

Exclusive agency listing agreement made on *[date]* between *[name of broker]*, of *[address of broker]*, referred to below as "broker," and *[name of owner]*, of *[address of owner]*, referred to below as "owner."

For and in consideration of the services to be performed by broker, owner employs broker as owner's sole and exclusive agent to sell that certain piece of property known as *[address of property]*, and more specifically described as *[legal description of property]*, subject to the following terms and conditions:

#### SECTION I. OBLIGATIONS OF BROKER

Broker shall undertake to find a buyer for the property. Broker shall:

- (1) include it with the other listings maintained by *[him / her]*;
- (2) place a suitable sign on the premises;
- (3) notify owner promptly of prospective buyers; and
- (4) show the property to prospective buyers *[if applicable]*,

*add: subject to the conditions noted on the reverse side of this agreement].* Broker shall pursue these duties and obligations with diligence.

## SECTION II. BROKER'S COMMISSION

Broker shall receive a commission of *[percentage]*% of the first \$*[dollar amount]* of the selling price and *[percentage]*% of the selling price in excess of that amount if:

- A. Broker procures a buyer who is ready, willing, and able to purchase the property on the terms established herein or on terms more advantageous to owner;
- B. Owner actually sells the property to a purchaser procured by broker or by any other broker during the term of this listing; or
- C. Within *[number]* months after the termination of this listing, the property is sold by owner or by any other person to a buyer who was first submitted to owner, directly or indirectly, by broker.

## SECTION III. TYPE OF LISTING

This listing is and shall be considered by the parties to be an exclusive listing and broker's right to a commission will arise on the sale of the property to a buyer who is procured by any broker, but shall not accrue if the buyer is procured by owner *[himself/herself]*.

## SECTION IV. TERM OF LISTING

The rights and obligations created by this agreement shall commence on the date first above written and shall terminate at midnight, the last hour of *[date]*.

This listing is renewable by owner beyond the termination date by appropriate notation on the reverse side hereof. This listing may be canceled by either party at any time after *[number]* days after the date first above written by *[number]* days' written notice.

## SECTION V. BROKER'S AUTHORITY TO RECEIVE DEPOSIT

Broker is authorized to receive a deposit from any purchaser who offers to buy the property and shall promptly notify owner of the receipt of any such deposit. The deposit shall be considered accepted only when owner accepts buyer's offer. Should any deposit so received be forfeited, one-half of

it may be retained by broker, and the balance shall be paid to owner.

#### SECTION VI. ATTORNEY'S FEES

In the event that any action is filed in relation to this listing, the unsuccessful party in the action shall pay to the successful party, in addition to all other sums that either party may be called on to pay, a reasonable sum for the successful party's attorney's fees.

#### SECTION VII. OWNER'S COVENANT TO SELL

Owner agrees to furnish to purchaser either an owner's title insurance policy insuring purchaser to the full amount of the purchase price against loss or damage by reason of defect in the title of seller, subject to the following exceptions or exclusions: *[state exceptions]* or, alternatively, a complete abstract of title, properly certified down to date, within *[number]* days from *[date]*, for examination by purchaser, and furnish a *[specify, such as: warranty]* deed conveying a good and sufficient title to the property. Owner understands that procurement of a ready, willing, and able purchaser by broker will entitle broker to the commission specified herein notwithstanding failure of owner to convey for any reason. Owner acknowledges receipt of a copy of this agreement.

In witness, the parties have executed this agreement at *[designate place of execution]* the day and year first above written.

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*[Signatures]*

#### NOTES TO FORM

##### Drafter's Notes

An "exclusive agency to sell" granted to a real-estate broker precludes the owner from selling the property through another broker, but does not preclude the owner from selling to a purchaser procured by the owner. *Nicholas v. Bursley*, 119 So. 2d 722, 88 A.L.R.2d 929 (Fla. Dist. Ct. App. 2d Dist. 1960); *Wilkins v. W. B. Tilton Real Estate & Ins., Inc.*, 257 So. 2d 573 (Fla. Dist. Ct. App. 4th Dist. 1971).

On the other hand, an exclusive right to sell granted to a broker

entitles the broker to such broker's stipulated commission on any sale made during the term of the contract irrespective of whether the broker, the owner, or some third party is the procuring cause of the sale. *Alex D. Smith Real Estate, Inc. v. Gables Venetian Waterways, Inc.*, 98 So. 2d 372 (Fla. Dist. Ct. App. 3d Dist. 1957); *Whitehurst v. Erstling*, 184 So. 2d 233 (Fla. Dist. Ct. App. 3d Dist. 1966); *Community Cablecasting Corp. v. Daniels & Associates, Inc.*, 215 So. 2d 17 (Fla. Dist. Ct. App. 1st Dist. 1968).

In some cases, a broker may be entitled to a fee for efforts to sell the property, even after the exclusive listing has been terminated. In *Media Services Group, Inc. v. Bay Cities Communications, Inc.*, 237 F.3d 1326 (11th Cir. 2001), the broker had an exclusive right to sell the seller's radio station for a certain time, at the end of which the seller terminated the agreement. The broker continued to try to find a buyer, however, with the seller's knowledge, and eventually brought the seller together with a buyer. The buyer and seller intentionally excluded the broker from negotiations, and the seller refused to pay a brokerage fee. The court held that, in the absence of a written contract, the broker was entitled to compensation for the value of the services provided to the seller under the theory of unjust enrichment.

For discussion of, and forms relating to, sales, see Sales (Ch 1).

For discussion of, and forms relating to deeds, see Conveyances (Ch 2).

#### Tax Notes

The commission paid by the seller must be capitalized as part of the cost of the property, whether or not the taxpayer is engaged in the real estate business. Commissions paid for the sale of real estate by a taxpayer who isn't engaged in the real estate business can't be deducted and must be offset against the selling price to determine the amount of gain or loss realized on the sale. If the seller is engaged in the real estate business, the commissions paid on property sales are fully deductible business expenses. Am. Jur. 2d, Federal Taxation ¶ 16533.

The commission paid to the broker is ordinary income to the broker under I.R.C. § 61(a)(1), against which the broker may deduct the ordinary and reasonable expenses of engaging in the business. I.R.C. § 162(a).

#### Research References

##### *A.L.R. Library*

Real estate broker's rights and liabilities as affected by failure to disclose financial information concerning purchaser, 34 A.L.R. 4th 191.

