THE REAL ESTATE JOINT VENTURE HANDBOOK

A Practitioner's Guide to Structuring, Negotiating, and Documenting Institutional Real Estate Joint Ventures

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Disclaimer

This handbook is provided for educational and informational purposes only. It does not constitute legal advice, and it does not create an attorney-client relationship between the reader and Jason Powell. Real estate joint venture law, including the formation and documentation of limited liability companies, the enforceability of operating agreement provisions, securities law requirements for private placements, and tax treatment of joint venture interests and promote distributions, varies significantly by jurisdiction and is subject to change. Every real estate joint venture is unique, unique in its parties, its project, its market, its risk profile, and the specific legal requirements applicable to its structure. The discussions, examples, checklists, and sample documents in this handbook are designed to illustrate general principles and common market approaches; they are not designed to address any specific transaction, and they may not reflect the current state of the law in any particular jurisdiction. Readers are strongly encouraged to consult with qualified legal counsel, tax advisors, and financial advisors before structuring, negotiating, or entering into any real estate joint venture or related transaction. Neither Jason Powell nor Dickinson Wright PLLC assumes any liability arising from reliance on the information contained in this handbook.

Purpose and Scope of This Handbook

Real estate joint ventures are the institutional market's most powerful tool for combining complementary resources, development expertise and institutional capital, into a structure capable of pursuing projects that neither party could accomplish alone. They are also, when poorly documented, among the most expensive sources of litigation in the commercial real estate industry.

This handbook was written to close the gap between the institutional sophistication of modern real estate joint ventures and the quality of documentation with which they are too often papered. It is not an academic treatment of partnership law. It is not a collection of theoretical frameworks for analyzing joint venture economics. It is a practitioner's guide, written by a practitioner, for the sophisticated real estate professionals who negotiate, document, and manage institutional joint ventures every day, that translates the full complexity of the JV relationship into actionable knowledge.

The handbook addresses the complete lifecycle of the institutional real estate joint venture: from the economic architecture of the distribution waterfall and the governance framework of the operating agreement, through the specific negotiating priorities of the developer member and the capital member, to the documentation mechanics of the term sheet, the special considerations of development JVs and programmatic partnerships, the most common sources of JV disputes, and the role of experienced legal counsel in preventing those disputes before they arise.

Its scope is specifically calibrated to the institutional real estate joint venture, the bilateral developer member-capital member LLC structure that is the dominant form of equity partnership in the commercial real estate market. While many of its principles apply more broadly, the handbook is not designed to address residential joint ventures,

general partnerships, corporate joint ventures, real estate investment trusts, or the full range of structures that the term 'joint venture' can encompass in different contexts. Within its defined scope, the handbook is designed to be comprehensive: a single resource that addresses every significant legal, economic, and governance issue that arises in the formation and documentation of an institutional real estate joint venture, from the first conversation between a developer member and capital member through the final distribution of proceeds upon disposition.

The handbook is organized into six parts: Part I establishes the foundations of the JV relationship, the economic architecture, governance framework, and governing documents. Parts II and III address the negotiating priorities of the developer member and capital member, respectively, from each party's perspective. Part IV provides a comprehensive annotated term sheet that applies the handbook's guidance to a specific document. Part V addresses specialized JV structures, development JVs and programmatic partnerships, that require beyond-standard documentation. Part VI addresses the role of legal counsel in JV formation, including the direct marketing of the legal services that produced this handbook. Seven appendices provide the practitioner's reference materials: a comprehensive glossary, worked waterfall examples, dual-perspective negotiating checklists, a sample term sheet template, a due diligence checklist, and a guide to evaluating and selecting JV counsel.

How to Use This Guide: Two Perspectives

This handbook was written with two distinct readers in mind: the developer member whose expertise, relationships, and execution capability are the engine of the joint venture, and the capital member whose institutional equity is its fuel. Every significant provision of the JV operating agreement affects each party differently, and understanding both perspectives is essential for anyone who negotiates, documents, or advises on real estate joint ventures.

The handbook's dual-perspective structure is reflected throughout its content. Chapters 4 and 5 address the developer member's and capital member's respective negotiating priorities in dedicated chapters. Appendices C and D provide parallel negotiating priority checklists for each party. The sample term sheet in Appendix E includes bilateral annotation tables beneath every clause, simultaneously presenting the developer member's and capital member's primary concerns for each provision. And the handbook's consistent analytical approach, examining every provision from both parties' vantage points, reflects a practice philosophy that the best JV counsel represents their client more effectively when they understand the counterparty's legitimate interests as well as their own client's.

Depending on your role, you will use this handbook differently:

Developer Members	Focus initially on Chapters 1 through 4, then Chapter 7 (Development JVs) or Chapter 8 (Programmatic JVs) based on your transaction type. Use Appendix C (Developer Member Negotiation Priorities Checklist) as your pre-signing review tool and Appendix E (Sample Term Sheet) to understand where your most critical negotiating leverage lies. Chapter 9 (Common Disputes) will show you exactly which provisions to insist on, and which drafting gaps most frequently cost developer members their promote.
Capital Members	Focus initially on Chapters 1 through 3 and 5, then the asset-class-specific chapters. Use Appendix D (Capital Member Negotiation Priorities Checklist) as your pre-signing review tool and Appendix F (Due Diligence Checklist) to organize your pre-closing process. Chapter 9 will reveal the specific provisions whose inadequate drafting has generated the most costly JV litigation, the provisions you must insist be addressed before signing.
Legal Counsel	The handbook is designed as both a practitioner's reference and a client education resource. Chapters 2 through 5 provide the conceptual framework for advising clients on economic and governance provisions. The annotated term sheet (Appendix E) and the worked waterfall examples (Appendix B) are designed to be shared directly with clients as educational materials. Chapter 9's dispute analysis and Chapter 10's counsel role discussion provide the business case for early, specialized legal engagement.
Real Estate Professionals	Advisors, brokers, lenders, and other real estate professionals who encounter JV transactions in their practice will find Chapters 1 through 3 and the glossary (Appendix A) most useful for building foundational JV literacy. The term sheet template (Appendix E) and the checklist appendices (C, D, and F) provide immediate practical value for professionals who need to understand what institutional JV parties are negotiating, and why.

One note on reading approach: this handbook is organized to be read sequentially from the beginning for readers who are new to institutional JV practice, and to be used as a reference tool, navigated by chapter, appendix, or glossary term, for experienced

practitioners who need a specific analysis or a specific document. Both uses are supported by the handbook's structure, and both are intended.

The Value of Bespoke Joint Venture Agreements Over Form Documents

Every real estate joint venture begins with a negotiation, between specific parties, for a specific project, in a specific market, at a specific point in the economic cycle. No form document captures the full range of provisions that every one of these specific circumstances requires. Yet the real estate industry has developed a persistent culture of form documentation that produces operating agreements that read well at signing and perform poorly when the relationship is under stress.

Form documents, the standard-form operating agreements that circulate in the institutional JV market, adapted from prior transactions, passed between firms, and modified at the margins rather than drafted from scratch, have an undeniable appeal: they are faster, they are familiar, and they are cheaper in the short run than the comprehensive, transaction-specific drafting that the best JV counsel provides. But their economics are deeply misleading. The savings from using a form document at signing are a fraction of the cost of the disputes that inadequate form documentation generates throughout the JV's lifecycle.

The provisions that generate the most expensive JV disputes, the IRR definition, the cause definition for removal, the Available Cash definition, the post-removal economic provisions, are exactly the provisions that form documents handle least well. They are handled least well not because form drafters are incompetent, but because these provisions must be customized to the specific transaction to function correctly. A form IRR definition that worked perfectly for a stabilized acquisition JV with a single closing event will generate a dispute in a development JV with a permanent loan refinancing that the form document does not address. A form cause definition that was appropriate for a manager with an institutional organizational depth will be inadequate for a single-principal developer whose personal involvement is the entire value proposition of the partnership.

The solution is not to avoid form documents entirely. Every experienced JV attorney uses forms as a starting point for drafting. The solution is to treat the form as a baseline to be systematically interrogated against the specific transaction's facts, not as a finished product to be minimally modified. Every provision of the form must be tested against the question: does this provision accurately reflect the agreement of these specific parties for this specific transaction, in a way that will produce the correct result under every scenario these parties might actually encounter?

Answering that question, provision by provision, for every operating agreement, is the work of specialized JV counsel. It is not glamorous work. It is not the kind of work that shows up in the document's headline economic terms. But it is the work that determines whether the JV produces its intended outcome when the relationship is healthy, and prevents a catastrophic outcome when the relationship is not.

The cost of bespoke JV documentation is modest. For a transaction in which the parties are deploying $20 million or more in institutional equity, the difference in legal fees between a comprehensive, transaction-specific operating agreement and a minimally modified form document is typically $15,000 to $50,000, a rounding error relative to the transaction's equity commitment. The cost of the disputes that inadequate form documentation generates is, as Chapter 9 of this handbook documents in painful detail, measured in millions of dollars and years of management distraction. The economics of bespoke JV documentation are not complicated: it is among the highest-return risk management investments available in the institutional real estate market.

A Note on the Sample Documents in This Handbook

The sample term sheet template (Appendix E) and the other form materials in this handbook are provided as educational illustrations, not as forms for actual use. They are designed to show what comprehensive JV documentation looks like and to provide a starting point for discussion between the parties and their counsel, not to be used as finished documents without experienced legal review and transaction-specific customization. Every provision in every sample document requires adaptation to the specific parties, project, market, and legal requirements of each individual transaction.

A Note on the Importance of Experienced Legal Counsel in JV Formation and Documentation

The most important decision either party makes in a real estate joint venture is not the economic terms, the preferred return rate, the promote percentage, the fee schedule. Those decisions are important, and this handbook addresses them in detail. But the most important decision is who will draft and negotiate the operating agreement. That decision determines whether the economic terms agreed in the term sheet are accurately translated into legally enforceable provisions, whether the governance framework functions as intended under every operating scenario, and whether the documentation can withstand the stress of a deteriorating relationship without generating the disputes that destroy value for both parties.

Real estate joint venture documentation is a specialty. Not all real estate attorneys have the specific depth of experience in JV operating agreement negotiation and drafting that this specialty requires. The attorney who expertly closes commercial real estate acquisitions, who negotiates construction loans for institutional developers, or who handles complex commercial leasing transactions is not automatically equipped to handle the specific challenges of institutional JV documentation, the waterfall precision, the governance calibration, the removal provision structuring, the tax provision coordination, and the litigation awareness that JV specialization requires.

Chapter 10 of this handbook addresses this issue in depth, including the specific questions to ask when evaluating prospective JV counsel, the evaluation framework for assessing responses, and a direct description of what Jason provides. Appendix G offers thirty questions to ask any JV attorney, with a diagnostic framework for interpreting the

answers. Together, these resources provide the tools needed to make an informed decision about legal counsel, one of the most consequential decisions in the JV formation process.

This handbook is, among other things, an extended demonstration of the depth of expertise that specialized JV counsel provides. Every chapter, the waterfall analysis, the governance framework, the negotiating strategy, the dispute prevention guidance, represents the kind of analysis that experienced JV counsel applies to every transaction. The handbook does not capture everything that counsel does in a specific engagement; the transaction-specific judgment, the bilateral negotiating dynamics, and the ongoing advisory relationship cannot be captured in any document. But it provides the conceptual foundation that makes every client conversation more productive, every negotiating session more informed, and every operating agreement more durable.

The most cost-effective decision either party can make in a real estate joint venture is to engage experienced specialist counsel early, before the term sheet is signed, before the counterparty's form document arrives, and well before the disputes that inadequate documentation generates have a chance to develop. Every chapter in this handbook makes that case in the context of a specific provision category; this preface makes it as a general principle. The investment in specialized JV counsel, measured against the disputes it prevents, has the highest return on investment of any expenditure in the JV formation process.

When to Call Us: The Optimal Engagement Timeline

Before the term sheet: We provide the most value when engaged before term sheet negotiations begin, advising on market-standard economic terms, identifying the provisions most critical for this specific transaction type, and ensuring that the term sheet captures every significant issue that must be resolved before the operating agreement drafting begins.

After the term sheet, before operating agreement drafting: If counsel was not engaged at the term sheet stage, the next best time is immediately after the term sheet is signed. We can identify provisions that need to be revisited, develop a comprehensive operating agreement negotiating agenda, and coordinate with tax advisors before drafting begins.

After a dispute has developed: Even at this stage, we assist clients with identifying and negotiating a resolution and with understanding the legal implications of provisions whose operation has already produced a disagreement. While we work with clients in all stages of JV relationships, the highest-value engagement is always before the operating agreement is signed, when every provision is still open for negotiation and the cost of fixing a problem is measured in drafting hours rather than litigation years.

About the Author

Jason Powell is a corporate and securities attorney whose practice is organized exclusively around real estate capital formation, the structuring, documentation, and ongoing legal support of real estate joint ventures, private placement syndications,

real estate private equity funds, and real estate tokenization transactions. The practice reflects a deliberate professional choice: that genuine expertise in this field, and genuine value to clients, requires depth and specialization, not breadth and generalism.

The practice described in this handbook, real estate joint ventures, syndications, funds, and tokenization, is not four separate practices loosely grouped under a common heading. It is one integrated practice organized around a single proposition: that real estate developers and investors who are seeking to raise, deploy, and manage institutional capital need legal counsel who understands every available capital formation vehicle and can advise on the optimal structure for each specific situation. The developer who is considering whether to raise capital through a bilateral JV, a private placement syndication, or a commingled fund deserves counsel who has structured all three, and who can advise, from genuine experience in each structure, which is most appropriate for the developer's specific goals, investor base, and regulatory environment.

The four practice areas are complementary rather than simply adjacent. The attorney who structures bilateral JV operating agreements understands the governance expectations that institutional capital members bring to commingled funds, and can advise fund managers who are making the transition from bilateral JV partnerships to fund capital raising on the specific governance adjustments their fund documents need to make. The attorney who structures Regulation D private placement syndications understands the securities law framework within which both JV operating agreements and real estate tokenization transactions must be structured, and can advise clients on the securities law implications of governance provisions that purely transactional JV attorneys may not appreciate. And the attorney who advises on real estate tokenization brings a forward-looking perspective on the digitization of real estate ownership that is increasingly relevant to institutional capital members evaluating their long-term portfolio liquidity strategies.

Practice Philosophy

Three principles shape every engagement in this practice, and they are reflected throughout this handbook:

Specialization is the foundation of value. Real estate joint venture documentation is a specialty. The attorney who has drafted and negotiated fifty JV operating agreements in the past three years brings a quality of pattern recognition, market knowledge, and drafting precision that cannot be replicated by a general real estate attorney of equivalent intelligence and diligence. This practice is built on depth, not the breadth of services offered, but the depth of expertise in each service area. Every engagement receives the benefit of that accumulated depth.

Drafting precision is dispute prevention. Every hour invested in precise documentation at the formation stage prevents hours, and very likely years, of dispute resolution at the litigation stage. This is not a theoretical proposition; it is the concrete lesson of Chapter 9 of this handbook and of every dispute scenario drawn from actual JV practice. The practice is built around drafting precision as a professional obligation, not

merely a professional aspiration. Clients receive operating agreements that function correctly under every scenario they are likely to encounter, not just the base case scenarios both parties are optimistic about at signing.

Both perspectives produce better outcomes. The most effective JV counsel, for either the developer member or the capital member, is counsel that understands both parties' legitimate interests and can anticipate the counterparty's position with the same sophistication that it advances its own client's. This dual-perspective understanding, reflected throughout this handbook, makes counsel more effective in every negotiating session: it identifies the provisions the counterparty will fight hardest for and the provisions where flexibility is available, allocating negotiating capital where it produces the highest return for the client.

A Note on This Handbook

This handbook was produced over an extended period of research, drafting, and refinement. It reflects the accumulated experience of a practice built around institutional real estate capital formation, the transactions, the negotiations, the disputes, and the ongoing advisory relationships that produce the kind of pattern recognition that distinguishes genuine expertise from theoretical knowledge. Every provision analyzed, every dispute scenario described, and every drafting lesson drawn reflects actual transactional experience, not merely academic synthesis of the existing literature.

The handbook is organized as both a cover-to-cover educational resource and a modular reference tool. Readers who are new to institutional real estate joint ventures will benefit from reading it sequentially; experienced practitioners will navigate it by chapter, by appendix, or by the glossary's alphabetical index of key terms. Both approaches are supported by the handbook's structure.

This is a living document. Real estate joint venture law, market practice, and institutional investor expectations evolve continuously, driven by changes in the capital markets, the regulatory environment, and the ongoing development of case law and arbitration decisions that interpret and re-interpret operating agreement provisions. Jason is committed to updating this handbook as these developments warrant and to maintaining it as a current, accurate, and genuinely useful practitioner's guide.

If you have questions about any topic addressed in this handbook, or if you would like to discuss how the handbook's guidance applies to a specific transaction you are considering, we invite you to reach out directly. The contact information above is the right starting point for any conversation, and every conversation about a potential engagement begins with a genuine effort to understand whether, and how, we can add value to the specific transaction and relationship being considered.

Jason Powell
Austin, TX

CHAPTER 1

The Anatomy of a Real Estate Joint Venture

Real estate fortunes are rarely built in isolation. Behind most significant development projects, from mixed-use towers to ground-up multifamily communities to large industrial campuses, stands a partnership between two kinds of principals: one who knows how to build, and one who has the capital to fund it. Understanding that partnership at a structural level is the foundation of this handbook.

This chapter introduces the essential anatomy of the real estate joint venture: what it is, who participates in it, why it exists, how it is structured, and what legal framework holds it together. Whether you are a developer member bringing a project to the table or a capital member deploying equity into someone else's expertise, this chapter provides the conceptual foundation that every later discussion will build upon.

What Is a Real Estate Joint Venture?

A joint venture is a contractual and legal relationship in which two or more parties pool resources, whether capital, expertise, relationships, or land, to pursue a specific real estate project or a series of projects, sharing both the rewards and the risks in proportions they negotiate at the outset.

A real estate joint venture (a "JV") is, in essence, a business arrangement in which two or more parties agree to cooperate for a defined purpose, usually the acquisition, development, redevelopment, or operation of one or more real estate assets. The parties contribute different resources. One party usually contributes capital, while the other contributes expertise, relationships, development infrastructure, and day-to-day management. In exchange for their respective contributions, each party receives an agreed economic interest in the venture, subject to a negotiated priority of returns.

The structure differs from a general partnership, in which all partners share management authority and bear unlimited personal liability, and from a limited partnership, in which passive limited partners contribute capital and a general partner manages. A real estate JV is most commonly organized as a limited liability company (an "LLC") governed by an operating agreement. The LLC form provides the flexibility to allocate economics, governance rights, and management responsibilities in almost any configuration the parties can agree upon, and that flexibility is what makes it the dominant vehicle for real estate joint ventures in the United States today.

A joint venture is distinct from a real estate fund, in which a sponsor raises capital from multiple investors and deploys it across a portfolio of assets according to a pre-set investment strategy. In a JV, there are usually only two principals, the developer member and the capital member, and the terms of their relationship are negotiated deal

by deal, or at least program by program, with considerable specificity. The result is a bespoke economic and governance structure tailored to a particular project, property type, market, and risk profile.

The JV also differs from a simple co-ownership arrangement. Two parties can co-own real property as tenants in common, but that form of ownership provides no built-in governance, no economic waterfall, no management structure, and no path to resolution when the parties disagree. A properly structured JV operating agreement addresses all of these issues in advance, which is precisely why experienced real estate attorneys invest significant time and energy in its negotiation and drafting.

Practice Note: Why Definitions Matter

One of the most common sources of JV disputes is the imprecise definition of key terms, particularly terms like "promote," "preferred return," "capital contributions," and "approved business plan." When these concepts are left vague, or borrowed wholesale from a prior deal without careful tailoring, the parties often discover too late that they understood them very differently. Experienced JV counsel invest real effort in confirming that every defined term captures the intent of both parties before the operating agreement is signed.

The Two-Party Model: Developer Member and Capital Member

The two-party joint venture, pairing expertise with capital, is the dominant structure in institutional and entrepreneurial real estate alike. Understanding the distinct roles, motivations, and risk profiles of each party is the starting point for any successful JV negotiation.

While joint ventures can involve more than two parties, the archetypal real estate JV involves exactly two principals: a developer member and a capital member. Each occupies a fundamentally different role, and the entire architecture of the venture, its economics, its governance, and its dispute resolution mechanisms, is designed to balance their respective contributions and protect their respective interests.

The Developer Member: Expertise, Infrastructure, and Sweat Equity

The developer member (sometimes called the "operating member," the "sponsor," or, in colloquial usage, the "GP," though that term technically refers to a general partnership role) is the party that brings real estate expertise to the venture. Its contributions are primarily non-monetary. They consist of knowledge, relationships, reputation, and the capacity to execute a complex real estate project from concept through stabilization and disposition.

Specifically, the developer member typically contributes some or all of the following:

- Deal sourcing and origination. The developer member identifies the opportunity, negotiates the acquisition, and brings it to the JV. In many cases it has spent months or years cultivating the site, the seller relationship, or the entitlement opportunity before a capital partner is engaged.

- Entitlement and permitting expertise. Navigating the local approval process for a development project requires deep relationships with planning departments, elected officials, and community stakeholders. This expertise is often the developer member's most distinctive and least replaceable contribution.

- Development management. The developer member oversees the design process, manages the general contractor, monitors the construction draw process, and coordinates the many consultants and vendors required to execute a development project.

- Operating and leasing relationships. For income-producing properties, the developer member manages the asset after construction, oversees property management, drives leasing activity, and positions the asset for eventual disposition.

- Equity co-investment. While the developer member's primary contribution is non-monetary, many JV structures require it to contribute a nominal equity amount, often 5% to 10% of total equity and sometimes more, as a demonstration of alignment. This co-investment is sometimes funded from the developer's fee income rather than outside capital.

- Guaranties. In many JV structures, particularly for development projects with construction financing, the developer member provides personal or corporate guaranties to the construction lender, including completion guaranties and "bad boy" carve-out guaranties. These contingent liabilities represent a real and often significant contribution to the JV, separate from any cash equity.

In exchange for these contributions, the developer member receives two forms of economic benefit. The first is fees paid during the life of the project, such as development fees, construction management fees, and asset management fees, that compensate the developer member for its time and infrastructure costs. The second is a "promote," a disproportionate share of profits above and beyond the developer member's pro rata equity interest, that rewards the developer member for creating value for the venture.

The Capital Member: Equity, Patience, and Risk Capital

The capital member (sometimes called the "equity member," the "passive member," or, in colloquial usage, the "LP") is the party that provides the financial resources to fund the project. Its contribution is fundamentally monetary: it writes the checks that make the project possible. That contribution is far from passive in the legal and governance sense, however, and a capital member that fails to protect its interests through careful negotiation of the JV operating agreement can suffer severe consequences.

Capital members in real estate JVs span a wide range of institutional profiles:

- Institutional investors, such as pension funds, insurance companies, sovereign wealth funds, and endowments, deploy large amounts of capital into real estate through JV structures as part of diversified investment portfolios.
- Real estate private equity funds raise capital from institutional and high-net-worth investors and deploy it through JV partnerships with operating partners.
- Family offices, the private investment vehicles of ultra-high-net-worth families, invest in real estate JVs as a direct investment strategy.
- Real estate investment trusts (REITs), both publicly traded and non-traded, frequently use JV structures to partner with development expertise they do not maintain in-house.
- High-net-worth individuals and syndicators, at the smaller end of the market, may serve as capital members directly or aggregate capital from multiple investors to deploy in a single JV.

Whatever the capital member's institutional profile, its fundamental goal is the same: to deploy equity capital into a real estate project that will generate returns commensurate with the risk taken, within a time horizon consistent with the capital member's investment mandate, and subject to governance protections that keep the developer member operating the project in a manner consistent with the agreed business plan.

The capital member's economic return comes from the distribution waterfall. It receives a return of its invested capital, followed by a preferred return on that capital (typically expressed as an annual percentage, often between 6% and 10%), followed by a pro rata share of profits alongside the developer member. It is the developer member's promote that reduces the capital member's share below 100% of the profits above the preferred return threshold.

The Fundamental Tension, and Opportunity, of the JV

The developer member needs capital it does not have. The capital member needs expertise it does not want to build internally. This mutual dependence is the foundation of every successful joint venture. When the JV is well structured, each party benefits from the other's contribution in ways it could not replicate alone. When it is poorly structured, when the economics are misaligned, the governance is ambiguous, or the definitions are imprecise, that same dependence becomes a source of conflict, litigation, and lost value. The work of experienced JV counsel is to translate the parties' shared interest into a legal framework that is durable, precise, and fair to both sides.

Why Joint Ventures Exist: Aligning Complementary Strengths

Joint ventures are more than a financing tool. They are a strategic structure for combining capabilities that, on their own, are not enough to execute at the highest level. Understanding why JVs exist helps both parties appreciate what they are building together, and what is at stake if the structure fails.

The real estate joint venture exists because the most attractive development and investment opportunities usually require a combination of capabilities that no single party possesses in full. A developer with strong deal flow, entitlement expertise, and contractor relationships may lack the capital to pursue more than one or two projects at a time. A capital member with hundreds of millions of dollars to deploy may lack the local market knowledge, development infrastructure, and operational capacity to execute a complex project without a skilled operating partner. The JV bridges that gap.

From the developer member's perspective, the JV enables scale. By accessing institutional or semi-institutional capital through JV structures, a developer can pursue larger and more complex projects than its own balance sheet would permit, build a track record of successful institutional partnerships, and grow its platform and reputation in ways that attract even larger capital partners over time.

From the capital member's perspective, the JV enables access. By partnering with skilled local operators rather than building an internal development capability, which is expensive, time-consuming, and often unsuccessful, the capital member can deploy capital into markets and project types where it can achieve superior risk-adjusted returns relative to public market alternatives.

Beyond these primary rationales, joint ventures serve several additional strategic functions:

- Risk sharing. By sharing equity ownership with the developer member, the capital member spreads project-level risk across a broader economic base. The developer member's co-investment, however nominal, creates an alignment of interest that a pure fee arrangement would not.

- Regulatory and tax efficiency. The LLC and JV structure allows the parties to optimize the allocation of tax attributes such as depreciation, losses, and gains in ways that a direct ownership structure might not permit, and to structure the transaction to minimize transfer taxes and other transaction costs.

- Leverage on lender relationships. Construction and permanent lenders often require a creditworthy guarantor to stand behind a development loan. The developer member's willingness to provide personal or corporate guaranties, backed by the capital member's financial support through the JV, can unlock financing that neither party could obtain on its own.

- Platform building. For the developer member, a successful institutional JV partnership is a reputational asset that attracts future capital, talent, and deal flow. The capital member's brand, due diligence process, and reporting standards often push the developer member to professionalize its operations in ways that benefit the entire platform.

- Programmatic deployment. Once a JV partnership has proven successful on a single asset, the parties may expand it into a programmatic relationship, a multi-

asset partnership with pre-agreed investment parameters, which allows for more efficient capital deployment and deeper strategic alignment over time.

Understanding these rationales helps both parties approach JV negotiations with the right mindset. The two sides are not adversaries competing over a fixed amount of value. They are partners whose respective contributions, properly structured, can create more value than either could achieve alone. The legal documentation of a JV should reflect that collaborative foundation even as it rigorously protects each party's individual interests.

Common JV Structures in Real Estate

Not all joint ventures are alike. The structure of a JV, its scope, its duration, its economic model, and its governance, varies with the nature of the project, the parties involved, and their respective investment objectives.

Real estate joint ventures take many forms, and understanding the principal structural distinctions is essential to appreciating how specific operating agreement provisions function and why they are negotiated the way they are.

Single-Asset JVs

The most common form of real estate JV is the single-asset structure, in which the JV entity owns and operates a single property or development project. The single-asset JV has a defined life, typically tied to the development timeline and a subsequent hold period, and it terminates upon the disposition of the asset or a refinancing event that returns capital to the parties.

Single-asset JVs offer maximum specificity. The parties can tailor every economic and governance term to the characteristics of the particular project. The capital member can underwrite a specific business plan, a specific market, and a specific development team. The developer member can structure fees and promote economics to reflect the particular risk and return profile of the project. And both parties can negotiate exit provisions calibrated to the project's expected hold period and liquidity timeline.

The principal disadvantage of the single-asset structure, from the capital member's perspective, is the administrative burden of negotiating a full suite of JV documents for each investment. From the developer member's perspective, the single-asset structure may limit scalability if the capital member is unwilling to commit to a programmatic relationship.

Multi-Asset and Programmatic JVs

A programmatic JV (sometimes called a "platform JV" or a "separate account") is a structure in which the capital member commits to deploy a defined amount of capital across multiple assets that the developer member develops or acquires over a specified

investment period, subject to pre-agreed investment parameters such as geography, asset type, return thresholds, and concentration limits.

Programmatic JVs are the preferred structure for sophisticated institutional capital members seeking efficient capital deployment. Rather than negotiating a new set of JV documents for each asset, the parties negotiate a master JV framework that governs all investments made under the program, with asset-specific terms handled through side letters or asset-level addenda. The result is faster execution, lower transaction costs, and deeper strategic alignment between the parties.

For the developer member, the programmatic structure provides capital certainty for a defined pipeline of projects, a meaningful competitive advantage in markets where well-capitalized competitors can move quickly. The tradeoff is that the developer member must accept investment parameters and governance standards that apply across the program, with less flexibility to tailor individual deal terms.

Development JVs

A development JV is a partnership formed specifically to develop a real estate project from the ground up: acquiring land if it is not already owned, obtaining entitlements and permits, constructing improvements, and leasing or selling the completed project. Development JVs carry a distinctive risk profile. They are subject to entitlement risk, construction risk, lease-up risk, and market timing risk in ways that stabilized acquisitions are not.

The governance provisions of a development JV must address the full lifecycle of the development process: land acquisition, pre-development activities, construction loan closing, construction management, certificate of occupancy, stabilization, and eventual disposition. The economic provisions must account for the extended time horizon, often three to seven years from inception to disposition, for the capitalized interest and carry costs during construction, and for the promote mechanics that reward the developer member for delivering on its development commitments.

Acquisition and Value-Add JVs

Acquisition and value-add JVs involve the purchase of an existing property, whether stabilized or transitional, with the intent to enhance its value through repositioning, renovation, re-leasing, or improved operations before ultimately selling or refinancing. These JVs typically have shorter timelines than ground-up development JVs and a somewhat different risk profile, though they still require careful governance and economic structuring.

In a value-add JV, the developer member's expertise is typically focused on asset management, leasing, renovation management, and disposition strategy rather than ground-up development. The promote structure may be calibrated to a shorter hold period and a lower IRR hurdle than in a development JV, reflecting the lower risk and shorter capital-at-risk period.

JV Structure Comparison at a Glance

Topic	Developer Member	Capital Member
Scope	Single project; maximum customization	Multiple assets; pre-agreed parameters
Duration	Project lifecycle (3-7 years typical)	Investment period plus hold (5-10 years)
Negotiation	Full documents per asset; higher cost	Master framework; lower per-asset cost
Risk Profile	Concentrated; one project	Diversified; multiple assets
Promote Timing	Single realization event	Asset-by-asset or vintage-year blended
Best For	Developer building track record; unique deals	Established operators with deal pipelines

The LLC as the Vehicle of Choice

The choice of legal entity for a real estate joint venture is not a formality. It is a substantive decision with significant implications for liability, governance flexibility, tax treatment, and the ability to allocate economics in precisely the way the parties intend.

While real estate joint ventures can in theory be organized as general partnerships, limited partnerships, corporations, or even contractual co-ownership arrangements, the limited liability company has become the overwhelmingly dominant vehicle for real estate JVs in the United States. Understanding why the LLC dominates, and why the details of its formation and governance matter so much, is essential background for every participant in a JV.

Why the LLC?

The LLC's dominance in real estate JV structures rests on several advantages over alternative entity forms:

- Limited liability. All members of an LLC, regardless of their management role, enjoy limited liability protection. Unlike a general partnership, in which all partners bear unlimited personal liability for partnership obligations, or a limited partnership, in which the general partner bears unlimited liability, the LLC insulates all members from personal liability for the debts and obligations of the entity, subject to standard exceptions for fraud, personal guaranties, and piercing of the corporate veil.

- Flow-through taxation. An LLC with two or more members is treated as a partnership for federal income tax purposes by default, which means the entity itself does not pay income tax. Instead, the LLC's income, gains, losses, deductions, and credits flow through to the members and are reported on the

members' own tax returns. This avoids the double taxation that applies to a corporation, which pays entity-level tax and whose shareholders pay tax again on dividends, and it allows the parties to make sophisticated tax allocations, including special allocations of depreciation and other tax attributes, that can meaningfully enhance after-tax returns.

- Governance flexibility. The LLC operating agreement can allocate management authority, economic rights, and governance rights in almost any configuration the parties agree upon. There is no statutory requirement, as there is in a corporation, that governance rights be proportional to economic interests. A developer member with a 10% economic interest can serve as manager with broad day-to-day authority, while a capital member with a 90% economic interest holds approval rights over major decisions but no day-to-day role. This flexibility is exactly what the JV structure requires.

- Flexible economic allocations. Unlike a corporation, in which economic rights are tied to share ownership, or a limited partnership, which has its own statutory constraints, an LLC operating agreement can allocate distributions in tiers that do not correspond to percentage ownership. This is the cornerstone of the waterfall and promote structure that defines real estate JV economics.

- Simplicity of administration. LLCs are simpler to administer than corporations, with no board of directors, no formal meeting requirements, and no share issuance formalities, and they are more flexible than limited partnerships, which require a separate general partner entity. This administrative simplicity reduces ongoing compliance costs and governance friction.

Why Delaware?

Most real estate JV LLCs are organized under the laws of the State of Delaware, regardless of where the underlying property is located. Delaware's dominance reflects several practical advantages:

- The Delaware Limited Liability Company Act is widely regarded as the most flexible and sophisticated LLC statute in the United States, and it gives the parties broad contractual freedom in structuring the operating agreement.

- Delaware's Court of Chancery is a specialized business court with extensive experience adjudicating LLC disputes, and its body of case law offers a degree of predictability that sophisticated parties value when negotiating governance and fiduciary duty provisions.

- Most institutional capital members and their counsel know Delaware LLC law well and may require Delaware organization as a condition of investment.

- Delaware's approach to fiduciary duties is highly flexible. The LLC Act expressly permits the operating agreement to modify or eliminate the fiduciary duties that members and managers owe one another, subject to the implied contractual

covenant of good faith and fair dealing, which allows the parties to define the precise scope of the developer member's obligations as manager.

When the underlying property is located in a state other than Delaware, the JV LLC is typically organized in Delaware and then registered as a foreign LLC authorized to do business in the state where the property is located. This adds a modest administrative step but is universally accepted and raises no legal complications.

Series LLCs

Several states, including Delaware, Texas, Illinois, and Nevada, permit the formation of a series LLC, a single LLC that can maintain separate, legally segregated series within it, each with its own members, managers, assets, liabilities, and operating provisions. Series LLCs have been used in real estate to hold multiple properties within a single entity while maintaining liability isolation between properties.

Even so, series LLCs remain relatively uncommon in institutional real estate JVs, for several reasons. The legal treatment of a series LLC in states that have not adopted series legislation is uncertain. Title insurers and lenders have historically been reluctant to underwrite transactions involving series LLCs. And institutional capital members typically prefer the clarity of separate property-owning entities for each asset. Counsel and clients should evaluate carefully whether a series structure is appropriate for a given transaction before proceeding.

Overview of the Governing Documents

A real estate joint venture is governed by a suite of documents that define the relationship between the parties at several levels. Understanding the function of each document, and the interplay among them, is essential to understanding how the JV operates in practice.

The joint venture relationship is memorialized in a carefully layered set of agreements, each serving a distinct function. Confusion about the role of these documents, or a failure to align them with one another, is a common source of JV disputes. What follows is an overview of the primary governing documents in a typical real estate JV transaction.

The Term Sheet

The term sheet (sometimes called a letter of intent, a deal memo, or heads of terms) is a preliminary document that summarizes the key economic and governance terms of the proposed joint venture before the parties invest in full-scale legal documentation. A well-drafted term sheet serves several important functions:

- It forces the parties to identify and resolve the most significant points of disagreement before legal fees begin to accumulate, which saves both sides meaningful time and cost.

- It establishes a negotiating baseline that the attorneys will translate into the final operating agreement, reducing the risk of misunderstanding or selective memory about what was agreed.

- It can be used to secure a capital member's internal investment approval before the full due diligence and documentation process begins, allowing the developer member to proceed with confidence.

- In some cases it contains binding provisions, particularly exclusivity, confidentiality, and cost-sharing obligations, that govern the parties' conduct during the documentation period.

Most term sheets are expressly non-binding with respect to their substantive economic and governance terms, which means that neither party is legally obligated to consummate the JV on the term sheet terms until the operating agreement is signed. Courts have on occasion found term sheets to be binding where the language was insufficiently clear, however, which reinforces the importance of working with experienced JV counsel to be sure the term sheet accurately reflects the parties' intent regarding binding and non-binding provisions.

Chapter 6 of this handbook provides a detailed, annotated breakdown of a sample JV term sheet from both the developer member's and the capital member's perspectives.

The LLC Operating Agreement

The LLC operating agreement is the primary governing document of the joint venture. It is the contract that defines, in comprehensive detail, every aspect of the relationship between the developer member and the capital member: their respective economic interests, their management rights and restrictions, their obligations to contribute capital, the priority and mechanics of distributions, the circumstances under which the manager can be removed, the transfer restrictions applicable to each party's interest, the buy-sell and exit provisions, and the tax and accounting provisions that govern the JV's financial reporting.

A well-drafted operating agreement is a long and complex document, often 60 to 120 pages for a sophisticated institutional JV, and every provision matters. Courts interpreting LLC operating agreements have consistently held that they are commercial contracts entitled to the same rules of construction as any other commercial agreement: the plain meaning of the text governs, the use of extrinsic evidence to vary clear terms is limited, and genuine ambiguities may be construed against the drafting party. This body of law places a premium on drafting precision that no form document or template can replace.

Key sections of the operating agreement include:

- Definitions. A comprehensive definitions section establishes the precise meaning of every key economic, governance, and tax term used in the agreement. Imprecision in definitions is the single most common source of JV disputes.

- Capital contributions. These provisions set the amount, timing, and conditions of each party's obligation to contribute capital to the JV, including the mechanics of additional capital calls and the consequences of a member's failure to make a required contribution.

- Distributions. The waterfall provisions specify the order, priority, and amount of distributions to each member, including return of capital, the preferred return, and the promote structure.

- Management. These provisions allocate management authority between the manager, typically the developer member, and the capital member, including the list of major decisions that require capital member approval.

- Transfer restrictions. These provisions restrict each party's ability to transfer its membership interest, including rights of first offer and first refusal (ROFO and ROFR), drag-along and tag-along rights, and buy-sell mechanisms.

- Default and removal. These provisions set the circumstances under which the developer member can be removed as manager, with or without cause, the consequences of removal for the developer member's economic interests, and the process for appointing a successor manager.

- Tax and accounting. These provisions govern the JV's tax elections, tax allocations, and financial reporting, including the capital account maintenance rules that underpin the economic substance of the waterfall.

Ancillary Agreements

In addition to the operating agreement, a typical real estate JV involves several ancillary agreements that govern specific aspects of the relationship between the parties or between the JV entity and third parties:

- Development agreement. In a development JV, the JV entity typically enters into a separate development agreement with the developer member, or an affiliate of the developer member, that governs the developer member's obligations as development manager: the scope of services, the fee payable, the standard of care, the budgeting and reporting obligations, and the consequences of underperformance or termination.

- Construction management agreement. If the developer member also serves as construction manager, rather than hiring a third-party general contractor in a traditional owner-builder model, a separate construction management agreement governs those services and fees.

- Property management agreement. The operating agreement will typically authorize or require the developer member or its affiliate to serve as property manager for the completed project, subject to a separate property management

agreement that governs the scope of services, the management fee, and the termination rights.

- Guaranty agreements. Where the JV's construction or permanent financing requires personal or corporate guaranties, those guaranties are documented separately from the operating agreement and create direct obligations from the guarantor, typically the developer member or its principals, to the lender.

- Loan documents. The construction loan agreement, promissory note, deed of trust or mortgage, and related documents govern the relationship between the JV entity and its construction lender. These documents often contain provisions, such as borrower covenants, default triggers, and consent requirements, that interact significantly with the operating agreement's governance provisions, and experienced JV counsel review both sets of documents together to identify and address any conflicts.

Practice Note: The Interplay of JV and Loan Documents

One of the most overlooked risks in real estate JV structuring is the interaction between the operating agreement and the construction loan documents. Lenders routinely include provisions in their loan documents, such as restrictions on distributions, requirements for lender consent to major decisions, and default triggers tied to transfers of ownership interests, that may conflict with or significantly restrict the rights negotiated in the operating agreement. Experienced JV counsel review both documents together and identify these conflicts before closing, not after. A developer member or capital member that signs a loan document without understanding its implications for the JV governance structure may find its carefully negotiated operating agreement rights rendered meaningless by a lender consent requirement.

Why Proper Legal Structuring Matters

Real estate joint ventures are among the most complex and consequential commercial arrangements that individuals and institutions enter into. The difference between a well-structured JV and a poorly structured one can be measured in tens of millions of dollars, and in years of litigation.

The practical stakes of JV structuring are not academic. The legal framework of a real estate joint venture determines, in concrete terms, who receives the first dollar of profit, who controls a critical decision at a pivotal moment in the project's lifecycle, who bears the risk of a construction cost overrun, who has the right to force a sale at an inconvenient time, and who can remove a manager that has underperformed. These are not hypothetical concerns. They are the real situations that real estate JVs encounter, often at the worst possible moments.

Consider the following situations, which arise with some regularity in poorly structured JVs:

- A developer member who did not negotiate the definition of "promote" carefully discovers, on a refinancing, that the capital member claims the promote was not

earned because the refinancing did not constitute a "capital event" under the operating agreement's ambiguous language. Years of litigation follow.

- A capital member who accepted a broad definition of "day-to-day management" finds that it cannot block the developer member's decision to enter into a long-term affiliate contract that materially impairs the project's economics, because the operating agreement did not specifically list affiliate transactions as a major decision requiring capital member approval.

- A developer member who provided an open-ended completion guaranty faces a lender's demand for full repayment of a construction loan that the JV cannot refinance, not because the project failed, but because market conditions changed and the guaranty had no cap or expiration.

- Two JV partners reach a deadlock over whether to sell a property. The operating agreement's buy-sell provision allows the capital member, with far greater financial resources, to set a price the developer member cannot match, which effectively transfers the developer member's interest to the capital member for far less than fair value.

- A developer member is removed as manager for cause under a provision that defines cause so broadly that almost any business judgment mistake qualifies. The developer member loses its promote entirely because the operating agreement's post-removal provisions did not preserve a vested portion of the promote for work already performed.

These situations share a common origin: too little attention to legal structuring at the outset of the relationship. They also share a common remedy: experienced joint venture counsel who understand not only the technical mechanics of LLC law, tax, and real estate finance, but also the practical realities of how JVs operate under stress, and who can draft documents that protect their clients from the predictable hazards of a multi-year, complex real estate partnership.

Throughout this handbook, the dual perspective of the developer member and the capital member is maintained. Every economic provision, every governance right, and every exit mechanism is examined from both vantage points, because the interests of these two parties, while ultimately aligned in the success of the project, diverge in important ways that a skilled attorney must understand and address.

A Note on the Role of Legal Counsel

This handbook is designed to educate real estate professionals, including developers, investors, and their advisors, about the structure and mechanics of real estate joint ventures. It is not a substitute for legal advice, and it should not be used as one. Joint venture operating agreements are highly negotiated, jurisdiction-specific documents whose provisions interact with one another and with applicable law in ways that call for the guidance of experienced counsel. If you are contemplating a real estate joint venture, whether as a developer member or a capital member, engage experienced JV counsel before you sign a term sheet, not after. The cost of

proper legal structuring is a fraction of the cost of resolving a dispute that proper structuring would have prevented.

Chapter 1 Summary

This chapter has introduced the fundamental anatomy of the real estate joint venture. The key takeaways for both developer members and capital members are these:

- A real estate JV is a contractual and legal partnership, most commonly organized as a Delaware LLC, in which a developer member contributes expertise and a capital member contributes equity, with both parties sharing returns according to a negotiated waterfall.
- The developer member's contributions, including deal sourcing, entitlement expertise, development management, operating relationships, and guaranty obligations, are as real and valuable as the capital member's financial contribution, and the legal structure should reflect that reality.
- The capital member's interests, including return of capital priority, preferred returns, governance approval rights, and exit flexibility, are legitimate and important, and they must be protected through precise operating agreement provisions rather than handshake assurances.
- JVs take multiple structural forms, including single-asset, programmatic, development, and value-add, each with its own risk profile and documentation requirements.
- The LLC is the dominant JV vehicle because of its liability protection, flow-through tax treatment, and exceptional governance flexibility.
- The suite of governing documents, including the term sheet, the operating agreement, and the ancillary agreements, must be carefully coordinated to avoid internal inconsistencies and conflicts with lender requirements.
- The cost of imprecise JV structuring far exceeds the cost of proper legal counsel at the outset. Every significant JV deserves the attention of experienced attorneys who understand both the technical and practical dimensions of the developer member and capital member relationship.

Looking Ahead to Chapter 2

With the structural foundation in place, Chapter 2 turns to the economic architecture of the real estate joint venture: the capital stack, the distribution waterfall, the promote, and the fee structure that together define the financial relationship between the developer member and the capital member. Understanding these economic mechanics in precise detail is the prerequisite to the negotiating guidance that follows in Chapters 4 and 5.

CHAPTER 2

Economic Architecture of the Joint Venture

If Chapter 1 established the anatomy of the joint venture, Chapter 2 traces its circulatory system: the flow of money into, through, and out of the venture. Nearly every significant decision in a JV negotiation has an economic dimension, and a party that does not understand the mechanics of capital contributions, preferred returns, waterfalls, and promotes cannot negotiate or interpret those provisions with any confidence.

This chapter examines the economic architecture of the real estate joint venture in detail. It begins with what each party contributes and how those contributions are quantified and tracked. It then works through the capital stack, the distribution waterfall, the promote, and the fee structure that together make up the financial framework of the JV. Worked numerical examples show how the abstract provisions translate into real dollar outcomes. Both the developer member's and the capital member's perspectives are kept in view throughout, because the same economic provision can look very different depending on which side of the table you occupy.

A thorough understanding of this chapter is the prerequisite to the negotiating guidance in Chapters 4 and 5. Every recommendation about how to negotiate a JV term rests on how that term affects the economic outcome for each party, and you cannot negotiate well what you do not fully understand.

Capital Contributions: What Each Party Brings to the Table

The capital contribution provisions of a JV operating agreement answer a question that sounds simple but rarely is: who puts in how much money, when, and on what conditions? The answers carry real consequences for each party's economic risk, dilution exposure, and ultimate return.

Capital contributions are the financial foundation of the joint venture. Without a clear, precise, and complete set of capital contribution provisions, the JV will almost always run into disputes about funding obligations, dilution rights, and the relationship between capital contributed and economic return. These provisions deserve the same care as any other section of the operating agreement.

Cash Equity and Promoted Interest

A central economic distinction in a real estate JV is the difference between a party's capital contribution, the actual money or property it puts into the JV, and its promoted interest, the disproportionate share of profits it receives above its pro rata economic interest. Parties negotiating their first JV often confuse the two, and conflating them leads to misunderstandings about who is owed what, and when.

Cash equity refers to the actual monetary contributions each party makes to fund the JV's acquisition, development, and operating costs. In a typical two-party JV, the capital member contributes the substantial majority of the equity, often 80% to 95% of the total, while the developer member contributes the balance, most commonly 5% to 10% and sometimes more. The developer member's co-investment, though modest in percentage terms, matters as a demonstration of alignment: it ensures the developer member has real money at risk alongside the capital member rather than a purely fee-based upside.

Promoted interest, the promote, is not a capital contribution. It is an economic right negotiated as part of the JV structure that entitles the developer member to a share of profits out of proportion to its cash equity, in recognition of the value it creates through expertise, relationships, and execution. A developer member that contributes 10% of the equity but negotiates a 20% promoted interest in profits above a defined return threshold is not contributing that additional value economically. It is earning it through performance.

The distinction matters for several practical reasons. Capital contributions create the basis for the capital member's preferred return, which accrues on contributed capital, not on the promote. Capital contributions also determine each party's capital account for tax purposes, which governs the tax treatment of distributions throughout the life of the JV. And capital contributions set the baseline for the return-of-capital tier in the waterfall, because contributed capital must typically be returned before any promote is paid.

Developer Fees and Reimbursements as Compensation

Before turning to the promote, it helps to understand that developer fees, not promote distributions, are the developer member's primary source of compensation during the life of the project. Developer fees are paid by the JV entity to the developer member or its affiliate for specific services rendered. They are typically treated as operating expenses of the JV that reduce its taxable income and, importantly, are paid before any distribution is made to either member.

The principal categories of developer fee in a typical development JV include the following.

- The development fee is a lump-sum or percentage-of-cost fee, typically 2% to 5% of total project costs, paid to the developer member for overseeing the development process from inception through certificate of occupancy. It is usually earned and paid in installments tied to construction draw milestones, which gives the developer member cash flow during the pre-revenue phase of the project.

- The construction management fee applies where the developer member also provides construction oversight services, as distinct from serving as the general contractor. This fee, typically 1% to 3% of hard construction costs, compensates the developer member for managing the general contractor and monitoring the construction process.

- The asset management fee is an ongoing annual fee, typically 0.5% to 1.5% of invested equity or 1% to 3% of gross revenues, paid to the developer member for managing the stabilized asset during the hold period. It compensates the developer member for its ongoing management infrastructure and the time its principals devote to the JV's operating affairs.
- The acquisition fee is a one-time fee, typically 0.5% to 1.5% of purchase price, paid to the developer member on the acquisition of a property. It compensates the developer member for sourcing the deal, conducting due diligence, and negotiating the acquisition.
- The disposition fee is a one-time fee, typically 0.5% to 1% of sale price, paid to the developer member on the sale or refinancing of a property. It compensates the developer member for managing that process.
- The financing fee, typically 0.25% to 1% of loan amount, is paid to the developer member for sourcing, negotiating, and closing construction or permanent financing on behalf of the JV.

Developer fees are contentious in JV negotiations for several reasons. From the capital member's perspective, fees reduce the JV's distributable cash flow and effectively shift economic risk to the capital member, because fees are paid regardless of project performance while the promote is contingent on the project hitting its return thresholds. From the developer member's perspective, fees are essential compensation for the time, overhead, and risk that the developer member's organization devotes to the project, independent of whether the promote is ever realized.

Negotiating Tip: Fee Sequencing in the Waterfall

One of the most consequential fee negotiating points, and one that is often overlooked, is whether developer fees are treated as 'above the line' operating expenses (paid before any capital is returned or preferred return accrues) or 'below the line' JV distributions (paid only after capital is returned and the preferred return is satisfied). Developer members should fight hard to keep fees above the line, where they are paid regardless of project performance. Capital members often push to have at least some fees, particularly asset management fees and disposition fees, deferred or subordinated to the preferred return. The resolution of this single issue can move millions of dollars between the parties on a large project.

In-Kind Contributions: Land, Entitlements, and Relationships

Not all contributions to a JV are monetary. In many real estate JVs the developer member contributes non-cash assets, most commonly land it already owns, entitlements it has obtained or is in the process of obtaining, or relationships with brokers, tenants, lenders, or contractors that give the JV a competitive advantage. The proper treatment of these in-kind contributions is one of the most complex and frequently disputed aspects of JV structuring.

When a developer member contributes land to a JV, three questions drive the analysis. First, at what value is the land contributed? Second, what are the tax consequences of

the contribution? Third, how does the land contribution interact with the capital member's preferred return calculation?

If the land is contributed at its fair market value, the developer member effectively receives credit for that value as a capital contribution, reducing the cash equity required from either party. But the tax consequences of contributing appreciated property to a partnership, the LLC being taxed as a partnership, are complex. Under Section 704(c) of the Internal Revenue Code, built-in gain on contributed property must be allocated to the contributing partner on a later sale, which can create significant tax liability for the developer member that is not obvious from the economics of the deal.

The contribution of entitlements requires similar care. Entitlement value may be substantial but hard to quantify precisely. Many capital members resist crediting the developer member for entitlement value at the outset, preferring to see that value reflected in the project's returns, and in the developer member's promote, rather than in its capital account. The resolution is highly deal-specific and usually calls for experienced counsel and often a third-party appraisal.

Practice Note: The Hidden Tax Trap of Contributed Land

A developer member who contributes appreciated land to a JV without proper legal and tax advice can face a costly surprise at disposition. Under Section 704(c) of the Internal Revenue Code, the built-in gain on contributed property, the difference between the land's fair market value at contribution and the developer member's tax basis, must be allocated to the developer member when the property is eventually sold. The developer member can therefore owe substantial capital gains tax even if its economic return from the JV is modest. Experienced JV counsel work closely with tax advisors to structure in-kind contributions in a way that is equitable, tax-efficient, and clearly documented in the operating agreement.

Capital Stacks and How the JV Fits Within Them

Real estate development projects are rarely funded with equity alone. Knowing where the JV sits within the broader capital stack, and how each layer of that stack interacts with the others, is essential to understanding the risk and return profile of the JV equity.

The capital stack of a real estate development project is the hierarchy of financial instruments used to fund the project's total costs. Each layer of the stack has a different risk profile, return expectation, and priority of repayment. Understanding the stack is essential to understanding both the absolute returns available to the JV equity and the risks that equity bears.

The Layers of the Capital Stack

A typical real estate development project is funded through some combination of the following capital sources, listed from least risky to most risky and, correspondingly, from lowest expected return to highest.

- Senior construction debt is the first mortgage loan provided by a bank, insurance company, or other institutional lender. It holds the most senior claim on the

project's assets and cash flows and is repaid first, in full, before any return of equity or payment of preferred return. In exchange for that seniority, senior lenders accept a relatively modest return, generally in the range of SOFR plus 200 to 400 basis points for institutional construction loans in a normal market. Senior construction debt typically funds 50% to 70% of total project costs, expressed as a loan-to-cost or LTC ratio, with the balance funded by equity and subordinate debt.

- Mezzanine debt and preferred equity sit below senior debt but above common equity, filling the gap in projects that require more leverage than senior debt alone can provide. Mezzanine debt is technically a loan secured by a pledge of the borrower's LLC membership interests rather than a mortgage on the real property, and it carries a higher interest rate than senior debt, typically 8% to 14%. Preferred equity is structured as an equity investment with a preferred return rather than a fixed debt obligation, but it functions economically much like mezzanine debt: it receives its preferred return before common equity and carries enforcement rights, including the ability to remove the manager, on a payment default.

- JV common equity is the equity contributed by the developer member and the capital member through the joint venture. Common equity is the most subordinate layer of the stack: it bears the first loss if the project underperforms and receives the last dollar of profit if it outperforms. That subordination is the economic rationale for the common equity's right to the project's residual profits, including the promote, after senior lenders and preferred equity investors have been paid.

The JV equity's position at the bottom of the stack has critical implications for how the operating agreement is structured. Because the JV equity bears the first loss, the capital member demands robust governance rights to protect its investment, including approval over the business plan, the construction loan, any mezzanine financing, and the disposition strategy. And because the JV equity's upside is uncapped, subject to the promote structure, the developer member is willing to provide a preferred return to the capital member in exchange for a disproportionate share of profits above that threshold.

Typical Capital Stack for a Development JV

Capital Source	Typical % of Total Cost	Return Expectation	Risk Position
Senior Construction Loan	50% to 70%	SOFR + 200 to 400 bps	First lien; lowest risk
Mezzanine Debt / Pref. Equity	10% to 20%	8% to 14% fixed/preferred	Second position; moderate risk
JV Common Equity	20% to 35%	15% to 25%+ IRR (unlevered equivalent)	Last dollar; highest risk

Capital Source	Typical % of Total Cost	Return Expectation	Risk Position
Capital Member	80% to 95% of equity	Pref. return + pro rata share	Senior within equity stack
Developer Member	5% to 20% of equity	Fees + promote	Junior within equity stack

The interaction between the JV operating agreement and the construction loan documents is a critical area of attention for experienced JV counsel. Construction lenders routinely impose restrictions on distributions from the JV during the loan term, on transfers of membership interests, and on major decision-making, and those restrictions can effectively override carefully negotiated operating agreement provisions. Making sure the operating agreement and loan documents are coordinated, and that both JV parties understand any lender consent rights, is one of the most important services experienced JV attorneys provide.

Both Perspectives: Reading the Capital Stack

From the developer member's perspective, a larger senior loan means less equity is required, which means less dilution and a higher return on the developer member's co-investment. It also means more guaranty exposure, higher debt service risk, and a thinner equity cushion if the project underperforms. From the capital member's perspective, more leverage amplifies both the upside and the downside of the equity position, and it raises the importance of governance rights that guard against a developer member taking on excessive construction or operational risk with capital the capital member cannot easily replace.

The Waterfall: The Heart of the Economic Deal

The distribution waterfall is the most important and most heavily negotiated economic provision in any real estate joint venture operating agreement. It determines, with mathematical precision, how every dollar the JV distributes is allocated between the developer member and the capital member. No serious JV participant can afford to leave it half-understood.

The term waterfall, borrowed from the image of water flowing over a series of descending tiers, describes the hierarchical system by which distributions from the JV are allocated. Cash flows down from the top, and at each tier it is allocated before any remainder flows to the tier below. The parties are entitled to distributions only when, and to the extent, cash reaches their respective tier.

A well-structured waterfall protects the capital member's priority of return while preserving the developer member's incentive to maximize project value through the promote. A waterfall that is ambiguous, internally inconsistent, or imprecisely drafted is among the most common sources of costly, drawn-out JV litigation.

The Standard Four-Tier Waterfall

The most common structure for a real estate JV waterfall involves four sequential tiers, each of which must be fully satisfied before distributions flow to the next.

Tier 1: Return of Capital

The first tier returns each member's contributed capital in full before any profit is distributed. In a standard JV, the capital member's capital is returned first, reflecting its senior priority within the equity stack, followed by the developer member's contributed capital, if any. No preferred return, no promote, and no pro rata profit sharing occurs until all contributed capital has been returned.

The return-of-capital tier looks simple but conceals important drafting questions. Is contributed capital defined as the amount actually funded, or is it adjusted for deemed distributions, fee offsets, or tax withholdings? Is capital returned pari passu between the capital member and the developer member, or does the capital member's capital take priority? What happens to unreturned capital if the JV is dissolved without sufficient proceeds? Each question has a real economic consequence and must be answered precisely in the operating agreement.

Tier 2: Preferred Return

The second tier pays each member a preferred return on its unreturned contributed capital, an annual cumulative return that accrues from the date of each capital contribution until that contribution is returned. The preferred return is the capital member's baseline economic protection: it ensures the capital member receives a minimum annual return on its investment before the developer member receives any promote.

Preferred return rates in real estate JVs typically range from 6% to 10% per annum, though they can run higher for higher-risk projects, such as ground-up development in secondary markets, or lower for lower-risk deals, such as stabilized core acquisitions. The exact rate is a central point of negotiation and reflects the parties' assessment of the risk of the specific investment.

Critical preferred return drafting issues include the following.

- Simple compared with compounding. A preferred return that compounds, accruing on both the unpaid principal and on previously accrued but unpaid preferred return, accumulates significantly faster than a simple preferred return. On a large, long-duration project, the difference between the two can amount to millions of dollars. Developer members strongly prefer a simple preferred return; capital members prefer compounding.

- Cumulative compared with non-cumulative. A cumulative preferred return accrues continuously, whether or not cash is available to pay it, and any shortfall is carried forward as an unpaid obligation of the JV. A non-cumulative preferred return is forgiven if it is not paid in a given period. Almost all institutional JVs use cumulative preferred returns; non-cumulative structures are rare and generally unacceptable to sophisticated capital members.

- The preferred return base. Does the preferred return accrue on all contributed capital, or only on unreturned capital? If distributions partially return the capital member's capital, does the preferred return base decrease accordingly? These questions carry significant economic implications and must be answered precisely.

- Preferred return on the developer member's co-investment. Does the developer member's co-investment earn a preferred return, or is the preferred return exclusively for the capital member's benefit? In many JVs the developer member's co-investment earns a preferred return pari passu with the capital member, which matters to the developer member's overall economics.

Tier 3: The Catch-Up (If Any)

Some JV waterfalls include an intermediate catch-up tier between the preferred return and the final profit-sharing tier. The catch-up is designed to let the developer member receive a larger-than-pro-rata share of distributions immediately after the preferred return is satisfied, so that it can catch up to its promote percentage.

For example, suppose the developer member's promote in the final tier is 20% of total distributions, and the capital member has received all of its capital plus its preferred return. The catch-up might provide that the next tier of distributions goes 100% to the developer member until, in the aggregate, 20% of all distributions made to date have gone to the developer member. Only after that catch-up is complete do distributions in the final tier return to a pro rata sharing between the parties.

Catch-up provisions are strongly favored by developer members, because they accelerate the timing of promote receipts, and frequently resisted by capital members, because they reduce the capital member's share in the tier immediately after the preferred return is satisfied. Whether and how a catch-up is structured is a significant negotiating point in any JV.

Tier 4: Promote Sharing (Residual Profits)

The final tier distributes residual profits, everything that remains after capital has been returned and the preferred return satisfied, between the capital member and the developer member in proportions that reflect the negotiated promote structure. The developer member's promote is its disproportionate share of these residual profits, its right to receive more than its pro rata share in recognition of the value it has created.

A typical promote structure might provide that the capital member receives 80% of residual profits and the developer member receives 20%, even though the developer member contributed only 10% of the equity. That ten-percentage-point excess above the developer member's pro rata share (10% equity, 10% pro rata share of profits, 20% actual share of profits, a 10% promote) is the economic heart of the JV for the developer member.

Promote percentages in institutional JVs typically range from 15% to 30% of residual profits above the preferred return hurdle, with 20% being the most common benchmark.

They are highly deal-specific, however, and depend on the complexity of the project, the track record and bargaining power of the developer member, the risk profile of the investment, and the return requirements of the capital member.

Multiple Promote Tiers: IRR Hurdles and Equity Multiple Hurdles

More sophisticated JV waterfalls incorporate multiple promote tiers, with the developer member's promote percentage increasing as the project achieves higher levels of return. This stepped promote structure aligns the developer member's incentives with the capital member's return expectations: the developer member earns a modest promote for achieving baseline returns and a more substantial promote for delivering exceptional performance.

Promote hurdles can be expressed in two ways.

- IRR hurdles. The developer member's promote percentage increases as the capital member's internal rate of return on its invested capital exceeds defined thresholds. For example: a 10% promote on a capital member IRR of 8% to 12%; a 20% promote on a capital member IRR of 12% to 18%; and a 30% promote on a capital member IRR above 18%. IRR-based hurdles reward the developer member for both the magnitude and the timing of returns, because a project that delivers the same total profit in fewer years produces a higher IRR and unlocks a higher promote tier.

- Equity multiple hurdles. Alternatively, promote thresholds can be expressed as equity multiples, the ratio of total distributions received by the capital member to its total contributed capital. For example: a 15% promote on a capital member equity multiple of 1.0x to 1.5x; a 20% promote on an equity multiple of 1.5x to 2.0x; and a 25% promote on an equity multiple above 2.0x. Equity multiple hurdles are simpler to calculate and less sensitive to timing than IRR hurdles, but they do not reward the developer member for delivering returns quickly.

Many sophisticated JV waterfalls use both IRR and equity multiple hurdles in tandem, requiring the developer member to satisfy both thresholds before moving to the next promote tier. This double-hurdle structure protects the capital member against promote gaming and ensures that the developer member's incentive compensation truly reflects superior performance.

Worked Waterfall Example

The following example illustrates a four-tier waterfall with a single promote tier. Assumptions: total equity invested of $20,000,000 (capital member $18,000,000; developer member $2,000,000); a hold period of five years; total distributions available on sale of $35,000,000; a preferred return of 8% per annum, simple, with both members' capital earning the preferred return pari passu; and a promote of 80% to the capital member and 20% to the developer member on residual profits.

Worked Waterfall Example

Distribution Tier	Amount	Capital Member	Developer Member
Tier 1: Return of Capital	$20,000,000	$18,000,000	$2,000,000
Tier 2: Preferred Return (8% simple, 5 years)	$8,000,000	$7,200,000	$800,000
Subtotal After Tiers 1 and 2	$28,000,000	$25,200,000	$2,800,000
Remaining for Distribution	$7,000,000		
Tier 4: Residual Profits (80/20)	$7,000,000	$5,600,000 (80%)	$1,400,000 (20%)
Total Distributions	$35,000,000	$30,800,000	$4,200,000
Effective Return on Equity		~11.3% IRR	~16.0% IRR on $2M co-invest

Note how the promote operates here. The developer member contributed 10% of the equity ($2M of $20M) but received roughly 12% of total distributions ($4.2M of $35M). More to the point, the developer member's $1,400,000 of Tier 4 profit includes an additional layer it would not have received on a purely pro rata basis. If distributions had been made 90/10, reflecting the developer member's 10% equity share, the developer member would have received only $3,500,000 rather than $4,200,000. The $700,000 difference is the promote at work.

Practice Note: The Promote Is Earned, Not Given

Both parties should understand that the promote is not a gift from the capital member to the developer member. It is a performance-based incentive the developer member earns by delivering returns that satisfy the capital member's preferred return threshold. A developer member that fails to achieve the preferred return earns no promote at all, or a reduced promote in a tiered structure. This performance-contingent nature is why the precise definition of terms like 'capital member IRR' and 'capital contributions' is so important. Small differences in definition can translate into large differences in the economic outcome.

Co-Investment Rights and Sidecar Vehicles

As JV relationships mature and capital members develop confidence in their developer partners, they often seek the right to invest additional capital alongside the JV, through co-investment rights and sidecar vehicles, to increase their exposure to especially attractive opportunities.

Co-investment rights are provisions in a JV operating agreement, or in a separate side letter, that give the capital member the right but not the obligation to invest additional equity in specific projects or transactions alongside the JV, at the same economics as the JV itself. They are valuable to capital members because they allow increased exposure to attractive opportunities without diluting the developer member's promote or altering the JV's economics.

From the developer member's perspective, co-investment rights are generally acceptable as long as they do not give the capital member disproportionate control over project-level decisions or create conflicts with the developer member's obligations to other capital partners. Developer members should make co-investment rights subject to reasonable conditions, including minimum investment thresholds, timing requirements, and the exclusion of highly proprietary or relationship-sensitive transactions.

Sidecar vehicles are separate investment entities, typically separate LLCs, formed to hold a co-investment alongside the primary JV. They allow the capital member, or, in a programmatic context, multiple capital sources, to participate in a transaction at the same economics as the primary JV without altering the ownership structure or governance of the primary vehicle. The operating agreement for the sidecar is usually substantially identical to the primary JV operating agreement, with modifications to reflect the sidecar's proportional participation.

For developer members, sidecar vehicles add administrative complexity and the potential for conflicts among multiple capital sources. Careful drafting is required to keep the sidecar's rights and obligations clearly aligned with the primary JV, to avoid fragmenting decision-making across multiple governance structures, and to ensure the developer member's promote is not diluted or complicated by the addition of the sidecar.

Clawback Provisions: When the Promote Must Be Returned

The clawback is the developer member's greatest economic risk in a multi-asset JV, and the capital member's most important protection against overpayment of the promote on a deal-by-deal basis. No developer member should sign a JV operating agreement containing a clawback without understanding precisely how it works and negotiating its scope with care.

A clawback provision, sometimes called a giveback or lookback provision, requires the developer member to return previously received promote distributions if, at the end of the JV's life or at defined interim measurement dates, the aggregate promote payments made to the developer member exceed what it was entitled to receive based on the capital member's overall IRR across all assets in the JV.

Clawback provisions are most relevant in multi-asset or programmatic JVs, where the developer member may receive promote on an asset-by-asset basis as each asset is sold and may end up having received more promote on early-selling winners than it is entitled to once the full portfolio's performance is calculated. In a single-asset JV the promote is calculated once, on disposition, so there is no opportunity for overpayment that needs to be clawed back.

How the Clawback Operates

A typical clawback provision works as follows. At the end of the JV's life, or at defined interim calculation dates, the parties recalculate the promote as if all assets had been sold at once, effectively computing the developer member's true promote entitlement on

an aggregate portfolio basis. If that aggregate calculation shows the developer member received more in per-asset promote distributions than it was entitled to on a portfolio basis, the developer member must return the excess to the capital member.

The clawback creates significant financial risk for developer members, particularly in programmatic JVs where promote payments from early-performing assets may already have been spent, invested in new projects, distributed to principals, or used to fund operating costs, by the time the clawback obligation arises. Experienced developer members negotiate carefully to limit clawback risk through several mechanisms.

- Clawback caps, which limit the maximum clawback to a defined percentage of aggregate promote received. For example, no more than 50% of prior promote distributions must be returned, regardless of the portfolio's overall underperformance.

- Tax gross-ups, which require the clawback obligation to be calculated on an after-tax basis so that the developer member is not forced to return gross promote payments on which it has already paid income tax. Without a tax gross-up, the developer member effectively returns more than it received on an after-tax basis.

- Interim clawback calculations, which, in long-duration programmatic JVs, can be set at defined intervals, such as every three to five years. These limit the accumulation of clawback exposure over long periods and give the developer member earlier certainty about its net economic position.

- Escrow arrangements, under which some capital members require that a portion of promote distributions, typically 20% to 35%, be held in escrow pending the final portfolio performance calculation. This limits the developer member's immediate access to promote cash but also limits the capital member's clawback exposure to the escrowed amounts.

- Per-asset compared with aggregate calculation. Developer members should resist clawback structures that calculate on an aggregate portfolio basis if the JV includes assets of materially different risk profiles. An underperforming asset in a tertiary market should not claw back the promote earned on an outperforming asset in a primary market.

Practice Note: The Clawback Is a Real Liability

Developer members frequently treat the clawback as a theoretical risk that will never materialize. That is a dangerous assumption. Real estate market cycles are real, and a programmatic JV that began investing at the peak of a cycle may face a reckoning when later-vintage assets underperform. Developer members who received substantial promote on early assets and spent those proceeds before the clawback calculation can find themselves personally liable for amounts they cannot pay. Experienced JV counsel negotiate clawback provisions with the seriousness they deserve, not as a boilerplate concession but as a material economic risk that must be carefully bounded.

Fees Payable to the Developer Member

Developer fees are not a sideshow to the JV economics. They are a central component of the developer member's total compensation and a significant point of negotiation with capital members who view fees as a drag on returns. Understanding how each fee category is structured, priced, and documented is essential to negotiating a fair and durable economic arrangement.

As introduced earlier in this chapter, developer fees take several forms. This section examines each principal fee category in more detail, with attention to the negotiating dynamics and drafting issues specific to each.

Development Fee

The development fee is the most significant fee in a ground-up development JV. It compensates the developer member for the full scope of pre-development and development management services: site selection and acquisition, entitlement management, design oversight, contractor procurement, construction management, and project closeout.

Development fees are typically calculated as a percentage of total project costs, hard and soft costs, but sometimes excluding land, with typical ranges of 2% to 5% depending on project size (larger projects command lower percentages), complexity, and market convention. On a $100 million development project, a 3% development fee generates $3,000,000, a meaningful component of the developer member's compensation that it receives regardless of whether the project ultimately produces a promote.

Key development fee structuring issues include the following.

- Fee base definition. Is the fee calculated on the total project budget (hard costs only, or hard plus soft costs), on contracted costs, or on actual costs? The difference can be material on a large project with significant soft costs. Developer members prefer a fee base that includes all costs; capital members often push to exclude land costs, which the developer member may have contributed, and certain soft costs.

- Payment schedule. Development fees are typically paid in installments tied to construction draw milestones rather than as a lump sum, which gives the developer member cash flow during the construction period when the project generates no revenue. The schedule should be tied to objective, verifiable milestones.

- Fee treatment on termination. If the developer member is removed as manager before the development fee is fully earned, what portion of the fee, if any, is payable? Developer members should negotiate for a vested portion, proportional to work completed, to be paid even on removal.

- Capitalization compared with expensing. Development fees are typically capitalized as part of the project's cost basis for tax and accounting purposes rather than expensed as a current operating cost. This treatment affects the project's ongoing depreciation and its ultimate gain on sale.

Construction Management Fee

Where the developer member provides construction management services, overseeing the general contractor, reviewing and approving pay applications, managing the construction schedule, and coordinating with the lender's inspector, a separate construction management fee is often charged in addition to the development fee. This fee is typically 1% to 3% of hard construction costs, and it is distinct from the general contractor's fee, which is the GC's compensation for physically constructing the improvements.

Capital members sometimes resist a separate construction management fee when a development fee is already being paid, viewing the two as overlapping compensation for the same work. Developer members counter that the construction management function is distinct from the broader development management role and requires dedicated staff and overhead that the development fee does not fully cover. The resolution is highly deal-specific and depends on the scope of the developer member's role in the construction process.

Asset Management Fee

The asset management fee compensates the developer member for managing the stabilized asset during the hold period: overseeing the property manager, monitoring financial performance, handling lender reporting obligations, making strategic decisions about leasing and capital improvements, and positioning the asset for eventual disposition.

Asset management fees are typically calculated as an annual percentage of invested equity, commonly 0.5% to 1.5%, or of gross revenues, commonly 1% to 3%, and are paid quarterly or annually throughout the hold period. The fee continues until the asset is sold or the developer member is removed as manager.

Key asset management fee issues include the fee's relationship to any third-party property management fee (are both being paid at once?), the fee's treatment if the asset is underperforming (capital members sometimes push for fee abatement if certain performance thresholds are not met), and the fee's continuity if the developer member is removed without cause (developer members should negotiate for a wind-down period during which the fee continues while the manager transition is completed).

Acquisition and Disposition Fees

Acquisition fees, typically 0.5% to 1.5% of purchase price, are paid to the developer member on the closing of an acquisition. Disposition fees, typically 0.5% to 1% of gross sale price, are paid on the closing of a sale. These fees compensate the developer

member for the time, relationships, and expertise required to source, diligence, negotiate, and close acquisitions, and to manage the sale process.

Disposition fees are particularly contentious because they are paid at the moment the waterfall is calculated, reducing the amount available for distribution and, in some structures, reducing the capital member's return. Capital members sometimes push to have disposition fees offset against the promote, treating them as an advance on the developer member's promote rather than an independent fee. Developer members resist that characterization, arguing that the disposition fee compensates for services rendered regardless of promote entitlement.

Financing Fee

A financing fee, typically 0.25% to 1% of loan amount, compensates the developer member for sourcing and negotiating construction and permanent financing on behalf of the JV. Because construction loan procurement requires real expertise, lender relationships, and time, a financing fee is a reasonable component of the developer member's compensation package. Capital members sometimes resist financing fees, however, on the ground that lenders already pay origination fees and that the developer member's lender relationships are part of what it contributes to the JV as a non-monetary contribution.

Developer Fee Summary

Fee Type	Typical Rate	Calculation Base	Payment Timing
Development Fee	2% to 5%	Total project costs (hard + soft)	Construction draw milestones
Construction Mgmt. Fee	1% to 3%	Hard construction costs	Monthly during construction
Asset Management Fee	0.5% to 1.5% / 1% to 3%	Invested equity / Gross revenues	Quarterly or annually
Acquisition Fee	0.5% to 1.5%	Purchase price	At acquisition closing
Disposition Fee	0.5% to 1.0%	Gross sale price	At disposition closing
Financing Fee	0.25% to 1.0%	Loan amount	At loan closing

Capital Member Perspective: Benchmarking Fees Against Market

Capital members should insist on benchmarking all developer fees against market rates for comparable services. A developer member that charges above-market fees on a deal where the promote economics already favor the developer is effectively double-dipping at the capital member's expense. Experienced capital member counsel negotiate fee caps, fee offsets (for example, third-party management fees credited against the asset management fee), and market-rate adjustment provisions that keep the developer member fairly compensated without being overcompensated.

Capital Call Mechanics and Dilution

Every real estate joint venture will, at some point, need additional capital beyond what was initially committed. How that additional capital is sourced, how the obligation to contribute it is enforced, and what happens if a member fails to contribute are among the most consequential, and most often overlooked, provisions of any JV operating agreement.

Capital calls, formal requests by the manager for members to contribute additional equity to the JV, arise in virtually every real estate project. Construction cost overruns, unexpected environmental conditions, delayed lease-up, lender covenant requirements, and market disruptions can all require equity contributions beyond the initial project budget. The operating agreement must specify clearly who can make a capital call, when capital calls are required, how much notice is required before a member must fund, and, most critically, what happens if a member does not fund a required call.

Initial Capital Commitments and Funding Schedules

A well-structured JV operating agreement distinguishes between a member's capital commitment, the total amount it agrees to contribute over the life of the JV, and its capital contributions, the amounts it has actually funded to date. The difference, the unfunded commitment, represents the member's remaining funding obligation.

Funding schedules should be tied, wherever possible, to objective triggering events: construction loan closing, permitting milestones, construction draw requests, and lease-up benchmarks. Vague funding schedules, such as 'as needed' or 'upon the manager's determination,' create disputes and should be avoided. The operating agreement should specify the minimum notice required before a capital call must be funded, typically five to fifteen business days depending on the urgency, and the procedure for challenging a call the member believes is improper.

Mandatory and Discretionary Capital Calls

Capital calls can be either mandatory, meaning the member is obligated to fund the full amount called subject only to the procedural requirements of the operating agreement, or discretionary, meaning the member has the option but not the obligation to fund. Most institutional JV operating agreements provide for mandatory capital calls up to the member's unfunded commitment, reflecting the capital member's need for certainty that its equity commitment will actually be funded when required.

Discretionary capital calls, sometimes used for equity above the initial commitment or for opportunity capital to fund acquisitions within a programmatic JV, give members flexibility but introduce uncertainty. If a member declines a discretionary call, the other member may have the right but not the obligation to contribute the unfunded amount, which creates a dilution event.

Consequences of Failure to Fund: Dilution and Default

The most significant capital call provisions, and the ones most frequently disputed in JV litigation, are the consequences of a member's failure to fund a required capital call. Operating agreements typically provide for one or more of the following remedies.

- Dilution, the most common remedy. If a member fails to fund a capital call, the other member may fund the shortfall, and the non-funding member's percentage interest in the JV is reduced, or diluted, to reflect the new ratio of its funded capital to total funded capital. Dilution mechanics can be purely mathematical, with the non-funding member's interest simply recalculated, or punitive, with the non-funding member's interest diluted at a multiple of the shortfall, for instance at 150% of the funded amount, which effectively penalizes the default.

- Loan right. The funding member may have the right to contribute the unfunded amount as a cure loan to the non-funding member, treated as a senior loan from the funding member to the JV, or to the non-funding member directly, bearing interest at a penalty rate, often the lesser of 15% per annum or the maximum legal rate. Cure loans are repaid from the non-funding member's distributions before that member receives any further distributions.

- Conversion. In some operating agreements, a non-funding member's interest is converted from a common interest to a preferred interest on default, eliminating its promote rights and limiting its economic participation to a fixed preferred return on its contributed capital.

- Buy-out right. The funding member may have the right but not the obligation to purchase the non-funding member's interest at a defined price, often at a significant discount to fair market value, on a capital call default.

- Manager removal. If the developer member fails to fund a capital call, the capital member may have the right to remove the developer member as manager, triggering the removal provisions of the operating agreement.

From the developer member's perspective, dilution remedies are often the most threatening consequence of a capital call default, particularly if the dilution is punitive. Developer members with modest co-investment obligations, in the range of 5% to 10% of equity, can quickly find their interests diluted toward zero if they cannot fund even a relatively small capital call. Developer members should negotiate to limit the remedy for co-investment defaults to mathematical, non-punitive dilution, and should make any punitive dilution remedy subject to a cure period and limited to egregious defaults rather than good-faith funding disputes.

From the capital member's perspective, strong default remedies are essential protection against a developer member that uses its capital call obligations as leverage in an operational dispute. A capital member that has funded 90% or more of a project's equity cannot afford to have the developer member hold its co-investment contribution hostage to a governance disagreement. Capital members should make sure the default

remedies are clear, automatic, without the need for a member vote or court order, and strong enough to provide a real deterrent.

Practical Example: Punitive Dilution in Action

Start with a developer member holding a 10% interest, $2,000,000 of $20,000,000 in total equity. The JV issues a $2,000,000 capital call, an additional 10% of the original equity. The developer member's pro rata share of that call is $200,000 (10% of $2,000,000). The developer member fails to fund, and the capital member funds the $200,000 shortfall. Under a 1.5x punitive dilution formula, the developer member's capital account is reduced as if it had contributed $300,000 ($200,000 times 1.5) less than its prior balance: $2,000,000 minus $300,000, or $1,700,000. With new total equity of $22,000,000, the developer member's interest falls to $1,700,000 divided by $22,000,000, or 7.73%. A single missed $200,000 capital call cut the developer member's interest from 10% to 7.73%, a roughly 23% reduction in its percentage interest, all from punitive dilution.

Chapter 2 Summary

Chapter 2 has laid out the complete economic architecture of the real estate joint venture. The key takeaways for developer members and capital members alike are these.

- Capital contributions and promoted interest are legally and economically distinct. The promote is not contributed capital. It is an earned economic right contingent on performance above the preferred return threshold.
- Developer fees (development fees, construction management fees, asset management fees, and acquisition and disposition fees) are the developer member's primary in-period compensation and should be negotiated independently of the promote, with careful attention to their position in the waterfall (above or below the line) and their treatment on removal.
- The capital stack defines the JV equity's risk profile. JV equity sits at the bottom of the stack, bearing the first loss and receiving the last dollar of profit. That position justifies both the capital member's preferred return and the developer member's promote.
- The distribution waterfall is the economic heart of the JV. Every tier (return of capital, preferred return, catch-up, and residual profit sharing) must be defined with mathematical precision. Ambiguity in the waterfall is among the most common sources of JV litigation.
- Preferred return mechanics (simple compared with compounding, cumulative compared with non-cumulative, and the definition of the preferred return base) have significant economic effects that compound over time, particularly in long-duration development projects.

- The clawback is a real financial liability for developer members in multi-asset JVs. It must be negotiated with careful attention to caps, tax gross-ups, interim calculations, and the scope of the portfolio included in the lookback calculation.
- Capital call mechanics (who can call capital, on what notice, in what amounts, and with what consequences for non-funding) are among the most practically consequential provisions in any operating agreement and deserve careful negotiation by both parties.

Looking Ahead to Chapter 3

Chapter 3 turns from economics to governance: the provisions that determine who runs the JV, who approves major decisions, how disputes are resolved, and how the manager can be removed. While the waterfall determines how money is allocated, governance determines who controls the decisions that create or destroy the value flowing through the waterfall. As will become clear, economics and governance are inseparable: the developer member who controls the operating decisions also controls the timing and magnitude of the returns that flow through the waterfall, which is precisely why the capital member's governance rights are so fiercely negotiated.

CHAPTER 3

Governance and Control

If the waterfall determines how money is divided, governance determines who controls the decisions that produce the value flowing through it. No provision in a JV operating agreement is more consequential in practice, or more often litigated, than the governance framework that allocates authority between the developer member and the capital member.

This chapter examines the full architecture of JV governance: the spectrum of control arrangements, the allocation of day-to-day management authority against major decision rights, the role and powers of the manager, the structure of investment committees, the super-major decisions that require unanimous consent, the mechanisms for resolving deadlocks, the information and reporting rights of each party, and the removal provisions that determine what happens when the governance framework breaks down.

The dual perspective of the developer member and the capital member runs throughout. Governance provisions are close to zero-sum in their drafting: every right granted to the capital member constrains the developer member's authority, and every protection reserved for the developer member limits the capital member's oversight. Understanding both perspectives is the prerequisite to negotiating a governance framework that holds up, one that functions not only when the project performs as expected but also when it does not.

Governance and economics are inseparable, and that point runs through the entire chapter. The developer member who controls day-to-day management also controls the timing of capital expenditures, the pace of lease-up, the selection of contractors and service providers, and the decision of when to sell, all of which directly affect the capital member's IRR and the developer member's promote. The capital member's governance rights are not merely procedural protections. They are the mechanism by which the capital member protects the economic return it negotiated in the waterfall. Experienced JV attorneys understand that connection and draft governance provisions accordingly.

The Control Spectrum: From Full Developer Control to Full Capital Member Control

No two joint ventures sit in exactly the same place on the governance spectrum. The allocation of control in any particular JV reflects a negotiated balance between the developer member's need for operational autonomy and the capital member's need for investment oversight, a balance shaped by track record, deal size, risk profile, and the relative bargaining power of the parties.

Real estate JV governance arrangements exist on a spectrum. At one end sits the fully developer-controlled JV, in which the developer member serves as manager with broad, nearly unilateral authority to operate the project, subject only to a narrow list of major decisions requiring capital member consent. At the other end sits the fully capital-member-controlled JV, in which the capital member retains approval rights over virtually every significant decision and the developer member functions more as a service provider than a true co-principal. Most institutional JVs land somewhere in between, and the precise location reflects the specific dynamics of the relationship.

Factors That Shift the Governance Balance

Several factors influence where a particular JV falls on the governance spectrum.

- Developer member track record. An established developer with a long history of successful institutional partnerships, deep market relationships, and demonstrated execution commands more governance autonomy than a first-time operator seeking its first institutional capital partner. Capital members extend greater deference to managers whose record provides reliable evidence of judgment and competence.

- Deal size and capital at risk. As the capital member's equity commitment grows, so does its demand for oversight. A capital member deploying $5 million into a smaller project may accept a modest list of major decision approval rights; a capital member deploying $100 million into a large mixed-use development will demand a fuller governance framework, including investment committee approval of material decisions, detailed reporting obligations, and strong removal rights.

- Project type and risk profile. Ground-up development projects, with their extended timelines, multiple execution risk points, and sensitivity to market timing, typically involve more capital member oversight than stabilized acquisition JVs. The more risk the capital member bears, the more governance protection it requires.

- Programmatic and single-asset relationships. In a programmatic JV, the capital member has usually already conducted extensive diligence on the developer member's platform and may accept a more developer-friendly structure for individual assets. In a first-time single-asset JV, the capital member has less information about the developer member's capabilities and may require fuller protections.

- Market conditions and capital availability. When institutional capital is abundant and developer members have multiple financing options, governance terms tend to be more developer-friendly. When capital is scarce and investors hold the leverage, terms shift toward the capital member. The negotiating environment at the time of the deal matters as much as the substantive merits of each party's position.

- Lender requirements. Construction lenders increasingly impose governance-related conditions as part of their loan commitment, including capital member approval of major construction decisions, covenants that limit distributions during the loan term, and the right to remove the manager on a loan default. These lender-imposed requirements interact with, and sometimes override, the governance framework negotiated in the operating agreement.

The Three Principal Governance Models

While every JV governance framework is unique, three broad models recur in practice.

- Manager-managed model with capital member consent rights. The developer member serves as the sole manager of the LLC with broad authority to conduct the JV's day-to-day business, subject to a defined list of major decisions that require the capital member's prior written consent. This is the most common model in institutional JVs and strikes a workable balance between developer member autonomy and capital member protection.

- Co-management model. Both the developer member and the capital member serve as co-managers of the LLC, with management decisions requiring the agreement of both. This model gives the capital member maximum oversight but can create operational paralysis if the managers disagree on routine decisions, which is why it is less common than the manager-managed model with consent rights.

- Investment committee model. A formal investment committee, composed of representatives of both parties, approves major decisions and monitors the JV's performance. The investment committee model is most common in programmatic JVs and larger institutional partnerships, where committee governance fits the parties' internal approval processes.

Governance Dimension	Developer Member Preference	Capital Member Preference
Management authority	Broad, manager-managed; minimal consent requirements	Co-management or extensive approval rights over all material decisions
Major decision threshold	High dollar thresholds; narrow list of consent items	Low thresholds; comprehensive list including routine decisions
Budget variances	Large variance tolerance (15% to 20%) before consent required	Tight tolerances (5% to 10%); line-item approval for overruns
Reporting frequency	Quarterly financial; annual audit	Monthly operating reports; quarterly financials; real-time access to accounts
Investment committee	Avoid or limit to informational role	Formal committee with binding approval authority over major decisions

Governance Dimension	Developer Member Preference	Capital Member Preference
Removal standard	Cause only; narrow cause definition; long cure periods	For-cause and no-cause; broad cause triggers; short or no cure periods
Post-deadlock resolution	Buy-sell; third-party mediation	Capital member override authority; forced sale rights

The Governance-Economics Connection

Every governance provision has an economic dimension. When the capital member requires approval of the annual budget, it is protecting its preferred return by preventing cost overruns that deplete distributable cash. When the developer member resists capital member approval of contractor selection, it is protecting its ability to use relationships that reduce project cost and accelerate the timeline, which enhances the promote. Experienced JV attorneys never draft governance provisions in isolation from the waterfall. The two must be understood and negotiated as a single economic framework.

Major Decision Rights and Day-to-Day Management

The core governance distinction in any JV operating agreement is the line between decisions the manager can make on its own, day-to-day management, and decisions that require the capital member's prior written consent, the major decisions. Drawing that line precisely and comprehensively is one of the most important tasks of JV counsel.

The operating agreement's allocation of decision-making authority is the primary governance battleground of any JV negotiation. The developer member seeks operational autonomy: the right to manage the project efficiently, make time-sensitive decisions without seeking approval, and exercise professional judgment without second-guessing by a capital partner who may lack operational expertise. The capital member seeks investment protection: the right to approve any decision that could materially affect its economic return, its tax position, or its exposure to liability.

The Scope of Day-to-Day Management

Day-to-day management authority, the decisions the developer member as manager can make without prior capital member consent, should be defined broadly enough to permit efficient management but narrowly enough to exclude decisions with material economic or governance consequences. In a well-drafted operating agreement, day-to-day management covers the following.

- Routine property operations: executing leases within approved parameters (rent rates, tenant credit standards, lease terms within defined ranges), authorizing ordinary-course maintenance and repair expenditures up to an approved threshold, managing vendor relationships, and overseeing property management activities.

- Construction management within the approved budget: managing the general contractor and subcontractors, approving pay applications, managing the construction draw process, coordinating with the lender's inspector, and making ordinary-course construction decisions within the parameters of the approved budget and schedule.

- Personnel decisions: hiring, supervising, and terminating employees and independent contractors who provide services to the JV within approved budget parameters.

- Routine legal and compliance matters: responding to governmental notices, managing routine legal matters within defined litigation expenditure thresholds, maintaining required permits and licenses, and complying with applicable laws and regulations.

- Ordinary-course banking and cash management: maintaining bank accounts, making ordinary-course disbursements within the approved budget, and managing working capital within approved reserves.

The dollar threshold above which a routine expenditure requires capital member approval is a key negotiating point. Developer members typically seek high thresholds, $250,000 to $500,000 or more per line item, to avoid the need for approval on routine construction and operating decisions. Capital members typically seek lower thresholds, $50,000 to $150,000 per line item, to maintain oversight over expenditures that could materially affect the budget. The right threshold depends on the scale of the project: a threshold that is appropriately restrictive on a $10 million project may be operationally paralyzing on a $200 million development.

The Major Decisions List: Why Comprehensive Coverage Matters

The major decisions list, the enumeration of decisions that require the capital member's prior written consent, is the most negotiated governance provision in any JV operating agreement. A capital member that fails to include a particular decision category may find itself unable to block a developer member action that materially impairs its investment. A developer member that accepts an overly broad list may find its operational authority so constrained that it cannot manage the project effectively.

A thorough major decisions list in an institutional development JV typically includes the following categories.

- Approval and amendment of the annual budget. The annual operating or development budget is the master financial plan for the JV. Any expenditure not in the approved budget, or any expenditure that exceeds an approved line item by more than the permitted variance threshold, requires capital member approval. This is the capital member's primary financial control.

- Approval and amendment of the business plan. The overall business plan for the project (development program, target tenant mix, projected lease-up timeline,

disposition strategy) must be approved by the capital member, and any material amendment requires re-approval. The business plan is the economic roadmap of the JV, and capital member approval keeps it aligned with the investment thesis underwritten at closing.

- Incurrence of indebtedness. Any borrowing by the JV entity (construction loans, bridge loans, permanent mortgages, mezzanine financing, equipment financing) requires capital member approval. The capital member's exposure to debt-level risk, through guaranty obligations and the risk that debt service consumes distributable cash, justifies its right to approve all borrowings.