Real-estate broker's right to recover commission from seller where sale fails because of seller's failure to deliver good title-modern cases, 28 A.L.R. 4th 1007.

Construction of provision in real-estate broker's listing contract that broker shall receive commission on sale after expiration of listing period to one with whom broker has "negotiated" during listing period, 51 A.L.R. 3d 1149.

Liability of real-estate broker or agent to principal for concealing or failing to disclose offer, 7 A.L.R. 3d 693.

*Legal Encyclopedias*

Fla. Jur. 2d, Right of broker to compensation under exclusive agency to sell and exclusive right to sell, Brokers § 88.; Rights and powers of broker, Brokers §§ 51 et seq.; Duties and Liabilities; Enforcement of Violations, Brokers §§ 90 et seq.

*Law Reviews and Other Periodicals*

Levin, Real Estate Agent Liability for Creative Financing Failures, 39 U. Miami L. Rev. 429 (1985).

### **§ 10:21 Exclusive agency listing—Leasing of premises**

This instrument was prepared by [name of preparer] of [address of preparer].

Agreement made on [date] between [name of broker], of [address of broker], referred to below as "broker," and [name of owner], of [address of owner], referred to below as "owner."

#### **SECTION I. EMPLOYMENT OF BROKER**

In consideration of the services to be rendered by broker, owner employs broker as [his/her] exclusive agent to procure tenants for rental units located in the County of [county], State of Florida, and more particularly described as follows: [describe rental units]. A description of each individual rental unit, together with the minimum rents to be charged, appears in Schedule "A" attached to this agreement and made a part of it. Broker is authorized to rent the units at rents equal to or greater than the minimum amounts indicated and only to mature, sober, and solvent tenants.

#### **SECTION II. COMMISSION**

As compensation for broker's acceptance of this listing, advertising of the rental premises, and diligent efforts to procure tenants, owner agrees that broker shall have as a commission for each tenant procured by broker or by any other broker or agent [percentage]% of each month's rental receipts attributable to that tenant. [If desired, add: In addition to this commission, broker shall receive a bonus of [percentage]% of one month's rent for every unit that is rented under a written lease for at least one year.]

#### **SECTION III. TERM**

This agreement shall continue in effect until terminated

by either party on *[number]* days' written notice, but, in the event of termination by owner, broker's rights hereunder as to parties with whom broker may have been negotiating at the time of termination shall continue for a period of *[number]* days following the termination.

#### SECTION IV. EFFECT OF AGREEMENT

Owner understands and agrees that this agreement shall constitute an exclusive agency to broker to rent the above-described units. The commissions specified in this agreement shall be paid with respect to tenants procured by any broker during the term of this agreement, but shall not be paid with respect to any tenants procured by owner without the services of any broker.

#### SECTION V. ADVERTISING

Broker is authorized to advertise the rental units in whatever manner *[he/she]* deems best. Broker may also place signs on the premises and remove all other rental signs.

#### SECTION VI. ATTORNEY'S FEES

In the event that any action is commenced in relation to this listing agreement, the unsuccessful party in the action shall pay to the successful party, in addition to all other sums that either party may be required to pay, a reasonable sum for the successful party's attorney's fees.

Dated: *[date]*.

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*[Signature of owner]*

I agree to act diligently to locate tenants for the rental units on the terms stated above.

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*[Signature of broker]*

#### SCHEDULE A

*[Describe units and set forth minimum rents.]*

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 10:20.

##### Tax Notes

If the broker is on the accrual basis, the commissions and bonuses received under Section II are taxable when accrued or when received,

whichever occurs first. This is true even if the payments relate to a later period of the lease term. If the broker is on the cash basis, these payments are income when received, either actually or constructively. Am. Jur. 2d, Federal Taxation ¶¶ 6150, 6200.

The owner, however, must capitalize any payments made that relate to a later period. The bonus payable under Section II, for example, will have to be recovered over the term of the lease since it is an expense relating to acquiring the lease. The commissions payable from each month's rent will be deductible when made since the payment relates to the current lease term.

**Research References**

*Legal Encyclopedias*

Am. Jur. 2d, Federal Taxation ¶¶ 16533, 16383.

**§ 10:22 Exclusive agency listing—Leasing of premises—Provision—Investigation of tenant**

Broker shall not be required to make an investigation, warranty, or representation of any potential tenant's financial condition or ability to perform its obligations.

**NOTES TO FORM****Drafter's Notes**

See Drafter's Notes following § 10:20.

**Research References**

*Legal Encyclopedias*

Fla. Jur. 2d, Broker's duty to disclose knowledge of facts, Brokers § 92.

**§ 10:23 Exclusive agency listing—Between owner and broker to solicit tenants****LEASE AGREEMENT**

This Agreement is made as of [date], by and between [name of owner], a [state] corporation, having an office at [address of owner], referred to as the Owner, and, [name of broker], having an office at [address of broker], referred to as Broker, as follows:

**RECITALS**

In consideration of the mutual promises and covenants here contained, Owner now retains Broker to solicit desirable tenants for Owner's property commonly known as [description of property], located at [address of property],

referred to as the Premises, and to negotiate leases for the Premises, and Broker here agrees to solicit tenants and negotiate leases, on the terms and conditions set forth below.

#### ARTICLE I. LEASING FUNCTIONS

(a) Broker shall use its best efforts to locate desirable tenants for available space in the Premises and to negotiate leases of for available space, provided, however, all such leases shall:

- (i) be at a rental rate not less than the minimum rental rate approved by Owner;
- (ii) be with a tenant satisfactory to Owner;
- (iii) contain any terms and provisions as may be satisfactory to Owner; and
- (iv) be executed by Owner unless otherwise directed by Owner in a particular case.

Broker shall not make any new leases or any agreements renewing, extending, modifying, amending, or canceling any existing lease without the prior written approval of Owner.

(b) Broker here represents that it and all of its employees required to be licensed are licensed real estate broker(s) or sales person(s) in the State of Florida.