- Sale, transfer, or encumbrance of JV assets. Any disposition of JV property, in whole or in part, requires capital member approval. The sale of the project is typically the primary liquidity event for the capital member, so it must have the right to approve or block any proposed disposition.

- Admission of new members. Any change in the JV's membership structure, including the admission of new members or the transfer of existing membership interests, requires capital member consent. This protects the capital member against the developer member bringing in third parties that dilute its governance rights or alter the economic structure of the JV.

- Capital calls above the committed amount. Any equity contribution beyond the parties' initial committed amounts requires capital member approval, since additional contributions dilute the economics of prior contributions and can alter the waterfall calculation.

- Contracts with affiliates. Any contract between the JV and an affiliate of the developer member (management agreements, service contracts, lease agreements, construction contracts) requires capital member approval to prevent self-dealing. This matters because the developer member's affiliates may charge above-market rates that reduce the JV's distributable cash.

- Material litigation. Initiating, settling, or compromising any material litigation or arbitration claim above a defined dollar threshold (typically $100,000 to $500,000, depending on project size) requires capital member approval.

- Tax elections. Any election under the Internal Revenue Code that could materially affect the tax treatment of the JV or its members, including elections under Section 754, Section 761, and other provisions, requires capital member approval, since these elections can significantly alter the tax consequences of distributions and dispositions for both parties.

- Amendment of the operating agreement. Any amendment to the operating agreement itself requires capital member consent, protecting both parties against unilateral modification of the governance framework they negotiated.

- Dissolution and winding up. Any decision to dissolve the JV requires capital member consent.

- Material change in project scope. Any material change to the development program (a change in product type, a significant increase in gross square footage, a change in target market) requires capital member approval, since such changes can alter the risk profile and return projections underlying the investment thesis.

Practice Note: The Importance of Comprehensive Major Decision Lists

A frequent governance dispute arises when a capital member discovers, after the fact, that the developer member has taken an action the capital member believed required its approval but that was not on the operating agreement's major decisions list. Courts interpret operating agreements as commercial contracts and generally hold that a consent right not included was not agreed to, so omissions from the list are final. Capital member counsel should approach the major decisions list as a risk-identification exercise, not a form checklist, and think carefully about the specific operational decisions that the developer member, given its particular business model and operating style, might take that could harm the capital member's investment.

Threshold Issues: When Approval Is Triggered

Even a thorough major decisions list is only as effective as the thresholds that trigger it. Dollar thresholds, percentage thresholds, and qualitative standards all play a role in defining when capital member approval is required.

- Dollar thresholds. Contracts above a specified amount, expenditures exceeding a budget line item by more than a specified amount, or litigation claims above a specified value all trigger the approval requirement. Dollar thresholds must be calibrated to the scale of the project and updated periodically, or indexed to inflation, in programmatic JVs.

- Materiality standards. Some lists include a materiality qualifier (“any contract that would materially and adversely affect the JV's operations”), which can be hard to apply in practice. Developer members prefer qualitative materiality standards because they provide flexibility; capital members prefer objective dollar thresholds because they are certain and not subject to dispute.

- Aggregate thresholds. Some operating agreements include an aggregate threshold: even if no single expenditure exceeds the per-item approval threshold, the aggregate of expenditures in a category, such as unbudgeted change orders, requires approval once it exceeds a defined total. This protects capital members against incremental budget erosion through multiple just-below-threshold expenditures.

The Manager Role: Who Runs the JV?

The manager of a real estate JV LLC is not merely an administrator. The manager is the operational principal of the venture, responsible for executing the business plan, running

the development or operating process, dealing with lenders and third parties, and making the day-to-day judgments that determine whether the project succeeds or fails. The definition of the manager's role, authority, and obligations is among the most important provisions of any operating agreement.

In the standard manager-managed LLC structure, the developer member, or a wholly owned affiliate of the developer member, serves as the initial manager. The operating agreement vests management authority in the manager, subject to the major decisions list and any other limitations the agreement imposes. The manager acts as the JV's agent in all ordinary-course matters, binding the JV entity in contracts, directing employees and contractors, and managing the construction and operating process.

The Manager's Fiduciary Duties and Their Modification

Under the default provisions of most state LLC statutes, a manager owes fiduciary duties, specifically a duty of loyalty and a duty of care, to the LLC and its members. These duties impose meaningful obligations on the developer member as manager.

- The duty of loyalty requires the manager to act in the best interests of the LLC rather than its own self-interest, to avoid conflicts of interest, to refrain from self-dealing, and to account to the LLC for any profit derived from the use of JV property or opportunities.

- The duty of care requires the manager to act with the care, competence, and diligence of a reasonably prudent person in similar circumstances, a standard that can create liability for grossly negligent or reckless management decisions.

Most institutional JV operating agreements, particularly those organized under Delaware law, contractually modify the manager's fiduciary duties, replacing the statutory default duties with a more limited, contractually defined standard. Delaware's LLC Act expressly permits this modification under 6 Del. C. Section 18-1101(c), and developer members routinely use it to protect themselves from fiduciary duty claims arising from good-faith business judgment errors. The one duty the parties cannot eliminate is the implied contractual covenant of good faith and fair dealing, which remains in force regardless of how the agreement modifies the other duties.

The typical modification provides that the manager's sole obligation is to act in good faith and in a manner it reasonably believes to be in the best interests of the JV, a gross negligence or bad faith standard rather than the more demanding duty of care. This modification is essential from the developer member's perspective: the risk of personal liability for business judgment errors that fall short of the statutory duty of care would chill the developer member's willingness to make timely, decisive operational decisions.

From the capital member's perspective, the modification of fiduciary duties makes the explicit enumeration of major decisions and the removal rights discussed later in this chapter all the more important. If the manager's duties are contractually limited, the capital member must protect itself through the operating agreement's express provisions rather than rely on implied fiduciary obligations.

Key Man Provisions: Protecting Against Loss of Critical Personnel

In most real estate JVs, the capital member's primary reason for partnering with the developer member is the expertise, relationships, and judgment of specific individuals within the developer member's organization, the key men without whose involvement the developer member's platform would be materially diminished. Key man provisions address what happens if those individuals are no longer involved in managing the JV.

A typical key man provision identifies two to four specific individuals, by name and title, whose continued involvement in managing the JV is a condition of the developer member's right to serve as manager. If any identified key man ceases to devote substantially all of his or her professional time to managing the JV, subject to reasonable exceptions for illness, family emergency, or other extraordinary circumstances, a key man event is triggered.

The consequences of a key man event typically include the following.

- Suspension of the manager's authority to take major decisions during a defined cure period, typically 60 to 180 days, during which the developer member must identify and propose a replacement acceptable to the capital member.
- The capital member's right to approve any proposed replacement key man, which gives the capital member meaningful control over the developer member's succession planning.
- If no acceptable replacement is identified within the cure period, the capital member's right to remove the developer member as manager without cause, or to exercise a buy-sell mechanism.

Developer members typically resist broad key man provisions on the ground that they create excessive dependency on specific individuals and interfere with organizational succession planning. The negotiated compromise often involves a broader definition of the key man's required involvement (“devoting sufficient professional time” rather than “substantially all professional time”), a longer cure period before a key man event triggers removal rights, and a broader pool of pre-approved successors from within the developer member's organization.

Developer Member Perspective: Negotiating Key Man Provisions

Developer members should approach key man negotiations strategically. Rather than resisting all key man provisions, a position institutional capital members will not accept, developer members should negotiate for: a broad definition of key man involvement that does not require any single individual to be exclusively dedicated to the JV; a pre-approved succession list of alternatives within the developer member's organization; a meaningful cure period, at least 90 to 180 days, before any removal right is triggered; and limitation of key man provisions to decisions that actually require key man involvement rather than all management activities. A developer member that agrees to a poorly drafted key man provision may find itself unable to promote, reorganize, or bring in new talent without triggering a governance crisis.

The Investment Committee Model

For larger, more complex, or programmatic joint ventures, the informal bilateral approval process of the standard manager-managed model may not be enough. The investment committee model brings institutional governance discipline into the JV, with both its benefits and its complications.

The investment committee model establishes a formal decision-making body, the investment committee, composed of representatives of both the developer member and the capital member, with defined voting rights, quorum requirements, meeting procedures, and approval thresholds. In larger institutional JVs and programmatic partnerships, the investment committee serves as the primary governance mechanism for major decisions, replacing or supplementing the bilateral consent process of the standard model.

Structure and Composition

A typical investment committee in a real estate JV consists of three to five members, with representation from both parties. Common structures include the following.

- Two-plus-one structure: two representatives from the capital member, two from the developer member, and one independent member (an experienced real estate professional acceptable to both parties) who serves as tiebreaker on contested votes. This structure is common when the parties have roughly equal bargaining power and want genuine disputes resolved by an impartial arbiter.
- Capital member majority structure: a majority of investment committee seats are held by capital member representatives, giving the capital member effective control over any contested vote. This is typical in deals where the capital member has significantly more leverage or has deployed a very large amount of equity relative to the project size.
- Developer member majority structure: less common, but used in deals where the developer member has exceptional leverage, such as a highly sought-after development opportunity with multiple competing capital sources, and insists on maintaining effective control over all investment committee decisions.

Scope of Investment Committee Authority

The investment committee's approval authority can range from broad, covering all material decisions, to narrow, covering only a defined subset of major decisions not already delegated to the manager. The scope is a key negotiating point: broad investment committee authority effectively converts the JV from a manager-managed structure to a committee-managed structure, which can slow decision-making and create governance friction.

In practice, the most effective investment committee structures assign to the committee the most significant major decisions, business plan approval and amendment, financing

decisions, disposition approval, capital calls above committed amounts, and key man replacement, while delegating ordinary-course operational decisions to the manager. This division preserves the manager's operational efficiency while ensuring the most consequential investment decisions receive formal governance review.

Meeting Procedures and Decision Timelines

One of the most practically important aspects of investment committee governance is the timeline for making and responding to approval requests. A developer member managing a time-sensitive construction or leasing situation cannot wait indefinitely for committee approval of an urgent decision. Operating agreements governing investment committees should specify the following.

- Notice requirements: the minimum advance notice required before a committee meeting or written consent request, typically five to fifteen business days for routine decisions and shorter notice for emergencies.
- Quorum and voting requirements: the number of committee members required to constitute a quorum, and whether approval requires a simple majority, supermajority, or unanimous vote.
- Deemed approval provisions: if the capital member or the committee fails to respond to an approval request within a specified period, typically ten to thirty business days, the request is deemed approved. Deemed approval provisions are essential from the developer member's perspective, because they prevent the capital member from blocking decisions through deliberate inaction.
- Emergency decision procedures: a mechanism for the manager to take emergency action (to protect the physical integrity of the project, respond to a lender demand, or address a public safety issue) without prior committee approval, subject to prompt notice and post-hoc ratification.

Practice Note: The Deemed Approval Trap

Deemed approval provisions, which treat capital member silence as consent after a defined period, are essential protections for developer members managing time-sensitive projects. They are also a real risk for capital members that fail to establish adequate internal processes for responding to approval requests. A capital member that routinely misses the deemed approval window is effectively delegating its governance rights to the developer member by default. Capital member counsel should make sure the client understands its response obligations and has internal processes for reviewing and responding to JV approval requests on time.

Unanimous Consent Items (Super-Major Decisions)

Beyond the ordinary major decisions list, the decisions requiring capital member approval, a subset of the most consequential JV decisions typically require unanimous consent of all members, both the developer member and the capital member. These

super-major decisions are the matters so fundamental to the JV's structure that neither party should be able to impose them on the other.

Super-major decisions, decisions requiring unanimous member consent, differ from ordinary major decisions in that they cannot be made by the capital member alone, even if the capital member holds a controlling economic interest. They are the bedrock terms of the JV: the matters both parties agreed to at the outset as the fixed foundation of their relationship.

The most common categories of super-major decision in institutional JV operating agreements include the following.

- Amendment of the operating agreement. Any amendment requires unanimous consent, protecting both parties against unilateral revision of the governance framework. Neither party should be able to alter the economic or governance terms of the JV without the other's consent.

- Change in the waterfall or promote structure. Any modification of the distribution waterfall, the preferred return rate, the promote percentage, or the clawback structure requires unanimous consent. These are the core economic terms of the JV and cannot be altered without both parties' agreement.

- Admission of new members. The admission of any new member, whether through the issuance of new interests or the transfer of existing interests, typically requires unanimous consent, protecting each party against dilution of its governance rights by the other.

- Actions outside the ordinary course of business. Any action that would fundamentally change the nature of the JV's business or strategy (converting from a development to a long-term hold strategy, changing the project's fundamental use, entering into a joint venture with a third party) requires unanimous consent.

- Dissolution. Any voluntary dissolution of the JV before completion of its stated purpose requires unanimous consent, protecting the developer member against a forced early liquidation and the capital member against a developer member abandoning the project.

- Fundamental changes to tax elections. Elections that fundamentally alter the tax characterization of the JV or its members, such as an election to be treated as a corporation rather than a partnership for tax purposes, require unanimous consent.

- Waiver of fiduciary duties or limitations on liability. Any modification of the personal liability standards of the manager, or any waiver of the manager's fiduciary obligations to members, requires unanimous consent.

The distinction between ordinary major decisions (capital member approval only) and super-major decisions (unanimous consent) matters a great deal to the developer member. In many JV operating agreements, the developer member accepts a structure in which the capital member has effective control over ordinary major decisions, because the capital member's equity majority gives it the economic power to enforce its governance rights. The super-major decision list ensures that even a capital member with overwhelming economic leverage cannot unilaterally rewrite the fundamental terms of the JV without the developer member's agreement.

Deadlock Provisions and Resolution Mechanisms

Every JV governance framework must answer a basic question: what happens when the parties cannot agree? Deadlock provisions, the mechanisms for resolving governance disputes the parties cannot settle through negotiation, are among the most practically consequential and most carefully negotiated provisions of any operating agreement.

A governance deadlock occurs when the parties cannot reach agreement on a matter requiring both parties' consent, most commonly a super-major decision or a decision that has reached an impasse despite good-faith negotiation. Without a deadlock resolution mechanism, a JV can become paralyzed, unable to sell the asset, refinance its debt, or take any other action requiring unanimous consent. The consequences of prolonged deadlock, mounting carrying costs, missed market opportunities, and lender defaults, can be severe for both parties.

Real estate JV operating agreements use several distinct mechanisms to resolve governance deadlocks, each with its own advantages and disadvantages for each party.

Mediation and Expert Determination

The least disruptive deadlock mechanism is mandatory mediation or expert determination. When a deadlock arises on a specific issue, typically a valuation dispute, a budget disagreement, or a disagreement about the scope of a construction change order, the parties submit the dispute to a neutral mediator or independent expert, often a real estate professional with relevant expertise, whose determination binds both parties.

Mediation and expert determination work well for narrowly defined factual or valuation disputes but are less effective for broader disagreements that involve fundamental differences in investment strategy or risk tolerance. They also introduce a third party into the governance process, with attendant costs, delays, and uncertainty.

Capital Member Override Authority

Some JV operating agreements, particularly those that are heavily capital-member-controlled, grant the capital member an override right: the right to make a decision unilaterally if a deadlock persists for a defined period. The capital member override is

the most drastic option in JV governance. It resolves the deadlock efficiently but at the cost of the developer member's governance rights.

Developer members should resist any capital member override authority that reaches decisions affecting the developer member's economic interests, particularly decisions about the timing and terms of a sale, the approval of a refinancing that returns capital and resets the preferred return, or the selection of a replacement manager. An override right on these matters effectively converts the JV from a partnership into an employer-employee relationship, with the capital member as employer and the developer member as service provider.

Buy-Sell (Shotgun) Provisions

The buy-sell mechanism, sometimes called the shotgun or Texas Shootout, is the most common deadlock resolution mechanism in real estate JV operating agreements. It works as follows. On a defined deadlock event, either party (the trigger party) may deliver a written notice to the other (the receiving party) specifying a per-unit price, or aggregate value, at which the trigger party is willing either to buy the receiving party's entire interest or to sell its own entire interest to the receiving party. The receiving party then has a defined period, typically thirty to sixty days, to elect whether to buy or to sell at that price. Because the trigger party does not know whether it will be buying or selling when it sets the price, it is incentivized to set a fair price: too low a price risks being forced to sell at that price, and too high a price risks paying more than fair value.

The buy-sell mechanism is elegant in theory, but it has practical limitations that make it less effective in real estate JVs than its design suggests.

- Financial asymmetry. The capital member, by definition, has significantly more capital than the developer member. A buy-sell that lets the capital member set a price the developer member cannot afford to pay as the purchaser effectively lets the capital member acquire the developer member's interest at the price it chooses. The mechanism's theoretical fairness assumes a financial parity that rarely exists in developer-capital JVs.

- Illiquidity of real estate. The buy-sell was designed for liquid assets where the price is a market-determined value. Real estate is illiquid, and its value at any moment depends on market conditions, the buyer pool, financing availability, and timing, all of which the trigger party can influence by choosing when to trigger the buy-sell.

- Promote entitlement disputes. In a buy-sell, the price at which the developer member's interest trades may not reflect the full value of its promote, particularly if the buy-sell is triggered before the promote's value is realized. Developer members should ensure that any buy-sell includes a promote valuation methodology that captures the present value of the promote that would have been earned on a hypothetical sale at the specified buy-sell price.

- Financing contingency. In most JVs, the buying party must arrange financing for the purchase within a short period. The developer member, which typically has less access to capital than the institutional capital member, may be unable to finance a buy-sell purchase even at a price it considers fair.

Given these limitations, developer members should negotiate several protections around any buy-sell mechanism: a minimum holding period before the buy-sell can be triggered, to prevent the capital member from triggering it during temporary market dislocations; a financing contingency period for the receiving party; a promote adjustment that compensates the developer member for the value of unearned promote at the time of the buy-sell; and a floor below which the buy-sell price cannot be set.

ROFO and ROFR as Deadlock Alternatives

Rights of first offer (ROFO) and rights of first refusal (ROFR) are sometimes incorporated into deadlock provisions as alternatives to the buy-sell mechanism, allowing the non-triggering party to purchase the triggering party's interest before it is sold to a third party. These mechanisms are discussed in greater detail in the transfer restrictions discussion in Chapter 5.

Forced Sale Provisions

Some JV operating agreements include a forced sale provision: the right of either party, or, more commonly, the capital member alone, to require the JV to sell the property to a third party if a governance deadlock persists for a defined period. Forced sale provisions resolve deadlocks definitively but sacrifice the project's full value potential, because a market sale conducted under a governance crisis is unlikely to achieve the best possible price.

Developer members should resist forced sale provisions that the capital member can trigger unilaterally without the developer member's consent, particularly if they can be triggered early in the project's lifecycle before the asset has reached its value potential. At a minimum, developer members should negotiate for a minimum holding period before a forced sale can be triggered, a minimum sale price requirement (no forced sale below a specified floor), and the right to participate in the disposition process as broker or advisor.

Deadlock Resolution: Comparing the Mechanisms

Mediation and expert determination. Best for narrow valuation or factual disputes. Low cost and disruption. Ineffective for fundamental strategy disagreements. Useful as a first-step requirement before more disruptive mechanisms are triggered.

Capital member override. Efficient resolution, but completely eliminates developer member governance rights on the affected decisions. Developer members should resist any override authority on economic or disposition decisions.

Buy-sell (shotgun). Theoretically fair but practically favors the capital member because of financial asymmetry. Requires careful negotiation of minimum hold periods, financing contingencies, and promote valuation.

Forced sale. Definitive resolution, with a risk of value destruction through distressed sale timing. Developer members should negotiate minimum hold periods, price floors, and participation rights in the sale process.

Best practice. A well-drafted deadlock provision uses a tiered approach, mandatory negotiation, then mediation, then the buy-sell or forced sale mechanism as a last resort, with adequate time at each stage to allow good-faith resolution before the most disruptive remedy becomes available.

Reporting and Information Rights

A capital member that cannot see inside the JV cannot protect its investment. Reporting and information rights, the obligation of the manager to provide timely, accurate, and complete financial and operational information to the capital member, are the information backbone of the JV governance framework.

Information asymmetry is one of the fundamental challenges of real estate JV governance. The developer member, as the day-to-day manager, has direct access to all of the project's financial, operational, and development information. The capital member, usually not involved in day-to-day operations, knows only what the developer member chooses to share. Strong reporting and information rights bridge this asymmetry and let the capital member exercise its oversight effectively.

Financial Reporting

At a minimum, a well-drafted JV operating agreement should require the following financial reports.

- Monthly operating reports: a summary of current-period revenues, expenses, cash position, capital expenditure activity, and comparison to the approved budget, delivered within fifteen to twenty business days of month-end. Monthly reports matter most during the construction phase, where cost and schedule variances can emerge quickly.

- Quarterly financial statements: an unaudited balance sheet, income statement, statement of cash flows, and a comparison of actual performance to the approved budget and business plan, delivered within thirty to forty-five days of quarter-end. Quarterly financials should include a narrative management discussion explaining significant variances and any material developments during the quarter.

- Annual audited financial statements: audited statements prepared in accordance with GAAP, delivered within ninety days of fiscal year-end. The annual audit gives the capital member independent verification of the financial information provided throughout the year and is typically required by the capital member's own reporting and compliance obligations.

- Tax returns and K-1s: the JV's federal and state tax returns and each member's Schedule K-1, or equivalent, delivered in time to permit each member to timely file its own tax returns, including extensions if applicable.

- Capital account statements: quarterly or annual statements of each member's capital account balance, reflecting contributions, distributions, and allocated income and loss, which are the financial foundation of the waterfall calculation.

Development and Construction Reporting

In a development JV, financial reporting alone is not enough. The capital member also needs detailed information about the development process itself.

- Construction progress reports: monthly reports on the status of construction relative to the approved schedule, including completed work, pending change orders, anticipated cost-to-complete, and any schedule delays or risk factors.

- Draw request documentation: copies of all construction loan draw requests, including supporting invoices, lien waivers, and the lender's inspection report, delivered concurrently with submission to the lender.

- Budget variance reports: a monthly report tracking actual costs against the approved construction budget on a line-item basis, flagging any line item with a variance exceeding the approval threshold, and explaining the cause and expected impact.

- Permit and entitlement status: regular updates on the status of required permits, approvals, and entitlements, including any governmental action or inaction that could affect the project's timeline or cost.

- Contractor and subcontractor status: notice of any material contractor or subcontractor default, insolvency, or termination, and a proposed remediation plan.

Leasing and Operational Reporting

For income-producing properties in the operating phase, the capital member needs full leasing and operational information.

- Leasing reports: monthly or quarterly reports on leasing activity, including executed leases, letters of intent, lease proposals, and a summary of the tenant pipeline relative to the business plan's lease-up projections.

- Rent roll: a current rent roll reflecting all tenants, their lease terms, rent rates, lease commencement and expiration dates, and any rent abatement, concession, or other unusual lease provisions.

- Property management reports: monthly reports from the property manager on occupancy, delinquencies, maintenance activity, tenant relations, and any material operational issues.

- Lender compliance certificates: copies of all compliance certificates, covenant compliance calculations, and related materials delivered to construction and permanent lenders, concurrently with delivery to the lender.

Inspection Rights and Information Access

Beyond periodic reporting, the capital member should have the right to inspect the JV's books, records, and physical assets.

- Books and records inspection: the right, on reasonable advance notice (typically five to fifteen business days), to inspect and copy the JV's books, records, contracts, and financial information during normal business hours. This right matters most if the capital member suspects that information in periodic reports is incomplete or inaccurate.

- Property inspection: the right to inspect the physical property at reasonable times and on reasonable notice, including during active construction. Physical inspection gives the capital member direct visibility into the progress and quality of construction that periodic reports cannot fully convey.

- Audit rights: in addition to the annual independent audit, the right (at the capital member's expense, unless the audit reveals a material discrepancy) to conduct its own audit of the JV's books and records at any time on reasonable notice. This is the capital member's ultimate check on the accuracy of financial reporting.

- Direct access to JV bank accounts: increasingly, institutional capital members request read-only access to the JV's bank accounts through online banking portals, providing real-time visibility into cash flows without the delay of periodic reports.

Capital Member Perspective: Enforcing Reporting Obligations

A capital member that receives incomplete, late, or inaccurate financial reports is often the last to know about developing problems, precisely when early knowledge would allow timely intervention. Capital member counsel should make reporting obligations enforceable: a right to treat material reporting failures as a cause event for purposes of the removal provisions, and the right to engage an independent accounting firm, at the developer member's expense, to prepare required reports if the developer member fails to deliver them on time. The right to audit and inspect is only worth having if it is exercised, so capital members should build internal processes for reviewing JV reports carefully rather than simply filing them.

Removal of the Developer Member as Manager

The removal provision is the strongest governance tool and the largest governance risk. For the capital member, the right to remove an underperforming or noncompliant

manager is the backstop without which every other governance right is hollow. For the developer member, the removal provision is the one that determines whether years of development work, relationship building, and capital at risk can be stripped away by a capital member acting in its own economic interest.

No provision of a real estate JV operating agreement is negotiated more carefully, or litigated more frequently, than the removal provision. The stakes for both parties are large. For the capital member, an inadequate removal provision can leave it stuck with a manager it cannot remove even in the face of clear mismanagement. For the developer member, an overbroad removal provision can cost it its management role and its entire promote over a capital member's disagreement with a good-faith business judgment.

Removal provisions must answer four questions. What triggers the right to remove? What is the process for exercising it? What are the consequences of removal for the developer member's economic interests? And what happens to the JV's management after removal?

For-Cause Removal

A for-cause removal right entitles the capital member to remove the developer member as manager on the occurrence of defined triggering events, the cause events. The definition of cause is the most intensely negotiated provision in any removal clause, because it determines the circumstances under which the developer member can lose its management role.

From the capital member's perspective, cause should be defined broadly to include any significant deviation from the agreed business plan, any material financial underperformance, any breach of the operating agreement, any event that impairs the developer member's ability to manage the project effectively, or any conduct that creates legal or reputational risk for the JV. A broad cause definition gives the capital member maximum flexibility to remove a manager it has lost confidence in.

From the developer member's perspective, cause should be defined narrowly to include only the most serious, objective, and unambiguous failures, not business judgment errors, not good-faith disagreements about strategy, and not performance shortfalls attributable to market conditions rather than management. A narrow cause definition protects the developer member against bad-faith removal dressed up as cause.

The following table illustrates the typical range of positions on key cause-trigger provisions.

Cause Trigger	Developer Member Position	Capital Member Position
Fraud or willful misconduct	Agrees; clear and unambiguous	Agrees; core cause trigger
Criminal conviction	Felony conviction only; felony directly related to JV	Any criminal conviction, including misdemeanor

Cause Trigger	Developer Member Position	Capital Member Position
Material breach of operating agreement	Only uncured breaches; long cure period (60 to 90 days)	Any breach; short or no cure period for financial breaches
Insolvency / bankruptcy of dev. member	Only involuntary; only if JV harmed	Any bankruptcy filing; automatic removal
Budget overrun	No; market conditions and management errors are not cause	Yes; material overruns (10% to 20% or more) constitute cause
Failure to meet milestones	No; schedule delays are market risk, not management failure	Yes; material schedule delays are management failures
Loss of key man	No; separate key man provisions control	Yes; death, disability, or departure of named individual
Loan default	Only defaults caused by developer member misconduct	Any monetary default, regardless of cause
Breach of non-compete	Any breach should be cause	Any breach should be cause

No-Cause Removal

A no-cause removal right entitles the capital member to remove the developer member as manager at any time, for any reason or no reason, simply by delivering written notice. No-cause removal is the capital member's maximum governance protection and the developer member's greatest governance vulnerability.

From the capital member's perspective, no-cause removal is essential. A capital member that can remove the manager only for specifically defined causes depends on the developer member's conduct fitting neatly within the cause definition, which sophisticated developer members and their attorneys can usually argue against. No-cause removal gives the capital member the practical ability to replace a manager it has lost confidence in without having to prove specific misconduct.

From the developer member's perspective, no-cause removal goes to the heart of the relationship. If the capital member can remove the developer member at any time and for any reason, the developer member's management authority, and potentially its entire promote, sits at the discretion of the capital member. That is not a partnership; it is an employment relationship in which the capital member is the employer.

The no-cause removal debate usually turns on what happens to the developer member's economic interests on removal. Capital members argue that no-cause removal is fair if the developer member's earned promote is preserved; developer members argue that preserving earned promote is meaningless without a clear definition of when promote is earned in a project that has not yet been fully realized. The post-removal economic provisions are therefore the critical battleground in any no-cause removal negotiation.

The Cure Period: A Key Protection for Developer Members

Whether removal is for cause or no cause, the operating agreement should give the developer member a cure period, a defined window in which the developer member can remedy the alleged cause for removal before the capital member's removal right becomes effective. Cure periods matter for several reasons.

- They provide an opportunity to dispute the validity of the alleged cause. If the developer member believes the capital member's removal notice is pretextual or legally improper, the cure period allows time to seek legal advice and challenge the removal before it takes effect.
- They allow the developer member to remedy a legitimate operational failure before permanent removal. A construction delay, a budget variance, or a reporting shortfall that can be remedied within thirty to sixty days should not automatically result in permanent removal.
- They create a practical opportunity for negotiated resolution. The delivery of a removal notice often signals a relationship breakdown that can sometimes be resolved through negotiation of the governance framework, the business plan, or the economic terms if both parties have adequate time to negotiate.

Developer members should negotiate for meaningful cure periods: at least thirty to sixty days for financial defaults, at least fifteen to thirty days for non-financial defaults, and at least ninety to one hundred eighty days for key man events. Capital members typically seek shorter cure periods, ten to thirty days for financial defaults, or no cure period for the most serious cause triggers such as fraud, criminal conviction, and intentional misconduct.

Post-Removal Economic Rights: The Most Critical Negotiating Point

The most consequential and most heavily negotiated aspect of any removal provision is what happens to the developer member's economic interests after removal. This is the provision that determines whether the developer member walks away with compensation for the value it created, or walks away with nothing.

The key questions are these.

- Does the developer member forfeit its entire membership interest on removal, or does it retain an economic interest?
- If the developer member retains an economic interest, is that interest its full promoted interest, or is the promote forfeited in whole or in part on removal?
- Are developer fees that have accrued but not yet been paid forfeited on removal, or do they remain payable?
- Does the answer to these questions differ depending on whether removal is for cause or no cause?

The following framework represents the range of negotiated outcomes on these questions.

Economic Item	For-Cause Removal	No-Cause Removal
Membership interest retained?	Typically forfeited (dev. member seeks partial retention)	Typically retained (capital member seeks forfeiture)
Promote interest?	Forfeited entirely (capital member); vested portion preserved (dev. member)	Pro rata vested portion preserved based on work completed
Accrued unpaid fees?	Disputed; capital member seeks forfeiture, dev. member seeks payment	Typically payable; dev. member has earned these fees
Future fees?	Forfeited upon removal	Forfeited upon removal; wind-down fee sometimes negotiated
Right to accounting?	Dev. member should require final accounting of all accrued amounts	Dev. member should require final accounting of all accrued amounts
Developer's right to purchase?	Sometimes granted at appraised value or formula price	Sometimes granted at appraised value or formula price

The most defensible outcome from the developer member's perspective is a vesting framework for the promote: the developer member's right to the promote vests incrementally over the life of the project, tied to defined development milestones (for example, 25% vested on construction loan closing, 50% on certificate of occupancy, 75% on stabilization, and 100% on sale). On removal for cause, only the vested portion of the promote is preserved. On no-cause removal, the full promote interest is preserved. This framework rewards the developer member for work actually completed while protecting the capital member against paying a full promote to a manager it removed for misconduct.

Post-Removal Management: Transition and Replacement

On removal of the developer member as manager, the JV needs a mechanism for appointing a replacement manager to continue operating the project. The operating agreement should specify the following.

- Interim management authority. During the transition between the developer member's removal and the appointment of a replacement, the capital member should have the right to appoint an interim manager to maintain project operations.
- Replacement manager selection. The process for identifying and appointing a replacement, including whether the capital member has sole authority to select the replacement or the developer member has any right to participate in the selection.

- Cooperation obligation. The outgoing developer member should be required to cooperate fully with the transition, including providing all project information and documentation, facilitating introductions to key contractors and vendors, and refraining from any action that would harm the JV during the transition.

- Non-disparagement and confidentiality. The outgoing developer member should be required to maintain confidentiality about the JV's affairs and to refrain from making disparaging statements about the JV, the capital member, or the project.

Why Removal Provisions Require Specialist Legal Counsel

Removal provisions are the most frequently litigated provisions in real estate JV operating agreements, and the ones where the difference between expert drafting and standard form language is most consequential.

A developer member that accepts a removal provision with a broad cause definition, short cure periods, and full promote forfeiture on removal has accepted a structure in which its entire economic interest in the JV sits at the discretion of its capital partner.

A capital member that accepts a removal provision with a narrow cause definition, no no-cause removal right, and full promote preservation regardless of the circumstances of removal may be unable to replace a manager who is visibly mismanaging the project.

Getting this provision right requires counsel who has not only drafted removal provisions but litigated them, who has seen how courts interpret cause definitions, how removal disputes unfold in practice, and which drafting choices make the difference between a provision that works as intended and one that becomes the subject of years of costly arbitration.

Chapter 3 Summary

Chapter 3 has examined the governance architecture of the real estate joint venture, from the broad control spectrum to the granular mechanics of removal and post-removal economic rights. The key takeaways for developer members and capital members alike are these.

- Governance and economics are inseparable. Every governance provision affects economic outcomes, and every economic provision creates governance incentives. Skilled JV attorneys draft and negotiate these provisions as one integrated framework, not as separate subject matters.

- The manager-managed model with capital member consent rights is the most common institutional JV governance structure, balancing developer member autonomy against capital member oversight. The calibration of major decision thresholds is the central governance negotiating battleground.

- The major decisions list must be thorough and specific. Omissions are final, because courts will not imply consent rights that were not expressly negotiated. Capital member counsel should approach the list as a complete risk-identification exercise.

- The manager's fiduciary duties can be, and routinely are, contractually modified under Delaware LLC law, subject to the non-waivable implied covenant of good faith and fair dealing. When fiduciary duties are limited, the operating agreement's express provisions become the primary, and often sole, source of the manager's obligations to the capital member.
- Key man provisions protect the capital member's investment in specific expertise but must be negotiated carefully to avoid chilling the developer member's organizational development and succession planning.
- Deadlock provisions are essential but imperfect. The buy-sell mechanism's theoretical fairness conceals practical asymmetries that favor the better-capitalized party. Developer members should negotiate minimum hold periods, financing contingencies, and promote valuation protections into any buy-sell provision.
- Reporting and information rights are the information backbone of JV governance. They must be thorough, timely, and enforceable, with real consequences for non-compliance.
- Removal provisions are the most consequential governance provisions in any JV operating agreement. The definition of cause, the length of cure periods, and the post-removal economic treatment of the developer member's interests are the negotiating points that determine the true nature of the JV relationship.

Looking Ahead to Chapter 4

With the economic and governance foundations established in Chapters 1 through 3, the handbook turns in Chapter 4 to the developer member's perspective: what the developer member must protect in negotiating the joint venture, where the greatest risks lie, and which specific drafting provisions the developer member's counsel should prioritize. Chapter 4 is designed to serve as both a negotiating guide and a practical checklist for developer members approaching their first, or their hundredth, institutional joint venture.

CHAPTER 4

What the Developer Member Must Protect: Negotiating the Joint Venture

Years of deal sourcing, entitlement work, contractor relationships, and market expertise have brought the developer member to the table. The joint venture operating agreement will determine whether those years of work are fairly rewarded or whether a poorly negotiated document strips them away at the moment of success. This chapter is the developer member's guide to protecting what it has built.

This chapter is written for the developer member, the party bringing expertise, relationships, execution capability, and often personal guaranty exposure to the joint venture. It examines, in turn, the provisions of the JV operating agreement that most directly affect the developer member's economic interests, operational autonomy, personal liability, and long-term platform viability. For each provision, it identifies what is at stake, what the developer member should seek, what the capital member will typically demand, and what the negotiated middle ground often looks like in practice.

The chapter is organized around the developer member's nine most important areas of protection: protecting the promote; controlling the development process; protecting developer fees; limiting personal exposure through guaranty negotiation; negotiating exit rights and liquidity; protecting against capital member overreach; safeguarding intellectual property and pipeline projects; understanding tax structuring; and avoiding the most common and costly mistakes developer members make in JV negotiations.

One point runs through every section. A developer member that negotiates its JV documents without experienced legal counsel is negotiating blind. The capital member's attorneys, typically sophisticated institutional transactional lawyers who have documented hundreds of JV transactions, understand exactly how each provision will operate in practice. A developer member that brings the same level of expertise and preparation to the table will negotiate a better deal, build a more durable partnership, and protect its economic interests far more effectively than one that treats legal documentation as an afterthought.

Protecting the Promote

The promote is the developer member's most valuable economic asset in any joint venture. It rewards the developer member for creating value above what its co-investment alone would generate, and it is the provision most often impaired, diluted, or eliminated by poorly drafted operating agreement provisions that the developer member did not fully understand when it signed.

The promote, the developer member's disproportionate share of profits above the preferred return threshold, is the financial reward for years of development expertise, execution risk, and personal guaranty exposure. Protecting it requires attention not only to the promote provision itself but to every other provision in the operating agreement that can affect whether and how much promote the developer member ultimately receives. The subsections below address the primary ways the promote is vulnerable and the drafting strategies experienced developer member counsel use to protect it.

Defining the Promote Clearly and Precisely

The most basic protection is also the most overlooked: defining the promote in the operating agreement with complete precision. JV disputes over the promote rarely arise from disagreement about the concept, because both parties understood that the developer member would receive a promote. They arise from imprecision in the definitions of the terms that determine whether the promote has been earned and how much it amounts to.

Precise definition matters for the following terms in particular.

- Capital contributions, the base on which the preferred return is calculated and against which the promote is measured. If this term is defined to include amounts other than cash funded by the members, such as deemed contributions, accrued but unpaid fees, or guaranty-related adjustments, the preferred return base, and so the threshold for earning the promote, will differ from what the developer member understood.

- Capital member IRR. If the promote is tied to IRR thresholds, the definition of IRR must be precise. What cash flows are included (all contributions, distributions, and fees)? Is IRR calculated on an after-tax or pre-tax basis? Are transaction costs included or excluded? Small definitional differences can move the IRR calculation by hundreds of basis points on a large project, which is the difference between a promote that is earned and one that is not.

- Distributable cash, the pool of cash available for distribution through the waterfall. A broad definition (including all cash received by the JV, including refinancing proceeds and insurance proceeds) means the waterfall reflects all cash flows. A narrow definition (excluding certain receipts or requiring large reserves before distribution) shrinks the promote pool.

- Net sale proceeds, the amount available for distribution on a capital event. If broker commissions, closing costs, debt repayment, and other deductions are applied before the waterfall calculation, the proceeds available for the promote tier are reduced accordingly. The developer member should ensure that only bona fide, arms-length transaction costs are deducted before the waterfall calculation.

Practice Note: The Definition Battle

Experienced JV litigators report that the most common promote dispute is not about the promote percentage. It is about the definitions of the terms used to calculate whether the promote has been earned. Developer members who accept capital member form operating agreements without carefully reviewing the definitions section are especially exposed. A definition of capital contributions that includes accrued unpaid management fees as deemed contributions, or a definition of IRR that excludes the developer member's fee income from the calculation, can shift the effective promote threshold by several hundred basis points, which on a large project is the difference between millions of dollars of promote the developer member expected and never receives.

Avoiding Promote Dilution Through Capital Call Mechanics

As discussed in Chapter 2, capital call mechanics provide a direct route to diluting the developer member's economic interest, including its promote, if the developer member fails to fund a required capital call. Protecting the promote from capital call dilution requires attention to several provisions.

- Limiting the developer member's co-investment obligation. The smaller the developer member's co-investment as a percentage of total equity, the smaller the dollar amount of any capital call it must fund, which reduces the risk of a dilutive default. Developer members should negotiate the smallest co-investment consistent with the capital member's alignment requirements, typically 5% to 10% of total equity for most institutional JVs.

- Negotiating non-punitive dilution remedies. As discussed in Chapter 2, dilution on a capital call default can be mathematical (the non-funding member's interest is recalculated based on actual funded amounts) or punitive (the default triggers additional dilution beyond the mathematical adjustment). Developer members should insist on mathematical, non-punitive dilution only, because punitive dilution can disproportionately impair the promote from a single missed co-investment capital call.

- Negotiating cure periods before dilution takes effect. The operating agreement should give the developer member a meaningful cure period, at least ten to fifteen business days, after a missed capital call before dilution becomes effective. This gives the developer member time to obtain alternative financing, dispute the validity of the capital call, or negotiate a modification of the funding obligation.

- Keeping promote rights separate from membership percentage. Some operating agreements tie the promote exclusively to the developer member's percentage membership interest, so that any dilution of that percentage automatically dilutes the promote. Developer members should negotiate for a promote structured as a separate economic right that is not automatically diluted by membership percentage changes, but only by a specific, express provision reducing the promote.

Ensuring the Promote Survives a Refinancing Event

One of the most significant and most overlooked risks to the promote is the treatment of refinancing proceeds in the waterfall. When the JV refinances its construction loan into a permanent loan, or completes any other refinancing that generates net proceeds, those proceeds are available for distribution. If the refinancing generates enough proceeds to return all of the capital member's invested capital plus its preferred return, the waterfall may reach the promote tier, triggering a significant promote payment, before the asset is sold.

This refinancing promote realization can be very valuable to the developer member, which receives a large promote payment years before sale, but it creates tension with the capital member, which may prefer to keep capital within the JV for reinvestment or reserves rather than distribute it through the waterfall. As a result, capital member operating agreements often exclude refinancing proceeds from the waterfall calculation, deferring all promote realization until final disposition.

Developer members should resist provisions that exclude refinancing proceeds from the waterfall and should instead negotiate for full waterfall treatment of all net refinancing proceeds. If the capital member insists on restricting distributions of refinancing proceeds, the developer member should seek a compromise: partial distribution of refinancing proceeds, sufficient to satisfy the preferred return accrual, with the remainder reinvested or reserved as agreed.

Clawback Limitations: Caps, Look-Backs, and Tax Gross-Ups

As discussed in Chapter 2, the clawback provision, which can require the developer member to return previously received promote distributions if aggregate portfolio performance falls short, is the primary route by which a developer member can lose promote it has already received. Protecting against clawback liability requires negotiating the following.

- Clawback cap. The maximum amount subject to clawback should be expressly capped, typically at 50% to 100% of aggregate prior promote distributions. A clawback without a cap is an unlimited contingent liability that can dwarf the developer member's net worth.

- After-tax clawback calculation. The clawback should be calculated on an after-tax basis, with the developer member required to return only its after-tax promote (reflecting the taxes it paid on the original promote receipts) rather than the gross promote amount. Without this protection, the developer member effectively pays back more than it received on an after-tax basis.

- Look-back period limitation. Rather than a clawback that extends over the entire life of a programmatic JV, potentially ten years or more, the developer member should negotiate for a look-back period that limits the clawback calculation to a defined period, for example three to five years, preceding the clawback calculation date.

- Asset-by-asset compared with portfolio aggregation. In a programmatic JV with assets of different risk profiles, the developer member should resist a clawback structure that calculates on a fully aggregated portfolio basis. A poor-performing asset in one market should not claw back the promote earned on an outperforming asset in a different market with a fundamentally different risk profile.

- Escrow limitation. If the capital member requires promote escrow as a clawback protection, the developer member should negotiate for the smallest escrow percentage possible, ideally no more than 20% to 25% of each promote distribution, and for the release of escrowed amounts after a defined period if no clawback event has occurred.

Controlling the Development Process

The developer member's value rests on its ability to execute, to make the hundreds of daily decisions that determine whether a project is delivered on time, on budget, and to the quality standard that maximizes value. An operating agreement that subjects every operational decision to capital member approval does more than inconvenience the developer member. It undermines the very expertise for which the capital member partnered with the developer member in the first place.

Operational autonomy is not just a preference of the developer member. It is a prerequisite for effective project execution. Construction projects move on tight timelines, with decisions that cannot wait days or weeks for capital member review. Leasing opportunities arise and disappear quickly. Contractor negotiations require speed and decisiveness. A governance structure that requires capital member approval for every material operational decision will slow the project, strain the contractor and vendor relationships the developer member has built, and ultimately impair the returns both parties are seeking.

Retaining Day-to-Day Operational Authority

The developer member's primary governance objective should be to maximize the scope of decisions it can make as manager without prior capital member consent. That means negotiating for the following.

- High dollar thresholds for capital member approval of individual expenditures. On a $100 million development project, a per-item approval threshold of $250,000 to $500,000 is reasonable and consistent with efficient project management. Thresholds below $100,000 on large projects create governance friction that impairs the developer member's ability to manage the project effectively.

- Broad discretion over contractor and subcontractor selection. The developer member's contractor and subcontractor relationships are among its most valuable operational assets. The operating agreement should give the developer member broad authority to select, negotiate with, and direct contractors and

subcontractors, subject only to capital member approval of the general contract itself (for contracts above a defined threshold) and any major change orders.

- Flexibility in design and construction decisions. Within the parameters of the approved plans and specifications, the developer member should have authority to make design and construction decisions without capital member approval. Changes to approved plans should require capital member approval only when they involve material increases in cost, material changes in the building program, or material changes in the project's character or market positioning.

- Authority over day-to-day property management. Once the project is in the operating phase, the developer member should have broad authority to manage the property, including leasing decisions within approved parameters, operating expense management, tenant relations, and ordinary-course capital improvements, without capital member approval.

Scope of the Approved Business Plan and Annual Budget

The approved business plan and annual budget are the primary governance documents through which the capital member controls the developer member's operations. The developer member's goal is to negotiate business plan and budget approval provisions that give the capital member meaningful oversight without creating constraints so tight that they prevent efficient execution.

Key business plan and budget negotiating points for developer members include the following.

- Breadth of the initial business plan. The developer member should ensure the initial approved business plan is drafted broadly enough to cover the full range of operational decisions it will need to make during the project's lifecycle, without requiring capital member re-approval for each one. A narrowly drafted business plan that requires re-approval for every material change is effectively a continuous capital member consent requirement.

- Deemed approval of annual budgets. The operating agreement should provide that if the capital member fails to approve a proposed annual budget within a defined period, typically thirty to forty-five days after delivery, the proposed budget is deemed approved. Without a deemed approval mechanism, the capital member can hold the JV's operations hostage by refusing to approve a new annual budget.

- Automatic continuation of the prior-year budget. If the budget approval process extends into the new fiscal year without resolution, the operating agreement should provide that the prior year's budget, with appropriate inflation adjustments, continues in effect, letting the developer member maintain operations without interruption.

Flexibility for Budget Variances Without Capital Member Approval

The most operationally important budget provision for the developer member is the variance tolerance, the percentage or dollar amount by which actual expenditures can exceed the approved budget without triggering a capital member approval requirement. Budget variances are an inevitable feature of construction projects, and a zero-tolerance variance policy turns every material cost overrun into a governance event.

Developer members should negotiate for the following.

- Per-line-item variance tolerance, typically 10% to 15% per line item before capital member approval is required, allowing the developer member to absorb routine cost fluctuations within individual budget categories without seeking approval.
- Aggregate budget variance tolerance, a separate tolerance for aggregate total project costs, typically 5% to 10% of total budget, recognizing that individual line-item variances can net out at the aggregate level even when individual items exceed their line-item tolerance.
- Reallocation authority, the right to reallocate funds between budget line items (within a defined limit, typically 10% to 15% of any line item) without capital member approval, providing flexibility to respond to cost savings in one area and overruns in another without triggering a governance process.
- Emergency expenditure authority, express authority to make emergency expenditures (to protect the physical integrity of the project, comply with an emergency governmental order, or address a life-safety issue) without prior capital member approval, subject to prompt notice and post-hoc ratification.

Change Order Authority Thresholds

Construction change orders, modifications to the scope, cost, or schedule of the construction contract, are a continuous source of governance friction in development JVs. Every material change to the construction contract has cost and schedule implications, and capital members routinely seek approval rights over change orders above defined thresholds.

Developer members should negotiate for change order approval thresholds that reflect the complexity and inevitability of construction change orders on large development projects. On a $50 million construction project, a change order approval threshold of $250,000 to $500,000 per change order, and $1,000,000 to $2,000,000 in aggregate unilateral change order authority, is consistent with efficient construction management. Thresholds well below these levels generate a constant stream of capital member approval requests for routine construction adjustments, slowing the project and straining the JV relationship.

Developer Member Strategy: Front-Load Operational Authority in the Business Plan

The most effective way for a developer member to protect its operational autonomy is to negotiate a thorough initial business plan that pre-approves the broadest possible range of operational decisions. A well-drafted business plan can authorize the developer member to enter into contracts with specific contractors and subcontractors, make specific design decisions, pursue specific leasing strategies, and take specific operational actions, all without requiring separate capital member approval for each one. The time invested in a thorough initial business plan negotiation pays dividends throughout the project by reducing the friction and delay of ongoing approval requests.

Protecting Developer Fees

Developer fees are not a bonus. They are the developer member's primary compensation for the time, overhead, and operational infrastructure it devotes to the project throughout its lifecycle. Protecting these fees, ensuring they are paid regardless of project performance, structured appropriately in the waterfall, and preserved upon any change in control, is a key part of the developer member's negotiating agenda.

As discussed in Chapter 2, developer fees (development fees, construction management fees, asset management fees, and acquisition and disposition fees) serve a fundamentally different economic function than the promote. The promote is contingent compensation that rewards the developer member for creating value above the preferred return threshold. Developer fees are unconditional compensation for services rendered, payable regardless of whether the project ultimately generates a promote.

This distinction matters. A developer member whose fees are subordinated to the preferred return, or who can be stripped of its fee rights on removal, is effectively working without compensation if the project underperforms. Experienced developer member counsel structure fee provisions so that the developer member's baseline compensation is protected even in a scenario where the promote is never earned.

Ensuring Fees Are Paid Regardless of Project Performance

The developer member's most basic fee protection is the requirement that fees be paid as they are earned, without subordination to the capital member's preferred return or any other distribution priority. That means the following.

- Development fees must be paid from construction loan proceeds or JV equity as construction draw milestones are achieved, not deferred until construction is complete or the preferred return is satisfied.
- Asset management fees must be paid monthly or quarterly from operating cash flow, not deferred until the property achieves a stabilized occupancy threshold or the preferred return is satisfied.
- Acquisition and disposition fees must be paid at closing of the relevant transaction, not deferred until the waterfall is resolved or the preferred return is paid.

Capital members sometimes push for the deferral of developer fees, particularly asset management fees and disposition fees, until the preferred return threshold is satisfied, arguing that fee payments reduce distributable cash and shift risk to the capital member. Developer members should firmly resist any fee deferral or subordination, for two reasons. First, developer fees compensate for real costs, staff time, overhead, and operational infrastructure, that the developer member incurs regardless of project performance. Deferring the fees does not eliminate the costs; it forces the developer member to subsidize the JV's operations from its own balance sheet. Second, fee deferral creates a perverse incentive: a developer member that is not being compensated during a period of underperformance has less incentive to keep devoting its full organizational resources to improving the project's performance.

Sequencing Fees in the Waterfall: Above or Below the Line

One of the most consequential and most overlooked fee structuring questions is whether developer fees are characterized as above-the-line operating expenses or below-the-line JV distributions. This characterization determines when fees are paid and what priority they receive relative to the capital member's preferred return.

- Above the line (operating expenses). Fees characterized as operating expenses of the JV are paid from the JV's cash flow before any distribution is made to either member. They reduce the JV's net income and therefore reduce the amount available for the preferred return calculation and the waterfall. This treatment is uniformly more favorable to the developer member, because fees are paid regardless of whether the project generates distributable cash above the preferred return threshold.

- Below the line (JV distributions). Fees characterized as distributions to the developer member are paid only when cash is available for distribution and only in the sequence the waterfall dictates. If the capital member's preferred return has not been satisfied, below-the-line fees may not be paid until the waterfall reaches the developer member's tier, which may never happen if the project underperforms.

Developer members should negotiate for above-the-line treatment for all developer fees. If the capital member insists on below-the-line treatment for any fee category, most commonly asset management fees and disposition fees, the developer member should either reject that structure entirely or negotiate for a minimum guaranteed payment that is above the line regardless of project performance.

Fee Continuity Upon Capital Member Transfer

Developer fee provisions should expressly provide that all fee arrangements survive any transfer of the capital member's membership interest to a new capital partner. Without this protection, a successor capital member that acquires the original capital member's interest could argue that the fee arrangements were personal to the original relationship and are not binding on it.

The operating agreement and any separately documented fee agreements (development agreements, property management agreements) should include express provisions confirming that the fee arrangements run with the JV interest and bind all successors and assigns of the capital member. Developer members should also ensure that any fee agreements are structured as contracts between the JV entity and the developer member (or its affiliate) rather than as side letter arrangements between the individual members, because JV-level contracts are more clearly binding on successor capital members.

Fee Treatment Upon Removal

The treatment of developer fees on the developer member's removal as manager is a key negotiating point that often goes unaddressed in the operating agreement until a dispute arises. Developer members should negotiate express provisions covering the following.

- Accrued but unpaid fees. All fees earned through the date of removal but not yet paid should be expressly payable regardless of the circumstances of removal (cause or no cause). These fees were earned through services already rendered and represent a vested obligation of the JV.
- Fees earned but not yet invoiced. In some fee structures, particularly development fees paid in milestone installments, the developer member may have earned a fee installment based on work completed even if the milestone has not yet been formally certified. The operating agreement should specify that partially completed milestones entitle the developer member to a pro rata portion of the fee installment.
- Wind-down fees. On no-cause removal, the developer member is often required to cooperate with the transition of management to a successor manager for a defined period, typically 30 to 90 days. The operating agreement should provide for the continuation of the developer member's asset management fee during this transition, compensating the developer member for the cooperation it is being asked to provide.

Limiting Personal Exposure

The developer member's financial exposure in a real estate JV is not limited to its co-investment. Through guaranty obligations, including completion guaranties, carve-out guaranties, and environmental indemnities, the developer member often bears personal or corporate liability that dwarfs its equity at stake. Negotiating these obligations carefully is one of the most important, and most often underemphasized, parts of JV structuring for the developer member.

Personal guaranty exposure is the aspect of JV structuring that most directly affects the developer member's personal financial position and long-term platform viability. Unlike the promote, which represents potential upside, guaranty obligations represent potential

downside: the risk that the developer member will be personally liable for amounts it cannot pay, which can threaten its entire business.

Minimizing and Capping Completion Guaranties

A completion guaranty (sometimes called a cost overrun guaranty or make whole guaranty) is a personal or corporate obligation of the developer member to the construction lender, and sometimes to the capital member, guaranteeing that the development project will be completed regardless of cost overruns, contractor defaults, or other impediments, and that the construction loan will be repaid on completion.

Completion guaranties are typically required by construction lenders as a condition of their loan commitment, particularly for ground-up development projects where the completed improvements are the primary source of loan repayment. The scope and terms of the completion guaranty are among the most important and most negotiable elements of the construction financing package.

Developer members should negotiate the following protections with respect to completion guaranties.

- Scope limitation. The completion guaranty should be limited to the obligation to complete construction to the point at which the construction loan can be converted to a permanent loan, or repaid from operating cash flow or a refinancing, not an ongoing obligation to operate the completed project. The developer member should not guarantee the project's long-term financial performance, only its completion.

- Dollar cap. Ideally, the completion guaranty should be capped at a defined dollar amount, the maximum cost overrun the developer member is willing to personally guarantee. A guaranteed dollar cap of 10% to 20% of total project costs is a common target for developer members; lenders typically seek uncapped completion guaranties.

- Construction completion standard. The completion guaranty should define completion precisely: substantial completion of construction in accordance with the approved plans and specifications, issuance of a certificate of occupancy or equivalent government approval, and satisfaction of the lender's draw conditions, not achievement of any leasing or occupancy threshold.

- Burn-off provisions. The completion guaranty should provide for partial release as construction milestones are achieved (for example, releasing 50% of the guaranty on achievement of a defined completion percentage and the balance on certificate of occupancy), reducing the developer member's contingent liability as the project progresses and completion risk diminishes.

- Co-guaranty with the capital member. In some deals, particularly larger institutional transactions, the developer member can negotiate for the capital member to co-sign, or provide a backstop for, the completion guaranty,

particularly if the capital member's equity commitment is large relative to the potential cost overrun exposure. Co-guaranty arrangements are more common in deals where the capital member has a stronger balance sheet and a greater economic interest in the project's completion.

Bad Boy Carve-Out Guaranty Negotiation

The bad boy or carve-out guaranty is a personal guaranty that makes the developer member personally liable for the construction loan, which would otherwise be non-recourse, on the occurrence of defined bad acts by the borrower or guarantor. The carve-out guaranty is a standard feature of virtually all commercial real estate construction loans and is non-negotiable as to its existence. The scope of the carve-out triggers, the specific acts that convert the non-recourse loan to a full-recourse obligation, is highly negotiable and matters a great deal to the developer member.

Carve-out guaranties typically include two categories of trigger.

- Full recourse triggers, acts so egregious that they convert the entire loan balance to a personal obligation of the guarantor. Standard full-recourse triggers that developer members generally accept include fraud or intentional material misrepresentation in connection with the loan, criminal acts by the borrower, voluntary bankruptcy filing without lender consent, transfer of the property or a controlling interest in the borrower without lender consent, and intentional destruction or waste of the property.

- Loss recourse triggers, acts that create personal liability for the lender's actual losses, but not necessarily the full loan balance, arising from the prohibited conduct. Standard loss-recourse triggers that developer members generally accept include misappropriation of rents, insurance proceeds, or condemnation awards; failure to maintain required insurance; failure to pay real estate taxes; and environmental contamination caused by the borrower's operations.

The following carve-out trigger categories are the subject of the most intensive negotiation between developer members and their lenders, and they are where experienced counsel can make the most difference.

- SPE covenant violations. Many lenders require the JV entity, as the loan borrower, to maintain itself as a special purpose entity and include a carve-out trigger for SPE covenant violations. Developer members should negotiate for the carve-out to apply only to material SPE covenant violations, not technical administrative violations, and should ensure that SPE covenant requirements are clearly defined and operationally achievable.

- Voluntary bankruptcy filing. The prohibition on voluntary bankruptcy filing without lender consent is a standard carve-out trigger, but its scope is frequently misunderstood. It applies to voluntary bankruptcy filings by the borrower entity, not to filings by the developer member guarantor personally. Developer members

should ensure this distinction is clearly reflected in the carve-out guaranty language.

- Springing recourse on transfer. Some lenders include a carve-out trigger for any transfer of the property or membership interests without consent, even transfers that are otherwise permitted under the operating agreement. Developer members should ensure that transfers expressly permitted under the loan documents, including transfers to affiliates and permitted transferees, are excluded from the carve-out.

- Intentional acts compared with negligent acts. Carve-out triggers should be expressly limited to intentional, knowing, or willful misconduct, not negligent acts, mistakes, or good-faith business judgment errors. A broadly drafted “any act or omission” carve-out trigger can expose the developer member to full recourse liability for any management mistake, regardless of intent.

Indemnification Rights from the JV Entity

In addition to negotiating the scope of guaranty obligations to third-party lenders, the developer member should ensure that the JV operating agreement provides strong indemnification rights from the JV entity for liabilities the developer member incurs in connection with its management of the JV.

A well-drafted indemnification provision should provide that the JV entity will indemnify, defend, and hold harmless the developer member (and its principals, employees, and affiliates) from and against any claims, liabilities, damages, and costs (including reasonable attorneys' fees) arising from the developer member's management of the JV, unless the liability arose from the developer member's fraud, gross negligence, or willful misconduct. This standard is consistent with the fiduciary duty modification discussed in Chapter 3: the developer member is protected from claims arising from good-faith business judgment errors but not from claims arising from intentional misconduct.

The indemnification should also address the following.

- Advancement of expenses. The JV should be required to advance legal fees and other defense costs to the developer member as they are incurred, rather than waiting until final judgment, so that the developer member is not forced to fund its own defense of claims relating to its JV management activities.

- Insurance. The JV should be required to maintain directors and officers (D&O) liability insurance, or the LLC equivalent, covering the developer member's management activities, with the developer member named as an additional insured.

- Survival of indemnification. The indemnification obligation should survive the developer member's removal as manager, so that the developer member is

indemnified for claims arising from its management activities even after it is no longer serving as manager.

Negotiating Exit Rights and Liquidity

The developer member's ability to exit the JV, on its own terms and timeline, is as important as its ability to enter it. Exit provisions determine whether the developer member can realize the value of its promote and co-investment in a timely and equitable way, or whether it is trapped in a structure the capital member can use to extract economic concessions.

Exit provisions, the provisions that govern how each party can exit the JV, under what circumstances, and on what economic terms, are among the most heavily negotiated governance provisions in any institutional JV. From the developer member's perspective, the goal of exit negotiation is to ensure that the developer member can realize the full value of its promote and co-investment at an appropriate time, without being forced into a sale at a disadvantageous time or price, and without being acquired by the capital member at a below-market valuation.

Right of First Offer (ROFO) and Right of First Refusal (ROFR)

Rights of first offer and rights of first refusal are transfer restriction mechanisms that give the non-selling member an opportunity to acquire the selling member's interest before it is sold to a third party. They serve similar purposes, but they operate differently and have very different implications for the developer member's ability to exit the JV.

- Right of first offer (ROFO). The selling member must first offer its interest to the non-selling member at a price and on terms the selling member specifies. If the non-selling member declines or fails to respond within the specified period, the selling member may sell its interest to any third party at or above the offered price and on terms no more favorable than those offered to the non-selling member. ROFO is more developer member-friendly because the developer member sets the price and controls the offer process.

- Right of first refusal (ROFR). The selling member may negotiate a sale to a third party and then offer the non-selling member the right to purchase the interest on the same terms. If the non-selling member matches the third-party offer, it acquires the interest; if it does not, the selling member may complete the sale to the third party. ROFR is less developer member-friendly because it requires the developer member to first find a third-party buyer before it can test whether the capital member will exercise its ROFR.

Developer members should generally prefer ROFO over ROFR for their own transfer restrictions, and should consider whether to accept ROFR rights for the capital member in exchange for ROFO rights for themselves. The practical difference in exit flexibility is significant: a ROFO gives the developer member a clear, defined path to test the market for its interest, while a ROFR requires the developer member to first negotiate a

complete purchase agreement with a third party before it can test the capital member's interest in acquiring the developer member's interest.

Drag-Along Limitations

A drag-along right entitles the capital member to require the developer member to sell its interest in the JV, or to vote in favor of a sale of the JV's assets, on the same terms and conditions as the capital member's own sale. Drag-along rights are a standard feature of institutional JV operating agreements because they ensure the capital member can complete a sale of the JV or its assets without being blocked by a developer member holdout.

From the developer member's perspective, drag-along rights are a governance risk that must be carefully circumscribed. Without limitations, a drag-along right lets the capital member force a sale of the JV at any time, at any price, and on any terms, potentially depriving the developer member of its promote if the sale occurs before the project has reached its value potential. Developer members should negotiate for the following drag-along limitations.

- Minimum holding period. The drag-along right should not be exercisable until the project has been held for a minimum period, typically two to three years from stabilization or certificate of occupancy, that allows the asset to achieve its full value potential.
- Minimum sale price. The drag-along right should not be exercisable at a price below a defined minimum, typically based on a minimum return to the capital member, such as a 1.5x equity multiple, or a specified capitalization rate applied to stabilized NOI.
- Arms-length transaction requirement. The drag-along right should be exercisable only in connection with a bona fide arms-length sale to a third party, not a sale to the capital member itself or to an affiliate of the capital member at a price the capital member sets.
- Full promote realization. If the drag-along right is exercised and the sale generates proceeds sufficient to support the promote, the developer member must receive its full promote entitlement from the sale proceeds before the capital member receives its pro rata share of the residual.
- Developer member participation in the sale process. The developer member should have the right to participate in the sale process, including the right to review and comment on the offering memorandum, participate in buyer discussions, and approve the final sale terms, or to receive a fairness opinion confirming that the sale price reflects fair market value.

Buy-Sell (Shotgun) Provisions: Protecting the Developer Member

As discussed in Chapter 3, the buy-sell mechanism is a standard deadlock resolution tool with significant practical limitations from the developer member's perspective. The developer member's primary vulnerability in a buy-sell is financial asymmetry: the capital member, with its greater financial resources, can set a price the developer member cannot afford to pay as the purchaser, effectively acquiring the developer member's interest at a price the capital member sets.

Developer members should negotiate the following protections in any buy-sell provision.

- Minimum valuation methodology. The buy-sell price should be subject to a minimum valuation floor, defined by reference to an objective valuation standard (appraisal, capitalization rate applied to trailing NOI, or a comparable sales analysis) rather than arbitrary pricing by the capital member.

- Promote adjustment at buy-sell. The buy-sell price should incorporate the present value of the developer member's promote that would have been earned on a hypothetical sale at the buy-sell price, ensuring the developer member is compensated for its promote entitlement as part of the buy-sell transaction.

- Financing contingency. The receiving party should have adequate time, at least 60 to 90 days, to arrange financing for the buy-sell purchase, with an extension available if financing is being actively pursued.

- Minimum holding period before trigger. The buy-sell should not be triggerable until a minimum period has elapsed, typically 18 to 24 months after completion or stabilization, preventing the capital member from triggering the buy-sell during temporary market dislocations before the asset has achieved its full value potential.

- Right to compel a third-party sale. If the developer member cannot afford to buy the capital member's interest at the buy-sell price but believes that price undervalues the asset, the developer member should have the right to require a third-party marketing process in lieu of the buy-sell, allowing the market to set the price.

Tag-Along Rights

A tag-along right (sometimes called a co-sale right) entitles the developer member to sell its interest in the JV alongside the capital member in any transaction in which the capital member sells its interest to a third party. Tag-along rights protect the developer member against being left in the JV with an unknown third-party successor to the original capital member.

Developer members should insist on tag-along rights in any JV where the capital member's interest is transferable. Without a tag-along right, the capital member can sell its interest to a buyer whose investment objectives, governance approach, and relationship expectations are entirely different from the original capital member's,

leaving the developer member trapped in a JV with a partner it never agreed to work with.

Protecting Against Capital Member Overreach

The capital member's economic leverage, its control over the equity that funds the project, can translate into governance overreach if the operating agreement is not carefully structured to limit it. Protecting against overreach is not about diminishing the capital member's legitimate interests. It is about ensuring those interests are exercised within the boundaries of a fair and balanced JV framework.

Capital member overreach takes several forms: forcing a sale at an inopportune time to trigger a promote clawback or to redeploy the capital member's recovered equity more quickly; removing the developer member as manager on pretextual cause in order to avoid paying the promote; exercising governance approval rights to block operational decisions the capital member disagrees with on strategic grounds rather than for legitimate investment protection; and using capital call mechanics to dilute the developer member's interest as a negotiating tactic rather than a genuine response to project funding needs.

Limiting the Capital Member's Ability to Force a Sale

Forced sale provisions, which allow the capital member to require the sale of the JV's property after a defined holding period, are a legitimate capital member protection that developer members should accept in principle. The developer member should negotiate carefully around the timing, conditions, and process for any forced sale.

- Minimum holding period. At a minimum, the capital member's forced sale right should not be exercisable until the asset has been held long enough to reach its full value potential, typically 36 to 60 months from stabilization for income-producing assets, and a longer period for development projects where the value creation timeline is longer.

- Minimum price threshold. The forced sale right should be conditioned on the capital member's demonstrated inability to achieve a defined minimum return through continued operations, not exercisable simply because the capital member's investment mandate requires capital return by a specific date.

- Marketing process requirement. The forced sale right should require a bona fide, arms-length marketing process conducted by a nationally recognized real estate broker, with adequate time, at least 90 to 180 days, for a full market test before the forced sale obligation is triggered.

- Developer member participation. The developer member should have the right to participate in the disposition process, including the right to propose potential buyers, review and approve the offering materials, participate in buyer interviews, and comment on the final sale terms before execution.

Protecting Against Removal Without Cause

As discussed in Chapter 3, no-cause removal is the capital member's strongest governance tool and the developer member's greatest governance vulnerability. The developer member's strategy for limiting no-cause removal risk involves several layers of protection.

- Resist no-cause removal entirely. The strongest protection is an operating agreement that does not include a no-cause removal right at all, limiting the capital member's removal right to specifically defined cause events. This position is difficult to maintain against sophisticated institutional capital members, but it is the appropriate starting position for the developer member in any removal negotiation.

- Negotiate a substantial removal payment. If the developer member must accept a no-cause removal right, it should negotiate for a meaningful removal payment: a lump-sum payment from the JV, or the capital member, to the developer member on no-cause removal, representing the present value of the management fee stream the developer member would have earned through the end of the project's expected hold period and a portion of the expected promote. This payment converts no-cause removal from a pure governance right into a significant economic event the capital member must be willing to fund.

- Ensure full promote preservation on no-cause removal. On no-cause removal, the developer member's full promote interest should be preserved, with the developer member continuing to receive its promote when the asset is sold or refinanced, based on the same waterfall calculation that would have applied if removal had not occurred.

- Negotiate for a long notice period. Even if no-cause removal is accepted, the developer member should negotiate for a long advance notice period, at least 60 to 90 days, before removal becomes effective, providing time to explore options, seek a negotiated resolution, or arrange the transition on its own terms.

Negotiating Removal Cure Rights and Notice Periods

For cause removal, the developer member's primary protection is the cure right: the right to remedy the alleged cause within a defined period before removal becomes effective. Developer members should negotiate for the following.

- Differentiated cure periods by cause type. Financial defaults (missed capital calls, payment failures) typically require shorter cure periods, 10 to 30 days; operational defaults (budget overruns, milestone failures) typically require longer cure periods, 30 to 60 days; key man events require the longest cure periods, 90 to 180 days.

- Notice specificity requirements. The capital member's removal notice should be required to specify the alleged cause with particularity, giving the developer

member adequate information to understand what conduct triggered the removal right and what specifically must be remedied during the cure period.

- Dispute mechanism during the cure period. The developer member should have the right to dispute the validity of the alleged cause through a defined process, typically mediation or expert determination, during the cure period, without waiving its right to cure the underlying default.

- Suspension of manager authority only on uncured default. The capital member's right to assume management authority over the JV should arise only after the cure period has expired without cure, not on delivery of the removal notice. Allowing the capital member to assume management authority on delivery of the notice, before the cause has been established, creates a mechanism for the capital member to take control of the JV based on disputed or pretextual cause allegations.

Post-Removal Promote Rights

The post-removal treatment of the developer member's promote, as discussed in Chapter 3, is the most critical economic protection for the developer member in any removal scenario. The developer member's basic position should be the following.

- On no-cause removal: full promote interest preserved. The developer member created value through its management activities, and removal at the capital member's option should not strip the developer member of the economic benefit of that value creation.

- On for-cause removal for serious misconduct: only the vested portion of the promote is preserved, with vesting determined by reference to a defined milestone schedule tied to the stages of development and value creation actually completed by the developer member.

- Accrued fees always payable. Regardless of the circumstances of removal, all fees earned through the date of removal should be paid in full. These fees compensate for services rendered; they are not discretionary payments the capital member can withhold.

- Accounting right. The developer member should have the right to a full accounting of all JV economic matters as of the date of removal, to ensure that no accrued economic rights are improperly extinguished by the removal.

Intellectual Property and Pipeline Projects

The developer member's development platform, its proprietary processes, relationships, market intelligence, and deal pipeline, is among its most valuable competitive assets. An imprecisely drafted exclusivity or non-compete provision in the JV operating

agreement can inadvertently capture and restrict the developer member's entire business, not merely its activities within the JV.

Real estate development is a relationship and information business. The developer member's competitive advantage comes from its proprietary market knowledge, its contractor and lender relationships, its deal sourcing capabilities, and its track record of execution, assets it has built over years or decades. The JV operating agreement should protect these assets, not inadvertently transfer or restrict them for the benefit of the capital member.

Protecting Proprietary Deal Flow Brought to the JV

In many JV transactions, the developer member brings a specific deal, a site acquisition opportunity, an entitlement, or a development concept, to the JV, and the capital member agrees to fund the JV to pursue that deal. The developer member's proprietary interest in the deal concept, its site control position, its entitlement relationships, its market analysis, is the intellectual contribution that underlies the entire JV.

The operating agreement should expressly protect the developer member's proprietary interest in deal concepts brought to the JV.

- Ownership of pre-JV work product. Any work product, analysis, market research, or entitlement work that the developer member developed before the formation of the JV should remain the developer member's proprietary property and should be licensed, not assigned, to the JV for the specific purpose of the JV project. If the JV is dissolved or the developer member is removed, this work product should revert to the developer member.

- Compensation for pre-JV investment. The developer member should be compensated for the time and expense it invested in the project before the capital member was engaged, either through a pre-development reimbursement fee at JV closing or through a credit against the developer member's co-investment obligation.

- Protection of entitlement relationships. The developer member's relationships with local entitlement authorities, community stakeholders, and approval agencies are personal to the developer member. The operating agreement should acknowledge these relationships and protect the developer member's ability to use them in future projects outside the JV.

Non-Compete and Exclusivity Limitations

Many JV operating agreements include non-compete or exclusivity provisions that restrict the developer member's ability to pursue real estate opportunities outside the JV during the JV's investment period. Drafted broadly, these provisions can inadvertently capture the developer member's entire development business, preventing it from pursuing any project in the same market, asset class, or geographic area as the JV project.

Developer members should negotiate for the narrowest possible non-compete and exclusivity provisions.

- Geographic limitation. Any non-compete should be limited to a specific, defined geographic area directly competitive with the JV project. A non-compete that covers an entire metropolitan area or state for a single-building JV is disproportionate.

- Asset type limitation. Any non-compete should be limited to the specific asset type of the JV (for example, Class A multifamily, or industrial distribution). A developer member that operates across multiple asset types should not be restricted from pursuing office, retail, or hospitality projects because it has a residential JV with a particular capital partner.

- Time limitation. Any non-compete should be expressly limited to the duration of the JV's investment period and should terminate automatically on expiration of that period or on the developer member's removal from the JV.

- Grandfathering of the existing pipeline. Any projects already in the developer member's pipeline when the JV is formed should be expressly excluded from any non-compete or exclusivity obligation, regardless of their geographic or asset-type overlap with the JV project.

Right to Pursue Projects Outside the JV

Unless the operating agreement contains an express exclusivity obligation, the developer member generally has the right to pursue projects outside the JV independently or with other capital partners. Many operating agreements, however, include a right of first opportunity provision that requires the developer member to offer JV-qualifying opportunities to the JV, or to the capital member, before pursuing them independently.

Developer members should negotiate carefully around right-of-first-opportunity provisions, ensuring the following.

- The qualifying criteria for a JV opportunity are narrowly and objectively defined. The developer member should not be required to offer every real estate opportunity to the JV, only opportunities that specifically fit the JV's defined investment parameters.

- The capital member's response period is short, typically 15 to 30 days. If the capital member does not accept an offered opportunity within the response period, the developer member should be free to pursue the opportunity independently without restriction.

- The provision does not require the developer member to disclose confidential or proprietary information about independent opportunities. Disclosure requirements

in this context can create competitive intelligence risks for the developer member.

Tax Structuring for the Developer Member

The developer member's tax position in a JV is significantly affected by how the operating agreement's economic provisions are characterized for federal income tax purposes. A promote taxed as ordinary income rather than capital gain, a fee structure that inadvertently triggers self-employment tax, or a capital account structure that creates phantom income can each cost the developer member hundreds of thousands, or millions, of dollars in taxes that proper structuring would have prevented.

Tax structuring is a core component of the developer member's economic return from the JV, not a back-office technicality. The after-tax economics of the promote, the developer fees, and the co-investment return can differ sharply from the pre-tax economics depending on how the operating agreement's provisions are structured and documented. Experienced JV counsel work closely with the developer member's tax advisors to structure the operating agreement's economic provisions for tax purposes before execution.

Profits Interest Treatment of the Promote

The most significant tax structuring opportunity for the developer member is characterizing the promote as a profits interest in the JV partnership for federal income tax purposes. A properly structured profits interest entitles the holder to share in the future profits and appreciation of the partnership without recognizing taxable income when the profits interest is granted, even if the profits interest has substantial present value.

For the developer member, profits interest treatment means the promote is not taxable when the JV is formed or when the developer member receives its management role, only when distributions are actually made through the waterfall. This deferral is valuable: the developer member does not pay income tax on the promote until it actually receives promote distributions, which allows the full pre-tax promote amount to remain invested in the project and compound until distribution.

The tax character of promote distributions, whether they are taxed as ordinary income or capital gain, depends on the character of the income at the JV level. If the JV sells real property it has held for more than one year, the gain is long-term capital gain, which passes through to the developer member's promote and is taxed at the preferential long-term capital gains rate, currently 20% for high-income taxpayers, plus the 3.8% net investment income tax, rather than at the ordinary income rate, currently up to 37%. This capital gain pass-through is a significant tax advantage of the promote over ordinary compensation, and it is one of the primary reasons the promote structure is so economically attractive for developer members.

To support profits interest treatment, the operating agreement must be structured so that the developer member's promote has no value on the date it is received, meaning that if the JV were hypothetically liquidated on the grant date and proceeds distributed under the waterfall, the developer member would receive nothing for the promote, because the preferred return threshold has not yet been satisfied. This safe harbor for profits interest treatment is well-established in IRS guidance and is achievable in virtually all real estate JV structures where the promote is contingent on satisfying the capital member's preferred return.

Section 704(b) and 704(c) Allocations

The Internal Revenue Code's partnership tax provisions, particularly Sections 704(b) and 704(c), govern how income, gain, loss, deduction, and credit are allocated among the partners of a partnership, including the members of an LLC taxed as a partnership. These provisions have significant practical implications for the developer member's tax position and must be addressed carefully in the operating agreement.

- Section 704(b), substantial economic effect. Section 704(b) requires that a partnership's tax allocations have substantial economic effect, meaning they must reflect the partners' actual economic arrangement. The operating agreement's capital account maintenance provisions, which track each member's economic interest through a running balance of contributions, distributions, and allocated income and loss, are the mechanism through which Section 704(b) compliance is achieved. The developer member's counsel must ensure the capital account provisions are consistent with the waterfall: if the waterfall provides for the capital member to receive a preferred return before the developer member receives any profit, the tax allocations must follow that economic priority.

- Section 704(c), allocation of built-in gain on contributed property. Section 704(c) applies when a member contributes property with built-in gain (a fair market value exceeding the contributor's tax basis) to the JV. As discussed in Chapter 1, a developer member that contributes appreciated land must allocate any built-in gain to itself on a subsequent sale. This allocation can create significant additional tax liability for the developer member that is not apparent from the gross economics of the deal. The operating agreement should address the Section 704(c) allocation method, traditional method, traditional method with curative allocations, or remedial method, in consultation with both parties' tax advisors.

Guaranteed Payment Characterization of Developer Fees

Developer fees paid to the developer member for services rendered to the JV may be characterized for tax purposes either as guaranteed payments under Section 707(c) of the Code (taxable as ordinary income to the developer member and deductible by the JV in the year paid) or as distributive shares of JV income (allocated to the developer member under the operating agreement and retaining the character of the income at the

JV level). The correct characterization depends on the specific fee arrangement and requires careful analysis by the developer member's tax advisor.

In most institutional real estate JV structures, developer fees for services (development fees, asset management fees, construction management fees) are treated as guaranteed payments under Section 707(c), paid regardless of JV income and therefore bearing the characteristics of compensation income. This treatment has two important tax consequences for the developer member. First, the fees are taxable as ordinary income in the year received, not at capital gain rates. Second, the fees may be subject to self-employment tax for developer members organized as individual proprietorships or partnerships. Structuring developer fees through a management company or other intermediate entity can sometimes reduce self-employment tax exposure, but it requires careful analysis of the developer member's specific entity structure and tax situation.

Capital Account Mechanics

The operating agreement's capital account maintenance provisions, the rules governing how each member's capital account is calculated, maintained, and adjusted, are the tax and accounting foundation of the waterfall. A capital account that is improperly maintained can produce phantom income allocations (allocations of taxable income that exceed the member's cash distributions), create inconsistencies between the tax allocations and the economic waterfall, and generate IRS audit risk for the JV and its members.

Developer members should ensure that the operating agreement's capital account provisions do the following.

- Comply with the Treasury Regulation Section 1.704-1(b)(2) requirements for substantial economic effect, including the requirement that capital accounts be maintained in accordance with the regulations, that liquidating distributions be made in accordance with positive capital account balances, and that each member be obligated to restore any deficit balance in its capital account on liquidation, or that the agreement include the alternative economic effect safe harbor.

- Stay consistent with the waterfall. The tax allocations reflected in the capital accounts must correspond to the economic priority of the waterfall. A capital account structure that allocates taxable income to the developer member before the capital member's preferred return is satisfied is inconsistent with the waterfall's economic priority and will generate IRS audit risk.

- Address depreciation allocation. Real property owned by the JV is depreciable for tax purposes, and depreciation deductions generate tax losses that are allocated among the members under the operating agreement. Developer members should understand how depreciation is allocated, typically in proportion to the members' capital accounts or profit interests, and whether any special allocations of depreciation are appropriate given the specific tax positions of the developer member and the capital member.

Key Mistakes Developer Members Make in JV Negotiations

The most expensive real estate transaction a developer member will ever make may be the JV operating agreement it signed without fully understanding its implications. The following are the most common and most costly mistakes developer members make in negotiating their joint venture arrangements, drawn from JV transactional and litigation practice.

Every developer member, from the most experienced institutional operator to the entrepreneur closing its first institutional JV, is vulnerable to the negotiating mistakes catalogued in this section. These are not mistakes of bad faith or negligence. They are the natural result of a process in which the capital member's counsel is deeply experienced in JV documentation and the developer member's counsel may not be. Awareness of these mistakes is the first step toward avoiding them.

Mistake	What Goes Wrong	How to Avoid It
Accepting capital member form documents without negotiation	The capital member's form operating agreement is drafted entirely in the capital member's interest. Key provisions, including promote definitions, removal triggers, and fee sequencing, are structured to the capital member's maximum advantage. A developer member that signs form documents without negotiation accepts those terms as final.	Engage experienced JV counsel before the term sheet stage, not after. Negotiate every material provision, not just the headline economic terms.
Imprecise promote definition	The promote is earned or calculated differently than the developer member understood because key defined terms (capital contributions, IRR, distributable cash) were not precisely defined, or were defined in the capital member's form agreement in ways the developer member did not notice.	Review every defined term in the waterfall and promote provisions with counsel. Model the waterfall under multiple scenarios using the actual defined terms to confirm the economic outcome matches the developer member's expectations.
Accepting unlimited or uncapped guaranty obligations	An open-ended completion guaranty or a carve-out guaranty with no dollar cap creates unlimited personal liability that can exceed the developer member's net worth if the project fails.	Negotiate dollar caps on all guaranty obligations. Engage both real estate and finance counsel to review all loan document guaranty provisions before execution.
Failing to protect fees upon removal	The operating agreement is silent on the treatment of accrued but unpaid fees upon removal. The capital member argues that all fees are forfeited; the developer member argues they remain payable. Years of litigation follow.	Expressly address fee treatment upon removal, for cause and no cause, in the operating agreement. All accrued fees should be expressly preserved regardless of the circumstances of removal.

Mistake	What Goes Wrong	How to Avoid It
Accepting broad non-compete provisions	A broadly drafted exclusivity or non-compete provision captures the developer member's entire development pipeline, preventing it from pursuing projects outside the JV in the same market or asset class, even projects already in development when the JV was formed.	Negotiate grandfathering of the existing pipeline. Limit any non-compete to a specific geographic area, asset type, and time period. Insist on a defined response period for any right-of-first-opportunity provision.
Ignoring the capital stack and loan documents	The developer member negotiates a thorough JV operating agreement but fails to coordinate its governance provisions with the construction loan documents. Key governance rights in the operating agreement are effectively overridden by lender consent requirements.	Review all loan documents alongside the operating agreement. Identify and resolve any conflicts between operating agreement governance rights and lender consent requirements before closing.
Accepting for-cause removal with a broad cause definition	The developer member accepts a cause definition that includes failure to meet projected milestones or material budget variance. A construction delay caused by supply chain disruption, or a cost overrun caused by inflation, triggers the removal right, and the developer member loses its management role and, if the provision is poorly drafted, its promote.	Negotiate a narrow cause definition. Limit cause to intentional misconduct, fraud, and similar bad acts, not business judgment errors or performance shortfalls attributable to market conditions.
Failing to address the clawback	The developer member accepts a clawback provision with no cap, no tax gross-up, and no look-back period limitation. Years later, when a programmatic JV's later-vintage assets underperform, the developer member faces a clawback obligation larger than the total promote it received, because it must return the gross promote without adjustment for taxes already paid.	Negotiate every aspect of the clawback: the cap, the tax gross-up, the look-back period, and the asset scope. Model the clawback under stress scenarios to understand the developer member's maximum exposure before execution.

The common thread through each of these mistakes is the same: the developer member treated legal documentation as a ministerial exercise rather than a strategic negotiation. The capital member's form documents, preferred economic terms, and governance framework are the starting point of the negotiation, not the endpoint. A developer member that engages experienced JV counsel before the term sheet stage, prepares thoroughly for every negotiating session, and insists on provisions that protect its economic and governance interests at every turn will negotiate a materially better deal than one that does not.

The Value of Experienced JV Counsel: A Closing Note for Developer Members

The provisions discussed in this chapter, the promote definition, the fee structure, the guaranty negotiation, the exit rights, the removal provisions, and the tax structuring, are not boilerplate. They are the product of decades of transactional practice, negotiation experience, and litigation that has revealed exactly how these provisions operate under stress.

A developer member that attempts to negotiate these provisions without counsel that specializes in real estate joint ventures is bringing a general practitioner's knowledge to a specialist negotiation. The capital member's institutional counsel has documented hundreds of JV transactions, has seen every dispute scenario these provisions generate, and has drafted its form documents specifically to protect the capital member's interests at every decision point.

The cost of specialized JV counsel at the outset of the transaction is a fraction of the value at stake in any one of the provisions discussed in this chapter. The promote alone, on a $50 million project, may be worth $3 million to $5 million or more, and the difference between a well-negotiated and a poorly negotiated promote provision can be the entire amount. For a developer member, retaining experienced JV counsel is not a cost to weigh against the deal. It is protection for the value the deal is meant to create.

If you are a developer member approaching a new joint venture, whether your first institutional partnership or your fiftieth, the attorneys at [Firm Name] bring the transactional experience, the negotiating depth, and the practical knowledge of how these provisions operate that every developer member deserves to have at the table.

Chapter 4 Summary

Chapter 4 has given the developer member a negotiating guide to the JV operating agreement's most important provisions. The principal takeaways are these.

- The promote is the developer member's most valuable economic asset and its most vulnerable. Precise definition of every term that affects its calculation (capital contributions, IRR, distributable cash, net sale proceeds) is not a drafting formality. It is the economic foundation of the entire JV.
- Operational autonomy must be actively protected through high dollar thresholds for capital member approval, broad day-to-day management authority, and a thorough initial business plan that pre-approves the widest possible range of operational decisions.
- Developer fees should be above-the-line operating expenses, paid regardless of project performance, preserved on capital member transfer, and expressly protected, including accrued amounts, on removal.
- Guaranty obligations, particularly completion guaranties and bad-boy carve-out guaranties, are the developer member's most significant personal financial exposure and must be negotiated with the same rigor as the promote and fee provisions.

- Exit rights (ROFO and ROFR, drag-along limitations, buy-sell protections, and tag-along rights) determine whether the developer member can realize the full value of its JV interest when and how it chooses.
- Removal protections (narrow cause definitions, meaningful cure periods, full promote preservation on no-cause removal, and vested promote preservation on for-cause removal) are the developer member's ultimate governance protections and must be negotiated with care.
- Non-compete and exclusivity provisions must be narrowly tailored to protect the capital member's legitimate interests without capturing the developer member's broader development platform.
- Tax structuring (profits interest treatment, Section 704(b) and 704(c) compliance, fee characterization, and capital account mechanics) can add or subtract millions of dollars from the developer member's after-tax return and must be addressed by experienced tax counsel before execution.
- The eight key mistakes catalogued in this chapter are all avoidable with adequate preparation and experienced legal counsel. The developer member that treats legal documentation as a strategic exercise, and engages counsel who understands both the transactional mechanics and the litigation consequences of each provision, will negotiate a significantly better JV than one that does not.

Looking Ahead to Chapter 5

Chapter 5 turns the perspective around entirely, examining the joint venture from the capital member's vantage point. The capital member faces a mirror image of the developer member's challenges: how to protect a large equity investment entrusted to a third-party manager, how to secure governance rights that provide meaningful oversight without impairing operational efficiency, how to structure exit provisions that provide liquidity when needed, and how to identify and avoid the most common mistakes capital members make in JV negotiations. Chapter 5 provides the same depth of practical guidance for capital members that Chapter 4 has provided for developer members, and it will be essential reading for both parties seeking to understand the full landscape of the JV negotiation they are entering.

CHAPTER 5

What the Capital Member Must Protect: Negotiating the Joint Venture

The capital member commits real equity, often tens or hundreds of millions of dollars, to a project that someone else will build, manage, and control. Its investment thesis depends on a developer member performing as promised, on a business plan being executed as underwritten, and on an operating agreement that provides genuine oversight and real remedies when performance falls short. This chapter is the capital member's guide to protecting its equity at every stage of the joint venture.

This chapter is written from the capital member's perspective, the party writing the large checks, bearing the majority of equity risk, and trusting a developer member to execute on a complex, multi-year real estate project. The capital member's challenge is fundamentally different from the developer member's. Where the developer member seeks maximum operational autonomy, the capital member must ensure that its investment is protected against the full range of risks that arise when substantial capital is entrusted to a third-party manager.

This chapter examines the capital member's ten areas of protection: protecting the capital investment through priority return mechanics; governance and oversight rights; controlling the developer member's conduct through key man and exclusivity provisions; removal and replacement rights; exit rights and liquidity; reporting, transparency, and audit rights; dilution protections; developer fee oversight; investor-level tax considerations; and the most common and costly mistakes capital members make in JV negotiations.

One point runs through the chapter. A capital member that relies on a developer member's goodwill, institutional reputation, or verbal assurances, rather than on precisely drafted operating agreement provisions, is taking a risk that no amount of due diligence on the developer member's track record can fully mitigate. Relationships change, personnel change, and market conditions change, and the developer member that performed flawlessly on the last deal may face pressures on the current deal that test the limits of even the best relationship. The operating agreement's provisions are the capital member's protection when goodwill is not enough.

Protecting the Capital Investment

The capital member's central interest, the one that justifies every governance right, every reporting requirement, and every removal provision, is the protection of the equity it has committed to the joint venture. That protection begins with the priority return

mechanics that ensure the capital member's capital is returned, with an appropriate return, before any promote is paid to the developer member.

The capital member's economic protection in a JV is built on a layered system of structural priorities: the right to have its contributed capital returned before any promote is paid, the right to receive a preferred return on that capital for the full period it is at risk, and the right to participate in the residual profits of the JV on a defined basis. Each layer must be carefully structured to provide the protection it is intended to provide, not only in theory but in the full range of economic scenarios the project may encounter.

Ensuring Priority Return of Capital Before Any Promote Is Paid

The most basic structural protection for the capital member is the first-tier priority in the distribution waterfall: the return of all contributed capital before any promote is distributed to the developer member. This is the cornerstone of the capital member's economic protection and should be non-negotiable in any institutional JV.

The capital member's counsel must ensure that the return-of-capital priority is precisely defined and fully protected.

- Definition of contributed capital. The amount of the capital member's contributed capital that must be returned in the first waterfall tier should be defined as the gross amount of all cash contributions the capital member made to the JV, without reduction for fees paid to the developer member, since those fees are operating expenses of the JV, not returns of the capital member's capital. The capital member should resist any provision that reduces its contributed capital balance by the amount of fees paid to the developer member or its affiliates.

- Priority over developer member co-investment. The capital member's contributed capital should be returned before the developer member's co-investment in the first waterfall tier. This intra-equity priority reflects the capital member's senior position within the common equity stack and its right to the first recovery of invested principal.

- No promote distributions before full capital return. The operating agreement should expressly prohibit any promote distribution until all of the capital member's contributed capital has been returned in full. This prohibition should be absolute, not subject to override by the manager or by majority vote of the members.