(c) Broker shall, so far as possible, procure references from prospective tenants, investigate references, and use its best judgment in the selection of prospective tenants. Immediately following any vacancy, Broker will prepare adequate rental listings and promptly distribute them to reputable and active real estate brokers. All terms and conditions of each listing agreement shall be subject to Owner's review and written approval prior to distribution. After a vacancy is so listed, Broker will cooperate with any of the brokers in any manner likely to aid in successfully filling the vacancy. Broker agrees to perform whatever service may be required in connection with the negotiation of leases or renewals, extensions, modifications, or cancellations of the leases.

(d) All inquiries for leases for the rental of the Premises or any part of the Premises received by Owner during the term of this Agreement shall be referred to Broker and all negotiations in connection with the leases shall be conducted by Broker, subject to the terms and provisions of this Agreement.

(e) Broker shall have the sole authority and responsibility to hire, supervise, and terminate all employees, agents or subagents necessary to carry out its obligations under this Agreement. It is expressly understood and agreed by the parties here that all personnel hired by Broker shall be the employees of Broker.

(f) Broker shall furnish to Owner, as requested, a written summary of the activities conducted by Broker in leasing the Premises, in form and format satisfactory to Owner, including a list of:

- (i) parties who have expressed interest as prospective tenants of the Premises;
- (ii) leases under negotiation; and
- (iii) leases executed.

(g) All leases are to be prepared by Broker in accordance with the leasing guidelines established by Owner with respect to the Premises and on the standard lease form attached as Exhibit A-1. The leasing guidelines are attached to this Agreement as Schedule A but may be revised at any time by Owner on written notice to Broker. Except as otherwise directed by Owner in a particular case, all leases shall be in Owner's name and shall be executed by Owner.

(h) Broker shall keep a written record of exclusive and restrictive rights granted to tenants, shall fully disclose all exclusive and restrictive rights of tenants to Owner for Owner's approval prior to the granting of the rights, and shall be responsible for ascertaining that no lease, including any of the provisions of the lease, violates any exclusive or restrictive rights previously granted to any other tenant under any existing lease.

(i) Broker shall prepare or cause to be prepared advertising plans and promotional material to be used to further rentals. Such plans or material shall only be used if approved in advance in writing by Owner and in conformance with such approval. Broker shall not use Owner's name in any advertising or promotional material without Owner's expressed prior written approval in each instance. Advertising and promotional materials shall be prepared in full compliance with federal, state, and municipal fair housing laws, ordinances, regulations, and orders. Broker shall prepare an overall marketing program for the

Premises, including a budget to be approved in writing by Owner.

(j) Within *[number]* days after the execution of this Agreement, and afterwards annually on or before 90 days prior to the end of each fiscal year, Broker shall submit to Owner a comprehensive written proposal setting forth leasing objectives for the Premises for the following fiscal year, together with a marketing program and a detailed budget, which proposal, marketing program, and budget shall be subject to approval by Owner in writing prior to being implemented. The “fiscal year” for the Premises shall commence on *[date]* and end on *[date]*.

(k) No sales commission or any other form of remuneration will be due Broker in the event the Premises are sold to any tenant of the Premises, whether or not procured by Broker, or to any other third party. If Owner executes a listing agreement with an agent or broker, referred to in this section as the Agent, other than Broker, for sale of the Premises, or any portion of the Premises, Broker shall cooperate with such Agent to the end that the respective activities of Broker and Agent may be carried on without friction and without interference with tenants and occupants. Broker will permit Agent to exhibit the Premises during reasonable business hours. Sale of the Premises is important. Broker agrees that failure on its part to extend cooperation to any Agent to show the Premises is a material default on its part under this Agreement, and upon any such default, Owner may immediately terminate this Agreement as provided in Article IV, Paragraph (c) of the Agreement.

(l) If any lease, or any agreement collateral to or affecting such lease, shall provide that Owner shall be required to credit or offset or both any tenant's rental obligations respecting any space occupied by the tenant in the Premises, referred to as the Present Space against the rental otherwise owing to Owner for the leased premises pursuant to the lease, or that Owner shall be required to indemnify any tenant as to any obligations respecting the Present Space, then in calculating the actual aggregate rentals owing to Owner under the lease, there shall be deducted the total dollar amount of the obligations so undertaken pursuant to such actual cost of crediting, indemnification, or undertaking, and the commission pay-

able to Broker under this Agreement shall be computed only on the actual aggregate rental remaining after such deduction or deductions.

(m) Except in the event of a sale of the Premises by Owner, Broker shall be entitled to commissions on all transactions originating during the term of this Agreement on leases signed by any tenant and delivered to Broker or Owner within *[number]* days after the effective date of expiration or earlier termination of this Agreement, and then subsequently signed by Owner. As evidence of transactions originating during the term of this Agreement, Broker shall submit to Owner, within 10 days after the effective date of expiration or earlier termination of this Agreement, a final cumulative list containing names of only those specific prospective tenants for new leases (exclusive of any renewals, extensions, or options under existing leases) from whom Broker has, prior to the effective date of expiration or earlier termination of this Agreement, received written evidence of significant interest for space, and Broker shall also submit such required written evidence, which shall justify its inclusion of any tenant on the list. The final list of prospective tenants shall be in substantial conformance with the last previously filed leasing status report as called for in Article I, Paragraph (p) of this Agreement.

(n) Broker shall at all times have in its employ a sufficient number of employees, and Broker shall further engage a sufficient number of capable representatives, referred to as subagents, to enable it to perform properly its obligations under this Agreement. As between Owner and Broker, Broker shall at all times be solely responsible for the actions of any such employees and subagents, it being understood and agreed that Owner shall not be the employer of or be in any way responsible for the actions of any such employees and subagents, and that Broker is engaged as an independent contractor or in the business of real estate brokerage negotiating lease transactions. With respect to Broker's employees, Broker is to furnish Owner, if required by law, with evidence of statutory Workers' Compensation Insurance and Employers' Liability Insurance in a minimum amount of *[\$/dollar amount]*. Nothing contained in this Agreement or in the relationship of Broker and Owner shall be deemed to con-

stitute a partnership, joint venture, or any other relationship between Broker and Owner except as limited by the terms of this Agreement. Broker's authority is limited to performing the services set forth here in accordance with the terms of this Agreement. Except only as may otherwise be expressly set forth in this Agreement, Broker does not have any authority to execute any contracts or agreements for or on behalf of Owner and is not granted any right or authority to assume or create any obligation or liability or make any representation, covenant, agreement, or warranty, express or implied, on Owner's behalf, or to bind Owner in any manner whatsoever. Any consents, approvals, or instructions which may be required of Owner may only be given by Owner's authorized representative.