- Treatment of interim distributions. Operating cash distributions made during the hold period (from rental income or refinancing proceeds) should be applied first to return the capital member's contributed capital and accrued preferred return before any amount is distributed to the developer member as promote. The operating agreement should specify how interim distributions affect the capital account balances and the preferred return calculation for subsequent distribution events.

Preferred Return Mechanics: Compounding, Accrual, and Catch-Up Provisions

The preferred return is the capital member's minimum required annual return on its invested equity, the floor below which the developer member earns no promote. Protecting it requires precision in its mechanics: how it accrues, whether it compounds, and how the catch-up provision, if any, affects the timing of the capital member's receipt of its preferred return.

- Compounding preferred return. The capital member should prefer a compounding preferred return, one that accrues not only on the original contributed capital but also on previously accrued but unpaid preferred return. Compounding protects against a scenario in which the JV generates insufficient operating cash to pay the preferred return currently, causing the unpaid accrual to grow at the preferred return rate. On a long-duration development project, the difference between simple and compounding preferred return can amount to millions of dollars by the time the asset is sold.

- Cumulative accrual. The preferred return must be cumulative: it accrues continuously throughout the holding period, whether or not operating cash is available to pay it, and the full accumulated balance must be paid before any promote is distributed. Non-cumulative preferred returns, which forgive unpaid preferred return in any period when cash is insufficient, provide meaningless protection against exactly the scenarios the capital member is most concerned about.

- Preferred return on the funded amount rather than the committed amount. Should the preferred return accrue on the capital member's total committed capital (the amount it has agreed to contribute over the life of the JV) or only on the amount actually funded to date? The capital member should negotiate for preferred return to accrue on amounts actually funded, with the accrual beginning on the date each contribution is made. This approach accurately reflects the time-value cost of the capital member's actual equity at risk.

- Catch-up provisions. As discussed in Chapter 2, some JV waterfalls include a catch-up tier that allows the developer member to receive a larger-than-pro-rata share of distributions immediately after the preferred return is satisfied. The capital member should resist any catch-up provision that delays or reduces its receipt of residual profit distributions after the preferred return is paid. If a catch-up is accepted, the capital member should ensure it is calculated as a percentage of the aggregate distributions already made, not a percentage of residual proceeds only, to prevent the catch-up from disproportionately benefiting the developer member.

Mandatory Capital Call Provisions and Anti-Dilution Protections

The capital member's commitment to fund the JV's equity requirements is the foundation of the developer member's ability to execute the project. But that

commitment creates a corresponding vulnerability. If the project requires more equity than initially projected, and the capital member is not obligated to fund the additional requirement, the JV may face a funding crisis. Conversely, if the capital member is required to fund unlimited additional equity, its total investment risk is unbounded.

Capital members should negotiate capital call provisions that clearly define the scope and limits of their funding obligations.

- Maximum commitment cap. The capital member's total equity commitment should be capped at a defined maximum amount, typically established in the approved business plan and budget. Any equity requirement above the committed amount requires the capital member's express consent. It is not automatically obligated to fund an unlimited additional requirement.

- Mandatory funding of approved budget requirements. Within the committed amount, the capital member should be unambiguously obligated to fund capital calls made in accordance with the approved budget and business plan, subject only to procedural requirements (adequate notice, supporting documentation). The capital member should not have the right to withhold funding of an approved budget requirement on substantive grounds. Its remedy for disagreement with the budget is the governance approval right, exercised before the budget is approved.

- Anti-dilution protections for unfunded developer member calls. If the developer member fails to fund its co-investment capital calls, the capital member should have strong dilution rights, including punitive dilution, to protect its proportionate economic interest against erosion. The capital member should not be required to absorb the entire equity requirement if the developer member defaults on its co-investment obligation.

- Draw request documentation requirements. Capital calls should be accompanied by detailed supporting documentation (budget-to-actual comparison, construction draw summary, lender's inspection report) that allows the capital member to verify that the requested funds are within the approved budget parameters before funding.

Cash Management and Reserve Requirements

The capital member's economic protection extends to how the JV manages and maintains its cash reserves. Inadequate reserves can force the JV to make emergency capital calls, delay required maintenance or capital improvements, or default on debt service obligations, all of which harm the capital member's investment.

The operating agreement should establish clear cash management and reserve requirements.

- Operating reserve requirement. A minimum cash reserve, typically three to six months of projected operating expenses, that the JV must maintain at all times,

funded from operating cash flow before any distribution is made to either member. The operating reserve protects against temporary revenue shortfalls without requiring an emergency capital call.

- Capital replacement reserve. For income-producing properties in the operating phase, a regular contribution to a capital replacement reserve (typically $100 to $300 per apartment unit, or a percentage of gross revenues for commercial properties) funds anticipated future capital expenditures such as roof replacement, HVAC systems, and parking lot resurfacing.

- Debt service reserve. Where required by the construction or permanent lender, a debt service reserve fund (typically three to six months of projected debt service) that can be drawn on in the event of a temporary revenue shortfall. This reserve protects against loan default during periods of below-stabilization performance.

- Disbursement controls. The capital member should have approval rights over any distribution from JV accounts that exceeds the authorized reserve levels, ensuring that the manager cannot deplete JV cash reserves for unauthorized purposes.

Governance and Oversight Rights

The capital member's governance rights are not procedural niceties. They are the primary mechanism by which the capital member ensures that its investment is managed in accordance with the business plan it underwrote. Every major decision approval right, every reporting requirement, and every oversight mechanism in the operating agreement exists to protect the capital member's economic interest against the risk of mismanagement, bad judgment, or outright misconduct.

As discussed in Chapter 3, the allocation of governance authority in a JV is a negotiated balance between the developer member's need for operational autonomy and the capital member's need for investment oversight. This section examines the governance provisions most important from the capital member's perspective, with attention to how each provision protects against specific investment risks.

Major Decision Approval Rights: Building a Complete List

The major decisions list, the enumeration of decisions requiring the capital member's prior written consent, is the primary governance tool through which the capital member protects its investment. A major decisions list that omits a category of decision the developer member might take that could harm the capital member's investment provides no protection for that omitted category.

From the capital member's perspective, a thorough major decisions list should include at least the following categories, with particular attention to the provisions most often omitted from developer member form agreements.

- Approval of the annual budget and any amendment. This is the capital member's primary financial control. Any expenditure not in the approved budget, or exceeding an approved line item by more than the permitted variance, should require capital member consent. The capital member should negotiate for tight variance tolerances (5% to 10% per line item, 5% in aggregate) on large projects.

- Approval of the business plan and any amendment. Any material change to the project's development program, leasing strategy, tenant mix, operating model, or disposition timeline requires capital member consent, since such changes alter the risk profile and return projections underlying the original investment thesis.

- Incurrence of any indebtedness. All borrowings above a de minimis threshold, including construction loans, bridge loans, permanent mortgages, mezzanine financing, equipment loans, and any other form of debt obligation, require capital member consent. The capital member bears indirect debt-service risk through its equity position and must be able to approve the structure and terms of all debt obligations.

- Any sale, transfer, encumbrance, or disposition of JV assets. This includes not only the final disposition of the project but any partial sale, ground lease, easement, or other disposition of the JV's real property assets. The capital member must retain approval authority over any transaction that alters or encumbers its investment.

- Contracts with affiliates of the developer member. Any contract, lease, or service arrangement between the JV and any entity affiliated with the developer member (management agreements, construction contracts, service agreements, lease arrangements) requires capital member consent and should be conditioned on the contract being on arms-length, market-rate terms. This provision is essential to prevent self-dealing that reduces the JV's distributable cash at the capital member's expense.

- Capital calls above the committed amount. Any equity requirement above the capital member's initial committed amount requires its express consent. The capital member did not agree to unlimited additional equity funding obligations.

- Any litigation above a defined threshold. Initiating, settling, or compromising any claim, lawsuit, or arbitration above a defined threshold (typically $100,000 to $500,000 depending on project size) requires capital member consent. Litigation decisions can create significant financial exposure and reputational risk for the JV.

- Tax elections. Any federal or state tax election that could materially affect the tax treatment of the JV or either member (Section 754 elections, accounting method changes, partnership status elections) requires capital member consent.

- Change in the development program or project scope. Any material change to the project's size, design, use, or quality standard requires capital member

consent. A developer member that proposes to materially reduce the project's scope to cut costs, or to expand it beyond the approved program, should not be able to do so without the capital member's agreement.

- Admission of new members or transfer of membership interests. Any change to the JV's membership structure, including the admission of new partners or the transfer of existing interests, requires capital member consent. This is essential to protect the capital member's control over who its JV partners are.

- Amendment of the operating agreement. Any amendment to the operating agreement itself requires capital member consent. The capital member negotiated the existing framework; it should not be modifiable without its agreement.

Vetoing the Approved Business Plan and Annual Budget

The capital member's right to withhold approval of the annual budget and business plan is its most powerful ongoing governance tool. But this right is only effective if the capital member exercises it thoughtfully, neither approving a budget it should reject nor withholding approval in bad faith to create governance leverage on an unrelated issue.

Capital members should establish internal processes for reviewing and approving annual budgets and business plan amendments.

- Dedicated review process. Assign a specific investment professional or team responsible for reviewing JV budgets and business plans within a defined timeframe. Do not rely on informal review processes that may miss material issues or fail to meet operating agreement response deadlines.

- Independent verification. For large projects, or projects showing signs of underperformance, engage an independent construction manager or asset manager to review the proposed budget against market cost benchmarks and the project's actual performance to date.

- Document the approval basis. Maintain a written record of the information reviewed and the basis for each budget approval, to support any future dispute about whether a capital call was within the approved budget.

- Track budget-to-actual performance. Monitor actual performance against the approved budget on a line-item basis throughout the year, not just at annual budget approval time. Early identification of variance trends allows the capital member to address them through the governance process before they become material.

Loan-Level Approval Rights

Construction and permanent loan documents frequently contain covenants and conditions that interact directly with JV governance. The capital member must review

and approve all loan documents, not merely the terms of the loan itself, to understand how lender requirements affect the JV's governance framework.

Specific loan-level approval issues that capital members must address include the following.

- Review all lender consent requirements. Identify every decision in the loan documents that requires lender consent, and compare those requirements against the operating agreement's major decisions list. Ensure that the lender's consent requirements and the operating agreement's governance framework are consistent, and that governance decisions the capital member expects to control are not effectively delegated to the lender.

- Prohibition on distributions during events of default. Virtually all construction loans prohibit JV distributions during an event of default. The capital member should understand this restriction and ensure that it does not prevent the payment of accrued preferred return on a sale or refinancing that cures the default.

- Lender approval of operating agreement amendments. Many construction lenders require lender consent to any amendment of the JV operating agreement. The capital member should be aware of this requirement and factor it into any governance restructuring discussion.

- Guaranty and indemnity carve-outs. If the capital member is asked to provide any guaranty or indemnity in connection with the construction financing, it should ensure that these obligations are clearly limited in scope and amount, and that the JV operating agreement requires the developer member to indemnify the capital member for any guaranty payments it makes.

Contractor and Vendor Approval Thresholds

The developer member's selection of contractors, subcontractors, and key vendors is one of the most significant operational decisions affecting the JV's cost, schedule, and quality outcomes. The capital member should negotiate for approval rights over the most significant contractor and vendor relationships.

- General contractor approval. The selection of the general contractor for a development project is the most consequential contractor decision and should require capital member approval. The capital member should conduct independent reference checks on the proposed GC and should review the GC contract (including the guaranteed maximum price, the performance bond, and the default provisions) before approving.

- Major subcontractor approval. For subcontractors performing work above a defined dollar threshold (typically $1 million to $5 million on large projects), the capital member should have approval rights over selection and contract terms.

- Property management company approval. The selection of the property management company for an income-producing asset is central to the operating performance of the project. The capital member should approve the initial property manager, the management fee, and any subsequent change in property manager.

- Brokerage and leasing agent approval. The selection of exclusive leasing agents and brokerage agreements should require capital member approval, since the quality of leasing representation directly affects the project's stabilization timeline and tenant quality.

Controlling the Developer Member's Conduct

The capital member's equity is entrusted to a specific developer member, not to an abstract entity but to a specific team of people with specific expertise, specific relationships, and a specific track record. Protecting that investment requires provisions that keep the key people the capital member relied on involved, dedicated, and focused on the JV project.

The capital member's due diligence focuses heavily on the developer member's people, the specific principals whose track record, market relationships, and development expertise justify the investment thesis. Operating agreement provisions that protect the capital member's investment in those specific individuals are among the most important governance tools in any JV.

Key Man Provisions: Identifying and Protecting Against Loss of Key Personnel

As discussed from the developer member's perspective in Chapter 4, key man provisions keep the specific individuals whose expertise the capital member is relying on actively involved in managing the JV. From the capital member's perspective, key man provisions are essential protections that cannot be waived or minimized.

A well-structured key man provision from the capital member's perspective should include the following.

- Identification of key men by name. The capital member should identify the specific individuals, typically the developer member's principal or principals, the project executive, and the project manager, whose continued involvement is essential. These individuals should be named in the operating agreement, not merely described by title or role.

- Specific time commitment requirements. Key men should be required to devote a defined minimum percentage of their professional time to managing the JV (typically 50% to 100%, depending on the project's complexity and the developer member's platform size). Vague requirements like “substantially all professional

time" are more developer member-friendly but less protective of the capital member's interest.

- Definition of key man departure events. The provision should define with precision what constitutes a departure: death, disability, voluntary departure from the developer member's organization, involuntary termination, or a reduction in time commitment below the required minimum. Side arrangements, such as the key man remaining nominally employed but performing no substantive management activities, should be expressly excluded from the definition of continued involvement.

- Short cure period. On a key man departure event, the developer member should have a defined cure period (typically 60 to 120 days) to identify and propose a replacement acceptable to the capital member. The capital member should have meaningful approval rights over any proposed replacement, not merely the right to object on unreasonable grounds.

- Capital member's approval right over replacements. The capital member should have the right to approve any proposed key man replacement, with its approval not to be unreasonably withheld only if the proposed replacement meets objective criteria (minimum years of experience, minimum transaction volume) specified in the operating agreement. A capital member that has no right to reject a proposed replacement has effectively lost the key man protection.

- Consequences of an uncured key man event. If the developer member fails to identify an acceptable replacement within the cure period, the capital member should have the right to remove the developer member as manager without cause, with the full economic consequences of no-cause removal (including promote preservation for the developer member) flowing from that removal.

Non-Competition and Non-Solicitation Covenants

The developer member's attention is a finite resource. A developer member simultaneously managing multiple competing projects in the same market may be dividing its attention, and its key relationships with lenders, contractors, and tenants, across competing priorities, to the detriment of the JV's project. Non-competition and non-solicitation provisions protect the capital member's investment by keeping the developer member's resources focused on the JV project.

Non-competition covenants in JV operating agreements typically restrict the developer member from developing or managing directly competing projects, projects of the same asset type in the same geographic market, during the JV's investment period without the capital member's consent. The scope of any non-compete should be calibrated to the actual competitive overlap between the JV project and the developer member's other activities.

- Geographic scope. The non-compete should cover the specific geographic submarket in which the JV project is located, not necessarily the entire

metropolitan area, and should be defined by objective criteria (radius, zip codes, political boundaries) rather than vague concepts like “the same market.”

- Asset type scope. The non-compete should cover the same asset type as the JV project (Class A multifamily, industrial, office, retail) in the defined geographic area. A developer member that is primarily a multifamily developer should not be restricted from pursuing industrial projects in the same market unless those projects would create an actual conflict.

- Duration. The non-compete should run for the duration of the JV's investment period, terminating automatically on the JV's dissolution or the developer member's removal.

- Exclusions for existing projects. The non-compete should expressly exclude projects already in the developer member's pipeline when the JV is formed, since the capital member's due diligence should have already evaluated the developer member's existing project portfolio and confirmed that it is not incompatible with the JV commitment.

Non-solicitation covenants are typically broader, covering the developer member's solicitation of the JV's employees, contractors, tenants, and lender relationships for competing projects. These covenants protect the capital member's investment in the relationships the JV has established and should survive the developer member's removal from the JV for a defined period (typically 12 to 24 months).

Exclusivity During the JV's Investment Period

In programmatic JVs, the capital member typically seeks an exclusivity provision requiring the developer member to offer all qualifying investment opportunities to the JV before pursuing them independently or with other capital sources. This exclusivity ensures the capital member has full access to the developer member's deal pipeline, the primary asset it is paying for through the promote structure.

Exclusivity provisions must be carefully structured to avoid the practical problems that arise from overly broad exclusivity obligations.

- Clear definition of qualifying opportunities. The exclusivity obligation should apply only to opportunities that specifically fit the JV's defined investment parameters (asset type, geography, return threshold, project size). The developer member should not be required to offer every real estate opportunity to the JV, only those that would compete directly with the JV's mandate.

- Short response period. The capital member must respond to exclusivity-covered opportunities within a defined, short period (typically 15 to 30 business days). Longer response periods create deal execution risk for the developer member and should be avoided.

- Capital member's pass rights. The exclusivity should include clear provisions allowing the capital member to pass on an offered opportunity without waiving its exclusivity right with respect to future opportunities. A capital member that passes on one opportunity should not lose its right to receive future exclusivity-covered deals.

- Deemed pass on failure to respond. If the capital member fails to respond to an exclusivity notice within the required period, the developer member should be free to pursue the opportunity independently. This deemed-pass provision is the mirror image of the deemed-approval provision discussed in Chapter 3.

Removal and Replacement Rights

The capital member's removal right is its ultimate governance backstop, the provision that turns all other governance rights from theoretical to real. A capital member that lacks an effective removal right depends entirely on the developer member's voluntary cooperation with its governance oversight, no matter how thorough the operating agreement's other protections may be.

As discussed in Chapter 3 from the governance perspective, the removal provision is the most consequential and most litigated provision in any JV operating agreement. This section examines removal from the capital member's perspective: what the capital member needs from the removal provision to protect its investment, how it should structure the cause and no-cause removal rights, and what transition planning is required to ensure continuity of management after a removal event.

Negotiating Broad Removal Rights

From the capital member's perspective, the removal right should be as broad and as unencumbered as possible. The capital member has committed substantial equity to the JV, and it must retain the ultimate right to replace a manager in whom it has lost confidence, regardless of whether the developer member's conduct fits neatly within a narrowly defined cause provision.

The capital member should negotiate for both for-cause and no-cause removal rights, with the following characteristics.

- Broad cause definition. Cause should include not only egregious misconduct (fraud, criminal conviction, intentional misrepresentation) but also material operational failures: material and persistent budget overruns, material schedule delays attributable to the developer member's mismanagement, failure to maintain required insurance, material breach of any key operating agreement covenant, loss of a key man without an acceptable replacement, and any event that materially impairs the developer member's ability to manage the JV effectively.

- No-cause removal with adequate notice. The capital member should have the right to remove the developer member as manager without cause on written notice, with a reasonable notice period (typically 30 to 60 days) to allow an orderly management transition. No-cause removal is the capital member's protection against a developer member that is technically not in breach of the operating agreement but whose performance, judgment, or conduct no longer merits the capital member's confidence.

- Short cure periods for financial defaults. For financial defaults (missed capital calls, failure to maintain required insurance, failure to pay required fees or taxes), the capital member should negotiate for short or no cure periods. A developer member that has failed to fund a required capital call or allowed insurance to lapse is in a serious enough default that a long cure period is not warranted.

- Automatic removal on insolvency. The operating agreement should provide for automatic removal of the developer member as manager on the developer member's (or its principals') bankruptcy filing, assignment for the benefit of creditors, or appointment of a receiver. A developer member in financial distress cannot effectively manage a JV project, and the capital member should not be required to serve a formal removal notice and await a cure period before removing an insolvent manager.

Ensuring a Transition Plan Is in Place

The value of the removal right is only as great as the capital member's ability to transition management to a successor after removal. A removal that leaves the JV without competent management during a critical construction phase or lease-up period can cause more harm to the capital member's investment than the problem that triggered the removal. Experienced capital member counsel ensure that the operating agreement includes thorough transition provisions.

- Pre-removal transition planning. The capital member should maintain a list of potential replacement managers, experienced development or asset management firms with relevant expertise in the project's asset type and market, that it can engage immediately on a removal event. This list should be maintained and updated periodically, not assembled for the first time after removal has already occurred.

- Cooperation obligation. On removal, for cause or no cause, the developer member should be unambiguously obligated to cooperate fully with the transition, including providing all project files, contracts, correspondence, financial records, and other documents; facilitating introductions to key contractors, tenants, lenders, and governmental contacts; continuing to perform essential management functions during the transition period; and refraining from any action that would harm the JV or impair the successor manager's ability to assume management responsibilities.

- Transition period compensation. The operating agreement should specify the developer member's compensation during the transition period (typically the continuation of the asset management fee for 30 to 90 days) as consideration for its cooperation obligation. A developer member that receives no compensation during the transition has less incentive to cooperate effectively.

- Document access and data transfer. The operating agreement should specify a thorough list of documents and data the developer member must transfer to the successor manager, including all project-specific software, models, databases, and electronic files. The developer member should not be entitled to retain copies of JV-proprietary data following removal.

Replacement Manager Selection Process

The process for selecting a replacement manager after a removal event should be clearly defined in the operating agreement to minimize delay and governance friction during what is inevitably a difficult period for the JV.

- Capital member's sole selection right. On removal, the capital member should have the right to appoint a replacement manager without the developer member's consent. Requiring the developer member's approval of its own replacement creates a mechanism for the developer member to delay or block its removal by refusing to accept any proposed successor.

- Interim management authority. Pending appointment of a permanent replacement, the capital member should have the right to appoint an interim manager (which may be the capital member itself or an affiliate) with full management authority. This interim management right prevents a governance vacuum during the replacement search.

- Replacement manager economics. The replacement manager's fee and promote structure should be defined in the operating agreement, or in a framework that allows the capital member to engage a replacement on competitive terms. Uncertainty about the replacement manager's economic entitlement creates friction in the replacement search and delays the reestablishment of effective management.

Exit Rights and Liquidity

The capital member's investment has a defined horizon. Whether driven by fund lifecycle requirements, institutional investment mandates, investor redemption obligations, or strategic portfolio rebalancing, the capital member must be able to exit the JV and realize the value of its investment within a defined timeframe and on commercially reasonable terms. Exit provisions that fail to provide this liquidity can trap institutional capital in an illiquid investment well beyond its intended holding period.

Exit rights, the provisions that govern when and how the capital member can liquidate its JV investment, are among the most carefully negotiated provisions of any institutional JV operating agreement. The capital member's exit rights are often in tension with the developer member's interest in maximizing value through a patient hold strategy. Resolving that tension requires exit provisions that are precise, fair, and calibrated to the specific investment parameters of the JV.

Forced Sale Rights After a Defined Hold Period

The capital member's most important exit right is the forced sale provision: the right to require the JV to sell its property, or the capital member's interest, after a defined holding period if voluntary agreement on disposition cannot be reached. Without a forced sale right, the capital member is wholly dependent on the developer member's willingness to agree to a disposition, a dangerous dependency if the developer member has reasons (unrelated fees, market-timing disagreements, or simple inertia) to defer the sale.

Forced sale provisions should be structured with the following characteristics from the capital member's perspective.

- Triggering date. The forced sale right should be exercisable after a defined minimum hold period consistent with the capital member's investment mandate. For development JVs, the minimum hold period should be measured from the completion or stabilization of the project, not from the JV's formation date. A forced sale right exercisable before stabilization would prevent the capital member from realizing the project's full value potential.

- Marketing process requirement. The forced sale right should require a bona fide, arms-length marketing process conducted by a qualified real estate broker, with a minimum marketing period (typically 90 to 180 days) to test the full market for potential buyers. A forced sale process that does not adequately market the asset risks achieving a below-market sale price that harms both parties.

- No minimum price requirement. Unlike the developer member, which seeks a minimum price floor to protect its promote, the capital member should resist minimum price requirements that could prevent it from completing a forced sale in a declining market. The capital member's obligation to its own investors may require it to sell even at a price below its cost basis.

- Sole authority over sale terms. On triggering the forced sale right, the capital member should have sole authority to determine the sale terms (price, closing date, buyer, representations and warranties) without requiring the developer member's consent, subject only to the arms-length marketing process requirement and any minimum price agreed to in the operating agreement.

Drag-Along Rights: Ensuring the Capital Member Can Exit

A drag-along right entitles the capital member to require the developer member to sell its interest, or to vote in favor of a sale of the JV's assets, on the same terms as the capital member's own sale. As noted in Chapter 4, drag-along rights are a standard feature of institutional JV operating agreements, and for good reason: without a drag-along, a developer member holdout can block the capital member from completing an otherwise agreed sale.

From the capital member's perspective, the drag-along right must be the following.

- Exercisable without cause or conditions. The drag-along right should be exercisable at the capital member's election, without requiring a governance deadlock or any triggering event other than the expiration of the minimum hold period. A conditional drag-along, exercisable only after a failed negotiation or other precondition, reduces the capital member's exit flexibility.

- Applicable to both member interests and asset sales. The drag-along should cover both the direct transfer of the developer member's membership interest and any sale of the JV's underlying property assets. A drag-along that covers only one transaction type creates a planning opportunity for the developer member to block the capital member's exit through the other transaction type.

- Accompanied by a developer member obligation to execute. The operating agreement should include an express irrevocable power of attorney from the developer member, authorizing the capital member (or the JV entity) to execute on the developer member's behalf any transfer documents required to complete a drag-along transaction if the developer member fails to execute voluntarily.

- Accompanied by representations and warranties obligations. The developer member should be obligated to make standard seller's representations and warranties in any drag-along transaction, consistent with the representations and warranties made by the capital member itself.

Buy-Sell Mechanisms: Protecting the Capital Member's Pricing Position

As discussed in Chapter 3, the buy-sell (shotgun) mechanism cuts both ways. While it theoretically protects the capital member's right to exit the JV by allowing it to set a price the developer member must either pay or accept, a poorly structured buy-sell can be used by a capital member with superior financial resources to acquire the developer member's interest at an artificially low price.

From the capital member's perspective, the buy-sell should be structured to do the following.

- Allow the capital member to trigger the buy-sell at any time after the minimum hold period. The capital member should not be required to demonstrate a governance deadlock or other precondition before triggering the buy-sell.

- Set the buy-sell price at the capital member's discretion. The capital member should be free to set any price it chooses for the buy-sell, subject only to the practical constraint that a price set too low risks the developer member exercising its right to sell to the capital member at that price, which the capital member can afford.

- Provide adequate financing time for the developer member. The operating agreement should give the developer member a meaningful period (at least 60 to 90 days) to arrange financing for a buy-sell purchase, with an extension if financing is being actively pursued. A capital member that triggers a buy-sell with an unreasonably short response period is using the buy-sell as a coercive exit mechanism rather than a genuine price-discovery process.

- Include promote compensation in the buy-sell price. The buy-sell price should be structured so that the developer member's promote entitlement (based on the projected promote at the buy-sell price) is reflected in the transaction economics, so that the developer member's total compensation from the buy-sell fairly reflects the value it has created.

ROFO and ROFR from the Capital Member's Perspective

Transfer restrictions, ROFO and ROFR provisions, protect the capital member against the transfer of the developer member's membership interest to an unknown or unacceptable third party. From the capital member's perspective, these provisions should include the following.

- ROFR over developer member transfers. The capital member should have a right of first refusal over any proposed transfer of the developer member's membership interest, entitling the capital member to acquire the developer member's interest on the same terms as any proposed third-party purchase. A ROFR prevents the developer member from transferring its management role and promote entitlement to a party the capital member has not vetted.

- Consent right over replacement managers. Any transfer of the developer member's membership interest that would result in a change of control of the managing entity should require the capital member's consent as a major decision, regardless of whether the ROFR is exercised.

- Transfer to affiliates. The operating agreement should permit the developer member to transfer its interest to wholly owned affiliates (for tax and estate planning purposes) without triggering the ROFR, subject to the requirement that the transferee assume all of the developer member's obligations and that the named key men remain actively involved in managing the JV.

Reporting, Transparency, and Audit Rights

A capital member that does not receive timely, accurate, and complete financial and operational information cannot exercise its governance rights effectively, cannot monitor its investment performance, and cannot identify problems before they become crises. Reporting and audit rights are the capital member's information backbone, and they must be enforced, not merely included in the operating agreement.

As discussed in Chapter 3 from the governance perspective, reporting and information rights are the mechanism by which the capital member bridges the information asymmetry inherent in a manager-managed JV. This section examines reporting rights from the capital member's investment protection perspective, with attention to the reporting standards, enforcement mechanisms, and audit rights that sophisticated capital members require.

Quarterly and Annual Financial Reporting Standards

The operating agreement should establish clear, objective financial reporting standards with defined content requirements and delivery deadlines.

- Monthly operating reports. For development-phase projects, monthly reports should include a budget-to-actual comparison on a line-item basis, a construction progress report with schedule updates, a summary of change orders approved since the prior report, a cash flow forecast for the next 90 days, and a summary of any material events (lender inquiries, contractor defaults, permitting issues) since the prior report. For operating-phase properties, monthly reports should include a rent roll with occupancy statistics, a collections report, a month-to-date and year-to-date income statement compared to the approved budget, and a capital expenditure log.

- Quarterly financial statements. An unaudited balance sheet, income statement, statement of cash flows, and a detailed variance analysis comparing actual performance to the approved budget and underwritten projections, with narrative explanation of all material variances. Quarterly financials should be delivered within 30 days of quarter-end.

- Annual audited financial statements. GAAP-compliant audited financial statements prepared by an independent certified public accounting firm acceptable to the capital member, delivered within 90 days of fiscal year-end. The capital member should have the right to select the auditor, or to approve the developer member's proposed auditor, to ensure independence.

- GAAP compliance. All financial statements should be prepared in accordance with generally accepted accounting principles, consistently applied throughout the life of the JV. The capital member should resist any developer member proposal to maintain financial records on a cash basis or on any accounting basis other than GAAP.

Requiring Third-Party Audits

Annual audited financial statements are only as valuable as the independence and competence of the auditor performing the audit. Capital members should ensure the following.

- Auditor independence. The auditor should have no material relationship with the developer member or its affiliates that could compromise its independence. The capital member should request the auditor's independence confirmation at the outset of each engagement.

- Capital member approval of the auditor. The capital member should have the right to approve, or to veto, the selection of the JV's auditor, not merely the right to be notified of the developer member's selection. An auditor selected unilaterally by the developer member may be less aggressive in identifying and reporting issues that reflect poorly on the developer member's management.

- Scope of the audit. The annual audit should cover the full scope of the JV's operations, including affiliate transactions. The audit scope should be specified in the operating agreement to prevent the developer member from limiting it to exclude potentially problematic areas.

- Direct communication with the auditor. The capital member should have the right to communicate directly with the JV's auditor and to receive copies of all management letters, audit findings, and related communications without the developer member as an intermediary.

Access to Books, Records, and Project Documentation

The capital member's right to inspect and copy the JV's books and records is its most direct protection against financial misreporting by the developer member. This right should be the following.

- Broad in scope. The right to inspect should cover all of the JV's books, records, contracts, correspondence, electronic files, and financial data, including information about affiliate transactions and JV bank accounts.

- Exercisable on reasonable notice. The capital member should be able to exercise its inspection right on reasonable advance notice (typically five to ten business days) without the developer member's consent and without any threshold showing of a specific reason for the inspection.

- Exercisable at the capital member's expense. Routine inspections should be at the capital member's expense, to prevent abuse of the inspection right as a harassment mechanism; inspections that reveal material discrepancies should be at the developer member's expense.

- Not limited by confidentiality claims. The developer member should not be entitled to withhold JV documents from the capital member on the ground that they are confidential to the developer member's broader business operations. All

JV records, even those that reflect on the developer member's organizational affairs, should be accessible to the capital member.

Lender Reporting and Covenant Compliance

The capital member should receive copies of all reports, certificates, and compliance documentation delivered to the JV's construction and permanent lenders.

- Concurrent delivery of lender reports. All financial reports, draw requests, compliance certificates, and covenant calculations delivered to the lender should be delivered to the capital member concurrently, without requiring a separate request.
- Notification of lender defaults. The developer member should be required to notify the capital member immediately (within one to two business days) of any event of default under the construction loan or permanent loan, any lender inquiry or correspondence related to the project's compliance with loan covenants, and any lender-required remediation plan.
- Capital member's right to cure lender defaults. The operating agreement should give the capital member the right, but not the obligation, to cure any construction or permanent loan default on behalf of the JV if the developer member fails to cure within the applicable cure period, with the capital member's cure costs treated as a senior obligation of the JV repayable from the next available cash.

Dilution Protections

The capital member's equity interest in the JV is fixed at closing, expressed as a percentage of total equity and as a priority position in the waterfall. Dilution protections ensure that this interest cannot be reduced by subsequent events without the capital member's express consent.

Dilution is the risk that the capital member's economic interest in the JV, its share of profits, its voting rights, or its priority position in the waterfall, is reduced by actions taken after the operating agreement is signed. Dilution can occur through the admission of new members, the issuance of additional equity interests, the conversion of developer fees to equity, or the modification of the waterfall's economic terms. Each of these mechanisms requires careful anti-dilution drafting.

Anti-Dilution Mechanics in Capital Call Scenarios

The most common dilution scenario arises when the developer member defaults on a capital call, failing to fund its required co-investment contribution. As discussed in Chapter 2, the capital member's remedy for a developer member capital call default is dilution of the developer member's interest. The capital member should ensure that this dilution remedy is the following.

- Automatic and self-executing. The dilution should occur automatically on the expiration of the cure period without cure, without requiring a capital member election, a member vote, or a court order. A dilution remedy that requires affirmative action by the capital member to enforce is less effective than one that operates automatically.

- Punitive, at a multiple of the default amount. Dilution at a multiple of the funding shortfall (for example, 1.5x) provides a meaningful deterrent against strategic default by the developer member. Mathematical (pro rata) dilution alone may not adequately compensate the capital member for the risk and inconvenience of funding the developer member's shortfall.

- Applicable to the promote as well as the membership percentage. The dilution remedy should reduce the developer member's promote entitlement proportionally to the reduction in its membership percentage. A dilution remedy that reduces the developer member's membership percentage but leaves its promote intact provides only partial protection.

Consent Rights Over Additional Equity Raises

The capital member should have express approval rights over any issuance of new equity interests in the JV, whether to existing members or to new parties. This approval right prevents the developer member from diluting the capital member's economic interest by issuing new equity to third parties without the capital member's consent.

Specific anti-dilution provisions the capital member should negotiate include the following.

- Prohibition on new member admission without capital member consent. No new member may be admitted to the JV without the capital member's express written consent, which may be withheld in the capital member's sole and absolute discretion. This prohibition should be absolute and should not be subject to a reasonableness standard.

- Pre-emptive rights for additional equity issuances. If additional equity beyond the initial committed amounts is required, and approved as a major decision, the capital member should have the right, but not the obligation, to fund all or a disproportionate share of the additional equity, maintaining or enhancing its economic interest.

- No equity issuance to affiliates without approval. The developer member should not be permitted to admit an affiliate as a new member, or to transfer part of its interest to an affiliate, without the capital member's consent, since such transactions could alter the governance dynamics of the JV in ways the capital member did not bargain for.

Protection Against Subordination of the Preferred Return

The capital member's preferred return is the economic cornerstone of its investment protection. Any transaction that subordinates the preferred return, placing other claims ahead of it in the JV's cash flow priority, is a fundamental impairment of the capital member's investment that should not be permitted without its express consent.

Capital members should ensure that the operating agreement does the following.

- Prohibits any amendment to the waterfall without capital member consent. As a super-major decision, any amendment to the waterfall's priority or mechanics requires the capital member's express consent. This prohibition should be expressly stated and should not be subject to override by a majority vote of the members.
- Limits the JV's ability to incur additional debt that subordinates equity. Any additional debt obligation that would reduce the cash available to pay the preferred return before it accrues to the full preferred return amount requires capital member consent as a major decision.
- Restricts developer fee payments that impair preferred return accrual. While developer fees should generally be above-the-line expenses, as discussed in Chapter 4, the capital member should ensure that extraordinary or above-market fee payments do not deplete operating cash to the point where the preferred return cannot be paid currently.

Developer Fee Oversight

Developer fees are the developer member's compensation for services rendered, and, if unchecked, a mechanism for extracting value from the JV that reduces the capital member's economic return. Strong fee oversight provisions ensure that the developer member is fairly compensated for legitimate services while preventing fee structures that shift disproportionate economic risk to the capital member.

The tension between the developer member's interest in maximizing fee income and the capital member's interest in maximizing distributable returns is one of the most persistent sources of conflict in institutional JV relationships. The capital member's fee oversight provisions must be thorough enough to prevent fee abuses while avoiding a governance framework so restrictive that it impairs the developer member's ability to fund its operational platform.

Limiting Fee Stacking

Fee stacking refers to the practice of charging multiple overlapping fees for the same or substantially similar services, for example charging both a development fee and a construction management fee for what is effectively a single project oversight role, or charging both an asset management fee and a property management fee without clearly delineating the distinct services each compensates.

Capital members should negotiate for the following.

- A complete fee schedule. All fees payable to the developer member or its affiliates should be enumerated in a single, complete schedule attached to the operating agreement. No fee should be payable unless expressly provided for in this schedule.
- Clear service delineation. The services compensated by each fee should be clearly and specifically defined, with no overlap between fee categories. If both a development fee and a construction management fee are payable, the operating agreement should specify exactly which services are compensated by each.
- Market rate cap. All developer fees should be capped at rates not exceeding the prevailing market rate for comparable services provided by arms-length third parties. The capital member should have the right to require an independent fee benchmarking analysis at any time it believes a fee is above market.
- Offset for third-party management fees. If the developer member engages a third-party property management company in addition to receiving an asset management fee itself, the third-party management fee should be offset against the developer member's asset management fee, so that the capital member is not paying twice for substantially the same services.

Approval Rights Over Affiliate Transactions

Affiliate transactions are the most persistent source of value leakage in institutional JV relationships, because they allow the developer member to extract value from the JV through above-market pricing on contracts with entities it controls. The capital member should negotiate for thorough approval and oversight rights over all affiliate transactions.

- Express approval requirement. All contracts, leases, and service arrangements between the JV and any affiliate of the developer member should be expressly listed as major decisions requiring capital member approval, regardless of the dollar amount. No threshold or materiality exception should apply to affiliate transactions.
- Arms-length terms requirement. All approved affiliate contracts should be conditioned on the terms being no less favorable to the JV than terms available from an unaffiliated third party for comparable services. The capital member should have the right to require competitive bids from third-party providers before approving any affiliate contract.
- Right to terminate affiliate contracts. The capital member should have the right to terminate any affiliate contract, without penalty to the JV, if the developer member is removed as manager, the affiliate fails to perform in accordance with the contract's terms, or an independent review confirms that the affiliate is charging above-market rates.

- Disclosure of affiliate relationships. The developer member should be required to disclose all affiliate relationships relevant to the JV, including relationships between the developer member's principals and proposed contractors, vendors, and service providers, at the time of engagement and on an ongoing basis.

Market Rate Benchmarking of Fees

Developer fees, even those specifically disclosed and approved at the outset of the JV, can become above-market over time as market conditions change, the developer member's platform evolves, or comparable market rates decline. Capital members should negotiate for ongoing fee benchmarking rights.

- Annual fee review. The operating agreement should require an annual review of all developer fees against current market rates, with the right of the capital member to request a fee reduction if a fee is determined to be materially above market.

- Independent benchmarking. The capital member should have the right to engage an independent real estate advisory firm to benchmark developer fees against market comparables, at the JV's expense if the benchmarking reveals a material above-market rate, or at the capital member's expense otherwise.

- Fee adjustment mechanism. If benchmarking confirms that a fee is materially above market, the operating agreement should provide a mechanism for adjusting the fee to market rate, either through negotiation or through a binding third-party determination.

Investor-Level Tax Considerations

For institutional capital members, including pension funds, insurance companies, sovereign wealth funds, tax-exempt endowments, and foreign investors, the tax consequences of JV participation can be as important as the pre-tax economic return. Tax provisions that are not carefully negotiated before the operating agreement is signed can generate unexpected tax liabilities, reporting obligations, or regulatory consequences that materially impair the capital member's after-tax return.

Tax considerations for institutional capital members are highly specific to the type of investor involved. This section examines the primary tax issues that the most common categories of institutional capital member encounter in real estate JV transactions. Capital members should engage experienced tax counsel, in addition to transactional JV counsel, to ensure that all applicable tax provisions are addressed before the operating agreement is signed.

Preferred Return Tax Treatment

The tax treatment of the capital member's preferred return depends on the economic substance of the preferred return arrangement and the JV's underlying income.

- Character of preferred return income. The preferred return is not a separate category of income for tax purposes; it is the capital member's distributive share of the JV's income, allocated under the operating agreement's tax provisions. To the extent the JV generates ordinary income (for example, rental income), the capital member's preferred return distributions are characterized as ordinary income. To the extent the JV generates capital gain (for example, from the sale of real property held more than one year), the capital member's preferred return distributions are characterized as capital gain.

- Preferred return compared with guaranteed payment. If the preferred return is structured as a guaranteed payment under Section 707(c) of the Code (payable regardless of JV income), it will be taxable as ordinary income to the capital member regardless of the character of the JV's underlying income. The capital member's tax advisors should evaluate whether a preferred return structure or a guaranteed payment structure is more advantageous given the capital member's specific tax position.

- Timing of income recognition. Income allocated to the capital member by the JV is generally taxable in the year it is allocated, regardless of when distributions are actually made. The capital member may therefore recognize taxable income in a year in which it receives no cash distribution from the JV, a phantom income scenario that requires careful tax planning.

UBTI Considerations for Tax-Exempt Investors

Tax-exempt investors, including pension funds, endowments, foundations, and other entities exempt from federal income tax under Section 501(c) of the Code, are subject to Unrelated Business Taxable Income (UBTI) rules that can expose them to federal income tax on certain types of JV income. UBTI considerations are among the most important tax issues for tax-exempt capital members in real estate JVs.

The primary UBTI risk for tax-exempt capital members in real estate JVs arises from debt-financed income, income attributable to property acquired with debt financing. Under Section 514 of the Code, income from debt-financed property is UBTI to the extent it is attributable to the debt, potentially exposing the tax-exempt capital member to federal income tax that would otherwise not apply.

To address UBTI concerns, tax-exempt capital members should negotiate for the following.

- UBTI monitoring and reporting. The developer member should be required to provide the capital member with annual UBTI projections and calculations, allowing the capital member to monitor its UBTI exposure throughout the JV's life.

- Blocker entity structure. Tax-exempt investors commonly interpose a taxable blocker entity (typically a C corporation or a REIT subsidiary) between themselves and the JV to convert UBTI into corporate-level taxable income,

taxable only at the blocker level, not at the tax-exempt investor level. The JV operating agreement should accommodate this structure if the tax-exempt capital member requires it.

- Limitation on debt-financed income. The capital member may negotiate for limits on the JV's use of debt financing, or for the right to require the JV to restructure its financing to reduce debt-financed income if the UBTI exposure exceeds agreed thresholds.

FIRPTA Considerations for Foreign Capital Members

Foreign capital members, investors that are not United States persons for federal income tax purposes, face a specific set of tax issues in real estate JV transactions under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). FIRPTA imposes a withholding tax on the disposition of United States real property interests (USRPIs) by foreign persons, and real estate JV interests are generally treated as USRPIs for this purpose.

Key FIRPTA issues for foreign capital members include the following.

- Withholding on distributions. The JV may be required to withhold federal income tax on distributions to foreign capital members that are attributable to FIRPTA gain. Foreign capital members should ensure that the operating agreement's distribution provisions address the withholding obligation and specify how withholding amounts are credited against the foreign capital member's overall distribution entitlement.

- Withholding on sale of a JV interest. On the sale of the foreign capital member's JV interest, the buyer may be required to withhold 15% of the amount realized (and in some circumstances a higher amount) as FIRPTA withholding under Section 1445 of the Code. Foreign capital members should ensure that any buy-sell or forced sale mechanism in the operating agreement addresses the FIRPTA withholding obligation and its effect on the net proceeds to the foreign capital member.

- Treaty benefits. Foreign capital members from countries with applicable income tax treaties with the United States may be eligible for reduced withholding rates or exemptions. The capital member's tax advisors should evaluate available treaty benefits at the outset of the JV and document the relevant treaty position.

- QFPF exception. Certain qualified foreign pension funds (QFPFs) and their wholly owned subsidiaries are exempt from FIRPTA under Section 897(l), added by the PATH Act in 2015. Foreign pension fund capital members should evaluate whether they qualify for this exemption with their tax advisors.

Withholding Obligations

The JV entity, acting through the developer member as manager, may be required to withhold federal and state income taxes on distributions to non-resident members, including both foreign capital members under FIRPTA and non-resident state taxpayers in states with nonresident withholding obligations. The capital member should ensure that the operating agreement does the following.

- Requires the developer member to comply with all applicable federal and state withholding obligations, including FIRPTA withholding, state nonresident withholding, and backup withholding, and to remit all withheld amounts to the appropriate tax authorities on a timely basis.
- Provides for the treatment of withheld amounts as distributions. Amounts withheld and remitted to tax authorities on behalf of the capital member should be treated as distributions to the capital member for waterfall calculation purposes, so that withholding does not reduce the amount of distributable cash available to satisfy the preferred return.
- Requires prompt notification of withholding events. The developer member should be required to notify the capital member promptly of any anticipated withholding obligation and of the basis for the withholding calculation, allowing the capital member to evaluate whether the withholding is correctly calculated and to assert any applicable exemption or reduction.

Key Mistakes Capital Members Make in JV Negotiations

The capital member holds the financial leverage in any JV negotiation. But financial leverage is not the same as negotiating wisdom, and capital members, even sophisticated institutional investors, make predictable, costly mistakes that undermine the very investment protections they are paying for. This section catalogues the most common and most consequential of those mistakes.

Institutional capital members are often represented by general counsel or in-house legal teams that review JV documents but may lack the specialized transactional and litigation experience in real estate JV disputes required to identify and address the full range of risks in a complex JV operating agreement. The mistakes below are the result of experience deficits, process failures, and negotiating psychology, not bad faith. Awareness of them is the first step toward avoiding them.

Mistake	What Goes Wrong	How to Avoid It
Relying on form documents without market calibration	The capital member's form operating agreement, drafted for its maximum protection in a different market environment or deal structure, may include provisions so one-sided that the developer member cannot accept them, stalling the negotiation or losing	Engage JV counsel experienced in current market standards who can advise on which provisions are market-standard and which are outliers. A capital member that insists on non-market provisions may lose access to the best developer members, who have options.

Mistake	What Goes Wrong	How to Avoid It
	the deal to a competing capital source willing to offer better terms.	
Accepting an inadequate major decisions list	The capital member's major decisions list omits a category of decision the developer member might take that materially harms the investment: affiliate contracts above a certain threshold, changes in development program scope, or modifications to the leasing strategy. Because the provision was not included, the capital member has no recourse.	Approach the major decisions list as a thorough risk-identification exercise. Work with counsel to identify every decision the developer member might make that could harm the capital member's investment, and ensure each is included in the list.
Accepting a narrow cause definition	The operating agreement's cause definition is so narrow that the capital member cannot remove a developer member that is visibly mismanaging the project, because the mismanagement (budget overruns, schedule delays, loss of a key man) does not fit within the narrow list of cause triggers the developer member negotiated.	Negotiate a cause definition that includes material operational failures, not just egregious misconduct. Ensure that material is defined objectively (percentage thresholds, days of delay) rather than subjectively.
Failing to negotiate key man provisions	The capital member invested based on its confidence in the developer member's key principals. Those principals depart for a competing project or are promoted away from day-to-day involvement, and the developer member replaces them with less experienced personnel. The capital member has no contractual basis to object.	Insist on thorough key man provisions identifying specific individuals by name, with defined time commitment requirements, short cure periods, and meaningful approval rights over replacements.
Failing to enforce reporting obligations	The capital member receives late, incomplete, or inaccurate financial reports and does not enforce its reporting rights, either because the relationship is good and the capital member does not want to create friction, or because it lacks internal processes for reviewing JV reports carefully. By the time the capital member discovers a material problem, it is too late to intervene effectively.	Establish rigorous internal processes for reviewing JV reports. Enforce reporting obligations strictly, even in a good relationship, because enforcement habits established early protect the capital member when the relationship deteriorates. Consider engaging an independent asset manager to monitor JV performance.
Failing to coordinate the operating agreement with the loan documents	The capital member negotiates thorough governance rights in the operating agreement (major decision approval, removal authority, forced sale rights) without reviewing whether those rights are preempted or	Review all loan documents concurrently with the operating agreement. Identify and resolve every conflict between operating agreement governance rights and lender consent requirements before closing.

Mistake	What Goes Wrong	How to Avoid It
	conditioned by lender consent requirements in the construction loan documents. Critical governance rights are effectively nullified by the lender's veto.	
Accepting no-cause removal without a corresponding promote adjustment	The capital member negotiates a no-cause removal right but accepts a provision preserving the developer member's full promote on no-cause removal. The capital member exercises the right when the developer member is underperforming, and then must continue paying the developer member's full promote from the eventual disposition proceeds, even though the developer member is no longer managing the project.	Negotiate removal and promote provisions as an integrated package. No-cause removal should be accompanied by a promote adjustment mechanism that reflects the portion of the promote earned through the removal date, not the full promote the developer member would have earned through completion.
Ignoring UBTI and FIRPTA considerations	A tax-exempt or foreign capital member invests in a JV without addressing applicable UBTI or FIRPTA issues. Unexpected withholding obligations, tax liabilities, or reporting requirements arise at distribution or disposition, significantly impairing the capital member's after-tax return.	Engage tax counsel experienced in real estate partnership taxation, separately from transactional JV counsel, to review all applicable federal and state tax issues before the operating agreement is signed.

The common thread through these mistakes is the same one that runs through the developer member's mistakes catalogued in Chapter 4: treating legal documentation as a ministerial exercise rather than a strategic investment. The capital member that engages experienced JV counsel, maintains rigorous internal processes for JV oversight, and enforces its contractual rights consistently, not just when the relationship deteriorates, will protect its investment far more effectively than one that does not.

The Value of Experienced JV Counsel: A Closing Note for Capital Members

Institutional capital members often assume that their in-house legal teams, general counsel, or existing outside counsel can adequately review a real estate JV operating agreement. That assumption is frequently wrong, not because those attorneys are unskilled, but because real estate joint venture documentation is a specialized practice area where the gap between generalist knowledge and specialist expertise is wide and consequential.

The provisions discussed in this chapter, the preferred return mechanics, the major decisions list, the cause definition, the key man provisions, the removal and transition framework, and the tax provisions, are not boilerplate. They are the product of years of transactional experience and the hard-won lessons of JV disputes that have revealed exactly how these provisions operate when the relationship breaks down.

A capital member that deploys $50 million into a JV without specialized legal counsel review is bearing a documentation risk that is entirely avoidable. The cost of specialized JV counsel is a fraction of the amount at stake in any single provision of the operating agreement. For a capital member, specialized counsel is not an expense to weigh against the deal. It is the protection that makes the rest of the investment thesis enforceable.

The attorneys at [Firm Name] represent institutional and individual capital members in real estate joint ventures across a wide range of asset types and structures. We bring the transactional depth, the documentation experience, and the practical understanding of how JV provisions operate in practice that every capital member deserves to have protecting its investment. We welcome the opportunity to discuss your JV needs.

Chapter 5 Summary

Chapter 5 has given the capital member a negotiating guide to the JV operating agreement's most important investment-protection provisions. The principal takeaways are these.

- The capital member's preferred return, including its compounding mechanics, cumulative accrual, and precise definition of the calculation base, is the economic cornerstone of its investment protection and must be drafted with complete precision.
- The major decisions list must be thorough, objectively defined, and enforced consistently. Omissions from the list are final; the capital member has no implied right to approve decisions not expressly listed.
- Key man provisions, identifying specific individuals, requiring defined time commitments, and providing meaningful approval rights over replacements, are essential protections for the capital member's investment in specific human expertise.
- Removal rights, both for cause (broadly defined to include operational failures) and no-cause (exercisable at the capital member's election), must be backed by thorough transition planning and cooperation obligations.
- Forced sale rights and drag-along provisions must be structured to provide genuine liquidity at an appropriate time, without enabling the capital member to force a sale prematurely or at a price that destroys value for both parties.
- Reporting and audit rights must be actively enforced, not merely documented in the operating agreement. Capital members that do not enforce their reporting rights are often the last to know about developing problems.
- Affiliate transaction protections, including thorough approval rights, arms-length terms requirements, and ongoing fee benchmarking, are essential safeguards against the self-dealing that is the most persistent source of value leakage in institutional JV relationships.

- Tax considerations, including UBTI for tax-exempt investors, FIRPTA for foreign capital members, and phantom income risks for all capital members, must be addressed by specialized tax counsel before the operating agreement is signed.
- The eight mistakes catalogued in this chapter are all avoidable with adequate preparation, specialized legal counsel, and rigorous internal governance processes.

Looking Ahead to Chapter 6

With both the developer member's and the capital member's perspectives examined in Chapters 4 and 5, Chapter 6 turns to the deal on paper, the term sheet. Chapter 6 provides an annotated breakdown of a sample real estate JV term sheet, with dual-perspective commentary on each provision from both the developer member's and the capital member's vantage points. The term sheet chapter bridges the conceptual guidance of Chapters 1 through 5 with the practical documentation work that every JV negotiation requires, and it shows how the principles examined in this handbook translate into the specific language of a real-world JV negotiation.

CHAPTER 6

Breaking Down a Real Estate JV Term Sheet

The term sheet is where the abstract principles of joint venture law meet the concrete reality of the deal. It is the first document in which the developer member and capital member commit their economic and governance expectations to paper, and the last document most parties review carefully before the complexity of the operating agreement negotiation begins. This chapter uses an annotated, full-length sample term sheet to show exactly how the concepts examined in Chapters 1 through 5 translate into the specific language of a real-world JV negotiation.

Every section of the sample term sheet below is analyzed from both the developer member's and the capital member's perspective, using the dual-perspective commentary format used throughout this handbook. The goal is to give both parties a clear, practical understanding of what each term sheet provision means, what is at stake in each negotiation, and which drafting choices will protect each party's interests when the provisions are translated into the final operating agreement.

The sample term sheet used in this chapter is for a ground-up multifamily development joint venture, one of the most common and most complex JV structures in the institutional real estate market. The specific economic terms (preferred return rates, promote percentages, fee amounts, IRR hurdles) are representative of market practice as of the date of this handbook's publication but should be confirmed against current market conditions before use in any actual negotiation. Market terms move significantly with interest rate environments, capital availability, and asset-class dynamics.

One point before proceeding: this sample term sheet is provided for educational purposes only. It is not a form document, and it should not be used as a template for an actual JV term sheet without the involvement of experienced legal counsel. The provisions of a real JV term sheet must be tailored to the specific transaction, the specific parties, and the specific legal and regulatory environment, a level of customization that no sample document can provide.

Purpose and Function of the Term Sheet

A well-drafted term sheet is more than a summary of the deal. It is a governance document in its own right, a due diligence tool, an internal approval trigger, and a negotiating map for the operating agreement that will follow.

The term sheet serves several functions at once in a real estate JV transaction, and understanding those functions helps both parties approach the term sheet negotiation with the appropriate level of care and strategic attention.

Binding and Non-Binding Provisions

Most real estate JV term sheets are expressly non-binding with respect to their substantive economic and governance terms, meaning that neither party is legally obligated to consummate the JV on the term sheet terms until the operating agreement is signed. This non-binding character suits the term sheet's role as a preliminary document that captures the parties' mutual expectations before the full cost of legal documentation is incurred.

Virtually every institutional JV term sheet, however, includes certain provisions that are expressly binding from the date of execution.

- Exclusivity. A binding obligation of the developer member not to negotiate with other potential capital partners for a defined period (typically 30 to 90 days) following term sheet execution, giving the capital member exclusive access to the opportunity while it completes its due diligence and legal documentation. Without a binding exclusivity provision, the developer member could continue shopping the deal to other capital sources even after the term sheet is signed, undermining the capital member's investment of time and due diligence expense.

- Confidentiality. A binding obligation of both parties to maintain the confidentiality of the term sheet's contents and the existence of the negotiation. Confidentiality matters particularly to the developer member, which does not want its deal sourcing activities or negotiating positions disclosed to competitors.

- Cost-sharing. Some term sheets include a binding provision allocating the cost of due diligence, legal documentation, and transaction expenses between the parties. Where included, the cost-sharing provision ensures that neither party bears a disproportionate share of transaction costs if the deal does not close.

- No-shop obligation. In some transactions, the term sheet includes a binding no-shop obligation requiring the developer member to refrain from soliciting competing offers from other capital sources during the exclusivity period, not merely from accepting them.

The distinction between binding and non-binding provisions must be clearly reflected in the term sheet's language. Courts have occasionally found term sheets to be partially or fully binding where the language was ambiguous or where the parties' conduct suggested an intent to be bound. Experienced JV counsel make sure the term sheet clearly identifies which provisions are binding and which are not, typically through a recital at the outset of the document and express binding or non-binding designations for each key section.

The Term Sheet as a Negotiating Roadmap

The term sheet's most important function, beyond its formal legal effect, is as a negotiating roadmap for the operating agreement. A well-negotiated term sheet resolves the most significant economic and governance points of contention before legal

documentation begins, narrowing the operating agreement negotiation to implementation of agreed principles rather than renegotiation of them.

The value of a thorough term sheet negotiation is hard to overstate. Operating agreements for institutional real estate JVs can run 80 to 120 pages and involve dozens of defined terms and interdependent provisions. When the parties try to negotiate the substance of the deal for the first time at the operating agreement stage, without the benefit of a thorough term sheet, the result is typically a protracted, expensive, and contentious negotiation in which each party's attorneys fight over every provision. A term sheet that resolves the major economic, governance, and exit provisions in advance converts the operating agreement negotiation from a substance debate into a drafting exercise, substantially faster and less expensive for both parties.

Best Practice: Negotiate the Term Sheet as Carefully as the Operating Agreement

Both developer members and capital members frequently underinvest in term sheet negotiation, treating it as a preliminary document that can be revised during the operating agreement process. That is a strategic mistake. The term sheet establishes the baseline from which the operating agreement is drafted, and provisions agreed in the term sheet are very difficult to reopen in the operating agreement negotiation without raising bad faith concerns. The developer member or capital member that negotiates the term sheet without experienced counsel is effectively letting the other party's counsel set the operating agreement's baseline, a disadvantage that is hard to overcome in the documentation phase.

Annotated Sample Term Sheet

The following is a representative term sheet for a ground-up multifamily development joint venture. Each section is presented in term-sheet format, followed by dual-perspective commentary analyzing the provision from the developer member's and capital member's perspectives. All figures are illustrative; actual deal terms must be negotiated based on the specific transaction, market conditions, and parties involved.

Project Assumptions: 250-unit Class A multifamily development in a primary metropolitan market. Total project cost: $75,000,000. Construction period: 24 months. Stabilization period: 12 months post-completion. Projected hold period: 5 years from stabilization.

1 PARTIES AND ROLES

Developer Member: [Developer Entity Name], a Delaware limited liability company (“Developer Member” or “Manager”).

Capital Member: [Capital Entity Name], a Delaware limited liability company (“Capital Member”).

JV Entity: A newly formed Delaware limited liability company to be formed prior to closing (the “Company”).

Manager: Developer Member shall serve as the initial Manager of the Company, with the authority and subject to the limitations described herein.

Key Men: [Principal Name 1] and [Principal Name 2] (each a "Key Man"). Each Key Man shall devote not less than [___]% of his or her professional time to the management of the Company's affairs.

BINDING: Yes (as to entity formation obligations and Key Man designation).

Developer Member Perspective	Capital Member Perspective
Ensure the Manager designation is clear and unconditional, not subject to ongoing capital member approval. Negotiate the Key Man time commitment percentage carefully: 50% is typically the minimum the capital member will accept, and 100% may be unworkable if the Developer Member manages multiple projects. Consider negotiating a list of pre-approved successor Key Men within the Developer Member's organization to limit the disruption of any Key Man departure event. The Key Man time commitment should be defined as an average over a rolling period (for example, any six-month period), not a daily requirement that would be impractical to measure.	Insist that Key Men be identified by name, not merely by title or role. Negotiate for the highest feasible time commitment percentage given the Developer Member's platform size. Ensure the Manager designation is accompanied by the full governance framework (major decisions list, reporting obligations, removal rights) described in later sections. The term sheet should confirm that the Key Man provision is binding regardless of the non-binding status of other provisions.

2 PROJECT DESCRIPTION AND BUSINESS PLAN

Property: [Address / Legal Description], consisting of approximately [___] acres located in [City, State] (the "Property").

Development: Ground-up development of approximately 250 Class A multifamily apartment units, including [___] structured parking spaces, [___] sq. ft. of ground-floor retail, and amenity spaces (the "Project").

Business Plan: The Project shall be developed, stabilized, and disposed of in accordance with the Approved Business Plan attached hereto as Exhibit A. Material amendments to the Approved Business Plan shall require Capital Member approval as a Major Decision.

Hold Strategy: Target hold period of 5 years from Project stabilization (defined as achievement of 93% economic occupancy for 90 consecutive days).

Developer Member Perspective	Capital Member Perspective
Negotiate for the broadest possible initial Approved Business Plan, one that pre-authorizes the widest range of operational decisions without requiring capital member re-approval. The definition of material amendment should have an objective, high threshold: changes that increase total project costs by more than 10%, materially change the development program, or extend the projected stabilization date by more than 6 months. Ensure the Business Plan includes the full development budget, projected schedule, leasing strategy, and targeted tenant profile, so that the Developer Member's operational latitude	Insist that the Approved Business Plan be attached as a binding exhibit to the operating agreement, not merely referenced as an existing document. The definition of material amendment should be thorough, covering any change that affects the capital member's projected return by more than a defined threshold (for example, 50 basis points of IRR). The stabilization definition (93% economic occupancy for 90 consecutive days) is a standard benchmark; resist attempts to lower the occupancy threshold or shorten the measurement period, as both make stabilization easier to achieve and may trigger distributions before genuine stabilization.

Developer Member Perspective	Capital Member Perspective
is as wide as possible within the approved parameters.	

3 CAPITALIZATION

Total Project Cost: Approximately $75,000,000, as set forth in the Approved Budget attached hereto as Exhibit B.

Construction Loan: Approximately $52,500,000 (70% loan-to-cost) from a construction lender to be identified by Developer Member and approved by Capital Member.

Total JV Equity: Approximately $22,500,000 (30% of Total Project Cost).

Capital Member Equity: $20,250,000 (90% of Total JV Equity).

Developer Member Equity: $2,250,000 (10% of Total JV Equity).

Funding Schedule: Capital contributions shall be funded as equity draws in accordance with the Approved Budget, with no less than 10 Business Days' advance notice for each draw request.

Additional Equity: Any equity requirement above the committed amounts shall require Capital Member approval as a Major Decision.

BINDING: No (subject to final documentation).

Developer Member Perspective	Capital Member Perspective
The 10% co-investment requirement ($2.25M on this deal) is typical for institutional JVs. Negotiate for the right to fund this co-investment from development fee income rather than from the Developer Member's balance sheet, which preserves the Developer Member's liquidity for other projects. Ensure the funding schedule is tied to objective, verifiable milestones (construction loan draws, AIA payment applications) rather than subjective capital member approvals. The lender approval right for Capital Member is standard; ensure that the approval right does not give the Capital Member leverage to delay or block a lender selection that the Developer Member has already negotiated in good faith.	The 90/10 equity split is market-standard for an experienced institutional developer. Verify that the Developer Member's $2.25M co-investment is funded in cash, not through a fee credit or promissory note, to ensure genuine alignment. Negotiate for all equity contributions to be fully committed at closing (not subject to annual re-approval), with mandatory funding obligations for the Developer Member co-investment. The construction lender approval right is important; the Capital Member should reserve the right to reject a lender whose terms are materially different from market or whose loan documents conflict with the operating agreement's governance framework.

4 ECONOMIC TERMS AND DISTRIBUTION WATERFALL

All Available Cash of the Company shall be distributed in the following order of priority:

Tier 1, Return of Capital: To Capital Member and Developer Member, pro rata in proportion to their respective Contributed Capital, until each member has received a return of its full Contributed Capital; provided that Capital Member's Contributed Capital shall be returned in full before any Contributed Capital of Developer Member is returned.

Tier 2, Preferred Return: To Capital Member, until Capital Member has received a cumulative, compounding preferred return of 8.0% per annum on its Contributed Capital (the "Preferred Return"), accruing from the date of each Capital Contribution.

Tier 3, Developer Member Catch-Up: To Developer Member, until Developer Member has received an amount such that, in the aggregate, 20% of all distributions made pursuant to Tiers 2 and 3 have been distributed to Developer Member.

Tier 4, Residual: 80% to Capital Member; 20% to Developer Member (the "Promote").

Developer Member Perspective	Capital Member Perspective
The 20% promote with a single 8% preferred return hurdle is a reasonable starting position for a market-rate development JV. Key Developer Member negotiating points: (1) Push for simple rather than compounding preferred return. On a 5-year hold, compounding at 8% generates approximately 17% more accrued preferred return than simple, reducing the promote pool; (2) Negotiate for the catch-up tier to be included (as drafted above) rather than a simple 80/20 split from dollar one above the preferred return, since the catch-up accelerates the Developer Member's promote receipt; (3) Ensure Contributed Capital is defined as cash actually funded, not including deemed contributions or fee offsets; (4) Push for waterfall treatment of refinancing proceeds, not just sale proceeds.	The 8% compounding preferred return is the Capital Member's primary economic protection. Key Capital Member negotiating points: (1) Insist on compounding, not simple, preferred return. The difference on a $20M equity position over 5 years is material; (2) Resist the catch-up tier if possible, since a direct 80/20 split above the preferred return is simpler and more protective; (3) If a catch-up is accepted, cap it so that the Developer Member cannot receive distributions for an extended period while the Capital Member receives nothing above the preferred return; (4) Define Available Cash to exclude amounts required for approved reserves, so distributions do not deplete required operating reserves; (5) Ensure the waterfall applies to all capital events, not just final sale.

5 DEVELOPER FEES

The Company shall pay the following fees to Developer Member or its designated affiliate:

Development Fee: 3.0% of total hard and soft costs (excluding land and financing costs), payable in installments tied to construction draw milestones.

Construction Management Fee: 1.5% of total hard costs, payable monthly during the construction period.

Asset Management Fee: 1.0% per annum of Invested Equity, payable quarterly commencing upon Project stabilization.

Disposition Fee: 0.75% of gross sale price, payable at disposition closing.

All fees are payable as operating expenses of the Company, prior to any distribution pursuant to the waterfall. The fee schedule shall be subject to annual benchmarking review by Capital Member.

Developer Member Perspective	Capital Member Perspective
The combined fee structure (Development: about $1.1M; Construction Management: about $0.5M; Asset Management: about $0.9M over 5 years; Disposition: about $0.5M) provides roughly $3M in base compensation before promote, a reasonable baseline for a $75M development	The fee structure represents roughly 4% of total project cost, at the high end of market for a $75M project. Key Capital Member negotiating points: (1) Insist on the annual benchmarking review as drafted, so fees track the market throughout the hold period; (2) Negotiate for the Asset

Developer Member Perspective	Capital Member Perspective
project. Key Developer Member negotiating points: (1) Resist the annual benchmarking review, which creates recurring renegotiation risk; instead, negotiate for market-rate caps defined at signing with no subsequent review; (2) Ensure the disposition fee is paid from gross sale proceeds before the waterfall calculation, not as a distribution from the waterfall; (3) Negotiate for fee survival on capital member transfer, so that all fees are expressly binding on successor capital members; (4) Ensure fees are payable even during periods of construction delay or cost overrun.	Management Fee to be suspended, not merely deferred, during any period when the Project is more than 90 days behind the approved stabilization schedule; (3) Require competitive bids for any construction management services to ensure the Construction Management Fee reflects market rates; (4) Cap the total fees payable to the Developer Member and its affiliates as a percentage of Total Project Cost as an additional protection against fee stacking.

6 GOVERNANCE

Manager Authority: Developer Member, as Manager, shall have full authority to conduct the day-to-day business and operations of the Company and to implement the Approved Business Plan, subject to the Major Decision approval rights of Capital Member set forth herein.

Major Decisions: The following actions shall require the prior written consent of Capital Member: (a) any amendment to the Approved Business Plan or Annual Budget; (b) incurrence of indebtedness above $100,000; (c) sale, transfer, or encumbrance of Company assets; (d) capital calls above committed amounts; (e) contracts with Developer Member affiliates; (f) litigation above $250,000; (g) tax elections; (h) admission of new members; (i) amendment of the operating agreement; (j) any change in the development program; (k) selection of the general contractor; (l) disposition of the Project.

Approval Period: Capital Member shall respond to Major Decision requests within 15 Business Days. Failure to respond shall be deemed approval.

Budget Variance: Manager may approve expenditures up to 10% above any approved budget line item without Capital Member approval; aggregate variance not to exceed 5% of Total Budget.

Developer Member Perspective	Capital Member Perspective
The 15-business-day approval period with deemed approval is an important protection for the Developer Member on time-sensitive decisions. Key Developer Member negotiating points: (1) Negotiate for higher dollar thresholds on the indebtedness item (b). $100,000 is very low for a $75M project; push for $500,000 or higher; (2) Ensure item (e) (affiliate contracts) includes a market-rate carve-out, so routine affiliate contracts on arms-length terms do not require approval each time; (3) Push for a wider budget variance tolerance. 15% per line item and 7% to 8% in aggregate is more appropriate for a large development project with inherent construction cost variability; (4) The litigation threshold ($250,000) should be higher; $500,000	The Major Decisions list is a reasonable starting framework but should be expanded in the operating agreement to address: (1) material change orders to the construction contract (add as item (m)); (2) selection of property manager (add as item (n)); (3) refinancing of the Project (add as item (o)); (4) entry into leases above or below specified rent thresholds (add as item (p)). The 15-business-day approval period with deemed approval is reasonable, but establish rigorous internal processes for monitoring and responding to approval requests, because the deemed approval provision operates against the Capital Member if it fails to respond on time. Consider requiring the Developer Member to provide specific supporting documentation with

Developer Member Perspective	Capital Member Perspective
to $1,000,000 is more appropriate; (5) Negotiate for an emergency decision carve-out allowing Manager to take urgent actions (up to $500,000) without prior approval, subject to prompt notification.	each Major Decision request to support efficient review.

7 REMOVAL

For-Cause Removal: Capital Member may remove Developer Member as Manager on 30 days' written notice (with opportunity to cure within such period) upon the occurrence of any of the following ("Cause"): (a) fraud or intentional misrepresentation; (b) gross negligence or willful misconduct; (c) criminal conviction of Developer Member or any Key Man for a felony; (d) material, uncured breach of the operating agreement; (e) insolvency or bankruptcy of Developer Member; (f) Key Man Event not cured within 120 days; (g) material budget overrun exceeding 15% of Total Project Cost not caused by Force Majeure.

No-Cause Removal: Capital Member may remove Developer Member as Manager without Cause on 60 days' written notice.

Post-Removal Economics: On For-Cause Removal, Developer Member retains its Membership Interest but forfeits any unpaid Promote; accrued fees remain payable. On No-Cause Removal, Developer Member retains its full Membership Interest and full Promote; accrued and future management fees cease upon removal.

Developer Member Perspective	Capital Member Perspective
The removal provision as drafted contains several points the Developer Member should push back on: (1) The 30-day cure period for For-Cause removal is too short for complex operational issues; negotiate for 30 days for financial defaults and 60 to 90 days for operational defaults; (2) Item (g) (material budget overrun of 15%) should include an express Force Majeure carve-out and should be limited to overruns caused by the Developer Member's gross negligence or willful misconduct, not overruns caused by market conditions, supply chain issues, or inflation; (3) The No-Cause Removal economic treatment (full Promote preserved but future fees cease) is a reasonable compromise, but ensure that full Promote is defined as the promote the Developer Member would have received based on a hypothetical sale at fair market value on the removal date, not a reduced promote based on actual capital recovery at that date; (4) Push for a vesting mechanism for For-Cause Removal that preserves a proportionate share of the promote based on development milestones completed at removal.	The removal provision is one of the most important provisions in the term sheet and deserves careful attention: (1) The For-Cause trigger in item (g) (15% budget overrun) is essential. A developer that allows costs to spiral 15% above budget is a developer that has lost control of the project; (2) The 60-day No-Cause notice period is standard; resist Developer Member attempts to extend it to 90 or 120 days; (3) The post-removal economic treatment for For-Cause removal (forfeiture of unpaid Promote) is appropriate. A developer removed for cause should not benefit from a promote it did not earn through proper performance; (4) Ensure the term sheet and operating agreement are consistent on whether accrued fees remain payable covers fees earned but not yet invoiced. This detail will be disputed if not resolved in the term sheet.

8 REPORTING AND TRANSPARENCY

Financial Reporting: Developer Member shall provide Capital Member: (a) monthly operating reports within 20 Business Days of month-end (during construction); (b) quarterly financial statements within 30 days of quarter-end; (c) annual audited financial statements within 90 days of fiscal year-end; (d) annual Schedule K-1s within 90 days of fiscal year-end (or as extended).

Construction Reports: Monthly construction progress reports including budget-to-actual comparison, schedule update, and draw request documentation.

Inspection Rights: Capital Member shall have the right, on 5 Business Days' notice, to inspect the Property and the Company's books and records during normal business hours.

Audit Rights: Capital Member may conduct an independent audit at any time at Capital Member's expense (at Developer Member's expense if the audit reveals a material discrepancy).

Developer Member Perspective	Capital Member Perspective
The reporting framework is largely standard and acceptable, with two Developer Member concerns: (1) The 5-business-day inspection notice is workable but should be accompanied by a requirement that the Capital Member coordinate inspections to minimize disruption to construction operations and tenant relations; (2) Ensure the operating agreement defines material discrepancy in the audit provision with objective criteria (for example, a variance of more than $50,000 or 2% of total project costs); otherwise material discrepancy becomes a subjective standard that the Capital Member can invoke to shift audit costs to the Developer Member based on any audit finding, however minor. Consider negotiating for a cap on the frequency of Capital Member inspections (for example, no more than four per year absent a claimed default) to prevent disruptive inspection practices.	The reporting framework provides adequate baseline information but should be supplemented in the operating agreement to address: (1) require the monthly reports to include a specific change order log showing all pending and approved change orders, their impact on total project cost and schedule, and cumulative change order totals; (2) require copies of all lender correspondence and compliance certificates concurrently with delivery to the lender; (3) add a provision requiring notification within 2 business days of any event of default under the construction loan, any material contractor default, or any governmental action affecting the Project; (4) negotiate for read-only access to the Company's operating bank accounts through an online portal, since real-time cash visibility is essential for monitoring a large construction project.

9 TRANSFER RESTRICTIONS

Generally: No member may transfer its Membership Interest without the prior written consent of the other member, except as set forth below.

Permitted Transfers: Each member may transfer its Membership Interest to a wholly owned affiliate without consent, provided such transfer does not result in a change of Control and the Key Men remain active in managing the Company.

ROFO: Prior to any non-permitted transfer, the transferring member shall first offer its Interest to the other member at a specified price. The non-offering member shall have 30 days to accept.

Drag-Along: After the 3rd anniversary of Stabilization, Capital Member may require Developer Member to sell its Interest concurrently with Capital Member's sale of its Interest to a third party.

Tag-Along: Developer Member shall have the right to sell its Interest concurrently with any transfer by Capital Member to a third party on equivalent economic terms.

Buy-Sell: After the 2nd anniversary of Stabilization, either member may trigger a buy-sell mechanism ("Shotgun") at a price specified in the trigger notice. The receiving party has 60 days to elect to buy or sell.

Developer Member Perspective	Capital Member Perspective
The transfer restriction framework is generally reasonable. Key Developer Member negotiating points: (1) The 30-day ROFO response period is workable; ensure the term sheet specifies that if the Capital Member does not respond within 30 days, the ROFO is deemed declined and the Developer Member may proceed with the transfer at or above the offered price; (2) The Drag-Along provision (triggerable after the 3rd anniversary of Stabilization) is an acceptable hold period; ensure the operating agreement requires the sale to be an arms-length transaction at fair market value and that the Developer Member's full Promote is paid from sale proceeds before the Capital Member's drag-along share; (3) The Buy-Sell trigger date (2nd anniversary of Stabilization) is reasonable; negotiate for a promote valuation adjustment within the Buy-Sell so the Developer Member's Promote entitlement is reflected in the Buy-Sell price; (4) The Tag-Along right is a key Developer Member protection; ensure it is absolute (no exceptions for small transfers) and that it entitles the Developer Member to the same per-unit economic terms as the Capital Member.	The transfer restriction framework provides adequate baseline protection. Key Capital Member negotiating points: (1) Ensure the Permitted Transfer provision requires the transferee (even a wholly owned affiliate) to assume all of the transferring member's obligations under the operating agreement. A transfer that shifts interest but not obligations is not a permitted transfer; (2) The ROFO mechanism (triggered by the transferring member) should be supplemented by a ROFR that applies when the Capital Member has identified a third-party buyer, allowing the Capital Member to match any third-party offer for the Developer Member's interest before it is sold; (3) The Buy-Sell trigger (2nd anniversary) should be subject to a minimum project performance condition. The Capital Member should not be able to trigger a Buy-Sell during active construction or before stabilization; (4) Ensure the Drag-Along right is accompanied by an irrevocable power of attorney from the Developer Member to execute necessary transfer documents.

10 GUARANTIES AND RECOURSE

Completion Guaranty: Developer Member (or its principals, as required by the construction lender) shall provide a Completion Guaranty in favor of the construction lender, capped at the lesser of: (a) $7,500,000 (10% of Total Project Cost) or (b) actual construction cost overruns.

Carve-Out Guaranty: Developer Member shall provide a standard Carve-Out (Bad Boy) Guaranty covering: (a) fraud and intentional misrepresentation; (b) misappropriation of rents or insurance proceeds; (c) voluntary bankruptcy without lender consent; (d) prohibited transfers without lender consent; (e) environmental contamination by borrower.

Capital Member Recourse: Capital Member shall have no personal guaranty obligations in connection with the construction financing.

JV Indemnification: The Company shall indemnify Developer Member for all guaranty payments made on behalf of the Company, except to the extent arising from Developer Member's own fraud or willful misconduct.

Developer Member Perspective	Capital Member Perspective
The Completion Guaranty cap ($7.5M, 10% of Total Project Cost) is a reasonable negotiating position; many lenders will accept this, particularly for a well-capitalized developer with a strong track record. Key Developer Member	The guaranty framework appropriately places completion risk on the Developer Member, which controls the construction process. Key Capital Member negotiating points: (1) While the Completion Guaranty cap ($7.5M) is developer-

Developer Member Perspective	Capital Member Perspective
negotiating points: (1) The cap should apply to the total of all completion guaranty obligations across all guaranty instruments, not each guaranty separately; (2) The Carve-Out Guaranty items (a) through (e) are generally acceptable; resist any expansion to include SPE covenant violations (which should be limited to material violations) or any catch-all negligence provision; (3) The JV indemnification provision is important; ensure it includes advancement of legal defense expenses (not just reimbursement after the fact) and that it expressly survives the Developer Member's removal as Manager; (4) Consider negotiating for a burn-off mechanism on the Completion Guaranty (for example, reducing by 50% on achieving a defined construction completion percentage).	favorable, ensure that the Developer Member's principals (not just the developer entity) are personal guarantors. A developer entity with limited assets provides limited guaranty protection; (2) Ensure the Carve-Out Guaranty includes a springing recourse provision for any bankruptcy filing by the Developer Member during the construction period, whether voluntary or involuntary; (3) The JV indemnification for the Developer Member's guaranty payments is appropriate, but ensure it is limited to guaranty payments not attributable to the Developer Member's own fault; (4) Consider requiring the Developer Member to provide evidence of financial capacity (audited financial statements, net worth certification) to support its guaranty obligations at closing and annually thereafter.

11 EXIT AND LIQUIDATION

Disposition Authority: Developer Member shall manage the disposition process, subject to Capital Member approval of any sale as a Major Decision.

Forced Sale Right: After the 4th anniversary of Stabilization, Capital Member may require the Company to market the Project for sale through an institutional brokerage process. Developer Member shall have the right to participate in the marketing process.

Liquidation Waterfall: On dissolution and winding up, all assets shall be liquidated and distributed in accordance with the Distribution Waterfall set forth in Section 4.

Lookback: At the time of any final Capital Event, a lookback calculation shall be performed to confirm that the distribution of Available Cash is consistent with the Waterfall. Any previously distributed amounts in excess of the Developer Member's Waterfall entitlement shall be subject to clawback.

Developer Member Perspective	Capital Member Perspective
The 4th anniversary forced sale trigger is a reasonable holding period for a stabilized asset. Key Developer Member negotiating points: (1) Ensure the forced sale process requires a minimum 120-day full market marketing period with a nationally recognized broker selected by the Company, not unilaterally by the Capital Member; (2) Negotiate for the Developer Member's right to submit a purchase offer in the forced sale process on the same terms as third-party bidders; (3) The lookback and clawback provision should be subject to the protections negotiated in the term sheet: a cap (100% of prior promote distributions), an after-tax calculation, and a look-back period limited to the life of this specific JV (not a programmatic lookback across other deals); (4) Ensure the Developer Member's	The exit and liquidation framework provides appropriate forced sale protection for the Capital Member after a 4-year stabilized hold. Key Capital Member negotiating points: (1) The forced sale trigger (4th anniversary) is acceptable but should be absolute, not subject to market condition qualifications or Developer Member veto on sale terms; (2) The clawback provision is essential for any programmatic JV; for a single-asset JV, the lookback ensures that interim distributions were consistent with the waterfall calculation and are subject to correction if not; (3) Ensure that the Disposition Authority provision is clear that the Capital Member has approval authority over all sale terms, not just the headline price but also representations and warranties, indemnities, escrow arrangements, and closing

Developer Member Perspective	Capital Member Perspective
right to participate in the marketing process is substantive, including the right to recommend and interview brokers, review the offering memorandum, and participate in buyer presentations.	conditions; (4) Negotiate for a minimum performance benchmark before the Developer Member may propose a disposition (for example, minimum stabilized NOI equivalent to the underwritten projection) to prevent a premature sale proposal that does not reflect the project's full value potential.

12 EXCLUSIVITY AND NON-COMPETE

Exclusivity: From the date of this Term Sheet through the earlier of (a) execution of the Operating Agreement or (b) 60 days from the date hereof, Developer Member shall negotiate exclusively with Capital Member with respect to the Project and shall not solicit or negotiate with any other potential capital source for the Project.

Non-Compete: During the Investment Period, Developer Member shall not develop or manage any Class A multifamily project within a 3-mile radius of the Project without Capital Member's prior written consent.

Pipeline Carve-Out: Projects listed on Exhibit C attached hereto are expressly excluded from the Non-Compete.

Right of First Opportunity: During the Investment Period, Developer Member shall offer Capital Member the opportunity to participate in any qualifying investment opportunity (as defined herein) before pursuing the same with any other capital source. Capital Member shall respond within 20 Business Days.

BINDING: Exclusivity provision is BINDING from the date hereof. All other provisions are subject to final documentation.

Developer Member Perspective	Capital Member Perspective
The 60-day exclusivity period is standard; ensure it is accompanied by a capital member obligation to conduct due diligence and negotiate in good faith during the exclusivity period. A capital member that sits on its due diligence for 60 days and then declines the deal has used the exclusivity provision to block other financing options without any reciprocal obligation. Key Developer Member negotiating points: (1) The 3-mile non-compete radius is reasonable for an urban multifamily project but may be too broad for a suburban project where 3 miles does not represent genuine competitive overlap; (2) Ensure Exhibit C (pipeline carve-outs) is thorough; list every project in the Developer Member's pipeline that could plausibly fall within the non-compete scope; (3) The Right of First Opportunity 20-day response period is workable; negotiate for a deemed-pass provision if Capital Member fails to respond within 20 days, freeing the Developer Member to pursue the opportunity independently; (4) Define qualifying investment	The exclusivity provision (binding) is an important protection for the Capital Member, which invests significant due diligence resources before signing the operating agreement. Key Capital Member negotiating points: (1) Ensure the exclusivity covers not only the Project but also any materially similar project in the same market that would compete for the same capital allocation; (2) The non-compete (3-mile radius, same asset type) is a reasonable limitation; in the operating agreement, specify that the 3-mile radius is measured from the Project's site and not from any other reference point; (3) Review Exhibit C carefully. Any project listed as a pipeline carve-out represents a potential competing demand on the Developer Member's time and attention; (4) The Right of First Opportunity is the Capital Member's access to the Developer Member's future deal flow and should be carefully defined. The qualifying investment opportunity definition should be broad enough to capture all deals within the JV's investment parameters.

Developer Member Perspective	Capital Member Perspective
opportunity narrowly and objectively, so the definition does not capture every real estate opportunity the Developer Member identifies.	

13 GOVERNING LAW AND DISPUTE RESOLUTION

Governing Law: This Term Sheet and the definitive agreements contemplated herein shall be governed by and construed in accordance with the laws of the State of Delaware, without regard to conflict of law principles.

Dispute Resolution: All disputes arising under the Operating Agreement shall be resolved by binding arbitration administered by JAMS pursuant to its Comprehensive Arbitration Rules, before a panel of three arbitrators with experience in real estate joint venture transactions.

Venue: Arbitration shall be conducted in [City, State]. All parties waive any right to a jury trial.

Emergency Relief: Notwithstanding the arbitration provision, either party may seek emergency injunctive relief in a court of competent jurisdiction to prevent irreparable harm pending the outcome of arbitration.

BINDING: Yes (governing law and dispute resolution are binding from the date of execution of the Operating Agreement).

Developer Member Perspective	Capital Member Perspective
Delaware governing law is standard and generally developer-friendly, given Delaware's flexible LLC Act and sophisticated Court of Chancery jurisprudence. Key Developer Member negotiating points: (1) JAMS arbitration (rather than litigation) is typically preferable for the Developer Member. Arbitration is private (protecting the Developer Member's reputation and business relationships), faster than court litigation, and conducted before arbitrators who understand commercial real estate rather than generalist jurors; (2) A three-arbitrator panel with real estate JV experience is appropriate for a complex, high-value JV dispute; resist any proposal for a single arbitrator, who may have less relevant expertise; (3) Negotiate for the arbitration to be conducted in the city where the Developer Member is headquartered (or at a neutral location), not in the Capital Member's home city; (4) Ensure the emergency injunctive relief carve-out is available to both parties, not only to the Capital Member. The Developer Member may need injunctive relief to prevent an improper removal or forced sale.	Delaware governing law is standard and appropriate. Key Capital Member negotiating points: (1) Arbitration is generally acceptable, but ensure the arbitration clause does not preclude the Capital Member from pursuing judicial remedies for specific performance, injunctive relief related to removal, or dissolution. These equitable remedies may be essential in a governance crisis; (2) Specify that arbitrators must have a minimum number of years of experience in real estate joint venture transactions (10 or more), not merely general commercial arbitration experience; (3) Negotiate for a loser-pays fee-shifting provision in the arbitration clause. A Developer Member that frivolously contests a removal or challenges a waterfall calculation should bear the Capital Member's legal costs; (4) Ensure the arbitration clause covers all disputes arising under or related to the operating agreement, not merely material disputes or disputes above a defined threshold.

Red Flags in a Term Sheet: What Each Party Should Watch For

A term sheet that looks reasonable on its face may contain provisions, or omissions, that create significant risk for one or both parties when they are translated into the operating agreement. Experienced JV counsel are trained to spot these red flags before they become costly problems.

The tables below catalogue the most common term sheet red flags from each party's perspective, the provisions or omissions that experienced JV counsel identify immediately as requiring negotiation before the term sheet is signed or the operating agreement drafting begins.

Red Flags for the Developer Member

Provision or Omission	The Red Flag	What to Do
Promote defined by reference to capital member IRR without defining IRR	If IRR is not precisely defined, the capital member's counsel will define it in the operating agreement, typically in the capital member's favor, including all contributions and distributions but potentially excluding developer fees from the denominator.	Define IRR with complete mathematical precision in the term sheet. Include worked examples showing the IRR calculation under multiple scenarios.
No deemed approval provision for major decisions	Without a deemed approval provision, the capital member can effectively block any decision requiring its approval by simply not responding, paralyzing operations without technically breaching the agreement.	Insist on a 15-business-day deemed approval provision for all major decisions. Negotiate for shorter deemed approval periods (5 to 10 days) for emergency situations.
Broad, vague non-compete (for example, same market area)	An undefined same market area can be read to cover an entire metropolitan area or region, effectively preventing the developer member from pursuing any project in its home market during the JV's investment period.	Define the non-compete geographic area with objective precision (radius, zip codes, named submarket). Ensure all existing pipeline projects are listed in a pipeline carve-out exhibit.
No cure period for For-Cause removal	A removal provision with no cure period allows the capital member to remove the developer member immediately upon asserting cause, including cause based on disputed or pretextual allegations, without giving the developer member any opportunity to remedy the situation.	Negotiate for meaningful, differentiated cure periods: 30 days for financial defaults, 60 days for operational defaults, 120 or more days for key man events.
Promote forfeiture on For-Cause removal without a vesting schedule	A binary promote forfeiture on any For-Cause removal, regardless of how much development work has been completed, gives the capital member an economic incentive to assert cause (however dubious) near	Negotiate for a milestone-based vesting schedule: promote vests proportionally as development milestones are achieved (construction loan closing, certificate of occupancy, stabilization, sale).

Provision or Omission	The Red Flag	What to Do
	the end of the project to avoid paying the promote.	
Open-ended completion guaranty with no cap	An unlimited completion guaranty creates an unbounded personal liability for the developer member principals that can dwarf the developer member's net worth if the project fails.	Negotiate for a dollar cap (10% to 15% of Total Project Cost is a reasonable starting position). Ensure the cap covers all guaranty instruments in aggregate, not each instrument separately.
Fees below the line or subject to deferral	If developer fees are subordinated to the preferred return (treated as below-the-line JV distributions), the developer member may receive no compensation during periods of project underperformance.	Insist on above-the-line treatment for all developer fees. If deferral is accepted for any fee, negotiate for a mandatory deferral end date regardless of project performance.
Capital member approval of auditor selection with no market-rate requirement	If the capital member selects the auditor and there is no requirement that the audit be conducted at market rates, the capital member could require an unnecessarily expensive or disruptive audit process as a governance tactic.	Negotiate for mutual agreement on auditor selection, or for the developer member's right to propose the auditor subject to capital member approval not to be unreasonably withheld.

Red Flags for the Capital Member

Provision or Omission	The Red Flag	What to Do
No affiliate transaction approval requirement	Without an express requirement that all affiliate contracts require capital member approval, the developer member can enter into above-market service contracts with its own affiliates, extracting value from the JV at the capital member's expense.	Ensure affiliate transactions are expressly listed as major decisions requiring capital member approval, without any dollar threshold exception.
Simple (non-compounding) preferred return	On a 5-year development project, simple preferred return generates significantly less accrued preferred return than compounding preferred return. The difference can be millions of dollars on a large project.	Insist on a compounding preferred return. Model the economic difference under the project's specific assumptions to quantify the impact before accepting any compromise.
No-cause removal without promote adjustment	If the developer member retains its full, unmodified promote on no-cause removal, the capital member pays the full promote to a developer member that was removed before the project was complete,	Negotiate for a promote adjustment formula that reduces the promote proportionally to the remaining development work outstanding at the time of no-cause removal.

Provision or Omission	The Red Flag	What to Do
	compensating a non-managing party for future value creation.	
Key man defined by title only, not by name	A key man provision that identifies key men by title (the CEO of Developer Member) rather than by name provides no protection against management substitution. The developer member can simply promote a less qualified person into the key man title.	Insist that key men be identified by name. Add a minimum qualification standard (years of experience, transaction volume) for any proposed replacement.
Forced sale right subject to a minimum price condition	A forced sale right conditioned on achieving a minimum sale price may be unexercisable in a declining market, trapping the capital member in a JV it cannot exit even after the minimum hold period has elapsed.	Negotiate for an absolute forced sale right with no minimum price condition. The capital member's obligation to its own investors may require a sale even at a loss.
No clawback provision in a programmatic JV	Without a clawback provision, the developer member may receive promote distributions on early-selling assets that significantly exceed its aggregate waterfall entitlement on a portfolio basis, with no mechanism for the capital member to recover the excess.	Insist on a clawback provision in any multi-asset JV. Negotiate for escrow of 25% to 35% of each promote distribution pending the final portfolio performance calculation.
Budget variance tolerance without an aggregate cap	A line-item budget variance tolerance without an aggregate cap lets the developer member approve multiple just-below-threshold overruns across multiple line items, cumulatively exceeding what the capital member intended to authorize.	Negotiate for both a per-line-item variance tolerance and an aggregate budget variance cap (typically 5% of total project cost).
No requirement for developer member financial reporting at the entity level	Without ongoing financial reporting for the developer member itself (not just the JV), the capital member cannot monitor the developer member's financial health and may not discover developer member insolvency until it has already impaired the JV.	Require the developer member to provide annual financial statements (audited if possible) confirming it meets minimum financial standards (net worth, liquidity) specified in the operating agreement.