(o) In order to induce Owner to enter into this Agreement and with full knowledge that Owner is relying on this covenant, Broker agrees that it will not enter into or accept any other leasing agency during the effective term of this Agreement pertaining to the leasing of space in any office building located or to be located within [number] miles of the Premises without the prior written consent of Owner.

(p) Broker shall submit to Owner a monthly written report, in format satisfactory to Owner, on the cumulative status of, and response to, the leasing and marketing activities and comparing budgeted costs to actual costs.

## ARTICLE II. INDEMNIFICATION

Broker agrees to defend, indemnify, and hold and save Owner free and harmless from liability for damages or injuries to persons or property caused by either the intentional or negligent acts, omissions, or misconduct of Broker or Broker's employees, agents, or subagents or both (whether or not under the control of Broker). Broker agrees to reimburse Owner for and indemnify Owner against the payment of any monies which Owner is required to pay out in connection with or as an expense of any claims, civil or criminal action, proceedings, charge, or prosecution made, instituted, or maintained against Owner or Owner and Broker jointly and severally (including those expenses incurred in connection with the fees of attorneys hired, with Owner's approval, to defend any claim or to enforce this indemnification provision), due to, caused by, or arising out of either the inten-

tional or negligent acts, omissions, or misconduct of Broker or Broker's employees, agents, or subagents or both (whether or not under the control of Broker) and to fully indemnify Owner against any judgment, loss, or settlement on account of any of the preceding.

### ARTICLE III. COMPENSATION

As full compensation for all services performed by Broker pursuant to the terms of this Agreement, Owner agrees to pay to Broker a commission as follows:

(a) *[\$/Dollar amount].*

(b) Notwithstanding anything to the contrary under this Agreement, a tenant under a lease for which Broker is the procuring cause, or would otherwise be entitled to a commission here, fails to take possession of the space demised under such lease or to commence paying rent because of a default by such tenant, Broker shall not be entitled to any commission, and any commission previously received by Broker in payment for Broker's procuring the lease shall be refunded to Owner and Broker shall have no claim against Owner. Owner shall retain the right to bring any action or proceeding against any tenant who shall have failed to occupy space under a lease or shall have failed to pay rent thereunder; however, Broker shall not be entitled to any part of any payment received as a result of the action or proceeding.

(c) Notwithstanding anything to the contrary here, no commissions will be paid on allowances and concessions, and no commissions, fees, or any other form of remuneration shall be due and payable to Broker for any of the following:

- (i) renewals;
- (ii) renewal options;
- (iii) lease over *[number]* years in length;
- (iv) escalations;
- (v) utilities and real estate tax collections or other tenant pass-through;
- (vi) collections other than base rent;
- (vii) financing of tenant improvements;
- (viii) expansion options;
- (ix) late payment charges;
- (x) rent payable on month-to-month occupancy;

- (xi) rent payable on continuance of tenancy on statutory basis, any holdover tenancy, or any tenancy or occupation by any tenant for which there is no Owner-approved lease agreement;
  - (xii) any parking revenue; or
  - (xiii) any executed and approved leases (or subleases) by and between Owner and any of its subsidiaries or affiliates.
- (d) Commissions provided for above shall become owing by Owner to Broker at such time as:
- (i) any new lease (or amendment for expansion space to an existing lease) has been duly executed by Owner and the tenant;
  - (ii) Broker shall have obtained and delivered to Owner all advance rentals, security deposits, or other monies incident to the occupancy and payable by any tenant, as well as any and all insurance certificates and policies of any and all tenants as required by the respective leases;
  - (iii) the tenant has accepted and taken occupancy of the demised premises;
  - (iv) all “tenant improvements” provided for under such lease have been completed and accepted by the tenant;
  - (v) rentals have commenced to accrue;
  - (vi) tenant has executed a Tenant Estoppel Certificate in form and substance acceptable to Owner; and
  - (vii) Owner has been furnished with a certificate of occupancy from the governmental authority, if any and applicable, having jurisdiction, provided, however, that Owner shall be given a credit against amounts to become owing by Owner under this Agreement in the amount of: (A) any new and additional commission for which Owner becomes responsible as a result of a tenant filing for protection or reorganization under the federal bankruptcy laws or any laws of the state in which the Premises are located, if Owner has previously paid Broker a commission for the subject leased or proposed-to-be-leased space; or (B) any commission already paid by Owner to Broker if the tenant vacates the leased space prior to the end of the

lease term and ceases to pay rent, such credit to be calculated from the date of such occurrence. The term new lease as used here shall not include the renewal or extension of an existing lease.

(e) In the event a lease is accepted and executed through the cooperation of another broker, the commission schedule as set forth here shall apply, without modification and without adjustment, to the end and intent that Broker shall be solely responsible for commissions, fees, and any other remuneration that may be due, accrued or owing to any and all cooperating brokers and/or agents, and Broker shall further indemnify, defend, and hold Owner harmless from any and all claims, demands, judgments, orders, settlements, decrees in connection with any such commissions, fees, or other remuneration, and any and all costs and expenses of Owner incident.

#### ARTICLE IV. TERM

(a) The term of this Agreement shall be effective as of the date as first set forth above and shall continue in full force and effect until *[date]*. Subject to Subsections (b) and (c) below, unless either party to this Agreement has given written notice of the party's election not to renew this Agreement at least 30 days prior to the conclusion of the term here or any renewal of it, this Agreement shall automatically renew for an additional term on the same covenants and conditions as are herein contained.

(b) This Agreement may be terminated by Owner or Broker without cause by giving 30 days prior written notice to the other party.

(c) This Agreement shall terminate automatically and immediately as to the Premises upon sale by Owner or upon termination of Owner's right to collect the rents from the Premises. In the event of any sale of the Premises by Owner, Broker shall, upon request by Owner, certify in writing to Owner that all information, documentation, correspondence, reports, rent rolls, etc., required to be supplied to Owner by Broker in accordance with Broker's duties and obligations under the Agreement have in fact been supplied and are true, complete, and correct in all material respects.