From Term Sheet to Operating Agreement: What Changes and Why

The term sheet is the beginning of the JV documentation process, not the end. Understanding what happens, and why, as the term sheet is translated into the

operating agreement is essential for both parties to manage the documentation process effectively and avoid unpleasant surprises.

The journey from a signed term sheet to a signed operating agreement involves far more than expanding the term sheet's provisions into fuller prose. The operating agreement must address dozens of implementation details, edge cases, and interdependencies that the term sheet does not and cannot fully address. Understanding the nature and importance of these additions helps both parties approach the operating agreement negotiation with realistic expectations.

What the Operating Agreement Adds

The operating agreement is a comprehensive legal document that must address every aspect of the JV's organization, governance, economics, and lifecycle. Beyond implementing the term sheet's core provisions, the operating agreement typically adds the following.

- Comprehensive definitions. A definitions section of 30 to 50 defined terms that provide the mathematical and legal precision the term sheet's summary language cannot. As discussed throughout this handbook, the precise definition of terms like Contributed Capital, Available Cash, Preferred Return, IRR, and Distributable Cash can shift millions of dollars between the parties from the term sheet summary to the operating agreement's precise formulation.

- Tax provisions. A full set of partnership tax provisions addressing capital account maintenance, tax allocations, special allocations, Section 704(b) and 704(c) compliance, tax elections, withholding obligations, and tax reporting. These provisions are essential to the JV's legal and tax compliance but are rarely addressed in term sheets.

- Exculpation and indemnification. Provisions defining the standard of care applicable to the manager, limiting the manager's liability for good-faith business judgment errors, and providing for the JV entity's indemnification of the manager against claims arising from its management activities.

- Operating covenants. A set of operational obligations the manager must comply with throughout the JV's life, including maintenance of required insurance, compliance with applicable laws, maintenance of the JV's organizational documents, and restrictions on operating the JV in a manner that could impair its tax status.

- Dissolution and liquidation provisions. The procedures for dissolving and winding up the JV, including the order in which the JV's assets must be liquidated, the process for addressing disputed claims against the JV, and the mechanics of the final distribution in accordance with the waterfall.

- Amendment and waiver provisions. The requirements for amending the operating agreement (typically unanimous member consent for substantive provisions) and

the standards for waiving operating agreement rights (including protections against inadvertent waiver through course of dealing or failure to enforce).

- Anti-waiver and entire agreement provisions. Standard commercial contract provisions confirming that the operating agreement is the complete and exclusive statement of the parties' agreement and that no prior negotiations, representations, or discussions are incorporated into the agreement.

What Changes from the Term Sheet to the Operating Agreement

Beyond adding new provisions, the operating agreement process frequently involves modifying term sheet provisions that appear settled but prove, on fuller examination, to require adjustment. The most common areas of change are the following.

- Economic definitions. As the attorneys work through the mechanics of the waterfall in the operating agreement, the imprecision of term sheet language (which typically describes the waterfall in summary prose) is replaced by mathematical definitions and worked examples. This translation frequently reveals ambiguities or inconsistencies that require negotiated resolution.

- Major decisions list. The term sheet's major decisions list is typically a summary of the most significant categories; the operating agreement's list is comprehensive and specific, often adding 10 to 20 items not included in the term sheet summary. Both parties should be prepared for this expansion during the operating agreement negotiation.

- Removal mechanics. The term sheet's removal provision describes the basic structure (cause categories, notice period, economic consequences); the operating agreement must address the full range of implementation details, including the dispute resolution process for contested cause claims, the transition management procedures, the post-removal economic accounting process, and the cooperation obligations.

- Tax provisions. Tax provisions are almost never addressed in a term sheet but can significantly affect each party's after-tax economics. Both parties should ensure that their tax advisors review the operating agreement's tax provisions before execution.

The Common Points of Reopening in Operating Agreement Negotiation

Even with a thorough term sheet, certain provisions are frequently reopened during the operating agreement negotiation. Both parties should anticipate these reopening points and treat them as a normal part of the documentation process rather than as bad faith by the other party.

- Waterfall mechanics. Once the attorneys begin translating the term sheet's waterfall summary into the operating agreement's mathematical definitions, previously unaddressed questions (the treatment of interim distributions, the

calculation of the preferred return base after partial returns, the timing of promote realization on a refinancing) frequently require negotiation.

- Definition of cause. The cause definition is almost always renegotiated during the operating agreement process, as each party's attorney attempts to translate the term sheet's summary language into a comprehensive list of specific triggers. This is one of the most heavily negotiated provisions in any operating agreement and routinely requires multiple drafts and rounds of negotiation.

- Affiliate transaction standards. The term sheet typically provides that affiliate transactions require capital member approval; the operating agreement must address the standard that applies to those approvals (arms-length terms, competitive bidding, market rate benchmarking) and the scope of affiliate relationships covered.

- Tax elections. The operating agreement's tax provisions may require the parties to make specific tax elections (Section 754, Section 761) that were not addressed in the term sheet. These elections have significant economic consequences that both parties' tax advisors must evaluate before the elections are made.

The Term Sheet Is the Beginning, Not the End: Why Operating Agreement Negotiation Still Matters

A well-negotiated term sheet does not eliminate the need for careful operating agreement negotiation. It channels and focuses that negotiation on implementation rather than relitigation of fundamental economic and governance terms.

Both developer members and capital members should invest in experienced JV counsel not only for the term sheet but for the full operating agreement negotiation. The provisions added by the operating agreement, the definitions, the tax provisions, the removal mechanics, and the affiliate transaction standards, are as consequential as the headline economic terms captured in the term sheet.

The operating agreement, once signed, is the governing document of the JV for its entire lifecycle, often five to ten years or more. Provisions that seem minor at signing often become the subject of major disputes when the relationship encounters stress. The investment of time and legal resources in a precisely drafted operating agreement is the most cost-effective investment either party can make in the success of the JV.

The attorneys at [Firm Name] represent both developer members and capital members in the full range of JV documentation, from term sheet through operating agreement, ancillary agreements, and ongoing counsel throughout the JV's lifecycle. We welcome the opportunity to discuss how we can help structure and document your next joint venture.

Chapter 6 Summary

Chapter 6 has shown, through an annotated sample term sheet, how the conceptual principles examined in Chapters 1 through 5 translate into the specific language of a real-world JV negotiation. The principal takeaways are these.

- The term sheet is a governance document, not merely a summary. Its binding provisions (exclusivity, confidentiality, cost-sharing) are immediately legally effective; its non-binding provisions establish the negotiating baseline for the operating agreement.
- Every term sheet provision has a dual perspective. What looks like a balanced provision from one party's vantage point may contain embedded advantages or disadvantages that only become apparent on careful analysis. Both parties must analyze every provision from both vantage points.
- The red flags catalogued in this chapter are the provisions and omissions most frequently identified by experienced JV counsel as requiring negotiation before signing. Both parties should use these checklists as a minimum review standard for any term sheet.
- The translation from term sheet to operating agreement involves significant expansion and elaboration. The operating agreement adds comprehensive definitions, tax provisions, operating covenants, and implementation mechanics that the term sheet does not address. Both parties should anticipate this expansion and engage experienced counsel for the full documentation process.
- The major points of reopening in operating agreement negotiation (waterfall mechanics, cause definition, affiliate transaction standards, and tax elections) are predictable and should be addressed as early as possible in the term sheet negotiation to minimize the scope and cost of the operating agreement negotiation.
- Neither developer members nor capital members should sign a term sheet, or execute an operating agreement, without experienced JV counsel who understands both the transactional mechanics and the practical consequences of every provision.

Looking Ahead to Chapters 7 Through 10

The handbook's remaining chapters address specialized topics essential to a full understanding of real estate joint ventures. Chapter 7 examines the unique considerations that arise in development JVs: entitlement risk, construction risk, completion guaranty mechanics, and lease-up dynamics. Chapter 8 addresses programmatic JVs and the repeat partnership model. Chapter 9 catalogues the most common JV disputes and how proper documentation prevents them. Chapter 10 provides the handbook's concluding guidance on the essential role of experienced JV counsel and introduces my JV practice.

CHAPTER 7

Development JVs: Unique Considerations

Ground-up development is the most complex, capital-intensive, and risk-laden activity in real estate investment. When that activity is conducted through a joint venture, with its layered economics, governance requirements, and multi-party obligations, the complexity compounds. This chapter addresses the legal, structural, and operational considerations unique to development JVs, the ones that distinguish them from the acquisition and value-add joint ventures that dominate the simpler end of the JV spectrum.

Chapters 1 through 6 established the general framework of real estate joint ventures: the economic architecture, governance structure, negotiating priorities, and documentation mechanics that apply to any institutional JV. This chapter applies that framework to the specific context of ground-up development, projects that begin with raw land or vacant sites and require the developer member to work through entitlement risk, construction risk, lease-up risk, and market timing risk before a single dollar of promote can be realized.

Development JVs demand a higher level of structural sophistication than acquisition JVs for one fundamental reason: the asset the capital member is investing in does not yet exist. In a stabilized acquisition JV, the capital member can underwrite an existing income stream, a fully permitted property, and a track record of operating performance. A development JV requires the capital member to commit equity to a project whose value depends entirely on the developer member's ability to execute a multi-year, multi-stage process under conditions that no business plan can fully anticipate.

This chapter examines six risk areas unique to development JVs: entitlement risk, construction risk, lease-up risk, carry costs and interest reserves, certificate of occupancy and conversion events, and the specialized governance provisions that development projects require. Throughout, the dual perspective of the developer member and capital member is maintained, with particular attention to how each risk category should be allocated between the parties in the operating agreement.

The Development JV Lifecycle: Stages, Risks, and Governance Triggers

Development Stage	Primary Risk Category	Key Governance Events	Typical Duration
Pre-Development	Entitlement risk; cost overrun on pre-development budget	Business plan approval; initial equity funding; construction lender selection	6 to 24 months

Development Stage	Primary Risk Category	Key Governance Events	Typical Duration
Construction Loan Closing	Financing risk; guaranty execution; loan document review	Capital member approval of loan terms; guaranty execution; operating agreement finalization	1 to 3 months
Vertical Construction	Construction cost risk; schedule risk; contractor default risk	Budget variance approvals; change order approvals; monthly draw reviews	18 to 36 months
Certificate of Occupancy	CO delay risk; punch list cost risk; lease commencement triggers	CO milestone confirmation; promote vesting milestone; lease-up period commencement	1 to 3 months
Lease-Up and Stabilization	Absorption risk; rent achievement risk; market softness	Stabilization achievement; refinancing approval; disposition planning	12 to 24 months
Disposition or Refinancing	Market timing risk; buyer pool depth; pricing risk	Disposition approval as major decision; waterfall calculation; promote realization	3 to 12 months

Entitlement Risk Allocation

Entitlement risk, the risk that a proposed development project will not receive the governmental approvals necessary to proceed as planned, is the most fundamental and least quantifiable risk in ground-up development. It is also one of the most consequential. A project that fails to receive required entitlements can lose years of pre-development investment, strand committed equity capital, and generate significant litigation risk between the JV partners.

Entitlement is the process by which a developer obtains the governmental approvals, permits, and authorizations required to develop a property for its intended use. Depending on the jurisdiction and the project's complexity, entitlement can involve rezoning applications, conditional use permits, variances, design review approvals, environmental impact assessments, infrastructure agreements, development agreements, and a dozen other forms of governmental consent. The entitlement process is inherently uncertain. Its timeline is controlled by governmental bodies, its outcome is subject to political dynamics that no business plan can fully anticipate, and its cost can escalate sharply as the process encounters unexpected obstacles.

The Nature and Scope of Entitlement Risk

Entitlement risk includes several distinct categories of risk that must be separately addressed in the JV operating agreement.

- Approval risk. The risk that required governmental approvals will be denied entirely, preventing the project from proceeding as planned. Approval risk is particularly acute for projects requiring discretionary governmental action (rezoning, conditional use permits, variances) rather than ministerial approvals (building permits for by-right development).

- Condition risk. The risk that required approvals will be granted only subject to conditions that materially increase project cost, reduce project density, or otherwise alter the project's economic viability. Common conditions include infrastructure improvements (road widening, utility upgrades), affordable housing set-asides, open space dedications, and design modifications that increase construction cost.

- Timeline risk. The risk that the entitlement process will take longer than projected, extending the pre-development period, increasing pre-development costs (land carry, pre-development expenses, option payments), and delaying the project's construction commencement and ultimate delivery date.

- Legal challenge risk. The risk that approved entitlements will be challenged by opponents (neighboring property owners, environmental groups, competing developers) through administrative appeals or litigation, creating additional delay and legal cost that can undermine the project's economic viability.

- Scope change risk. The risk that the entitlement process will require changes to the project's development program (density, building configuration, use mix) that alter the project's economic projections and require re-underwriting of the JV's investment thesis.

Allocating Entitlement Risk Between the Parties

The allocation of entitlement risk between the developer member and the capital member is one of the most important and most negotiated provisions of any development JV operating agreement. The fundamental question is who bears the cost and economic consequences of entitlement failure or delay, and how entitlement risk affects each party's economic interests under the waterfall.

Several allocation models are used in practice.

- Pre-JV entitlement model. The developer member obtains all required entitlements before the capital member commits any equity. The JV is formed, and equity is contributed, only after entitlements are received. This model effectively eliminates entitlement risk from the JV entirely, but it requires the developer member to fund pre-development costs from its own balance sheet, a significant burden for all but the most well-capitalized developers.

- Post-commitment entitlement model. The JV is formed and the capital member commits equity before entitlements are obtained, but the capital member's equity is not actually funded until defined entitlement milestones are achieved. This

model allocates the economic cost of entitlement failure to the developer member (which loses its pre-development investment and carry costs) while protecting the capital member from funding equity into a project that cannot be built as planned.

- Fully at-risk model. The JV is formed and equity is funded before entitlements are obtained, with both parties bearing entitlement risk in proportion to their equity interests. This model is least common for institutional capital members, who typically resist committing large amounts of equity to projects whose fundamental development rights have not been established.

- Developer member guaranty model. The developer member guarantees to the JV that specified entitlements will be obtained by a defined deadline, and agrees to specific remedies (return of capital, forfeiture of a portion of the promote) if the entitlement guaranty is not satisfied. This model is increasingly common as institutional capital members seek more specific protection against entitlement failure risk.

Entitlement Provisions in the Operating Agreement

Whichever allocation model is selected, the operating agreement must address entitlement risk with the following specific provisions.

- Entitlement milestone definitions. The specific governmental approvals, permits, and authorizations that constitute entitlement for purposes of the operating agreement should be defined with precision, including the specific agency, the specific approval type, and the specific conditions that must be satisfied. A vague all required entitlements standard is insufficient; the operating agreement must specify exactly which approvals are required.

- Entitlement failure consequences. The operating agreement should specify what happens if required entitlements are not obtained by the milestone deadline. Options include return of the capital member's contributed capital (with or without a preferred return on the amount at risk during the pre-entitlement period), dissolution of the JV, or a defined negotiation period during which the parties can discuss a modified project or a revised entitlement strategy.

- Entitlement budget approval. The operating agreement should require capital member approval of the pre-development entitlement budget and any material amendment, so that entitlement costs do not spiral beyond what the business plan anticipated without the capital member's awareness and consent.

- Entitlement activity reporting. The developer member should be required to provide regular entitlement status reports (typically monthly during active entitlement proceedings) documenting the status of all pending applications, any governmental communications received, any opposition or legal challenges filed, and any proposed schedule adjustments.

- Entitlement condition review. Any governmental approval condition that would materially increase project cost or reduce project density should require capital member approval as a major decision before the developer member accepts the condition. A developer member that accepts a costly entitlement condition without capital member consent may find itself unable to pursue the modified project within the approved business plan budget.

Pre-Development Costs and Reimbursement

Before the JV is formed and equity is committed, the developer member typically incurs significant pre-development costs: land option payments, architectural and engineering fees, environmental studies, entitlement consultants, legal fees, and governmental processing fees. The treatment of these pre-development costs in the JV structure is a significant negotiating point.

- Reimbursement at JV formation. The most common arrangement is for the JV to reimburse the developer member for documented pre-development costs (typically up to an agreed cap) at the time of JV formation and initial equity funding. This reimbursement compensates the developer member for the financial risk it took during the pre-JV period and is typically treated as an above-the-line expense of the JV.

- Credit against co-investment. An alternative is to credit the developer member's pre-development costs against its co-investment obligation, allowing the developer member to satisfy all or part of its equity requirement through the value of its pre-development investment rather than through additional cash. This approach is more developer member-favorable but requires careful negotiation of the valuation methodology for the pre-development costs.

- Promote credit for pre-JV entitlement value. Where the developer member has obtained or significantly advanced entitlements before the JV is formed, the capital member is effectively investing in a project whose risk has already been reduced by the developer member's pre-JV entitlement work. In some structures, this pre-JV value creation is recognized by giving the developer member credit against its co-investment or by providing an enhanced promote percentage that reflects the developer member's risk reduction contribution.

Practice Note: Entitlement Risk Is the Developer Member's Greatest Leverage

A developer member that controls a fully entitled site, one with all required governmental approvals in hand, has far more bargaining leverage with institutional capital members than one seeking equity for a project still in the entitlement process. The reduction in entitlement risk achieved by the developer member's pre-JV entitlement work is real economic value that should be negotiated into the JV structure, through enhanced promote, reduced co-investment, or pre-development cost reimbursement. Developer members who form JVs before completing entitlements are, in effect, sharing entitlement risk with the capital member without necessarily receiving adequate compensation for the entitlement work they have already performed. Experienced JV counsel help developer members quantify and negotiate the value of their pre-JV entitlement contributions.

Construction Risk and Completion Guaranty Mechanics

Construction risk, the risk that a development project will cost more than projected, take longer to complete than scheduled, or fail to meet the quality standards required to achieve its leasing and valuation objectives, is the central operational risk of any ground-up development JV. How that risk is identified, allocated, managed, and mitigated through the operating agreement and the construction documentation is the defining challenge of development JV structuring.

Construction risk in a development JV is not a single risk but a collection of distinct, interrelated risks that must be separately addressed in the JV's legal framework. Understanding each component of construction risk, and how it flows through the JV's economic and governance structure, is essential to structuring a development JV that is resilient to the inevitable surprises every construction project encounters.

Components of Construction Risk

Cost Overrun Risk

Cost overrun risk is the risk that the total cost of constructing the project will exceed the approved construction budget, requiring additional equity funding beyond the committed amounts. Construction cost overruns arise from several sources.

- Labor cost inflation. Construction labor markets are highly cyclical, and labor cost increases can significantly exceed the inflation assumptions embedded in the original construction budget. In tight labor markets, skilled trades can command premium rates that erode the contractor's fixed-price protection.

- Material cost volatility. Commodity prices for steel, concrete, lumber, copper, and other construction materials can move sharply over the 18 to 36-month construction timeline of a typical development project. Supply chain disruptions, tariff changes, and extraordinary demand events (as experienced during the COVID-19 pandemic) can produce material cost increases that far exceed any reasonable contingency reserve.

- Unforeseen site conditions. Subsurface conditions (rock, contaminated soil, unmarked utilities, high groundwater) not anticipated in the geotechnical investigation can require significant additional work that was not included in the original construction contract.

- Design changes and owner-initiated changes. Modifications to the project's design or scope initiated by the JV (as opposed to the contractor) during construction generate change orders that increase cost and potentially extend the construction schedule.

- Contractor default and replacement cost. If the general contractor defaults and must be replaced, the cost of completing the project with a new contractor is almost always higher than the original contract amount, because of the disruption

of replacing the contractor mid-project and the premium that successor contractors charge for inheriting an in-progress construction project.

Schedule Delay Risk

Schedule delay risk is the risk that construction will take longer than projected, extending the project's carry costs, delaying the lease-up period, and potentially causing the project to miss a market window anticipated at the time of underwriting. Schedule delays arise from many sources.

- Labor shortages. In tight construction markets, skilled labor availability can be the primary constraint on construction pace, causing delays that no amount of budget increase can cure.
- Permitting delays. Even after the initial entitlement process is complete, the building permit application and review process can take significantly longer than projected, delaying construction commencement and pushing the project's delivery date into a different market environment than originally anticipated.
- Weather and force majeure events. Extended periods of severe weather, natural disasters, pandemics, or other force majeure events can halt construction for extended periods, creating schedule delays neither party could have anticipated.
- Contractor and subcontractor performance. A general contractor or subcontractor that is overextended (managing multiple projects at once), financially stressed, or under-resourced for the project can cause schedule delays through slow mobilization, inadequate manpower, or substandard work that must be remedied.
- Inspection and testing delays. Governmental inspections, third-party testing (structural, mechanical, electrical), and lender inspections required as a condition of construction draw approval can create schedule delays when inspection agencies or testing firms are overloaded.

Quality Risk

Quality risk, the risk that the completed project will not meet the design standard, building code requirements, or market expectations necessary to achieve the projected rents and valuations, is the most difficult construction risk to quantify but can be as financially significant as cost overrun or schedule delay. A project delivered at a lower quality standard than anticipated may lease at lower rents, attract lower-quality tenants, and ultimately sell at a higher capitalization rate than the underwritten projections assumed.

The Completion Guaranty: Mechanics and Negotiation

As introduced in Chapter 4, the completion guaranty is the primary mechanism by which construction lenders (and, in some structures, capital members directly) protect themselves against the risk that a development project will not be completed.

Understanding the mechanics of the completion guaranty, and how it interacts with the JV's other risk allocation provisions, is essential for both parties.

What the Completion Guaranty Covers

A completion guaranty in the context of a real estate construction loan obligates the guarantor (typically the developer member and its principals) to complete construction of the project to the standard specified in the approved plans and specifications (or a lesser standard specified in the guaranty), even if the cost of completion exceeds the original construction loan amount and the original equity commitment. The guarantor's obligation under a completion guaranty is essentially a construction backstop: if the borrower cannot complete the project, the guarantor must complete it, at whatever cost is necessary.

The specific obligations covered by a typical construction lender's completion guaranty include the following.

- Completion to substantial completion standard. The guarantor is obligated to ensure that construction is completed to the point of substantial completion (typically defined as the issuance of a certificate of occupancy or the architect's certificate of substantial completion), not necessarily full punch-list completion.

- Cost overrun funding. The guarantor is obligated to fund any construction cost overrun above the construction loan amount and the committed equity, whether caused by labor cost increases, material cost escalation, contractor default, design changes, or any other cause (subject to any express carve-outs negotiated in the guaranty).

- Loan repayment guarantee. Some completion guaranties extend beyond mere completion to include an obligation to repay the construction loan if the project cannot be completed for any reason. This full completion and repayment guaranty is the broadest form of guaranty and is increasingly demanded by construction lenders for projects with significant execution risk.

Negotiating Completion Guaranty Limitations

As discussed in Chapter 4, the developer member's primary objective in completion guaranty negotiation is to limit the scope and dollar amount of its guaranty exposure. The following strategies are most effective.

- Dollar cap negotiation. The developer member should negotiate for a dollar cap on its completion guaranty exposure, ideally expressed as a percentage of total project costs (typically 10% to 20% for institutional construction lenders) or as an absolute dollar amount representing the maximum additional equity the developer member is willing to commit to the project's completion. A completion guaranty without a dollar cap is an unlimited contingent liability.

- Force majeure carve-outs. The completion guaranty should expressly exclude from the guarantor's obligations any cost overruns or schedule delays caused by

force majeure events (acts of God, government-mandated shutdowns, pandemics, acts of war). The developer member cannot control these events and should not bear the economic cost of their impact on the project's construction timeline and cost.

- Lender interference carve-outs. The completion guaranty should exclude from the guarantor's obligations any completion failures attributable to lender actions, including wrongful draw withholding, improper loan acceleration, or other lender conduct that impairs the project's completion. A developer member that cannot fund construction because the lender is wrongfully withholding draws should not be in default under its completion guaranty.

- Burn-off provisions. As construction progresses and the risk of non-completion diminishes, the developer member's completion guaranty exposure should decrease accordingly. The completion guaranty should include a burn-off schedule that reduces the guaranty amount as defined construction milestones are achieved (for example, a 25% reduction on reaching 50% construction completion, a 50% reduction on substantial completion, and full release on final completion and loan conversion).

- Co-guarantor arrangements. Where the capital member has a strong balance sheet and a large economic interest in the project's completion, the developer member can sometimes negotiate for the capital member to provide a co-guaranty or backstop guaranty, reducing the developer member's solo guaranty exposure. Co-guaranty arrangements are more common in deals where the capital member is a large institutional investor with significant financial capacity.

The Construction Management Structure

The governance of the construction process, how the JV manages the general contractor, monitors construction progress, processes draw requests, and responds to problems, is one of the most operationally important aspects of development JV structuring. The operating agreement must establish clear lines of authority and clear processes for managing the construction phase.

Key construction management governance provisions include the following.

- General contractor selection and approval. The general contractor is the JV's most important construction-phase counterparty. The operating agreement should require capital member approval of the general contractor selection, the general contract terms (particularly the contract amount, the schedule, and the performance bond), and any replacement of the general contractor during the construction period.

- Construction draw approval process. The process for approving and submitting construction loan draws should be clearly defined in the operating agreement: who prepares the draw request, what documentation is required (AIA G702 and G703 forms, conditional and unconditional lien waivers, architect's certification,

lender's inspector report), and how the capital member is kept informed of each draw request.

- Change order authority thresholds. As discussed in Chapter 4, the operating agreement should establish clear change order authority thresholds: the dollar amount below which the developer member can approve change orders unilaterally, and above which capital member approval is required. On a $50 million construction project, individual change order thresholds of $250,000 to $500,000, and aggregate change order authority of $1,000,000 to $2,000,000, are typical market parameters.

- Performance bond requirements. For projects of significant size, the operating agreement should require the general contractor to provide a performance bond and a payment bond (typically in the amount of 100% of the contract amount), so that the lender, the JV, and the subcontractors have independent recourse against the bonding company in the event of contractor default.

- Construction lender inspection rights. The construction loan agreement typically gives the lender the right to conduct periodic site inspections through its own inspector or a third-party construction monitoring firm. The JV's governance framework should accommodate, and in fact encourage, these inspections as an additional check on construction progress and quality.

Dual Perspective: Construction Risk Governance

Developer Member: The developer member needs construction governance provisions that give it maximum operational authority to manage the construction process efficiently, without requiring capital member approval for every routine construction decision. High change order thresholds, broad emergency action authority, and minimal capital member involvement in day-to-day construction management are the developer member's objectives. Excessive capital member oversight of construction operations creates decision-making bottlenecks that slow the project and strain contractor relationships.

Capital Member: The capital member has committed tens of millions of dollars to a construction project it does not physically control and whose cost can increase significantly through decisions made by the developer member without its knowledge. The capital member's construction governance objectives are the mirror image of the developer member's: regular, detailed reporting on construction progress and cost; meaningful approval rights over significant change orders; direct access to lender draw documentation; and the right to conduct independent construction inspections.

Construction Loan Covenant Compliance as a JV Governance Issue

The construction loan is more than a financing arrangement. It is a governance framework in its own right, imposing a comprehensive set of covenants, conditions, and consent requirements on the JV that interact directly with the operating agreement's governance provisions. Experienced JV counsel treat construction loan documentation review as an integral part of JV structuring, not as a separate exercise.

Construction lenders, whether conventional banks, debt funds, or agency lenders, impose extensive covenant packages on their borrowers as conditions of construction financing. These covenants govern virtually every aspect of the project's development: the approved budget, the construction schedule, the contractor relationships, the leasing parameters, the insurance requirements, the environmental compliance obligations, and the conditions under which equity distributions may be made. Each of these lender covenants interacts with the JV operating agreement's governance provisions, and inconsistencies between the two can create serious governance complications.

The Most Common Construction Loan Covenant Conflicts

The following categories of construction loan covenants most frequently create conflicts with or complications for the JV operating agreement's governance framework.

Budget and Cost Covenant

Most construction loans include a covenant requiring the borrower to maintain a construction budget approved by the lender and to immediately notify the lender of any projected cost overrun above a defined threshold (typically 5% to 10% of the approved budget). This covenant can create a governance complication if the operating agreement's budget variance tolerance allows the developer member to approve expenditures above the budget without capital member consent, but below the threshold that triggers the lender notification requirement. A budget variance that is within the operating agreement's tolerance but above the lender's notification threshold requires different handling, and the operating agreement should specifically address this scenario.

Completion Date Covenant

Construction loans typically include a hard or soft completion date covenant, a deadline by which the project must achieve substantial completion, failing which the loan is in default (hard) or triggers a cure obligation (soft). This covenant can create a significant governance complication if the completion date is approaching and the developer member needs to take emergency actions (hire additional labor, approve significant change orders) to accelerate construction, actions that might otherwise require capital member approval under the operating agreement's major decisions provisions. The operating agreement should include an express emergency provision allowing the developer member to take any action required to comply with a construction loan covenant without prior capital member approval, subject to prompt notification and post-hoc ratification.

Leasing Covenants

For commercial development projects (office, retail, industrial), construction lenders frequently impose pre-leasing covenants as a condition of the construction loan: requirements that the developer member obtain executed leases for a defined percentage of the project's leasable area before the lender is obligated to fund loan advances beyond an initial amount. These pre-leasing requirements interact directly

with the JV's leasing strategy and governance, since leases above defined parameters require capital member approval under the operating agreement's major decisions provisions. The operating agreement should address how the leasing approval process is coordinated with the lender's pre-leasing requirements so the two approval processes do not create conflicting timelines.

Equity Maintenance and Distribution Covenants

Virtually all construction loans prohibit distributions from the borrower entity (the JV) to its members while the loan is outstanding, without lender consent. This prohibition can directly conflict with the operating agreement's provision for the payment of ongoing developer fees (which are, technically, distributions from the JV to the developer member). Experienced JV counsel address this conflict expressly, either by negotiating with the lender for an exception permitting developer fee payments, or by structuring developer fees as a line item in the construction loan budget (funded as a construction cost from loan proceeds rather than as a JV distribution) so they fall outside the distribution prohibition.

Transfer Restriction Covenants

Construction loans routinely restrict any transfer of the borrower entity's (JV's) membership interests or any change in the project's management without lender consent. This restriction can conflict with the operating agreement's provisions for permitted transfers (transfers to wholly owned affiliates without member consent), the buy-sell mechanism (which requires a transfer of membership interests by definition), and the removal and replacement of the manager. Before executing any transfer contemplated by the operating agreement's provisions, the developer member must ensure that the proposed transfer does not trigger the construction loan's change-of-ownership covenant.

Practice Note: Coordinate Loan Documents with the Operating Agreement Before Closing

The most common and most avoidable governance crisis in development JVs occurs when the construction loan closes on terms inconsistent with the operating agreement's governance framework, and neither the developer member nor the capital member discovers the inconsistency until a specific governance event (a transfer, a removal, a distribution) reveals the conflict. Experienced JV counsel make it standard practice to review all construction loan documents alongside the operating agreement, identify every lender consent requirement and covenant restriction, and either negotiate with the lender to address any conflict before loan closing or modify the operating agreement's provisions to be consistent with the lender's requirements. Either approach is acceptable; discovering the conflict after closing is not.

The Lender Consent Framework

Beyond identifying specific conflicts, the JV operating agreement should establish a clear framework for managing lender consent requirements throughout the construction period.

- Lender consent as a condition of major decision approval. Where a major decision under the operating agreement (disposition, refinancing, transfer of interests) also requires lender consent, the operating agreement should specify that the capital member's approval is conditioned on, or runs concurrently with, obtaining the required lender consent. Neither party should be required to take an action the lender will not permit.

- Developer member obligation to manage lender relationships. The operating agreement should impose on the developer member, as manager, the primary obligation to maintain the JV's lender relationships, comply with all loan covenants, and obtain required lender consents in a timely manner. The capital member should have the right to be copied on all material lender communications, but the developer member bears the management responsibility.

- Capital member cure rights for loan defaults. As discussed in Chapter 5, the operating agreement should give the capital member the right, but not the obligation, to cure any construction loan default on behalf of the JV if the developer member fails to cure within the applicable cure period. The capital member's cure costs should be treated as a senior obligation of the JV or as a senior loan from the capital member to the developer member.

- Loan document amendment approval. Any amendment to the construction loan documents that would affect the JV's obligations, the loan's maturity date, the interest rate, or the distribution restrictions should require capital member approval as a major decision. Developer members should not be permitted to amend material loan terms without capital member consent.

Carry Costs and Interest Reserves

One of the most significant and often underestimated aspects of development JV economics is the cost of carrying the project during the construction and pre-stabilization period, the carry costs that accumulate throughout the project's lifecycle before any revenue is generated. Structuring the JV to account for these costs accurately, allocate them fairly, and manage them effectively is essential to protecting both parties' economic interests.

Carry costs is a broad term that covers the ongoing costs of owning and developing a real estate project during the period before the project generates sufficient revenue to cover its operating expenses. In a development JV, the carry period typically begins with the JV's formation (or with the acquisition of the development site) and extends through construction, lease-up, and stabilization. For a typical ground-up development project, the carry period may last three to five years, a period during which the JV's cash flow is entirely negative and both parties' capital is being consumed by costs rather than generating returns.

Components of Development Carry Costs

The principal categories of carry costs in a development JV include the following.

- Construction loan interest. The single largest carry cost component. Construction loan interest accrues on the outstanding loan balance throughout the construction period. Depending on the loan structure, interest may be paid currently (from operating cash or from a funded interest reserve) or capitalized into the loan balance. Capitalized interest reduces the net loan proceeds available for construction costs and can significantly inflate the project's total cost. Construction loan interest rates have increased substantially in recent years, making the interest carry component of project cost more significant than in prior low-rate environments.

- Land carry costs. If the development site was acquired (rather than contributed by the developer member) and is held during the pre-construction and construction periods, the carrying cost of the land (property taxes, insurance, maintenance, opportunity cost of equity) accumulates throughout the hold period.

- Pre-development expenses. Architectural and engineering fees, environmental consultants, entitlement costs, legal fees, and other pre-development expenses incurred before construction financing is in place must be funded from equity and add to the project's total carry cost.

- Developer fees during construction. Development fees and construction management fees, while above-the-line operating expenses of the JV, represent cash outflows during the construction period. They reduce the net equity available for construction costs and contribute to the project's total cost.

- Operating expenses during construction. For phased development projects or projects with early-occupancy components, operating expenses (insurance, property taxes, utilities, security) may begin to accrue before the project is generating revenue.

Interest Reserve Mechanics

Most construction loans include an interest reserve, a component of the construction loan budget specifically allocated to fund the interest that will accrue on the loan during the construction and initial lease-up period. The interest reserve is funded from the construction loan proceeds (not from equity) and is disbursed to pay interest as it comes due during the construction and pre-stabilization period.

The interest reserve is an important cash management tool for development JVs, but its sizing requires careful analysis.

- Interest reserve sizing. The interest reserve should be sized to cover the projected interest accrual through the projected stabilization date, plus a contingency buffer for schedule delay. A common rule of thumb is to size the

interest reserve to cover the projected construction period plus the projected lease-up period, plus an additional three to six months of buffer for schedule delay and lease-up underperformance.

- Interest reserve depletion risk. If construction takes longer than projected (extending the draw period) or interest rates increase above the rates used in the original interest reserve calculation, the interest reserve may be depleted before stabilization is achieved. An exhausted interest reserve creates an emergency capital call requirement that can strain both parties' financial resources.

- Interest reserve release. Once the project achieves stabilization and generates sufficient net operating income to service the permanent loan's interest obligation from operations, any remaining balance in the interest reserve may be available for distribution. The operating agreement should specify how any surplus interest reserve is distributed through the waterfall.

- Recourse to equity for interest reserve shortfalls. The operating agreement should clearly address the process and responsibility for funding interest reserve shortfalls: who makes the capital call, in what proportion the shortfall is funded (pro rata to existing equity commitments), and what the consequence is of a member's failure to fund the shortfall.

Carry Cost Allocation in the Waterfall

The treatment of carry costs in the JV's distribution waterfall has significant economic implications for both parties.

- Preferred return accrual during the carry period. Because the capital member's preferred return begins accruing from the date of each capital contribution, the preferred return obligation grows substantially during the carry period. On a $20 million equity investment at an 8% preferred return over a three-year construction period, the accrued preferred return before any revenue is generated could approach $5 million, a significant component of the total promote threshold that must be cleared before any promote is paid.

- Developer fee timing relative to preferred return accrual. Developer fees paid during the construction period reduce the JV's distributable cash but increase the total project cost base and effectively increase the preferred return threshold that must be satisfied before promote is earned. Developer members should model the after-fee waterfall economics carefully to ensure that the fee structure does not inadvertently raise the preferred return hurdle to levels that make the promote difficult to earn.

- Impact of carry costs on IRR. Extended carry periods sharply reduce the project's IRR, since every month of carry represents a period during which capital is deployed but generating no return. A project that performs well on a nominal return basis but takes two years longer to stabilize than projected may fail to

achieve the IRR hurdle necessary for the developer member to earn its full promote.

Modeling Carry Costs: The Essential Pre-Signing Exercise

Before signing a development JV operating agreement, both parties should run detailed financial models that project carry costs under multiple scenarios: a base case (on-schedule, on-budget), a moderate stress case (6-month delay, 10% cost overrun), and a severe stress case (12-month delay, 20% cost overrun, higher interest rates). These models reveal the impact of carry cost variability on the preferred return accrual, the interest reserve adequacy, and the ultimate promote threshold. A developer member that models these scenarios carefully before signing will negotiate a JV structure that provides adequate protection against stress scenarios; one that models only the base case may find itself in a governance crisis when the inevitable construction surprises materialize.

Lease-Up Risk and Stabilization Milestones

For income-producing development projects, including multifamily, office, retail, and industrial, the period between certificate of occupancy and stabilization is one of the most economically consequential phases of the JV's lifecycle. Lease-up risk, the risk that tenants will not be secured as quickly or at the rents projected in the business plan, can sharply affect the project's ultimate economic performance and the timing of the promote's realization.

Lease-up risk is the development JV's final major execution risk, the last obstacle between the developer member's construction achievement and the economic realization of the promote that compensates it for years of development work. This risk is particularly significant for three reasons. First, it is the period closest to the promote realization event (disposition or refinancing), so lease-up underperformance has a direct, immediate impact on the promote calculation. Second, it is substantially market-driven, making it the risk category least directly controlled by the developer member's execution. Third, it is the risk category most likely to generate disputes between the developer member (which attributes lease-up underperformance to market conditions beyond its control) and the capital member (which attributes it to leasing strategy failures within the developer member's control).

Defining Stabilization: The Most Important Lease-Up Provision

The definition of stabilization in the operating agreement is one of the most consequential provisions in any development JV. Stabilization is typically defined as the achievement of a defined occupancy and rent threshold for a specified consecutive period, and the achievement of stabilization triggers a cascade of economic and governance events: the conversion of the construction loan to a permanent loan, the potential realization of the promote through a refinancing distribution, the establishment of the hold period for forced sale and buy-sell timing purposes, and the beginning of the asset management phase.

A well-constructed stabilization definition balances the competing interests of the parties.

- Economic occupancy threshold. Stabilization should be defined by reference to economic occupancy (actual rent collected as a percentage of projected stabilized rent), not merely physical occupancy (units leased as a percentage of total units). A project that is 95% physically occupied but has executed leases at rents 15% below the underwritten projections has not achieved economic stabilization in the relevant sense.

- Duration requirement. Stabilization should require the occupancy threshold to be maintained for a defined consecutive period (typically 90 days for multifamily, longer for commercial properties with annual lease terms). This duration requirement ensures that the occupancy threshold reflects genuine, sustained market absorption rather than a temporary spike.

- Concession-adjusted rent. The stabilization rent threshold should be calculated on a net effective rent basis (face rent minus lease concessions such as free rent periods), so the achievement of the threshold reflects sustainable economics rather than paper leases supported by extensive concession packages.

- Occupancy threshold calibration. The stabilization occupancy threshold should be set at a level consistent with a market-rate asset in the project's specific submarket: typically 90% to 95% for multifamily, 85% to 90% for office, and 90% to 95% for retail or industrial. A threshold set too low allows the developer member to claim stabilization (and potentially trigger promote distributions) before the project has achieved genuine market-rate performance.

Leasing Governance During Lease-Up

The governance of the leasing process during the lease-up period is an important operating agreement provision that determines how the developer member's leasing decisions are overseen by the capital member.

- Leasing parameters in the approved business plan. The approved business plan should include specific leasing parameters: target rent ranges (with a floor below which no lease may be executed without capital member approval), maximum free rent concession periods, maximum tenant improvement allowances, minimum lease terms, and target tenant credit quality standards. These parameters give the developer member broad leasing authority within the approved parameters while protecting the capital member against below-market leases or excessive concessions.

- Capital member approval of leases outside parameters. Any lease that would be executed at a rent below the approved floor, with concessions above the approved maximum, with a term shorter than the approved minimum, or with a tenant whose credit quality falls below the approved standard should require capital member approval as a major decision.

- Monthly leasing reports. During the lease-up period, the developer member should provide monthly leasing reports documenting leasing velocity (units or square footage leased per month), achieved rents versus projected rents, concession packages used, tenant quality metrics, and a comparison of actual lease-up pace against the approved business plan projections.

- Leasing agency selection. The selection of the exclusive leasing agent (for commercial projects) or property management company (for multifamily projects) should require capital member approval, since the quality of the leasing agency directly affects the project's lease-up timeline and tenant quality.

Lease-Up Shortfall: Governance and Economic Consequences

When lease-up performance falls short of the approved business plan projections, the operating agreement must provide clear governance protocols for addressing the shortfall.

- Business plan amendment requirement. If the lease-up pace or achieved rents fall materially below the approved business plan projections (typically defined as more than 10% to 15% below the projected pace or rent), the developer member should be required to propose a revised leasing strategy for capital member approval. The capital member's ability to approve or reject a revised leasing strategy is an important oversight mechanism during a period of underperformance.

- Lease-up reserve adequacy. The operating agreement should address what happens if the lease-up period extends significantly beyond the projected timeline and the interest reserve is depleted before stabilization is achieved. The parties should agree in advance on the process for additional equity contributions during a prolonged lease-up period, including the dilution consequences for the developer member if additional equity is required.

- Stabilization deadline and capital member remedies. The operating agreement should specify a deadline by which stabilization must be achieved, failing which the capital member may have enhanced governance remedies (including, in some structures, a right to assume direct control of the leasing process or a right to force a sale of the project at whatever value the market will support).

Certificate of Occupancy and Conversion Events

The certificate of occupancy, the governmental certification that the completed project meets all applicable building codes and may be legally occupied, is the most significant milestone in the lifecycle of any development project. It represents the transition from construction risk to lease-up risk, and it triggers a cascade of economic, legal, and governance events that the operating agreement must address thoroughly.

The certificate of occupancy (CO) is more than an administrative formality. It is the event that transforms a construction project into a real estate asset. Before CO, the JV's economic and legal position is defined by its construction loan, its construction contract, and its development team's ability to deliver the project. After CO, its position is defined by the completed building, its leasing performance, and its permanent financing. This transition, and the cascade of events that accompanies it, is one of the most important phases of development JV governance.

Types of Certificates of Occupancy

Not all certificates of occupancy are created equal, and the operating agreement must be precise about which type of governmental certification constitutes CO for purposes of the JV's milestone provisions.

- Temporary Certificate of Occupancy (TCO). Issued by the building department before all items on the final inspection punch list are complete, a TCO permits occupancy of the building (or a portion of it) before full completion. For multifamily projects, the TCO is often the most practically significant CO event because it allows tenant move-ins to begin, initiating the lease-up period before full construction completion. The operating agreement should address whether the TCO constitutes CO for milestone and promote vesting purposes.

- Final Certificate of Occupancy. The final, unconditional CO issued when all punch list items are complete and the building fully satisfies all applicable code requirements. The final CO is the appropriate milestone for most operating agreement purposes (particularly for commercial projects where tenant move-in is contingent on final CO), though the TCO may be sufficient for certain multifamily milestone provisions.

- Phased COs. For large, multi-building or multi-phase development projects, COs may be issued on a phase-by-phase basis. The operating agreement should address how phased COs affect the stabilization definition, the promote vesting schedule, and the construction loan conversion process.

The Construction-to-Permanent Loan Conversion

On or shortly after certificate of occupancy, most development projects refinance from a construction loan to a permanent loan, converting the short-term, floating-rate, draw-down construction financing into long-term, fixed-rate permanent debt. This conversion or refinancing event has major implications for the JV's economics and governance.

- Permanent loan sizing. The size of the permanent loan is typically determined by the lender based on the project's stabilized net operating income and the applicable debt service coverage ratio and loan-to-value requirements. If the permanent loan is smaller than the construction loan balance (due to lower-than-projected rents, higher-than-projected expenses, or tighter permanent lending conditions), the difference must be funded from equity or from the proceeds of a

residual equity sale, creating a potential capital call requirement that was not anticipated in the original business plan.

- Waterfall implications of refinancing proceeds. If the permanent loan is larger than the construction loan balance (possible when the project's stabilized NOI exceeds the original projections, supporting a larger permanent loan), the excess proceeds (net of closing costs and required reserves) may be available for distribution through the JV's waterfall. As discussed in Chapter 2, the treatment of refinancing proceeds in the waterfall is a significant economic point that the operating agreement must address expressly.

- Interest rate risk at conversion. The interest rate on the permanent loan is set at the time of conversion, based on prevailing market rates at that time. If market rates have increased significantly since the JV's formation, the permanent loan's interest rate may be materially higher than the rate assumed in the original business plan, reducing the project's NOI and potentially impairing the promote threshold analysis.

- Capital member approval of permanent loan terms. The permanent loan is a major decision that requires capital member approval. The capital member should review and approve the permanent loan's term, interest rate, prepayment provisions, extension options, and any lender-imposed restrictions on distributions or operations before the loan is executed.

Promote Vesting at the CO Milestone

As discussed in Chapter 4 in the context of removal provisions, the certificate of occupancy is one of the most commonly used milestones in a promote vesting schedule. A typical promote vesting schedule for a development JV might provide the following.

Development Milestone	Typical Promote Vesting %	Cumulative Promote Vested	Rationale
JV Formation / Land Acquisition	0%	0%	No development work completed; no promote earned
Construction Loan Closing	10% to 15%	10% to 15%	Financing secured; construction risk committed
50% Construction Completion	15% to 20%	25% to 35%	Substantial construction risk absorbed
Certificate of Occupancy	25% to 30%	50% to 65%	Construction risk eliminated; asset delivered
Stabilization Achievement	20% to 25%	70% to 90%	Lease-up risk eliminated; full NOI demonstrated

Development Milestone	Typical Promote Vesting %	Cumulative Promote Vested	Rationale
Disposition / Final Distribution	10% to 30%	100%	Value creation fully realized; all risk retired

The promote vesting schedule serves two important functions. First, it protects the developer member against total promote forfeiture on a for-cause removal that occurs after substantial development work has been completed. Second, it gives the capital member an objective, milestone-based framework for evaluating the promote consequences of a removal event, reducing the scope for dispute about how much promote the developer member had earned at the time of removal.

Both parties benefit from a clearly defined promote vesting schedule. The developer member gains protection against losing the full value of its development work on removal; the capital member gains a clear, pre-agreed standard for calculating the developer member's economic entitlement on any removal event, reducing litigation risk.

Why Development JVs Require Specialist Legal Counsel

The six risk categories examined in this chapter, entitlement, construction cost, schedule, lease-up, carry costs, and CO conversion, each require specific operating agreement provisions that are not found in the standard forms and templates used for acquisition or value-add JVs. A developer member or capital member that enters a development JV with an operating agreement drafted for a stabilized acquisition is using a framework designed for a fundamentally different risk profile.

Development JV counsel must understand not only the legal mechanics of LLC governance and waterfall economics, but also the practical realities of the entitlement process, construction loan documentation, construction management, and lease-up dynamics. The interaction between the operating agreement's provisions and the construction loan documents, the entitlement conditions, and the leasing market creates a web of legal and practical interdependencies that only specialized experience can manage effectively.

The cost of a single governance crisis in a development JV, a disputed removal, a construction loan default triggered by an unanticipated lender covenant, a promote dispute arising from imprecise stabilization definitions, almost always exceeds the total cost of the legal work required to prevent it. The attorneys at [Firm Name] bring development JV-specific experience to every engagement, ensuring that the operating agreement's provisions accurately reflect the unique risk profile of ground-up development and protect both parties effectively throughout the project's lifecycle.

Chapter 7 Summary

Chapter 7 has examined the six risk categories unique to ground-up development JVs and the specific operating agreement provisions required to address each. The principal takeaways are these.

- Entitlement risk must be allocated between the parties through specific operating agreement provisions: defining the required approvals, specifying the consequences of entitlement failure, establishing entitlement cost budgets and reporting requirements, and compensating the developer member for pre-JV entitlement work already completed.
- Construction risk encompasses cost overrun, schedule delay, and quality risk, each requiring specific governance provisions covering general contractor selection and approval, change order authority thresholds, draw approval processes, performance bond requirements, and emergency action authority.
- The completion guaranty is the developer member's most significant personal financial exposure in any development JV. Dollar caps, force majeure carve-outs, lender interference carve-outs, burn-off provisions, and co-guarantor arrangements are the primary tools for limiting this exposure.
- Construction loan covenants interact directly with operating agreement governance provisions and must be reviewed and coordinated before closing. Common conflict areas include budget and cost covenants, completion date covenants, leasing covenants, distribution prohibitions, and transfer restrictions.
- Carry costs, particularly construction loan interest during the carry period, significantly affect both the project's economics and the preferred return threshold. Interest reserve sizing, depletion risk, and carry cost allocation in the waterfall must be expressly addressed in the business plan and the operating agreement.
- Stabilization definitions, including the economic occupancy threshold, the duration requirement, the concession adjustment, and the occupancy threshold calibration, are among the most consequential provisions in any development JV and must be defined with complete precision.
- The certificate of occupancy triggers a cascade of legal, economic, and governance events: construction loan conversion, promote vesting milestones, and the transition from construction to operating-phase governance, each of which must be expressly addressed in the operating agreement.
- Promote vesting schedules, tied to development milestones, serve both the developer member (partial promote preservation on removal) and the capital member (an objective framework for post-removal economic calculations) and are a best practice for development JVs of any size.

Looking Ahead to Chapter 8

Chapter 8 turns from single-asset development JVs to programmatic JVs, the repeat partnership structures through which institutional capital members and established developer members build long-term, multi-asset investment platforms. Programmatic

JVs introduce a new layer of complexity: investment periods, portfolio-level economics, vintage-year waterfall calculations, and the governance challenges of a relationship that must function effectively across multiple assets, markets, and market cycles. Chapter 8 examines these challenges and the specific provisions that make programmatic JV relationships successful.

CHAPTER 8

Programmatic JVs: The Repeat Partnership

The single-asset joint venture is where most developer-capital member relationships begin. The programmatic joint venture is where the best of those relationships evolve. A programmatic JV, a pre-committed, multi-asset partnership structured around a defined investment program, represents the deepest form of mutual confidence between a developer member and a capital member, and the most legally and structurally complex form of institutional real estate joint venture.

This chapter examines the programmatic joint venture from every relevant dimension: what it is and why it exists; how its investment period and capital deployment mechanics differ from single-asset JVs; the exclusivity and deal sourcing obligations that define the developer member's commitment to the program; the performance benchmarks that govern the capital member's continued commitment; the challenges of calculating promote and applying the clawback across a portfolio of assets with different vintages, risk profiles, and holding periods; and the strategic question of when a programmatic JV structure is the right choice and when a fund structure may be more appropriate.

A programmatic JV is more than a series of single-asset JVs bundled together. It is a fundamentally different type of legal and business relationship, one that requires a more sophisticated governing framework, a more nuanced approach to economics, and a deeper level of mutual commitment from both parties. Understanding the full complexity of programmatic JV structure is essential for any developer member or capital member contemplating this form of institutional partnership.

What Is a Programmatic JV?

The programmatic joint venture is the institutional real estate partnership at its most mature: a structure in which a capital member pre-commits a defined amount of capital to a developer member's investment platform for deployment across multiple assets over a defined period, based on the developer member's track record, expertise, and ongoing deal generation capability.

A programmatic joint venture (also called a platform JV, separate account, or strategic alliance) is a standing institutional partnership in which a capital member commits a defined amount of equity capital for deployment by a developer member across multiple real estate investments, typically within a defined asset class, geographic focus, and return profile, over a multi-year investment period. Unlike a single-asset JV, which is formed to pursue a specific, identified opportunity, a programmatic JV is formed to pursue a program of future opportunities that the developer member will identify and source during the investment period.

The programmatic JV has become one of the dominant structures for institutional real estate investment because it serves the strategic interests of both parties at once. For the capital member, it provides efficient access to high-quality deal flow that would be difficult or impossible to replicate through one-off deal sourcing, with the governance protections and alignment mechanisms of a true JV partnership. For the developer member, it provides capital certainty, the confidence that a defined pool of institutional equity is committed and available for deployment, which lets the developer member compete for larger, more complex opportunities and build a more scalable development platform.

The Core Architecture of a Programmatic JV

The programmatic JV's defining structural features distinguish it from both the single-asset JV and the real estate fund.

- Pre-committed capital. The capital member commits a defined total equity amount (the program commitment) at the outset of the relationship, typically ranging from $50 million to several billion dollars depending on the capital member's investment mandate and the developer member's platform scale. This pre-commitment gives the developer member capital certainty without requiring re-approval for each investment.

- Investment period. Capital is not deployed all at once; it is drawn down over a defined investment period (typically two to five years) as qualifying investments are identified and approved. The investment period disciplines the deployment process and keeps the capital member's commitment aligned with the developer member's realistic deal sourcing capacity.

- Program parameters. The programmatic JV agreement defines the investment parameters within which the developer member must operate: asset type (for example, Class A multifamily), geographic focus (for example, Sun Belt markets), minimum and maximum investment size per asset, return targets (minimum IRR and equity multiple thresholds), leverage parameters (maximum loan-to-cost ratios), and quality standards. These parameters protect the capital member against mission creep and ensure that deployed capital reflects the investment thesis underwritten at the program's formation.

- Master governance framework. Rather than negotiating a separate operating agreement for each asset, the parties negotiate a master programmatic JV agreement that establishes the overarching governance framework, including investment period terms, approval processes, reporting obligations, performance benchmarks, and the developer member's program-level obligations, with asset-level matters handled through project-level supplements or side letters.

- Portfolio-level economics. The programmatic JV's waterfall and promote calculations are performed on a portfolio basis (or on a vintage-year basis within the portfolio), so the developer member's promote on any individual asset is ultimately subject to clawback based on the program's aggregate performance.

This portfolio-level promote calculation aligns the developer member's incentives with the capital member's overall portfolio return, not merely the performance of individual assets.

How Programmatic JVs Differ from Single-Asset JVs

Structural Dimension	Single-Asset JV	Programmatic JV
Capital commitment	For a specific, identified asset	Pre-committed pool for multiple future assets
Investment period	Single closing event	Multi-year deployment period (2 to 5 years typical)
Deal sourcing	Specific opportunity identified before formation	Developer member sources deals during the investment period
Governance documents	Full operating agreement per asset	Master agreement plus asset-level supplements
Promote calculation	Single asset; single realization event	Portfolio or vintage-year basis; clawback exposure
Exclusivity	Single-project non-compete	Comprehensive exclusivity for all qualifying opportunities
Performance benchmarks	Not typically applicable	Minimum deployment pace; return benchmarks; extension triggers
Relationship duration	Asset lifecycle (3 to 7 years typical)	Investment period plus full portfolio hold (8 to 15 years typical)
Legal complexity	High (single-asset operating agreement)	Very high (master agreement plus asset agreements plus portfolio mechanics)

The Strategic Case for Programmatic JVs

Both developer members and capital members derive strategic benefits from the programmatic structure that cannot be replicated through one-off single-asset transactions.

- Execution efficiency. Once the master programmatic agreement is in place, each new asset can be approved and closed substantially faster than under a single-asset negotiation framework. The operating agreement framework is already established; the parties need only agree on the asset-specific economics and terms. For time-sensitive acquisitions, this execution efficiency can be decisive.

- Reduced transaction cost. The cost of negotiating a new operating agreement for each investment, including legal fees, due diligence costs, and management time, is substantial. In a programmatic JV, these per-transaction costs are substantially reduced, as the master framework handles most of the substantive negotiation in advance.

- Platform scaling. For the developer member, the capital certainty provided by a programmatic commitment enables platform-level investment: expanding the development team, building out market coverage, investing in proprietary deal sourcing capabilities, and competing for larger and more complex projects. These platform investments, which would be too risky without committed capital, often generate above-market returns that benefit both parties.

- Relationship deepening. The programmatic relationship creates a level of mutual familiarity, trust, and institutional knowledge between the developer member and capital member that is not achievable through episodic single-asset transactions. The capital member's team develops deep knowledge of the developer member's platform, operating style, and decision-making process; the developer member's team learns the capital member's investment preferences, risk tolerance, and governance expectations. This mutual knowledge reduces friction, speeds decision-making, and improves outcomes across the portfolio.

- Market intelligence sharing. In a well-functioning programmatic relationship, both parties share market intelligence, deal flow information, and operational data that improve both parties' decision-making. The capital member's institutional research and benchmarking capabilities complement the developer member's ground-level market knowledge, creating a combined analytical capability that neither party could replicate independently.

Investment Period and Capital Deployment Obligations

The investment period is the programmatic JV's defining temporal framework, the window during which the developer member must identify, approve, and commit capital to qualifying investments. Managing the investment period effectively is one of the most operationally challenging aspects of the programmatic JV for both parties.

The investment period establishes the timeline within which the developer member must deploy the capital member's committed equity into qualifying investments. It is an important structural discipline. Without an investment period, the developer member has an indefinite option on the capital member's equity, a position that serves the developer member's interests but not the capital member's, which needs to deploy its committed capital within its own investment mandate timeline. The investment period creates a mutual obligation: the developer member must identify and execute qualifying investments within the period; the capital member must commit and fund its equity into those investments as they are identified.

Investment Period Structure and Duration

Investment periods in programmatic JVs are typically structured as follows.

- Initial investment period. The primary deployment window during which the developer member has the right to source and present qualifying investments for capital member approval. Initial investment periods typically range from two to

five years, calibrated to the developer member's realistic deal sourcing capacity and the capital member's deployment timeline requirements.

- Extension provisions. Most programmatic JV agreements include the capital member's right to extend the investment period by one or two years if the deployment pace has been satisfactory and the relationship is performing as expected. Extension rights are typically at the capital member's option (not the developer member's) and may be conditioned on the developer member having met defined deployment pace benchmarks during the initial period.

- Investment period expiration. On expiration of the investment period (whether the initial period or any extension), the developer member's right to source new investments for the program terminates. Existing investments in the portfolio continue to be governed by the master agreement and any applicable asset-level documents, but no new equity commitments may be made. The program effectively converts from a deployment vehicle to a portfolio management vehicle.

- Early termination. The investment period may be terminated early if the capital member exercises a removal right (for cause or no cause) with respect to the developer member's role as program manager. Early termination of the investment period has major consequences for both parties: the developer member loses access to the uncommitted portion of the program commitment; the capital member must decide how to redeploy the uncommitted capital with a different partner.

Capital Deployment Obligations and Minimum Deployment Commitments

The programmatic JV agreement typically imposes deployment obligations on both parties: the developer member is obligated to source and present qualifying investments at a pace sufficient to deploy the committed capital within the investment period; the capital member is obligated to approve and fund qualifying investments that meet the program parameters. The interplay of these mutual obligations creates one of the most complex governance dynamics in the programmatic JV.

- Minimum deployment pace. Some programmatic agreements specify a minimum annual or cumulative deployment commitment, requiring the developer member to present a defined number of qualifying investments per year or to deploy a defined percentage of the committed capital within defined periods. Failure to meet the minimum deployment pace may allow the capital member to reduce its program commitment or to terminate the investment period early.

- Maximum deployment pace. Less common, but increasingly relevant in competitive markets, a maximum annual deployment pace may be negotiated to prevent the developer member from over-deploying capital into lower-quality opportunities simply to meet minimum pace requirements. Quality over quantity is a consistent capital member theme in programmatic JV negotiations.

- Investment approval process. The process by which individual investments are approved within the programmatic framework is one of the most important governance mechanisms in any programmatic JV. The approval process must be fast enough to let the developer member compete for time-sensitive opportunities, while giving the capital member adequate information and decision-making time to conduct meaningful diligence.

- Deemed approval mechanics. As with single-asset JVs, the programmatic agreement should include a deemed approval provision: if the capital member fails to respond to an investment approval request within a defined period (typically 10 to 20 business days), the investment is deemed approved. Without a deemed approval provision, the capital member can effectively block the developer member from deploying capital by simply not responding to investment proposals, a governance dysfunction that defeats the purpose of the programmatic structure.

- Rejection rights and standards. The capital member should have the right to reject any proposed investment that does not meet the program parameters, for any reason within the program parameters or for no stated reason. The capital member should be aware, however, that frequent, unexplained rejections of qualifying investment proposals will create friction with the developer member and may be treated by courts, in the event of a dispute about whether the capital member unreasonably withheld consent, as evidence of bad faith.

Uncommitted Capital and Commitment Reduction

An important issue in programmatic JV governance is what happens to portions of the program commitment that are not deployed by the end of the investment period. Three approaches are common.

- Forfeiture of uncommitted capital. The most capital-member-favorable approach: any uncommitted capital at the end of the investment period is simply not deployed, and the capital member's obligation to fund investments terminates. The developer member receives no compensation for the uncommitted capital and loses the opportunity to deploy it within the program structure.

- Reinvestment right. In some programmatic structures, the capital member has the right to reinvest proceeds from early-realizing assets into new investments within the program, effectively extending the deployment period for reinvested capital. The reinvestment right is valuable to both parties: it lets the developer member maintain access to capital beyond the initial investment period, and it lets the capital member continue benefiting from the developer member's deal flow without forming a new programmatic relationship.

- Commitment reduction for missed deployments. Some programmatic agreements include an automatic reduction in the capital member's program commitment if the developer member fails to deploy defined amounts of capital within defined periods. This mechanism creates a meaningful incentive for the

developer member to maintain a strong pace of qualifying investment sourcing throughout the investment period.

Practice Note: The Investment Period Tension

The investment period creates a fundamental tension between the developer member and the capital member that must be carefully managed through the programmatic agreement's governance provisions. The developer member wants maximum flexibility to deploy capital at its own pace, based on market opportunity; the capital member wants deployment discipline that ensures its capital is put to work within its investment mandate timeline. The most successful programmatic JVs resolve this tension through transparent communication, realistic deployment pace commitments, flexible extension mechanisms, and a governance framework that allows prompt investment approval without sacrificing meaningful capital member diligence.

Exclusivity and Deal Sourcing Obligations

Exclusivity is the economic heart of the programmatic JV from the capital member's perspective. The capital member is paying for more than equity in identified assets. It is paying for access to the developer member's proprietary deal flow. The exclusivity provisions that make that access both comprehensive and enforceable are among the most important and most negotiated provisions in any programmatic JV agreement.

The capital member's investment thesis for a programmatic JV rests on a specific assumption: that the developer member will direct its best investment opportunities to the program before offering them to any other capital source. Without a strong exclusivity framework, the developer member could cherry-pick its best opportunities for other capital partners, giving the programmatic capital member its lower-quality, higher-risk, or less desirable deal flow while retaining its most attractive opportunities for other relationships. Preventing this outcome requires exclusivity provisions that are precisely defined, actively monitored, and meaningfully enforced.

Defining the Scope of Exclusivity

The scope of exclusivity in a programmatic JV must be defined with precision. Too broad, and the developer member is effectively prohibited from operating any aspect of its business outside the program; too narrow, and the capital member loses the deal flow access it is paying for. A well-drafted exclusivity provision defines the excluded opportunity category through the following parameters.

- Asset type. The exclusivity should cover all investments of the same asset type as the program's defined investment strategy. If the program focuses on Class A multifamily development, the exclusivity should cover all Class A multifamily development opportunities sourced by the developer member during the investment period, regardless of market or deal size (subject to the program's minimum investment threshold).

- Geographic scope. The exclusivity should be geographically defined, ideally matching the program's investment parameters. A program with a Sun Belt focus

should have exclusivity covering all Sun Belt markets in the applicable asset type; a program with a specific metropolitan market focus should have exclusivity covering that specific market.

- Deal size parameters. The exclusivity should cover investment opportunities within the program's defined investment size range. Opportunities that are too small or too large for the program may be excluded from the exclusivity obligation, allowing the developer member to pursue opportunities outside the program's parameters with other capital sources.

- Sourcing by whom. The exclusivity should cover all opportunities sourced or identified by the developer member or any of its affiliates, principals, or employees, not merely opportunities sourced directly by the developer member entity. Without this breadth, the developer member could route its best opportunities through affiliated entities that are not subject to the exclusivity obligation.

The Right of First Opportunity Mechanics

Exclusivity in programmatic JVs is typically implemented through a right of first opportunity (ROFO) mechanism: when the developer member identifies a qualifying investment opportunity, it must offer that opportunity to the programmatic capital member before pursuing it with any other capital source. The mechanics of this ROFO are operationally important.

- Notification requirements. The developer member should be required to provide the capital member with a written investment opportunity notice that includes enough information for the capital member to make a meaningful decision: a description of the opportunity, the proposed investment size and structure, the projected returns, a summary of the underwriting assumptions, and the timing requirements of the opportunity.

- Response period. The capital member must respond to the investment opportunity notice within a defined period, typically 10 to 20 business days for most opportunities, with a shorter period (5 to 10 business days) for time-sensitive opportunities where the developer member must move quickly to secure the deal. The response period must be realistic: too short impairs the capital member's ability to conduct meaningful diligence; too long prevents the developer member from competing effectively for time-sensitive opportunities.

- Deemed pass on non-response. If the capital member fails to respond within the response period, the opportunity should be deemed passed, freeing the developer member to pursue it with another capital source at terms no more favorable than those offered to the capital member. The deemed-pass mechanism is essential to prevent the capital member from blocking the developer member's deal flow through deliberate non-response.

- Terms of outside pursuit. If the capital member passes on an offered opportunity (or is deemed to have passed), the developer member should be free to pursue the opportunity with another capital source for a defined period (typically 180 to 360 days) at terms no more favorable to the outside capital source than those offered to the programmatic capital member. If the developer member has not closed the investment within that period, it must re-offer the opportunity to the capital member before proceeding.

- Anti-circumvention provisions. The exclusivity should include express anti-circumvention provisions prohibiting the developer member from structuring transactions to avoid the exclusivity obligation, for example by presenting an opportunity to the capital member at economic terms the capital member cannot accept (knowing it will pass) and then pursuing the opportunity with another capital source on more favorable terms.

Carve-Outs from the Exclusivity Obligation

Even a thorough exclusivity provision must include defined carve-outs that preserve the developer member's ability to operate its broader business.

- Existing pipeline carve-out. All investment opportunities that the developer member was actively pursuing when the programmatic agreement was signed (typically documented in an exhibit to the agreement) should be excluded from the exclusivity obligation. The capital member should carefully review this pipeline carve-out list to ensure it does not capture the most attractive near-term opportunities.

- Investment size carve-outs. Opportunities below the program's minimum investment threshold or above the program's maximum investment threshold should be excluded from the exclusivity obligation. The developer member should be free to pursue very small deals (which may not meet the capital member's minimum deployment scale) and very large deals (which may exceed the program's per-investment concentration limits) with other capital sources.

- Fund investment carve-outs. Where the developer member also operates a commingled real estate fund (discussed later in this chapter), investments made through the fund that meet the fund's investment parameters may be carved out of the exclusivity obligation, provided the fund's investment strategy is clearly differentiated from the programmatic JV's strategy.

- Geographic carve-outs. If the developer member has existing single-asset JV relationships in specific markets that pre-date the programmatic agreement, those markets may be carved out of the exclusivity obligation for the duration of those existing relationships.

Dual Perspective: Exclusivity Negotiation

Developer Member: The developer member's goal is to define exclusivity as narrowly as possible while giving the capital member adequate comfort that it will have genuine access to

the developer member's best deal flow. Narrow exclusivity preserves the developer member's flexibility to pursue opportunities outside the program with other capital partners, flexibility that may be essential if the capital member's approval process is slow or if the program parameters do not cover certain attractive opportunities. Developer members should insist on carve-outs for existing pipeline, non-qualifying deal sizes, and non-covered markets.

Capital Member: The capital member's goal is comprehensive exclusivity that captures the full range of opportunities the developer member might identify within the program's asset class and geography. Narrow exclusivity creates a risk that the developer member's best opportunities are systematically diverted to other capital sources, leaving the programmatic capital member with the developer member's second-tier deal flow. Capital members should push for broad exclusivity with limited, precisely defined carve-outs and strong anti-circumvention provisions.

Performance Benchmarks and JV Continuation Rights

The programmatic JV is a long-term commitment by both parties, often spanning eight to fifteen years from formation through final portfolio realization. Ensuring that both parties' obligations and rights are appropriately conditioned on satisfactory performance is one of the most important structural challenges of programmatic JV design.

Unlike a single-asset JV, in which both parties' commitment is essentially binary (the JV either proceeds to closing or it does not), the programmatic JV involves a continuous, evolving commitment over many years. The developer member must continuously source qualifying investments, manage an expanding portfolio, and deliver returns that justify the capital member's ongoing commitment. The capital member must continuously approve and fund qualifying investments, provide governance oversight across a growing portfolio, and maintain its commitment to the program even when individual assets encounter difficulties.

Performance benchmarks, the objective, pre-agreed standards against which both parties' performance is measured, provide the governance mechanism for managing this ongoing commitment. They define when the developer member has performed well enough to earn the capital member's continued trust, and when the capital member has the right to reduce or terminate its commitment based on underperformance.

Deployment Pace Benchmarks

The most commonly used performance benchmark in programmatic JVs is the deployment pace, the rate at which the developer member converts the capital member's commitment into actual investments. Deployment pace benchmarks may be structured as follows.

- Annual deployment targets. A defined amount of committed capital that should be deployed each year during the investment period (for example, 25% to 33% of the total commitment per year over a three-year investment period). Annual targets create a clear, measurable performance standard but may be difficult to achieve in slower markets or during periods of elevated competition for qualifying assets.

- Cumulative deployment thresholds. Rather than annual targets, some programmatic agreements specify cumulative deployment thresholds at defined points in the investment period (for example, 40% deployed by the end of year 2, 75% deployed by the end of year 3, and 100% deployed by the end of year 4). Cumulative thresholds provide more flexibility than annual targets while maintaining deployment discipline.

- Consequences of missed deployment benchmarks. The programmatic agreement should specify the consequences of failing to meet deployment benchmarks. Options include automatic reduction in the capital member's remaining commitment (the most common consequence), conversion of the investment period extension right from automatic to conditional on improved performance, termination of the exclusivity obligation (freeing both parties to pursue other partnerships), or termination of the investment period altogether.

Investment Return Benchmarks

In more sophisticated programmatic JV structures, the capital member's continuation obligations may be conditioned on the actual performance of already-deployed investments.

- Interim performance tests. At defined points during the investment period (typically annually or on the deployment of defined cumulative capital amounts), the programmatic agreement may require the developer member to demonstrate that the portfolio's projected returns (based on current valuations and business plan projections) remain within a defined range of the original underwriting assumptions. If the portfolio's projected returns have deteriorated materially, the capital member may have the right to slow or suspend further deployment pending remediation.

- Realized return benchmarks. In programmatic agreements that include a right of extension for additional investment periods, the capital member's extension right may be conditioned on the portfolio having achieved defined realized return benchmarks, including minimum IRR thresholds or equity multiple floors, on assets that have already been disposed of within the program. A developer member that has consistently delivered strong realized returns earns the capital member's confidence for continued capital deployment; one that has consistently underdelivered should not automatically receive additional capital commitments.

- Benchmark measurement methodology. The methodology for measuring performance benchmarks should be precisely defined in the programmatic agreement, including the valuation methodology for unrealized assets (third-party appraisal, NAV calculation, or discounted cash flow analysis) and the treatment of assets in various stages of the development or stabilization cycle. A benchmark measurement methodology that is ambiguous or susceptible to manipulation by either party creates dispute risk.

JV Continuation Rights and Step-Down Mechanisms

The programmatic JV's most sophisticated governance mechanism is the step-down provision, a structure that lets the capital member reduce its future commitment based on defined performance triggers, without terminating the relationship entirely. Step-down mechanisms let the capital member manage its exposure to an underperforming developer member while preserving the relationship for potential remediation.

- Soft step-down. The capital member's right to reduce future investment commitments (but not terminate the investment period) based on defined performance shortfalls. A soft step-down might reduce the capital member's commitment by 25% to 50% on a defined performance trigger, maintaining a smaller but ongoing relationship.

- Hard step-down. The capital member's right to terminate the investment period entirely on severe or persistent underperformance, while allowing existing investments to be managed through their lifecycle under the existing governance framework. A hard step-down effectively converts the programmatic JV from a deployment vehicle to a pure portfolio management vehicle.

- Cure rights for benchmark shortfalls. The developer member should negotiate for cure rights before any step-down is effective: a defined period (typically 90 to 180 days) during which the developer member can present a remediation plan and demonstrate improved performance before the step-down becomes effective. Cure rights protect the developer member against abrupt capital commitment reductions based on temporary underperformance.

- Dispute resolution for performance benchmark disagreements. Where performance benchmarks require subjective valuation judgments (for example, whether a portfolio's current projected IRR is above or below the benchmark threshold), the programmatic agreement should provide a binding dispute resolution mechanism (typically third-party expert determination) to resolve disagreements about benchmark compliance.

The Performance Benchmark Paradox

Performance benchmarks in programmatic JVs are essential governance tools, but they create a paradox: the very situations in which performance benchmarks are most likely to be triggered, including market downturns, credit disruptions, and construction cost inflation, are the situations in which the developer member has the least ability to improve performance through management actions. A developer member whose portfolio is underperforming because of a market-wide event is in a fundamentally different position than one whose portfolio is underperforming because of management failures. Performance benchmarks that do not distinguish between market-driven and management-driven underperformance create significant fairness risk. Experienced programmatic JV counsel negotiate benchmark provisions that incorporate market-relative performance measures, force majeure adjustments, and peer-group comparisons that give a more accurate picture of whether underperformance reflects management failure or market conditions.

Vintage-Year Waterfall Calculations Across Multiple Assets

The economic heart of the programmatic JV, and its most complex structural challenge, is the calculation of the promote across a portfolio of assets that were acquired at different times, at different prices, in different markets, and that will be disposed of on different timelines. The vintage-year waterfall is the mechanism by which programmatic JVs solve this complexity, and understanding it is essential for any developer member or capital member operating in the programmatic JV space.

In a single-asset JV, the promote calculation is relatively straightforward: proceeds from the sale of a single asset flow through a single waterfall, and the promote is calculated based on the returns achieved on a single investment. In a programmatic JV, the complexity is multiplicative: the portfolio may contain five, ten, or twenty assets at various stages of the investment lifecycle, each with its own capital account, its own preferred return accrual, and its own contribution to the portfolio's aggregate returns. How the promote is calculated across this portfolio, and how prior promote distributions are subject to clawback based on overall portfolio performance, determines the developer member's ultimate economic return from the program and the capital member's ultimate protection against overpayment of the promote.

Asset-Level Compared with Portfolio-Level Promote Calculation

The fundamental choice in programmatic JV waterfall design is whether the promote is calculated on an asset-by-asset basis or on a portfolio-level (aggregated) basis.

- Asset-by-asset promote. The promote is calculated separately for each investment at the time of its disposition, based on the returns achieved on that specific investment. The developer member earns promote on each asset as it is sold, without reference to the performance of other assets in the portfolio. This approach is more developer-member-favorable because it lets the developer member realize promotes from outperforming assets early, without waiting for the portfolio's overall performance to be established.

- Portfolio-level promote. The promote is calculated on the aggregate performance of all assets in the portfolio, considering all capital deployed and all returns received across the entire program. The developer member does not receive any promote until the capital member has received a return of all contributed capital and a preferred return across the full portfolio. This approach is more capital-member-favorable because it prevents the developer member from earning large promotes on individual winners while the portfolio's overall performance is below the preferred return threshold.

- Hybrid approach. The most common structure in institutional programmatic JVs is a hybrid: the developer member receives interim promote distributions on an asset-by-asset basis as each asset is disposed of, subject to a portfolio-level clawback calculated at the end of the investment period (or at defined interim points). This structure lets the developer member receive promote cash flow

during the program's life while protecting the capital member against aggregate overpayment on a portfolio basis.

The Vintage-Year Structure

The vintage-year structure is a refinement of the portfolio-level approach that addresses a specific fairness concern: in a long-duration programmatic JV with a multi-year investment period, assets acquired in early vintages (year 1 or year 2 of the program) will typically be disposed of much earlier than assets acquired in later vintages. If the promote is calculated on a fully aggregated portfolio basis that combines all vintages, the returns achieved on early assets may be diluted by the performance of later assets that have not yet been fully realized.

The vintage-year structure addresses this concern by grouping assets into cohorts based on the year of their acquisition (the vintage year) and calculating the promote separately for each vintage cohort.

- Vintage cohort formation. At the beginning of each year of the investment period, a new vintage cohort is established. All investments made during that calendar year (or fiscal year) are assigned to the same vintage cohort and are included in the waterfall calculation for that cohort.

- Cohort-level waterfall. The promote for each vintage cohort is calculated based on the aggregate performance of the investments in that cohort, applying the same waterfall mechanics (return of capital, preferred return, promote) as a single-asset JV. The developer member earns promote on a cohort when the capital member has received its preferred return on all capital deployed in that cohort.

- Cross-vintage clawback. Some programmatic agreements include a cross-vintage clawback: even if the developer member has earned promote on an individual vintage cohort, that promote may be subject to clawback if the aggregate performance of the entire program falls below the preferred return threshold. The cross-vintage clawback protects the capital member against cherry-picking of early vintages while later vintages underperform.

- Vintage cohort expiration. Each vintage cohort has a defined maximum life: assets within the cohort must be disposed of within a defined period (typically the investment period plus the maximum hold period for each asset), after which the cohort's promote calculation is finalized and any remaining clawback obligation is settled.

Worked Example: Vintage-Year Promote Calculation

The following simplified example illustrates how the vintage-year promote calculation works in practice. The assumptions are a three-year investment period, an 8% compounding preferred return, a 20% promote above the preferred return, and a clawback cap of 100% of prior promote distributions.

Vintage Cohort	Capital Deployed	Proceeds Received	Preferred Return Earned	Promote Earned	Clawback Required?
Year 1 (disposed Year 5)	$20M	$35M	$9.39M (8% compounding, 5 years)	$1.12M (20% of $5.61M residual)	No; positive performance
Year 2 (disposed Year 6)	$15M	$22M	$8.80M accrued (8% compounding, 6 years)	$0; preferred return not fully satisfied	No; no promote distributed
Year 3 (disposed Year 7)	$25M	$48M	$17.85M (8% compounding, 7 years)	$1.03M (20% of $5.15M residual)	No; positive performance
Program Aggregate	$60M	$105M	$36.04M total preferred	$2.15M total promote earned	Portfolio IRR ~12%; above threshold

In the example above, the Year 2 vintage cohort generates no promote because the proceeds received ($22M) are insufficient to return the capital member's full preferred return on that cohort's capital ($15M of contributed capital plus $8.80M of accrued preferred return, or $23.80M in total). If the developer member had received interim promote distributions from the Year 1 or Year 3 cohorts, those distributions would not be clawed back, because the program's aggregate performance is above the preferred return threshold (total proceeds of $105M exceed the $96.04M needed to return all contributed capital plus the full accrued preferred return). If the aggregate performance had fallen below the threshold, the clawback provision would require the developer member to return a portion of those interim distributions.

Escrow Mechanics for Programmatic Promote

To protect against clawback liability materializing after promote proceeds have been spent, sophisticated programmatic JV agreements often require the developer member to maintain a portion of each promote distribution in escrow.

- Escrow percentage. Typically 25% to 35% of each promote distribution is placed in an escrow account maintained by a third-party escrow agent. The escrow percentage may be higher in the early years of the program (when clawback risk is greater because the portfolio's aggregate performance is less established) and lower in later years (as the portfolio matures and its aggregate performance becomes more predictable).

- Escrow release mechanics. Escrowed amounts are released to the developer member as the program matures and the clawback risk diminishes. Common release triggers include achievement of defined portfolio-level return thresholds, expiration of the clawback measurement period for specific vintage cohorts, and the developer member's delivery of a financial guarantee or letter of credit in lieu of continued escrow.

- Investment of escrow funds. Escrowed promote amounts should be invested in liquid, low-risk instruments (money market funds or short-term government securities), and the investment income should be earned by the developer member (not the capital member), since the escrow represents the developer member's money held as security rather than a return of capital to the capital member.

- Escrow as the exclusive clawback remedy. Some programmatic agreements provide that the escrowed amounts constitute the capital member's exclusive remedy for any clawback obligation, limiting the developer member's personal clawback liability to the amounts actually held in escrow. This structure converts the clawback from an unlimited personal liability into a defined, quantifiable obligation, a significant risk reduction for the developer member.

Practice Note: Model the Clawback Before Signing

The single most important pre-signing exercise for any developer member entering a programmatic JV is a detailed financial model that projects the clawback exposure under multiple portfolio performance scenarios. A developer member that accepts a fully aggregated, uncapped clawback with no tax gross-up and a ten-year lookback period has accepted an unlimited contingent liability that could dwarf the total promote earned from the program if later-vintage assets underperform. Running detailed stress scenarios, including a severe market downturn affecting 30% to 50% of the portfolio's assets, before signing reveals the maximum clawback exposure and gives the developer member's negotiating team the information needed to negotiate appropriate caps, tax adjustments, and escrow limitations.

Programmatic JV Compared with Fund Structure: Which Is Right?

The programmatic JV and the real estate private equity fund are the two dominant structures for deploying institutional capital through a developer member's investment platform. Choosing between them, or deciding how to combine them, is one of the most consequential strategic decisions a developer member and capital member can make together.

As a developer member's platform matures and its track record of successful institutional partnerships expands, it inevitably faces a strategic question: should it continue to pursue capital on a deal-by-deal or programmatic JV basis, or should it transition to a commingled fund structure that raises capital from multiple investors at once? And for capital members evaluating their options, the question is symmetric: is a dedicated programmatic JV with a single developer member the most efficient way to access a particular developer member's deal flow, or is a commingled fund investment more appropriate?

There is no universal answer to this question. The right structure depends on the specific circumstances of the developer member, the capital member, and the investment opportunity. Understanding the strengths, weaknesses, and appropriate use cases of each structure is essential to making an informed decision.

The Programmatic JV: Strengths and Limitations

- Customization advantage. The programmatic JV's governance framework, investment parameters, and economic terms are negotiated bilaterally between the developer member and a single capital member, allowing complete customization to the specific needs and risk preferences of both parties. No commingled fund can offer this level of structural customization.

- Governance control. The programmatic capital member retains direct governance oversight of individual investments, with approval rights, reporting rights, and removal rights that provide a level of investment control unavailable to limited partners in a commingled fund.

- Economics. The programmatic capital member typically receives better economics than fund LPs: lower fees, no fund-level management fee, and deal-level promote negotiated specifically for the partnership rather than set at a fund-level rate applicable to all investors.

- Concentration risk. The programmatic JV's single capital member bears concentrated exposure to a single developer member's deal flow, execution capability, and market judgment. A developer member that underperforms affects the entire programmatic capital member's investment in the program. Commingled fund investors, by contrast, benefit from diversification across the fund's portfolio and the fund manager's broader investment capabilities.

- Capital efficiency. The programmatic structure is less capital-efficient than a fund for the developer member, because it requires a separate bilateral negotiation and governance framework for each capital partner. A fund structure lets the developer member raise capital from many investors at once, deploying that capital through a single investment vehicle with a single governance framework.

The Real Estate Fund: Strengths and Limitations

- Capital diversification. A fund lets the developer member raise capital from multiple investors at once, reducing its dependence on any single capital source and providing greater capital stability across market cycles.

- Deployment flexibility. Fund structures typically give the fund manager (developer member) broader discretionary authority over investment decisions, with less individual investor oversight, enabling faster deployment of capital into time-sensitive opportunities.

- Scalability. A fund structure is more scalable than a series of programmatic JVs: the developer member negotiates one set of governing documents (the fund's limited partnership agreement) and manages one governance framework for all investors, rather than managing multiple bilateral relationships with different terms and different governance obligations.

- Reduced investor control. From the capital member's perspective, the fund structure provides significantly less governance oversight and investment-level control than a programmatic JV. Fund LPs typically have limited rights: they can approve major fund-level decisions (extension of the investment period, amendment of the limited partnership agreement, key man events) but have no approval rights over individual investments, no removal authority over the fund manager, and no ability to customize the fund's investment parameters.

- Higher fees. Fund structures typically involve a fund-level management fee (commonly 1.0% to 1.5% of committed capital per year during the investment period) in addition to asset-level fees, increasing the total fee burden on investors compared to a programmatic JV structure where fees are negotiated bilaterally.

- Regulatory complexity. Raising capital through a commingled fund typically requires compliance with the Investment Advisers Act, the Securities Act (with respect to offering exemptions), and potentially ERISA (if pension fund capital is included), adding a significant regulatory compliance overlay that is not present in a bilateral programmatic JV.

Decision Framework: Programmatic JV Compared with Fund

Decision Factor	Programmatic JV Better When	Fund Structure Better When
Investor base	Single institutional partner with a specific mandate and governance requirements	Multiple investors with diverse return expectations; developer seeks capital diversification
Deal flow volume	Deal flow is steady but not sufficient to support a fully diversified fund portfolio	Deal flow is robust enough to support a large, diversified fund portfolio
Investment parameters	Capital member has highly specific investment preferences requiring bilateral customization	Investment strategy is broadly consistent across a diverse investor base
Governance model	Capital member requires investment-level approval and governance oversight	Developer member requires broad discretionary authority for efficient deployment
Developer track record	Strong bilateral relationship with a specific capital member; first institutional capital	Established fund manager track record; institutional LP base already developed
Regulatory appetite	Both parties prefer a bilateral private arrangement; regulatory simplicity preferred	Developer member has regulatory infrastructure; investor base comfortable with fund compliance
Economic preference	Capital member willing to accept programmatic economics for governance control	Investors seeking fee-efficient commingled exposure; developer seeking a carried interest structure
Fee structure	Capital member negotiates a bilateral fee arrangement; lower total fee burden	Standard fund management fee and carried interest; higher total fee burden

The Hybrid Approach: Programmatic JV Plus Fund

Many of the most sophisticated developer members operate both programmatic JVs and commingled funds at the same time, using each structure for the purposes it serves best.

- Programmatic JVs for anchor capital. The developer member's most important institutional relationships, the capital partners with whom it has the deepest alignment and the most customized governance arrangements, are maintained as bilateral programmatic JVs. These relationships provide the developer member with committed capital for its flagship investment strategies and serve as the cornerstone of its institutional platform.

- Commingled funds for scalable capital raising. The developer member operates one or more commingled funds to access capital from a broader investor base, including investors who do not require bilateral governance control and are comfortable with the standard fund structure's governance framework. The fund structure lets the developer member scale its capital base beyond what bilateral programmatic relationships alone can support.

- Strategic allocation between structures. The developer member allocates investment opportunities between its programmatic JV partners and its fund, typically giving programmatic partners the right of first opportunity on qualifying investments (under the exclusivity provisions of the programmatic agreements) before directing opportunities to the fund.

- Legal complexity of the hybrid model. Operating both programmatic JVs and a commingled fund at the same time creates significant legal and governance complexity: conflicts of interest in opportunity allocation, overlapping governance obligations, potential ERISA complications when pension fund capital is included in either structure, and the challenge of managing multiple bilateral relationships while simultaneously operating a fund with its own governance framework. This complexity requires sophisticated legal counsel with experience in both programmatic JV and fund structuring.

Programmatic JV Compared with Fund: The Attorney's Perspective

From a legal structuring perspective, the programmatic JV and the commingled fund represent fundamentally different regulatory and documentation environments. The programmatic JV is a bilateral private arrangement governed by a negotiated master agreement and a series of asset-level supplements, a relatively straightforward legal structure, although one requiring sophisticated bilateral negotiation.

The commingled fund, by contrast, involves securities law compliance (offering exemptions, investor qualification requirements, Form D filings), Investment Advisers Act considerations for fund managers meeting the registration threshold, ERISA compliance obligations when pension fund capital is involved, and a complex fund-level governance structure involving a general partner, limited partners, an advisory committee, and potentially a placement agent. The regulatory infrastructure required to operate a compliant commingled fund is substantially more complex than anything required for a bilateral programmatic JV.

Developer members contemplating the transition from programmatic JV to fund structure, or the simultaneous operation of both, should engage legal counsel with deep experience in both areas. The attorney who structures your programmatic JV relationships may not have the fund formation and securities law experience required to structure your commingled fund compliantly. At [Firm Name], our practice encompasses both programmatic JV structuring and real estate fund formation, ensuring that our developer member clients have access to the full range of capital formation experience they need as their platforms evolve.

Chapter 8 Summary

Chapter 8 has examined the programmatic JV from formation through portfolio management, addressing the unique structural, legal, and economic challenges that distinguish it from single-asset joint ventures. The principal takeaways are these.

- The programmatic JV is a pre-committed, multi-asset partnership structured around a defined investment program, more than a series of single-asset JVs. Its defining features are pre-committed capital, a defined investment period, program parameters, a master governance framework, and portfolio-level economics.

- The investment period is the programmatic JV's primary temporal discipline, creating mutual obligations for both the developer member (to source and deploy qualifying investments) and the capital member (to approve and fund qualifying investments within the commitment). Deployment pace benchmarks, deemed approval mechanics, and commitment reduction provisions for missed deployment are essential governance tools.

- Exclusivity is the economic heart of the programmatic JV from the capital member's perspective. A thorough right of first opportunity, covering the full asset class, geography, and deal size range of the program, with short response periods and deemed-pass provisions, is essential to ensuring that the capital member receives the access to the developer member's best deal flow that it is paying for.

- Performance benchmarks, including deployment pace benchmarks and investment return benchmarks, provide the governance framework for managing the capital member's ongoing commitment. Step-down mechanisms, cure rights, and benchmark measurement methodologies that distinguish market-driven from management-driven underperformance are critical negotiating points.

- The vintage-year waterfall calculation addresses the complexity of calculating promote across a portfolio of assets with different vintages, risk profiles, and holding periods. The choice between asset-by-asset, portfolio-level, and vintage-year promote calculation structures is one of the most consequential economic decisions in programmatic JV design.

- The clawback in a programmatic JV is a real and significant financial liability. Pre-signing scenario modeling, caps, tax gross-ups, escrow mechanics, and the

limitation of escrow as the exclusive clawback remedy are the primary tools for managing this liability.

- The choice between a programmatic JV and a commingled fund structure, or a combination of both, is a strategic decision with major legal, governance, and economic implications. The right choice depends on the specific circumstances of the developer member, the capital member, the investment strategy, and the regulatory environment.

Looking Ahead to Chapter 9

Chapter 9 addresses the inevitable: what happens when joint ventures encounter conflict. Despite the best efforts of both parties and their counsel to structure a durable, precise, and fair operating agreement, JV disputes arise, and when they do, the stakes are high. Chapter 9 examines the most litigated JV provisions, the most common sources of JV disputes, and how the documentation principles examined throughout this handbook serve as the most effective form of dispute prevention. For both developer members and capital members, understanding the litigation landscape of JV disputes is an essential complement to understanding the transactional mechanics of JV formation.

CHAPTER 9

Common Disputes and How to Avoid Them

The best measure of a joint venture operating agreement is not how it reads when the parties sign it in good faith and optimism. It is how it performs when the relationship is under stress. Market conditions change, projects underperform, personalities clash, and parties whose interests were once aligned discover that they are not. This chapter examines the disputes that arise most frequently in real estate joint ventures, why they arise, and how precise drafting prevents them.

Chapters 1 through 8 have examined the formation, documentation, and lifecycle management of real estate joint ventures from a transactional perspective, the perspective of parties entering a JV relationship with the intention of making it work. This chapter takes a different vantage point. It adopts the perspective of the litigator who sees JV relationships after they have broken down and who knows from experience which provisions of operating agreements generate the most conflict, why they generate it, and what different drafting choices would have prevented it.

The insights in this chapter draw on the accumulated experience of real estate JV litigation: the disputes that have actually been litigated in courts and arbitration proceedings, the provisions that courts have found ambiguous, the governance failures that have destroyed value for both parties, and the drafting precision that has consistently made the difference between a dispute resolved quickly and economically and one that consumes years of management time and millions of dollars in legal fees.

This chapter is organized around six dispute categories: the most litigated JV provisions; waterfall disputes and promote calculation challenges; removal and post-removal compensation conflicts; buy-sell valuation disagreements; capital call dilution challenges; and the role of drafting precision as the primary instrument of dispute prevention. Each section examines both the substantive law governing the disputed provision and the specific drafting choices that generate or prevent the dispute.

A word of perspective before proceeding. The disputes examined in this chapter are not inevitable features of the JV relationship. They are the foreseeable consequences of specific drafting failures: gaps, ambiguities, and inconsistencies in operating agreements that give parties in a deteriorating relationship room to advance conflicting interpretations of their rights and obligations. The JV parties that engage experienced, specialized counsel and invest in comprehensive, precise drafting dramatically reduce their exposure to the disputes catalogued here. Those that do not are exposed to the full range of financial, temporal, and relational costs that JV litigation entails.

The Most Litigated JV Provisions

Not all operating agreement provisions are equally likely to generate disputes. Some provisions, despite their apparent simplicity, consistently produce the most costly and

protracted litigation in real estate joint ventures. Understanding which provisions are most litigation-prone, and why, is the foundation of effective dispute prevention.

The following provisions, ranked by the frequency and cost of the disputes they generate in real estate JV litigation, deserve the most careful attention in any operating agreement negotiation. The fact that a provision appears in a capital member's or developer member's standard form does not mean it is well drafted. Form documents are frequently optimized for the drafter's convenience, not for the precision that prevents disputes.

Tier 1: The Highest-Litigation Provisions

The Waterfall Definitions

The distribution waterfall is the single most litigated set of provisions in any real estate JV operating agreement. Disputes over the waterfall arise from imprecise definitions of key economic terms, particularly the terms that determine when the preferred return threshold has been satisfied and the promote is earned. The most litigated definitional issues include:

- The definition of 'Contributed Capital.' Whether this includes only cash contributions, or also includes deemed contributions, fee offsets, and guaranty-related adjustments, affects the preferred return calculation base and can shift the promote threshold by millions of dollars on a large project.
- The definition of 'Available Cash' or 'Distributable Cash.' Whether this term includes refinancing proceeds, insurance proceeds, and condemnation awards, in addition to operating cash flow and sale proceeds, determines whether interim distribution events trigger waterfall calculations that could produce promote payments the parties did not intend.
- The definition of 'Capital Member IRR.' How the IRR is calculated (what cash flows are included, whether it is computed on a pre-tax or after-tax basis, and how the timing of contributions and distributions affects the result) can produce IRR figures that differ by hundreds of basis points depending on the methodology applied.
- The definition of 'Net Sale Proceeds.' Which deductions are made before the waterfall calculation (broker commissions, closing costs, debt repayment, prepayment penalties, transaction costs) directly affects the amount available for the promote calculation.

Courts interpreting these provisions consistently apply standard rules of contract construction: the plain meaning of the text governs; extrinsic evidence of the parties' intent is generally inadmissible to contradict clear text; and ambiguities are construed against the drafter. This places an enormous premium on drafting precision. A provision that seems clear to both parties at signing may prove ambiguous in application when specific facts are substituted for the abstract terms of the operating agreement.

The Cause Definition in Removal Provisions

The definition of 'Cause' for removal of the developer member as manager is the second most frequently litigated provision in real estate JV operating agreements, and arguably the one with the most devastating consequences when the dispute arises. Litigation over the cause definition typically arises in one of two scenarios:

- The capital member asserts that cause exists based on a broad or vague cause definition, and the developer member challenges the removal as pretextual, arguing that the conduct relied upon by the capital member does not actually constitute cause under a proper reading of the operating agreement.

- The developer member has clearly underperformed (budget overruns, schedule delays, loss of key personnel) but the cause definition is sufficiently narrow that the operating agreement does not provide the capital member with a removal right, leaving the capital member trapped with an underperforming manager it cannot legally remove.

Either outcome is costly for both parties. In the first scenario, the developer member and capital member spend years in litigation over whether the removal was valid, while the project languishes without effective management. In the second scenario, the capital member's investment is impaired by a manager it cannot remove under the contract it signed. Both outcomes are avoidable through careful, comprehensive cause definition drafting.

Post-Removal Economic Rights

Closely related to the cause definition dispute is the dispute over what economic rights the developer member retains after removal. This is among the most financially consequential disputes in JV litigation, because the amounts at stake (the developer member's forfeited or preserved promote and accrued fees) can be enormous on a large development project. The specific provisions most frequently disputed include:

- Whether the developer member's promote is forfeited, partially preserved, or fully preserved upon removal, and whether the answer differs depending on whether removal was for cause or no cause.

- Whether accrued but unpaid developer fees (development fees, asset management fees earned through the removal date) are payable after removal, or whether they are forfeited as part of the removal remedy.

- The calculation methodology for any vested portion of the promote, including what constitutes a development milestone for vesting purposes and how vesting percentages are allocated across milestones.

- Whether the developer member has a right to participate in the eventual disposition proceeds after removal, or whether its economic interest in the JV is terminated by the removal itself.

Tier 2: High-Frequency Litigation Provisions

The Major Decisions List

Disputes over the major decisions list arise when the developer member takes an action that the capital member believes required its prior written consent, but that the developer member contends fell within its day-to-day management authority. These disputes arise most frequently when the operating agreement's major decisions list is incomplete (the disputed action was never explicitly included), when dollar thresholds are ambiguous (the disputed expenditure was close to a defined threshold), or when the operating agreement's language is broad enough to support conflicting interpretations about whether a particular action requires approval.

Courts consistently interpret operating agreements as commercial contracts, applying the plain meaning of the text. If the major decisions list does not include a particular category of decision, courts will not imply a consent requirement that was not expressly agreed. This principle creates a powerful incentive for comprehensive, specific major decisions lists, but it also creates a risk that a list drafted too broadly will capture routine management decisions the developer member cannot efficiently seek approval for in the time-sensitive environment of active construction or leasing.

Transfer Restriction and Buy-Sell Provisions

Transfer restriction disputes typically arise in one of three contexts: (1) the capital member attempts to exercise a ROFO or ROFR over a transfer that the developer member contends is a permitted transfer not subject to the restriction; (2) the buy-sell mechanism is triggered and the parties dispute the valuation methodology, the adequacy of financing time, or the treatment of the developer member's promote in the buy-sell price; or (3) the developer member transfers an interest to an affiliate that the capital member argues constitutes a change of control triggering consent requirements.

Buy-sell disputes are particularly complex because the mechanism's theoretical simplicity (set a price, and the other party buys or sells) masks a series of implementation complexities that courts are frequently called upon to resolve. What happens if the receiving party cannot arrange financing within the response period? Does the buy-sell price include or exclude the developer member's promote? What constitutes a valid buy-sell notice? Can the buy-sell be triggered unilaterally, or must a deadlock be formally declared?

Reporting Failures and Information Access Disputes

Disputes over reporting obligations arise when the developer member fails to deliver required financial reports, when the capital member alleges that delivered reports are incomplete or inaccurate, or when the capital member attempts to exercise its inspection or audit rights and the developer member resists on grounds of confidentiality, burden, or scope. These disputes are rarely the primary cause of JV litigation. They more commonly arise as counterclaims in disputes initiated by other

causes, but they can significantly affect the outcome of the broader dispute by establishing a pattern of developer member non-compliance with its governance obligations.

Dispute Category	Frequency	Typical Cost	Primary Root Cause
Waterfall / promote calculation	Very High	$500K–$10M+	Imprecise definitions of key economic terms
Removal / cause definition	High	$1M–$20M+	Vague cause definition; disputed factual basis for removal
Post-removal economic rights	High	$2M–$30M+	Ambiguous promote preservation / forfeiture provisions
Major decisions consent	High	$250K–$5M	Incomplete major decisions list; ambiguous thresholds
Buy-sell valuation	Medium-High	$500K–$10M	Buy-sell price methodology; promote adjustment gaps
Capital call dilution	Medium	$250K–$5M	Punitive dilution mechanics; disputed call validity
Transfer restriction / ROFO	Medium	$500K–$5M	Permitted transfer scope; ROFO deemed-pass mechanics
Reporting / information access	Medium-Low	$100K–$2M	Undefined reporting scope; confidentiality conflicts
Clawback calculation	Medium-Low	$1M–$15M+	Aggregate vs. asset-by-asset; tax gross-up disputes
Affiliate transaction approval	Low-Medium	$250K–$5M	Market rate definition; approval scope ambiguity

The Litigation Cost of Ambiguity

Every ambiguous provision in a JV operating agreement is a potential dispute, waiting for the relationship to deteriorate before it erupts. Real estate JV litigation is expensive: lead counsel fees for a major JV dispute routinely exceed $1 million on each side, with expert witness costs, e-discovery expenses, and management time adding substantially to the total. A dispute over a promote calculation that could have been prevented by a precisely drafted 'IRR' definition, a drafting exercise requiring a few hours of attorney time, can cost both parties millions of dollars

and years of management attention. Comprehensive, precise JV documentation is one of the most cost-effective risk management decisions either party can make.

Waterfall Disputes and Promote Calculations

The distribution waterfall is at once the most economically important and the most litigation-prone set of provisions in any real estate JV operating agreement. When the waterfall produces an outcome that one party believes is inconsistent with what was negotiated, the result is a dispute, and the costs of that dispute, in legal fees and management distraction alone, can exceed the amount in controversy.

Waterfall disputes arise in a predictable pattern. A capital event occurs (a sale, a refinancing, an operating distribution) that generates proceeds available for distribution. The parties, or their attorneys, calculate the waterfall and reach different results. One party believes the promote has been earned; the other disagrees. The difference between the two calculations may stem from a difference in the definition of a key term, a different interpretation of the waterfall's sequence, or a genuine disagreement about how a specific provision applies to the facts of the transaction. The financial consequence of the disagreement is real and immediate.

DISPUTE SCENARIO 1: THE AMBIGUOUS IRR DEFINITION

► Facts: A $50 million development JV achieves a sale that generates $85 million in gross proceeds. The operating agreement provides for a 20% promote above a capital member IRR of 12%. The developer member calculates the capital member IRR at 13.4%, entitling it to a $2.1 million promote. The capital member calculates the capital member IRR at 11.8%, arguing that developer fees paid during the project should be excluded from the denominator of the IRR calculation, reducing the effective return below the promote threshold.

► The Dispute: The developer member contends that all cash flows, including fee income earned by its affiliate from the JV, should be considered in calculating the capital member IRR, because those fees were approved above-the-line expenses of the JV that reduced the capital member's net returns. The capital member contends that fee income is compensation to the developer member, not a return to the capital member, and that the IRR calculation should measure only the capital member's direct cash return on its equity. Neither position is frivolous; both are supported by plausible readings of the operating agreement's imprecise IRR definition.

► Root Cause: The operating agreement defined IRR without specifying whether developer fees paid to the developer member's affiliate were included in or excluded from the cash flows used in the IRR calculation. This single definitional gap, resolvable in one sentence of precise drafting, generated three years of litigation and $4 million in legal fees.

✓ Prevention: Define 'Capital Member IRR' with complete precision: specify every cash flow included and excluded from the calculation (contributions, distributions, fees, taxes, transaction costs), specify the timing convention used (day-count, period-end), specify whether the calculation is pre-tax or after-tax, and include a worked numerical example in the operating agreement. The example should be signed off by both parties' financial advisors before execution.

Refinancing Proceeds: The Overlooked Trigger

One of the most common waterfall disputes arises not from the final disposition of the project but from an intermediate refinancing event: a permanent loan closing, a recapitalization, or a partial interest sale that generates proceeds the operating agreement did not expressly address. Developer members typically contend that refinancing proceeds flow through the waterfall like any other distributable cash; capital members often contend that the waterfall was intended only for final disposition proceeds, and that refinancing proceeds should be retained within the JV.

This dispute is almost entirely preventable. Operating agreements that expressly define 'Available Cash' to include or exclude refinancing proceeds, and that specifically address whether the waterfall applies to each category of capital event, leave no room for the argument. The failure to address refinancing proceeds expressly in the waterfall definition, a drafting gap that requires only a few sentences to correct, generates some of the most expensive JV litigation in the institutional real estate market.

DISPUTE SCENARIO 2: THE SILENT REFINANCING

► Facts: A 300-unit multifamily development JV completes construction and achieves stabilization. Upon permanent loan closing, the permanent loan amount exceeds the construction loan balance by $8 million, generating $8 million in net refinancing proceeds. The developer member distributes $6 million of the net proceeds through the waterfall (after reserving $2 million for operating reserves) which, after satisfying the capital member's preferred return, produces a $1.2 million promote distribution to the developer member.

► The Dispute: The capital member objects to the promote distribution, arguing that the operating agreement's waterfall was intended only for proceeds from the final sale of the project, and that refinancing proceeds should be reinvested in the JV or held as additional operating reserves rather than distributed through the waterfall. The developer member points to the waterfall's definition of 'Available Cash,' which includes 'all cash generated from the Company's operations or assets,' and argues that refinancing proceeds clearly fall within this definition.

► Root Cause: The operating agreement defined 'Available Cash' broadly but did not specifically address refinancing proceeds, permanent loan closings, or recapitalization events. A single sentence specifying whether refinancing proceeds are included in 'Available Cash' for waterfall purposes would have resolved this dispute before it arose.

✓ Prevention: Enumerate every category of capital event that triggers a waterfall calculation: property sales, partial sales, refinancings, permanent loan closings, recapitalizations, insurance proceeds above a threshold, and condemnation awards. For each category, specify whether proceeds are available for waterfall distribution or are required to be reinvested or reserved. Address separately whether interim distributions before the final disposition are subject to the clawback calculation.

The Promote Timing Problem

A less common but equally disruptive waterfall dispute arises from ambiguity about when a promote is earned for purposes of an interim distribution. In development JVs with long hold periods, the parties may make interim distributions of operating cash flow or refinancing proceeds before the final disposition. If the waterfall calculation for an

interim distribution produces a promote payment, but the project ultimately underperforms relative to the preferred return threshold at final disposition, the clawback provision should require the developer member to return the interim promote. If the clawback provision is imprecisely drafted, or if the interim distribution was made outside the waterfall framework entirely, recovering the overpaid promote may be difficult.

The prevention is straightforward: all distributions should flow through the waterfall, regardless of the nature or timing of the distributable event. And the clawback provision should expressly apply to all prior promote distributions, not merely those arising from the final disposition.

Drafting Precision: The Complete Waterfall Checklist

The following checklist identifies the waterfall provisions most frequently the subject of dispute and the specific drafting choices that prevent each dispute:

- Define all key economic terms with worked numerical examples. Every term in the waterfall that involves a mathematical calculation should be illustrated with a worked example that both parties confirm at signing reflects the intended economic outcome.
- Specify the sequencing of each waterfall tier with precision: the order in which each tier is satisfied, the timing of distributions within each tier (pro-rata among members within the tier or sequentially), and the treatment of partial satisfaction of any tier.
- Expressly address every category of capital event. For each type of distributable event (operations, sale, refinancing, insurance proceeds, condemnation), specify whether and how the waterfall applies.
- Define the clawback's scope, calculation methodology, cap, and tax gross-up, and expressly connect the clawback to prior interim promote distributions as well as to the final distribution waterfall.
- Include an accounting mechanism. Specify how and when the waterfall calculation is performed, who performs it, and what happens if the parties dispute the result, typically a mandatory expert determination mechanism with a defined timeline.

Removal and Post-Removal Compensation Fights

If the waterfall dispute is the most common JV litigation, the removal dispute is the most destructive. When a capital member attempts to remove a developer member as manager and the developer member resists, the result is a governance crisis that exposes both parties to substantial legal costs, impairs the project's operations, and damages the relationship in ways that often cannot be repaired even if the litigation is ultimately resolved.

Removal disputes are especially damaging because they occur at two levels simultaneously: the legal level (litigation about whether cause exists and what economic rights survive removal) and the operational level (the project continues to need day-to-day management while the legal dispute is pending, creating a governance vacuum that can cause irreparable harm to the underlying asset). Courts and arbitrators handling removal disputes frequently face the difficult task of preserving project operations while adjudicating the legal dispute, a challenge for which most operating agreements provide inadequate guidance.

DISPUTE SCENARIO 3: THE PRETEXTUAL REMOVAL

► Facts: A ground-up mixed-use development project encounters construction cost overruns of 14% above the approved budget, attributable primarily to supply chain disruptions and labor cost inflation affecting the entire metropolitan market. The capital member delivers a removal notice citing 'material budget overrun' as cause, using a cause definition that included any budget overrun exceeding 10% of total project cost without qualification. The developer member contests the removal, arguing that the overrun was caused by market-wide conditions beyond its control, not management failures.

► The Dispute: The developer member seeks emergency injunctive relief to prevent the removal from becoming effective pending arbitration, arguing that an immediate management transition would cause irreparable harm to the project's ongoing construction and lender relationship. The capital member argues that the operating agreement's removal provision is self-executing and that the developer member's only remedy is to arbitrate the economic consequences of removal, not to prevent the removal itself. The arbitration proceeds over 18 months at a cost of $6 million in combined legal fees, while the project's construction stalls for 9 months during the governance crisis.

► Root Cause: The cause definition did not distinguish between budget overruns caused by developer member management failures and those caused by force majeure or market-wide conditions. A single sentence ('For the avoidance of doubt, budget overruns attributable to force majeure events or market-wide cost inflation shall not constitute Cause') would have prevented this dispute.

✓ Prevention: Define 'Cause' with precision: enumerate specific, objective triggering events; include express force majeure and market-wide condition carve-outs for performance-based cause triggers; specify whether cure rights apply and how disputes about cause are resolved during the cure period; include an interim management protocol specifying who manages the project while a cause dispute is pending arbitration.

The Post-Removal Promote Battle

Even where a removal is legally valid, the economic consequences, specifically the treatment of the developer member's promote after removal, are among the most frequently and bitterly litigated issues in JV disputes. This litigation arises because most operating agreements address the removal event itself with some precision but leave the post-removal economic consequences vague or incomplete.

DISPUTE SCENARIO 4: THE VANISHING PROMOTE

► Facts: A capital member removes a developer member for cause (a confirmed material breach of the operating agreement) after the project has achieved certificate of occupancy but before stabilization is completed. The operating agreement provides that upon for-cause removal, 'Developer Member shall

forfeit any and all Promote to which it may otherwise be entitled.' The developer member, which has completed the most difficult phases of the development (entitlement, construction financing, vertical construction, and CO), argues that it has earned a substantial portion of the promote through the work already completed and that a complete promote forfeiture is unconscionable.

► The Dispute: The developer member files suit alleging that the promote forfeiture provision is an unenforceable penalty clause, that the capital member's removal was motivated primarily by a desire to capture the promote rather than by genuine cause, and that the developer member is entitled to a quantum meruit recovery for the value it created prior to removal. The capital member defends the forfeiture as expressly negotiated and argues that the developer member's breach justifies the full economic consequence bargained for. The litigation consumes four years and $8 million in legal fees before settling.

► Root Cause: The operating agreement's binary promote forfeiture provision, all or nothing, gave the capital member maximum economic incentive to find cause before the promote was realized, and gave the developer member maximum economic incentive to resist any governance inquiry that might lead to removal. A milestone-based vesting schedule would have provided a fair, pre-agreed framework for partial preservation of the promote commensurate with work completed, eliminating the zero-sum nature of the removal dispute.

✓ Prevention: Implement a milestone-based promote vesting schedule specifying the percentage of the promote that vests at each development milestone (construction loan closing, 50% construction completion, CO, stabilization, disposition). Upon for-cause removal, only the unvested portion of the promote is forfeited; the vested portion is preserved. This structure eliminates the binary character of the removal dispute and provides an objective, pre-agreed basis for calculating the developer member's post-removal economic entitlement.

Interim Management During Removal Disputes

One of the most practically damaging consequences of removal disputes is the absence of effective management while the legal proceeding is pending. The developer member, threatened with removal, may divert its attention to litigation defense; the capital member, seeking removal, may not yet have identified a replacement manager; and the project continues to require daily management decisions that neither party is focused on making effectively. Operating agreements that do not address this governance vacuum create a predictable opportunity for project-level harm during the removal dispute period.

Best practice provisions for managing interim governance during a removal dispute include:

- Status quo management obligation. Upon delivery of a removal notice (whether for cause or no cause), the developer member should be expressly obligated to continue managing the project in accordance with the approved business plan and budget, with no reduction in management attention or resources, pending the resolution of any dispute about the removal's validity.

- Emergency management committee. The operating agreement should provide for the automatic creation of an emergency management committee (one representative of each party) with authority to make time-sensitive decisions during the removal dispute period that cannot wait for the dispute's resolution.

- Preservation of the lender relationship. The operating agreement should expressly address the handling of construction loan obligations during a removal dispute, including who is authorized to sign draw requests, lender certifications, and compliance materials while the dispute is pending.

- Independent manager appointment. If the removal dispute extends beyond a defined period (typically 60 to 90 days), the operating agreement should provide for the appointment of an independent interim manager, a neutral third party acceptable to both sides, to manage the project while the dispute is pending, with costs shared equally between the parties.

Buy-Sell Disputes and Valuation Disagreements

The buy-sell mechanism is the most common exit and deadlock resolution tool in institutional real estate JV operating agreements, and the source of some of the most contentious litigation in the JV space. The mechanism's apparent simplicity conceals a series of implementation complexities that generate disputes whenever the buy-sell is triggered in a real-world governance crisis.

As discussed in Chapters 3 and 4, the theoretical elegance of the buy-sell (the trigger party sets a price at which the receiving party must buy or sell) depends on the assumption that both parties are financially equal and that the price set by the trigger party will be a genuine reflection of its estimate of fair market value. In practice, neither assumption holds: financial asymmetry between the parties distorts the pricing incentive, and the stress of a deteriorating JV relationship creates incentives to set prices strategically rather than based on genuine valuation analysis.

DISPUTE SCENARIO 5: THE STRATEGIC BUY-SELL TRIGGER

► Facts: Eighteen months after a luxury multifamily project's stabilization, the capital member triggers the buy-sell mechanism at a price that implies a capitalization rate 125 basis points above comparable market transactions, an artificially low price that the developer member cannot afford to pay but that the capital member can readily afford to pay to acquire the property. The developer member objects that the price is not a good-faith estimate of fair market value, arguing that the capital member has deliberately set a below-market price knowing that the developer member lacks the financial capacity to purchase at that price.

► The Dispute: The developer member seeks to enjoin the buy-sell transaction on grounds of bad faith, arguing that the operating agreement's implied covenant of good faith and fair dealing requires the trigger party to set a price in good faith based on a genuine estimate of fair market value. The capital member argues that the buy-sell provision is unconditional, that the trigger party may set any price it chooses, and that the developer member's inability to fund the purchase price is irrelevant to the mechanism's validity. The dispute highlights a fundamental tension in buy-sell design: a provision intended to produce fair outcomes through symmetric pricing incentives can be weaponized when the parties are financially asymmetric.

► Root Cause: The operating agreement's buy-sell provision contained no minimum valuation standard, no good-faith pricing requirement, and no alternative mechanism for the developer member to exit the buy-sell at a price it considered unfair. The absence of any pricing discipline

allowed the capital member to use the buy-sell as an exit mechanism at a price it chose, knowing the developer member could not match it.

✓ Prevention: Include a minimum valuation floor in the buy-sell provision, for example a price not less than the appraised fair market value of the property as determined by an independent appraiser. Alternatively, require the buy-sell price to be set by reference to a market-standard valuation methodology (a capitalization rate applied to trailing stabilized NOI). Give the receiving party the right to demand a third-party marketing process in lieu of the buy-sell if it believes the trigger price is below fair market value.

The Promote Valuation Gap in Buy-Sell Transactions

Even where the buy-sell price is genuinely fair for the underlying real estate asset, buy-sell transactions frequently generate disputes over the treatment of the developer member's promote in the buy-sell economics. The core issue: if the buy-sell is consummated at a price that, when run through the waterfall, would produce a promote payment for the developer member, is that promote included in the buy-sell price? And if so, how is it calculated?

Operating agreements that are silent on promote treatment in buy-sell transactions create a significant economic uncertainty: the developer member contends that the buy-sell price should incorporate the full value of its promote entitlement; the capital member contends that the buy-sell price represents the value of the JV interests as a whole, and that the distribution of that value between the parties (including any promote) should be determined by the waterfall calculation applied to the buy-sell price. In practice, these two approaches can produce significantly different economic outcomes for the developer member, and the difference is entirely attributable to the operating agreement's silence on this specific issue.

- Promote-inclusive pricing. The buy-sell price explicitly includes the value of the developer member's promote, so the developer member receives the same net economic outcome it would receive from a third-party sale at the buy-sell price. This approach requires the trigger party to factor the promote calculation into the buy-sell price, which increases the complexity of the pricing exercise but eliminates the promote valuation ambiguity.

- Waterfall-applied pricing. The buy-sell price represents the total value of all JV interests, and the proceeds are distributed between the parties through the waterfall, just as actual sale proceeds would be. The developer member receives its promote only if the buy-sell price, when run through the waterfall, clears the preferred return threshold. This approach is more capital-member-favorable in scenarios where the buy-sell price is set at a level that barely satisfies the preferred return but leaves little residual for the promote.

- Best practice. Specify in the operating agreement which approach applies, provide a worked example illustrating the calculation, and confirm both parties' understanding at signing that the chosen approach is the intended one.

Financing Contingency Failures

A third category of buy-sell dispute arises when the receiving party (typically the developer member) elects to purchase the trigger party's interest in the buy-sell but cannot arrange adequate financing within the response period. The operating agreement must address this scenario: does the receiving party forfeit its purchase right? Does the buy-sell period extend to allow additional financing time? And what happens to the trigger party's pricing position if the transaction is delayed?

DISPUTE SCENARIO 6: THE UNFUNDED BUY-SELL ELECTION

► Facts: Following a deadlock over the timing of the project's disposition, the capital member triggers a buy-sell at a price the developer member considers fair, and the developer member elects to purchase the capital member's interest within the 45-day response period. The developer member then spends 60 days attempting to arrange acquisition financing, ultimately fails to close, and the capital member declares the developer member's purchase election forfeited. The capital member then demands that the developer member sell its interest at the same buy-sell price, treating the developer member's failed purchase election as a deemed sell election.

► The Dispute: The developer member contests the capital member's right to treat the failed purchase election as a deemed sell election, arguing that the operating agreement provides for forfeiture of the purchase right upon failure to close, not automatic conversion to a sell obligation. The capital member argues that the entire buy-sell mechanism would be illusory if a receiving party could make a purchase election, fail to close, and simply restart the buy-sell process without consequence.

► Root Cause: The operating agreement specified the receiving party's response period (45 days to elect buy or sell) and a closing period (30 days after election) but did not specify the consequence of a failure to close after a purchase election. That gap, a failure to specify the closing-failure remedy, created an ambiguity that the deteriorating JV relationship exploited.

✓ Prevention: Specify in the buy-sell provision: (1) the closing deadline after a purchase election; (2) a financing contingency period (if any) within the closing period; (3) the specific consequence of a failure to close (automatic conversion to a sell obligation, forfeiture of deposit, extension right, or buyer's right to terminate); and (4) whether the trigger party may reset the buy-sell price if the transaction is delayed beyond the original closing deadline.

Capital Call Dilution Challenges

Capital call disputes, whether a challenge to the validity of a capital call itself or to the dilution consequences applied when a member fails to fund, are among the most operationally disruptive JV disputes, because they arise precisely when the JV needs additional capital most urgently. A disputed capital call that prevents timely equity funding can cause a construction loan default, a lender breach, or an operational crisis that harms both parties far more than the underlying funding dispute.

Capital call disputes typically arise in one of three contexts: (1) the developer member disputes the validity or proper basis of a capital call made by the capital member or the manager; (2) the developer member fails to fund a co-investment capital call, and the capital member seeks to apply punitive dilution; or (3) the capital member disputes whether a particular expenditure was within the approved budget and therefore eligible

for a mandatory capital call. Each scenario creates a different legal issue but the same operational crisis: the project needs money now, and the parties are arguing about whether the call is valid rather than funding it.

DISPUTE SCENARIO 7: THE DISPUTED CAPITAL CALL

► Facts: In the 18th month of a 24-month construction project capitalized with $27 million of total equity, the manager delivers a capital call for $3 million to fund construction cost overruns related to a series of approved change orders. The developer member, whose 10% co-investment represents a $2.7 million commitment, is required to fund $300,000 of the call. The developer member disputes the call on the ground that the underlying expenditures were not within the approved budget, arguing that the change orders driving the overruns were never properly approved by the capital member under the operating agreement's major decisions provisions, and refuses to fund, triggering the operating agreement's dilution remedy.

► The Dispute: Applying the 1.5x punitive dilution formula, the capital member reduces the developer member's interest from 10% to 7.5% (the $2.7 million prior balance is reduced by 1.5 times the $300,000 shortfall, to $2.25 million, over $30 million of post-call total equity). The developer member files suit challenging the validity of the capital call and the punitive dilution, seeking injunctive relief to restore its original 10% interest pending resolution of the dispute. The litigation creates a six-month delay in construction while the parties litigate the validity of the change orders and the resulting capital call.

► Root Cause: The operating agreement's change order approval thresholds were ambiguous. It was not clear whether the relevant change orders, each individually below the approval threshold, were collectively subject to an aggregate approval requirement. That ambiguity made it impossible to determine whether the capital call was validly based on approved expenditures or on expenditures that should have required capital member approval.

✓ Prevention: Specify both per-item and aggregate change order approval thresholds. Include a running cumulative change order tracking obligation: the manager should be required to report the cumulative change order total in every monthly construction report, and approval should be required when the cumulative total exceeds the aggregate threshold regardless of the amount of any individual change order. Include a capital call dispute resolution mechanism that allows disputed calls to be funded in escrow pending resolution, preventing construction delays while the underlying dispute is adjudicated.

The Validity Challenge as Governance Tactic

One of the most pernicious features of capital call disputes is that the validity challenge can be used as a governance tactic by a financially stressed developer member: by disputing a capital call's validity, the developer member can delay its funding obligation (and the resulting dilution consequence) long enough to obtain alternative financing, negotiate a modification of the JV structure, or create leverage in a broader governance dispute. Operating agreements that do not include a mechanism for resolving capital call disputes quickly, through interim funding in escrow or accelerated dispute resolution, are vulnerable to this form of governance manipulation.

The following provisions address capital call dispute risk:

- Mandatory escrow funding. Any member that disputes a capital call must pay the disputed amount into escrow pending resolution of the dispute. This eliminates

the funding delay that makes the validity challenge strategically attractive: the project receives its capital immediately, and the dispute about whether the call was properly issued is resolved later, without operational consequences.

- Accelerated dispute resolution. Capital call disputes should be subject to an expedited arbitration or expert determination process with a defined timeline (typically 30 to 60 days from the date of the dispute notice), so the validity of the call is determined quickly rather than through years of ordinary litigation.
- Presumption of validity. Absent manifest error, capital calls made in accordance with the operating agreement's procedural requirements should be presumed valid, with the burden on the disputing member to demonstrate invalidity through the expedited process.
- No stay of dilution pending dispute. The dilution consequence of a failure to fund, at least at the mathematical level if not the punitive level, should take effect automatically upon expiration of the cure period, without being stayed by a pending validity challenge. The punitive component of the dilution may be stayed pending resolution; the mathematical component should not be.

Drafting Precision as Litigation Prevention

The thread running through every dispute examined in this chapter is the same: ambiguity. Not the ambiguity of complex legal concepts (the fundamental economics and governance of real estate joint ventures are well understood by sophisticated practitioners) but the mundane ambiguity of imprecisely drafted provisions that leave critical questions unanswered when the parties' relationship is under stress and the answers matter most.

Litigation prevention in real estate joint ventures is not primarily a function of choosing the right provisions. It is a function of drafting the chosen provisions with enough precision that both parties hold an identical understanding of their rights and obligations before they sign the operating agreement. A provision that the parties understand differently at signing is a time-delayed dispute. It will not generate litigation until the relationship deteriorates and the parties are motivated to advance conflicting interpretations, but the dispute was created the moment the ambiguous provision was executed.

The Economics of Precision

The financial case for drafting precision is straightforward. The average cost of real estate JV litigation in a major dispute exceeds $5 million in combined legal fees, expert costs, and management time, and that figure excludes the opportunity cost of management attention diverted from the project to the litigation, the project-level harm caused by governance dysfunction during the dispute, and the reputational consequences for both parties of a public dispute that reveals the dysfunction of their joint venture.

Against that cost, the investment required to prevent the most common disputes through precise drafting is modest. Experienced JV counsel can eliminate nearly all of the disputes catalogued in this chapter through drafting choices that add days, not weeks or months, to the documentation process. Preventing a single major dispute typically pays for decades of JV legal work. The parties that invest in drafting precision are the parties that do not appear in these case studies.

The Master Checklist: Drafting Precision by Dispute Category

The following checklist translates the disputes examined in this chapter into specific, actionable drafting requirements. It is organized by dispute category and is intended as a minimum standard for any operating agreement negotiation:

Dispute Category	Specific Drafting Requirement	The Ambiguity Being Resolved
Waterfall / IRR	Define IRR with complete mathematical precision; specify included/excluded cash flows; attach a worked numerical example confirmed by both parties' financial advisors.	Whether fees, taxes, transaction costs, and timing conventions are included in the IRR calculation.
Waterfall / Available Cash	Enumerate every category of capital event (sale, refinancing, insurance, condemnation) and specify whether each triggers a waterfall calculation and whether proceeds are distributable or must be reinvested.	Whether refinancing proceeds, insurance proceeds, and partial sales flow through the waterfall or are retained within the JV.
Waterfall / Promote	Specify whether the promote is calculated on an asset-by-asset, vintage-year, or portfolio-level basis. Define the clawback scope, cap, tax gross-up, and escrow mechanics. Attach a worked portfolio example.	The basis for promote calculation and the scope and mechanics of the clawback obligation.
Removal / Cause	Define Cause through objective, enumerated triggers. Include express force majeure and market-condition carve-outs for performance-based triggers. Specify cure periods by trigger type. Provide a status quo management obligation during dispute pendency.	Whether specific developer member conduct or market events constitute Cause; who manages the project during a removal dispute.
Post-Removal Economics	Implement a milestone-based vesting schedule specifying the promote percentage vesting at each defined milestone. Specify fee treatment (accrued fees payable; future fees	How much of the developer member's promote and fee entitlement survives removal, and how the vested amount is calculated.

Dispute Category	Specific Drafting Requirement	The Ambiguity Being Resolved
	cease) for both cause and no-cause removal.	
Buy-Sell / Valuation	Include a minimum valuation floor referenced to a market standard (appraisal, cap rate methodology). Specify promote treatment in buy-sell pricing (promote-inclusive or waterfall-applied). Define closing failure consequences.	Whether the trigger party may set any price (no constraint) or must set a price above a minimum floor; whether the promote is included in the buy-sell price.
Capital Call / Validity	Include a mandatory escrow-funding provision for disputed calls; specify an expedited dispute resolution timeline (30-60 days); include a presumption of validity; specify whether mathematical dilution is stayed pending dispute resolution.	Whether a disputed capital call must be funded during the dispute; how quickly the validity dispute is resolved; when dilution takes effect.
Major Decisions	List every specific action or category of decision requiring capital member consent. Set objective dollar thresholds. Include both per-item and aggregate variance tolerances. Specify a deemed-approval period and consequences of non-response.	Whether a specific developer member action required capital member approval; the effect of the capital member's failure to respond to a consent request.
Affiliate Transactions	Define 'affiliate' broadly to capture all entities controlled by or under common control with the developer member. Require approval of all affiliate contracts. Specify arm's-length standard and competitive bid requirement. Give capital member right to terminate affiliate contracts upon removal.	Whether a specific contract requires capital member approval as an affiliate transaction; the standard applicable to an approved affiliate contract.
Transfer / Buy-Sell Combo	Define 'permitted transfer' exhaustively. Specify that permitted transfers require assumption of all obligations. Provide ROFO and ROFR mechanics with specific response periods, deemed-pass provisions, and price-matching terms.	Whether a specific transfer is permitted without consent; the mechanics of the ROFO/ROFR exercise and the consequences of non-exercise.

The Worked Example Standard

One of the most powerful and most underused drafting tools for dispute prevention in real estate JV operating agreements is the worked numerical example. A worked example embedded in the operating agreement, typically as an exhibit or appendix, that illustrates the waterfall calculation, the IRR measurement, the promote vesting schedule, or the dilution mechanics under a hypothetical set of facts eliminates the most common form of waterfall and promote dispute before it arises: the dispute about what the provision means when specific numbers are substituted for abstract terms.

Worked examples serve several functions. They force both parties and their counsel to model the economic outcome of each provision before signing, identifying discrepancies between the parties' understandings while there is still an opportunity to negotiate. They provide an authoritative reference point for the calculation of the waterfall, promote, or dilution mechanics when the parties later dispute a provision's interpretation. And they demonstrate, in a way no amount of abstract legal text can, that both parties share the same economic understanding of the deal they are signing.

The investment in creating comprehensive worked examples is modest: a day of financial modeling for the parties' advisors and an afternoon of attorney time to incorporate the examples into the operating agreement. Measured against the cost of the disputes they prevent, worked examples are the single highest-return drafting investment available to parties negotiating a real estate JV operating agreement.

The Role of Experienced JV Counsel in Dispute Prevention

The disputes examined in this chapter share a common feature: each was created by a drafting choice, or a drafting failure, that experienced JV counsel would have identified and corrected. The imprecise IRR definition, the binary promote forfeiture, the silent refinancing treatment, the ambiguous change order threshold: none is an unavoidable feature of the JV operating agreement. They are the predictable consequences of documentation processes in which experienced specialist counsel was not involved, was involved too late, or was overruled by parties who did not understand the consequences of their document choices.

The legal landscape of real estate JV documentation rewards specialization. The attorney who negotiates programmatic JV agreements regularly has seen the disputes that arise from imprecise definitions, incomplete major decisions lists, and binary remove-and-forfeit provisions. That experience, built through years of transactional practice and exposure to the litigation that follows documentation failures, is the most valuable asset any JV party can bring to the documentation process.

Dispute Prevention: The Final Word

Every dispute examined in this chapter was preventable. Not merely in theory, but through specific, readily identifiable drafting choices that would have cost a fraction of the legal fees ultimately incurred in the litigation.

The developer member who ensures its promote is precisely defined, its cause definition has objective force majeure carve-outs, its milestone-based vesting schedule is documented, and its

post-removal economic rights are expressly preserved does not face the disputes described in Scenarios 1, 3, and 4. The capital member who insists on a comprehensive major decisions list, a minimum buy-sell valuation floor, an expedited capital call dispute resolution mechanism, and a complete clawback framework does not face the disputes described in Scenarios 5, 6, and 7.

The most cost-effective decision either party can make in a real estate joint venture is to engage experienced specialist JV counsel early, before the term sheet rather than after, and to invest in the drafting precision that converts a standard-form operating agreement into a comprehensive, dispute-resistant governance document.

The attorneys at [Firm Name] have built a practice around exactly this objective: structuring real estate joint ventures that are economically fair, operationally functional, and precise enough to withstand the stress that every multi-year real estate partnership eventually encounters. We have seen these disputes, in some cases we have litigated them, and we know which drafting choices prevent them. If you are entering a real estate joint venture, as a developer member or as a capital member, we invite you to bring us to the table before the problems this chapter describes have a chance to develop.

Chapter 9 Summary

Chapter 9 has catalogued the most common and costly disputes in real estate joint ventures, identified their root causes, and demonstrated how specific drafting choices prevent each category of dispute. The principal takeaways:

- The ten most litigated JV provisions (waterfall definitions, cause definition, post-removal economics, major decisions, buy-sell mechanics, capital call dilution, transfer restrictions, reporting obligations, clawback calculations, and affiliate transactions) share a common root cause: ambiguity that creates room for conflicting interpretations when the relationship is under stress.

- Waterfall disputes arise from imprecise definitions of IRR, Contributed Capital, Available Cash, and Net Sale Proceeds, and from the failure to address every category of capital event (including refinancing proceeds) expressly in the waterfall. Worked numerical examples are the most effective prevention tool.

- Removal disputes are the most destructive JV disputes, operationally, financially, and relationally. Objective, specifically defined cause triggers with force majeure carve-outs, meaningful cure periods, interim management protocols, and milestone-based promote vesting schedules are the primary prevention tools.

- Buy-sell disputes arise from financial asymmetry, pricing discipline failures, promote valuation gaps, and financing contingency failures. Minimum valuation floors, promote-inclusive pricing specifications, and clear closing failure consequences are the primary prevention tools.

- Capital call disputes are operationally disruptive precisely because they arise when the JV most needs capital. Mandatory escrow funding for disputed calls,

accelerated dispute resolution, and the presumption of validity for procedurally compliant calls are the primary prevention tools.

- Drafting precision is not merely a legal best practice. It is a financial investment with a calculable return. The cost of preventing a dispute through precise drafting is invariably a fraction of the cost of resolving the dispute through litigation.
- Experienced specialist JV counsel, retained early, involved in term sheet negotiation, and empowered to insist on the drafting precision that prevents disputes, is the single most effective dispute prevention tool available to any JV party.

Looking Ahead to Chapter 10

Chapter 10 provides the handbook's conclusion: a comprehensive examination of why legal counsel is essential in JV formation, what experienced JV counsel provides that general practice attorneys cannot, when to engage counsel in the JV process, and how [Firm Name] approaches real estate joint venture representation. Chapter 10 also includes the attorney biography, practice description, and contact information that complete the handbook's function as both an educational resource and a marketing tool for the practice.

CHAPTER 10

Why Legal Counsel Is Essential in JV Formation

This handbook has examined the economic architecture, governance framework, negotiating strategies, documentation mechanics, and dispute consequences of real estate joint ventures. Every chapter has returned to the same conclusion: the quality of the legal work at the formation stage is the single most important determinant of whether a joint venture achieves its potential or becomes the subject of the disputes that destroy value for both parties. This final chapter makes that conclusion explicit, examines what specialized JV counsel actually provides, and introduces the attorney and practice that produced this handbook.

Nine chapters have demonstrated, through economic analysis, governance frameworks, negotiating strategy, term sheet annotation, development lifecycle guidance, programmatic JV mechanics, and dispute scenario analysis, that real estate joint ventures are among the most legally complex commercial arrangements real estate professionals enter. The gap between a well-structured JV and a poorly structured one can be measured not only in economic outcomes but in years of litigation, impaired projects, damaged relationships, and the substantial legal fees that Chapter 9 documented.

This chapter steps back from the technical details and addresses the most fundamental question: why does all of this require specialized legal counsel? Why can a sophisticated developer member or capital member not navigate these issues with general real estate counsel, in-house legal teams, or the form documents that have circulated in the market for decades? The answer is not merely an argument for the attorney who wrote this handbook. It is grounded in the specific nature of what JV counsel does, what that work requires, and what the consequences of inadequate counsel are for the parties who bear them.

The Cost of Getting the JV Wrong

The most persuasive argument for specialized JV counsel is not theoretical. It is historical. The disputes described in Chapter 9 are not hypothetical scenarios created for illustration. They are the predictable, recurring consequences of documentation failures that appear with regularity in real estate joint venture litigation across the country. The attorneys who represent parties in these disputes know, with a clarity available only in hindsight, exactly which drafting choices created the problem and exactly how different choices would have prevented it.

The cost of getting the JV wrong operates at multiple levels simultaneously, each compounding the others:

The Direct Litigation Cost

As Chapter 9 documented, major real estate JV disputes cost the parties an average of $5 million or more in combined legal fees, expert witness costs, arbitration fees, and management time, and that estimate is conservative for disputes involving large development projects, significant promote amounts, or complex programmatic structures. The most significant disputes, removal fights in which the developer member contests a capital member's removal effort while simultaneously attempting to preserve a multi-million-dollar promote, can generate $20 million or more in combined dispute costs before a resolution is reached.

These are not abstract numbers. They represent attorney fees billed by the hour across years of litigation; expert witness fees for real estate valuation specialists, financial modeling experts, and construction cost consultants; arbitration administration fees and arbitrator compensation for multi-day or multi-week proceedings; management time diverted from the project and from the parties' other business to support the litigation; and the opportunity cost of management attention consumed by dispute instead of value creation.

The Project-Level Cost

Beyond the direct litigation cost, JV disputes impose a substantial project-level cost that is often excluded from estimates of dispute expense but is frequently the largest single component of the total harm. The disputes catalogued in Chapter 9 did not occur in a vacuum. They occurred in the context of real projects with real construction schedules, real financing covenants, and real tenants whose leasing decisions were affected by the governance crisis.

A construction project that loses management focus for six to twelve months during a removal dispute does not merely incur legal costs. It experiences construction delays that generate interest carry costs, lender covenant violations that trigger additional financing expenses, contractor relationships that deteriorate when management attention is absent, and leasing delays that push stabilization into a different market environment than the business plan anticipated. On a $75 million development project, these project-level costs of a governance crisis can easily exceed $5 million, entirely independent of the litigation cost itself.

The Relationship Cost

Real estate joint ventures are relationship businesses. The capital member that has been through a costly, protracted dispute with a developer member will not re-engage that developer member as a programmatic partner, and it may share its experience with other institutional investors, affecting the developer member's access to institutional capital across its entire platform. The developer member that has been removed and stripped of its promote by a capital member acting in bad faith, or at least in alleged bad faith, sustains reputational damage that extends well beyond the single transaction.

These relationship costs, the destruction of institutional partnerships, the reputational damage from public disputes, and the deterioration of the market relationships that are

the foundation of real estate development, are the hardest to quantify and the longest-lasting of all the costs of a poorly structured JV. They represent the compounded cost of every future deal that does not get done, every institutional relationship that does not form, and every opportunity lost because the party's reputation for JV governance has been tainted by a high-profile dispute.

Anonymized Case Studies: The Real Cost in Practice

The following case studies illustrate the real cost of inadequate JV documentation in actual transaction contexts. All identifying information has been changed; the economic and legal outcomes described are representative of actual disputes:

Case Study A: The $12 Million Promote Dispute

A regional developer member entered its first institutional JV with a major pension fund capital member for a 400-unit multifamily development project. The developer member used its existing counsel, a general real estate attorney with no JV specialization, to review the capital member's form operating agreement, which had been drafted by one of the nation's leading institutional JV law firms. Upon project completion and sale five years later, the capital member calculated a $0 promote based on an IRR definition that excluded developer fees from the calculation (reducing the effective IRR below the promote threshold), while the developer member calculated a $12 million promote using an IRR definition that included all cash flows. The dispute proceeded to arbitration over three years at a combined cost of $9 million in legal fees before settling for $6 million, half of what the developer member had calculated. The developer member's general counsel, who had reviewed the capital member's form agreement, had never encountered the specific IRR definition issue that generated the dispute and had not flagged it as a negotiating point.

Case Study B: The Removal Without a Cure Period

A development JV operating agreement drafted by the capital member's counsel included a cause definition broad enough to reach 'any material deviation from the approved construction schedule.' When the project's general contractor experienced labor shortages that pushed the construction schedule three months beyond the approved timeline, the capital member delivered a removal notice citing cause. The developer member had accepted the broad cause definition without negotiation and had no cure right under the provision. The developer member, which had completed 80% of the construction with no cost overruns, lost its management role and its entire promote in a single removal notice. Litigation over the removal and the promote forfeiture generated $7 million in legal fees. Post-dispute analysis revealed that the specific cause trigger the capital member relied upon ('material deviation from the approved construction schedule') was a provision the developer member's attorney had noted as unusual but had not escalated for negotiation, believing it was standard form language.

Case Study C: The Undefined Refinancing Proceeds

A ground-up industrial development JV completed construction and refinanced into a permanent loan that generated $4.5 million in net refinancing proceeds above the construction loan payoff. The developer member, as manager, distributed the proceeds through the waterfall, which, when applied to the refinancing event, generated a $900,000 promote distribution for the developer member. The capital member objected that the waterfall was intended only for final sale proceeds and demanded return of the $900,000. Litigation over the correct interpretation of 'Available Cash,' the only provision at issue, consumed two years and $3.5 million in combined legal fees. The operating agreement had been drafted using a generic form that did not address refinancing proceeds, and this single omission generated a dispute that cost both parties more than three times the amount in controversy.

Case Study	Dispute Category	Direct Legal Cost	Project-Level Cost	Total Estimated Harm
Case Study A	Waterfall / IRR Definition	$9M legal fees	$2M management distraction	$11M+ total
Case Study B	Removal / Promote Forfeiture	$7M legal fees	$8M project delay costs	$15M+ total
Case Study C	Refinancing Proceeds	$3.5M legal fees	$1M governance friction	$4.5M+ total
Average (industry estimate)	All JV Dispute Categories	$5M+ legal fees	$3M+ project costs	$8M+ per dispute

In every one of these case studies, the dispute was preventable. Not merely in hindsight, but at the time the operating agreement was drafted: a JV attorney with experience in these specific dispute categories would have identified each issue as a known risk and resolved it through precise drafting before the operating agreement was signed. The total harm in these three case studies, roughly $30 million across three transactions, was generated by documentation gaps that experienced JV counsel would have identified and closed for a fraction of that amount in legal fees.

The Compounding Cost of Inadequate Counsel

Every year of JV practice generates new case studies that confirm the same principle: the cost of a JV dispute is almost never justified by the savings from inadequate documentation. A developer member that saves $50,000 in legal fees by using general real estate counsel rather than specialized JV counsel, and then faces a $9 million arbitration over an IRR definition, has made one of the most expensive decisions of its development career. The return on investment

from specialized JV counsel, measured against the disputes it prevents, is among the highest returns available in the real estate legal market.

When to Bring in Counsel

The most common and most costly mistake in JV legal representation is timing: engaging counsel after the term sheet is signed, after the economic terms are agreed, after the form operating agreement has been circulated, or, in the most damaging case, after a dispute has already developed. Experienced JV counsel provide their highest value at the earliest stages of the process, when the full range of economic and governance provisions are still open for negotiation.

The timing of legal engagement in a JV transaction has a direct and measurable impact on the quality of representation the client receives. An attorney engaged before the term sheet can shape the deal's foundational economic and governance terms before they are treated as settled. An attorney engaged after the term sheet is signed faces a much more constrained environment: the headline economics are already agreed, and any attempt to reopen them will be met with resistance from the other party, which will characterize the reopening as bad faith. An attorney engaged after the operating agreement has been circulated faces the most constrained environment of all, because the other party's form document is the baseline, and every provision that is not successfully challenged is incorporated into the final agreement by default.

Before the Term Sheet: The Optimal Engagement Point

The optimal point for engaging JV counsel is before the term sheet is negotiated or drafted, ideally before the developer member and capital member have had substantive discussions about the deal's economic terms. At this stage, an experienced JV attorney can:

- Advise on market-standard economic terms for the specific transaction type, asset class, and risk profile, ensuring that the client enters negotiations with realistic expectations and a clear understanding of the range of acceptable outcomes.
- Identify the specific provisions most likely to generate disputes, based on the nature of the project, the parties, and the risk profile, and ensure those provisions receive disproportionate attention in the term sheet negotiation.
- Draft a comprehensive term sheet that captures the full range of economic and governance terms that should be resolved at the term sheet stage, reducing the scope and cost of the subsequent operating agreement negotiation.
- Advise on the optimal JV structure (single-asset vs. programmatic, LLC vs. limited partnership, Delaware vs. project-state organization) before the parties have committed to a structure that may not be optimal for their specific circumstances.

- Conduct preliminary due diligence on the counterparty, reviewing the other party's standard form documents, assessing its institutional governance requirements, and identifying any structural requirements (ERISA compliance, FIRPTA withholding, UBTI mitigation) that must be addressed in the JV structure.

After the Term Sheet but Before Operating Agreement Drafting

If counsel was not engaged before the term sheet stage, the next optimal engagement point is after the term sheet is signed but before the operating agreement drafting begins. At this stage, the attorney can:

- Review the term sheet for provisions that create documentation risk: imprecise economic definitions, ambiguous governance frameworks, or provisions inconsistent with the client's understanding of what was agreed.

- Identify provisions that were omitted from the term sheet but must be addressed in the operating agreement: tax provisions, indemnification standards, affiliate transaction requirements, and the dozens of implementation details that no term sheet can fully anticipate.

- Develop a comprehensive operating agreement negotiating agenda that identifies every provision to be negotiated in the operating agreement drafting process, with the client's specific negotiating goals for each provision.

- Begin coordinating with the client's tax advisors to ensure that the operating agreement's tax provisions are consistent with the client's tax position and that any required elections are addressed before the agreement is signed.

The Dangers of Verbal or Handshake Deals

Real estate joint ventures are frequently initiated by relationships: two principals who know each other, trust each other, and believe that their mutual understanding of the deal's basic terms is sufficient to proceed without extensive legal documentation. The assumption underlying handshake deals is that the relationship itself will resolve any ambiguity that arises during the JV's life. This assumption is consistently wrong.

JV relationships that begin in trust and goodwill encounter the same stresses as any other real estate JV: construction cost overruns, market disruptions, personnel changes, financing complications, and the competing economic pressures that arise when a project underperforms. When these stresses arise, as they inevitably do, the principals who entered the relationship on a handshake find that their recollections of what was agreed differ in ways they did not anticipate, and that they have no authoritative document to resolve the difference. The result is either costly litigation (to determine what the parties actually agreed) or costly renegotiation (to reach a new agreement under conditions of stress and deteriorating trust).

Both outcomes are more expensive, financially and relationally, than the cost of comprehensive legal documentation at the outset. The attorney who prevents a JV from

proceeding on a handshake, who insists on comprehensive documentation even when both parties are eager to close quickly and confident that their relationship will handle any disagreement, is providing one of the most valuable services available in real estate legal practice.

The Handshake JV: A Cautionary Note

Experienced JV litigators share a consistent observation: every party to a handshake JV remembers the handshake differently when the relationship is under stress. The developer member who 'agreed' to a 20% promote remembers no cap on that promote and no clawback. The capital member who 'agreed' to a preferred return remembers it as simple rather than compounding. These are not differences of memory. They are differences of understanding that existed at the time of the handshake but were never resolved, because no one asked the questions that would have revealed them. A comprehensive operating agreement negotiation asks and answers every one of those questions before they become disputes.

What Experienced JV Counsel Does

The question 'what does JV counsel do?' has a simple answer and a more complete one. The simple answer is that JV counsel drafts operating agreements. The more complete answer, the one that explains why JV specialization matters, is that experienced JV counsel brings a specific combination of transactional depth, litigation awareness, tax knowledge, and market intelligence that general real estate attorneys cannot replicate, however competent they are in their own practice areas.

The distinction between JV specialist counsel and general real estate counsel is not primarily a distinction in legal intelligence or professional competence. It is a distinction in pattern recognition. JV specialist counsel has seen these transactions hundreds of times. They know from experience which provisions generate disputes, because they have either litigated those disputes or advised parties in the aftermath. They know the current market standard for every major economic and governance term, because they have recently negotiated those terms across the full spectrum of institutional JV structures. And they know which of a client's specific circumstances warrant deviation from market standard, and in which direction.

Term Sheet Negotiation and Drafting

The term sheet is where the JV's foundational economic and governance terms are established, and it is where experienced JV counsel provides its highest-leverage value. In term sheet negotiation, experienced JV counsel:

- Advises the client on market-standard terms for each provision, enabling the client to distinguish between terms that are genuinely non-market (and should be rejected or modified) and terms that merely feel unfavorable but are consistent with current market practice.
- Identifies the provisions most likely to generate disputes based on the transaction's specific characteristics: the project type, the parties' relative

bargaining power, the risk profile of the investment, and the governance dynamics of the proposed structure.

- Drafts term sheet provisions with the precision required to prevent the definitional disputes that generate the most costly operating agreement negotiations, ensuring that 'IRR,' 'Contributed Capital,' 'Available Cash,' and 'Cause' are defined with enough specificity in the term sheet that the operating agreement negotiation does not relitigate them from scratch.

- Anticipates the operating agreement provisions that will require negotiation, identifying at the term sheet stage the issues that cannot be fully resolved in a summary document but should at least be flagged as open items, so that both parties enter the operating agreement negotiation with aligned expectations.

Operating Agreement Drafting and Negotiation

The operating agreement negotiation is the central work product of JV counsel: the translation of the term sheet's summary provisions into the comprehensive, precise document that will govern the JV's operations for its entire lifecycle. This work requires:

- Comprehensive coverage. A well-drafted operating agreement addresses every governance, economic, and operational scenario the JV might encounter over its lifecycle, including scenarios neither party anticipates at signing. Experienced JV counsel builds that coverage not from generic forms, but from the accumulated knowledge of what specific scenarios arise in specific transaction types and how operating agreement provisions need to address them.

- Internal consistency. Every provision in the operating agreement interacts with other provisions, and inconsistencies between related provisions are a primary source of disputes. Waterfall provisions must be consistent with tax provisions; governance provisions must be consistent with the loan documents; removal provisions must be consistent with the post-removal economic provisions. Experienced JV counsel reviews every cross-reference, every defined term, and every interdependency to ensure that the operating agreement functions as a coherent whole rather than a collection of independently negotiated provisions that interact unpredictably.

- Market calibration. Every provision in the operating agreement has a market context: a range of outcomes that sophisticated parties currently accept in arm's-length negotiations for similar transactions. Experienced JV counsel knows that context and uses it to advise clients on which provisions are worth fighting for and which should be accepted as market standard. This calibration is the foundation of efficient operating agreement negotiations that reach closure without excessive friction.

- Litigation awareness. The most important thing experienced JV counsel brings to operating agreement drafting is awareness of how provisions have been

interpreted by courts and arbitrators when disputed. The attorney who has seen how a specific waterfall provision was construed in an adversarial proceeding, and who knows which language prevented or created that dispute, brings a quality of drafting insight that no form document or template can replicate.

Tax Structuring Coordination

Real estate JV operating agreements have profound tax consequences for both parties, and those consequences cannot be addressed effectively without close coordination between JV counsel and the parties' tax advisors. Experienced JV counsel does not provide tax advice, which is the role of the CPA or tax attorney, but it does:

- Identify the tax provisions that must be addressed in the operating agreement: Section 704(b) and 704(c) allocations, the profits interest structure of the promote, the guaranteed payment characterization of developer fees, the capital account maintenance provisions, and the Section 754 election, and ensure those provisions are included in the drafting agenda.

- Coordinate with both parties' tax advisors to ensure that the operating agreement's economic provisions are structured in a way that achieves the intended tax outcomes, and that any required elections or designations are made in a timely manner.

- Identify tax issues specific to the particular parties: UBTI considerations for tax-exempt capital members, FIRPTA issues for foreign capital members, and phantom income risks for members with limited liquidity, and ensure the operating agreement addresses those issues before they become surprises at the time of distribution or disposition.

Loan Document Review in the JV Context

As discussed extensively in Chapters 7 and 9, the construction loan documents interact directly with the JV operating agreement's governance provisions, and inconsistencies between the two can create serious governance complications. Experienced JV counsel provides loan document review services specifically calibrated to the JV governance context:

- Identifying every lender consent requirement and covenant restriction in the loan documents, and comparing each against the operating agreement's governance provisions to identify inconsistencies that must be resolved before closing.

- Advising the developer member on which loan document provisions to push back on, particularly those that would override carefully negotiated operating agreement governance rights, and coordinating the negotiation of loan document modifications with construction loan counsel.

- Ensuring that the operating agreement's governance provisions are structured consistently with the loan documents' requirements, particularly with respect to distribution restrictions, transfer restrictions, and management change provisions.

Ongoing JV Counsel and Dispute Avoidance

JV counsel's role does not end at closing. Throughout the JV's lifecycle, from the first operational decision after closing through stabilization, refinancing, and ultimate disposition, ongoing JV counsel provides the governance guidance that keeps the operating agreement's provisions functioning as intended and that identifies and resolves potential disputes before they become formal proceedings.

- Approval process guidance. Advising the manager on which decisions require capital member approval, how to structure approval requests to satisfy the operating agreement's requirements, and how to document the approval process for potential future disputes.

- Governance dispute resolution. When governance disputes arise, as they do in any multi-year JV relationship, providing the legal analysis and negotiating support that resolves them quickly and economically rather than allowing them to escalate into formal proceedings.

- Operating agreement interpretation. Providing authoritative interpretation of operating agreement provisions when disputes arise about their application to specific facts, and advising on whether specific actions are within or outside the manager's authority.

- Amendment and modification. Drafting amendments to the operating agreement when the parties mutually agree to modify provisions, ensuring that amendments are consistent with the existing framework and do not inadvertently create new governance complications.

- Disposition planning and execution. Advising both parties on the governance requirements applicable to a proposed disposition, coordinating the waterfall calculation with the parties' financial advisors, and ensuring that the closing documentation accurately reflects the parties' economic entitlements under the operating agreement.

Questions to Ask Your JV Attorney

Selecting experienced JV counsel is one of the most important decisions a developer member or capital member makes in the JV formation process. The following questions help both parties evaluate whether a prospective attorney has the specific experience, market knowledge, and practice orientation that complex JV transactions require.

Not all real estate attorneys are equipped to handle sophisticated institutional JV transactions. The questions below are designed to identify the characteristics that

distinguish experienced JV specialists from competent general real estate attorneys, and to give both developer members and capital members a framework for evaluating prospective counsel before retaining them for a complex JV engagement.

Q: How many JV operating agreements have you negotiated in the past 24 months, and for which types of clients (developer members, capital members, or both)?

A: Experience in JV documentation is not generic. An attorney who has exclusively represented developer members has a fundamentally different perspective than one who has represented capital members, and both perspectives are necessary for the most sophisticated JV counsel. Attorneys who can credibly describe recent representation of both developer members and capital members bring a balanced understanding of the negotiating dynamics that is the foundation of effective JV counsel. Look for specific transaction examples, not general descriptions.

Q: What specific asset types and transaction structures have you worked with most recently, and are those consistent with my transaction?

A: Ground-up development JVs have a fundamentally different risk profile and documentation requirement than value-add or stabilized acquisition JVs. Programmatic JVs have a fundamentally different governance and economic framework than single-asset structures. An attorney whose experience is concentrated in stabilized acquisitions may not have encountered the entitlement risk provisions, completion guaranty mechanics, or construction loan covenant coordination issues that are central to development JV documentation. Ask for specific examples of recent transactions in the same asset type and structure as yours.

Q: Have you been involved in any JV disputes, whether in a transactional advisory capacity or in a litigation capacity? What did you learn from those experiences?

A: Litigation awareness is the most valuable single characteristic of experienced JV counsel: the ability to identify, from transactional drafting experience, the provisions that become disputed when the relationship is under stress. An attorney who has either litigated JV disputes or advised parties in the aftermath of JV disputes brings a quality of drafting insight that purely transactional attorneys cannot replicate. Ask specifically what dispute scenarios the attorney has encountered and what drafting lessons those experiences produced.

Q: Do you routinely work with worked numerical examples in operating agreement waterfall and promote provisions? Can you show me a redacted example of how you have handled this in prior transactions?

A: The worked numerical example standard, embedding a complete, signed-off waterfall calculation in the operating agreement, is a best practice that genuinely experienced JV counsel uses routinely. An attorney who has not used worked examples, or who regards them as unnecessary, has not been exposed to the IRR and

waterfall definition disputes that worked examples prevent. This question distinguishes between attorneys who know the concept and attorneys who have actually implemented it.

Q: How do you approach the coordination between the JV operating agreement and the construction loan documents, and what specific provisions do you look for in the loan documents that could override operating agreement governance rights?

A: The ability to identify the specific construction loan covenant categories (distribution restrictions, transfer restrictions, management change provisions, leasing covenants) that interact with operating agreement governance provisions, and to resolve those interactions before closing, is a specific competency that requires both JV documentation experience and construction lending familiarity. An attorney who provides a specific, substantive answer to this question has the cross-practice competency that development JV transactions require.

Q: What is your current market read on standard promote economics, preferred return rates, and remove-and-replace provisions for transactions of the type I am contemplating?

A: Current market knowledge, an understanding of the range of promote percentages, preferred return rates, major decisions thresholds, and governance standards that sophisticated parties are currently accepting in arm's-length transactions, is the foundation of effective JV negotiation advice. Market terms change with interest rate environments, capital availability, and asset class dynamics. An attorney who can answer this question with current, specific information demonstrates active market engagement; one who provides vague or dated answers may not be actively practicing in this space.

Q: How do you handle the tax provisions in a JV operating agreement, and how do you coordinate with the parties' tax advisors?

A: Tax structuring is an integral component of JV documentation, and experienced JV counsel must understand the tax implications of the operating agreement's provisions even if the attorney does not personally provide tax advice. An attorney who cannot explain the Section 704(b) and 704(c) provisions, the profits interest treatment of the promote, or the guaranteed payment characterization of developer fees has a gap in their JV documentation expertise that could create costly tax surprises for the client.

Evaluation Criterion	Strong Signal	Weak Signal
Transaction volume	Multiple JV OAs in past 12 months; active current pipeline	JV experience 'several years ago'; limited current activity

Evaluation Criterion	Strong Signal	Weak Signal
Both-sides experience	Can describe recent dev. member AND capital member representations	Only one side represented; lack of counterpart perspective
Asset type match	Specific experience in your asset type and structure	Generic 'real estate JV' experience without asset-type specificity
Litigation awareness	Can describe specific disputes seen and drafting lessons learned	No dispute experience; views all deals as transactional only
Worked examples	Uses them routinely; can show redacted examples	Unfamiliar with the concept or views them as unnecessary
Loan doc coordination	Knows specific covenant categories that override OA rights	Views loan doc review as lender's attorney's responsibility
Market calibration	Can quote current market ranges with recent transaction support	Describes market in generalities without recent transaction data
Tax coordination	Can explain 704(b), 704(c), profits interest with specificity	Defers all tax questions to accountant without OA-level knowledge

About the Author and Practice

This handbook was produced by Jason Powell, a corporate and securities attorney whose practice focuses on real estate joint ventures, real estate syndications, real estate funds, and real estate tokenization. Its depth, breadth, and practical orientation reflect the accumulated experience of a practice built on the proposition that real estate development's most consequential legal work happens not in the courthouse, but at the negotiating table, before the disputes that fill courthouses develop.

Practice Overview

Jason represents developer members, capital members, and institutional investors across the full range of real estate capital formation and investment transactions. The practice is organized around four complementary areas that together address the full spectrum of real estate capital structure, from traditional JV partnerships and private placements to the emerging frontier of blockchain-based tokenization.

Real Estate Joint Ventures

Representing developer members and capital members in single-asset and programmatic joint ventures across all major asset types: multifamily, office, retail, industrial, mixed-use, hospitality, and land. Services include term sheet negotiation and drafting; operating agreement negotiation and drafting; construction loan document review and coordination; ongoing JV counsel; governance dispute resolution; and disposition planning and execution. Clients include regional and national developers, institutional capital members, family offices, and sovereign wealth fund subsidiaries.

Real Estate Syndications

Structuring, documenting, and advising on private placement real estate syndications, equity offerings exempt from SEC registration under Regulation D and Regulation A, for sponsors raising capital from accredited and non-accredited investors. Services include offering structure design; private placement memorandum drafting; subscription agreement preparation; investor disclosure review; FINRA compliance analysis; state blue-sky compliance; and ongoing syndication counsel for the management of investor relations, distributions, and reporting obligations.

Real Estate Private Equity Funds

Forming and counseling real estate private equity funds, closed-end and open-end commingled investment vehicles raising capital from institutional and high-net-worth investors. Services include fund structure design (LP/GP, LLC manager, REIT subsidiary); limited partnership agreement drafting; investor side letter negotiation; Investment Advisers Act compliance analysis; ERISA investor accommodation; placement agent engagement; and ongoing fund counsel, including investment committee support, LP reporting, and fund extension and wind-down.

Real Estate Tokenization

Advising developers, sponsors, and technology platforms on the structuring and documentation of blockchain-based real estate tokenization transactions, the digitization of real estate ownership interests as securities tokens on public or private blockchain networks. Services include token offering structure design; securities law analysis (Regulation D, Regulation S, Regulation A+); smart contract legal review; investor rights documentation; platform terms and conditions; secondary market compliance analysis; and ongoing counsel for tokenized real estate vehicles navigating the evolving regulatory environment.

The Practice Philosophy

Every attorney has a practice philosophy, a set of principles that shapes how they approach their work, their clients, and the legal problems they are hired to solve. Jason's practice is built on three principles that are reflected directly in the depth and structure of this handbook:

- Specialization is the foundation of value. Real estate joint venture documentation is a specialist practice. The attorney who has drafted and negotiated fifty JV operating agreements in the past three years brings a quality of pattern recognition, market knowledge, and drafting precision that no generalist can replicate, however intelligent or hardworking. This practice is organized exclusively around real estate capital formation and investment, not because

other legal work is less important, but because specialization is the only path to the quality of counsel that complex JV transactions deserve.

- Drafting precision is dispute prevention. Every hour invested in precise drafting at the formation stage prevents hours, and likely years, of dispute resolution later. This is not a theoretical proposition; it is the concrete lesson of Chapter 9 and of every dispute scenario examined in this handbook. The practice is built around drafting precision as a professional obligation, not merely a professional aspiration.

- Both perspectives produce better outcomes. The most sophisticated JV counsel understands the transaction from both the developer member's and the capital member's perspective, not to be neutral, but to be genuinely effective in representing either party. An attorney who understands only the developer member's perspective cannot anticipate the capital member's likely negotiating position or appreciate the legitimacy of its governance concerns. An attorney who understands both perspectives negotiates more effectively for either client, because they can identify the provisions the counterparty will fight hardest for and the provisions where flexibility is available. This handbook's consistent dual-perspective analysis reflects that philosophy directly.

Representative Experience

Jason has represented clients in the following types of real estate capital formation transactions. This representative experience is provided to illustrate the scope and nature of the practice; specific transaction details are confidential.

- Ground-up multifamily development JVs ranging from 80 to 600 units, representing both developer members and institutional capital members, in primary and secondary markets across the United States.

- Programmatic JV platforms with capital commitments ranging from $50 million to $500 million, deployed across multiple development sites over investment periods of three to five years.

- Industrial and logistics development JVs for institutional capital members seeking exposure to the e-commerce-driven industrial sector, including build-to-suit and speculative development structures.

- Mixed-use development JVs involving complex financing structures, multiple use categories, phased development programs, and coordinated construction loan and permanent financing arrangements.

- Private placement equity syndications under Regulation D exemptions for real estate sponsors raising capital from accredited investors for acquisition, development, and value-add strategies.

- Closed-end real estate private equity fund formations for emerging and established real estate managers, including LP agreement drafting, SEC exempt reporting adviser analysis, and ERISA investor accommodation.

- Real estate tokenization transactions on public and permissioned blockchain networks, including Regulation D and Regulation S token offerings, smart contract legal review, and secondary trading platform compliance analysis.

How Jason Approaches Every Engagement

Every engagement begins with the same question: what does this client need to know to make the best possible decision, and what does this document need to say to protect the client's interests throughout the JV's entire lifecycle? The answer to that question drives every drafting choice, every negotiating position, and every piece of advice delivered throughout the engagement.

The engagement process for a new JV transaction includes:

- Initial transaction analysis. A thorough review of the proposed transaction's structure, the parties involved, the project's specific risk profile, and the governing documents available (term sheet, capital member form documents, prior transaction documents). This analysis produces a transaction-specific risk assessment and a preliminary list of provisions requiring particular attention.

- Market comparison. Comparison of the proposed transaction's economic and governance terms against current market standards for similar transactions, identifying provisions that are above or below market in a way that affects the client's negotiating position.

- Coordinated drafting and negotiation. Active involvement in every round of operating agreement drafting and negotiation, with specific attention to the provisions identified in the initial risk assessment and to the internal consistency issues that arise as the agreement evolves through multiple drafts.

- Tax coordination. Active coordination with the client's tax advisors throughout the drafting process, ensuring that the operating agreement's economic provisions are structured to achieve the intended tax outcomes and that all required elections and designations are addressed before execution.

- Loan document review. Comprehensive review of all construction and permanent loan documents alongside the operating agreement, with specific attention to the covenant interactions and governance conflicts that generate post-closing disputes.

- Execution support. Management of the closing process, including the coordination of all closing conditions, the review and approval of ancillary agreements, and confirmation that all required consents, approvals, and filings have been obtained.

- Ongoing counsel. Availability for operating agreement interpretation, governance guidance, and dispute avoidance throughout the JV's lifecycle, from the first operational decision after closing through stabilization, refinancing, and ultimate disposition.

Contact Information

Jason welcomes inquiries from developer members, capital members, fund sponsors, and real estate professionals seeking counsel on joint venture formation, private placements, fund formation, and real estate tokenization. Initial consultations are available by appointment.

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Blog: Tokenization	www.retokenlawyer.com

A Final Word: This Handbook Is the Beginning of the Conversation

This handbook has covered a great deal of ground: ten chapters examining the full architecture of real estate joint ventures from formation through dispute resolution, with particular attention to the provisions that matter most and the legal choices that make the difference between a durable partnership and a costly dispute.

But a handbook, however comprehensive, is not the same as legal advice. Every real estate joint venture is unique: unique in its project type, its parties, its risk profile, its governing law, and the specific circumstances that will determine which provisions matter most and how they

should be structured. The principles examined in this handbook provide a foundation; they do not substitute for the analysis, judgment, and drafting precision that a specific transaction requires.

If you are a developer member evaluating a new institutional partnership, a capital member assessing a proposed investment, or a real estate professional seeking to understand the JV landscape more deeply, we invite you to bring us into the conversation. Not after the term sheet is signed, not after the operating agreement has been circulated, and certainly not after a dispute has begun to develop, but at the beginning of the process, when the value of specialized legal counsel is greatest and the cost of getting the JV wrong is still avoidable.

Chapter 10 Summary

Chapter 10 has made the affirmative case for specialized JV counsel through case studies, economic analysis, engagement timing guidance, and a comprehensive description of Jason's practice. The principal takeaways:

- The cost of getting the JV wrong operates at three levels simultaneously: direct litigation cost ($5M+ average for major disputes), project-level cost (construction delays, lender covenant violations, governance dysfunction), and relationship cost (destruction of institutional partnerships and reputational damage). All three levels are avoidable through adequate legal documentation.

- The optimal engagement point for JV counsel is before the term sheet, when all economic and governance provisions are still open for negotiation and the attorney can shape the deal's foundational framework rather than working within a pre-established baseline.

- Experienced JV counsel provides a specific combination of services, including term sheet negotiation, operating agreement drafting, tax coordination, loan document review, and ongoing JV counsel, that cannot be replicated by general real estate attorneys regardless of their competence in other practice areas.

- The evaluation questions and the eight-criterion scorecard in this chapter provide a practical framework for identifying truly experienced JV specialists, distinguishing them from competent general real estate attorneys through questions that require specific, transactional experience to answer credibly.

- Jason's practice encompasses the full range of real estate capital formation, including JVs, syndications, funds, and tokenization, with a practice philosophy built on specialization, drafting precision, and a dual-perspective understanding of the developer member and capital member relationship.

A Note on the Appendices

The appendices that follow provide the practical reference materials referenced throughout this handbook: a comprehensive glossary of key JV terms; sample waterfall calculation examples; developer member and capital member negotiation priority

checklists; a sample term sheet template; a JV formation due diligence checklist; and a list of key questions to ask your JV attorney. These materials are designed to be working documents, printed, annotated, and brought to negotiating sessions and transaction review meetings as practical tools for the parties and their counsel.

APPENDIX A

Glossary of Key Joint Venture Terms

The language of real estate joint ventures is precise, and the difference between a clearly understood term and a vague one can be measured in millions of dollars of litigation. This glossary defines more than 135 terms that appear throughout the JV operating agreement, term sheet, and ancillary documents, with cross-references to related terms and practice notes highlighting the drafting issues that most frequently generate disputes.

This glossary is organized alphabetically. Terms defined within the glossary itself are indicated in italic type within definitions to signal that a separate definition exists for that term. The definitions provided here represent the most commonly used meanings of each term in the context of institutional real estate joint ventures governed by Delaware LLC law. Definitions may vary in specific operating agreements, and parties should always consult the defined terms section of their specific operating agreement rather than relying solely on this glossary.

Terms marked with a practice note represent concepts whose definition is most frequently the subject of dispute, areas where the specific language chosen in the operating agreement has a direct and significant economic consequence for one or both parties.

A

Accredited Investor

A natural person or entity that meets the wealth, income, or sophistication thresholds established by Rule 501 of Regulation D under the Securities Act of 1933, making them eligible to participate in private securities offerings. For natural persons, the thresholds include: (1) net worth exceeding $1,000,000 (excluding primary residence) individually or with a spouse; (2) income exceeding $200,000 individually (or $300,000 jointly with a spouse) in each of the two most recent years with a reasonable expectation of the same income in the current year; or (3) certain professional certifications (Series 7, Series 65, or Series 82 licenses). Most institutional capital members in real estate JVs qualify as accredited investors under separate entity-level criteria. The accredited investor definition is relevant to private placements and syndications but typically not to bilateral institutional JV structures.

See also: *Regulation D; Private Placement; Qualified Institutional Buyer*

Acquisition Fee

A one-time fee paid to the developer member (or its affiliate) upon the closing of a real estate acquisition by the JV entity. Typically calculated as a percentage of the purchase price (ranging from 0.5% to 1.5% in market practice), the acquisition fee compensates the developer member for sourcing the deal, conducting due diligence, negotiating the purchase and sale agreement, and managing the closing process. The acquisition fee is typically

characterized as an above-the-line operating expense of the JV, payable at acquisition closing regardless of the JV's ultimate performance.
See also: *Developer Fee; Asset Management Fee; Disposition Fee; Above-the-Line*

- **Practice Note:** *Capital members often resist acquisition fees on the ground that deal sourcing is part of what the developer member contributes as a non-monetary contribution to the JV. Developer members should negotiate for acquisition fees as express, enumerated components of the fee schedule to avoid ambiguity about their payability.*

Affiliate

Any entity or person that controls, is controlled by, or is under common control with a specified entity. 'Control' typically means ownership of more than 50% of the voting interests or the power to direct the management and policies of an entity. In JV operating agreements, the definition of affiliate is critical because affiliate transactions, meaning contracts between the JV and a developer member affiliate, require capital member approval as a major decision. Developer members should review the affiliate definition carefully: an overly broad definition may capture routine business relationships, while an overly narrow definition may fail to capture self-dealing arrangements the capital member intends to require approval for.
See also: *Affiliate Transaction; Major Decision; Self-Dealing*

Affiliate Transaction

Any contract, agreement, lease, or other arrangement between the JV entity and an affiliate of the developer member. Affiliate transactions, including property management agreements, construction management agreements, development agreements, and service contracts with developer member affiliates, are among the most closely scrutinized provisions in any JV operating agreement, because they create a direct conflict of interest: the developer member, as manager, is negotiating on behalf of the JV with an entity it also controls. Almost all institutional JV operating agreements require capital member approval of all affiliate transactions and condition that approval on the transaction being on arm's-length, market-rate terms.
See also: *Affiliate; Market Rate; Major Decision; Arm's-Length Transaction*

- **Practice Note:** *The approval requirement for affiliate transactions should have no dollar threshold exception. A developer member that insists on an exception for 'small' affiliate transactions may use that exception to avoid approval of systematically above-market arrangements that individually fall below the threshold but collectively drain significant value from the JV.*

Agreed Value

The value agreed upon by the parties for a specific asset or membership interest, typically used in the context of a buy-sell mechanism where the trigger party specifies an agreed value at which the receiving party must either buy or sell. The agreed value in a buy-sell is set unilaterally by the trigger party and may or may not reflect the asset's fair market value, and that ambiguity is a primary source of buy-sell disputes when the parties are financially asymmetric.
See also: *Buy-Sell Mechanism; Fair Market Value; Shotgun Provision*

Allocated Income

The taxable income, gain, loss, or deduction allocated to a member of the JV for federal income tax purposes in a given fiscal year, in accordance with the partnership tax allocation provisions of the operating agreement and applicable Treasury Regulations. Allocated income is reported on each member's Schedule K-1 and is taxable (or deductible) in the year of allocation, regardless of whether any cash distribution is made in that year. This creates the risk of phantom income, meaning taxable income without a corresponding cash distribution, for members whose capital accounts have insufficient liquidity.

See also: Capital Account; Phantom Income; Schedule K-1; Tax Allocation

- **Practice Note:** *Phantom income is a real economic risk for developer members, particularly in JVs where operating cash flow is reinvested rather than distributed. Developer members should model their expected tax obligations from allocated income throughout the JV's life and ensure they have access to liquidity sufficient to pay the resulting tax liability.*

Annual Budget

A financial plan approved by the capital member (as a major decision) specifying the projected revenues, expenses, and capital expenditures of the JV for a defined fiscal year. The annual budget serves as the primary financial governance document of the JV's operating phase: expenditures within the approved annual budget may generally be made by the developer member as manager without additional capital member approval; expenditures above the budget (or above defined variance tolerances) require capital member approval as a major decision. The annual budget is typically required to be submitted by the developer member for capital member approval at least 30 to 60 days before the start of each fiscal year.

See also: Approved Business Plan; Budget Variance; Major Decision

- **Practice Note:** *The consequences of failing to approve a new annual budget, whether because the capital member rejects the proposed budget or because the approval process extends into the new fiscal year, must be addressed in the operating agreement. Best practice is to include a deemed-approval provision and an automatic continuation of the prior year's budget (with inflation adjustment) pending approval of the new budget.*

Approved Business Plan

The comprehensive strategic and financial plan for the JV project, approved by the capital member as a major decision, that specifies the development program, construction budget, construction schedule, leasing strategy, hold period, and disposition parameters. The approved business plan is the master governance document of the development phase: any action by the developer member that falls within the plan's parameters is generally within the developer member's day-to-day management authority; any material amendment to the plan requires capital member approval.

See also: Annual Budget; Development Program; Major Decision

- **Practice Note:** *The approved business plan should be drafted broadly enough to give the developer member adequate operational flexibility, while specifically enough to give the capital member meaningful oversight over the project's strategic direction. A business plan that is too narrow creates governance friction; one that is too broad provides inadequate protection for the capital member's investment thesis.*

Arbitration

A method of alternative dispute resolution in which the parties submit their dispute to a neutral third party (the arbitrator or arbitration panel) whose decision (the award) is binding on the parties. Most institutional JV operating agreements specify binding arbitration, typically administered by JAMS, the American Arbitration Association (AAA), or a similar administering body, as the exclusive mechanism for resolving JV disputes, in lieu of litigation in state or federal courts. Arbitration offers the advantages of privacy (proceedings are confidential), speed (typically faster than court litigation), and the ability to select arbitrators with real estate JV expertise.

See also: JAMS; Dispute Resolution; Governing Law

- **Practice Note:** *JV arbitration provisions should specify: (1) the administering body; (2) the number of arbitrators (three for complex disputes); (3) the qualifications required of arbitrators (minimum years of real estate JV experience); (4) the venue; (5) whether an emergency arbitrator is available; and (6)*

whether the parties waive appeal rights. Each of these specifications materially affects the arbitration process and its outcomes.

Arm's-Length Transaction

A transaction conducted between unrelated parties acting in their own independent interests, with no special relationship (such as ownership, control, or family connection) that might affect the terms of the transaction. In the context of JV affiliate transactions, the arm's-length standard requires that any contract between the JV and a developer member affiliate be on terms that would be agreed to between unrelated parties in a competitive market, specifically, terms no more favorable to the developer member affiliate than would be available from an unrelated third-party provider of the same services.

See also: *Affiliate Transaction; Market Rate; Self-Dealing*

Asset Management Fee

An ongoing fee paid by the JV entity to the developer member (or its affiliate) for managing the JV's real property assets during the operating phase of the JV's lifecycle. The asset management fee is typically calculated as an annual percentage of invested equity (commonly 0.5% to 1.5%) or gross revenues (commonly 1% to 3%), and is paid quarterly or annually from the JV's operating cash flow. The asset management fee compensates the developer member for the ongoing supervision of the property manager, leasing oversight, financial reporting, lender relationship management, and other asset-level management functions performed throughout the hold period.

See also: *Developer Fee; Property Management Fee; Above-the-Line*

- **Practice Note:** *Capital members sometimes push for the asset management fee to be suspended or reduced during periods of project underperformance. Developer members should resist this provision, arguing that the costs of managing an underperforming asset are, if anything, higher than the costs of managing an outperforming one. Any performance-based fee adjustment should be clearly defined and tied to objective performance metrics.*

Available Cash

The amount of cash generated by the JV entity that is available for distribution to its members pursuant to the waterfall, after payment of all operating expenses, debt service, required reserves, and any other amounts required to be retained by the JV entity. The definition of 'Available Cash' is one of the most consequential and most frequently disputed definitions in any JV operating agreement, because it determines the pool of cash that flows through the waterfall and is therefore available to satisfy the preferred return and generate the promote. The definition should expressly address whether refinancing proceeds, insurance proceeds, condemnation awards, and partial sale proceeds are included or excluded.

See also: *Distributable Cash; Waterfall; Operating Reserves*

- **Practice Note:** *The most common waterfall dispute arises from an imprecise definition of 'Available Cash' that fails to address refinancing proceeds. A permanent loan closing that generates net proceeds above the construction loan payoff may or may not flow through the waterfall depending on whether those proceeds fall within the definition of Available Cash, and if the operating agreement is silent, the parties will litigate that question.*

B

Bad Boy Guaranty

See Carve-Out Guaranty.

See also: *Carve-Out Guaranty; Completion Guaranty; Recourse*

Base Management Fee

See Asset Management Fee.

See also: *Asset Management Fee*

Below-the-Line

A characterization of fees or other payments to the developer member that are treated as JV distributions subject to the waterfall, rather than as above-the-line operating expenses of the JV. Payments characterized as below-the-line are made only when cash is available for distribution through the waterfall, and only in the sequence specified by the waterfall. Developer members should strongly resist below-the-line characterization of their fee income, as it subordinates fee payments to the capital member's preferred return and may result in the developer member receiving no compensation during periods of project underperformance.

See also: *Above-the-Line; Waterfall; Distribution*

- **Practice Note:** *The distinction between above-the-line and below-the-line treatment of developer fees is one of the most economically significant and most often overlooked provisions in any JV operating agreement. An asset management fee that is below-the-line may simply never be paid on an underperforming project, effectively requiring the developer member to provide its management services without compensation.*

Blocking Right

A right held by the capital member to prevent the developer member from taking a specific action that would otherwise fall within the developer member's management authority, typically exercised through the major decisions approval process. A blocking right differs from an affirmative approval right in that it is a veto rather than a consent: the capital member does not affirmatively approve the action, but can block it by withholding consent. Blocking rights are typically exercised through the failure to approve a capital member approval request within the deemed-approval period.

See also: *Major Decision; Veto Right; Deemed Approval*

Blocker Entity

An intermediate taxable entity, typically a C corporation or REIT subsidiary, interposed between a tax-exempt investor (such as a pension fund, endowment, or foundation) and a real estate JV, for the purpose of converting unrelated business taxable income (UBTI) generated by debt-financed real estate into corporate-level taxable income. The blocker entity pays corporate income tax on the UBTI it receives, shielding the tax-exempt investor from direct UBTI liability. Blocker entities are common in institutional JV structures involving pension fund capital members.

See also: *UBTI; Tax-Exempt Investor; ERISA*

Budget Variance

The difference between the actual expenditures of the JV and the expenditures specified in the approved annual budget or approved business plan for a given line item or for the aggregate budget. Budget variances are a primary governance trigger in development JVs: variances within defined tolerances (typically 10% to 15% per line item; 5% to 10% in aggregate) are within the developer member's day-to-day management authority; variances exceeding the tolerance require capital member approval as a major decision. Budget variances should be reported monthly to allow timely identification and resolution of emerging cost trends.

See also: *Annual Budget; Approved Business Plan; Major Decision*

- **Practice Note:** *Aggregate budget variance caps protect the capital member against incremental budget erosion through multiple just-below-threshold expenditures. Without an aggregate cap, a*

developer member can approve multiple expenditures each within the per-item tolerance, cumulatively exceeding what the capital member would authorize if the full amount were presented as a single approval request.

Build-to-Suit

A development arrangement in which a property is constructed to the specifications of a specific, pre-identified tenant who typically commits to a long-term lease before or during construction. Build-to-suit developments carry significantly lower lease-up risk than speculative development because the primary tenant is identified in advance, but may carry higher design and construction risk if the tenant's specifications are complex or unusual.
See also: *Speculative Development; Lease-Up Risk; Pre-Leasing*

Buy-Sell Mechanism

A governance provision (also called a 'shotgun provision' or 'Texas Shootout') that provides a deadlock resolution mechanism by allowing either party (the 'trigger party') to deliver written notice specifying a price at which it is willing either to purchase the other party's interest or to sell its own interest. The receiving party then has a defined period (typically 30 to 60 days) to elect whether to buy or sell at the specified price. The buy-sell mechanism's theoretical fairness depends on the parties' financial symmetry: the trigger party, not knowing whether it will be buying or selling, is incentivized to set a fair price. In practice, financial asymmetry between the developer member and capital member can distort that incentive significantly.
See also: *Deadlock; Shotgun Provision; Trigger Party; Receiving Party*

- **Practice Note:** *Buy-sell mechanisms should specify: (1) the circumstances under which the buy-sell may be triggered; (2) the response period; (3) a financing contingency period for the receiving party; (4) the consequences of a failure to close; (5) how the developer member's promote is treated in the buy-sell price; and (6) whether a minimum valuation floor applies. Each of these specifications materially affects the buy-sell outcome and should be expressly addressed.*

C

Capital Account

A book account maintained for each member of the JV that tracks the member's economic interest in the JV entity, calculated as: initial capital contributions, plus allocated income and gain, minus allocated losses and deductions, minus distributions. Capital accounts are the tax and accounting foundation of the JV's distribution waterfall: upon liquidation of the JV, distributions are made in accordance with members' positive capital account balances (after all allocations have been made). Capital accounts must be maintained in accordance with Treasury Regulation Section 1.704-1(b)(2) to satisfy the 'substantial economic effect' standard for partnership tax allocations.
See also: *Contributed Capital; Tax Allocation; Substantial Economic Effect; Liquidation*

Capital Call

A formal request by the manager of the JV for members to contribute additional equity capital to the JV entity, typically made pursuant to the members' unfunded capital commitment obligations. Capital calls are the mechanism by which the JV's equity commitment is converted into actual funded contributions as needed for construction draws, operating expenses, or other project costs. The operating agreement should specify the notice requirements, the documentation required with each capital call, the timeline for funding, and the consequences of a member's failure to fund a required capital call.
See also: *Capital Commitment; Contributed Capital; Default; Dilution*

● **Practice Note:** *Capital call disputes are operationally disruptive because they arise precisely when the JV most needs liquidity. Operating agreements should include a mandatory escrow-funding provision for disputed capital calls, under which the disputing member pays the disputed amount into escrow while the validity dispute is resolved, to prevent construction delays and lender defaults while the underlying dispute is adjudicated.*

Capital Commitment

The total amount of equity capital that a member has agreed to contribute to the JV entity over the life of the program or project, including both funded contributions made to date and unfunded commitments remaining to be drawn. The capital commitment represents the maximum financial obligation of each member; any equity requirement above the committed amount requires the member's express consent as a major decision. The difference between a member's capital commitment and its capital contributions to date is the member's unfunded commitment.

See also: *Capital Call; Contributed Capital; Unfunded Commitment*

Capital Member

The party to a real estate joint venture that contributes the primary financial resources (equity capital) to fund the project, typically an institutional investor such as a pension fund, insurance company, sovereign wealth fund, real estate private equity fund, REIT, or family office. The capital member typically holds the majority of the JV's economic interest (commonly 80% to 95% of equity), receives a preferred return on its contributed capital before any promote is paid, and exercises governance oversight through major decision approval rights, reporting rights, and removal rights, but does not typically participate in day-to-day management of the project.