(d) Notwithstanding any provisions of Subsection (a) or (b) above which may be to the contrary, this Agree-

ment shall terminate immediately and without the requirement for notice to be given upon dissolution or termination of the corporate or partnership existence of Broker by merger, consolidation, or otherwise; upon termination or suspension of Broker's real estate brokerage license; upon death of Broker, if an individual, or death of any general partner of Broker, if a partnership; upon cessation on the part of Broker to continue to do business; or upon failure of Broker to properly deal with or account for funds, or bankruptcy, insolvency, receivership, or assignment for the benefit of creditors of Broker. Action having for its purpose a reorganization or reconstitution of Broker shall likewise effect an immediate termination. In addition, if either party hereunder defaults in the performance of any other obligation under this Agreement and the default is not cured within 10 business days after written notice is sent to such defaulting party, the nondefaulting party may then terminate this Agreement for cause.

(e) Upon the expiration or termination of this Agreement for any reason or the withdrawal of any property which may constitute the Premises, Broker shall, within 10 days after the effective date of said expiration, termination, or withdrawal, deliver to Owner the following with respect to the Premises or with respect to the property withdrawn, as the case may be:

- (i) any balance of monies which may be held by Broker;
- (ii) all records, contracts, leases, receipts for deposits, and other papers or documents which pertain to the Premises; and
- (iii) a schedule of all prospective tenants for new leases (exclusive of any renewals, extensions, or options under existing leases) with whom Broker has had any negotiations or discussions as set forth in Article I(m).

On such termination, expiration, or withdrawal, and after delivery of the above-designated items to Owner, if Owner does not notify Broker in writing within a reasonable time of any claimed inaccuracy in the amount of monies, or with respect to papers and documents delivered, or of any other claims of Owner against Broker, then Broker shall be released by Owner from responsibility for the further payment of and delivery of the aforesaid items.

(f) A separate commission schedule shall be negotiated on a case-by-case basis for the following leases:

- (i) a lease for all or substantially all of the Premises; and
- (ii) any lease in excess of *[number]* rentable square feet.

(g) Owner reserves the right at any time to make prepayment of commissions due Broker, discounted at *[percentage]%* per year.

#### ARTICLE V. MISCELLANEOUS

(a) Any and all notices, consents, or directives by either party intended for the other shall be sent by registered or certified mail, return receipt requested, to Owner at the address for Owner set forth on above and to Broker at the address set forth above, unless either party shall have designated different addresses by serving written notice of such change of address on the other party by registered or certified mail.

(b) Broker acknowledges that this Agreement is personal to Broker and establishes a relationship of confidence and trust between Owner and Broker in which Broker is acting as a fiduciary for Owner. Accordingly, Broker shall not assign this Agreement, whether voluntarily or by operation of law, without the express prior written consent of Owner, which consent Broker agrees may be withheld for any reason or for no reason, even though Owner's refusal to consent may be arbitrary or unreasonable or both.

(c) Broker acknowledges that it is aware that Owner may from time to time assign all or a portion of the legal or beneficial interest in the Premises to one or more pension funds or related accounts managed by Owner or subsidiaries or affiliates of Owner and that Owner may therefore, from time to time, advise Broker of the identity of persons who are "parties-in-interest" within the meaning of the Employee Retirement Income Security Act of 1974, as amended, referred to as ERISA, and the regulations issued in connection with ERISA, or "disqualified persons" within the meaning of the Internal Revenue Code of 1986, as amended, referred to as the I.R.C., and the regulations issued in connection with the I.R.C., or who are persons otherwise prohibited or discouraged from leasing space in the Premises by ERISA or I.R.C. and the regulations issued in connec-

tion with those statutes. Broker here covenants and agrees that upon receipt of any such notice, Broker shall not, with respect to the Premises, engage in any transaction or lease any space within the Premises, which would be a “prohibited transaction” under, or otherwise be in violation of, ERISA or I.R.C. and the regulations issued in connection with those statutes, with any such “party-in-interest,” “disqualified person”, or any other person otherwise prohibited or discouraged from leasing space in the Premises pursuant to such statutes and regulations, who is identified and disclosed to Broker in writing from time to time by Owner.

(d) In performing their respective obligations under this Agreement, Broker and Owner shall comply with and abide by every valid and enforceable rule, order, determination, ordinance, and law of every federal, state, municipal, governmental, and/or quasi-governmental authority having jurisdiction over the Property.

(e) No consent or waiver, express or implied, by either party of or to any breach or default shall be deemed or construed to be a consent or waiver of or to any other breach or default under this Agreement of the same or any other obligation of such party. Failure on the part of either party to protest any act of the other party or to declare the other party in default under this Agreement, regardless of how long such failure continues, shall not constitute a waiver by such party of its rights under this Agreement.

(f) This Agreement contains the entire understanding and agreement of the parties, and it may be changed or modified only by written instrument signed by duly authorized officers or representatives of the parties to this Agreement.

(g) This Agreement and the obligations of the parties under this Agreement shall be interpreted, construed, and enforced in accordance with the laws of the state in which the Premises are located.

(h) This Agreement and the rights and benefits of Broker under this Agreement are and shall be subject and subordinate to the lien and security title of any deed of trust, mortgage, or other security instrument (including any renewal, modification, amendment, consolidation, extension, or replacement of any of the preceding)

now or afterwards encumbering the Property. This subordination is and shall be self-operative and no further instrument of subordination shall be required to effectuate the provisions of this Section; nonetheless, Broker shall execute, seal, and deliver to Owner any instruments as Owner may from time to time request to further evidence and confirm the subordination effected.

(i) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall comprise but a single instrument.

(j) All personal pronouns used in this Agreement, whether used in masculine, feminine, or neuter gender, shall include all other genders; the singular shall include the plural; and the plural shall include the singular. The titles of Articles and Sections in this Agreement are for convenience of reference only and neither limit nor amplify the provisions of this Agreement. All references in this Agreement to Articles or Sections shall refer to the corresponding Article or Section of Agreement unless specific reference is made to the Articles or Sections of any other specified document or law. No provision of this Agreement shall be construed against or interpreted to the disadvantage of either Owner or Broker having, or being deemed to have, structured or dictated the provisions, the parties acknowledging that the parties have jointly participated in the negotiation, drafting, and preparation of this Agreement.

(k) If any provision of this Agreement shall be found to be invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected, and this Agreement shall be enforced to the greatest extent permitted by law.

The parties have executed this Agreement and have affixed their seals as of the date first written above.