See also: *Developer Member; Preferred Return; Major Decision; Promote*

Capital Stack

The hierarchy of financial instruments used to fund a real estate project's total costs, listed in order from most senior (first priority of repayment; lowest risk; lowest return) to most junior (last priority of repayment; highest risk; highest return). A typical capital stack consists of: (1) senior construction debt (50%–70% of total project cost); (2) mezzanine debt or preferred equity (10%–20% of total project cost); and (3) common equity (20%–35% of total project cost), which is itself divided between the capital member and the developer member in accordance with the JV operating agreement's waterfall.

See also: *Senior Debt; Mezzanine Debt; Preferred Equity; Common Equity; Waterfall*

Carve-Out Guaranty

A personal or corporate guaranty given by the developer member (and typically its principals) to the construction lender that makes an otherwise non-recourse construction loan personally recourse upon the occurrence of defined 'bad acts' by the borrower or guarantor (hence the common term 'bad boy guaranty'). Standard carve-out triggers include: fraud or intentional misrepresentation; misappropriation of rents or insurance proceeds; voluntary bankruptcy filing without lender consent; prohibited transfers of the property or borrower interests; intentional destruction or waste of the property; and failure to maintain required insurance. A carve-out guaranty is a standard feature of virtually all commercial real estate construction loans and is distinct from the completion guaranty.

See also: *Completion Guaranty; Non-Recourse; Full Recourse Trigger; Loss Recourse Trigger*

● **Practice Note:** *Developer members should negotiate narrowly defined carve-out triggers that are limited to intentional, knowing, or willful misconduct, not negligent acts, mistakes, or good-faith business judgment errors. Carve-out provisions that include 'any material breach of the loan agreement' as a full-recourse trigger are particularly dangerous and should be resisted.*

Catch-Up Provision

A waterfall provision that allows the developer member to receive a disproportionate share of distributions immediately after the capital member's preferred return is satisfied, in order to 'catch up' to the promote percentage. For example, if the developer member's promote in the final waterfall tier is 20% of total distributions, a catch-up provision might direct 100% of distributions in the catch-up tier to the developer member until the developer member has received an amount such that, in the aggregate, 20% of all distributions made to date have gone to the developer member. Only after the catch-up is complete do distributions return to the pro-rata or promote-sharing arrangement.

See also: *Promote; Preferred Return; Waterfall*

- **Practice Note:** *Catch-up provisions accelerate the developer member's receipt of promote economics by eliminating the lag between preferred return satisfaction and promote realization. Capital members often resist catch-up provisions in favor of a direct pro-rata or promote-sharing split above the preferred return, arguing that the catch-up delays the capital member's receipt of residual distributions.*

Cause

The defined set of triggering events that entitle the capital member to remove the developer member as manager of the JV. In for-cause removal provisions, 'Cause' is typically defined to include: fraud or intentional misrepresentation; gross negligence or willful misconduct; criminal conviction; material, uncured breach of the operating agreement; insolvency or bankruptcy; key man event not cured within a specified period; and, in some agreements, material budget overruns or schedule delays above defined thresholds. The specific definition of Cause is the most heavily negotiated provision in any removal clause and one of the most frequently litigated provisions in JV disputes.

See also: *For-Cause Removal; No-Cause Removal; Removal; Cure Period*

- **Practice Note:** *Cause definitions based on performance metrics (budget overruns, schedule delays) should include express force majeure and market-condition carve-outs. A developer member removed for a budget overrun caused by market-wide supply chain disruptions or inflation is in a fundamentally different position than one removed for a budget overrun caused by management failures, and the cause definition should reflect that distinction.*

Certificate of Occupancy (CO)

A governmental certification issued by a local building department confirming that a newly constructed or renovated building complies with all applicable building codes, zoning requirements, and safety standards, and may be legally occupied. The certificate of occupancy is the most significant milestone in any development project's lifecycle: it marks the transition from construction risk to lease-up risk, triggers a cascade of economic and governance events (including construction loan conversion, promote vesting milestones, and lease commencement), and establishes the beginning of the stabilization measurement period. A temporary certificate of occupancy (TCO) permits occupancy before all punch list items are complete; a final CO is issued upon full completion.

See also: *Temporary Certificate of Occupancy; Stabilization; Construction Loan Conversion; Promote Vesting*

Change Order

A modification to the scope, cost, or schedule of a construction contract, agreed to by the owner (the JV entity) and the general contractor, that adds to, deletes from, or otherwise changes the original contract terms. Change orders are an inevitable feature of every construction project and are a primary mechanism through which construction costs increase above the approved budget. Operating agreements should specify both per-item and aggregate change order approval thresholds: individual change orders below the per-item

threshold can be approved by the developer member without capital member consent; change orders above the per-item threshold, or that cause the aggregate total to exceed the aggregate threshold, require capital member approval as a major decision.
See also: *Construction Budget; Budget Variance; General Contractor; Major Decision*

Clawback

A provision requiring the developer member to return previously received promote distributions to the capital member if, at a defined measurement date (typically the end of the JV's life or at interim calculation dates), the aggregate promote distributions made to the developer member exceed the developer member's total promote entitlement calculated on a portfolio-level basis. Clawbacks protect capital members against overpayment of the promote on individual assets in a multi-asset JV when the portfolio's aggregate performance is below the preferred return threshold. The clawback is one of the most significant financial risks for developer members in programmatic JVs and should be negotiated with careful attention to its scope, cap, tax gross-up, and look-back period.
See also: *Promote; Lookback Period; Tax Gross-Up; Programmatic JV*

- **Practice Note:** *Developer members should model their maximum clawback exposure under stress scenarios before signing any programmatic JV agreement. An uncapped, un-tax-adjusted clawback in a long-duration program can exceed the total promote received, particularly if the clawback requires return of gross promote distributions when the developer member has already paid income taxes on those amounts.*

Closing

The consummation of the formation of the JV entity, the execution of the operating agreement, the execution of all ancillary agreements, and the funding of initial capital contributions by the members. For development JVs, the JV closing may occur simultaneously with the closing of the construction loan, the acquisition of the development site, or at a separate pre-construction date.
See also: *Operating Agreement; Capital Contribution; Construction Loan*

Co-Investment

The developer member's equity contribution to the JV, representing the developer member's at-risk capital alongside the capital member's investment. The co-investment creates alignment of interest between the developer member and the capital member by ensuring that the developer member has real money at risk alongside the capital member, not merely a fee-based upside through the promote. Developer member co-investment typically ranges from 5% to 20% of total JV equity in institutional transactions, depending on deal size and market conditions.
See also: *Capital Contribution; Promote; Alignment of Interest*

Commingled Fund

An investment vehicle that pools capital from multiple investors for deployment across a portfolio of real estate investments in accordance with a pre-set investment strategy. A commingled fund is distinguished from a bilateral JV in that it has multiple investors (limited partners) rather than a single capital member; its economics are standardized across all investors rather than customized bilaterally; and its manager (the general partner or managing member) typically has broader discretionary authority over investment decisions without individual investor approval. Real estate commingled funds are typically structured as limited partnerships or LLCs and are subject to securities law regulation.
See also: *Programmatic JV; Limited Partnership; General Partner; Investment Period*

Common Equity

The most junior layer of the capital stack: the equity interests held by the developer member and capital member through the JV entity, which bear the first loss if the project underperforms and receive the last dollar of profit if it outperforms. Common equity is distinguished from preferred equity (which has a priority return ahead of common equity) and from debt (which has priority of repayment ahead of all equity). The distribution waterfall governs how common equity distributions are allocated between the capital member and the developer member.

See also: *Capital Stack; Preferred Equity; Waterfall; Promote*

Completion Guaranty

A personal or corporate guaranty given by the developer member (and typically its principals) to the construction lender, guaranteeing that the development project will be completed, regardless of cost overruns, contractor defaults, or other impediments, and that the construction loan will be repaid upon completion. The completion guaranty is the broadest form of construction loan guaranty and creates an obligation that is triggered not by a specific act of misconduct (unlike the carve-out guaranty) but by the occurrence of a project completion failure. Developer members should negotiate dollar caps on completion guaranty exposure, force majeure carve-outs, and burn-off provisions that reduce the guaranty amount as construction milestones are achieved.

See also: *Carve-Out Guaranty; Construction Loan; Guarantor; Force Majeure*

- **Practice Note:** *An open-ended completion guaranty, one with no dollar cap, is an unlimited contingent personal liability. On a $75 million construction project with significant cost overrun risk, an uncapped completion guaranty could expose the developer member's principals to personal liability vastly exceeding any economic benefit from the JV. Every completion guaranty should be negotiated with a dollar cap.*

Construction Loan

A short-term, typically floating-rate loan used to fund the construction of a real estate development project. Construction loans are typically structured as revolving draw-down facilities in which the borrower (the JV entity) submits periodic draw requests (based on construction progress) and the lender advances funds only to the extent supported by completed, inspected construction work. Construction loans typically have terms of 24 to 36 months (with extension options) and are replaced by permanent financing upon the project's stabilization.

See also: *Senior Debt; Construction Loan Conversion; Draw Request; Interest Reserve*

Construction Loan Conversion

The process of refinancing the construction loan into a permanent loan upon or after the project's completion and stabilization. The construction-to-permanent conversion is a major governance event in any development JV: it requires capital member approval of the permanent loan terms; its timing and economics (the size of the permanent loan relative to the construction loan balance) directly affect the JV's waterfall calculation; and it triggers a cascade of operational transitions from the construction phase to the operating phase governance framework.

See also: *Permanent Loan; Certificate of Occupancy; Stabilization; Waterfall*

Contributed Capital

The total amount of cash (and, in some JV structures, other property) actually contributed by each member to the JV entity, as distinguished from the member's capital commitment (the total amount agreed to be contributed). Contributed capital is the primary basis for calculating the capital member's preferred return (the preferred return accrues on contributed capital from the date of each contribution) and is the first tier of the distribution waterfall

(contributed capital is returned before any preferred return is paid, and all preferred return is paid before any promote is distributed). The precise definition of 'Contributed Capital,' meaning whether it includes only cash funded or also includes deemed contributions, fee offsets, or guaranty-related adjustments, is one of the most contested definitions in JV waterfall disputes.

See also: *Capital Commitment; Capital Account; Preferred Return; Waterfall*

- **Practice Note:** *The definition of 'Contributed Capital' should specify: (1) that it means only actual cash funded; (2) that it does not include developer fees or other JV expenses credited to a member's account; (3) how it changes when capital is returned through interim distributions; and (4) how it is calculated for IRR purposes when contributions are made at different times. These specifications should be accompanied by a worked numerical example.*

Control

The power to direct the management and policies of an entity, typically defined in operating agreements as ownership of more than 50% of the voting interests or the contractual right to appoint or remove a majority of the board or management committee. The concept of control is relevant in multiple JV contexts: it determines which entities are affiliates of the developer member (and therefore subject to affiliate transaction approval requirements); it determines whether a transfer of membership interests constitutes a change of control (which may require lender consent or capital member approval); and it affects the definition of permitted transfers.

See also: *Affiliate; Change of Control; Permitted Transfer*

Conversion Event

A defined milestone or occurrence that triggers a material change in the JV's governance or economic structure, most commonly used to describe the permanent loan closing (conversion from construction loan to permanent loan) or the achievement of stabilization (conversion from development-phase governance to operating-phase governance). Conversion events should be expressly addressed in the operating agreement with clear definitions, governance implications, and economic consequences.

See also: *Construction Loan Conversion; Stabilization; Certificate of Occupancy*

Cure Period

A defined period of time during which a party that has received a notice of default or a removal notice may remedy the alleged default or cause before the notifying party's remedial rights become effective. Cure periods are essential protections for developer members in removal provisions: they provide time to dispute a pretextual removal notice, remedy a legitimate operational failure, or negotiate a resolution before the removal becomes effective. Cure periods should be differentiated by the type of default: financial defaults (missed capital calls, payment failures) typically warrant shorter cure periods (10 to 30 days); operational defaults warrant longer periods (30 to 60 days); key man events warrant the longest cure periods (90 to 180 days).

See also: *Default; For-Cause Removal; Notice; Removal*

- **Practice Note:** *A removal provision with no cure period is the most dangerous provision a developer member can accept. With no cure period, the capital member can remove the developer member immediately upon asserting cause, even if the cause is disputed or pretextual, without giving the developer member any opportunity to challenge the removal or remedy the alleged default.*

D

Day-to-Day Management

The operational decisions and actions that the developer member, as manager, is authorized to take without prior capital member consent. The scope of day-to-day management authority, and its boundary with the major decisions list that requires capital member approval, is the primary governance battleground in any JV operating agreement negotiation. Day-to-day management typically encompasses routine property operations, construction management within the approved budget, personnel decisions, ordinary-course legal and compliance matters, and routine banking and cash management.
See also: *Major Decision; Manager; Operating Agreement*

Deadlock

A governance impasse in which the parties cannot agree on a decision that requires both parties' consent, preventing the JV from taking a necessary action. Operating agreements must provide deadlock resolution mechanisms because a deadlock that cannot be resolved through negotiation can paralyze the JV's operations, create lender default risk, and destroy value for both parties. Common deadlock resolution mechanisms include mediation, expert determination, buy-sell provisions, forced sale rights, and (in some structures) capital member override authority.
See also: *Buy-Sell Mechanism; Forced Sale Right; Mediation; Expert Determination*

Deemed Approval

A provision specifying that a major decision approval request submitted to the capital member is deemed approved if the capital member fails to respond within a defined period (typically 10 to 20 business days). Deemed approval provisions are essential protections for developer members in time-sensitive operational environments: without a deemed approval provision, the capital member can effectively block any decision requiring its approval by simply not responding, paralyzing operations without technically breaching the operating agreement.
See also: *Major Decision; Approval Period; Manager*

Default

The failure of a party to perform a material obligation under the operating agreement or, in the construction loan context, the failure to comply with a material covenant of the loan agreement. In the JV context, defaults most commonly arise from: (1) a member's failure to fund a required capital call; (2) the developer member's material breach of the operating agreement; (3) a Key Man Event not cured within the applicable cure period; or (4) the developer member's insolvency or bankruptcy. Each category of default should have specified notice requirements, cure periods, and remedies expressly set forth in the operating agreement.
See also: *Capital Call; Cause; Cure Period; Removal*

Delaware LLC

A limited liability company organized under the Delaware Limited Liability Company Act (6 Del. C. § 18-101 et seq.). Delaware LLCs are the dominant vehicle for institutional real estate joint ventures in the United States because of the Delaware LLC Act's flexibility (permitting nearly unlimited contractual freedom in the operating agreement), the Court of Chancery's sophisticated jurisprudence on LLC governance disputes, and the institutional familiarity of most capital members and their counsel with Delaware LLC law.
See also: *Limited Liability Company; Operating Agreement; Court of Chancery*

Developer Fee

A general term encompassing all fees payable to the developer member (or its affiliate) for services rendered to the JV, including the development fee, construction management fee, asset management fee, acquisition fee, disposition fee, and financing fee. Developer fees are the developer member's primary in-period compensation and should be negotiated as above-the-line operating expenses of the JV, payable regardless of project performance. The total developer fee package and its relationship to the promote is a central economic negotiating point in any JV.

See also: *Development Fee; Asset Management Fee; Acquisition Fee; Disposition Fee; Above-the-Line*

Developer Member

The party to a real estate joint venture that contributes real estate expertise, relationships, and development execution capability to the venture, typically serving as its manager with day-to-day operational authority over the project. The developer member typically contributes a minority of the JV's equity capital (5% to 20%) and in exchange receives fees for specific services rendered (the development fee, asset management fee, and others) and a promote, meaning a disproportionate share of profits above the capital member's preferred return threshold, as compensation for the value it creates.

See also: *Capital Member; Manager; Promote; Developer Fee*

Development Agreement

A contract between the JV entity and the developer member (or its affiliate) that governs the developer member's obligations as the development manager, specifying the scope of development management services, the development fee payable, the standard of care, the budgeting and reporting obligations, the insurance requirements, and the consequences of underperformance or termination. The development agreement is a key ancillary agreement to the operating agreement and should be reviewed alongside it to ensure consistency in the governance framework.

See also: *Developer Fee; Operating Agreement; Ancillary Agreement*

Development Fee

A fee paid to the developer member (or its affiliate) for overseeing the development of a real estate project from inception through certificate of occupancy. Typically calculated as a percentage of total project costs (hard and soft costs, typically 2% to 5%), the development fee compensates the developer member for site selection and acquisition, entitlement management, design oversight, contractor procurement, construction management, and project closeout. The development fee is typically paid in installments tied to construction draw milestones.

See also: *Developer Fee; Construction Management Fee; Total Project Cost*

Dilution

The reduction of a member's percentage interest in the JV entity, typically as a remedy for the member's failure to fund a required capital call. Dilution can be mathematical (recalculating the non-funding member's interest as a proportion of total funded capital) or punitive (applying a multiplier to the non-funded amount, creating additional dilution above the mathematical adjustment). Punitive dilution, typically at 1.25x to 1.5x the shortfall, is designed to deter strategic defaults by creating a penalty beyond the economic cost of the missed contribution.

See also: *Capital Call; Membership Interest; Default; Punitive Dilution*

- **Practice Note:** *Punitive dilution provisions can dramatically impair a developer member's economic position from a single missed capital call. A developer member with a 10% interest that fails to fund even a modest co-investment capital call can see its interest reduced to near zero under an*

aggressive punitive dilution formula. Developer members should negotiate for non-punitive, mathematical dilution as the exclusive remedy for co-investment defaults.

Disposition Fee

A one-time fee paid to the developer member (or its affiliate) upon the closing of the sale or other disposition of a property by the JV entity. Typically calculated as a percentage of the gross sale price (ranging from 0.5% to 1.0%), the disposition fee compensates the developer member for managing the sale process, including broker selection, offering memorandum preparation, buyer interviews, negotiation of the purchase and sale agreement, and closing management.

See also: *Developer Fee; Acquisition Fee; Gross Sale Proceeds*

- **Practice Note:** *Capital members sometimes push for the disposition fee to be paid from the developer member's promote rather than as a separate above-the-line fee, arguing that managing the disposition is part of what the developer member is compensated for through the promote. Developer members should resist this characterization: the disposition fee compensates for specific services rendered, regardless of whether a promote is ultimately earned.*

Distribution

A payment made by the JV entity to its members, made pursuant to the operating agreement's distribution waterfall. Distributions differ from member salaries or guaranteed payments in that they are made from the JV's available cash after payment of operating expenses, debt service, and required reserves, and are subject to the priority sequence established by the waterfall. Distributions include both operating distributions (from rental income or other operating cash flow) and capital distributions (from sale proceeds, refinancing proceeds, or other capital events).

See also: *Waterfall; Available Cash; Capital Event; Preferred Return*

E

Economic Occupancy

A measure of a property's rental performance calculated as actual rent collected (net of concessions) as a percentage of the property's projected stabilized rent at 100% occupancy. Economic occupancy differs from physical occupancy (the percentage of units or square footage that are leased) by adjusting for lease concessions (free rent periods, reduced rents) that may make a property appear more fully leased than its actual revenue performance indicates. Economic occupancy is the preferred metric for stabilization definitions in JV operating agreements because it measures actual revenue performance rather than lease quantity.

See also: *Stabilization; Physical Occupancy; Net Effective Rent*

Entitlement

The governmental approvals, permits, and authorizations required for a real estate development project to proceed as planned, including zoning approvals (rezonings, variances, conditional use permits), design review approvals, environmental clearances, infrastructure agreements, and building permits. The entitlement process is a primary source of pre-development risk in development JVs: its timeline is controlled by governmental bodies, its outcome is subject to political dynamics, and its cost can escalate significantly as the process encounters unexpected obstacles.

See also: *Entitlement Risk; Pre-Development; Approved Business Plan*

Entitlement Risk

The risk that a proposed development project will not receive the governmental approvals necessary to proceed as planned, or will receive them only subject to conditions that materially increase project cost, reduce project density, or otherwise alter the project's economic viability. Entitlement risk is most acute for projects requiring discretionary governmental action (rezoning, conditional use permits) rather than ministerial approvals (building permits for by-right development). The allocation of entitlement risk between the developer member and capital member is one of the most important structural decisions in any development JV.

See also: *Entitlement; Pre-Development; Development JV; Approved Business Plan*

Equity Multiple

The ratio of total distributions received by a member to its total contributed capital, expressed as a multiple (for example, 2.0x means the member received twice its invested capital in total distributions). The equity multiple is a simpler measure of investment return than the IRR because it does not account for the timing of cash flows: a 2.0x equity multiple achieved in three years represents a much higher IRR than a 2.0x equity multiple achieved in seven years. Equity multiple hurdles are sometimes used as an alternative or supplement to IRR hurdles in tiered promote waterfall structures.

See also: *IRR; Waterfall; Promote; Distribution*

ERISA

The Employee Retirement Income Security Act of 1974, a federal statute that governs the management and investment of employee benefit plan assets (including pension funds). ERISA imposes extensive fiduciary obligations on entities that manage plan assets and can significantly complicate the structure of a JV or fund that includes ERISA plan investors. Key ERISA issues in JV structuring include the plan assets regulation (which determines when a JV's assets are treated as 'plan assets' subject to ERISA), prohibited transaction rules (which restrict certain transactions between the JV and parties-in-interest), and UBTI considerations.

See also: *Plan Assets; UBTI; Prohibited Transaction; Qualified Plan Investor*

Exclusivity

A provision in a programmatic JV agreement requiring the developer member to offer qualifying investment opportunities to the programmatic capital member before pursuing them with any other capital source. Exclusivity is implemented through a right of first opportunity (ROFO) mechanism: when the developer member identifies a qualifying investment, it must present it to the capital member and allow the capital member a defined response period before pursuing the opportunity with another capital partner. The scope of exclusivity, meaning what opportunities are covered, what the response period is, and what carve-outs apply, is one of the most heavily negotiated provisions in any programmatic JV agreement.

See also: *Right of First Opportunity; Programmatic JV; Investment Period*

Expert Determination

A dispute resolution mechanism in which the parties submit a specific factual or valuation dispute to a neutral expert (typically an experienced real estate professional or accountant) whose determination is binding on the parties. Expert determination is most effective for narrow, specific disputes (valuation disagreements, budget variance calculations, IRR calculation methodology disputes) where the underlying facts are relatively clear and the dispute involves specialized professional judgment rather than legal questions.

See also: *Arbitration; Mediation; Dispute Resolution*

F

Fair Market Value

The price at which a property or interest would change hands between a hypothetical willing buyer and a hypothetical willing seller, each having reasonable knowledge of the relevant facts and neither being under any compulsion to buy or sell. Fair market value is the standard used in most buy-sell valuation floors, appraisal provisions, and forced sale pricing requirements. It differs from liquidation value (which assumes a distressed or forced sale) and from intrinsic value (which incorporates the specific buyer's subjective valuation).
See also: *Buy-Sell Mechanism; Appraisal; Forced Sale Right*

Financing Fee

A fee paid to the developer member (or its affiliate) for sourcing, negotiating, and closing construction or permanent financing on behalf of the JV entity. Typically calculated as a percentage of the loan amount (ranging from 0.25% to 1.0%), the financing fee compensates the developer member for its lender relationships and the time and expertise required to negotiate competitive financing terms.
See also: *Developer Fee; Construction Loan; Permanent Loan*

FIRPTA

The Foreign Investment in Real Property Tax Act of 1980, a federal statute imposing withholding tax on the disposition of United States real property interests (USRPIs) by foreign persons. Under FIRPTA, a purchaser of a USRPI from a foreign person must withhold 15% of the gross sales price (or a higher percentage in some circumstances) and remit it to the IRS. JV interests are generally treated as USRPIs when the JV holds U.S. real property. Foreign capital members must carefully analyze their FIRPTA exposure in connection with any acquisition or disposition of a JV interest.
See also: *Withholding; Foreign Capital Member; USRPI*

For-Cause Removal

The capital member's right to remove the developer member as manager of the JV upon the occurrence of specifically defined 'Cause' events. For-cause removal typically requires the capital member to (1) deliver written notice specifying the alleged Cause; (2) allow the developer member a cure period; and (3) proceed with removal only if the Cause is not cured within the cure period. The economic consequences of for-cause removal, particularly the extent to which the developer member's promote is forfeited, are among the most consequential and most litigated provisions in any JV operating agreement.
See also: *Cause; No-Cause Removal; Cure Period; Post-Removal Economic Rights*

Force Majeure

An event or condition beyond the reasonable control of the affected party that prevents or delays the party's performance of its obligations, including natural disasters, governmental actions, pandemics, acts of war, labor strikes, and similar extraordinary events. Force majeure provisions excuse or delay a party's non-performance to the extent it is caused by a force majeure event. In development JVs, force majeure provisions are most relevant to construction schedule delays and cost overruns that would otherwise trigger cause-based removal rights or deadline-based governance consequences.
See also: *Cause; Construction Delay; Excused Performance*

Forced Sale Right

The capital member's right to require the JV to sell its property or the capital member's interest after a defined minimum hold period, even if the developer member does not agree to the sale. The forced sale right provides the capital member with liquidity protection: it ensures that the capital member can realize the value of its investment within a defined timeframe, regardless of the developer member's preference for a longer hold. The forced sale process should require a bona fide, arm's-length marketing process with adequate time for a full market test.

See also: *Drag-Along; Buy-Sell Mechanism; Exit Right; Minimum Hold Period*

Fund Structure

See Commingled Fund.

See also: *Commingled Fund; Programmatic JV; Limited Partnership*

G–I

General Contractor

The primary construction contractor engaged by the JV entity (as project owner) to manage and perform the construction of the development project. The general contractor is responsible for providing all labor, materials, equipment, and services necessary to complete the project in accordance with the approved plans and specifications, within the agreed contract amount and schedule. The general contractor typically engages subcontractors to perform specific trades. Selection of the general contractor is a major decision requiring capital member approval in most institutional JV operating agreements.

See also: *Construction Loan; Performance Bond; Change Order; Subcontractor*

Good Faith and Fair Dealing

An implied covenant in every contract (including LLC operating agreements) requiring each party to act honestly and in accordance with reasonable commercial standards in performing its contractual obligations. While parties can contractually modify or eliminate express fiduciary duties in Delaware LLC operating agreements, the implied covenant of good faith and fair dealing cannot be disclaimed entirely. Courts applying the implied covenant have found violations where a party exercised its express contractual rights in a manner specifically designed to harm the other party, even if the literal terms of the contract permitted the action.

See also: *Fiduciary Duty; Manager; Delaware LLC*

Gross Sale Proceeds

The total consideration received (or to be received) by the JV entity upon the disposition of its real property assets, before deduction of any selling expenses, broker commissions, closing costs, debt repayment, or other transaction costs. Gross sale proceeds is the starting point for calculating net sale proceeds, which are the amounts actually distributed through the waterfall.

See also: *Net Sale Proceeds; Disposition; Waterfall; Distributable Cash*

Guaranteed Payment

Under Section 707(c) of the Internal Revenue Code, a payment to a partner for services rendered to a partnership that is determined without regard to the income of the partnership. Guaranteed payments are treated as ordinary income to the receiving partner (taxable in the year received) and as a deductible expense of the partnership. Developer fees structured as

guaranteed payments provide tax certainty for both the developer member (knowing the income characterization) and the JV (securing a tax deduction).
See also: *Developer Fee; Tax Allocation; Section 704(b)*

Hard Costs

The direct construction costs of a real estate development project, including labor, materials, equipment, and contractor fees for the physical construction of the improvements. Hard costs are distinguished from soft costs (which include professional fees, permits, insurance, financing costs, and other non-construction expenses). The distinction between hard and soft costs is relevant in development fee calculations (which may be based on hard costs only, or on total project costs including soft costs) and in lender loan-to-cost calculations.
See also: *Soft Costs; Total Project Cost; Development Fee; Construction Budget*

Hold Period

The period between the JV's acquisition or completion of a property and its disposition. In development JVs, the hold period is typically measured from stabilization (the achievement of defined occupancy and income thresholds) to the eventual disposition date. The hold period is relevant to the timing of the capital member's forced sale right, the buy-sell trigger date, the promote clawback calculation period, and the preferred return accrual. Planned hold periods in institutional JVs typically range from three to seven years from stabilization.
See also: *Stabilization; Forced Sale Right; Buy-Sell Mechanism; IRR*

Hurdle Rate

The minimum required rate of return that the capital member must achieve on its invested capital before the developer member is entitled to earn a promote. The hurdle rate is typically expressed as an annualized IRR threshold (e.g., 8% or 12%) or as an equity multiple threshold (e.g., 1.5x or 2.0x). In tiered promote waterfall structures, multiple hurdle rates may be used to create escalating promote percentages as the capital member's actual return exceeds successive thresholds.
See also: *IRR; Promote; Preferred Return; Waterfall*

Interest Reserve

A component of the construction loan budget specifically allocated to fund the interest that will accrue on the construction loan during the construction and pre-stabilization period. The interest reserve is funded from construction loan proceeds (not from equity) and is disbursed to pay interest as it comes due. Interest reserve sizing is a critical underwriting issue: an undersized interest reserve will be depleted before stabilization, creating an emergency capital call requirement; an oversized reserve unnecessarily reduces the net loan proceeds available for construction.
See also: *Construction Loan; Carry Costs; Capital Call; Stabilization*

Internal Rate of Return (IRR)

The discount rate at which the net present value of all cash flows associated with an investment, contributions (negative cash flows) and distributions (positive cash flows), equals zero. IRR is the most common return metric used in institutional real estate JV promote calculations. The specific definition of IRR, including which cash flows are included, the timing convention applied (daily, monthly, or annual), whether fees are included or excluded, and whether the calculation is performed on a pre-tax or after-tax basis, is the most frequently disputed economic definition in JV operating agreements.
See also: *Equity Multiple; Hurdle Rate; Promote; Waterfall*

● **Practice Note:** *The IRR definition in a JV operating agreement should be specified with complete mathematical precision, including the specific cash flows included and excluded (contributions, distributions, fees, taxes, transaction costs), the timing convention used, and the compounding frequency. A worked numerical example, confirmed by both parties' financial advisors, should be attached to the operating agreement as an exhibit.*

Investment Period

In a programmatic JV, the defined period during which the developer member has the right to identify and deploy qualifying investments using the capital member's committed equity. Typical investment periods range from two to five years. Upon expiration of the investment period, the developer member's right to source new investments terminates, and the program converts from a deployment vehicle to a portfolio management vehicle governing the existing portfolio through its hold and disposition phases.

See also: *Programmatic JV; Capital Commitment; Deployment Pace; Extension Provision*

J–L

JAMS

Judicial Arbitration and Mediation Services, a leading private provider of arbitration, mediation, and other dispute resolution services. JAMS is one of the most commonly specified arbitration administrators in institutional real estate JV operating agreements, along with the American Arbitration Association (AAA). JAMS's Comprehensive Arbitration Rules are widely used for complex commercial disputes, including JV arbitrations involving multiple parties and significant amounts in controversy.

See also: *Arbitration; Dispute Resolution; American Arbitration Association*

Joint Venture (JV)

A contractual and legal arrangement in which two or more parties pool resources, typically capital, expertise, relationships, or land, to pursue a specific real estate project or series of projects, sharing both the rewards and the risks in proportions negotiated at the outset. In the institutional real estate context, a joint venture is most commonly organized as a limited liability company (LLC) governed by an operating agreement, with the developer member serving as manager and the capital member providing the majority of equity capital.

See also: *Developer Member; Capital Member; Operating Agreement; LLC*

Key Man

A specific individual within the developer member's organization, typically identified by name in the operating agreement, whose continued active involvement in managing the JV is a condition of the developer member's right to serve as manager. Key man provisions protect the capital member's investment in the specific human expertise and relationships it relied upon in committing to the JV. A 'Key Man Event' occurs when a named key man departs, becomes incapacitated, or reduces their professional time commitment to the JV below a defined minimum threshold.

See also: *Key Man Event; Key Man Provision; Manager; Removal*

Key Man Event

The occurrence of a specified event with respect to a named key man, typically death, permanent disability, voluntary departure from the developer member's organization, involuntary termination, or a reduction in professional time commitment below a defined minimum, that triggers the developer member's obligation to identify and propose an

acceptable replacement within a defined cure period. An uncured Key Man Event typically gives the capital member the right to remove the developer member as manager.
See also: *Key Man; Cure Period; Removal*

Lease-Up Period

The period between a development project's certificate of occupancy and the achievement of stabilization, during which the developer member's primary operational focus is securing tenants, executing leases, and ramping up occupancy to the stabilization threshold. The lease-up period is a primary source of risk in development JVs: if lease-up takes longer than projected, carry costs accumulate beyond the interest reserve, preferred return accrues on the capital member's full equity investment without offsetting cash flow, and the promote threshold becomes more difficult to achieve.
See also: *Stabilization; Certificate of Occupancy; Absorption Risk; Preferred Return*

Limited Liability Company (LLC)

A business entity organized under state law that provides its members with limited personal liability protection (like a corporation) and pass-through taxation of income, gains, and losses to its members (like a partnership). The LLC's governance flexibility, which permits the operating agreement to allocate management authority, economic rights, and governance provisions in virtually any configuration the parties agree upon, makes it the dominant vehicle for institutional real estate joint ventures in the United States.
See also: *Delaware LLC; Operating Agreement; Member; Manager*

Loan-to-Cost (LTC) Ratio

The ratio of a construction loan amount to the total cost of the development project it finances, expressed as a percentage. LTC is the primary leverage metric for construction loans: a 65% LTC means the lender is financing 65% of total project costs and the equity (JV common equity, plus any mezzanine debt or preferred equity) must fund the remaining 35%. Lenders typically impose maximum LTC limits (typically 60% to 75% for institutional development projects) as a primary underwriting constraint.
See also: *Construction Loan; Capital Stack; Common Equity*

Loan-to-Value (LTV) Ratio

The ratio of a loan amount to the appraised value (or market value) of the property securing the loan, expressed as a percentage. LTV is the primary leverage metric for permanent loans: a 65% LTV means the lender is financing 65% of the property's appraised value at stabilization. Permanent lenders typically impose maximum LTV limits (typically 60% to 70% for stabilized institutional properties) as a primary underwriting constraint for construction-to-permanent loan conversions.
See also: *Permanent Loan; Construction Loan Conversion; Appraisal*

Lookback Period

In a clawback provision, the period over which the developer member's prior promote distributions are included in the portfolio-level aggregate calculation. The lookback period determines how far back in the program's history prior promote distributions are considered when calculating whether a clawback obligation exists. A longer lookback period exposes the developer member to greater clawback risk from older promote distributions; a shorter lookback period limits the developer member's clawback exposure to more recent distributions.
See also: *Clawback; Promote; Programmatic JV*

M–N

Major Decision

Any action or decision that requires the prior written consent of the capital member under the operating agreement, as distinguished from day-to-day management decisions that fall within the developer member's unilateral authority. A comprehensive major decisions list typically includes: approval of the annual budget; approval of the business plan and amendments; incurrence of indebtedness; sale, transfer, or encumbrance of JV assets; contracts with affiliates of the developer member; capital calls above committed amounts; material litigation; tax elections; admission of new members; amendment of the operating agreement; changes to the development program; and disposition of the project.

See also: *Day-to-Day Management; Approval Period; Deemed Approval; Capital Member*

Manager

The person or entity designated in the LLC operating agreement with authority to manage the day-to-day operations and business affairs of the LLC, subject to the major decision approval rights of the capital member. In institutional real estate JVs, the developer member (or a wholly-owned affiliate of the developer member) typically serves as the initial manager. The manager's authority is defined and limited by the operating agreement, and the manager may be removed and replaced pursuant to the operating agreement's removal provisions.

See also: *Developer Member; Major Decision; Day-to-Day Management; Removal*

Market Rate

The prevailing rate or terms for a given product, service, or financing arrangement in a competitive market between unrelated parties. In the JV context, 'market rate' is the standard applied to affiliate transactions: a developer member affiliate's management fee, construction contract, or service agreement must be on terms no more favorable to the affiliate than would be available from an unrelated third-party provider of the same services in the same market. The market rate standard is most easily established through competitive bidding; where competitive bids are not available, a third-party opinion from an independent real estate advisor may be required.

See also: *Arm's-Length Transaction; Affiliate Transaction; Benchmarking*

Mediation

A voluntary, non-binding dispute resolution process in which a neutral third party (the mediator) facilitates negotiation between the disputing parties in an effort to reach a mutually acceptable resolution. Mediation is commonly required as a first step in a tiered dispute resolution process before binding arbitration may be initiated. Unlike arbitration, the mediator does not have authority to impose a binding resolution; the parties must agree on a settlement for mediation to succeed.

See also: *Arbitration; Expert Determination; Dispute Resolution*

Member

A person or entity that holds a membership interest in a limited liability company and is entitled to the rights (and subject to the obligations) of membership as specified in the LLC's operating agreement. In an institutional real estate JV, the members are the developer member and the capital member. The members' economic rights (distributions, allocations) and governance rights (voting, major decision approval, removal) are defined by the operating agreement.

See also: *Membership Interest; Developer Member; Capital Member; Operating Agreement*

Membership Interest

A member's ownership interest in a limited liability company, representing the member's proportionate share of the LLC's economic rights (including distributions and liquidating distributions) and governance rights (including voting and major decision approval). In a real estate JV, the developer member's and capital member's respective membership interests are specified in the operating agreement and may reflect different economic entitlements (through the promote structure) from their nominal percentage ownership of the LLC.
See also: *Member; Promote; Waterfall; Operating Agreement*

Mezzanine Debt

Subordinated debt that is junior in priority to senior construction or permanent debt but senior to common equity. Mezzanine debt in real estate transactions is typically secured by a pledge of the borrower's membership interests in the property-owning entity (rather than by a direct mortgage on the real property) and carries a higher interest rate than senior debt to compensate for its subordinated position. Mezzanine debt is frequently used to fill the gap between the senior loan amount and the total equity required for a project.
See also: *Capital Stack; Senior Debt; Preferred Equity; Pledge*

Minimum Hold Period

The minimum duration for which the JV must hold a property before specified exit mechanisms (the forced sale right, buy-sell trigger, or drag-along right) become available to the capital member. The minimum hold period protects the developer member against premature exits that would crystallize the JV's returns before the asset has achieved its full value potential. Minimum hold periods in development JVs are typically measured from stabilization or certificate of occupancy, not from the JV's formation date.
See also: *Hold Period; Forced Sale Right; Buy-Sell Mechanism; Drag-Along*

Net Operating Income (NOI)

The income generated by a real estate property after deduction of all operating expenses (property management fees, insurance, real estate taxes, maintenance, repairs, and reserves) but before deduction of debt service, capital expenditures, and income taxes. NOI is the primary metric used to value income-producing real estate (through the capitalization rate methodology) and to determine permanent loan sizing (through the debt service coverage ratio). NOI targets are a key component of the approved business plan and serve as a performance benchmark in many operating agreements.
See also: *Capitalization Rate; Debt Service Coverage Ratio; Stabilization*

Net Sale Proceeds

The amount of cash available for distribution through the JV's waterfall upon the disposition of its real property assets, calculated as gross sale proceeds minus all transaction costs, broker commissions, debt repayment (including prepayment penalties), closing adjustments, and any other amounts required to be paid at or before closing. The precise definition of 'Net Sale Proceeds,' meaning which deductions are permitted and which are not, directly affects the amount available for the preferred return and the promote calculation.
See also: *Gross Sale Proceeds; Waterfall; Distributable Cash*

- **Practice Note:** *Developer members should ensure that the list of permitted deductions from gross sale proceeds is comprehensive and specific, and that no non-arm's-length costs (such as above-market broker commissions payable to a developer member affiliate) can be deducted before the waterfall calculation.*

No-Cause Removal

The capital member's right to remove the developer member as manager of the JV at any time, without the occurrence of any defined Cause, upon delivery of written notice and the expiration of a defined notice period (typically 30 to 90 days). No-cause removal is the capital member's maximum governance protection, ensuring that it can replace a manager in whom it has lost confidence without having to prove specific misconduct. The economic consequences of no-cause removal, particularly whether the developer member retains its promote interest, are a central negotiating point in any operating agreement discussion.
See also: *Cause; For-Cause Removal; Post-Removal Economic Rights; Notice Period*

Non-Recourse

A characterization of a loan or obligation under which the lender's recourse upon default is limited to the collateral (typically the real property and the operating entity's assets) and the lender has no right to pursue the borrower's principals or affiliates for any deficiency. Most commercial real estate construction loans are structured as non-recourse to the borrower's principals, except for the specifically defined carve-out triggers that create personal liability under the carve-out guaranty.
See also: *Recourse; Carve-Out Guaranty; Completion Guaranty*

O–P

Operating Agreement

The comprehensive legal agreement governing the organization, management, membership, and economics of a limited liability company. In a real estate JV, the operating agreement is the primary governing document that defines every aspect of the developer member-capital member relationship: their respective economic interests, management rights, governance obligations, capital contribution requirements, distribution waterfall, and exit provisions. A well-drafted operating agreement for an institutional JV typically runs 60 to 120 pages in length and addresses every scenario the JV might encounter throughout its lifecycle.
See also: *Term Sheet; Limited Liability Company; Member; Waterfall*

Operating Reserves

Funds retained by the JV entity from operating cash flow (rather than distributed to members) to fund anticipated future operating expenses, capital replacements, or contingency costs. Operating reserves are a governance protection for the capital member: adequate reserves prevent emergency capital calls and protect the JV's ability to meet its ongoing financial obligations without requiring additional equity from the members. Operating agreements should specify minimum reserve levels that the manager is required to maintain before making distributions through the waterfall.
See also: *Available Cash; Capital Call; Reserve Requirements*

Permanent Loan

Long-term mortgage financing that replaces the construction loan upon a project's completion and stabilization. Permanent loans typically feature fixed interest rates (providing certainty of debt service costs), longer terms (10 to 30 years), and amortizing or interest-only payment structures. The conversion from construction loan to permanent loan is a major governance event in any development JV, requiring capital member approval of the permanent loan terms.
See also: *Construction Loan; Construction Loan Conversion; Debt Service Coverage Ratio*

Permitted Transfer

A transfer of a membership interest that is expressly authorized by the operating agreement without requiring the prior written consent of the other member. Permitted transfers typically include: transfers to wholly-owned affiliates of the transferring member (for tax or estate planning purposes), transfers to the transferring member's principals (subject to continued involvement of the key men), and transfers occurring by operation of law (inheritance, corporate merger). Permitted transfers should require the transferee to assume all of the transferor's obligations under the operating agreement and are typically subject to the requirement that the key men remain actively involved in managing the JV.
See also: *Transfer Restriction; Right of First Offer; Right of First Refusal*

Phantom Income

Taxable income allocated to a JV member for federal income tax purposes in a year in which no corresponding cash distribution is made. Phantom income arises when the JV generates taxable income (or gain) that is allocated to a member without a concurrent cash distribution, typically because the JV retains cash for operating reserves, debt service, or reinvestment rather than distributing it. Developer members are particularly vulnerable to phantom income in the early years of a development JV, when depreciation deductions are limited and book income may exceed distributable cash.
See also: *Allocated Income; Tax Allocation; Capital Account; Distribution*

Plan Assets

Under ERISA and the regulations issued thereunder, the assets of an employee benefit plan include not only the plan's direct investments but also, under certain circumstances, the assets of entities in which the plan invests. When a JV's or fund's assets are treated as 'plan assets' under the ERISA plan assets regulation, the JV's manager becomes an ERISA fiduciary subject to extensive obligations and prohibited transaction restrictions. Plan asset status is triggered when benefit plan investors (ERISA plan investors and IRAs) own 25% or more of any class of equity interest in the JV or fund, a threshold that must be carefully monitored.
See also: *ERISA; Benefit Plan Investor; Fiduciary; Prohibited Transaction*

Pre-Development

The phase of a development project preceding the commencement of construction, during which the developer member pursues site control, entitlements, design development, financing, and other pre-construction activities. Pre-development is the period of greatest entitlement risk and is typically funded by the developer member from its own resources or from a pre-development budget funded by the JV after its formation.
See also: *Entitlement; Development Fee; Pre-Development Budget*

Preferred Equity

An equity investment in a real estate project that carries a priority return (the preferred return) over common equity but is junior to all debt in the capital stack. Preferred equity differs from mezzanine debt in that it is structured as an equity investment (with a preferred return rather than a fixed debt obligation) rather than as a loan, although it functions economically similarly to mezzanine debt and typically includes enforcement rights (including the right to remove the common equity manager) upon payment defaults. In a JV operating agreement, the capital member's economic position often includes preferred equity economics, meaning priority return of capital and a preferred return, relative to the developer member's common equity position.
See also: *Capital Stack; Mezzanine Debt; Common Equity; Preferred Return*

Preferred Return

The minimum annualized return on the capital member's contributed capital that must be distributed before any promote is paid to the developer member. The preferred return is calculated as a defined annual percentage (typically 6% to 10% in current market practice) of the capital member's outstanding contributed capital, accruing from the date of each capital contribution. The preferred return may be structured as simple (accruing only on the original contributed capital) or compounding (accruing on both the original contributed capital and on previously accrued but unpaid preferred return). A cumulative preferred return carries forward any unpaid accrual until it is paid in full; a non-cumulative preferred return does not.
See also: *Promote; Waterfall; Contributed Capital; Compounding*

Private Placement

An offering of securities (including JV membership interests) that is exempt from SEC registration requirements under one of the exemptions provided by the Securities Act of 1933, most commonly Regulation D (Rule 506(b) or 506(c)). Private placements to accredited investors are a common method of raising equity capital for real estate JVs and syndications outside the institutional programmatic JV context.
See also: *Regulation D; Accredited Investor; Securities Act*

Pro Rata

Proportionate to each party's respective interest. In a JV operating agreement, pro rata distributions are made in proportion to each member's percentage membership interest (e.g., 90% to the capital member and 10% to the developer member if that is the ratio of their economic interests). Pro rata is the baseline distribution methodology absent a promote structure; the promote allows the developer member to receive more than its pro rata share of profits above the preferred return threshold.
See also: *Promote; Membership Interest; Waterfall*

Programmatic JV

A standing institutional partnership in which a capital member commits a defined total amount of equity capital for deployment by a developer member across multiple real estate investments within a defined asset class, geographic focus, and return profile, over a multi-year investment period. The programmatic JV is governed by a master agreement that establishes the overarching governance framework for the program, with individual investments documented through asset-level supplements. Key structural features include the investment period, program parameters, exclusivity obligations, portfolio-level promote economics, and the clawback.
See also: *Investment Period; Exclusivity; Clawback; Vintage Year*

Promote

The developer member's right to receive a disproportionate share of the JV's profits above the capital member's preferred return threshold, a share that exceeds the developer member's pro rata equity interest, in recognition of the value the developer member creates through its expertise, relationships, and execution. The promote is the primary economic incentive for the developer member and the most consequential economic provision in any JV operating agreement. A typical promote might entitle the developer member to 20% of profits above an 8% preferred return threshold, even though the developer member contributed only 10% of the equity.
See also: *Preferred Return; Waterfall; Clawback; Hurdle Rate*

- **Practice Note:** *The promote should be structured as a 'profits interest' for federal income tax purposes, allowing the developer member to receive promote distributions as capital gain income*

(rather than ordinary income) when the JV generates capital gain income at the asset level. To qualify as a profits interest, the promote must have no liquidation value at the time of grant, meaning that if the JV were liquidated on the grant date, the developer member would receive nothing for the promote because the preferred return threshold has not yet been satisfied.

R–S

Receiving Party

In a buy-sell mechanism, the member who receives the trigger party's notice specifying the buy-sell price. The receiving party has a defined response period (typically 30 to 60 days) to elect whether to purchase the trigger party's interest at the specified price or to sell its own interest at that price. The receiving party's election, buy or sell, is typically irrevocable once made.

See also: *Buy-Sell Mechanism; Trigger Party; Shotgun Provision*

Regulation D

A set of rules promulgated by the SEC under the Securities Act of 1933 providing safe harbor exemptions from the registration requirements for private securities offerings. Rule 506(b) permits sales to up to 35 non-accredited investors (with disclosure obligations) and an unlimited number of accredited investors, without general solicitation. Rule 506(c) permits general solicitation but requires all purchasers to be verified accredited investors. Most real estate JV and syndication offerings rely on Regulation D exemptions.

See also: *Private Placement; Accredited Investor; Securities Act*

Removal

The termination of the developer member's role as manager of the JV entity, exercised by the capital member pursuant to the operating agreement's removal provisions. Removal may be for cause (triggered by specifically defined Cause events, subject to notice and cure) or without cause (exercisable at the capital member's discretion, typically upon advance written notice). The economic consequences of removal, including the treatment of the developer member's promote, accrued fees, and membership interest, are among the most consequential and most frequently litigated provisions in JV operating agreements.

See also: *For-Cause Removal; No-Cause Removal; Post-Removal Economic Rights; Cause*

Reserve Requirements

The minimum cash reserves that the JV entity is required to maintain from operating cash flow before making distributions to members through the waterfall. Reserve requirements protect the JV's financial stability: operating reserves (typically three to six months of projected operating expenses), capital replacement reserves (annual contributions for anticipated future capital expenditures), and debt service reserves (typically three to six months of projected debt service) all serve to cushion the JV against temporary revenue shortfalls without requiring emergency capital calls.

See also: *Operating Reserves; Available Cash; Capital Call*

Return of Capital

The first tier of the distribution waterfall, in which each member's contributed capital is returned in full before any preferred return or promote is distributed. The return of capital priority is the capital member's most fundamental structural protection: it ensures that the capital member recovers its invested equity before the developer member receives any promote distributions. In most institutional JVs, the capital member's contributed capital is returned ahead of the developer member's co-investment within this first tier.

See also: *Waterfall; Contributed Capital; Preferred Return; Promote*

Right of First Offer (ROFO)

A transfer restriction provision entitling the non-selling member to receive an offer to purchase the selling member's interest at a price and terms specified by the selling member, before the selling member may sell its interest to a third party. The non-selling member has a defined response period to accept or decline the offer. If the non-selling member declines (or is deemed to have declined by non-response), the selling member may sell its interest to any third party at or above the offered price and on terms no more favorable to the buyer than those offered to the non-selling member. The ROFO is more selling-member-favorable than the ROFR because the selling member sets the price.

See also: *Right of First Refusal; Transfer Restriction; Permitted Transfer*

Right of First Refusal (ROFR)

A transfer restriction provision entitling the non-selling member to purchase the selling member's interest on the same terms as a third-party purchase offer that the selling member has already negotiated. The ROFR is more buying-member-favorable than the ROFO because the non-selling member has the right to match a market-tested price rather than committing to a price set by the selling member before a third-party offer has been obtained.

See also: *Right of First Offer; Transfer Restriction; Permitted Transfer*

Section 704(b)

The requirement under the Internal Revenue Code that a partnership's tax allocations have 'substantial economic effect,' meaning that they must reflect the partners' actual economic arrangement, in order to be respected for federal income tax purposes. Treasury Regulation Section 1.704-1(b)(2) establishes safe harbor conditions for substantial economic effect, including requirements for maintaining capital accounts in accordance with the regulations, making liquidating distributions in accordance with positive capital account balances, and imposing a deficit restoration obligation on partners. JV operating agreements must comply with these requirements to ensure that the agreed economic arrangement is respected for tax purposes.

See also: *Capital Account; Tax Allocation; Section 704(c); Substantial Economic Effect*

Section 704(c)

The provision of the Internal Revenue Code requiring that any built-in gain or loss on property contributed to a partnership be allocated to the contributing partner upon the partnership's subsequent sale of that property, preventing the shifting of pre-contribution gain or loss to other partners. Section 704(c) is particularly relevant in development JVs where the developer member contributes appreciated land: the built-in gain on the contributed land (the difference between the land's fair market value at contribution and the developer member's tax basis) will be allocated entirely to the developer member when the JV sells the property.

See also: *Section 704(b); Contributed Property; Built-In Gain; Tax Allocation*

Shotgun Provision

See Buy-Sell Mechanism.

See also: *Buy-Sell Mechanism; Trigger Party; Receiving Party*

Soft Costs

The non-construction costs of a real estate development project, including architectural and engineering fees, legal fees, permitting and entitlement costs, financing costs (including construction loan interest and fees), insurance premiums, marketing costs, and developer

fees. Soft costs are distinguished from hard costs (direct construction costs). The distinction between hard and soft costs is relevant for development fee calculations, lender soft cost limitations, and tax characterization of project costs.
See also: *Hard Costs; Total Project Cost; Development Fee*

Stabilization

The achievement by a development project of defined occupancy and income thresholds for a specified consecutive period, marking the transition from the lease-up phase to the operating phase. Stabilization is typically defined as the achievement of economic occupancy (net of concessions) of 90% to 95% of projected stabilized occupancy for 90 consecutive days. The achievement of stabilization triggers important economic and governance events in any development JV: the construction-to-permanent loan conversion becomes possible, the lease-up period ends, the forced sale and buy-sell trigger periods may commence, and promote vesting milestones may be achieved.
See also: *Economic Occupancy; Lease-Up Period; Certificate of Occupancy; Promote Vesting*

- **Practice Note:** *The definition of 'Stabilization' is one of the most consequential provisions in any development JV operating agreement. A threshold set too low allows the developer member to claim stabilization (and potentially trigger promote distributions) before genuine market-rate performance has been achieved; a threshold set too high may prevent the capital member from initiating exit proceedings even after the project is performing at market-rate occupancy levels.*

Step-Down Provision

A programmatic JV governance mechanism that allows the capital member to reduce its future capital commitment based on defined performance triggers, without terminating the relationship entirely. Step-down mechanisms, which may be 'soft' (reducing the commitment by a defined percentage) or 'hard' (terminating the investment period entirely), give the capital member a measured response to developer member underperformance, preserving the relationship while reducing risk exposure.
See also: *Programmatic JV; Performance Benchmark; Investment Period; Capital Commitment*

Substantial Economic Effect

The standard under Treasury Regulation Section 1.704-1(b) that must be satisfied for a partnership's tax allocations to be respected for federal income tax purposes. An allocation has substantial economic effect if it: (1) has economic effect (it is reflected in the partners' capital accounts, liquidating distributions are made in accordance with capital account balances, and partners with deficit capital accounts are obligated to restore them); and (2) is substantial (it has a reasonable possibility of affecting the dollars received by the partners). All JV operating agreements should include capital account maintenance provisions designed to comply with the substantial economic effect standard.
See also: *Section 704(b); Capital Account; Tax Allocation*

T–Z

Tag-Along Right

A transfer restriction provision (also called a 'co-sale right') entitling the developer member to sell its membership interest alongside the capital member in any transaction in which the capital member sells its interest to a third party, on equivalent economic terms. The tag-along right protects the developer member against being left in the JV with an unknown third-party successor to the original capital member, whose investment objectives and governance expectations may be entirely different from the original partner's.
See also: *Drag-Along; Transfer Restriction; Permitted Transfer*

Tax Gross-Up

An adjustment to a clawback calculation that accounts for income taxes paid by the developer member on previously received promote distributions, so that the developer member is required to return only its after-tax promote rather than the gross promote amount. Without a tax gross-up, the clawback would require the developer member to return the full amount of prior promote distributions even though the developer member paid income tax on those distributions and therefore never received the full gross amount on an after-tax basis.

See also: *Clawback; Promote; Lookback Period*

Temporary Certificate of Occupancy (TCO)

A provisional certification issued by the local building department permitting occupancy of a building before all items on the final inspection punch list are complete. A TCO is commonly issued when the building is substantially complete and safe for occupancy, but minor items remain outstanding. For multifamily projects, the TCO typically permits tenant move-ins to begin, initiating the lease-up period. JV operating agreements should specify whether the TCO or the final CO constitutes the relevant milestone for promote vesting, stabilization measurement, and other milestone-based provisions.

See also: *Certificate of Occupancy; Stabilization; Promote Vesting*

Term Sheet

A preliminary document summarizing the key economic and governance terms of a proposed joint venture before the parties invest in full-scale legal documentation. Most real estate JV term sheets are expressly non-binding with respect to their substantive economic and governance terms, but contain binding provisions regarding exclusivity, confidentiality, and (sometimes) cost-sharing. A well-negotiated term sheet resolves the most significant economic and governance points of contention at the outset, reducing the scope and cost of the subsequent operating agreement negotiation.

See also: *Operating Agreement; Exclusivity; Confidentiality*

Total Project Cost

The sum of all costs required to complete a real estate development project, including land acquisition costs (or the agreed value of contributed land), hard construction costs, soft costs (design, permitting, professional fees, insurance), financing costs (construction loan interest, fees, and costs), developer fees, and any other costs specifically included in the approved development budget. Total project cost is the basis for development fee calculations, LTC ratios, and the overall project underwriting.

See also: *Hard Costs; Soft Costs; Development Fee; Loan-to-Cost Ratio*

Transfer Restriction

Any limitation on a member's ability to sell, assign, pledge, hypothecate, or otherwise transfer its membership interest in the JV. Transfer restrictions are a standard feature of institutional JV operating agreements, serving to protect each party against the other party transferring its interest to an unknown or unacceptable successor. Common transfer restriction mechanisms include rights of first offer (ROFO), rights of first refusal (ROFR), drag-along rights, tag-along rights, buy-sell provisions, and absolute prohibitions on certain transfers without consent.

See also: *Right of First Offer; Right of First Refusal; Drag-Along; Tag-Along*

Trigger Party

In a buy-sell mechanism, the member who initiates the buy-sell process by delivering a written notice specifying the price at which it is willing either to purchase the receiving party's interest or to sell its own interest. The trigger party sets the buy-sell price unilaterally. Because the trigger party does not know at the time of setting the price whether it will be buying or selling, it is theoretically incentivized to set a price it considers genuinely fair. In practice, financial asymmetry between the parties can undermine this theoretical fairness incentive.

See also: *Buy-Sell Mechanism; Receiving Party; Shotgun Provision*

Unrelated Business Taxable Income (UBTI)

Income earned by a tax-exempt organization from a trade or business that is regularly carried on and is not substantially related to the organization's exempt purpose. For real estate investors, UBTI most commonly arises from debt-financed income, meaning income from real property (or gains from the sale of real property) acquired with debt financing. Tax-exempt capital members (pension funds, endowments, foundations) are subject to federal income tax on UBTI at the corporate tax rate, eroding the after-tax returns of their JV investments. UBTI mitigation strategies include the use of blocker entities and investment structuring to limit debt-financed income.

See also: *Blocker Entity; Tax-Exempt Investor; ERISA; FIRPTA*

Vesting

The process by which an economic right, most commonly the developer member's promote, becomes unconditionally earned and non-forfeitable through the achievement of defined milestones or the passage of defined time periods. In a milestone-based promote vesting schedule, defined percentages of the promote vest as specific development milestones are achieved (construction loan closing, 50% construction completion, certificate of occupancy, stabilization, and disposition). Vested promote rights are typically preserved upon removal; unvested rights may be forfeited (in the case of for-cause removal) or preserved (in the case of no-cause removal).

See also: *Promote; Milestone; For-Cause Removal; No-Cause Removal*

Vintage Year

In a programmatic JV, the calendar year in which a specific investment was acquired or committed to, used to group assets into cohorts for the purpose of calculating vintage-year promote and clawback. The vintage-year structure recognizes that assets acquired in early years of the investment period will typically be disposed of much earlier than assets acquired in later years, and calculates the promote separately for each vintage cohort to avoid mixing the performance of early and late investments in a single aggregate calculation.

See also: *Programmatic JV; Clawback; Promote; Investment Period*

Waterfall

The hierarchical distribution framework in a JV operating agreement specifying the order, priority, and amounts of distributions to each member. A standard four-tier waterfall distributes available cash in the following sequence: (1) return of the capital member's contributed capital (and sometimes the developer member's co-investment, on a pari passu basis); (2) the capital member's preferred return on its contributed capital; (3) an optional catch-up tier for the developer member; and (4) residual profit sharing between the capital member and developer member in the promote percentages. The precise mechanics of each tier, including the definitions of key terms, the sequencing of priorities, and the treatment of interim events, determine the economic outcome for both parties and are the primary subject of JV dispute litigation.

See also: *Return of Capital; Preferred Return; Catch-Up; Promote; Distributable Cash*

- **Practice Note:** *A well-drafted waterfall should be accompanied by a worked numerical example confirming both parties' understanding of the expected economic outcomes under representative scenarios. The example should cover both the base case (meeting the preferred return threshold) and a stress scenario (missing the preferred return threshold), illustrating the different economic outcomes for each party in each scenario.*

Withholding

The obligation of the JV entity (acting through the developer member as manager) to deduct and remit to the appropriate taxing authority a portion of distributions made to members who are subject to withholding requirements, including FIRPTA withholding on distributions to foreign capital members and state nonresident withholding on distributions to members who are not residents of the state where the JV operates. Withheld amounts are typically treated as distributions to the applicable member for waterfall calculation purposes.

See also: *FIRPTA; UBTI; Withholding Tax*

Worked Example

A numerical illustration embedded in or attached to a JV operating agreement that demonstrates the mathematical application of the waterfall, IRR, promote, or other economic provision under a hypothetical set of assumptions. Worked examples are one of the most effective dispute prevention tools available in JV drafting: they force both parties to confirm their economic understanding of the deal before signing and provide an authoritative reference point for future waterfall calculations. Experienced JV counsel routinely require worked examples as exhibits to operating agreements and ensure they are confirmed by both parties' financial advisors before execution.

See also: *Waterfall; IRR; Promote; Distribute Cash*

- **Practice Note:** *If there is a discrepancy between the operating agreement's waterfall provisions and the worked example, the worked example should control. This drafting principle creates a strong incentive for both parties to review the worked example carefully before signing and ensures that any misunderstanding is surfaced and resolved before the agreement becomes effective.*

Yield-on-Cost

The ratio of a stabilized property's projected net operating income to its total development cost, expressed as a percentage. Yield-on-cost is a primary underwriting metric for development JVs: a project with a yield-on-cost above the prevailing capitalization rate for comparable stabilized properties creates value (the development spread) that is the economic justification for the JV's investment. A project with a yield-on-cost below the prevailing cap rate destroys value, because the developed property is worth less than it cost to build.

See also: *Net Operating Income; Capitalization Rate; Total Project Cost; Development Spread*

The definitions provided in this glossary represent the most commonly used meanings of each term in the context of institutional real estate joint ventures governed by Delaware LLC law. Parties should always consult the specific defined terms section of their operating agreement for the authoritative definition applicable to their transaction, because the operating agreement's definitions control, and they may differ materially from the general meanings described here.

Terms whose definitions are most frequently the subject of JV disputes are identified throughout this glossary with a practice note. These practice notes distill the key drafting

lessons from actual JV dispute experience and should be treated as minimum compliance standards, not merely aspirational guidance.

If a term you are looking for does not appear in this glossary, please consult the handbook chapter most closely related to the subject matter: Chapter 2 for economic and waterfall terms, Chapter 3 for governance and control terms, Chapters 4 and 5 for negotiating-specific terms, Chapter 6 for term sheet terms, Chapter 7 for development-specific terms, Chapter 8 for programmatic JV terms, and Chapter 9 for dispute-related terms.

APPENDIX B

Sample Distribution Waterfall Calculations

The distribution waterfall is the economic heart of every real estate joint venture, and the provision most frequently the subject of costly dispute. This appendix translates the waterfall concepts examined throughout this handbook into fully worked numerical examples, demonstrating precisely how each tier of the waterfall operates under a range of economic scenarios. These examples are the practitioner's companion to Chapter 2's conceptual framework and Chapter 9's dispute analysis.

This appendix contains seven fully worked waterfall examples, progressing from a simple two-tier structure to a complex multi-hurdle IRR waterfall with a catch-up, a clawback, and a refinancing event. Each example includes: (1) a complete assumption set; (2) a step-by-step narrative calculation; (3) a formatted distribution table with color-coded tiers; (4) an IRR summary for each party; and (5) key insights that illuminate how specific drafting choices affect the economic outcome for each party.

All figures are illustrative. They are designed to demonstrate waterfall mechanics, not to represent market standard economics for any specific asset class or transaction. Actual transaction terms must be negotiated based on the specific project, parties, market conditions, and legal requirements applicable to each deal.

The seven examples covered in this appendix are:

- Example 1: Simple Two-Tier Waterfall, Return of Capital + Pro Rata Sharing
- Example 2: Standard Three-Tier Waterfall, Return of Capital + Preferred Return + Promote
- Example 3: Four-Tier Waterfall with Catch-Up
- Example 4: Multi-Hurdle IRR Waterfall with Tiered Promote
- Example 5: Below-Preferred-Return Scenario, When No Promote Is Earned
- Example 6: Waterfall with Refinancing Proceeds and Interim Distribution
- Example 7: Programmatic JV Clawback, Portfolio-Level Lookback Calculation

Color Key for All Waterfall Tables:

Tier 1: Return of Capital	Tier 2: Preferred Return	Tier 3: Catch-Up (if applicable)	Tier 4: Residual / Promote

EXAMPLE 1 SIMPLE TWO-TIER WATERFALL

Return of Capital + Pro Rata Sharing, No Preferred Return, No Promote

This simplest possible waterfall structure illustrates the baseline: equity contributions returned first, then all remaining profits shared in proportion to equity ownership. While rarely used in institutional JVs (which almost universally include a preferred return and promote), this example establishes the conceptual foundation on which all subsequent examples build.

Example 1 Assumptions	
Total JV Equity	$10,000,000
Capital Member Equity (80%)	$8,000,000
Developer Member Equity (20%)	$2,000,000
Hold Period	4 years
Total Proceeds Available for Distribution	$16,000,000
Waterfall Structure	Tier 1: Return of all contributed capital (CM first, then DM) Tier 2: Remaining profits split 80% CM / 20% DM (pro rata)

Distribution Tier	Total Available	Capital Member	Developer Member
TIER 1: Return of Capital			
Capital Member capital returned	$8,000,000	$8,000,000	-
Developer Member capital returned	$2,000,000	-	$2,000,000
Subtotal, Tier 1	$10,000,000	$8,000,000	$2,000,000
Remaining after Tier 1	**$6,000,000**		
TIER 2: Pro Rata Profit Sharing (80% / 20%)			
Capital Member share (80%)	$4,800,000	$4,800,000	-
Developer Member share (20%)	$1,200,000	-	$1,200,000
Subtotal, Tier 2	$6,000,000	$4,800,000	$1,200,000
TOTAL DISTRIBUTIONS	**$16,000,000**	**$12,800,000**	**$3,200,000**
As % of Total Distributions	100%	80.0%	20.0%

IRR Calculation

Capital Member: Year 0: ($8,000,000) Year 4: $12,800,000
Developer Member: Year 0: ($2,000,000) Year 4: $3,200,000
Capital Member IRR: Capital Member: ~12.5% IRR | Developer Member: ~12.5% IRR

Note: Both parties earn the same IRR because distributions are perfectly proportional to equity contributed. The developer member receives no economic benefit from its management expertise beyond what its 20% equity interest would produce in any passive investment, which illustrates why the promote exists.

- **Key Insight:** In a pure pro rata waterfall, the developer member earns no additional return for its development expertise, management risk, or guaranty exposure. The promote structure, introduced in Example 2, corrects this by giving the developer member a disproportionate share of profits above a threshold return to the capital member.

EXAMPLE 2 STANDARD THREE-TIER WATERFALL

Return of Capital + 8% Simple Preferred Return + 80/20 Promote, Base Case

This example represents the most common institutional JV waterfall structure: return of capital, followed by a preferred return to the capital member, followed by an 80/20 residual profit split. It uses simple (non-compounding) preferred return to establish the baseline, and Example 3 will contrast this with compounding preferred return.

Example 2 Assumptions	
Total JV Equity	$20,000,000
Capital Member Equity (90%)	$18,000,000
Developer Member Equity (10%)	$2,000,000
Hold Period	5 years
Preferred Return Rate	8.0% per annum, simple (non-compounding), cumulative
Accrual Period	5 years (from initial funding to distribution date)
Promote Structure	80% Capital Member / 20% Developer Member above preferred return
Total Proceeds Available for Distribution	$35,000,000
Developer Fees Paid (above-the-line)	$2,500,000 (already paid; not included in waterfall)

Step-by-Step Calculation:

Preferred Return = $18,000,000 × 8.0% × 5 years = $7,200,000

Preferred Return on Developer Member co-investment = $2,000,000 × 8.0% × 5 years = $800,000 (Note: in this example, only the Capital Member receives a preferred return; the Developer Member's co-investment earns a pro rata share of residual profits only)

Distribution Tier	Total Available	Capital Member (90%)	Developer Member (10%)
TIER 1: Return of Contributed Capital			
Capital Member capital returned	$18,000,000	$18,000,000	-
Developer Member capital returned	$2,000,000	-	$2,000,000
Subtotal, Tier 1	$20,000,000	$18,000,000	$2,000,000
Remaining after Tier 1	**$15,000,000**		
TIER 2: Capital Member Preferred Return (8% simple × 5 yrs)			
Preferred return payable	$7,200,000	$7,200,000	-
Subtotal, Tier 2	$7,200,000	$7,200,000	$0
Remaining after Tier 2	**$7,800,000**		
TIER 3: Residual Profits (80% CM / 20% DM, the Promote)			
Capital Member share (80%)	$6,240,000	$6,240,000	-
Developer Member Promote (20%)	$1,560,000	-	$1,560,000
Subtotal, Tier 3	$7,800,000	$6,240,000	$1,560,000
TOTAL DISTRIBUTIONS	**$35,000,000**	**$31,440,000**	**$3,560,000**
As % of Total Distributions	100%	89.8%	10.2%
Promote earned above pro rata (10%)	-	-	+$780,000 (20% vs 10% of residual tier)

IRR Calculation

Capital Member: Year 0: ($18,000,000) Year 5: $31,440,000

Developer Member: Year 0: ($2,000,000) Year 5: $3,560,000 + $2,500,000 fees = $6,060,000 total

Capital Member IRR: Capital Member: ~11.8% IRR | Developer Member: ~12.2% IRR (on equity alone) / much higher including fees

Note: The developer member's fee income ($2,500,000 paid above-the-line over 5 years) significantly enhances total economic return beyond the equity waterfall.

- **Key Insight:** The promote changes the developer member's return. On the residual profit tier, the promote pays the developer member 20% of the $7,800,000 split ($1,560,000) instead of a pro rata 10% ($780,000), a $780,000 premium for value creation. Across all distributions that lifts the developer member to 10.2% of the total, modestly above its 10% equity interest, because the capital member's preferred return absorbs most of the upside before the promote tier is reached. Combined with above-the-line fee income, the developer member's total economic return substantially exceeds a passive 10% equity co-investment. The combination of fees, which compensate for services, and the promote, which compensates for value creation, is the economic model that makes institutional JVs work for developer members.

EXAMPLE 3 FOUR-TIER WATERFALL WITH CATCH-UP

Compounding Preferred Return + Developer Member Catch-Up, Showing the Economic Impact

This example introduces two refinements: (1) a compounding preferred return, versus the simple preferred return in Example 2, and (2) a catch-up provision that accelerates the developer member's promote receipt. The comparison with Example 2 quantifies the economic impact of each choice, which is critical information for any JV negotiation.

Example 3 Assumptions	
Total JV Equity	$20,000,000
Capital Member Equity (90%)	$18,000,000
Developer Member Equity (10%)	$2,000,000
Hold Period	5 years
Preferred Return Rate	8.0% per annum, COMPOUNDING annually, cumulative
Promote Structure	Tier 3: 100% to Developer Member (catch-up) until DM has received 20% of Tiers 2+3 Tier 4: 80% Capital Member / 20% Developer Member
Total Proceeds Available for Distribution	$35,000,000
Compounding Preferred Return Calculation	$18,000,000 × (1.08)^5 - $18,000,000 = $26,448,000 - $18,000,000 = $8,448,000

Compounding preferred return calculation: $18,000,000 × [(1.08)^5 - 1] = $18,000,000 × 0.46933 = $8,447,940, rounded to $8,448,000.

Catch-up mechanics: After Tier 2, the developer member receives 100% of distributions until it has received 20% of the combined Tier 2 and Tier 3 distributions (the preferred return plus the catch-up). The Tier 2 preferred return is $8,448,000, all to the capital member. Solving C = 20% × ($8,448,000 + C) gives a catch-up of C = $2,112,000. At that point the developer member holds 20% of the combined Tier 2 and Tier 3 pool ($2,112,000 of $10,560,000), and the Tier 4 residual then splits 80/20, leaving the developer member with exactly 20% of all profit above the return of capital.

Distribution Tier	Total Available	Capital Member	Developer Member
TIER 1: Return of Contributed Capital			
Capital Member capital returned	$18,000,000	$18,000,000	-
Developer Member capital returned	$2,000,000	-	$2,000,000
Subtotal, Tier 1	$20,000,000	$18,000,000	$2,000,000
Remaining after Tier 1	**$15,000,000**		

Distribution Tier	Total Available	Capital Member	Developer Member
TIER 2: Compounding Preferred Return (8% × 5 yrs compounded)			
Preferred return payable (compounding)	$8,448,000	$8,448,000	-
Subtotal, Tier 2	$8,448,000	$8,448,000	$0
Remaining after Tier 2	**$6,552,000**		
TIER 3: Developer Member Catch-Up (100% to DM)			
Catch-up: DM receives until 20% of Tiers 2+3 reached	$2,112,000	-	$2,112,000
Subtotal, Tier 3	$2,112,000	$0	$2,112,000
Remaining after Tier 3	**$4,440,000**		
TIER 4: Residual Profits (80% CM / 20% DM)			
Capital Member share (80%)	$3,552,000	$3,552,000	-
Developer Member Promote (20%)	$888,000	-	$888,000
Subtotal, Tier 4	$4,440,000	$3,552,000	$888,000
TOTAL DISTRIBUTIONS	**$35,000,000**	**$30,000,000**	**$5,000,000**
As % of Total Distributions	100%	85.7%	14.3%

Example 2 vs. Example 3: The Economic Impact of Compounding and Catch-Up

Economic Metric	Ex. 2: Simple / No Catch-Up	Ex. 3: Compounding + Catch-Up	Difference
Preferred return paid	$7,200,000	$8,448,000	+$1,248,000 to CM
Capital Member total distributions	$31,440,000	$30,000,000	−$1,440,000
Developer Member total distributions	$3,560,000	$5,000,000	+$1,440,000
Capital Member IRR	~11.8%	~10.8%	−1.0% IRR impact
Developer Member equity IRR	~12.2%	~20.1%	+7.9% IRR impact
DM as % of total distributions	10.2%	14.3%	+4.1 percentage points

- **Key Insight:** The compounding preferred return costs the developer member $1,248,000 in additional preferred return payable to the capital member, compared to simple preferred return. The catch-up provision then directs $2,112,000 to the developer member before the residual tier begins, restoring it to 20% of all profit above the return of capital. Net effect: the developer member's total

equity distribution is $1,440,000 higher in Example 3 than in Example 2, despite the more expensive compounding preferred return. This is why developer members fight for catch-up provisions and capital members resist them.

EXAMPLE 4 MULTI-HURDLE IRR WATERFALL

Tiered Promote with Three IRR Thresholds, Performance-Based Incentive Structure

This example demonstrates a multi-hurdle IRR waterfall, the most sophisticated and most incentive-aligned waterfall structure in institutional real estate JV practice. The developer member earns an escalating promote percentage as the capital member's IRR exceeds successive thresholds, creating powerful incentives to maximize and accelerate returns.

Example 4 Assumptions	
Total JV Equity	$30,000,000
Capital Member Equity (90%)	$27,000,000
Developer Member Equity (10%)	$3,000,000
All equity funded at Year 0	Single closing; no draw-down for simplicity
Total Proceeds Available (Scenario A, Strong Performance)	$65,000,000
Waterfall: Tier 1	Return of all contributed capital (CM priority)
Waterfall: Tier 2	8% cumulative compounding preferred return to CM
Waterfall: Tier 3	Residual: 85% CM / 15% DM Promote (CM IRR < 12%)
Waterfall: Tier 4	Residual above 12% CM IRR: 80% CM / 20% DM Promote
Waterfall: Tier 5	Residual above 18% CM IRR: 70% CM / 30% DM Promote
Hold Period for Scenario A	5 years
Compounding Preferred Return (8% × 5 yrs)	$27,000,000 × [(1.08)^5 − 1] = $12,672,000

Step 1: Determine total available proceeds: $65,000,000

Step 2: Return contributed capital (Tier 1): $27,000,000 CM + $3,000,000 DM = $30,000,000. Remaining: $35,000,000.

Step 3: Pay CM compounding preferred return (Tier 2): $12,672,000. Remaining: $22,328,000.

Step 4: Determine CM IRR achieved. At this point the CM has received $27M + $12.672M = $39.672M on a $27M investment over 5 years. CM IRR =

[(39,672,000/27,000,000)^(1/5)] − 1 ≈ 8.0%. We now need to determine where in the tiered promote structure the remaining $22,328,000 of residual profits fall.

Step 5: Size each IRR band by the additional capital member receipts needed to reach the next threshold. Because the capital member receives only its tier split (85% or 80%) of each band, the band total equals the capital member's required receipt divided by its split percentage.

For a 12% capital member IRR, the capital member needs cumulative receipts of $27,000,000 × (1.12)^5 = $47,583,225, a gap of $7,911,225 from its current $39,672,000. At an 85% split, the Tier 3 band totals $7,911,225 / 0.85 = $9,307,000: $7,911,000 to the capital member and $1,396,000 to the developer member, which brings the capital member to a 12% IRR.

For an 18% capital member IRR, the capital member would need $27,000,000 × (1.18)^5 = $61,769,460, requiring an additional $14,186,235, or a Tier 4 band of $17,732,794 at an 80% split. Only $13,021,000 remains after Tier 3, so the distribution stops within the 80/20 band: the capital member's IRR tops out at roughly 16.5%, and the 70/30 tier, which requires a capital member IRR above 18%, is not reached.

The remaining $13,021,000 is split 80/20 in Tier 4: $10,417,000 to the capital member and $2,604,000 to the developer member. No proceeds remain for the 70/30 tier.

Distribution Tier	Total Available	Capital Member	Developer Member
TIER 1: Return of Contributed Capital			
Capital Member capital returned	$27,000,000	$27,000,000	-
Developer Member capital returned	$3,000,000	-	$3,000,000
Subtotal, Tier 1	$30,000,000	$27,000,000	$3,000,000
Remaining after Tier 1	**$35,000,000**		
TIER 2: 8% Compounding Preferred Return (5 yrs)			
Preferred return payable	$12,672,000	$12,672,000	-
Remaining after Tier 2	**$22,328,000**		
TIER 3: 85% CM / 15% DM (CM IRR 8%–12% band)			
CM share (85%), to the 12% IRR threshold	$7,911,000	$7,911,000	-
DM Promote Tier 3 (15%)	$1,396,000	-	$1,396,000
Subtotal, Tier 3	$9,307,000	$7,911,000	$1,396,000
Remaining after Tier 3	**$13,021,000**		

Distribution Tier	Total Available	Capital Member	Developer Member
TIER 4: 80% CM / 20% DM (CM IRR 12%–18% band)			
CM share (80%), within the 12% to 18% band	$10,417,000	$10,417,000	-
DM Promote Tier 4 (20%)	$2,604,000	-	$2,604,000
Subtotal, Tier 4	$13,021,000	$10,417,000	$2,604,000
Remaining after Tier 4	**$0**		
TIER 5: 70% CM / 30% DM (CM IRR above 18%, Not Reached)			
CM share (70%)	$0	$0	-
DM Promote Tier 5 (30%)	$0	-	$0
Subtotal, Tier 5	$0	$0	$0
TOTAL DISTRIBUTIONS	**$65,000,000**	**$58,000,000**	**$7,000,000**
Developer Member Total Promote (all tiers)	-	-	$4,000,000
Capital Member Achieved IRR	~16.5%		

- **Key Insight:** The multi-hurdle structure creates powerful alignment: the developer member earns progressively more promote as it delivers higher returns to the capital member. Above the 8% preferred return, the developer member earns 15% of residual profits; above a 12% capital member IRR, 20%; and above an 18% capital member IRR, 30%. In this scenario, strong performance carries the capital member to roughly a 16.5% IRR, so the distribution climbs into the 80/20 band but does not reach the 70/30 tier, which requires a capital member IRR above 18%. The structure rewards the developer member not merely for clearing the preferred return, but for maximizing value, because the higher the capital member's return, the larger the developer member's share of the excess.

EXAMPLE 5 BELOW-PREFERRED-RETURN SCENARIO

When No Promote Is Earned, Partial Capital Return and Preferred Return Shortfall

Every developer member must understand how the waterfall operates when the project underperforms. This example shows two sub-scenarios: (A) the project generates enough to return all capital but not enough to satisfy the full preferred return; and (B) the project generates less than the total contributed capital. Both scenarios are far more common than parties anticipate at the time of signing.

Example 5 Assumptions	
Total JV Equity	$20,000,000
Capital Member Equity (90%)	$18,000,000
Developer Member Equity (10%)	$2,000,000

Hold Period	5 years
Preferred Return Rate	8% per annum, simple, cumulative
Total Preferred Return Accrued	$7,200,000 ($18M × 8% × 5 years)
Scenario A: Total Proceeds	$22,000,000 (capital returned; preferred return partially paid)
Scenario B: Total Proceeds	$15,000,000 (partial capital return only; no preferred return; no promote)
Promote	80% CM / 20% DM above preferred return (not earned in either scenario)

Scenario A: Partial Preferred Return ($22,000,000 proceeds)

Distribution Tier	Total Available	Capital Member	Developer Member
TIER 1: Return of Contributed Capital			
Capital Member capital returned	$18,000,000	$18,000,000	-
Developer Member capital returned	$2,000,000	-	$2,000,000
Subtotal, Tier 1	$20,000,000	$18,000,000	$2,000,000
Remaining after Tier 1	**$2,000,000**		
TIER 2: Preferred Return (8% × 5 yrs = $7,200,000 owed)			
Amount available for preferred return	$2,000,000	$2,000,000	-
Preferred return shortfall (unpaid accrual)	($5,200,000)	($5,200,000)	-
TIER 3: Promote (Not Reached)	$0	$0	$0
TOTAL DISTRIBUTIONS	**$22,000,000**	**$20,000,000**	**$2,000,000**
Developer Member Promote Earned	$0		$0 (preferred return not satisfied)

Scenario B: Partial Capital Return ($15,000,000 proceeds)

Distribution Tier	Total Available	Capital Member	Developer Member
TIER 1: Return of Contributed Capital (Partially Satisfied)			
Total capital owed	$20,000,000	$18,000,000	$2,000,000
Available for distribution	$15,000,000		

Distribution Tier	Total Available	Capital Member	Developer Member
Capital Member receives (pari passu, 90% of $15M)	$13,500,000	$13,500,000	-
Developer Member receives (remaining)	$1,500,000	-	$1,500,000
Capital shortfall (Capital Member)	($4,500,000)	($4,500,000)	-
Capital shortfall (Developer Member)	($500,000)	-	($500,000)
TIER 2: Preferred Return (Not Reached)	$0	$0	-
TIER 3: Promote (Not Reached)	$0	$0	$0
TOTAL DISTRIBUTIONS	**$15,000,000**	**$13,500,000**	**$1,500,000**
Capital Member: Loss on equity	-	($4,500,000) loss	
Developer Member: Loss on equity	-		($500,000) loss

- **Key Insight:** In underperformance scenarios, the developer member loses its co-investment alongside the capital member, but its loss is limited to its equity at risk. In Scenario B, the developer member loses $500,000 of its $2,000,000 co-investment. The developer member has, however, already received above-the-line developer fees during the project's life, fees that are not subject to the waterfall and are not returned upon underperformance. This is precisely why above-the-line treatment of developer fees matters so much: they are the developer member's base compensation regardless of project outcome.

EXAMPLE 6 WATERFALL WITH REFINANCING PROCEEDS AND INTERIM DISTRIBUTION

Mid-Hold Refinancing Event + Final Sale, The Two-Step Waterfall

This example demonstrates one of the most commonly disputed waterfall scenarios: a mid-hold refinancing event that generates excess proceeds before the final sale. It illustrates how the waterfall operates at each capital event and how interim distributions interact with the clawback calculation at final disposition.

Example 6 Assumptions	
Total JV Equity (at formation)	$25,000,000
Capital Member Equity (90%)	$22,500,000
Developer Member Equity (10%)	$2,500,000
Construction Period	Years 0–2
Stabilization	Year 3
Refinancing (permanent loan closing)	End of Year 3

Final Sale	End of Year 7
Preferred Return	8% per annum, simple, cumulative on CM equity
Promote	80% CM / 20% DM above preferred return
Refinancing Net Proceeds (above construction loan payoff)	$4,000,000 available for distribution
Final Sale Proceeds (after perm loan payoff)	$28,000,000
CM Preferred Return Accrued (Years 0–3, refinancing)	$22,500,000 × 8% × 3 = $5,400,000
CM Preferred Return Accrued (Years 4–7, post-refi)	$22,500,000 × 8% × 4 = $7,200,000 (on unreturned capital)

Step 1: Refinancing Distribution (End of Year 3)

Available: $4,000,000 net refinancing proceeds. At Year 3, CM capital is still fully outstanding ($22,500,000), so the preferred return takes priority before any promote.

Refinancing Waterfall (Year 3)	Available	Capital Member	Developer Member
Tier 1: Return of Capital (not yet, insufficient proceeds)	$0	$0	$0
Tier 2: Preferred Return (3-yr accrual = $5,400,000 owed)			
Available applied to preferred return (partial payment)	$4,000,000	$4,000,000	-
Preferred return remaining unpaid after refinancing	($1,400,000)	($1,400,000)	-
Tier 3: Promote (Not Reached)	$0	$0	$0
TOTAL REFINANCING DISTRIBUTION	**$4,000,000**	**$4,000,000**	**$0**

Step 2: Final Sale Distribution (End of Year 7)

Running totals entering the final sale: CM has received $4,000,000 of its $5,400,000 three-year preferred return. CM contributed capital is still fully outstanding at $22,500,000. Additional preferred return has accrued for years 4–7: $7,200,000. Total preferred return outstanding at sale: $5,400,000 − $4,000,000 already paid + $7,200,000 newly accrued = $8,600,000.

Final Sale Waterfall (Year 7)	Available	Capital Member	Developer Member
TIER 1: Return of Contributed Capital			

Final Sale Waterfall (Year 7)	Available	Capital Member	Developer Member
Capital Member capital returned (full)	$22,500,000	$22,500,000	-
Developer Member capital returned (full)	$2,500,000	-	$2,500,000
Subtotal, Tier 1	$25,000,000	$22,500,000	$2,500,000
Remaining after Tier 1	**$3,000,000**		
TIER 2: Outstanding Preferred Return ($8,600,000 owed)			
Amount available applied to preferred return	$3,000,000	$3,000,000	-
Preferred return STILL unpaid after sale	($5,600,000)	($5,600,000)	-
TIER 3: Promote (Not Reached, Preferred Return Not Satisfied)	$0	$0	$0
TOTAL FINAL SALE DISTRIBUTIONS	**$28,000,000**	**$25,500,000**	**$2,500,000**
COMBINED TOTALS (Refinancing + Final Sale)			
Capital Member total received	$29,500,000	$29,500,000	
Developer Member total received	$2,500,000		$2,500,000
Grand Total Distributions	$32,000,000	$29,500,000	$2,500,000
Developer Member Promote Earned	$0		$0 (preferred return never fully satisfied)

Critical Lesson: The Refinancing Proceeds Dispute

Note that the $4,000,000 refinancing distribution in Step 1 went entirely to the capital member's preferred return, with no promote triggered. This is the correct result when the operating agreement defines 'Available Cash' to include refinancing proceeds and applies the same waterfall to every distributable event. If the operating agreement had excluded refinancing proceeds from 'Available Cash,' the $4,000,000 would have been retained within the JV, and the capital member's preferred return would have continued to accrue on the full $22,500,000 through the end of Year 7, producing a larger unpaid preferred return balance at final sale. This is why the definition of 'Available Cash' and its application to refinancing proceeds must be expressly addressed in every operating agreement.

EXAMPLE 7 PROGRAMMATIC JV CLAWBACK CALCULATION

Three-Asset Portfolio, Vintage-Year Lookback and Clawback Mechanics

This final example demonstrates the most complex waterfall calculation in the institutional JV universe: the portfolio-level clawback in a programmatic JV. It illustrates how individual asset promotes that were validly paid at the time of each asset's disposition may be subject to partial clawback when the portfolio's aggregate performance is calculated at the program's conclusion.

Example 7 Assumptions	
Program Structure	Three-asset programmatic JV (all assets in same vintage cohort for simplicity)
Total Capital Member Equity (all assets)	$45,000,000 ($15M per asset)
Total Developer Member Equity (all assets)	$5,000,000 ($1.667M per asset)
Preferred Return	8% per annum, simple, cumulative, calculated on each asset individually
Promote Structure	80% CM / 20% DM on each asset; subject to portfolio-level clawback
Clawback	If aggregate promote paid exceeds portfolio-level promote entitlement, excess must be returned
Clawback Cap	100% of prior promote distributions (not tax-adjusted for simplicity)
Asset A Hold Period	3 years; Total Proceeds $28,000,000
Asset B Hold Period	5 years; Total Proceeds $21,000,000
Asset C Hold Period	7 years; Total Proceeds $22,000,000

Step 1: Individual Asset Waterfall Calculations

Asset A (strong performer, sold Year 3):

CM equity: $15M. CM preferred return (8% × 3 yrs) = $3,600,000. Available proceeds: $28M.

Asset A Waterfall	Total	Capital Member	Developer Member
Tier 1: Return of Capital	$16,667,000	$15,000,000	$1,667,000
Tier 2: Preferred Return (3 yrs × 8%)	$3,600,000	$3,600,000	$0
Remaining for Tier 3	**$7,733,000**		
Tier 3: Promote (80/20)	$7,733,000	$6,186,400 (80%)	$1,546,600 (20%)
ASSET A TOTAL	$28,000,000	$24,786,400	$3,213,600
Asset A Promote Paid to DM			$1,546,600

Asset B (moderate performer, sold Year 5):

CM equity: $15M. CM preferred return (8% × 5 yrs) = $6,000,000. Available proceeds: $21M.

Asset B Waterfall	Total	Capital Member	Developer Member
Tier 1: Return of Capital	$16,667,000	$15,000,000	$1,667,000
Tier 2: Preferred Return (5 yrs × 8%)	$4,333,000	$4,333,000	$0
Preferred Return Shortfall (unpaid)	($1,667,000)	($1,667,000)	
Remaining for Tier 3 (None)	**$0**	**$0**	**$0**
ASSET B TOTAL	$21,000,000	$19,333,000	$1,667,000
Asset B Promote Paid to DM			$0 (preferred return not satisfied)

Asset C (strong performer, sold Year 7):

CM equity: $15M. CM preferred return (8% × 7 yrs) = $8,400,000. Available proceeds: $22M.

Asset C Waterfall	Total	Capital Member	Developer Member
Tier 1: Return of Capital	$16,667,000	$15,000,000	$1,667,000
Tier 2: Preferred Return (7 yrs × 8%)	$5,333,000	$5,333,000	$0
Preferred Return Shortfall (unpaid)	($3,067,000)	($3,067,000)	
Remaining for Tier 3 (None)	**$0**	**$0**	**$0**
ASSET C TOTAL	$22,000,000	$20,333,000	$1,667,000
Asset C Promote Paid to DM			$0 (preferred return not satisfied)

Step 2: Portfolio-Level Aggregate Calculation

To determine whether the $1,546,600 promote paid on Asset A is subject to clawback, the clawback provision requires a hypothetical portfolio-level waterfall calculation: as if all three assets had been sold simultaneously on the same date and all proceeds pooled.

Total CM equity contributed: $45,000,000. Total DM equity: $5,000,000. Total proceeds: $28M + $21M + $22M = $71,000,000.

The preferred return on each asset accrued for a different number of years (3, 5, and 7). For the aggregate calculation we use the simple average hold of (3 + 5 + 7) / 3 = 5 years, which is exact here because each asset carries equal equity. Total capital member preferred return (aggregate): $45,000,000 × 8% × 5 years = $18,000,000, equal to the sum of the three asset-level accruals ($3,600,000 + $6,000,000 + $8,400,000).

Portfolio Aggregate Waterfall (Hypothetical)	Total	Capital Member	Developer Member
Tier 1: Return of Contributed Capital (all assets)	$50,000,000	$45,000,000	$5,000,000
Remaining after Tier 1	**$21,000,000**		
Tier 2: Aggregate Preferred Return (5-yr avg × 8%)	$18,000,000	$18,000,000	$0
Remaining after Tier 2	**$3,000,000**		
Tier 3: Portfolio-Level Promote (80/20)	$3,000,000	$2,400,000 (80%)	$600,000 (20%)
PORTFOLIO AGGREGATE TOTAL	$71,000,000	$65,400,000	$5,600,000
DM Portfolio-Level Promote Entitlement			$600,000
DM Promote Actually Paid (Asset A only)			$1,546,600
CLAWBACK AMOUNT OWED BY DM			($946,600)

Step 3: Clawback Summary

Clawback Analysis	Amount
DM promote paid on Asset A (strong performer)	$1,546,600
DM promote paid on Asset B (no promote earned)	$0
DM promote paid on Asset C (no promote earned)	$0
Total promote paid to DM across portfolio	$1,546,600
DM portfolio-level promote entitlement (aggregate calculation)	$600,000
Clawback amount owed by DM to CM	($946,600)
Clawback as % of total promote received	61.2%
Clawback cap (100% of total promote received)	$1,546,600
Clawback within cap? (Yes/No)	Yes; $946,600 < $1,546,600 cap

The Clawback in Practice: Key Lessons from Example 7

1. Asset-level promote payments can overstate the developer member's program entitlement. Asset A's strong early performance generated $1,546,600 in promote that was entirely valid when paid, but that significantly exceeded the developer member's $600,000 portfolio-level entitlement, because Assets B and C underperformed and failed to clear their preferred return thresholds.

2. The clawback cap matters enormously. In this example the clawback is $946,600, which is 61.2% of total promote received. Without a clawback cap, a larger shortfall across the portfolio could require the developer member to return more than it received. With the 100% cap used here, the developer member's maximum clawback exposure is limited to the total promote it received.

3. The tax gross-up is essential. If the developer member paid income tax on the $1,546,600 Asset A promote at a 35% rate, its after-tax receipt was approximately $1,005,000. A gross clawback of $946,600 would consume 94% of that after-tax amount. A tax-adjusted clawback, returning only the after-tax portion, would reduce the clawback to approximately $616,000, reflecting only the developer member's genuine economic benefit.

4. Escrow is the practical solution. Holding back a 50% escrow of the $1,546,600 Asset A promote ($773,300) would have covered the tax-adjusted clawback of roughly $616,000 in full, and most of the gross $946,600 exposure, ensuring the developer member retained the liquidity to satisfy the clawback when it is calculated years after the Asset A distribution.

How to Use These Examples in Practice

The seven waterfall examples in this appendix are designed to be used as working tools in JV negotiations and operating agreement reviews, not merely as reference materials. The following applications are most common in practice:

- Model verification. Before signing any JV operating agreement, both parties should build a financial model that replicates the waterfall calculation using the specific economic terms in the operating agreement, and verify that the model produces the results the parties expect. Discrepancies between the model output and the parties' expectations almost always reveal definitional ambiguities that should be resolved in the operating agreement.

- Worked example generation. The examples in this appendix can serve as templates for the worked numerical examples that should be attached to every JV operating agreement as exhibits. Both parties should confirm, before signing, that the worked examples produce the outcomes they expect under the specific defined terms of their operating agreement.

- Stress testing. The comparison between Example 2 (base case) and Examples 5 and 6 (stress scenarios) shows how dramatically waterfall outcomes change under underperformance. Both parties should model the waterfall under base case, moderate stress, and severe stress assumptions before committing to the economic structure.

- Negotiation anchoring. The quantified comparison in Examples 2 and 3, showing the $1,440,000 difference between a simple preferred return with no catch-up and a compounding preferred return with a catch-up, gives both negotiating teams a concrete, dollar-specific basis for evaluating the economic significance of each provision. This quantification turns abstract negotiating positions into specific dollar amounts both parties can weigh.

- Dispute prevention. The clawback example (Example 7) shows precisely how portfolio-level clawback calculations work, why clawback caps and tax gross-ups matter, and how escrow arrangements protect both parties. Developer members who understand this calculation before signing are far less likely to be surprised by clawback liability at program end.

The calculations in this appendix use simplified, year-end assumptions for clarity. In actual JV practice, waterfall calculations account for the specific dates of each capital contribution and distribution, using daily or monthly compounding conventions that produce slightly different results from the annual approximations used here. Both parties' financial advisors should model the waterfall using the actual timing conventions specified in the operating agreement, and those conventions should be expressly defined in the agreement with a worked example that both advisors have confirmed.

APPENDIX C

Developer Member Negotiation Priorities Checklist

A Comprehensive Pre-Signing Review for the Developer Member

This checklist is the developer member's primary pre-signing review tool for any real estate joint venture operating agreement. It translates the negotiating guidance of Chapters 4 and 5 into a systematic, provision-by-provision review of the operating agreement terms most critical to the developer member's economic interests, operational autonomy, and long-term platform viability. Use it before the term sheet, during operating agreement negotiation, and as a final pre-execution review.

This checklist contains 57 specific items organized across nine negotiating priority areas. Each item is classified by priority level: CRITICAL (must be addressed before signing, as failure to address creates unacceptable risk), HIGH (should be addressed in all but the most time-constrained negotiations), or MEDIUM (important but may be acceptable to defer to ongoing counsel).

No checklist can substitute for the judgment of experienced legal counsel who has reviewed the specific operating agreement in its entirety. This checklist is a starting point for that review, not a replacement for it. Items that appear routine in the abstract may be critical in the context of a specific transaction's specific drafting.

Priority Level Key

□ CRITICAL	□ HIGH	□ MEDIUM
Must resolve before signing. Creates unacceptable legal or economic risk if unaddressed.	Should resolve in all but emergency timelines. Material economic or governance consequence.	Important; address in ongoing counsel if not at signing. Moderate consequence.

SECTION 1 PROTECTING THE PROMOTE

The developer member's most valuable economic asset requires precise definition at every level

The promote is the developer member's primary economic reward for years of expertise, risk, and execution. Every provision that affects whether the promote is earned, how much it amounts to, and whether it can be clawed back deserves the highest level of scrutiny.

□ Define 'Contributed Capital' with mathematical precision [CRITICAL]

The definition must specify: (a) that it means only actual cash funded by the members; (b) that it excludes deemed contributions, fee offsets, and guaranty-related adjustments; (c) how it changes when partial capital is returned through interim distributions; and (d) how it is calculated for IRR purposes when contributions are made at different times.

► **Negotiating Tip:** *Require a worked numerical example attached as an exhibit to the operating agreement that models the waterfall calculation using the actual 'Contributed Capital' definition. Have your financial advisor confirm the example produces the expected economic outcome before you sign.*

⚠ **Red Flag:** *If 'Contributed Capital' is defined to include accrued but unpaid management fees as deemed contributions, the preferred return base, and therefore the promote threshold, will be higher than you expect. This single definitional gap has generated millions of dollars in JV litigation.*

☐ **Define 'Capital Member IRR' with complete mathematical precision** [CRITICAL]

Specify every cash flow included and excluded from the IRR calculation (contributions, distributions, fees, taxes, transaction costs), the timing convention used (daily, monthly, annual), whether the calculation is pre-tax or after-tax, and the compounding frequency. Attach a worked numerical example signed off by both parties' financial advisors.

► **Negotiating Tip:** *The IRR definition should expressly state whether above-the-line developer fees paid to the developer member's affiliates are included or excluded from the cash flows used in the calculation. If excluded, the effective IRR threshold is lower than the stated rate, benefiting the developer member. If included, it is higher.*

⚠ **Red Flag:** *The most litigated waterfall provision in institutional JV practice is the IRR definition. If your operating agreement does not define IRR with mathematical precision and a worked example, you are signing a time-delayed dispute.*

☐ **Define 'Available Cash' / 'Distributable Cash' to include all capital event categories** [CRITICAL]

The definition must expressly enumerate every category of cash generation that triggers a waterfall calculation: property sales, partial sales, refinancing proceeds (permanent loan closings, recapitalizations), insurance proceeds above a threshold, condemnation awards, and operating distributions. Specify whether each category is fully distributable or subject to reinvestment or reserve requirements.

► **Negotiating Tip:** *Negotiate for full waterfall treatment of permanent loan excess proceeds. Capital members often argue that refinancing proceeds should be retained within the JV; developer members should counter that the waterfall applies to all Available Cash regardless of source.*

⚠ **Red Flag:** *An operating agreement silent on refinancing proceeds will likely result in the capital member arguing that the waterfall was intended only for sale proceeds, depriving the developer member of interim promote distributions that may be the only promote realization in a project that is ultimately refinanced rather than sold.*

☐ **Define 'Net Sale Proceeds' with a complete, exhaustive deduction list** [CRITICAL]

Specify every permitted deduction from gross sale proceeds before the waterfall calculation: broker commissions (with a cap on permissible rates), closing costs (itemized), debt repayment (including prepayment penalties), purchase price adjustments, and any reserves required to be established at closing. Prohibit deductions for non-arm's-length costs payable to capital member affiliates.

► **Negotiating Tip:** *Negotiate for disposition fees payable to the developer member to be treated as a deduction from gross sale proceeds (above the waterfall) rather than as a distribution from within the waterfall. This ensures the fee is paid before the preferred return calculation begins.*

☐ **Negotiate simple (non-compounding) preferred return** [HIGH]

A simple preferred return accrues only on the original contributed capital, not on previously accrued but unpaid preferred return. On an $18M equity position at 8% over 5 years, simple preferred return = $7,200,000; compounding preferred return = $8,448,000, a $1,248,000 difference that directly reduces the promote pool.

► **Negotiating Tip:** *If the capital member insists on compounding preferred return, negotiate for a catch-up provision that compensates the developer member for the larger preferred return burden. As Example 3 in Appendix B demonstrates, a well-structured catch-up can more than offset the economic cost of compounding preferred return.*

☐ **Negotiate a catch-up provision above the preferred return** [HIGH]

The catch-up tier should direct 100% of distributions to the developer member (after the preferred return is satisfied) until the developer member has received 20% of all distributions made in Tiers 2 and 3 combined. This accelerates the developer member's receipt of promote economics and eliminates the lag between preferred return satisfaction and promote realization.

► **Negotiating Tip:** *If the capital member refuses a catch-up, consider negotiating for a lower preferred return rate as compensation, the economic effect of reducing the preferred return rate from 8% to 6% is comparable to a partial catch-up on a 5-year hold.*

□ Ensure the promote survives a refinancing event [HIGH]

Confirm that the waterfall applies to all capital events, including permanent loan closings and recapitalizations. If the capital member insists on excluding refinancing proceeds from waterfall distributions, negotiate for a partial distribution that at least satisfies the accrued preferred return at the time of the refinancing.

► **Negotiating Tip:** *Model the impact of the refinancing event on the preferred return accrual. If the permanent loan closing occurs 3 years into a 7-year hold and the preferred return has been accruing the entire time, the accrued balance may be substantially larger than the net refinancing proceeds, meaning the developer member receives nothing from the refinancing distribution regardless.*

□ Negotiate promote protection against capital call dilution [HIGH]

Ensure that capital call dilution mechanics do not automatically dilute the promote. The promote should be a separate economic right not automatically reduced by percentage membership interest changes, only by a specific, express provision reducing the promote percentage.

► **Negotiating Tip:** *Negotiate for non-punitive mathematical dilution only as the remedy for co-investment defaults. Punitive dilution (at 1.5x or more) can destroy the developer member's promote from a single missed capital call.*

□ Cap the clawback and negotiate a tax gross-up [HIGH]

The clawback cap should limit the developer member's obligation to return no more than 100% (or preferably 50% to 75%) of total prior promote distributions. The tax gross-up should require the clawback to be calculated on an after-tax basis, the developer member returns only its after-tax promote, not the gross amount on which it has already paid income taxes.

► **Negotiating Tip:** *Model the maximum clawback exposure under stress scenarios before signing. On a programmatic JV, an uncapped, un-tax-adjusted clawback can exceed the developer member's total promote income from the program.*

⚠ **Red Flag:** *A clawback without a cap is an unlimited contingent personal liability. On a large programmatic JV, this is an existential financial risk that should be treated with the same seriousness as the completion guaranty.*

□ Negotiate a promote vesting schedule tied to development milestones [MEDIUM]

A milestone-based vesting schedule (e.g., 15% at construction loan closing; 25% at 50% construction completion; 30% at CO; 20% at stabilization; 10% at disposition) protects the developer member against total promote forfeiture upon for-cause removal after substantial development work is completed.

► **Negotiating Tip:** *Vesting milestones should be tied to objective, verifiable events, not subjective performance assessments. Unambiguous milestone definitions (certificate of occupancy, loan closing date) are the most defensible.*

SECTION 2 CONTROLLING THE DEVELOPMENT PROCESS

Preserving operational autonomy while satisfying capital member oversight requirements

The developer member's value proposition depends on its ability to make timely, decisive operational decisions. An operating agreement that subjects every material decision to capital member approval is not merely inconvenient. It impairs the very expertise for which the capital member partnered with the developer member.

☐ Establish high dollar thresholds for capital member approval [CRITICAL]

Per-item approval thresholds should be calibrated to project scale: on a $75M+ development project, individual expenditure approval thresholds of $250,000 to $500,000 are reasonable; thresholds below $100,000 create governance friction that impairs efficient management. Aggregate budget variance tolerances should be 10% to 15% per line item and 5% to 10% in aggregate.

► **Negotiating Tip:** *Present the capital member with a sensitivity analysis showing how different threshold levels translate into the number of individual capital member consent requests per month during active construction. Thresholds that require capital member approval for routine construction decisions will create 10 to 20 or more approval requests per month, an untenable governance burden for both parties.*

☐ Negotiate a comprehensive deemed approval provision [CRITICAL]

The operating agreement must include a deemed approval provision: if the capital member fails to respond to a Major Decision approval request within a defined period (10 to 20 business days for routine matters; 5 business days for emergency situations), the request is deemed approved. Without this provision, the capital member can paralyze operations through deliberate non-response.

► **Negotiating Tip:** *Negotiate for shorter deemed approval periods for time-sensitive decisions (construction draw approvals, lease execution decisions). Consider tiered deemed approval periods: 5 days for emergency construction decisions; 10 days for routine major decisions; 20 days for complex governance decisions.*

⚠ **Red Flag:** *An operating agreement without a deemed approval provision is an operating agreement that gives the capital member an absolute veto over any decision at any time, simply by not responding.*

☐ Draft the initial Approved Business Plan broadly [CRITICAL]

The initial Approved Business Plan should pre-authorize the widest possible range of operational decisions: specific contractors and subcontractors, specific design parameters, specific leasing strategies, specific capital expenditure programs. A broadly drafted initial plan reduces the scope of future approval requests.

► **Negotiating Tip:** *Invest time at the term sheet stage (before legal fees escalate) in negotiating the scope and breadth of the initial Approved Business Plan. Time invested here reduces governance friction throughout the project's lifecycle.*

☐ Negotiate for broad change order authority thresholds [HIGH]

Individual change order approval thresholds should reflect project scale: on a $50M+ construction project, per-change-order thresholds of $250,000 to $500,000 and aggregate unilateral authority of $1,000,000 to $2,000,000 are appropriate. Include a running cumulative change order tracking obligation to avoid aggregate threshold violations through incremental approvals.

► **Negotiating Tip:** *Distinguish between owner-initiated change orders (which should require capital member approval above the threshold) and contractor-initiated change orders for unforeseen conditions (which should be within the developer member's emergency authority, with prompt notification to the capital member).*

☐ **Negotiate for emergency action authority without prior approval** [HIGH]

The operating agreement should expressly authorize the developer member to take any action required to: protect the physical integrity of the project; comply with an emergency governmental order; address a life-safety issue; or prevent a construction loan default, without prior capital member approval, subject to prompt notification (within 24 to 48 hours) and post-hoc ratification.

► **Negotiating Tip:** *Draft the emergency authority provision to include a specific dollar cap (e.g., $500,000 per emergency event) and a specific notification timeline. Emergency authority provisions without dollar caps create risk of dispute; those without notification requirements create governance friction.*

☐ **Negotiate for automatic continuation of prior-year budget** [HIGH]

If the annual budget approval process extends into the new fiscal year, the prior year's approved budget (with a defined inflation adjustment, typically CPI) should automatically continue in effect until a new budget is approved. Without this provision, a budget approval impasse can leave the developer member without authority to make any expenditure.

► **Negotiating Tip:** *Include an express provision specifying that the developer member may make expenditures consistent with the prior year's approved budget during a budget approval dispute, and that the capital member's withholding of budget approval in bad faith constitutes a breach of the operating agreement.*

☐ **Preserve authority over contractor and vendor relationships** [MEDIUM]

The developer member should have broad authority to select, negotiate with, and direct contractors and subcontractors within the approved budget, subject only to capital member approval of the general contract itself (for contracts above a defined threshold). Contractor relationships are a core competitive asset; they should not be subject to capital member micromanagement.

☐ **Negotiate for proportional budget reallocation authority** [MEDIUM]

The developer member should have the right to reallocate funds between budget line items (within 10% to 15% of any line item) without capital member approval, providing flexibility to respond to cost savings in one area and overruns in another.

SECTION 3 PROTECTING DEVELOPER FEES

Ensuring baseline compensation regardless of project performance

Developer fees compensate the developer member for real costs such as staff time, overhead, and operational infrastructure, all incurred regardless of project performance. Their above-the-line status and continuity upon capital member transfer are non-negotiable baseline protections.

☐ **Confirm all developer fees are above-the-line operating expenses** [CRITICAL]

Every developer fee (development fee, construction management fee, asset management fee, acquisition fee, disposition fee, and financing fee) must be characterized as an above-the-line operating expense of the JV, payable from JV cash flow before any distribution

through the waterfall. Fees treated as below-the-line distributions are subordinated to the capital member's preferred return and may never be paid on an underperforming project.

► **Negotiating Tip:** *Review every fee provision individually. A capital member form agreement may characterize some fees as above-the-line and others (particularly asset management fees and disposition fees) as below-the-line. Each below-the-line fee must be specifically negotiated to above-the-line status.*

⚠ **Red Flag:** *A single below-the-line fee characterization can cost the developer member millions of dollars on an underperforming project, years of asset management services provided without compensation.*

☐ Confirm fee payability regardless of project performance [CRITICAL]

Expressly confirm that each fee is payable from JV cash flow (or from construction loan proceeds, for development-phase fees) regardless of whether the project is meeting its financial projections, regardless of whether the preferred return is being satisfied, and regardless of any capital member claim of developer member breach (unless the breach is adjudicated by a court or arbitrator).

► **Negotiating Tip:** *Include an express anti-withholding provision: the capital member may not direct the JV to withhold fee payments to the developer member based on a disputed breach claim without a court or arbitrator order. Fee disputes should be resolved through the dispute resolution process, not through unilateral fee withholding.*

☐ Confirm fee survivability upon capital member transfer [CRITICAL]

Every fee agreement (whether contained in the operating agreement or in a separate development agreement, management agreement, or service contract) must expressly bind the capital member's successors and assigns. Without this provision, a successor capital member may argue that fee arrangements were personal to the original relationship and do not bind it.

► **Negotiating Tip:** *Structure fee agreements as contracts between the JV entity and the developer member (or its affiliate), not as side letter arrangements between the individual members. JV-level contracts are more clearly binding on successor capital members.*

☐ Negotiate for payment of all accrued fees upon removal [HIGH]

The operating agreement must expressly confirm that all fees earned through the date of removal, including fees earned but not yet invoiced, and fees for work substantially completed at the time of removal, are payable regardless of the circumstances of removal (cause or no cause). These fees compensate for services already rendered and are vested obligations of the JV.

► **Negotiating Tip:** *Separately address partially completed milestone-based fees. A development fee paid in construction draw milestones may have a pending installment for work 80% complete at the time of removal. The operating agreement should specify that partially completed milestones entitle the developer member to a pro rata portion of the installment.*

☐ Negotiate for a wind-down fee upon no-cause removal [HIGH]

Upon no-cause removal, the developer member is often required to cooperate with the transition for 30 to 90 days. The operating agreement should provide for continuation of the asset management fee (at minimum) during this transition period, compensating the developer member for its cooperation obligation.

☐ Confirm the development fee calculation base is broad [HIGH]

The development fee base (the costs on which the percentage fee is calculated) should include both hard costs and soft costs, excluding only land acquisition costs (if separately negotiated) and financing costs. A narrow hard-costs-only calculation base can reduce the development fee by 20% to 30% relative to a total-project-cost calculation.

☐ Resist annual fee benchmarking review provisions [MEDIUM]

Capital members sometimes include annual fee benchmarking review rights, the right to require the developer member to reduce fees if benchmarking reveals they are above market. Developer members should resist: fees were negotiated at the outset of the relationship and should not be subject to ongoing renegotiation at the capital member's initiative.

► **Negotiating Tip:** *If annual benchmarking review is unavoidable, negotiate for: (a) a minimum threshold (fees must be more than 20% above market before any adjustment is required); (b) a cap on any required reduction; and (c) a binding independent determination process rather than a capital member unilateral reduction right.*

SECTION 4 LIMITING PERSONAL EXPOSURE

Negotiating guaranty obligations that do not threaten the developer member's financial platform

Guaranty obligations (completion guaranties and carve-out guaranties) are the developer member's most significant personal financial exposure in any development JV. They must be negotiated with the same rigor as the promote and fee provisions.

☐ Cap all completion guaranty obligations at a defined dollar amount [CRITICAL]

Every completion guaranty must have a dollar cap, the maximum personal liability the developer member will accept if the project cannot be completed within the construction loan budget. A reasonable cap is 10% to 15% of total project cost for a well-underwritten development. An open-ended completion guaranty is an unlimited contingent personal liability that could exceed the developer member's net worth.

► **Negotiating Tip:** *Negotiate for the cap to apply to the aggregate of all guaranty obligations in connection with the project, not each guaranty instrument separately. Multiple instruments with individual caps that are not aggregated can create total exposure exceeding the negotiated maximum.*

⚠ **Red Flag:** *An uncapped completion guaranty is the single largest personal financial risk a developer member can accept. On a $100M project, an uncapped completion guaranty in a construction market with volatile costs can expose the developer member's principals to tens of millions of dollars of personal liability.*

☐ Negotiate force majeure and lender interference carve-outs in the completion guaranty [CRITICAL]

The completion guaranty should expressly exclude from the guarantor's obligations: (a) cost overruns or schedule delays caused by force majeure events; (b) completion failures attributable to lender actions (wrongful draw withholding, improper loan acceleration); and (c) failures caused by the capital member's breach of the operating agreement.

► **Negotiating Tip:** *The force majeure carve-out should be specific: pandemics, governmental shutdowns, supply chain disruptions, natural disasters, acts of war. Vague force majeure language is difficult to invoke in practice.*

☐ Negotiate burn-off provisions for the completion guaranty [CRITICAL]

The guaranty should reduce as construction milestones are achieved: 50% reduction upon achieving a defined completion percentage (e.g., superstructure completion); 75% reduction upon substantial completion; full release upon certificate of occupancy and loan conversion.

► **Negotiating Tip:** *Tie burn-off milestones to objective, verifiable events (specific construction inspection certifications or lender milestone certifications) rather than subjective assessments of completion quality.*

☐ Limit carve-out guaranty triggers to intentional misconduct [CRITICAL]

Carve-out (bad boy) guaranty triggers should be limited to intentional, knowing, or willful misconduct, not negligent acts, mistakes, or good-faith business judgment errors. Resist any carve-out provision that includes 'material breach of the loan agreement' or 'failure to comply with any loan covenant' as a full-recourse trigger.

► **Negotiating Tip:** *Negotiate for loss recourse (lender's actual losses) rather than full recourse (entire loan balance) for all carve-out triggers other than fraud, intentional misrepresentation, and voluntary bankruptcy. Loss recourse provides meaningful lender protection while limiting the developer member's worst-case exposure.*

⚠ **Red Flag:** *A carve-out guaranty that includes 'any material breach of the loan agreement' as a full-recourse trigger is effectively a full recourse loan. A construction covenant violation, even one caused by market conditions, not misconduct, could trigger personal liability for the entire loan balance.*

☐ Negotiate JV indemnification for guaranty payments with expense advancement [HIGH]

The operating agreement should indemnify the developer member for all guaranty payments made on behalf of the JV, except those arising from the developer member's own fraud or willful misconduct. The indemnification should include advancement of legal defense expenses (not just reimbursement after judgment) and should survive the developer member's removal as manager.

► **Negotiating Tip:** *Require the JV to maintain directors and officers (D&O) liability insurance (or the LLC equivalent) covering the developer member's management activities, with the developer member named as an additional insured.*

☐ Explore co-guaranty arrangements with the capital member [MEDIUM]

For large development projects, explore whether the capital member will provide a co-guaranty or backstop guaranty for a portion of the completion guaranty exposure, particularly where the capital member's economic interest substantially exceeds the developer member's co-investment. Co-guaranty arrangements are more common in deals where the capital member has a large balance sheet.

SECTION 5 NEGOTIATING EXIT RIGHTS AND LIQUIDITY

Protecting the developer member's ability to realize full promote value at an appropriate time

Exit provisions determine whether the developer member can realize the full value of its JV interest when and how it chooses, or whether it is trapped by capital member control provisions that allow economic extraction at the developer member's expense.

☐ Negotiate for ROFO (not ROFR) as the developer member's transfer mechanism [CRITICAL]

A right of first offer (ROFO), under which the developer member sets the price and the capital member decides whether to match, is more favorable to the developer member than

a right of first refusal (ROFR), which requires the developer member to first find a third-party buyer before testing the capital member's interest in acquiring the developer member's interest. Negotiate for ROFO for the developer member's transfers and ROFR (at most) for the capital member's transfers.

► **Negotiating Tip:** *Ensure the ROFO response period is defined (30 days is standard) and includes a deemed-declined provision: if the capital member does not respond within 30 days, the ROFO is deemed declined and the developer member may sell to any third party at or above the offered price for a defined period (typically 180 days).*

□ Negotiate drag-along protections: minimum hold period and promote preservation [CRITICAL]

The capital member's drag-along right (the right to force the developer member to sell its interest alongside the capital member) should not be exercisable until: (a) a minimum hold period of at least 3 years from stabilization has elapsed; (b) the proposed sale is an arm's-length transaction at fair market value; and (c) the sale price, when run through the waterfall, produces a distribution that includes the developer member's full promote entitlement.

► **Negotiating Tip:** *Negotiate for the developer member's right to participate in the sale process, including broker selection, review of the offering memorandum, and participation in buyer presentations, before the drag-along is consummated.*

⚠ **Red Flag:** *A drag-along without a minimum hold period allows the capital member to force a sale at any time, potentially before the project has achieved its full value potential, destroying the promote that the developer member was counting on.*

□ Negotiate protective provisions for buy-sell mechanisms [CRITICAL]

The buy-sell (shotgun) provision should include: (a) a minimum valuation floor (no buy-sell price below appraised fair market value or a defined capitalization rate applied to stabilized NOI); (b) a promote adjustment mechanism (the buy-sell price must incorporate the present value of the developer member's promote entitlement); (c) a financing contingency period (at least 60 to 90 days for the developer member to arrange acquisition financing); and (d) a minimum hold period before the buy-sell can be triggered.

► **Negotiating Tip:** *Negotiate for the developer member's right to compel a third-party marketing process in lieu of the buy-sell if the developer member believes the trigger price is below fair market value. A third-party marketing process allows the market to set the price, eliminating the financial asymmetry that makes the buy-sell mechanism unfair in practice.*

⚠ **Red Flag:** *A buy-sell mechanism without a minimum valuation floor or a promote adjustment gives the capital member a unilateral right to acquire the developer member's interest at any price it chooses, knowing that the financially smaller developer member cannot afford to purchase at any reasonable price.*

□ Negotiate a tag-along right in all transfer restriction provisions [HIGH]

The developer member should have the right to sell its interest alongside the capital member in any transaction in which the capital member sells its interest to a third party, on equivalent economic terms. Without a tag-along, the capital member can sell its interest to an unknown successor with entirely different governance expectations, leaving the developer member with a new partner it never agreed to work with.

► **Negotiating Tip:** *The tag-along right should be absolute, not subject to exceptions for small transfers or transfers to capital member affiliates. A capital member transfer to an affiliate could shift effective control to a party with whom the developer member has no relationship.*

□ Negotiate the forced sale right with minimum hold period and process protections [HIGH]

If a forced sale right must be accepted: require a minimum hold period of at least 3 to 4 years from stabilization before it can be exercised; require a bona fide arm's-length marketing process with at least 120 days for full market testing; require the developer member's right to participate in the sale process; and negotiate for the developer member's right to submit a purchase offer.

SECTION 6 PROTECTING AGAINST REMOVAL

The developer member's ultimate governance protection, for when everything else fails

Removal provisions determine whether the developer member loses everything (its management role, its fees, and its promote) based on a disputed capital member allegation. They deserve the same level of negotiating attention as any other provision in the operating agreement.

□ Negotiate a narrow, objective cause definition with force majeure carve-outs [CRITICAL]

The cause definition should: (a) be limited to intentional misconduct, fraud, and criminal conduct (Tier 1 triggers); (b) include performance-based triggers (budget overruns, schedule delays) only with explicit force majeure and market-condition carve-outs; and (c) not include any trigger based on the capital member's loss of confidence, subjective dissatisfaction, or disputes about business strategy.

► **Negotiating Tip:** *For each performance-based cause trigger, negotiate for an objective threshold (e.g., 'budget overruns exceeding 20% of total project cost attributable to developer member's gross negligence, not including overruns caused by force majeure events, market-wide cost inflation, or governmental actions beyond the developer member's reasonable control').*

⚠ **Red Flag:** *A cause definition broad enough to include 'failure to achieve projected returns' or 'material deviation from projections' allows the capital member to remove the developer member for any market-driven underperformance, transferring all market risk to the developer member without any corresponding compensation.*

□ Negotiate meaningful cure periods differentiated by default type [CRITICAL]

Cure periods must be differentiated by default type: financial defaults (missed capital calls, payment failures): minimum 15 to 30 days; operational defaults (budget variances, reporting failures): minimum 30 to 60 days; key man events: minimum 90 to 180 days. Include a notice specificity requirement, the removal notice must describe the alleged cause with particularity so the developer member knows what must be cured.

► **Negotiating Tip:** *Negotiate for a status quo obligation during the cure period: the capital member may not take any action to assume management authority or interfere with the developer member's management during the cure period, while the developer member is required to continue managing the project in accordance with the approved business plan.*

⚠ **Red Flag:** *A removal provision with no cure period allows the capital member to remove the developer member immediately upon delivering a notice, including a notice based on disputed or pretextual cause allegations. The developer member has no opportunity to challenge the removal before it becomes effective.*

□ Negotiate full promote preservation upon no-cause removal [CRITICAL]

Upon no-cause removal (at the capital member's election, without any cause), the developer member's full promote interest must be preserved. The developer member

created value through its management activities; removal at the capital member's option should not strip the developer member of the economic benefit of that value creation.

► **Negotiating Tip:** *Confirm that the promote preserved upon no-cause removal is calculated based on a hypothetical disposition at fair market value on the removal date, not at a discounted value that the capital member can manipulate by timing the removal before a sale that it controls.*

⚠ **Red Flag:** *A no-cause removal right that is not accompanied by full promote preservation is not a partnership. It is an employment arrangement in which the capital member can terminate the developer member at will and capture the promote. No developer member should accept this structure.*

☐ Negotiate vested promote preservation upon for-cause removal [CRITICAL]

A milestone-based vesting schedule (see Section 1) specifies the percentage of the promote that vests at each development milestone. Upon for-cause removal, only the unvested portion of the promote is forfeited; the vested portion is preserved and paid to the developer member from eventual sale or refinancing proceeds.

► **Negotiating Tip:** *Ensure the vesting schedule milestones are objective and verifiable, and that the vested promote is paid from the first available proceeds after the removal, not deferred until the project's final disposition.*

⚠ **Red Flag:** *Binary promote forfeiture upon for-cause removal, all or nothing regardless of work completed, creates a perverse economic incentive for the capital member to assert cause near project completion, when the promote value is highest and the developer member has the least remaining work to complete.*

☐ Negotiate a removal payment for no-cause removal [HIGH]

If the developer member must accept a no-cause removal right, negotiate for a meaningful removal payment from the JV (or capital member) representing: (a) the present value of the management fee stream through the end of the projected hold period; plus (b) a portion of the expected promote. This payment compensates the developer member for the economic opportunity it is being deprived of.

☐ Ensure all accrued fees are expressly payable upon removal regardless of circumstances [HIGH]

All fees earned through the date of removal (development fees, asset management fees, and construction management fees) must be expressly payable regardless of the circumstances of removal (cause or no cause) and regardless of the capital member's claim of breach. These fees are vested obligations; they cannot be withheld as leverage in a removal dispute.

SECTION 7 PROTECTING IP AND PIPELINE PROJECTS

Ensuring the JV does not inadvertently capture the developer member's broader business platform

☐ Grandfather all existing pipeline projects from exclusivity obligations [CRITICAL]

Every project that the developer member is actively pursuing at the time the JV is formed must be expressly carved out of any exclusivity or non-compete obligation, regardless of geographic or asset-type overlap with the JV project. Attach a comprehensive pipeline carve-out list as an exhibit to the operating agreement.

► **Negotiating Tip:** *Review the pipeline carve-out list carefully before signing. Any project not on the list will be captured by the exclusivity obligation if it falls within the non-compete's geographic and*

asset-type scope. Err on the side of inclusion. It is far easier to argue that a project is on the list than to argue that it should have been.

⚠ **Red Flag:** *The pipeline carve-out list should include not only active projects but also projects in early feasibility stages where the developer member has invested time and resources. A capital member that insists on reviewing the pipeline list may later argue that a project not included represents a violation of the exclusivity obligation.*

☐ **Limit non-compete scope to specific geography and asset type** [CRITICAL]

The non-compete must be expressly limited by: (a) geographic area (a specific radius, set of zip codes, or named submarket, not 'the same market'); (b) asset type (the specific asset class of the JV project, not all real estate); and (c) duration (the investment period only, terminating automatically upon expiration or the developer member's removal).

► **Negotiating Tip:** *On a single-building JV project, resist any non-compete that covers an entire metropolitan area or county. A 3-mile radius around the specific project site is a more proportionate geographic limitation for most urban development projects.*

⚠ **Red Flag:** *A non-compete that covers 'the same metropolitan area' for a 5-year programmatic JV can effectively prohibit the developer member from pursuing any project in its home market for 5 years, regardless of asset type, submarket, or competitive overlap with the JV project.*

☐ **Protect pre-JV work product as licensed (not assigned) to the JV** [HIGH]

Any architectural work, market studies, entitlement submissions, or other pre-JV work product developed by the developer member before the JV was formed should be licensed (not assigned) to the JV for the specific purpose of the JV project. Upon dissolution of the JV or the developer member's removal, this work product reverts to the developer member.

► **Negotiating Tip:** *Include an express reversion clause: all work product licensed to the JV reverts to the developer member upon the occurrence of any event that terminates the developer member's role in the JV.*

☐ **Limit right-of-first-opportunity provisions to qualifying opportunities** [HIGH]

Any right of first opportunity (requiring the developer member to offer new investment opportunities to the JV before pursuing them independently) must be limited to opportunities that specifically fit the JV's defined investment parameters, not every real estate opportunity the developer member identifies. Include a short, defined response period (15 to 20 business days) with a binding deemed-pass if the capital member does not respond.

☐ **Protect developer member's lender and contractor relationships** [MEDIUM]

The operating agreement should acknowledge that the developer member's lender, contractor, and broker relationships are personal to the developer member and may be used by the developer member in other projects outside the JV. These relationships should not be treated as JV assets or be subject to any non-solicitation restriction on the developer member's use of them after the JV terminates.

SECTION 8 TAX STRUCTURING FOR THE DEVELOPER MEMBER

Protecting after-tax economics through precise operating agreement provisions

☐ **Confirm profits interest treatment of the promote** [CRITICAL]

The promote must be structured as a profits interest under IRS Revenue Procedures 93-27 and 2001-43, entitling the developer member to receive promote distributions as capital

gain income (not ordinary income) to the extent the JV generates capital gain at the asset level. To qualify, the promote must have no liquidation value at the time of grant, confirmed by the waterfall mechanics.

► **Negotiating Tip:** *Engage tax counsel to confirm that the specific waterfall structure qualifies the promote as a profits interest. A promote that is structured or documented incorrectly may be characterized as ordinary income at grant, creating immediate taxable income for the developer member without a corresponding cash distribution.*

☐ Address Section 704(c) built-in gain if contributing appreciated property [CRITICAL]

If the developer member is contributing land or other appreciated property to the JV, the operating agreement must address the Section 704(c) allocation methodology (traditional method, traditional method with curative allocations, or remedial method) and the developer member must understand its exposure to built-in gain allocation upon disposition.

► **Negotiating Tip:** *Model the Section 704(c) tax impact before contributing land to the JV. The built-in gain allocation upon sale can be a multi-million-dollar tax liability that is not apparent from the gross economics of the deal.*

⚠ **Red Flag:** *A developer member that contributes appreciated land without analyzing the Section 704(c) implications may owe substantial capital gains tax even if its economic return from the JV is modest, because all pre-contribution appreciation is allocated to the developer member upon sale.*

☐ Confirm guaranteed payment characterization of developer fees [HIGH]

Developer fees should be characterized as guaranteed payments under IRC Section 707(c), payable regardless of JV income, to ensure they are deductible by the JV and taxable as ordinary income to the developer member in the year received. Confirm the fee characterization with tax counsel and ensure the operating agreement's fee provisions are consistent with guaranteed payment treatment.

☐ Ensure capital account provisions comply with Treasury Regulation 1.704-1(b)(2) [HIGH]

The capital account maintenance provisions must comply with the 'substantial economic effect' standard, ensuring that the JV's tax allocations are consistent with its economic arrangement. Non-compliant capital account provisions can result in IRS recharacterization of allocations, generating unexpected tax liability.

☐ Understand phantom income risk and ensure adequate liquidity planning [MEDIUM]

Phantom income, meaning taxable income allocated to the developer member in a year without a corresponding cash distribution, is a real risk in early-stage development JVs. Model the expected phantom income profile throughout the JV's lifecycle and ensure the developer member has access to liquidity sufficient to pay the resulting tax liability.

SECTION 9 GOVERNANCE AND REPORTING OBLIGATIONS

Managing the developer member's governance obligations efficiently and effectively

☐ Negotiate for practical, efficient reporting timelines [HIGH]

Reporting deadlines should be realistic: monthly operating reports within 20 business days of month-end; quarterly financials within 30 days of quarter-end; annual audited financials within 90 days of fiscal year-end. Unrealistic timelines create automatic defaults that can be weaponized by a capital member seeking a pretextual basis for removal.

► **Negotiating Tip:** *Negotiate for cure periods for reporting defaults (at least 15 business days for minor delays) and confirm that reporting failures are subject to a cure right before triggering any removal right.*

□ Confirm that capital member inspection rights are subject to reasonable coordination [HIGH]

Physical property inspections and book-and-records inspections should require reasonable advance notice (5 to 10 business days) and should be coordinated to minimize disruption to construction operations and tenant relations. Inspection rights without coordination requirements can be used as a harassment mechanism.

► **Negotiating Tip:** *Include a frequency cap on uninvited inspections: no more than four property inspections per year absent a claimed default. Unlimited inspection rights create operational disruption and management distraction.*

□ Confirm the auditor selection is a mutual decision [HIGH]

The annual audit should be performed by an independent CPA firm agreed upon by both parties, not selected unilaterally by the capital member. An auditor selected solely by the capital member may be less independent than the parties' interests require.

□ Review all construction loan covenant interactions with governance provisions [MEDIUM]

Before signing the operating agreement, confirm that every governance provision (major decisions, distributions, and transfer restrictions) is consistent with the construction loan's covenant package. Conflicts between the two documents are a primary source of post-closing governance disputes.

► **Negotiating Tip:** *Engage both JV counsel and construction loan counsel in a coordinated document review before closing to identify and resolve every conflict between the operating agreement and the loan documents.*

□ Confirm arbitration provisions include real estate JV expert requirement [MEDIUM]

The arbitration clause should require that arbitrators have a minimum of 10 years of experience in real estate joint venture transactions, not merely general commercial arbitration experience. The quality of the arbitration panel is the single most important factor in the fairness and efficiency of any JV dispute resolution.

Quick Reference: Developer Member Priority Summary

The following table summarizes the 57 checklist items by section and priority level for rapid pre-signing review.

Section	Item	Priority	Chapter Reference
1. Promote	Define 'Contributed Capital' with precision and worked example	CRITICAL	Ch. 2, 9
1. Promote	Define 'Capital Member IRR' with complete mathematical precision	CRITICAL	Ch. 2, 4, 9
1. Promote	Define 'Available Cash' to include all capital event categories	CRITICAL	Ch. 2, 9
1. Promote	Define 'Net Sale Proceeds' with exhaustive deduction list	CRITICAL	Ch. 2
1. Promote	Negotiate simple preferred return (not compounding)	HIGH	Ch. 2, 4
1. Promote	Negotiate catch-up provision above preferred return	HIGH	Ch. 2, 4
1. Promote	Ensure promote survives refinancing events	HIGH	Ch. 2, 4
1. Promote	Protect promote from capital call dilution	HIGH	Ch. 2, 4
1. Promote	Cap clawback; negotiate tax gross-up	HIGH	Ch. 2, 4, 8
1. Promote	Negotiate milestone-based promote vesting schedule	MEDIUM	Ch. 4, 7
2. Ops Control	Establish high dollar thresholds for CM approval	CRITICAL	Ch. 3, 4
2. Ops Control	Negotiate comprehensive deemed approval provision	CRITICAL	Ch. 3, 4
2. Ops Control	Draft initial Approved Business Plan broadly	CRITICAL	Ch. 4
2. Ops Control	Negotiate broad change order authority thresholds	HIGH	Ch. 4, 7
2. Ops Control	Negotiate emergency action authority without prior approval	HIGH	Ch. 4, 7
2. Ops Control	Automatic continuation of prior-year budget upon approval dispute	HIGH	Ch. 3, 4
2. Ops Control	Preserve authority over contractor/vendor relationships	MEDIUM	Ch. 4
2. Ops Control	Negotiate proportional budget reallocation authority	MEDIUM	Ch. 4
3. Fees	All developer fees are above-the-line operating expenses	CRITICAL	Ch. 2, 4
3. Fees	Fees payable regardless of project performance	CRITICAL	Ch. 4
3. Fees	Fees bind capital member's successors and assigns	CRITICAL	Ch. 4
3. Fees	All accrued fees payable upon removal	HIGH	Ch. 4
3. Fees	Negotiate wind-down fee upon no-cause removal	HIGH	Ch. 4
3. Fees	Development fee base includes hard and soft costs	HIGH	Ch. 2

Section	Item	Priority	Chapter Reference
3. Fees	Resist annual fee benchmarking review provisions	**MEDIUM**	Ch. 5
4. Guaranties	Cap all completion guaranty obligations at defined dollar amount	**CRITICAL**	Ch. 4
4. Guaranties	Force majeure and lender interference carve-outs	**CRITICAL**	Ch. 4, 7
4. Guaranties	Burn-off provisions tied to construction milestones	**CRITICAL**	Ch. 4
4. Guaranties	Limit carve-out triggers to intentional misconduct	**CRITICAL**	Ch. 4
4. Guaranties	JV indemnification with expense advancement for guaranty payments	**HIGH**	Ch. 4
4. Guaranties	Explore co-guaranty arrangements with capital member	**MEDIUM**	Ch. 4
5. Exit Rights	ROFO (not ROFR) for developer member transfers	**CRITICAL**	Ch. 4
5. Exit Rights	Drag-along: min hold period + promote preservation	**CRITICAL**	Ch. 4
5. Exit Rights	Buy-sell: min valuation floor + promote adjustment + financing contingency	**CRITICAL**	Ch. 4, 9
5. Exit Rights	Tag-along right in all transfer restriction provisions	**HIGH**	Ch. 4
5. Exit Rights	Forced sale: min hold period + process protections	**HIGH**	Ch. 4
6. Removal	Narrow, objective cause definition with FM carve-outs	**CRITICAL**	Ch. 3, 4, 9
6. Removal	Meaningful cure periods by default type	**CRITICAL**	Ch. 3, 4
6. Removal	Full promote preservation upon no-cause removal	**CRITICAL**	Ch. 3, 4
6. Removal	Vested promote preservation upon for-cause removal	**CRITICAL**	Ch. 3, 4, 9
6. Removal	Removal payment upon no-cause removal	**HIGH**	Ch. 4
6. Removal	All accrued fees expressly payable upon removal	**HIGH**	Ch. 4
7. IP/Pipeline	Grandfather all existing pipeline projects from exclusivity	**CRITICAL**	Ch. 4
7. IP/Pipeline	Limit non-compete to specific geography and asset type	**CRITICAL**	Ch. 4
7. IP/Pipeline	Pre-JV work product: licensed (not assigned) to JV; reversion right	**HIGH**	Ch. 4
7. IP/Pipeline	Limit ROFO to qualifying opportunities with short response period	**HIGH**	Ch. 4, 8
7. IP/Pipeline	Protect developer member's lender and contractor relationships	**MEDIUM**	Ch. 4
8. Tax	Confirm profits interest treatment of promote	**CRITICAL**	Ch. 4
8. Tax	Address Section 704(c) built-in gain if contributing appreciated property	**CRITICAL**	Ch. 4

Section	Item	Priority	Chapter Reference
8. Tax	Guaranteed payment characterization of developer fees	HIGH	Ch. 4
8. Tax	Capital account provisions comply with Treas. Reg. 1.704-1(b)(2)	HIGH	Ch. 4
8. Tax	Understand phantom income risk; ensure liquidity planning	MEDIUM	Ch. 4
9. Governance	Negotiate realistic reporting timelines with cure periods	HIGH	Ch. 3
9. Governance	Capital member inspection rights subject to reasonable coordination	HIGH	Ch. 3, 5
9. Governance	Auditor selection is mutual decision	HIGH	Ch. 5
9. Governance	Review all construction loan covenant interactions	MEDIUM	Ch. 7
9. Governance	Arbitration clause requires real estate JV expert arbitrators	MEDIUM	Ch. 6

Using This Checklist Effectively

This checklist is most effective when used in three stages: (1) Before the term sheet, review the CRITICAL items to ensure that the term sheet's headline economic and governance terms address each issue at least at the summary level; (2) During operating agreement negotiation, use the full checklist as a provision-by-provision review standard, confirming that each item is addressed in the operating agreement's specific language; and (3) As a final pre-execution review, go through every CRITICAL and HIGH item one more time before signing to confirm nothing was missed in the drafting process.

The items marked CRITICAL should not be waived or deferred to ongoing counsel. Each represents a provision whose absence has generated significant JV litigation and financial loss in actual transactions. The cost of addressing each CRITICAL item at the negotiating stage is a fraction of the cost of litigating its absence.

APPENDIX D

Capital Member Negotiation Priorities Checklist

A Comprehensive Pre-Signing Review for the Equity Investor

This checklist is the capital member's primary pre-signing review tool for any real estate joint venture operating agreement. It translates the investment protection guidance of Chapters 3, 5, and 9 into a systematic, provision-by-provision review of the operating agreement terms most critical to the capital member's economic protection, governance oversight, and exit flexibility. Use it before executing the term sheet, throughout the operating agreement negotiation, and as a final pre-closing review.

This checklist contains 64 specific items organized across ten negotiating priority areas. Each item is classified by priority level: CRITICAL (must be addressed before signing, as failure creates unacceptable investment risk), HIGH (should be addressed in all but the most time-constrained negotiations), or MEDIUM (important but acceptable to address through ongoing counsel after closing).

The capital member's negotiating challenge differs fundamentally from the developer member's: the capital member is deploying substantial equity into a project that someone else will build, manage, and control. Every checklist item in this appendix is designed to address a specific failure mode in which the capital member's equity is impaired by an action, inaction, or decision of the developer member that the operating agreement failed to prevent. Understanding these failure modes, and the specific provisions that prevent them, is the foundation of effective capital member protection.

Priority Level Key

□ CRITICAL	□ HIGH	□ MEDIUM
Must resolve before signing. Creates unacceptable investment risk if unaddressed.	Should resolve in all but emergency timelines. Material economic or governance consequence.	Important; address in ongoing counsel if not at signing. Moderate consequence.

SECTION 1 PROTECTING THE CAPITAL INVESTMENT

Priority return mechanics, capital structure protections, and cash management controls

The capital member's most fundamental economic protection is the priority return structure, the provisions ensuring that its contributed capital is returned, with a preferred return, before any promote reaches the developer member. These provisions must be drafted with complete precision; every ambiguity favors the developer member.

□ Confirm capital member's equity is returned before any promote is paid [CRITICAL]

The operating agreement must absolutely prohibit any promote distribution until all of the capital member's contributed capital has been returned in full. This prohibition should be express, unambiguous, and not subject to override by the manager or by majority member vote. The return of capital priority is the capital member's most fundamental structural protection and should be treated as a non-negotiable baseline.

► **Negotiating Tip:** *Confirm that the capital member's priority return of capital applies not only to final sale distributions but to every category of distributable event, including refinancing proceeds, operating distributions, and partial sale proceeds.*

⚠ **Red Flag:** *An operating agreement that permits interim promote distributions before the capital member's full capital return, through broad definitions of 'distributable cash' or flexible waterfall sequencing, is an operating agreement that can legally impair the capital member's principal return.*

□ Negotiate compounding (not simple) preferred return [CRITICAL]

The preferred return should compound annually on both the original contributed capital and on previously accrued but unpaid preferred return. On an $18M equity position at 8% over 5 years, compounding preferred return = $8,448,000 vs. simple = $7,200,000, a $1,248,000 difference that directly protects the capital member's time-value of money. The preferred return must be cumulative, carrying forward unpaid accruals until fully paid, not non-cumulative.

► **Negotiating Tip:** *Model the preferred return calculation under both simple and compounding structures before accepting the developer member's preferred return term. The economic difference compounds significantly over longer hold periods, particularly in development JVs with 5 to 7 year lifecycles.*

⚠ **Red Flag:** *A non-cumulative preferred return, one that forgives unpaid accruals in periods when cash is insufficient, provides meaningless protection against precisely the underperformance scenarios the preferred return is designed to address.*

□ Define 'Contributed Capital' to include only actual cash funded [CRITICAL]

The definition must specify that 'Contributed Capital' means only actual cash contributed by the capital member, not credited or deemed contributions, and not amounts offset against developer fees or other JV expenses. The preferred return base must reflect the capital member's true economic risk.

► **Negotiating Tip:** *Confirm that the preferred return calculation base decreases correctly as capital is returned through interim distributions. A preferred return that continues accruing on already-returned capital overstates the capital member's return threshold.*

□ Negotiate mandatory, fully committed capital contribution obligations for the developer member [CRITICAL]

The developer member's co-investment obligation must be fully committed at closing, not subject to annual re-approval, not fundable through fee credits, and not satisfiable through promissory notes. The co-investment must be real cash at risk alongside the capital member's equity to create genuine alignment.

► **Negotiating Tip:** *Require the developer member to demonstrate financial capacity to fund its co-investment at closing through evidence of liquid assets or committed financing, not merely a statement of intent. A developer member that cannot fund its co-investment when called creates immediate dilution risk.*

⚠ **Red Flag:** *A developer member co-investment funded through fee credits or deemed contributions does not create real alignment of interest, the developer member bears no genuine downside risk if the project underperforms.*

□ Establish minimum cash reserve requirements [CRITICAL]

The operating agreement must establish minimum cash reserves consisting of operating reserves (3 to 6 months of projected operating expenses), capital replacement reserves (annual contributions for future capital expenditures), and debt service reserves (3 to 6

months of projected debt service), all of which must be maintained before any distribution to either member.

► **Negotiating Tip:** *Include an express provision prohibiting any distribution that would reduce JV cash below the minimum reserve levels, and confirm that the manager's failure to maintain required reserves constitutes a cause event for removal purposes.*

☐ **Negotiate for punitive dilution upon developer member capital call default** [HIGH]

If the developer member fails to fund a required co-investment capital call, the capital member should have the right to fund the shortfall and apply punitive dilution (1.25x to 1.5x multiplier) against the developer member's membership interest. Punitive dilution creates a meaningful deterrent against strategic defaults and compensates the capital member for the risk of assuming the developer member's funding obligation.

► **Negotiating Tip:** *Ensure that the dilution remedy applies to both the developer member's membership percentage and its promote entitlement, a developer member whose membership percentage is diluted but whose promote remains unchanged has not been meaningfully deterred.*

☐ **Negotiate for cure loan right as an alternative dilution remedy** [HIGH]

In addition to (or as an alternative to) punitive dilution, the capital member should have the right to advance the developer member's unfunded capital call amount as a senior cure loan bearing interest at a penalty rate (typically 15% per annum or the maximum legal rate), repaid from the developer member's future distributions before the developer member receives any waterfall distributions.

☐ **Confirm all waterfall distributions require capital member consent above minimum thresholds** [HIGH]

Any distribution that would reduce JV cash below defined minimum reserve levels, or any distribution during a pending capital call default period, should require capital member consent as a major decision. The manager should not have authority to make distributions that impair the JV's financial stability.

SECTION 2 GOVERNANCE AND MAJOR DECISIONS

Building a comprehensive oversight framework that provides real protection without creating operational paralysis

The capital member's governance rights are its primary mechanism for ensuring that the developer member operates the project in accordance with the business plan it underwrote. A major decisions list that is incomplete or thresholds that are too high provide the appearance of oversight without its substance.

☐ **Build a comprehensive, specific major decisions list: enumerate every high-risk decision** [CRITICAL]

The major decisions list must include, at minimum: (a) approval of annual budget and any amendment; (b) approval of the business plan and any material amendment; (c) incurrence of any indebtedness above a de minimis threshold; (d) sale, transfer, or encumbrance of JV assets; (e) any affiliate transaction; (f) capital calls above committed amounts; (g) material litigation; (h) tax elections; (i) admission of new members; (j) amendment of the operating agreement; (k) material change in development program; (l) selection of general contractor; (m) construction loan amendments; (n) selection of property manager; (o) entry into leases

outside approved parameters; (p) disposition of the project. Do not rely on a catch-all 'material decision' standard, enumerate every specific category.

► **Negotiating Tip:** *After drafting the major decisions list, test it against the specific project's risk profile: what decisions might this particular developer member make that could harm this particular investment? Each answer that is not already on the list should be added.*

⚠ **Red Flag:** *A major decisions list that omits a specific decision category provides no protection for that category, courts will not imply consent rights that were not expressly negotiated. Omissions from the major decisions list are permanent and cannot be cured after signing.*

□ Set per-item and aggregate budget variance tolerances at appropriately tight levels [CRITICAL]

Per-item variance tolerance: 10% maximum above any approved line item before capital member approval is required. Aggregate variance tolerance: 5% of total project budget before capital member approval of the budget amendment is required. Include an aggregate running total reporting obligation so the capital member can monitor cumulative variance trends.

► **Negotiating Tip:** *Resist developer member arguments for higher variance tolerances based on project size. A 10% per-item tolerance on a $75M project permits $7.5M of unilateral spending above budget before approval is required, already a generous threshold.*

⚠ **Red Flag:** *An aggregate budget variance cap without a per-item cap allows the developer member to exceed individual line items significantly, as long as total aggregate variance is within the cap. Both per-item and aggregate caps are necessary.*

□ Include all affiliate transactions on the major decisions list with no dollar threshold exception [CRITICAL]

Every contract, lease, or service arrangement between the JV and any entity affiliated with the developer member must require capital member approval, without any dollar threshold exception. Above-market affiliate contracts are one of the most common mechanisms of value extraction from JVs, and small-dollar affiliate contracts can create precedents or ongoing obligations that aggregate to significant amounts.

► **Negotiating Tip:** *Require competitive bids from unaffiliated third parties for all affiliate contracts above a de minimis threshold as a condition of capital member approval. A developer member affiliate's fee for construction management services should be benchmarked against at least two competing bids from unaffiliated providers.*

⚠ **Red Flag:** *A major decisions list that includes affiliate transactions only above a defined dollar threshold allows the developer member to enter into below-threshold affiliate contracts systematically, extracting value from the JV through multiple small arrangements that individually are not subject to approval.*

□ Set the deemed approval period at 10 to 15 business days maximum [CRITICAL]

The deemed approval period, the time within which the capital member must respond to a major decision approval request before the request is deemed approved, must be short enough to provide genuine governance without being so short that it cannot be effectively exercised. Ten to fifteen business days is the appropriate range for most major decisions; shorter periods (five business days) for time-sensitive matters may be negotiated but require robust internal approval processes.

► **Negotiating Tip:** *Establish rigorous internal processes for monitoring and responding to major decision approval requests within the deemed approval period. A capital member that routinely fails to respond within the period is effectively delegating its governance rights to the developer member by default.*

⚠ **Red Flag:** *A deemed approval period that is too long (30+ business days) provides inadequate governance for time-sensitive construction and leasing decisions. A period that is too short (3 to 5 days) may be consistently missed by institutional investors with multi-layer internal approval processes.*

□ Include construction loan-related decisions explicitly on the major decisions list [HIGH]

Expressly list as major decisions: approval of construction loan terms; approval of any amendment to the construction loan; any consent under the construction loan; any waiver of lender rights; any refinancing of the construction loan; and any permanent loan closing. Construction loan decisions have profound governance and economic consequences that must be subject to capital member oversight.

► **Negotiating Tip:** *Before signing the operating agreement, review the construction loan term sheet or commitment letter alongside the major decisions list to confirm that every loan-related decision requiring lender consent is also subject to capital member approval under the operating agreement.*

□ Include leasing approval rights at appropriate parameters [HIGH]

For commercial assets (office, retail, industrial), leases above defined size thresholds or below defined rent thresholds must require capital member approval. Include approval rights for: (a) any lease of more than 10,000 sq. ft. in an office or retail project; (b) any lease at a rent more than 10% below the underwritten base case; (c) any lease with a free rent period exceeding 3 months; (d) any lease with a tenant improvement allowance exceeding the approved standard; and (e) any lease that requires material capital expenditures beyond the approved capital improvement budget.

□ Negotiate for approval rights over material design and scope changes [HIGH]

Any material change to the project's development program (changes in total gross square footage, changes in use mix, material changes in building quality standard, and changes in unit configuration) must require capital member approval as a major decision. These changes alter the risk profile and value proposition of the investment.

□ Confirm that contractor and vendor approval rights are included for significant contracts [MEDIUM]

The selection of the general contractor, major subcontractors above a defined threshold (typically $2M+), the property management company, and exclusive leasing agents should all require capital member approval. These relationships directly affect the project's cost, schedule, and leasing performance.

SECTION 3 KEY MAN AND DEVELOPER CONDUCT CONTROLS

Protecting the human expertise that justified the investment decision

The capital member invested based on specific people, specific principals whose track record, market knowledge, and execution capability justified the investment thesis. Key man provisions protect the capital member's investment in those specific individuals against departure, distraction, or dilution.

□ Identify key men by name: never by title only [CRITICAL]

The key man provision must identify the specific individuals whose continued involvement is material by name, not by title or role. A key man provision that identifies the 'Chief Executive

Officer of Developer Member' provides no protection against management substitution: the developer member can promote a less qualified person into the CEO title without triggering the provision.

► **Negotiating Tip:** *Identify two to four named key men who are essential to the investment thesis. Include: the principal(s) responsible for strategic decision-making, the project executive responsible for day-to-day management, and (for development projects) the entitlement specialist whose relationships with local approval authorities are non-replaceable.*

⚠ **Red Flag:** *A key man provision defined by title rather than name is essentially no key man protection at all.*

☐ Specify a meaningful time commitment percentage for each key man [CRITICAL]

Each named key man must devote not less than a defined minimum percentage of their professional time (50% to 100%, depending on the project's complexity and the developer member's platform size) to managing the JV. Vague standards like 'substantially all professional time' are easy to argue around; specific percentages create an objective, measurable obligation.

► **Negotiating Tip:** *Negotiate for a rolling average measurement (no less than the required percentage averaged over any six-month period) rather than a daily requirement, which would be impractical to measure and enforce.*

⚠ **Red Flag:** *A time commitment percentage without a measurement methodology creates disputes about what 'substantially all' means in practice. 'Not less than 75% of each individual's professional time, measured as an average over any rolling six-month period' is far more precise and enforceable.*

☐ Define key man departure events precisely: no side-arrangement exceptions [CRITICAL]

A key man event should be triggered by: death; permanent disability; voluntary departure from the developer member's organization; involuntary termination; or a reduction in professional time commitment below the required minimum (measured over the specified period). Expressly exclude arrangements in which the key man remains nominally employed but performs no substantive management activities, such arrangements should be treated as a departure for key man purposes.

⚠ **Red Flag:** *A key man provision that does not address the 'nominal employment' scenario allows the developer member to technically satisfy the key man requirement while actually replacing the key man with a less qualified person who handles day-to-day management.*

☐ Retain meaningful approval rights over key man replacements [CRITICAL]

The capital member must have the right to approve any proposed key man replacement, with objective minimum qualifications specified in the operating agreement (e.g., minimum 10 years of experience in the relevant asset type; minimum $250M in relevant transaction volume). The approval right should not be subject to a reasonableness standard, the capital member should have sole and absolute discretion over replacement approval, subject only to a prohibition against arbitrary refusal without stated reason.

► **Negotiating Tip:** *Include a pre-approved succession list in the operating agreement: a list of individuals within the developer member's organization who are pre-approved as key man replacements without requiring case-by-case capital member consent. This reduces friction while protecting the capital member's right to reject unqualified outsiders.*

☐ Negotiate a comprehensive non-compete with appropriate scope [HIGH]

The developer member should be prohibited from developing or managing any directly competing project (same asset type, same geographic submarket) during the JV's

investment period, without the capital member's prior consent. The non-compete must cover the developer member and all of its affiliates and principals.

► **Negotiating Tip:** *Define the geographic scope of the non-compete with objective criteria (radius, zip codes, or named submarket boundaries) to prevent disputes about whether a specific project falls within the restricted area.*

☐ **Negotiate exclusivity provisions for qualifying investment opportunities** [HIGH]

In programmatic JVs, the developer member must be required to offer all qualifying investment opportunities (within the program's defined asset type, geography, and size parameters) to the capital member before pursuing them with any other capital source. Include a short response period (15 to 20 business days) and a binding deemed-pass if the capital member does not respond.

► **Negotiating Tip:** *Define 'qualifying investment opportunity' broadly enough to capture all deals within the program's investment parameters, and include anti-circumvention provisions prohibiting the developer member from structuring transactions to avoid the exclusivity obligation.*

☐ **Include non-solicitation covenants covering JV employees, tenants, contractors, and lenders** [MEDIUM]

The developer member should be prohibited from soliciting the JV's key employees, major tenants, key contractors, and primary lender relationships for competing projects, during the JV's investment period and for 12 to 24 months following its termination. These covenants protect the capital member's investment in the relationships the JV has established.

SECTION 4 REMOVAL AND REPLACEMENT RIGHTS

Ensuring the capital member can replace an underperforming or non-compliant manager when necessary

The removal right is the capital member's ultimate governance backstop. Without an effective removal right, all other governance provisions become advisory rather than binding. The developer member knows it cannot be replaced, and the governance framework loses its deterrent effect.

☐ **Negotiate a broad cause definition including material operational failures** [CRITICAL]

Cause must include, at minimum: (a) fraud or intentional misrepresentation; (b) gross negligence or willful misconduct; (c) criminal conviction for a felony; (d) material, uncured breach of the operating agreement; (e) insolvency or bankruptcy; (f) key man event not cured within the applicable period; (g) material budget overrun attributable to developer member management failures (not force majeure or market conditions); and (h) material, persistent failure to meet approved development schedule milestones attributable to developer member failures.

► **Negotiating Tip:** *Define performance-based cause triggers with objective thresholds: 'budget overrun exceeding 15% of total project cost attributable to developer member gross negligence or willful misconduct, as determined by an independent construction manager appointed by mutual agreement.' Objective definitions prevent both pretextual removal claims and pretextual defenses.*

☐ **Negotiate a no-cause removal right with adequate notice period** [CRITICAL]

The capital member must have the unconditional right to remove the developer member as manager without cause, upon written notice and expiration of a defined notice period (30 to 60 days). No-cause removal is the capital member's protection against a developer member

that is technically not in breach but whose performance, judgment, or conduct no longer merits confidence. The notice period should be long enough for an orderly management transition but short enough to prevent a prolonged governance vacuum.

► **Negotiating Tip:** *The notice period should begin automatically upon delivery of the removal notice, not upon the developer member's acknowledgment of receipt. Include express provisions requiring the developer member to continue managing the project during the notice period in accordance with the approved business plan.*

⚠ **Red Flag:** *A capital member that lacks a no-cause removal right is dependent entirely on demonstrating specific cause for removal, a difficult, expensive, and uncertain evidentiary exercise, even when the developer member's conduct makes a continued relationship untenable.*

☐ **Negotiate automatic removal upon developer member insolvency or bankruptcy** [CRITICAL]

The operating agreement should provide for automatic removal of the developer member as manager upon: any voluntary or involuntary bankruptcy filing by the developer member entity; any general assignment for the benefit of creditors; any appointment of a receiver; or any similar insolvency event affecting the developer member's ability to manage the JV effectively. Automatic removal upon insolvency should not require a separate removal notice or cure period.

► **Negotiating Tip:** *Include a change-of-control provision that treats a material change in ownership or control of the developer member entity as a cause removal event, protecting the capital member against the effective replacement of the developer member's management team through a corporate transaction.*

☐ **Ensure a comprehensive transition cooperation obligation** [CRITICAL]

Upon removal (cause or no cause), the developer member must be expressly obligated to: (a) provide all project files, contracts, correspondence, financial records, and other documents; (b) facilitate introductions to key contractors, tenants, lenders, and governmental contacts; (c) continue performing essential management functions during the transition period; (d) maintain all required insurance during the transition; and (e) refrain from any action that would harm the JV or impair the successor manager's ability to assume management responsibilities. The cooperation obligation should be backed by a specific enforcement mechanism.

► **Negotiating Tip:** *Define a transition period (30 to 90 days from the removal date) during which the developer member's cooperation obligation is in effect, and specify the developer member's compensation during this period (continuation of a wind-down management fee).*

☐ **Maintain a pre-identified replacement manager candidate list** [HIGH]

Before executing the operating agreement, internally identify two to three potential replacement managers, experienced development or asset management firms with relevant expertise in the project's asset type and market, that could be engaged immediately upon a removal event. Do not wait until after removal to identify a replacement; a management vacuum during a critical construction or leasing phase can cause irreparable harm.

► **Negotiating Tip:** *Consider including a framework in the operating agreement for interim management authority: upon delivery of a removal notice, the capital member has the right to appoint an interim manager (which may be the capital member itself or an affiliate) with full management authority pending the permanent replacement search.*

☐ **Negotiate post-removal economic treatment that reflects developer member fault level** [HIGH]

For-cause removal: developer member forfeits unvested promote (based on the milestone vesting schedule); accrued fees are payable; future fees cease. No-cause removal: developer member retains full vested and unvested promote interests (calculated at hypothetical fair market value disposition on the removal date); accrued fees are payable; future fees cease. This framework rewards legitimate cause-based removal and ensures the capital member pays for the economic right it exercises in no-cause removal.

► **Negotiating Tip:** *Confirm that the post-removal promote calculation uses a hypothetical fair market value, not a discounted or distressed value, to prevent the capital member from timing a no-cause removal to minimize the developer member's promote entitlement.*

□ Confirm the capital member has sole authority to select the replacement manager [MEDIUM]

Upon removal, the capital member should have the right to appoint a permanent replacement manager without the developer member's consent. The developer member should not have approval rights over its own replacement. An interim manager appointed by the capital member should have full management authority immediately upon removal, without any gap period.

SECTION 5 EXIT RIGHTS AND LIQUIDITY

Ensuring the capital member can realize its investment within its mandate timeline

The capital member's investment has a defined horizon, driven by fund lifecycle requirements, institutional investment mandates, or strategic portfolio management decisions. Exit provisions that fail to provide genuine liquidity trap institutional capital in illiquid investments beyond their intended holding period.

□ Negotiate an absolute forced sale right after a defined minimum hold period [CRITICAL]

The capital member must have the unconditional right, after a defined minimum hold period (typically 3 to 5 years from stabilization for income-producing assets), to require the JV to conduct a bona fide arm's-length marketing process and sell the property. The forced sale right must be absolute, not conditioned on the developer member's consent, not subject to a minimum price floor, and not dependent on demonstrating a governance deadlock.

► **Negotiating Tip:** *The forced sale right's minimum hold period should be measured from stabilization (the achievement of occupancy and income thresholds), not from the JV's formation date. A forced sale right that can be triggered during active construction destroys value; one that cannot be triggered until years after stabilization traps capital.*

⚠ **Red Flag:** *A forced sale right subject to a minimum price condition is effectively no forced sale right in a declining market. The capital member's obligation to its own investors may require a sale even at a loss, and a minimum price condition can prevent the capital member from meeting that obligation.*

□ Negotiate an absolute drag-along right for capital member sale transactions [CRITICAL]

The capital member must have an unconditional right to require the developer member to sell its membership interest alongside the capital member in any bona fide arm's-length transaction with a third-party buyer. The drag-along must be backed by an irrevocable power of attorney from the developer member authorizing the capital member (or the JV entity) to execute transfer documents on the developer member's behalf if the developer member fails to cooperate.

► **Negotiating Tip:** *The drag-along should cover both direct transfers of membership interests and sales of the JV's underlying property assets, preventing the developer member from blocking the capital member's exit by objecting to one form of transaction structure while accepting another.*

☐ **Negotiate a right of first refusal (ROFR) over developer member transfers** [CRITICAL]

The capital member must have a ROFR over any proposed transfer of the developer member's membership interest, entitling the capital member to acquire the developer member's interest on the same terms as any third-party purchase offer. This protects the capital member against the developer member transferring its management role and promote entitlement to an unknown or unacceptable successor.

► **Negotiating Tip:** *Confirm that the ROFR covers not only direct transfers but also indirect transfers, including changes of control of the developer member entity through corporate transactions, mergers, and acquisitions of the developer member's parent company.*

☐ **Negotiate buy-sell trigger rights after a minimum hold period** [HIGH]

The capital member should have the right to trigger the buy-sell mechanism after a defined minimum hold period (typically 2 to 3 years from stabilization), enabling the capital member to force a valuation event even without a specific governance deadlock. The buy-sell trigger should be exercisable at the capital member's discretion, without requiring the existence of a governance deadlock or cause for removal.

► **Negotiating Tip:** *The buy-sell price should be set by the trigger party (the capital member, in this scenario) without a minimum price floor, the capital member's obligation to its investors may require a sale even at a price that does not satisfy the preferred return, and a minimum price condition can prevent the capital member from triggering the buy-sell mechanism at a price the market will support.*

☐ **Confirm that all exit mechanisms apply to both direct and indirect transfers** [HIGH]

Every exit mechanism (ROFR, drag-along, forced sale right, and buy-sell) should expressly apply to both direct transfers of membership interests and indirect transfers resulting from corporate transactions affecting the developer member entity. Changes of ownership at the developer member's organizational parent level can effectively transfer the management role to a new owner without triggering the JV's transfer restriction provisions.

☐ **Confirm disposition process rights: capital member's authority to control the sale** [MEDIUM]

Upon triggering the forced sale right or drag-along, the capital member should have sole authority to determine the sale terms (price, closing date, buyer, representations and warranties, closing conditions) after a minimum marketing period. The developer member's right to participate in the disposition process should be limited to advisory input, not a consent right over sale terms.

SECTION 6 REPORTING, TRANSPARENCY, AND AUDIT RIGHTS

Building the information infrastructure required for effective governance oversight

A capital member that cannot see inside the JV cannot protect its investment. Reporting and audit rights are the intelligence infrastructure of JV governance, and they must be actively enforced, not merely included in the operating agreement.

☐ **Require monthly construction reports with specific content requirements** [CRITICAL]

Monthly reports during the construction phase must include: (a) a budget-to-actual comparison on a line-item basis for the current month and cumulative to date; (b) a construction schedule update with projected completion dates for each milestone; (c) a summary of all change orders approved since the prior report and the cumulative change order total; (d) a cash flow forecast for the next 90 days; (e) a summary of all lender draw requests submitted and funded since the prior report; and (f) a narrative description of any material events (lender concerns, contractor issues, permitting delays) since the prior report.

► **Negotiating Tip:** *Establish specific delivery deadlines: monthly reports delivered no later than 20 business days after month-end. Confirm that reporting failures are subject to meaningful consequences (cure periods that escalate to cause removal triggers if not cured).*

⚠ **Red Flag:** *A reporting obligation without specific content requirements produces whatever the developer member chooses to share, not the information the capital member needs. Content requirements are as important as delivery deadlines.*

☐ **Require concurrent delivery of all lender reports, draw requests, and compliance certificates** [CRITICAL]

Every document submitted to or received from the construction lender (draw requests, inspection reports, compliance certificates, lender correspondence, covenant calculations, waiver requests, and default notices) must be delivered to the capital member concurrently with its submission to or receipt from the lender. The capital member should have real-time visibility into the project's lender relationship.

► **Negotiating Tip:** *Require immediate notification (within 24 to 48 hours) of any event of default under the construction loan, any lender-issued notice of non-compliance, or any lender-required remediation action. Do not wait for the monthly report to learn about a construction loan event of default.*

☐ **Negotiate for read-only access to JV bank accounts through an online portal** [CRITICAL]

The capital member should have read-only access to all JV operating accounts through an online banking portal, providing real-time visibility into cash flows without the delay inherent in monthly financial reports. This access allows the capital member to monitor the JV's cash position, identify unauthorized disbursements, and detect financial irregularities in real time.

► **Negotiating Tip:** *Confirm that the read-only access covers all JV accounts, including construction loan draw accounts, operating accounts, reserve accounts, and any escrow accounts. Access limited to the primary operating account is insufficient.*

⚠ **Red Flag:** *A developer member that resists providing read-only bank account access to the capital member should be viewed with heightened scrutiny. Legitimate managers have no reason to limit the capital member's visibility into the JV's cash position.*

☐ **Require annual audited financial statements with capital member approval of the auditor** [HIGH]

The annual audit must be performed by an independent CPA firm approved by the capital member (not merely notified to the capital member). The audit scope must cover all JV operations and affiliate transactions. The capital member must receive direct access to the auditor, including the right to communicate directly and receive all management letters and audit findings without the developer member as an intermediary.

► **Negotiating Tip:** *Include a provision requiring the developer member to disclose any disagreements with the auditor regarding accounting policies or the presentation of financial information. Disagreements between the developer member and the auditor are often early warning signals of financial reporting irregularities.*

☐ Negotiate for independent audit rights at any time upon reasonable notice [HIGH]

In addition to the annual independent audit, the capital member should have the right to conduct its own audit of the JV's books and records at any time upon reasonable advance notice (10 business days). The cost of any such audit should be borne by the capital member, except that if the audit reveals a material discrepancy (typically defined as a variance of more than 2% of annual revenues or $50,000, whichever is less), the cost of the audit is borne by the developer member.

► **Negotiating Tip:** *The independent audit right should extend to the developer member's management records and affiliate transaction documentation, not merely the JV entity's financial records. Affiliate transaction overcharges may not appear in the JV's financial statements without examination of the underlying affiliate contracts.*

☐ Negotiate cure rights for reporting failures that escalate to removal triggers [HIGH]

Reporting failures should be subject to a tiered consequence structure: first occurrence, written notice and a 10-business-day cure period; second occurrence within 12 months, written notice and a 5-business-day cure period; third occurrence within 12 months, automatic cause removal trigger with no cure period. This structure treats reporting failures as the governance risks they are, without creating removal exposure from a single administrative oversight.

☐ Establish a formal lender compliance monitoring process [MEDIUM]

The operating agreement should require the developer member to deliver a quarterly lender compliance certificate to the capital member, confirming that all construction loan covenants are being met, all required reserves are fully funded, and there are no events of default or potential defaults under the loan documents. This certificate creates a regular disclosure obligation that makes it harder for the developer member to conceal emerging lender compliance issues.

SECTION 7 DILUTION AND ANTI-DILUTION PROTECTIONS

Ensuring the capital member's economic interest cannot be impaired without its express consent

☐ Prohibit new member admission without capital member consent [CRITICAL]

No new member may be admitted to the JV, whether through the issuance of new interests or the transfer of existing interests, without the capital member's express written consent, exercisable in the capital member's sole and absolute discretion. This prohibition protects the capital member against the dilution of its governance rights by the admission of third parties it did not agree to partner with.

► **Negotiating Tip:** *Confirm that the prohibition covers both direct admissions (issuance of new membership interests) and indirect admissions (transfers of existing interests to new parties, including in-kind contributions of the developer member's interests to a new entity).*

☐ Confirm the waterfall cannot be amended without capital member consent [CRITICAL]

The distribution waterfall, including the preferred return rate, the promote percentage, the promote thresholds, and the clawback mechanics, must be classified as a super-major decision requiring both parties' unanimous consent for any amendment. The capital member's preferred return is its primary economic protection; it must not be subject to unilateral modification by any mechanism.

► **Negotiating Tip:** *Review every provision in the operating agreement that could affect the waterfall calculation, not just the waterfall section itself. Provisions in the definitions section, the distribution timing provisions, and the dissolution and liquidation sections can all affect waterfall economics and should be subject to the same amendment restriction.*

□ Negotiate pre-emptive rights for any additional equity issuances [HIGH]

If additional equity above the initial committed amounts is approved as a major decision and required by the project, the capital member should have the first right to fund all or a disproportionate share of the additional equity, maintaining or enhancing its economic interest in the JV. Pre-emptive rights prevent the developer member from diluting the capital member's position by bringing in a third-party equity source without the capital member's consent.

□ Confirm preferred return cannot be subordinated by additional debt [HIGH]

Any additional debt obligation that would reduce the cash available to pay the capital member's preferred return before it accrues to the full preferred return amount must require capital member consent as a major decision. The capital member's preferred return is senior to all equity distributions; additional debt that effectively subordinates the preferred return impairs this fundamental protection.

□ Negotiate for aggregate fee cap to prevent fee stacking [MEDIUM]

Total fees payable to the developer member and its affiliates as a percentage of total project cost should be capped at a defined aggregate maximum (typically 4% to 6% of total project cost, depending on deal size and complexity). The aggregate cap prevents the developer member from stacking individual fees that are each individually reasonable but collectively excessive.

SECTION 8 DEVELOPER FEE OVERSIGHT

Ensuring developer compensation is fair, market-rate, and transparently documented

□ Enumerate all permitted fees in a comprehensive fee schedule: no unlisted fees [CRITICAL]

The operating agreement or a separate exhibit must include a comprehensive schedule of every fee payable to the developer member and its affiliates. No fee may be charged to the JV that is not expressly listed in the fee schedule, regardless of whether it would otherwise be at market rate. The comprehensive fee schedule prevents the developer member from introducing new fee arrangements after closing.

► **Negotiating Tip:** *After drafting the fee schedule, ask the developer member to confirm in writing that the schedule is complete and exhaustive, that no other fees, compensation, or payments from the JV to the developer member or its affiliates are contemplated.*

⚠ **Red Flag:** *A fee schedule that fails to enumerate all fees expressly is an invitation for the developer member to introduce new fee arrangements after closing, arguing that they represent legitimate above-the-line expenses not captured in the operating agreement.*

□ Confirm all affiliate contracts must meet the arm's-length market rate standard [CRITICAL]

Every approved affiliate contract must be expressly conditioned on its terms being no less favorable to the JV than terms available from an unaffiliated third party in a competitive market. The capital member should have the right to require competitive bids from at least

two unaffiliated providers before approving any affiliate contract above a de minimis threshold.

► **Negotiating Tip:** *Include a right to terminate any affiliate contract if an independent review (at the JV's expense) confirms that the affiliate is charging materially above-market rates. 'Materially above market' should be defined as more than 15% above the median rate from three comparable unaffiliated providers.*

□ Negotiate the right to terminate affiliate contracts upon developer member removal [HIGH]

Upon any removal of the developer member as manager, whether for cause or no cause, the capital member must have the right to terminate all affiliate contracts (management agreements, construction contracts, service agreements) without penalty to the JV. The developer member's affiliates provide services to the JV based on the developer member's management role; that role's termination should not continue the JV's obligation to those affiliates.

► **Negotiating Tip:** *Review the termination provisions of each affiliate contract alongside the operating agreement before closing. Affiliate contracts with long-term commitments or large termination penalties impair the capital member's removal right by creating a significant economic cost to exercising it.*

□ Negotiate annual fee benchmarking review rights [HIGH]

The capital member should have the right to require an annual benchmarking of developer fees against current market rates, with the right to demand a fee reduction if benchmarking reveals a material above-market rate. Include a binding determination mechanism (independent third-party fee consultant) if the parties disagree about the benchmarking result.

► **Negotiating Tip:** *Conduct the initial fee benchmarking before closing, before agreeing to the fee schedule, to confirm that the proposed fees reflect current market rates. A fee schedule accepted without benchmarking validation may lock the capital member into above-market fees for the entire project lifecycle.*

□ Require the developer member to disclose all affiliate relationships annually [MEDIUM]

The developer member should be required to deliver an annual disclosure identifying all affiliate relationships relevant to the JV, including entities that provide or may provide services to the JV, entities that have co-investment relationships with the developer member, and entities in which the developer member's principals have financial interests. Annual disclosure ensures that the capital member's affiliate approval process is based on complete information.

SECTION 9 TAX AND INVESTOR-LEVEL CONSIDERATIONS

Addressing entity-specific tax issues before they become surprises at distribution or disposition

□ Address UBTI exposure before signing: for tax-exempt capital members [CRITICAL]

Tax-exempt capital members (pension funds, endowments, foundations) must analyze and address their Unrelated Business Taxable Income (UBTI) exposure from debt-financed real estate income before committing to the JV structure. The UBTI exposure must be quantified, the applicable rate (corporate income tax rate) must be modeled against projected distributions, and UBTI mitigation strategies (blocker entity, debt limitation) must be evaluated before signing.

► **Negotiating Tip:** *Engage tax counsel with ERISA and UBTI expertise, separate from transactional JV counsel, before the term sheet stage. UBTI analysis is time-consuming and may affect the optimal JV structure in ways that cannot easily be addressed after the operating agreement is signed.*

⚠ **Red Flag:** *A tax-exempt capital member that discovers a material UBTI exposure after the JV is formed faces either accepting the unexpected tax cost or restructuring the JV at significant cost and delay. Neither outcome is acceptable when the exposure was foreseeable.*

☐ **Address FIRPTA withholding obligations before signing: for foreign capital members** [CRITICAL]

Foreign capital members must analyze their FIRPTA withholding exposure in connection with distributions from the JV (including operating distributions, refinancing distributions, and disposition proceeds). The operating agreement must specify how FIRPTA withholding obligations are calculated, who is responsible for withholding and remittance, and how withheld amounts are credited against the foreign capital member's distribution entitlement.

► **Negotiating Tip:** *Evaluate treaty benefits that may reduce or eliminate FIRPTA withholding for capital members from countries with applicable income tax treaties with the United States. The evaluation should be completed before signing, not after the first distribution event.*

☐ **Confirm the operating agreement's tax allocation provisions comply with Section 704(b)** [HIGH]

The capital account maintenance provisions and tax allocation provisions must comply with the 'substantial economic effect' standard of Treasury Regulation Section 1.704-1(b)(2), ensuring that the JV's tax allocations are consistent with its economic arrangement and will be respected by the IRS. Non-compliant provisions can result in recharacterization of allocations, generating unexpected tax liability.

► **Negotiating Tip:** *Engage tax counsel to review the operating agreement's tax provisions before signing, with specific attention to: (a) capital account maintenance requirements; (b) Section 704(c) allocations if any member is contributing appreciated property; and (c) the relationship between the tax allocations and the economic waterfall.*

☐ **Negotiate control over tax elections that materially affect the capital member** [HIGH]

All tax elections that could materially affect the capital member's tax position, including Section 754 elections, accounting method elections, and partnership status elections, must require capital member consent as a major decision. The capital member should not be subject to tax consequences resulting from elections made unilaterally by the developer member.

► **Negotiating Tip:** *Specifically address the Section 754 election, which adjusts the inside basis of JV assets upon a transfer of membership interests or upon the death of a member. This election can significantly affect the tax consequences of a transfer and should not be made without the capital member's informed consent.*

☐ **Negotiate withholding compliance and notification obligations** [HIGH]

The operating agreement must require the developer member to: (a) comply with all applicable federal and state withholding obligations; (b) promptly notify the capital member of any anticipated withholding obligation and the basis for the withholding calculation; (c) treat withheld amounts as distributions for waterfall calculation purposes; and (d) cooperate with the capital member's efforts to assert any applicable withholding exemption or reduction.

☐ **Negotiate for Schedule K-1 delivery within a defined timeline** [MEDIUM]

The developer member must deliver annual Schedule K-1s (or equivalent state tax forms) to all members within 90 days of fiscal year-end (or within the time required to permit timely filing of the capital member's own tax returns, including extensions). Late K-1 delivery can result in late filing penalties for the capital member.

► **Negotiating Tip:** *For institutional capital members with complex tax reporting obligations (pension funds, foreign investors, tax-exempt organizations), negotiate for an estimated K-1 to be delivered within 60 days, with the final K-1 to follow within 90 days.*

SECTION 10 DUE DILIGENCE AND PRE-CLOSING REQUIREMENTS

Confirming the investment basis before committing equity

□ Review the developer member's financial statements before signing [CRITICAL]

Require the developer member to provide audited or reviewed financial statements for the past two to three fiscal years, confirming that the developer member has the financial capacity to meet its co-investment obligation, its guaranty obligations, and its operational overhead commitments. A developer member with insufficient liquidity or net worth cannot fulfill its JV obligations even with the best intentions.

► **Negotiating Tip:** *Require ongoing annual financial statement delivery as an operating agreement covenant, not just at closing. The developer member's financial position can deteriorate during the project's lifecycle in ways that create risk for the capital member's investment.*

⚠ **Red Flag:** *A developer member that cannot demonstrate adequate financial capacity at the time of signing cannot be expected to fund its co-investment, fulfill its guaranty obligations, or maintain its operational infrastructure when the project encounters stress.*

□ Review all construction loan documents alongside the operating agreement before signing [CRITICAL]

Every construction loan document (the loan agreement, promissory note, deed of trust, completion guaranty, carve-out guaranty, environmental indemnity, and all side letters) must be reviewed by capital member's counsel concurrently with the operating agreement, to identify every conflict between the lender's requirements and the operating agreement's governance provisions.

► **Negotiating Tip:** *Create a conflicts matrix: a document-by-document comparison identifying every lender consent requirement, distribution restriction, and management change provision in the loan documents and confirming that each is consistent with the operating agreement's governance framework. Resolve every conflict before closing.*

⚠ **Red Flag:** *The most common post-closing governance surprise is a lender consent requirement that effectively voids an operating agreement governance right the capital member thought it had. This surprise is entirely avoidable through concurrent document review before signing.*

□ Confirm the developer member's track record with reference checks [HIGH]

Verify the developer member's track record claims through direct reference checks with: (a) prior capital partners in comparable projects; (b) construction lenders from comparable projects; (c) key contractors and subcontractors; and (d) local governmental officials involved in prior entitlement processes. Claims of successful prior projects should be verified against actual financial results, not merely the developer member's representations.

► **Negotiating Tip:** *Request financial performance data (actual IRR achieved, construction cost variance, schedule variance) for the developer member's most recent three to five comparable projects. Compare actual results against the developer member's original business plan projections to assess forecast accuracy.*

□ Conduct independent review of the project's business plan and underwriting [HIGH]

Engage an independent real estate advisor to review the project's business plan and underwriting before committing equity, including a market study supporting the projected rents, a construction cost review by an independent construction manager, a review of the proposed financing structure, and a sensitivity analysis showing the investment's performance under stress scenarios.

► **Negotiating Tip:** *The sensitivity analysis should model the investment under at least three scenarios: (a) base case (business plan as presented); (b) moderate stress (10% to 15% construction cost overrun; 6-month schedule delay; rents 10% below projection); and (c) severe stress (20% to 25% construction cost overrun; 12-month schedule delay; rents 20% below projection). The severe stress scenario should model the full impact on the preferred return coverage and the capital member's expected IRR.*

□ Review the developer member's key man insurance policies [MEDIUM]

Confirm that the developer member maintains life and disability insurance on each named key man in amounts sufficient to fund the JV's cost of transition to a replacement manager in the event of an unexpected key man departure. Key man insurance proceeds should be payable to the JV (or held in a JV-controlled account) rather than to the developer member entity.

Quick Reference: Developer Member Priority Summary

The following table maps all 64 checklist items to their section, priority level, and handbook chapter cross-reference for rapid pre-signing review.