OWNER:

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*[Name of owner]*

ATTEST:

By: \_\_\_\_\_  
*[Signature of authorized person]*

Its: \_\_\_\_\_  
[Title of authorized person]

BROKER:

ATTEST:

By: \_\_\_\_\_  
[Signature of authorized individual]  
Its: \_\_\_\_\_  
[Title of authorized individual]

#### SCHEDULE A—OFFICE LEASING GUIDELINES

Except as may be otherwise directed in writing by Owner, lease negotiations will be carried out under the following terms and conditions:

1. The identity and creditworthiness of each tenant shall be expressly approved by Owner in writing in each instance.
2. All leases shall be in Owner's name and shall be executed by owner.
3. No lease shall have a term of less than one year nor more than [number] years including renewal options.
4. No lease shall cover building space in excess of [number] square feet, without Owner's express prior written approval.
5. No lease shall provide for an annual base rental less than that used for developing the then applicable annual budget or revisions to it, as approved by Owner.
6. The first month's rent and the security deposit, if required, are to be collected upon execution of each lease. All such advance rents and security deposits are to be deposited in the Operating Account or Security Deposit Account, as such terms are defined in the Management Agreement for the Premises, if applicable.
7. No obligation of a prospective tenant relative to an existing lease will be assumed without the express prior written approval of Owner in each instance.
8. No existing lease shall be canceled, modified, assigned, sublet, or altered in any respect other than increasing the square foot area covered by the lease (but not in

excess of *[number]* square feet of net rentable area in the aggregate and provided that any such expansion otherwise complies with all of the provisions of these Leasing Guidelines) without the prior written approval of Owner.

9. Leases are to provide for tenant participation in the increased costs above the base year for all taxes, special assessments, insurance, utilities, and any other operating expenses. Prior to the commencement of each lease year, the tenant will be furnished a written statement setting forth the estimated costs for such lease year, and the amount by which the estimated costs exceed the actual costs for the base year. Tenant shall pay its pro-rata share of such increase monthly.

10. The standard lease form approved by Owner is to be used. Use of any other lease form or any change, addition, or deletion in the standard lease form are subject to prior written approval by Owner in each instance. Owner's standard lease form is attached and is incorporated by reference as Schedule A-1.

11. Owner is to be immediately furnished an executed original of each lease executed.

12. Any lease which requires the expenditure of more than \$*[dollar amount]* per square foot to refurbish, rehabilitate, remodel, or otherwise prepare the lease premises must be submitted along with the estimated costs for such work to Owner for written approval prior to execution of the lease.

13. Neither Owner nor Broker nor any of their subsidiaries or affiliates nor any other entity specified by Owner shall be a tenant without prior written approval of Owner.

14. No "free" rent or other rent concession shall be offered to any tenant without the express written approval of Owner in each instance.

15. Any lease not complying with all of the foregoing conditions shall be submitted to Owner for approval prior to execution.

#### SCHEDULE A-1—OFFICE LEASE

*[Insert copy of office lease.]*

#### § 10:24 Exclusive agency listing—Between owner and broker to solicit tenants—Arbitration

Any controversy arising out of, or in connection with, this

exclusive brokerage agreement, shall be resolved by the American Arbitration Association in accordance with the then prevailing rules of that Association by an arbitration panel of not less than three arbitrators. It is understood that the arbitrators have no power to vary or modify any of the terms of this agreement and their jurisdiction is limited accordingly. Judgment on the award may be entered in any court having jurisdiction.

#### NOTES TO FORM

##### Drafter's Notes

Two or more parties may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Fla. Stat. Ann. § 682.02.

The making of an agreement or provision for arbitration subject to the Florida Arbitration Code and providing for arbitration in the state confers on any court of competent jurisdiction of the State of Florida the power to enforce the agreement, to enter judgment on an award duly rendered, and to vacate, modify, or correct an award for cause. Fla. Stat. Ann. § 682.18.

For discussion of, and forms relating to, arbitration, generally, see Arbitration (Ch 22).

For Commercial Arbitration Rules of the American Arbitration Association, see Arbitration (Ch 22).

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, Contractual nature of arbitration agreements, Arbitration and Award §§ 10 et seq.

#### § 10:25 Exclusive listing of property

This instrument was prepared by [name of preparer] of [address of preparer].

To: \_\_\_\_\_ [name of broker]

For and in consideration of your services to be rendered in listing for sale and in undertaking to sell or to find a purchaser for our property, we do appoint you exclusive agent with the exclusive right to sell the real estate located at [address of premises], together with the following improvements and fixtures: [describe]. The minimum selling price of the property shall be [\$dollar amount], to be payable on the following terms: [specify], and you are authorized to accept

and hold a deposit in the amount of *[\$/dollar amount]* and to apply the deposit on the purchase price.

If the above-described property is sold, traded, or in any other way disposed of either by us or by anyone else within the time specified here, it is agreed to and understood that you shall receive from the sale or trade of this property as your commission *[percentage]%* of the purchase price. Should this property be sold or traded within *[number]* days after the expiration of this listing contract to a purchaser with whom you have been negotiating for the sale or trade of the property, the above commission shall become due and payable on demand.

We agree to furnish either an owner's title insurance policy insuring purchaser to the full amount of the purchase price against loss or damage by reason of defect in the title of seller or, alternatively, to furnish a complete abstract of title, properly certified down to date, within *[number]* days from *[date]*, and further agree to convey by good and sufficient *[specify, such as: warranty]* deed on payment in full.

This listing contract shall continue until midnight, the last hour of *[date]*.

Dated: *[date]*.

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*[Signatures of owners]*

I accept this listing and agree to act promptly and diligently to procure a buyer for the property.

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*[Signature of broker]*

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 10:20.

#### § 10:26 Exclusive listing of property—Broker to have option to purchase

This instrument was prepared by *[name of preparer]* of *[address of preparer]*.

Agreement made on [date] between [name of owner], of [address of owner], referred to below as owner, and [name of broker], of [address of broker], referred to below as broker.

#### SECTION I. PURPOSE

Owner desires to sell certain real property located in the County of [county], State of Florida, and described as follows: [describe property]. Owner agrees with broker that [he/she] will sell and convey the property by [specify, such as: general warranty] deed, free from any and all liens of every kind and description, together with either an owner's title insurance policy insuring purchaser to the full amount of the purchase price against loss or damage by reason of defect in the title of seller or, alternatively, a complete abstract of title, properly certified down to date, to be furnished within [number] days from [specify, such as: acceptance of this agreement by seller] for examination by broker or any other person if so requested by broker for the sum of \$[dollar amount]. The object and intention of owner is to give to broker the right and option to purchase or procure a buyer for the property at the price set forth above during the term of this agreement.

#### SECTION II. TERM

The rights of broker under this agreement shall last for a period of [number] months, that is, until [date]. During this period, owner shall not dispose of the property by [himself/herself] or through any other person or agency without the consent of broker.

#### SECTION III. DUTIES OF BROKER

Broker agrees to act diligently to dispose of the property at the price fixed by owner and to perform the following acts and services: [set forth particular acts or services to be performed by broker].

#### SECTION IV. COMPENSATION

If broker shall dispose of the property at the price mentioned or purchase the property [himself/herself], owner shall not be required to pay or account to broker for any commissions, but broker shall have, hold, and receive for [his/her] services whatever [he/she] may be able to realize over and above the price stipulated in this agreement.

#### SECTION V. FAILURE TO SELL PROPERTY

Should broker not be able to sell the property within the

term specified in Section II and not purchase the property [*himself/herself*], [*he/she*] shall not in any way be liable to owner.

In witness, the parties have executed this agreement at [*designate place of execution*] the day and year written above.

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[Signatures]

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 10:20.

#### § 10:27 Description of listed property

##### LOCATION

Street address: [*address of property*], between [*specify*] and [*specify*].

City: [*city*]; County: [*county*].

Approximate size of lot: [*specify*]. Condition of yard: [*specify*].

Zoning restrictions: [*specify*].

Condition of street: [*specify*]; street lights? [*specify*]; sidewalks? [*specify*].

Distance to shopping: [*specify*]; public schools: [*specify*].

Public transportation: [*yes/no*].

Tax Assessor's Number: [*number*].

##### BUILDING

Year built: [*year*]. Type of construction: [*specify*].

Number of floors: [*number*]. Number of rooms: [*number*].

Condition of basement: [*specify*]; of roof: [*specify*].

Exterior paint: [*yes/no*]; interior paint: [*specify*].

Electricity? [*yes/no*]. Natural gas? [*yes/no*].

Water source: [*specify*]. Sewage facilities: [*specify*].

Garage? [*yes/no*].

Fixtures: [*specify*].

Special features: *[specify]*.

Amount of last annual property tax assessment: *[\$dollar amount]*. Years? *[number]*.

#### TERMS

Asking price: *[\$dollar amount]*. Minimum down payment: *[\$dollar amount]*.

Consider trade? *[yes/no]*.

Amount outstanding on present mortgage: *[\$dollar amount]*.

Mortgagee: *[name of mortgagee]*. Interest: *[specify]*. Assumable? *[yes/no]*.

#### LISTING

Type of listing: *[specify]*.

Date listed: *[date]*; term: *[specify]*.

Advertising: *[specify]*. Sign on property? *[yes/no]*.

To be shown anytime? *[yes/no]*; key at *[specify]*.

To be shown only by appointment with: *[specify]*; phone: *[phone number]*.

### § 10:28 Brokerage agreement—Exchange of property

This instrument was prepared by *[name of preparer]* of *[address of preparer]*.

Agreement made on *[date]*, between *[name of broker]*, of *[address of broker]*, referred to below as “broker,” and *[name of client]*, of *[address of client]*, referred to below as “client.”

#### SECTION I. PURPOSE

Client owns property at *[address of property1]*, particularly described as follows: *[legal description of property1]*. Client desires to exchange this property for property owned by *[name of individual]*, at *[address of property2]*, particularly described as follows: *[legal description of property2]*.

#### SECTION II. BROKER TO NEGOTIATE EXCHANGE

Broker shall have the exclusive right to negotiate an exchange of the properties. Client agrees that if broker secures an acceptance of the proposition to exchange these properties on terms acceptable to client, client will furnish either an owner's title insurance policy insuring *[name of in-*

*dividual]* in the amount of *[\$dollar amount]* against loss or damage by reason of defect in the title of client, or, alternatively, a complete abstract of title, properly certified down to date, to be furnished within *[number]* days from *[specify, such as: the date of acceptance of this agreement by [name of individual]]*, and furnish a *[specify, such as: warranty]* deed conveying a good and sufficient title to the property first above described.

### SECTION III. BROKER'S COMMISSION

On exchange of deeds, client agrees to pay broker a commission of *[if client expects to receive boot in the exchange: percentage]%* of any money received by client pursuant to this exchange in excess of *[\$dollar amount]* *[if client contemplates paying boot in the exchange: percentage]%* of the difference between *[\$dollar amount]* and the lesser amount which client actually agrees to pay pursuant to an exchange of these properties]. In any event, broker shall receive a commission of at least *[\$dollar amount]* if an exchange of properties is consummated.

### SECTION IV. TERM

This agency shall continue for *[number]* months from the date first written above, and client covenants to pay broker a commission as established in this agreement in the event that client become the owner of the above-described property of *[name of individual]* by any means within *[number]* years of the date first written above.

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*[Signature of client]*

I accept this listing and covenant to exercise diligence in attempting to negotiate and exchange of these properties. I further covenant to act as your fiduciary with respect to these negotiations, to deal with *[name of individual]* at arm's length as you would, and to make full disclosure to you of all material matters relative to the negotiations.

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*[Signature of broker]*

**NOTES TO FORM****Drafter's Notes**

See Drafter's Notes following § 10:20.

For discussion of, and forms relating to, exchanges, see Exchanges (Ch 1C).

**Tax Notes**

Earning commissions from an exchange of property, rather than from a sale of property, does not change the basic tax rule that these payments are ordinary income to the broker. I.R.C. § 61(a)(1). See the discussion earlier in this section of the tax aspects of brokers.

If this is a tax-free exchange of like-kind property—as it superficially appears to be—the commissions paid will not be deductible, but will be included in the tax basis of the property. I.R.C. § 1031. If boot is given or received, however, an aliquot portion of the commissions should be deductible against any tax payable as a result of this boot. Am. Jur. 2d, Federal Taxation ¶¶ 10375 et seq.

**§ 10:29 Brokerage agreement—Procurement of option to purchase**

This instrument was prepared by *[name of preparer]* of *[address of preparer]*.

Agreement made on *[date]*, between *[name of broker]*, of *[address of broker]*, referred to below as “broker,” and *[name of client]*, of *[address of client]*, referred to below as “client.”

**SECTION I. DUTIES OF BROKER**

Client authorizes and directs broker to act as client's agent to procure an option from *[name of individual]*, of *[address of individual]*, to purchase property described as follows: *[legal description of property]*, owned by *[name of individual]* in fee simple and *[unburdened by easements/burdened only by the following easements: [specify]]*, at a price of *[\$dollar amount]* or less.

**SECTION II. BROKER'S COMMISSION**

Client covenants to pay to broker a commission of *[\$dollar amount]* for procurement of this option *[if desired, add: and further covenants to pay an additional bonus of [percentage]% of the savings resulting to client from broker's procurement of an option at a lower selling price]*.

**SECTION III. CONDITIONS FOR RIGHT TO COMMISSION**

The covenant to pay broker the commission established herein is expressly conditioned on:

- (a) conveyance of the property by *[name of individual]* in accordance with the option procured by broker;
- (b) ability of *[name of individual]* to convey a fee simple title;
- (c) a determination that the property does in fact conform to the legal description set forth above; and
- (d) a determination that the property is in fact unencumbered by easements other than as set forth above.

#### SECTION IV. FAILURE TO EXERCISE OPTION

Client expressly understands and agrees that *[his/her]* failure to exercise an option procured by broker for any reason other than a defect noted above will not impair broker's right to the commission established in this agreement which will, in the event, be due and payable *[number]* days after delivery to client of the option.

#### SECTION V. TERM

This authorization shall expire *[number]* days from the date first written above, and broker shall return on that date the funds tendered in this agreement for use in procuring an option. Broker shall have no right to a commission for any option procured by client or a conveyance consummated after *[number]* days from the date first written above. Client covenants that *[he/she]* will not communicate with *[name of individual]* nor interfere in any way during the term of this agency and agrees that broker's commission will be due and payable if any violation by client of this covenant prevents broker from obtaining an option.

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*[Signature of client]*

I accept this agency, covenant to exercise diligence in attempting to procure an option for the purchase of the property, and acknowledge receipt of *[\$/dollar amount]* with which to acquire the option. I further covenant to act as client's fiduciary with respect to these negotiations and to deal with *[name of individual]* as client would. I further covenant to maintain a record of all business activities relevant to negotiations with *[name of individual]* and to keep the records for *[number]* years after termination of this agreement.

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[Signature of broker]

#### NOTES TO FORM

##### Drafter's Notes

See Drafter's Notes following § 10:20.

For discussion of, and forms relating to, options, see Options (Ch 1B).

#### C. OPTIONAL PROVISIONS

##### 1. Types of Listings

#### § 10:30 Nonexclusive listing

The parties understand and agree that this is an open listing agreement, and owner reserves the right to sell the property [*himself/herself*] or through any other broker without payment to broker of the commission established in this agreement. Broker shall be entitled to the commission only in the event that:

- (a) broker procures a prospect ready, willing, and able to purchase the property on the terms established in this agreement;
- (b) broker procures a buyer who does in fact purchase the property; or
- (c) the property is sold, by owner or any other person, to a prospect first submitted, directly or indirectly, to owner by broker, at any time during this listing agreement or within [*number*] months after the termination of it.

#### NOTES TO FORM

##### Research References

###### *Legal Encyclopedias*

Fla. Jur. 2d, Where exclusive agency or right to sell is given, Brokers § 88.

#### § 10:31 Exclusive agency listing

The parties understand and are agreed that this is an exclusive agency listing and broker shall be entitled to the commission established in the agreement if the property is sold by any broker during the term of this agreement or to any prospect first submitted to owner directly or indirectly by broker during the period of this listing or within [*number*] months after the termination of it.

**NOTES TO FORM****Drafter's Notes**

See Drafter's Notes following § 10:30.

**2. Commissions****§ 10:32 Fixed percentage of sale price**

Broker's commission shall be *[percentage]*% of the sale price up to \$*[dollar amount]* and *[percentage]*% of the sale price in excess of the amount.

**NOTES TO FORM****Research References**

*Legal Encyclopedias*

Fla. Jur. 2d, Compensation of broker, Brokers §§ 57 et seq.

**§ 10:33 Fixed percentage of sale price—Minimum guaranty**

Broker's commission for *[his/her]* services shall be *[percentage]*% of the sales price which owner actually receives, provided however, that the commission shall in no event be less than \$*[dollar amount]*.

**NOTES TO FORM****Drafter's Notes**

See Drafter's Notes following § 10:32.

**§ 10:34 Fixed percentage of sale price—Option agreement**

If the option granted is exercised and the purchase price is paid by optionee according to the terms hereof, optionor agrees to pay to *[name of broker]* a commission of *[percentage]*% of the purchase price.

**NOTES TO FORM****Drafter's Notes**

See Drafter's Notes following § 10:32.

**§ 10:35 Excess over stated amount**

As owner wishes to receive \$*[dollar amount]* free and clear from the sale of the property, broker agrees not to receive a percentage commission, but undertakes this listing in

**§ 10:35**

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consideration of payment of all amounts to be received by owner in excess of *[\$/dollar amount]*.

**NOTES TO FORM****Drafter's Notes**

See Drafter's Notes following § 10:32.

**3. Scope of Authority****§ 10:36 Execution of sales contract**

Owner understands that this agreement confers authority on broker to accept any offer to buy which conforms to the requirements established in this agreement and to execute a contract for the sale of the property to the purchaser on those terms.

**NOTES TO FORM****Research References**

*Legal Encyclopedias*

Fla. Jur. 2d, Broker's rights and powers, Brokers §§ 51 et seq.

**§ 10:37 Authority limited to receipt of offers and deposits**

Broker's authority under this listing agreement shall be limited to receipt and transmission to owner of offers to purchase the property on terms as good as or better than those established here and accompanied by deposits in cash of not less than *[\$/dollar amount]*. Any offers received by broker shall be transmitted to owner within 24 hours.

**NOTES TO FORM****Drafter's Notes**

See Drafter's Notes following § 10:36.

**(Continued in next volume)**