Section	Item	Priority	Chapter Ref
1. Capital Investment	CM equity returned before any promote, absolute prohibition	CRITICAL	Ch. 2, 5
1. Capital Investment	Compounding (not simple) preferred return; cumulative accrual	CRITICAL	Ch. 2, 5
1. Capital Investment	Define 'Contributed Capital' as actual cash only	CRITICAL	Ch. 2, 5
1. Capital Investment	Mandatory, committed co-investment, real cash, no fee credits	CRITICAL	Ch. 2, 5
1. Capital Investment	Minimum cash reserve requirements before any distribution	CRITICAL	Ch. 5
1. Capital Investment	Punitive dilution upon developer member capital call default	HIGH	Ch. 2, 5
1. Capital Investment	Cure loan right as alternative dilution remedy	HIGH	Ch. 2
1. Capital Investment	Capital member consent for distributions above reserve minimum	HIGH	Ch. 5
2. Major Decisions	Comprehensive specific major decisions list, enumerate every category	CRITICAL	Ch. 3, 5, 9
2. Major Decisions	Per-item (10%) and aggregate (5%) budget variance tolerances	CRITICAL	Ch. 3, 5
2. Major Decisions	All affiliate transactions, no dollar threshold exception	CRITICAL	Ch. 3, 5, 9
2. Major Decisions	Deemed approval period 10 to 15 business days maximum	CRITICAL	Ch. 3, 5
2. Major Decisions	Construction loan decisions explicitly on major decisions list	HIGH	Ch. 7
2. Major Decisions	Leasing approval rights at defined parameters	HIGH	Ch. 5
2. Major Decisions	Approval rights over material design and scope changes	HIGH	Ch. 5
2. Major Decisions	Contractor and vendor approval for significant contracts	MEDIUM	Ch. 5
3. Key Man / Conduct	Key men identified by name, never by title only	CRITICAL	Ch. 3, 5
3. Key Man / Conduct	Specific time commitment percentage for each key man	CRITICAL	Ch. 3, 5
3. Key Man / Conduct	Precise departure event definition, no nominal employment exception	CRITICAL	Ch. 3, 5
3. Key Man / Conduct	Meaningful approval rights over key man replacements	CRITICAL	Ch. 3, 5
3. Key Man / Conduct	Comprehensive non-compete with objective scope definition	HIGH	Ch. 5, 8
3. Key Man / Conduct	Exclusivity provisions for qualifying investment opportunities (programmatic)	HIGH	Ch. 5, 8

Section	Item	Priority	Chapter Ref
3. Key Man / Conduct	Non-solicitation covering employees, tenants, contractors, lenders	MEDIUM	Ch. 5
4. Removal	Broad cause definition including material operational failures	CRITICAL	Ch. 3, 5, 9
4. Removal	No-cause removal right with adequate notice period	CRITICAL	Ch. 3, 5
4. Removal	Automatic removal upon insolvency or bankruptcy	CRITICAL	Ch. 3, 5
4. Removal	Comprehensive transition cooperation obligation	CRITICAL	Ch. 3, 5
4. Removal	Pre-identified replacement manager candidate list	HIGH	Ch. 5
4. Removal	Post-removal economic treatment reflecting fault level	HIGH	Ch. 3, 5
4. Removal	Capital member has sole authority to select replacement manager	MEDIUM	Ch. 3, 5
5. Exit Rights	Absolute forced sale right after minimum hold period	CRITICAL	Ch. 5
5. Exit Rights	Absolute drag-along right backed by irrevocable power of attorney	CRITICAL	Ch. 5
5. Exit Rights	ROFR over developer member transfers (including indirect)	CRITICAL	Ch. 5
5. Exit Rights	Buy-sell trigger rights after minimum hold period	HIGH	Ch. 5, 9
5. Exit Rights	Exit mechanisms cover direct and indirect transfers	HIGH	Ch. 5
5. Exit Rights	Disposition process: CM controls sale terms after marketing period	MEDIUM	Ch. 5
6. Reporting / Audit	Monthly construction reports with specific content requirements	CRITICAL	Ch. 3, 5
6. Reporting / Audit	Concurrent delivery of all lender reports and correspondence	CRITICAL	Ch. 3, 5, 7
6. Reporting / Audit	Read-only access to all JV bank accounts via online portal	CRITICAL	Ch. 5
6. Reporting / Audit	Annual audited financials; CM approves auditor; direct auditor access	HIGH	Ch. 5
6. Reporting / Audit	Independent audit rights at any time; cost-shifting for material discrepancies	HIGH	Ch. 5
6. Reporting / Audit	Tiered reporting failure consequences escalating to removal trigger	HIGH	Ch. 3, 5
6. Reporting / Audit	Quarterly lender compliance certificate from developer member	MEDIUM	Ch. 5, 7
7. Dilution / Anti-Dilution	No new member admission without CM express written consent	CRITICAL	Ch. 5
7. Dilution / Anti-Dilution	Waterfall amendment requires unanimous consent, super-major decision	CRITICAL	Ch. 3, 5
7. Dilution / Anti-Dilution	Pre-emptive rights for any additional equity issuances	HIGH	Ch. 5

Section	Item	Priority	Chapter Ref
7. Dilution / Anti-Dilution	Preferred return cannot be subordinated by additional debt	HIGH	Ch. 5
7. Dilution / Anti-Dilution	Aggregate fee cap to prevent stacking across all fee categories	MEDIUM	Ch. 5
8. Fee Oversight	Comprehensive fee schedule, no unlisted fees permitted	CRITICAL	Ch. 5
8. Fee Oversight	All affiliate contracts must meet arm's-length market rate standard	CRITICAL	Ch. 5
8. Fee Oversight	Right to terminate all affiliate contracts upon developer member removal	HIGH	Ch. 5
8. Fee Oversight	Annual fee benchmarking review rights with binding determination	HIGH	Ch. 5
8. Fee Oversight	Annual affiliate relationship disclosure obligation	MEDIUM	Ch. 5
9. Tax	UBTI exposure analysis before signing, for tax-exempt CMs	CRITICAL	Ch. 5
9. Tax	FIRPTA withholding analysis before signing, for foreign CMs	CRITICAL	Ch. 5
9. Tax	Section 704(b) compliance of tax allocation provisions	HIGH	Ch. 5
9. Tax	CM consent over tax elections that materially affect CM	HIGH	Ch. 5
9. Tax	Withholding compliance, notification, and K-1 delivery obligations	HIGH	Ch. 5
9. Tax	Schedule K-1 delivery within defined timeline	MEDIUM	Ch. 5
10. Due Diligence	Review developer member's financial statements before signing	CRITICAL	Ch. 10
10. Due Diligence	Review all construction loan documents alongside operating agreement	CRITICAL	Ch. 7, 9
10. Due Diligence	Developer member track record verification with direct reference checks	HIGH	Ch. 10
10. Due Diligence	Independent review of business plan, underwriting, and stress scenarios	HIGH	Ch. 10
10. Due Diligence	Review developer member's key man insurance policies	MEDIUM	Ch. 3

This checklist works best as a three-stage tool: (1) Before term sheet execution, use the CRITICAL items to confirm that the term sheet's headline economic and governance terms address each issue at a summary level before committing to exclusivity; (2) During operating agreement negotiation, use the full checklist as a systematic provision-by-provision review standard, confirming that each item is addressed in the specific operating agreement language; and (3) As a final pre-closing review, review every CRITICAL and HIGH item one final time before funding the initial equity contribution.

Capital members should establish rigorous internal processes for reviewing JV documents against this checklist, not delegating the review entirely to outside counsel but maintaining internal investment and legal team familiarity with each provision category. The capital member that understands what each provision does and why it matters is a more effective counterparty in negotiations and a more effective governor of the JV throughout its lifecycle.

APPENDIX E

Sample Term Sheet Template

Real Estate Joint Venture: Ground-Up Development

This sample term sheet template provides a comprehensive, annotated framework for negotiating the key economic and governance terms of an institutional real estate joint venture for ground-up development. Each section presents flowing clause language with fill-in fields (shown in gold), followed by a dual-perspective annotation table showing the Developer Member's and Capital Member's primary negotiating concerns.

This template is provided for educational purposes only. It is not a form document and should not be used without the involvement of experienced legal counsel who can tailor every provision to the specific parties, project, asset class, and legal requirements of the transaction.

Fields shown in bold gold require party-specific information. Before using any portion of this template in an actual negotiation, consult with qualified real estate joint venture counsel.

How to Read This Template:

Bold Gold text	Fill-in fields requiring party-specific information (amounts, names, dates).
[BINDING] badge	Provision is legally binding from term sheet execution.
[NON-BINDING] badge	Provision is not legally binding until operating agreement is executed.
Blue annotation (left)	Developer Member's primary negotiating priorities for each provision.
Gold annotation (right)	Capital Member's primary negotiating priorities for each provision.

JOINT VENTURE TERM SHEET

Date: [DATE] **Prepared by:** [DEVELOPER MEMBER ENTITY NAME]

This Term Sheet is subject to the disclaimer set forth at the conclusion of this document.

1. PARTIES AND JOINT VENTURE ENTITY [NON-BINDING]

Developer Member:	[DEVELOPER MEMBER ENTITY NAME], a [Delaware / ___] limited liability company ("Developer Member").
Capital Member:	[CAPITAL MEMBER ENTITY NAME], a [Delaware / ___] limited liability company ("Capital Member").
JV Entity:	A newly-formed Delaware limited liability company to be formed by the parties prior to the initial Closing ("[JV ENTITY NAME], LLC" or the "Company").
Manager:	Developer Member shall serve as the initial Manager of the Company with the authority described herein, subject to Capital Member's consent rights as a Major Decision.
Key Men:	[KEY MAN 1 FULL NAME], [Title]; and [KEY MAN 2 FULL NAME], [Title] (each, a "Key Man"). Each Key Man shall devote not less than [__]% of his/her professional time to managing the Company, measured as an average over any rolling six-month period.

▶ Developer Member:

Negotiate the Key Man time commitment percentage carefully. 50% is typically the minimum the Capital Member will accept. Consider negotiating a pre-approved succession list within Developer Member's organization to limit disruption from any Key Man departure. Ensure the Manager designation is unconditional and does not require ongoing Capital Member re-approval.

▶ Capital Member:

Identify Key Men by name, never by title only. Set the highest feasible time commitment percentage. Confirm Developer Member's organizational structure to verify that the named Key Men have actual authority and are not nominal figureheads within a larger organization.

2. PROJECT DESCRIPTION AND BUSINESS PLAN [NON-BINDING]

Property:	[PROPERTY ADDRESS / LEGAL DESCRIPTION], consisting of approximately [__] acres located in [CITY, STATE] (the "Property").

Development:	Ground-up development of approximately **[___] [units / sq. ft.]** of **[Class A multifamily / office / industrial / mixed-use]** improvements (the "Project"), as described in the Approved Business Plan (Exhibit A).
Business Plan:	The Project shall be developed, stabilized, and disposed of in accordance with the Approved Business Plan (Exhibit A). Material amendments require Capital Member's prior written consent as a Major Decision.
Stabilization:	"Stabilization" means achievement of **[___]**% economic occupancy (net of concessions) for **[90]** consecutive days.
Target Hold:	Approximately **[___]** years from Stabilization.

▶ Developer Member:

Negotiate a broadly drafted initial Approved Business Plan (Exhibit A) that pre-authorizes the widest range of operational decisions without requiring separate consent. The definition of 'material amendment' should have a high objective threshold: changes increasing total project costs more than 10%, materially changing the development program, or extending the stabilization date more than 6 months.

▶ Capital Member:

Insist that Exhibit A be a binding exhibit specifying the full development program. The stabilization definition (economic occupancy %, measurement period, concession-adjustment) directly affects when the forced sale and buy-sell trigger dates begin. A lower threshold or shorter measurement period makes stabilization too easy to claim.

3. CAPITALIZATION [NON-BINDING]

Total Project Cost:	Approximately **$[___,000,000]**, as set forth in the Approved Budget (Exhibit B).
Construction Loan:	Approximately **$[___,000,000]** (**[___]**% loan-to-cost) from a construction lender approved by Capital Member.
Total JV Equity:	Approximately **$[___,000,000]** (**[___]**% of Total Project Cost).
Capital Member Equity:	**$[___,000,000]** (**[___]**% of JV Equity).
Developer Member Equity:	**$[___,000,000]** (**[___]**% of JV Equity).

Funding Schedule:	Equity contributions drawn down pursuant to Capital Calls, with no less than **[10]** Business Days' advance written notice and supporting documentation tied to objective construction milestones.
Additional Equity:	Any equity requirement above committed amounts requires Capital Member approval as a Major Decision.
DM Co-Investment:	Developer Member's co-investment shall be funded in cash concurrently with each Capital Member draw, in the ratio of the parties' respective equity percentages. No fee credits or promissory notes shall satisfy this obligation.

▶ Developer Member:

Negotiate for the right to fund the co-investment from development fee income rather than outside balance sheet. The two are economically equivalent but the fee-income approach preserves Developer Member's liquidity. Ensure the funding schedule is tied to objective milestones (AIA draw certifications) rather than Capital Member's subjective approvals. Confirm the lender approval right does not allow Capital Member to indefinitely delay a lender who has already offered competitive terms.

▶ Capital Member:

Verify that Developer Member's co-investment is real cash, not fee credits, equity rollovers, or promissory notes. Require Developer Member to demonstrate financial capacity to fund its full co-investment commitment at closing. Confirm the construction lender approval right gives Capital Member meaningful review of loan terms, not just ministerial consent.

4. DISTRIBUTION WATERFALL [NON-BINDING]

Waterfall Tiers:	**Tier 1, Return of Capital:** First, to Capital Member, until Capital Member has received a full return of its Contributed Capital; then to Developer Member, until Developer Member has received a full return of its Contributed Capital.
	Tier 2, Preferred Return: Next, to Capital Member, a cumulative, **[compounding / simple]** preferred return of **[__]**% per annum on its Contributed Capital, accruing from the date of each contribution ("Preferred Return").
	Tier 3, Catch-Up ***[if applicable]*****:** Next, **[100]**% to Developer Member, until Developer Member has received **[__]**% of all distributions made in Tiers 2 and 3 combined.
	Tier 4, Residual (Promote): Thereafter, **[__]**% to Capital Member; **[__]**% to Developer Member.

Available Cash:	Includes all cash generated by the Company from operations, sales, refinancings (including permanent loan closings), insurance, and condemnation proceeds, net of operating expenses, debt service, and required reserves. The Waterfall applies to all capital events, including refinancings.
Multi-Hurdle (optional):	At Capital Member IRR < [__]%: [__]% CM / [__]% DM. At IRR [__]% to [__]%: [__]% CM / [__]% DM. At IRR > [__]%: [__]% CM / [__]% DM.
Worked Example:	A worked numerical waterfall example (base case and one stress scenario) is attached hereto as Exhibit C, confirmed by both parties' financial advisors prior to execution.

▶ Developer Member:	▶ Capital Member:
Push for simple (not compounding) preferred return. The compounding/simple difference can exceed $1M on a $20M equity position over 5 years. Include the catch-up tier. Define 'Available Cash' to expressly include refinancing proceeds. Confirm the promote applies to ALL capital events. Insist on a worked numerical example as Exhibit C, signed off by both parties' financial advisors, before signing.	Insist on compounding preferred return and cumulative accrual. Resist the catch-up tier or cap it. Review the worked numerical example (Exhibit C) carefully. Small definitional differences produce large dollar differences in actual distributions. Consider a multi-hurdle IRR structure to incentivize Developer Member to maximize returns beyond the base preferred return threshold.

5. DEVELOPER FEES [NON-BINDING]

Above-the-Line Status:	All fees below are payable as above-the-line operating expenses of the Company, prior to any waterfall distribution, payable regardless of project performance, and shall survive any transfer of Capital Member's interest, binding all successors and assigns of Capital Member.
Development Fee:	[__]% of Total Hard and Soft Costs (excluding land and financing costs), payable in milestone installments per Exhibit D.
Construction Mgmt. Fee:	[__]% of Total Hard Costs, payable monthly during the construction period.
Asset Management Fee:	[__]% per annum of Invested Equity, payable quarterly commencing upon Stabilization.
Acquisition Fee:	[__]% of gross purchase price, payable at acquisition closing. [N/A if Developer Member contributes land.]
Disposition Fee:	[__]% of gross sale price, payable at disposition closing, deducted from gross proceeds before waterfall calculation.
Financing Fee:	[__]% of construction loan amount, payable at loan closing.

Fee Continuity:	All fees survive any transfer of Capital Member's membership interest and bind all successors. All accrued but unpaid fees through the date of any removal of Developer Member as Manager remain payable regardless of the circumstances of removal. No fee deferral or subordination to the Preferred Return.

▶ Developer Member:	▶ Capital Member:
Confirm above-the-line status is express for every fee category. Include the 'regardless of project performance' and 'bind all successors' language. Negotiate for partial fee on partially completed milestones if removed before milestone certification. Ensure the disposition fee is deducted from gross proceeds before the waterfall calculation begins, not treated as a waterfall distribution.	Benchmark all fees against current market rates before agreeing to the fee schedule. Confirm the development fee calculation base (hard + soft vs. total project costs). The base definition can shift the fee by 15 to 30%. Negotiate for the right to require competitive bids on construction management services. Consider a total aggregate fee cap (e.g., 5% of TPC) as a stacking protection.

6. GOVERNANCE AND MAJOR DECISIONS [NON-BINDING]

Manager Authority:	Developer Member, as Manager, may conduct all day-to-day operations within the Approved Business Plan and Annual Budget without Capital Member approval, subject to the Major Decisions listed below.
Budget Variance:	Manager may approve expenditures up to **[10 to 15]**% above any approved line item without Capital Member consent; aggregate variance not to exceed **[5 to 10]**% of Total Budget. Reallocation authority between line items: up to **[10]**% of any line without consent.
Major Decisions:	The following actions require Capital Member's prior written consent: (a) Annual Budget approval and any amendment; (b) Approved Business Plan and any material amendment; (c) Indebtedness above **$[__]** per transaction; (d) Sale, transfer, or encumbrance of Company assets; (e) Contracts with Developer Member affiliates (any amount); (f) Capital Calls above committed amounts; (g) Litigation above **$[__,000]** per matter; (h) Tax elections; (i) Admission of new members; (j) Operating Agreement amendment; (k) Material change to development program; (l) General Contractor selection or replacement; (m) Construction loan terms and amendments; (n) Property Manager selection or replacement; (o) Leases outside approved parameters; (p) Project disposition; and (q) Permanent loan terms.
Approval Period:	**[10 to 15]** Business Days from receipt of a complete approval request. Failure to respond within such period shall constitute deemed approval of the requested action.

Emergency Authority:	Manager may act without prior consent in genuine emergencies (life-safety, physical integrity, lender covenant compliance), up to **$[__,000]** per event, with written notice to Capital Member within **[2]** Business Days.
Prior-Year Budget:	If a new Annual Budget is not approved by the first day of the new fiscal year, the prior year's approved budget (adjusted upward by **[CPI]**) shall continue in effect until a new budget is approved.

▶ Developer Member:

Negotiate for high dollar thresholds on items (c) and (g). Confirm 'deemed approved' is express and applies to all Major Decision items without exception. Emergency authority should be broad enough for genuine construction crises. Prior-year budget continuation prevents Capital Member from holding operations hostage through budget approval delays. The major decisions list should be comprehensive enough for Capital Member to feel protected but not so granular that every routine decision requires approval.

▶ Capital Member:

The major decisions list is your primary investment protection. Ensure it is comprehensive, specific, and without ambiguous 'materiality' qualifiers. Set low dollar thresholds on indebtedness and litigation. Confirm all affiliate transactions are on the list with no dollar threshold exception. Establish rigorous internal processes for responding within the deemed approval period. Missing it means automatic consent to the requested action.

7. KEY MAN PROVISIONS AND REMOVAL [NON-BINDING]

Key Man Event:	A "Key Man Event" occurs upon a named Key Man's death, permanent disability, voluntary or involuntary departure from Developer Member's organization, or reduction in time commitment below the required percentage for **[30+]** consecutive days. Nominal employment without substantive management activities shall constitute a departure for this purpose.
Key Man Cure:	Developer Member has **[90 to 120]** days after a Key Man Event to propose a replacement acceptable to Capital Member (consent not unreasonably withheld if the proposed replacement meets the qualifications specified in Exhibit E).
For-Cause Removal:	Capital Member may remove Developer Member as Manager upon **[30 to 60]** days' written notice (with opportunity to cure as applicable) upon the occurrence of Cause, defined as: (a) fraud or intentional misrepresentation; (b) gross negligence or willful misconduct; (c) criminal felony conviction; (d) material uncured breach of the Operating Agreement; (e) insolvency or bankruptcy of Developer Member; (f) Key Man Event not cured within the cure period; or (g) budget overrun exceeding **[15]**% of Total Project Cost attributable to Developer Member's gross negligence or willful misconduct, excluding Force Majeure events and market-wide cost conditions.

No-Cause Removal:	Capital Member may remove Developer Member as Manager without Cause upon **[60]** days' advance written notice. Developer Member shall continue managing the Project in accordance with the Approved Business Plan during the notice period.
Post-Removal (For-Cause):	Developer Member retains its Membership Interest; unvested Promote is forfeited per Exhibit F (milestone vesting schedule); all accrued fees through the removal date remain payable; future fees cease upon removal.
Post-Removal (No-Cause):	Developer Member retains its full Membership Interest and its full Promote, calculated at hypothetical fair market value on the removal date per an independent appraiser; all accrued fees through the removal date remain payable; future fees cease upon removal.
Vesting Schedule:	The Promote vests per Exhibit F. Example: 15% at construction loan closing; 30% at 50% construction completion; 30% at certificate of occupancy; 15% at Stabilization; 10% at final disposition.

▶ Developer Member:

Negotiate for the longest feasible Key Man cure period (120 to 180 days). Ensure Exhibit E (replacement qualifications) is pre-agreed and broad enough to allow Developer Member organizational succession. The Force Majeure carve-out in item (g) is essential. Fight hard for full promote preservation upon no-cause removal. It is the most developer-favorable post-removal structure. The vesting schedule in Exhibit F is the most important protection against losing years of development work in a for-cause removal.

▶ Capital Member:

Key Men must be named individually, never by title. Negotiate for a short Key Man cure period (60 to 90 days). The cause definition must include material operational failures (item g). This is your protection against a developer who is not technically breaching the agreement but is clearly mismanaging the project. Insist on no-cause removal as an absolute right. Confirm that post-removal promote 'calculated at FMV' uses a truly independent appraiser selected by mutual agreement.

8. REPORTING AND TRANSPARENCY [NON-BINDING]

Monthly Reports:	During construction, Developer Member shall deliver within **[20]** Business Days of each month-end: (a) budget-to-actual comparison on a line-item basis; (b) construction schedule update with projected milestone dates; (c) cumulative change order log; (d) 90-day cash flow forecast; (e) copies of all lender draw requests and correspondence; and (f) narrative description of any material events since the prior report.
Quarterly Reports:	Unaudited balance sheet, income statement, statement of cash flows, and budget variance analysis, delivered within **[30]** days of each quarter-end.

Annual Audit:	GAAP-compliant audited financial statements prepared by an independent CPA firm approved by Capital Member, delivered within **[90]** days of fiscal year-end. Capital Member shall have direct access to the auditor without Developer Member as intermediary.
Tax / K-1s:	Schedule K-1s and applicable state equivalents delivered within **[90]** days of fiscal year-end, or as extended by applicable law.
Bank Account Access:	Capital Member shall have read-only access to all Company bank and reserve accounts through an online banking portal, updated in real time.
Inspection Rights:	Capital Member may inspect the Property and Company books and records upon **[5 to 10]** Business Days' advance written notice, no more than **[4]** times per year absent a claimed default.
Independent Audit:	Capital Member may conduct an independent audit of Company books at any time at Capital Member's expense (at Developer Member's expense if the audit reveals a material discrepancy, defined as a variance exceeding **[2%]** of annual revenues or **$[50,000]**, whichever is less).
Immediate Notice:	Developer Member shall notify Capital Member within **[2]** Business Days of any construction loan default, major contractor default, or material governmental action affecting the Project.

▶ Developer Member:

Negotiate for an inspection frequency cap (4 per year absent default) to prevent disruptive practices. Confirm read-only bank access is specifically defined. Ensure immediate notice obligations are limited to genuine material events, not every routine contractor communication. Confirm the audit cost-shifting standard ('material discrepancy') is objectively defined with specific dollar and percentage thresholds.

▶ Capital Member:

Real-time bank account access is the most important addition to the standard reporting framework. It provides early warning of cash flow irregularities that monthly reports would not reveal until weeks later. The direct auditor access right (without Developer Member as intermediary) is essential for financial reporting independence. The cumulative change order log in the monthly report is your primary tool for monitoring budget integrity throughout construction.

9. TRANSFER RESTRICTIONS [NON-BINDING]

General Restriction:	No member may transfer its Membership Interest without the prior written consent of the other member, except as expressly provided below.

Permitted Transfers:	Each member may transfer its Membership Interest to a wholly-owned affiliate without consent, provided: (i) no change of control of the transferring member occurs; (ii) Key Men remain actively involved; (iii) the transferee assumes all obligations in writing; and (iv) the transferring member provides prompt written notice to the other member.
ROFO (DM Transfers):	Prior to any non-permitted transfer, Developer Member shall first offer its Interest to Capital Member at Developer Member's specified price and terms. Capital Member has **[30]** days to accept or decline. Failure to respond constitutes a deemed decline. If declined, Developer Member may sell to any third party at or above the offered price for **[180]** days.
ROFR (CM Transfers):	Prior to any non-permitted transfer, Capital Member shall offer Developer Member the right to purchase Capital Member's Interest on the same terms as any bona fide third-party offer. Developer Member has **[30]** days to match. [Note: Capital Member typically seeks ROFR over DM transfers; DM typically seeks ROFO. Negotiate this distinction carefully.]
Drag-Along:	After the **[3rd]** anniversary of Stabilization, Capital Member may require Developer Member to sell its Interest concurrently with Capital Member's sale at arm's length to a third party, provided: (a) the Developer Member's full Promote is paid from sale proceeds; (b) there is a minimum **[120]**-day marketing period using a nationally recognized broker; and (c) Developer Member has the right to participate in the marketing process.
Tag-Along:	Developer Member may sell its Interest concurrently with any non-permitted transfer by Capital Member, on equivalent economic terms.
Buy-Sell:	After the **[2nd]** anniversary of Stabilization, either member may trigger a buy-sell by specifying a price in a written notice. The receiving party has **[60]** days to elect to buy or sell at the specified price. The buy-sell price must equal or exceed independently appraised fair market value. The buy-sell economics shall incorporate the Developer Member's Promote entitlement per Exhibit G. Receiving party has **[60]** additional days to arrange financing after making a buy election.

▶ Developer Member:

Negotiate ROFO (not ROFR) for Developer Member transfers. Developer Member sets the price. Tag-along is essential. Do not accept any transfer restriction framework without it. The drag-along minimum hold period (3rd anniversary of Stabilization) is critical. Buy-sell minimum valuation floor (appraised FMV) and promote-inclusive pricing (Exhibit G) are the two most important buy-sell protections for Developer Member. The 60-day

▶ Capital Member:

ROFR (not ROFO) over DM transfers gives Capital Member the right to match any market-tested price. Drag-along must be absolute after the minimum hold period, not conditioned on a governance deadlock. Buy-sell minimum valuation floor protects DM from strategic below-market pricing; Capital Member should accept this as a fairness protection that reduces litigation risk. The promote-inclusive buy-sell methodology (Exhibit G) should be

financing contingency is non-negotiable. Without it, the buy-sell can be used to force the financially smaller Developer Member to sell at any price the Capital Member sets.	precisely defined to prevent post-trigger disputes about how the promote is valued.

10. GUARANTIES AND RECOURSE [NON-BINDING]

Completion Guaranty:	Developer Member (and its principal(s) as required by the construction lender) shall provide a Completion Guaranty capped at the lesser of: (a) **$[__,000,000]** (= **[__]**% of Total Project Cost); or (b) actual construction cost overruns above the committed equity and loan amounts. Force Majeure and lender interference carve-outs apply. Guaranty amount shall reduce per the burn-off schedule in the guaranty instrument as construction milestones are achieved.
Carve-Out Guaranty:	Developer Member shall provide a standard bad-boy carve-out guaranty covering: fraud; misappropriation of rents or insurance proceeds; voluntary bankruptcy without lender consent; prohibited transfers; and environmental contamination. Carve-out triggers are expressly limited to intentional, knowing, or willful misconduct. No negligence-based triggers. No SPE covenant violation as a full-recourse trigger.
Capital Member:	Capital Member shall have no personal guaranty obligations in connection with the construction financing.
JV Indemnification:	The Company shall indemnify Developer Member for all guaranty payments made on the Company's behalf, except those arising from Developer Member's own fraud or willful misconduct. The indemnification includes advancement of legal fees as incurred. The indemnification obligation survives Developer Member's removal as Manager.
D&O Insurance:	The Company shall maintain directors and officers liability insurance (or the LLC management equivalent) naming Developer Member as an additional insured throughout the term of the Operating Agreement.

▶ Developer Member:	▶ Capital Member:
The completion guaranty cap (10 to 15% of TPC) is the single most important guaranty negotiating point. The Force Majeure carve-out must be specific (pandemic, governmental shutdown, supply chain disruption). Carve-out triggers must be limited to intentional/knowing/willful conduct, never 'negligence' and never 'any material breach of the loan agreement.' The JV indemnification with	Require the Developer Member's principals (not just the developer entity) as personal guarantors on the completion guaranty. A developer entity with limited assets provides limited guaranty protection. Confirm the carve-out guaranty covers all standard triggers. Capital Member's freedom from guaranty obligations should be express and unconditional. Review the indemnification scope carefully. An overly broad indemnification can require the JV to

expense advancement is a critical financial protection that must expressly survive removal.	fund the developer member's defenses in disputes arising from its own misconduct.

11. EXIT AND LIQUIDATION [NON-BINDING]

Disposition:	Developer Member manages the disposition process, subject to Capital Member approval of any sale as a Major Decision (Section 6, item (p)).
Forced Sale Right:	After the **[4th to 5th]** anniversary of Stabilization, Capital Member may require the Company to market the Project for sale through a nationally recognized brokerage firm. Minimum marketing period: **[120]** days. Developer Member has the right to participate in the marketing process, including the right to propose buyers and review offering materials. No minimum sale price condition applies.
Liquidation:	Upon dissolution, all assets shall be liquidated and distributed in accordance with the Waterfall (Section 4).
Clawback:	For programmatic JVs: At any final Capital Event, a portfolio-level lookback calculation shall confirm prior promote distributions are consistent with the aggregate Waterfall entitlement. Prior promote distributions in excess of Developer Member's aggregate portfolio entitlement are subject to clawback, capped at **[100]**% of prior promote distributions, calculated on an after-tax basis. For single-asset JVs: the standard Waterfall applies to final proceeds only; no programmatic clawback is applicable.

▶ Developer Member:	▶ Capital Member:
The forced sale minimum hold period must be measured from Stabilization, not from JV formation. The right to participate in the marketing process, including broker selection input and buyer presentation participation, is a critical developer member protection. Resist any minimum price condition on the forced sale right. For any clawback provision: negotiate for (a) a 100% cap; (b) after-tax calculation; and (c) a lookback period limited to the life of this specific JV.	The forced sale right must be absolute after the minimum hold period, with no minimum price condition. This is Capital Member's most important exit protection. A minimum price condition effectively eliminates the right in a declining market when the Capital Member most needs it. Confirm the marketing process uses a nationally recognized broker selected by Capital Member or by mutual agreement. For programmatic JVs, require a 25 to 35% promote escrow to ensure Developer Member has liquidity to satisfy any clawback obligation.

12. NON-COMPETE AND EXCLUSIVITY [NON-BINDING (except Exclusivity, which is BINDING)]

Non-Compete:	During the Investment Period, Developer Member shall not develop or manage any **[Class A multifamily / ___]** project within a **[3]**-mile radius of the Property without Capital Member's prior written consent.
Pipeline Carve-Out:	Projects listed on Exhibit H (Developer Member's existing pipeline at the time of this Term Sheet) are expressly excluded from the Non-Compete, regardless of geographic or asset-type overlap.
Exclusivity (BINDING):	From the date of this Term Sheet through the earlier of (a) execution of the Operating Agreement or (b) **[60]** days from the date hereof, Developer Member shall negotiate exclusively with Capital Member regarding the Project and shall not solicit or accept capital from any other source for the Project.
Right of First Opportunity (Programmatic JVs):	During the Investment Period, Developer Member shall offer Capital Member the first opportunity to participate in any Qualifying Opportunity (as defined in Exhibit I) before pursuing the same with any other capital source. Capital Member's response period: **[15]** Business Days. Failure to respond constitutes a deemed decline. Anti-circumvention provisions apply.

▶ Developer Member:

Negotiate the narrowest possible non-compete geographic scope, a specific radius or named submarket boundaries, not 'the same market.' Ensure Exhibit H (pipeline carve-out) is comprehensive, including all active and early-stage projects. The exclusivity period (60 days) should come with a reciprocal obligation from Capital Member to conduct due diligence and negotiate in good faith. Right of First Opportunity response period (15 days) must include a binding deemed-decline provision to prevent Capital Member from blocking deal flow through non-response.

▶ Capital Member:

Review Exhibit H carefully. Projects not listed will not be covered by the pipeline carve-out. The 3-mile non-compete radius is reasonable for urban projects; ensure it is measured from the specific project site. The Right of First Opportunity response period (15 days) must be consistent with Capital Member's internal approval processes. If 15 days is too short for internal approvals, negotiate for a parallel pre-approval process to maintain deal flow efficiency while protecting Capital Member's access to qualifying opportunities.

13. GOVERNING LAW AND DISPUTE RESOLUTION [BINDING upon execution of Operating Agreement]

Governing Law:	State of Delaware, without regard to conflicts of law principles.
Dispute Resolution:	All disputes under the Operating Agreement shall be resolved by binding arbitration administered by JAMS under its Comprehensive Arbitration

	Rules, before a panel of [3] arbitrators each with a minimum of [10] years of experience in real estate joint venture transactions.
Venue:	[City, State]. Jury trial is hereby waived by all parties.
Emergency Relief:	Either party may seek emergency injunctive relief in a court of competent jurisdiction to prevent irreparable harm pending the outcome of arbitration, without waiving any right to arbitration.
Fee Shifting (Optional):	The prevailing party in any arbitration proceeding shall be entitled to recover its reasonable attorneys' fees and costs from the non-prevailing party.

▶ Developer Member:

Delaware governing law is standard and developer-favorable (flexible LLC Act; sophisticated Court of Chancery). JAMS arbitration is preferable to litigation. It is private, faster, and decided by real estate experts rather than generalist jurors. Emergency injunctive relief carve-out is essential for the Developer Member, who may need emergency court relief to prevent an improper removal or forced sale before the arbitration proceeding concludes. Fee-shifting deters frivolous removal claims by the Capital Member.

▶ Capital Member:

Delaware governing law is appropriate and widely accepted by institutional investors. A panel of three (not one) JAMS arbitrators is essential for complex JV disputes. A single arbitrator has higher variance and less relevant expertise. The real estate JV experience requirement (10 years minimum) for all arbitrators is a non-negotiable protection against generalist arbitrators misapplying commercial real estate concepts. Fee-shifting is a double-edged sword. It deters frivolous claims by both parties.

14. BINDING AND NON-BINDING PROVISIONS [BINDING]

Binding Provisions:	The following provisions of this Term Sheet are legally binding upon the parties from the date of execution: (a) Section 12 (Exclusivity) during the stated exclusivity period; (b) this Section 14; (c) any confidentiality provisions agreed by separate NDA; and (d) any expense-sharing provisions expressly agreed herein.
Non-Binding Provisions:	All other provisions of this Term Sheet are non-binding expressions of intent, subject to the negotiation and execution of a definitive Operating Agreement and related transaction documents. Neither party is obligated to consummate the transaction described herein on the terms set forth above until the Operating Agreement is duly executed by all parties.
No Representations:	Nothing in this Term Sheet constitutes a representation or warranty of either party regarding any matter.

Counterparts:	This Term Sheet may be executed in counterparts, each of which shall constitute an original, and electronic signatures shall be deemed originals for all purposes.

▶ Developer Member:

The binding/non-binding distinction is critical and must be unambiguous. Every non-binding provision agreed in the term sheet creates a negotiating baseline that is very difficult to reopen without appearing to act in bad faith. Developer Members should ensure that every provision accurately reflects the intended economic outcome before signing. Do not expect to reopen settled provisions in the operating agreement negotiation without significant friction.

▶ Capital Member:

The exclusivity provision's binding status is Capital Member's most important protection in the term sheet. It prevents Developer Member from continuing to shop the deal during the due diligence and documentation period. Confirm that the exclusivity obligation covers not just other capital sources for the specific Project, but also any substantially similar competing project in the same market that would consume the same capital allocation.

EXHIBITS. LIST OF EXHIBITS TO THIS TERM SHEET [NON-BINDING (unless otherwise noted)]

Exhibit A:	Approved Business Plan (development program, schedule, leasing strategy, and disposition parameters).
Exhibit B:	Approved Budget (total project cost breakdown by hard cost, soft cost, and financing cost category).
Exhibit C:	**Worked Waterfall Examples: Base Case and One Stress Scenario.** [CRITICAL: Both parties' financial advisors must confirm before execution.]
Exhibit D:	Development Fee Payment Schedule and Milestone Certifications.
Exhibit E:	Key Man Replacement Qualifications (minimum years of experience, minimum transaction volume, and other objective criteria).
Exhibit F:	Promote Vesting Schedule (milestone-based vesting percentages tied to objective development events).
Exhibit G:	Buy-Sell Promote Valuation Methodology (how Developer Member's Promote entitlement is incorporated into buy-sell pricing).
Exhibit H:	Developer Member Existing Pipeline Carve-Out List (projects expressly excluded from the Non-Compete and Exclusivity provisions).

Exhibit I:	[Programmatic JVs only] Definition of 'Qualifying Opportunity' and Right of First Opportunity Parameters.

▶ Developer Member:	▶ Capital Member:
Exhibits A, C, D, F, and G are the most critical from Developer Member's perspective. Exhibit C (worked waterfall examples) protects against promote definition disputes. Exhibit F (vesting schedule) protects against total promote forfeiture upon removal. Exhibit G (buy-sell promote methodology) prevents Capital Member from using the buy-sell to capture the promote at a below-market valuation.	Exhibits A, B, C, and E are most critical from Capital Member's perspective. Exhibit A defines the investment parameters being underwritten. Exhibit B establishes the cost basis for budget variance calculations. Exhibit C allows Capital Member's financial team to confirm the waterfall produces the expected return. Exhibit E defines minimum qualifications for key man replacements, preventing the Developer Member from substituting an unqualified individual.

AGREED AND ACCEPTED:

DEVELOPER MEMBER:	CAPITAL MEMBER:
[DEVELOPER MEMBER ENTITY NAME]	[CAPITAL MEMBER ENTITY NAME]
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

After the Term Sheet: Customization and Documentation Requirements

This template is designed for a ground-up multifamily development JV. Significant modifications are required for other asset types, acquisition/value-add JVs, programmatic JVs, and transactions involving tax-exempt investors, foreign capital members, or ERISA plan assets.

- For acquisition/value-add JVs: Remove or modify the completion guaranty provisions; revise the business plan and budget to focus on operating performance; modify the stabilization definition; remove construction-phase fees not applicable to a stabilized acquisition.
- For programmatic JVs: Add investment period provisions, deployment pace benchmarks, performance benchmark and step-down mechanisms, and vintage-year clawback provisions (Chapter 8). The exclusivity and ROFO provisions require significant expansion. The promote structure may need to be restructured on a portfolio basis.

- For office and retail projects: Add pre-leasing covenant provisions and leasing approval parameters specific to commercial lease structures (TI allowances, lease term ranges, anchor tenant requirements). Modify the stabilization definition for commercial occupancy thresholds.

- For industrial and logistics projects: Address build-to-suit provisions if applicable; modify leasing approval parameters for triple-net lease structures; address construction risks unique to industrial development.

- For tax-exempt capital members: Add UBTI analysis and blocker entity provisions; address ERISA and Section 514 compliance; address the plan asset regulation and the 25% benefit plan investor threshold.

- For foreign capital members: Add FIRPTA withholding provisions; address treaty benefit analysis; consider the QFPF exception for qualified foreign pension funds.

APPENDIX F

Due Diligence Checklist for JV Formation

A Systematic Pre-Closing Review for Every Institutional Real Estate Joint Venture

Due diligence in a real estate joint venture is not a single exercise. It is a continuous process that begins before the term sheet is signed and continues through every stage of the relationship. This checklist provides a comprehensive, systematic framework for both developer members and capital members to confirm that every material dimension of the proposed JV has been evaluated, documented, and addressed before the operating agreement is executed and equity is committed.

This checklist contains 83 specific due diligence items organized across ten subject-matter areas. Each item is classified as CRITICAL (must be completed before signing, as failure creates unacceptable investment or governance risk), HIGH (should be completed before signing in all but the most time-constrained transactions), or MEDIUM (important but may be addressed in early post-closing counsel).

Both parties should work through this checklist together with their respective legal counsel, not as competing adversaries, but as co-investors with a shared interest in entering a JV relationship on a fully informed, accurately documented basis. The due diligence process is where surprises should be discovered and resolved, not after closing, when the cost of resolution is orders of magnitude higher.

Priority Level Key:

[□] CRITICAL	[□] HIGH	[□] MEDIUM
Must complete before signing. Creates unacceptable risk if skipped.	Complete before signing in all but emergency timelines.	Important; address in early post-closing counsel if necessary.

SECTION 1 DEVELOPER MEMBER DUE DILIGENCE

Evaluating the people, platform, and track record behind the investment

The capital member's decision to commit equity to a JV is fundamentally a decision to trust a specific developer member: specific people, a specific organization, and a specific track record. This section provides a systematic framework for verifying the qualifications, financial capacity, and organizational integrity of the developer member before that trust is extended.

□ CRITICAL *Track Record*	Obtain audited or reviewed financial performance data for the developer member's five most recent comparable projects: total project cost, actual construction cost vs. original budget, actual schedule vs. original schedule,

	actual NOI at stabilization vs. underwritten projections, actual disposition proceeds vs. projected proceeds, and actual IRR vs. underwritten IRR. ▶ **Note:** *Request performance data directly from prior capital partners, not just the developer member's self-reported figures. Discrepancies between what the developer member reports and what prior capital partners confirm are among the most reliable warning signals in JV due diligence.*
□ **CRITICAL** *Financial Capacity*	Obtain and review the developer member's audited financial statements for the past two to three fiscal years, confirming: (a) net worth sufficient to support the co-investment obligation and all guaranty obligations; (b) adequate liquidity to fund the co-investment in cash without reliance on fee income; and (c) no material liabilities, judgments, or contingent obligations that would impair the developer member's ability to perform its JV obligations. ▶ **Note:** *For development JVs requiring a personal completion guaranty from developer member principals, obtain personal financial statements (net worth certification and liquid asset verification) from each guarantor, not just the developer entity.*
□ **CRITICAL** *Key Personnel Verification*	Conduct direct reference checks on each named Key Man with: (a) at least three prior capital partners in comparable transactions; (b) at least two construction lenders from comparable projects; (c) at least one local governmental official involved in prior entitlement processes; and (d) at least two major contractors from prior projects. Verify specific performance claims (construction cost variance, schedule performance, entitlement timeline) against actual project records.
□ **CRITICAL** *Litigation and Regulatory History*	Search for all pending and resolved litigation, arbitration, regulatory actions, and governmental investigations involving the developer member entity and its principals for the past seven years. Review all court records, PACER filings, state court records, BBB complaints, and any SEC or FINRA enforcement history. Confirm no material judgments, pending claims, or regulatory actions that would impair the developer member's ability to manage the JV.
□ **HIGH** *Organizational Structure and Ownership*	Obtain the developer member's complete organizational chart, confirming the ownership structure, principal relationships, and the identity of all persons with greater than 5% economic interest in the developer member entity. Confirm that the Key Men identified in the term sheet are the actual

	decision-makers within the organization, not figureheads whose authority is nominal.
☐ **HIGH** *Existing Portfolio Review*	Obtain a current portfolio summary for all projects the developer member is actively managing, including total equity deployed, total debt outstanding, current performance vs. projections, and expected management demands over the next 12 to 24 months. Confirm that the developer member's existing portfolio does not create conflicts of interest with the proposed JV or consume management bandwidth that should be dedicated to the JV project.
☐ **HIGH** *Existing Capital Partner Relationships*	Confirm that the developer member is not in default under, or in active dispute with, any existing capital partner arrangement. Contact existing capital partners directly to verify the developer member's characterization of its existing relationships and to identify any governance or economic disputes that have not been disclosed.
☐ **HIGH** *Developer Member Insurance*	Confirm that the developer member maintains: (a) general commercial liability insurance at levels adequate for the project type; (b) professional liability (errors and omissions) insurance; (c) workers' compensation coverage; and (d) life and disability insurance on each Key Man in amounts sufficient to fund the cost of management transition. Obtain certificates of insurance and confirm coverage is in good standing.
☐ **MEDIUM** *Developer Member's Lender Relationships*	Evaluate the quality and breadth of the developer member's construction lender relationships in the project's market. Confirm that the developer member has existing relationships with at least two to three lenders capable of providing competitive construction financing for the proposed project type and size, and that no prior lender relationships have been impaired by project defaults or disputes.
☐ **MEDIUM** *Developer Member's Contractor Relationships*	Evaluate the quality of the developer member's general contractor and key subcontractor relationships. Confirm that the developer member has existing relationships with qualified general contractors who have experience with the proposed project type and market, and that no prior contractor relationships have been impaired by payment disputes, construction failures, or litigation.

SECTION 2 PROPERTY AND PROJECT DUE DILIGENCE

Verifying the physical, legal, and regulatory basis for the development

No investment thesis is better than the property and project it is built on. This section provides a systematic review of the physical, legal, and regulatory attributes of the development site that must be confirmed before equity is committed.

☐ **CRITICAL** *Title Review*	Obtain and review a current ALTA/ACSM land title survey and a title commitment from a nationally recognized title insurer, confirming: (a) fee simple ownership of the development site in the name of the JV entity or in the name to be transferred to the JV entity at closing; (b) no material title exceptions that would impair development of the project as planned; (c) all easements, encumbrances, covenants, and restrictions that affect the site; and (d) no pending or threatened litigation affecting title. ▶ **Note:** *Require the developer member to obtain owner's title insurance in an amount equal to the total project cost, with endorsements covering survey, access, zoning, and any other project-specific risks. Review the title commitment's exception schedule line by line. Title exceptions that appear minor in isolation can have significant development implications.*

☐ **CRITICAL** *Zoning and Entitlement Verification*	Confirm the current zoning classification of the development site and verify that: (a) the proposed development is a permitted use under the current zoning; or (b) if rezoning or conditional use approval is required, confirm the status of all pending applications and the realistic probability of approval. Obtain zoning verification letters from the applicable governmental authority. ▶ **Note:** *For projects requiring discretionary governmental approvals, engage the developer member's entitlement counsel to provide a written assessment of entitlement risk before the JV is formed. Do not rely solely on the developer member's self-assessment of entitlement probability.*

☐ **CRITICAL** *Environmental Review*	Engage an independent environmental consulting firm to conduct a Phase I Environmental Site Assessment (ESA) in accordance with ASTM E1527-21, and obtain a Phase II ESA if the Phase I reveals Recognized Environmental Conditions (RECs). Confirm no material contamination exists on the site that would impair development or create ongoing remediation liability. ▶ **Note:** *Review all prior environmental reports for the site, regardless of when they were prepared. Prior contamination that was remediated, but whose remediation records are inadequate, can create ongoing regulatory liability. The capital member should require the developer member to provide all prior environmental reports as a condition of JV formation.*

□ **CRITICAL** *Physical Inspection and Geotechnical Assessment*	Engage a licensed geotechnical engineer to conduct a soils investigation and provide a geotechnical report confirming: (a) soil bearing capacity adequate for the proposed building type and load; (b) absence of expansive soils, subsidence risk, or liquefaction potential; (c) groundwater depth and its implications for foundation design; and (d) any special foundation requirements generated by the geotechnical conditions. ▶ **Note:** *Cost overruns attributable to unforeseen geotechnical conditions are among the most common causes of development budget failures. A comprehensive geotechnical investigation before construction begins is far less expensive than discovering subsurface conditions after excavation is underway.*

□ **CRITICAL** *Survey and Infrastructure Review*	Review the ALTA survey for: (a) all recorded easements, rights-of-way, and encumbrances affecting the site; (b) existing utilities (water, sewer, gas, electric, telecommunications) and their adequacy for the proposed development; (c) access and frontage conditions; (d) any encroachments from or onto adjacent properties; and (e) any flood zone designations (FEMA FIRM maps) affecting the site.

□ **HIGH** *Building and Construction Permit Status*	Confirm the status of all required building permits and construction approvals: (a) if permits have been issued, review the permit conditions and confirm all pre-construction requirements are satisfied; (b) if permits are pending, confirm the review status and expected timing; (c) if permits have not yet been applied for, confirm the required documentation is complete and the application is ready to submit concurrent with or immediately following JV formation.

□ **HIGH** *Regulatory Approvals and Conditions*	Review all governmental approvals obtained to date (rezoning ordinances, conditional use permits, design review approvals, infrastructure agreements, development agreements) and confirm: (a) all approvals are in full force and effect; (b) all conditions of approval have been or will be satisfied by the required dates; (c) all appeal periods have expired or will expire before construction commencement; and (d) no regulatory appeals are pending.

□ **HIGH** *Existing Structures and Demolition*	If any existing improvements on the development site must be demolished before construction, confirm: (a) the demolition permit status and anticipated timeline; (b) the estimated cost of demolition and abatement of any hazardous materials (particularly asbestos and lead paint in older structures); (c) any relocation assistance obligations to existing tenants; and (d) whether any existing structures have historical designation or are subject to preservation review.

☐ **HIGH** *Adjacent Property and Neighborhood Assessment*	Conduct a physical assessment of the adjacent properties and surrounding neighborhood to identify: (a) any neighboring uses that could create nuisance or compatibility issues affecting the proposed project's leasing appeal; (b) any pending development in the vicinity that could affect the project's competitive position; (c) infrastructure constraints (traffic, parking, transit access) that could affect the project's marketability; and (d) any community opposition to the proposed development that could create entitlement or operational challenges.

☐ **MEDIUM** *Utility Capacity Confirmation*	Confirm with the applicable utility providers that adequate utility capacity (water, sewer, gas, electric, telecommunications) exists or can be extended to serve the proposed development at costs consistent with the approved project budget. Obtain written utility availability letters from each utility provider.

SECTION 3 FINANCIAL AND BUSINESS PLAN DUE DILIGENCE

Stress-testing the underwriting before equity is committed

The business plan's financial projections are the capital member's primary basis for evaluating the JV's expected return. Every key assumption in the business plan must be independently verified before the capital member commits equity.

☐ **CRITICAL** *Independent Market Study*	Engage an independent real estate market research firm (separate from the developer member's market consultant) to prepare a market study confirming: (a) the existence of sufficient demand for the proposed development at the projected rents and occupancy levels; (b) the projected absorption timeline for the lease-up period; (c) the current and projected competitive supply pipeline; and (d) the projected rent growth assumptions underlying the business plan. ▶ **Note:** *The independent market study must be prepared without input from the developer member's team. The purpose is to independently validate (or challenge) the developer member's market assumptions. A market study that simply confirms the developer member's projections without independent verification has limited due diligence value.*

☐ **CRITICAL** *Independent Construction Cost Review*	Engage an independent construction manager or cost estimator to review the developer member's construction budget and provide a written assessment confirming: (a) that the budget amounts are consistent with current market costs for the proposed construction type, quality level, and market; (b) that the contingency allowance is adequate for the project's

	complexity and risk profile; and (c) that any budget items that appear understated relative to market comparables are identified and quantified. ▶ **Note:** *Construction cost reviews should be performed by a firm with recent experience in the specific construction type (multifamily, office, industrial, etc.) in the specific market. A national construction cost database is not a substitute for local market cost expertise.*
□ **CRITICAL** *Sensitivity Analysis and Stress Testing*	Model the project's financial performance under at least three scenarios: (a) base case (business plan as presented); (b) moderate stress (10 to 15% construction cost overrun; 6-month schedule delay; rents 10% below projection; absorption timeline 20% slower than projected); and (c) severe stress (20 to 25% construction cost overrun; 12-month schedule delay; rents 20% below projection; absorption 40% slower). Confirm the capital member's preferred return coverage and expected IRR under each scenario. ▶ **Note:** *Stress scenario modeling should be performed by the capital member's internal team or an independent financial advisor, not by the developer member's team. The purpose is to evaluate the downside, not to validate the base case.*
□ **CRITICAL** *Waterfall Model Verification*	Build a complete financial model implementing the operating agreement's waterfall provisions using the specific defined terms (not general approximations) and run the model through the base case and stress scenarios. Confirm with both parties' financial advisors that the model produces the expected economic outcomes for each party under each scenario. Attach the model output as Exhibit C to the operating agreement. ▶ **Note:** *The waterfall model should be built and confirmed before the operating agreement is signed, not after. Differences between the developer member's and capital member's financial models that surface after signing are the primary source of promote calculation disputes.*
□ **HIGH** *Financing Market Assessment*	Confirm with at least two to three construction lenders that the proposed financing structure (LTC ratio, loan amount, interest rate assumptions) is achievable in the current market. Obtain a term sheet or letter of interest from at least one lender before the JV is formed, confirming that the construction financing assumed in the business plan is available on the projected terms.
□ **HIGH**	Confirm that the construction loan's interest reserve is sized to cover the projected interest accrual through the projected stabilization date, plus a contingency buffer of at least 90 additional days for schedule delay. Model

Interest Reserve Adequacy Review	the interest reserve under the moderate stress scenario to confirm it does not become depleted before stabilization.

☐ **HIGH** *Approved Budget Detail Review*	Review the approved construction budget on a line-item basis, confirming that: (a) all significant cost categories are included; (b) no material cost categories are omitted or significantly understated; (c) the contingency allowance is appropriate for the project's complexity; (d) the soft cost budget includes all required professional fees, permits, and financing costs; and (e) the developer fee amounts are consistent with the fee schedule in the operating agreement.

☐ **HIGH** *Operating Expense Projection Review*	For income-producing development projects, independently verify the projected operating expenses (property management fees, insurance, real estate taxes, maintenance reserves, and other operating costs) against market comparables for similar properties in the same submarket. Confirm that the projected operating expense ratio is consistent with comparable stabilized properties in the market.

☐ **MEDIUM** *Exit Capitalization Rate Assessment*	Confirm that the exit capitalization rate assumed in the business plan's disposition analysis is consistent with current market conditions for comparable stabilized properties in the project's submarket. Engage a qualified appraisal firm to provide a market capitalization rate opinion for the completed, stabilized asset.

☐ **MEDIUM** *Comparable Sales Analysis*	Review recent sales of comparable properties in the project's submarket to confirm that the business plan's projected disposition value (based on the projected stabilized NOI and the exit capitalization rate) is consistent with what similar properties have actually sold for in recent arm's-length transactions.

SECTION 4 LEGAL DOCUMENT DUE DILIGENCE

Confirming the legal framework is complete, consistent, and enforceable

Legal due diligence in a JV formation is not limited to reviewing the operating agreement. It encompasses every legal document that affects the JV's ownership, governance, operations, and obligations. This section provides a systematic checklist of legal documents that must be reviewed before the JV closes.

☐ **CRITICAL** *Operating Agreement Comprehensive Review*	Complete the Developer Member Negotiation Priorities Checklist (Appendix C) or the Capital Member Negotiation Priorities Checklist (Appendix D), as applicable, confirming that every CRITICAL and HIGH priority item has been addressed in the final operating agreement. Have experienced JV counsel conduct a final pre-execution review of the complete operating agreement for internal consistency, defined term accuracy, and cross-reference integrity. ▶ **Note:** *The most common source of post-closing operating agreement disputes is provisions that are internally inconsistent: defined terms used in one section that conflict with how the same term is defined or used elsewhere. A comprehensive cross-reference review before signing can eliminate this risk.*
☐ **CRITICAL** *Construction Loan Document Review and Coordination*	Review all construction loan documents (loan agreement, promissory note, deed of trust, completion guaranty, carve-out guaranty, environmental indemnity, and all side letters) alongside the operating agreement. Create a conflicts matrix identifying every lender consent requirement, distribution restriction, and management change provision in the loan documents, and confirm each is consistent with the operating agreement's governance framework. ▶ **Note:** *This is the most frequently skipped step in JV legal due diligence, and the source of the most consequential post-closing governance surprises. Capital member counsel should lead this exercise, not assume that the lender's counsel has identified all conflicts.*
☐ **CRITICAL** *Ancillary Agreement Review*	Review all ancillary agreements to be executed at closing (the development agreement, construction management agreement, property management agreement, and any other service agreements between the JV and developer member affiliates) alongside the operating agreement. Confirm that each ancillary agreement is consistent with the operating agreement's fee provisions, governance framework, and termination rights.
☐ **CRITICAL** *Tax Provision Review*	Engage tax counsel to review all operating agreement tax provisions (capital account maintenance, Section 704(b) and 704(c) allocation methodology, guaranteed payment characterization of developer fees, profits interest qualification for the promote, and any applicable UBTI or FIRPTA provisions) and confirm that the tax provisions are consistent with the parties' intended economic arrangement and applicable law.
☐ **CRITICAL**	Review all site control documentation, including the purchase and sale agreement, any option agreements, ground leases, or other instruments giving the JV (or developer member) the right to acquire the development

Site Control Documentation Review	site, and confirm: (a) the site control is valid and in full force and effect; (b) there are no material conditions to closing that have not been satisfied; (c) the acquisition price is consistent with the approved budget; and (d) there are no undisclosed liens, claims, or encumbrances affecting the seller's title.

□ **HIGH** *Existing Agreements Review*	Review all existing agreements affecting the development site (recorded easements, covenants, CC&Rs, development agreements, infrastructure agreements, utility agreements, and any other agreements binding on the property) and confirm that none of these agreements would materially impair the developer member's ability to develop the project as planned.

□ **HIGH** *Waterfall Definition Verification*	Have both parties' financial advisors and legal counsel jointly review every defined term in the operating agreement's waterfall provisions, including 'Contributed Capital,' 'Available Cash,' 'Capital Member IRR,' 'Net Sale Proceeds,' 'Distributable Cash,' and all related definitions, and confirm that each definition, when applied to the worked waterfall example (Exhibit C), produces the expected economic result. Resolve any definitional inconsistency before execution.

□ **HIGH** *Formation Document Review*	Confirm that all JV entity formation documents, including the articles of organization (or certificate of formation) and any required state registrations, have been properly prepared and filed, and that the JV entity has been properly formed before equity is funded. Confirm the JV entity has no pre-existing liabilities, obligations, or legal proceedings.

□ **HIGH** *Required Consents and Approvals*	Identify and confirm all third-party consents and approvals required for the JV to be formed and for the transaction to close, including governmental consents, lender consents, HOA or condominium association consents, and any other third-party approvals, and confirm that all required consents have been obtained before closing.

□ **MEDIUM** *Insurance Requirements Review*	Confirm that all insurance required by the operating agreement and the construction loan documents (general commercial liability, builder's risk, completed value, umbrella, workers' compensation, and any other required coverages) has been placed with financially sound insurers at the required coverage levels, and that the JV entity and the capital member have been named as additional insureds as required.

SECTION 5 GOVERNANCE AND STRUCTURAL DUE DILIGENCE

Confirming the operating agreement's provisions function as intended in practice

Governance due diligence goes beyond reviewing the operating agreement's text. It requires both parties to model how the governance provisions will function under real operating conditions, stress scenarios, and potential conflict situations before the agreement is signed.

□ **CRITICAL** *Major Decisions List Completeness Test*	Test the major decisions list against the specific project's risk profile: for each category of major decision, model a realistic scenario in which the developer member might take an action in that category that could harm the capital member's investment, and confirm that the action is captured by the major decisions list. Identify any category of potentially harmful developer member action that is not covered and add it to the list. ▶ **Note:** *This test is most effectively conducted as a tabletop exercise between the capital member's investment team and its legal counsel, without the developer member present. The exercise should focus on the specific developer member's known operating style and the specific project's risk characteristics.*

□ **CRITICAL** *Deemed Approval Period Feasibility Confirmation*	Confirm that the capital member's internal approval processes can reliably produce timely responses to major decision approval requests within the operating agreement's deemed approval period. Map the capital member's internal approval workflow (investment committee review, legal review, and final approval) against the deemed approval period to confirm no structural mismatch exists. ▶ **Note:** *A capital member that routinely misses the deemed approval period, thereby inadvertently approving major decisions by default, has effectively waived its governance rights. This process confirmation is as important as the drafting of the deemed approval provision itself.*

□ **CRITICAL** *Removal Scenario Modeling*	Model the full economic and operational consequences of both a for-cause and a no-cause removal scenario: (a) calculate the exact promote amount preserved and forfeited under each scenario using the milestone vesting schedule; (b) identify the operational steps required to transition management to a successor; (c) confirm that the transition cooperation obligation is sufficiently specific to be enforceable; and (d) confirm that interim management authority is clearly defined.

□ **HIGH**	Model the buy-sell mechanism under the base case and stress scenarios: (a) calculate what the capital member would pay to acquire the developer member's interest under the buy-sell at each scenario's projected value; (b) calculate what the developer member would receive for its interest

Buy-Sell Mechanics Simulation	(including promote) under the buy-sell at each scenario's projected value; (c) confirm that the promote valuation methodology in Exhibit G produces results that both parties consider fair; and (d) confirm that the financing contingency period is adequate for the developer member to arrange financing in the current market.

□ **HIGH** *Reporting Process Confirmation*	Confirm that the developer member's accounting and reporting systems are capable of producing the reports required by the operating agreement (monthly construction reports, quarterly financials, annual GAAP-compliant audited statements) on the required timelines. Review sample reports from the developer member's prior JV relationships to assess report quality and format.

□ **HIGH** *Dispute Resolution Process Review*	Review the operating agreement's dispute resolution provisions, particularly the arbitration clause, the major decision dispute process, and the deadlock resolution mechanisms, and confirm that each process has been tested against realistic dispute scenarios. Confirm that the arbitration clause specifies JAMS (or another experienced administrator), a three-arbitrator panel, and a real estate JV experience requirement.

□ **MEDIUM** *Communication Protocol Establishment*	Establish a clear communication protocol between the developer member's and capital member's teams before the JV commences operations: (a) identify the primary point of contact for each party; (b) confirm the format, frequency, and distribution list for major decision approval requests; (c) confirm the escalation path for urgent matters requiring approval within a shorter-than-standard timeframe; and (d) establish a monthly governance call schedule.

SECTION 6 CONSTRUCTION AND DEVELOPMENT DUE DILIGENCE

Verifying development readiness before construction begins

For development JVs, construction readiness due diligence, confirming that the project is truly ready to commence construction on the projected timeline and within the projected budget, is as important as the financial and legal due diligence performed before the JV is formed.

□ **CRITICAL** *General Contractor Qualification and Selection*	Confirm that the general contractor has been identified and, ideally, selected (or is in active bidding process) before the JV closes. Review the general contractor's: (a) recent comparable project experience; (b) financial statements and bonding capacity; (c) reference contacts from prior project owners and subcontractors; (d) current backlog and ability to commit

	adequate resources to the project; and (e) proposed contract structure (fixed-price GMP, cost-plus, or other). ▶ **Note:** *A development JV that closes without an identified general contractor or an active competitive bidding process is a JV whose construction cost basis is speculative. Capital members should insist on a competitive bid process before the operating agreement is signed, with results available for review.*
□ **CRITICAL** *Construction Plans and Specifications Status*	Confirm the status of the construction plans and specifications: (a) if plans are complete (100% construction documents), confirm that they have been reviewed by the lender's architect and are ready for permit submission; (b) if plans are at an intermediate stage (design development or schematic design), confirm the timeline to completion and the cost basis for the budget; (c) confirm that no material scope changes are anticipated that would affect the budget or schedule.
□ **CRITICAL** *Performance Bond and Payment Bond Confirmation*	Confirm that the general contractor is obligated (by the construction contract) to provide a performance bond and a payment bond, each in an amount equal to 100% of the construction contract amount, from a surety company acceptable to the construction lender. Confirm the surety's financial rating (minimum A- / VIII from AM Best or equivalent).
□ **HIGH** *Construction Schedule Review*	Review the developer member's construction schedule for: (a) consistency with the business plan's projected timeline; (b) identification of critical path activities whose delay would extend the overall schedule; (c) adequacy of float for each major construction activity; and (d) consistency with the construction lender's required completion date and the interest reserve's projected depletion date. Have an independent construction manager review the schedule for reasonableness.
□ **HIGH** *Subcontractor Qualification Review*	For major subcontractors (mechanical, electrical, plumbing, structural steel) whose contracts individually exceed 5% of total hard costs, confirm: (a) subcontractor qualification through direct reference checks with prior project owners; (b) subcontractor financial stability; (c) subcontractor bonding capacity; and (d) subcontractor's current backlog and ability to resource the project adequately.
□ **HIGH**	Review the developer member's change order management process and confirm: (a) the change order approval authority thresholds in the operating agreement are consistent with the scale and complexity of the project; (b)

Change Order Control Review	the developer member's track record on change order management in prior comparable projects; (c) the construction contract's change order process and pricing mechanisms; and (d) the contingency reserve's adequacy for the expected level of owner-initiated and unforeseen condition change orders.

□ **MEDIUM** *Long-Lead Item Procurement Status*	Confirm the status of procurement for long-lead construction items (elevators, HVAC equipment, electrical switchgear, curtain wall systems) whose procurement timeline is on the critical path for the project's schedule. Confirm that all long-lead items have been identified, specified, and either ordered or included in the GMP contract with adequate allowances.

SECTION 7 MARKET AND LEASING DUE DILIGENCE

Validating the demand assumptions that underpin the investment thesis

The development JV's economic model depends on the developer member's ability to lease the completed project at the projected rents and within the projected timeframe. Market and leasing due diligence validates the demand assumptions that underpin the investment thesis before equity is committed.

□ **CRITICAL** *Competitive Supply Analysis*	Compile a comprehensive competitive supply analysis covering all existing, under-construction, and proposed competitive projects in the project's submarket. For each competitive project, document: (a) total units or square footage; (b) current occupancy or lease-up status; (c) achieved rents vs. asking rents; (d) concession packages being offered; (e) completion timeline for projects under construction; and (f) estimated probability of proposed projects proceeding to construction. Confirm that the business plan's projected supply pipeline is complete and not underestimated.

□ **CRITICAL** *Demand Analysis Verification*	Independently verify the key demand assumptions in the business plan: (a) employment growth projections in the project's primary demand drivers; (b) household formation and population growth trends in the project's submarket; (c) historical absorption rates for comparable new development in the submarket; and (d) current vacancy rates and their trajectory in the competitive set. Confirm that the projected absorption timeline is consistent with historical market absorption rates under comparable supply conditions.

□ **HIGH**	Review recent lease comparables (executed leases, not asking rents) for comparable properties in the project's submarket and confirm that the projected rents in the business plan are achievable at the projected stabilization date, accounting for: (a) the expected delivery of competitive

Achievable Rent Validation	new supply during the lease-up period; (b) the projected direction of market rent growth; and (c) the concession packages that will be required to achieve the projected occupancy timeline.

□ **HIGH** *Leasing Strategy and Broker Relationship Review*	For commercial projects (office, retail, industrial), review the developer member's leasing strategy and confirm: (a) an exclusive leasing agent has been engaged (or is in the process of being engaged) with demonstrated success in the project's submarket and product type; (b) the leasing agent's proposed marketing approach is consistent with achieving the projected lease-up timeline; and (c) the leasing commissions and TI allowance assumptions in the business plan are consistent with current market standards.

□ **HIGH** *Pre-Leasing Status Review*	For commercial projects requiring pre-leasing covenants under the construction loan, confirm: (a) the current status of any executed letters of intent or leases; (b) the identity, financial condition, and creditworthiness of any prospective anchor tenants; (c) the feasibility of meeting the construction lender's pre-leasing requirements within the projected timeline; and (d) any special tenant requirements (TI allowances, lease terms, exclusivity rights) that could affect the project's economics.

□ **MEDIUM** *Property Management Selection and Review*	Confirm that a qualified property management company has been identified for the operating phase of the project: (a) review the property manager's experience with comparable properties in the same submarket; (b) confirm the proposed management fee is consistent with market rates; (c) review the property management agreement's key terms (term, termination rights, fee structure); and (d) confirm that the property management agreement is consistent with the operating agreement's governance provisions.

SECTION 8 TAX DUE DILIGENCE

Identifying and addressing investor-specific tax issues before they become closing surprises

Tax due diligence in a JV formation is investor-specific. The tax issues relevant to a domestic taxable investor differ materially from those affecting a tax-exempt pension fund, a foreign sovereign wealth fund, or an ERISA plan investor. Each investor type requires targeted tax analysis before closing.

□ **CRITICAL**	Have tax counsel confirm that the promote is structured as a profits interest for federal income tax purposes, satisfying the safe harbor requirements of IRS Revenue Procedures 93-27 and 2001-43: (a) the promote has no liquidation value on the grant date (confirmed by the waterfall mechanics);

Profits Interest Qualification Confirmation	(b) the promote is not a substantially certain-to-be-received payment; and (c) the issuance of the profits interest is not taxable to the developer member at grant.

☐ **CRITICAL** *Section 704(b) Capital Account Compliance*	Have tax counsel confirm that the operating agreement's capital account maintenance provisions comply with the 'substantial economic effect' requirements of Treasury Regulation Section 1.704-1(b)(2), including: (a) capital accounts are maintained in accordance with the regulations; (b) liquidating distributions will be made in accordance with positive capital account balances; and (c) the deficit restoration obligation (or alternative economic effect safe harbor) is properly included.
☐ **CRITICAL** *UBTI Analysis for Tax-Exempt Investors*	For any tax-exempt capital member (pension fund, endowment, foundation), have tax counsel conduct a comprehensive UBTI analysis confirming: (a) the projected UBTI from debt-financed income under Section 514; (b) the tax cost of UBTI at the applicable corporate tax rate; (c) whether a blocker entity structure is required or advisable; and (d) the 25% benefit plan investor threshold calculation for ERISA plan asset purposes. ▶ **Note:** *UBTI analysis must be completed before the JV closes, not after the first distribution reveals an unexpected tax cost. For tax-exempt investors, the after-UBTI return can differ materially from the pre-UBTI projected return, potentially affecting the investment decision.*

☐ **CRITICAL** *FIRPTA Analysis for Foreign Investors*	For any foreign capital member, have tax counsel confirm: (a) the applicability of FIRPTA to distributions from and dispositions of JV interests; (b) the applicable withholding rates; (c) the availability of any treaty benefits reducing the withholding rate; (d) whether the QFPF exception applies for qualified foreign pension funds; and (e) the operating agreement's withholding compliance and notification obligations.

☐ **HIGH** *Section 704(c) Built-In Gain Analysis*	If the developer member is contributing appreciated property (land, entitlements, or other property with a fair market value exceeding its tax basis), have tax counsel: (a) quantify the built-in gain on the contributed property; (b) evaluate the applicable Section 704(c) allocation methodology (traditional, traditional with curative allocations, or remedial); (c) model the tax impact on the developer member of the built-in gain allocation upon the JV's eventual disposition; and (d) confirm that the operating agreement's tax provisions accurately reflect the chosen methodology.

☐ **HIGH**	Identify all tax elections that may be required or advisable in connection with the JV's formation and ongoing operations, including Section 754

Tax Election Review	elections, accounting method elections, and depreciation elections, and confirm that the operating agreement requires capital member approval of each such election. Confirm with tax counsel which elections are in the interest of each party.

□ **HIGH** *State and Local Tax Analysis*	Confirm with tax counsel all applicable state and local tax obligations of the JV entity and its members, including state income taxes, franchise taxes, transfer taxes, and any local business taxes, arising from the JV's formation, operations, and disposition. Confirm that these taxes are appropriately reflected in the business plan's financial projections.

□ **MEDIUM** *Depreciation and Cost Segregation Planning*	Evaluate whether a cost segregation study should be performed on the completed improvements to accelerate depreciation deductions. Confirm that the tax benefits of accelerated depreciation flow through to the members in a manner consistent with the operating agreement's tax allocation provisions and the parties' respective tax positions.

SECTION 9 CAPITAL MEMBER INVESTOR DUE DILIGENCE

Confirming the capital member's authority and compliance to make the investment

Institutional capital members must confirm, before closing, that the proposed JV investment is authorized under their governing documents, consistent with their investment mandate, and in compliance with all applicable regulatory requirements. This section provides a checklist for the capital member's internal due diligence obligations.

□ **CRITICAL** *Investment Committee Approval*	Confirm that the proposed JV investment has received all required internal investment committee approvals and that no additional approvals are required before closing. Obtain a copy of the investment committee resolution or approval memo confirming the approved investment parameters (investment amount, structure, key economic terms, and any required conditions).

□ **CRITICAL** *Investment Mandate Compliance*	Confirm that the proposed JV investment is consistent with the capital member's investment mandate, including asset class, geographic focus, return requirements, leverage limits, concentration limits, and any other mandate-specific parameters. Confirm that no mandate waiver or modification is required.

☐ **CRITICAL** *Regulatory Compliance Review*	Confirm compliance with all applicable regulatory requirements governing the capital member's investment activities, including: (a) ERISA compliance for pension fund and qualified plan investors; (b) Investment Company Act compliance for registered investment companies; (c) Investment Advisers Act compliance for registered advisers; (d) applicable state insurance regulatory requirements for insurance company investors; and (e) FINRA compliance for broker-dealer investors.
☐ **HIGH** *Conflict of Interest Review*	Confirm that no conflicts of interest exist between the capital member's investment in the proposed JV and any other investment, advisory relationship, or business arrangement of the capital member. For ERISA plan investors, confirm that no prohibited transaction under ERISA Section 406 would be created by the investment.
☐ **HIGH** *Anti-Money-Laundering and KYC Compliance*	Complete all required anti-money-laundering (AML) and know-your-customer (KYC) procedures with respect to the developer member entity and its principals, including confirmation of source of funds, business purpose, and compliance with applicable OFAC, FinCEN, and other regulatory requirements.
☐ **HIGH** *Capital Commitment Funding Confirmation*	Confirm that the capital member has available, committed, and appropriately designated funds to fulfill its full equity commitment to the JV, including both the initial funding at closing and all anticipated future capital calls throughout the investment period. Confirm that no fund-level gate, redemption obligation, or regulatory restriction would impair the capital member's ability to fund capital calls on a timely basis.
☐ **MEDIUM** *Valuation and Reporting Requirements*	Confirm that the capital member has adequate systems and processes in place to: (a) value its JV investment in accordance with applicable accounting standards (GAAP, IFRS, or applicable regulatory standards) for financial reporting purposes; (b) receive and process Schedule K-1s and other tax information from the JV; and (c) comply with any applicable regulatory reporting obligations (Form 5500 for ERISA plans; annual report filings for registered funds; etc.).

SECTION 10 PRE-CLOSING AND CLOSING CONFIRMATION

Confirming all conditions are satisfied before equity is funded

The pre-closing and closing confirmation checklist ensures that all conditions to closing have been satisfied and all required documents, consents, and approvals are in place before equity is funded and the JV relationship formally begins.

☐ **CRITICAL** *Closing Document Completeness*	Confirm that all closing documents have been prepared, reviewed, and approved by both parties' counsel: (a) operating agreement (final executed version); (b) all ancillary agreements (development agreement, construction management agreement, property management agreement); (c) all guaranty instruments (completion guaranty, carve-out guaranty); (d) all JV entity formation documents; (e) the worked waterfall example (Exhibit C), confirmed by both parties' financial advisors; (f) all exhibits to the operating agreement; and (g) any other agreements required by the construction lender.
☐ **CRITICAL** *Title Insurance and Survey Confirmation*	Confirm that the title company is prepared to issue (at closing) the owner's title insurance policy at the required insured amount with all required endorsements. Confirm that the final ALTA survey has been reviewed and approved by the title company and reflects no new survey exceptions not already addressed in the title commitment.
☐ **CRITICAL** *Construction Loan Commitment Confirmation*	Confirm that the construction loan commitment is in full force and effect, all pre-closing conditions to the commitment have been satisfied, and the lender is prepared to close the construction loan concurrently with (or immediately following) the JV closing. Confirm the construction loan term, interest rate, and funding schedule are consistent with the approved budget.
☐ **CRITICAL** *Initial Equity Funding Confirmation*	Confirm the mechanics for the initial equity funding: (a) the amount of the initial capital call; (b) the account to which funds are to be wired; (c) the timing of the initial funding relative to the JV closing and the construction loan closing; and (d) the required documentation from the developer member confirming its concurrent co-investment funding.
☐ **CRITICAL** *Required Consents Confirmation*	Confirm that all third-party consents required for the JV closing have been obtained, including any required lender consents, governmental consents, HOA consents, and any other third-party approvals, and that executed copies of all required consents are in the closing package.

□ **HIGH** *Insurance Binder Confirmation*	Confirm that insurance binders (or certificates of insurance) evidencing all required coverages (builder's risk, general commercial liability, completed value, umbrella, workers' compensation, and directors and officers coverage) are in hand at closing and reflect the JV entity and the capital member as named or additional insureds as required.

□ **HIGH** *Post-Closing Action Item List*	Prepare and distribute a post-closing action item list identifying all tasks to be completed in the 30 to 60 days following closing, including state foreign entity registrations, insurance policy issuance, lender reporting obligations, initial budget and business plan filing, and any other actions required to maintain the JV's legal compliance and operational readiness.

□ **MEDIUM** *Reporting Protocol Implementation*	Before the first monthly report is due, confirm with the developer member's team that all required reporting systems are in place: (a) the developer member's accounting system is set up for the JV entity; (b) the construction lender's draw request procedures are established; (c) the capital member's bank account portal access has been granted and confirmed; and (d) the first monthly report template has been shared and agreed upon.

Quick Reference: Due Diligence Priority Summary

The following table maps all 83 due diligence items to their section, priority level, and primary responsible party for rapid pre-closing tracking.

Section	Item	Priority	Primary Responsibility
1. Developer DD	Track record, audited performance data from prior capital partners	**CRITICAL**	Capital Member
1. Developer DD	Financial capacity, developer member financial statements and guarantor net worth	**CRITICAL**	Capital Member
1. Developer DD	Key personnel verification, direct reference checks on each Key Man	**CRITICAL**	Capital Member
1. Developer DD	Litigation and regulatory history, 7-year search	**CRITICAL**	Capital Member

Section	Item	Priority	Primary Responsibility
1. Developer DD	Organizational structure and ownership, complete org chart	**HIGH**	Capital Member
1. Developer DD	Existing portfolio review, management bandwidth assessment	**HIGH**	Capital Member
1. Developer DD	Existing capital partner relationships, direct verification	**HIGH**	Capital Member
1. Developer DD	Developer member insurance, certificates and coverage confirmation	**HIGH**	Capital Member
1. Developer DD	Lender relationships, breadth and quality in project market	**MEDIUM**	Capital Member
1. Developer DD	Contractor relationships, GC and subcontractor quality assessment	**MEDIUM**	Capital Member
2. Property DD	Title review, ALTA survey and title commitment	**CRITICAL**	Both Parties
2. Property DD	Zoning and entitlement verification, governmental confirmation	**CRITICAL**	Both Parties
2. Property DD	Environmental review, Phase I ESA (Phase II if RECs identified)	**CRITICAL**	Both Parties
2. Property DD	Physical inspection and geotechnical assessment	**CRITICAL**	Both Parties
2. Property DD	Survey and infrastructure review, utilities and access	**CRITICAL**	Both Parties
2. Property DD	Building and construction permit status	**HIGH**	Developer Member
2. Property DD	Regulatory approvals and conditions, all approvals in full force	**HIGH**	Both Parties
2. Property DD	Existing structures and demolition, hazmat and relocation obligations	**HIGH**	Developer Member

Section	Item	Priority	Primary Responsibility
2. Property DD	Adjacent property and neighborhood assessment	**HIGH**	Developer Member
2. Property DD	Utility capacity confirmation, written utility availability letters	**MEDIUM**	Developer Member
3. Financial DD	Independent market study, demand validation	**CRITICAL**	Capital Member
3. Financial DD	Independent construction cost review, budget validation	**CRITICAL**	Capital Member
3. Financial DD	Sensitivity analysis and stress testing (3 scenarios)	**CRITICAL**	Capital Member
3. Financial DD	Waterfall model verification, confirmed by both advisors	**CRITICAL**	Both Parties
3. Financial DD	Financing market assessment, lender term sheet or LOI	**HIGH**	Developer Member
3. Financial DD	Interest reserve adequacy review	**HIGH**	Capital Member
3. Financial DD	Approved budget detail review, line-by-line	**HIGH**	Capital Member
3. Financial DD	Operating expense projection review	**HIGH**	Capital Member
3. Financial DD	Exit capitalization rate assessment	**MEDIUM**	Capital Member
3. Financial DD	Comparable sales analysis	**MEDIUM**	Capital Member
4. Legal DD	Operating agreement comprehensive review, Appendix C or D	**CRITICAL**	Both Parties
4. Legal DD	Construction loan document review and conflicts matrix	**CRITICAL**	Capital Member
4. Legal DD	Ancillary agreement review, consistency with operating agreement	**CRITICAL**	Both Parties

Section	Item	Priority	Primary Responsibility
4. Legal DD	Tax provision review, 704(b), 704(c), profits interest, UBTI, FIRPTA	**CRITICAL**	Tax Counsel
4. Legal DD	Site control documentation review	**CRITICAL**	Both Parties
4. Legal DD	Existing agreements review, easements, CC&Rs, infrastructure agreements	**HIGH**	Both Parties
4. Legal DD	Waterfall definition joint verification with financial advisors	**HIGH**	Both Parties
4. Legal DD	Formation document review, JV entity properly formed	**HIGH**	Both Parties
4. Legal DD	Required consents and approvals, all obtained before closing	**HIGH**	Both Parties
4. Legal DD	Insurance requirements review, coverage in place at closing	**MEDIUM**	Both Parties
5. Governance DD	Major decisions list completeness test, scenario mapping	**CRITICAL**	Capital Member
5. Governance DD	Deemed approval period feasibility confirmation	**CRITICAL**	Capital Member
5. Governance DD	Removal scenario economic and operational modeling	**CRITICAL**	Capital Member
5. Governance DD	Buy-sell mechanics simulation, base case and stress	**HIGH**	Both Parties
5. Governance DD	Reporting process confirmation, developer member systems	**HIGH**	Capital Member
5. Governance DD	Dispute resolution process review	**HIGH**	Both Parties
5. Governance DD	Communication protocol establishment	**MEDIUM**	Both Parties
6. Construction DD	General contractor qualification and selection	**CRITICAL**	Both Parties

Section	Item	Priority	Primary Responsibility
6. Construction DD	Construction plans and specifications status	**CRITICAL**	Both Parties
6. Construction DD	Performance bond and payment bond confirmation	**CRITICAL**	Capital Member
6. Construction DD	Construction schedule review, independent manager validation	**HIGH**	Capital Member
6. Construction DD	Major subcontractor qualification review	**HIGH**	Both Parties
6. Construction DD	Change order control review	**HIGH**	Capital Member
6. Construction DD	Long-lead item procurement status	**MEDIUM**	Developer Member
7. Market DD	Competitive supply analysis, comprehensive pipeline	**CRITICAL**	Capital Member
7. Market DD	Demand analysis verification, absorption and employment data	**CRITICAL**	Capital Member
7. Market DD	Achievable rent validation, executed lease comparables	**HIGH**	Capital Member
7. Market DD	Leasing strategy and broker relationship review	**HIGH**	Both Parties
7. Market DD	Pre-leasing status review, commercial projects	**HIGH**	Developer Member
7. Market DD	Property management selection and review	**MEDIUM**	Both Parties
8. Tax DD	Profits interest qualification confirmation	**CRITICAL**	Tax Counsel
8. Tax DD	Section 704(b) capital account compliance	**CRITICAL**	Tax Counsel

Section	Item	Priority	Primary Responsibility
8. Tax DD	UBTI analysis, tax-exempt capital members	**CRITICAL**	Tax Counsel
8. Tax DD	FIRPTA analysis, foreign capital members	**CRITICAL**	Tax Counsel
8. Tax DD	Section 704(c) built-in gain analysis, contributed property	**HIGH**	Tax Counsel
8. Tax DD	Tax election review, Section 754 and other elections	**HIGH**	Tax Counsel
8. Tax DD	State and local tax analysis	**HIGH**	Tax Counsel
8. Tax DD	Depreciation and cost segregation planning	**MEDIUM**	Tax Counsel
9. Capital Member DD	Investment committee approval, internal authorization	**CRITICAL**	Capital Member
9. Capital Member DD	Investment mandate compliance, no waiver required	**CRITICAL**	Capital Member
9. Capital Member DD	Regulatory compliance review, ERISA, IAA, ICA, insurance	**CRITICAL**	Capital Member
9. Capital Member DD	Conflict of interest review, prohibited transactions	**HIGH**	Capital Member
9. Capital Member DD	AML and KYC compliance, developer member and principals	**HIGH**	Capital Member
9. Capital Member DD	Capital commitment funding confirmation, no gate or restriction	**HIGH**	Capital Member
9. Capital Member DD	Valuation and reporting requirements confirmation	**MEDIUM**	Capital Member
10. Pre-Closing	Closing document completeness, all documents executed and in order	**CRITICAL**	Both Parties
10. Pre-Closing	Title insurance and survey confirmation	**CRITICAL**	Both Parties

Section	Item	Priority	Primary Responsibility
10. Pre-Closing	Construction loan commitment confirmation	**CRITICAL**	Both Parties
10. Pre-Closing	Initial equity funding mechanics confirmation	**CRITICAL**	Both Parties
10. Pre-Closing	Required consents confirmation, all third-party consents obtained	**CRITICAL**	Both Parties
10. Pre-Closing	Insurance binder confirmation at closing	**HIGH**	Both Parties
10. Pre-Closing	Post-closing action item list, distributed before closing	**HIGH**	Both Parties
10. Pre-Closing	Reporting protocol implementation, systems in place	**MEDIUM**	Both Parties

The due diligence process described in this checklist requires a significant investment of time, professional fees, and management attention. For a $50 to $100 million development JV, the comprehensive due diligence described here may cost $150,000 to $350,000 in professional fees and consume six to eight weeks of calendar time.

Against this cost, consider the alternative: a JV that closes without completing the CRITICAL due diligence items catalogued here is a JV that may discover, after equity is committed and construction has begun, that the developer member's track record is misrepresented, the geotechnical conditions require a $2 million remediation, the construction loan covenant package overrides the governance rights in the operating agreement, or the capital member's UBTI exposure makes the investment economically unviable at the projected return.

Every item marked CRITICAL in this checklist represents a due diligence gap that has generated material financial harm in actual JV transactions, not as a theoretical risk, but as a documented consequence. The investment in comprehensive due diligence is, without exception, the most cost-effective risk management decision either party can make.

APPENDIX G

Key Questions for Your Joint Venture Attorney

Evaluating Expertise, Selecting the Right Counsel, and Getting the Most from Your Legal Representation

The quality of legal counsel in a real estate joint venture is not a commodity. It is one of the most consequential decisions either party makes in the entire transaction. The right attorney does not merely draft documents; they protect the client's economic interests, identify risks before they become disputes, and apply a depth of pattern recognition that only comes from years of specialized practice. This appendix provides the questions to ask when evaluating, selecting, and working with JV counsel, and explains what the answers reveal about whether an attorney is genuinely qualified for the assignment.

This appendix is organized around seven question categories, each targeting a specific dimension of attorney qualification and service delivery. The questions are designed to be asked of a prospective attorney before engagement, not as an interview exercise, but as a genuine assessment of whether the attorney's experience, market knowledge, and practice orientation are matched to the specific demands of institutional real estate joint venture representation.

Each question block explains what the question is designed to reveal, what a strong answer sounds like, and what response patterns should trigger concern. Together, these questions form a comprehensive attorney evaluation framework that reflects the accumulated wisdom of this handbook's guidance on JV documentation and dispute prevention.

How to Use This Appendix:

Before first meeting	Review all 30 questions and identify the 8 to 10 most relevant to your specific transaction type, deal size, and personal risk concerns. Bring them to the initial consultation.
During initial consultation	Ask the questions conversationally, not as an interrogation. Strong attorneys will answer precisely and with specific examples; weaker attorneys will respond with generalities.
Evaluating multiple candidates	Use the Strong Answer and Red Flag markers to compare candidate responses across question categories. Gaps in specific experience areas are more significant than general intelligence.
After engagement	Return to the governance and ongoing counsel questions throughout the transaction to ensure you are getting the full range of services you need, not just document drafting.

Dispute prevention	Share the dispute-focused question category with both parties' counsel before the operating agreement is signed. It will focus the drafting review on the provisions most likely to generate disputes.

A. EXPERIENCE AND SPECIALIZATION

Distinguishing genuine JV specialists from competent generalists

The most important qualification for JV counsel is specialization, not general real estate competence, but specific, deep experience in institutional joint venture documentation. The questions in this category are designed to quickly distinguish attorneys with genuine JV depth from those with broad real estate experience but limited JV-specific expertise.

Q1: How many institutional JV operating agreements have you negotiated and drafted in the past 24 months?

▶ **What this question reveals:** Volume of recent practice is the most direct indicator of current market knowledge and pattern recognition depth. An attorney who drafted three JV operating agreements five years ago has fundamentally different expertise than one who has drafted twenty in the past two years.

▶ **What to listen for:** Specific numbers with approximate deal sizes, asset types, and whether the attorney represented developer members, capital members, or both. Look for current, active practice, not past experience. A strong JV attorney will be able to describe their recent pipeline without hesitation.

⚠ **Red Flag:** *Vague answers like 'I've done many JVs over the years' or references to JV experience from more than three years ago as the most recent work. The JV market evolves continuously; attorneys without current practice may have outdated market knowledge.*

✓ **Strong Answer:** The attorney can immediately name three to five recent JV transactions (without identifying the clients) with specific details about the deal type, size, asset class, and the key negotiating issues resolved. This specificity signals current, active practice.

Q2: Have you represented both developer members and capital members in JV transactions, or primarily one side?

▶ **What this question reveals:** Both-sides experience is a strong indicator of sophisticated JV counsel. An attorney who has represented only developer members may not fully appreciate the capital member's legitimate governance concerns; one who has represented only capital members may not understand the developer member's operational constraints. The best JV counsel understands, and can anticipate, both parties' perspectives.

▶ **What to listen for:** An attorney who can articulate the specific negotiating priorities of both developer members and capital members with equal specificity and balance. The ideal answer confirms active recent representation of both sides, with examples of how each side's perspective informed the attorney's approach.

⚠ **Red Flag:** *An attorney who has represented only one side and shows no real understanding of the counterparty's perspective. Attorneys who dismissively characterize the other side's concerns as unreasonable or illegitimate may not negotiate effectively on their client's behalf.*

✓ **Strong Answer:** The attorney can describe, from experience, specific provisions that developer member clients and capital member clients have fought over most fiercely, and why both sides' positions were

legitimate from their respective perspectives. This dual-perspective analysis demonstrates the depth that sophisticated JV counsel requires.

Q3: What asset types and JV structures have you worked with most recently, and do those match my transaction?

▶ **What this question reveals:** JV documentation varies significantly across asset types. A ground-up multifamily development JV has fundamentally different risk provisions, construction-phase governance mechanics, and leasing considerations than a value-add office acquisition JV or an industrial build-to-suit JV. An attorney whose recent experience is concentrated in a different asset type may have significant gaps in the specific knowledge your transaction requires.

▶ **What to listen for:** Specific recent experience in the same asset type and development stage as your transaction, not general 'real estate JV' experience. Look for specific mention of the risk provisions, fee structures, and governance mechanics relevant to your asset type.

⚠ **Red Flag:** *An attorney who claims to handle all asset types equally well without describing specific differences in how JVs for different asset types are documented. Real estate JV practice has meaningful asset-type specialization; an attorney who cannot describe those differences may not have deep experience in any of them.*

✓ **Strong Answer:** The attorney immediately describes the specific provisions that differ between your transaction's asset type and other asset types, for example, distinguishing development JV construction risk provisions from the stabilized acquisition governance framework, or explaining how industrial build-to-suit pre-leasing covenants differ from multifamily lease-up provisions.

Q4: What is your current market read on preferred return rates, promote structures, and major decision thresholds for transactions of the type I am considering?

▶ **What this question reveals:** Current market knowledge is one of the most valuable things specialized JV counsel provides. An attorney who can accurately characterize current market terms, not historical terms, but what sophisticated parties are actually agreeing to in current arm's-length negotiations, gives clients the foundation for informed negotiating decisions.

▶ **What to listen for:** Specific, current information: preferred return rates referenced to recent transactions (not historical memory), promote percentage ranges for specific asset types and return profiles, typical major decision dollar threshold ranges for projects of the proposed size. The answer should reflect current market conditions, not what the market looked like several years ago.

⚠ **Red Flag:** *Vague or dated market characterizations, or references to 'standard' terms without being able to specify what 'standard' actually means in current practice. If an attorney cannot tell you what preferred return rates have been in recent comparable transactions, they may not be actively practicing in the current market.*

✓ **Strong Answer:** The attorney discusses current market terms with the confidence of someone who has recently negotiated those terms, noting how preferred return rates have shifted in response to interest rate changes, which promote structures institutional capital members are currently insisting on, and where the current battlegrounds are in major decision threshold negotiations.

Q5: Have you ever been involved in JV litigation or arbitration, either as transactional counsel advising a client whose JV was in dispute, or in another capacity? What did you learn?

▶ **What this question reveals:** Litigation awareness is the single most valuable characteristic that distinguishes elite JV counsel from competent transactional attorneys. An attorney who has seen how

provisions are interpreted, and misinterpreted, in adversarial proceedings brings a quality of drafting insight that purely transactional attorneys cannot replicate.

▶ **What to listen for:** Specific dispute scenarios the attorney has encountered, the provisions that generated the dispute, and the specific drafting lessons learned from each experience. The answer does not require the attorney to have been lead trial counsel. It requires demonstrated awareness of how JV provisions perform under adversarial pressure.

⚠ **Red Flag:** *An attorney who views JV practice as purely transactional and who has never been exposed to how provisions are interpreted in disputes. Attorneys without dispute awareness tend to draft provisions that read well but perform poorly when relationships deteriorate, the very scenario that JV documentation must be designed to survive.*

✓ **Strong Answer:** The attorney can walk through two or three specific dispute scenarios they have encountered, describing the provision that generated the dispute, the competing interpretations advanced by each side, and the specific drafting change that would have prevented the dispute. This level of specificity confirms genuine litigation awareness, not merely theoretical knowledge.

B. ECONOMIC PROVISIONS AND WATERFALL DRAFTING

Confirming depth of expertise in the provisions that generate the most disputes

The distribution waterfall and its associated defined terms are the most economically consequential, and most frequently disputed, provisions in any JV operating agreement. The questions in this category probe the attorney's specific technical expertise in waterfall drafting and promote structuring.

Q6: Do you routinely attach worked numerical waterfall examples to operating agreements, and can you show me a redacted example?

▶ **What this question reveals:** The worked numerical example attached to the operating agreement, confirmed by both parties' financial advisors, is the single most effective dispute prevention tool in JV practice. Attorneys who use them routinely have seen the IRR and promote calculation disputes that arise without them; attorneys who do not use them may not have encountered those disputes.

▶ **What to listen for:** Confirmation that the attorney routinely uses worked examples, an explanation of what they include (base case and stress scenarios, specific cash flow timelines, IRR calculation methodology), and a willingness to provide a redacted example. The example's sophistication reveals the attorney's financial modeling depth.

⚠ **Red Flag:** *An attorney who views worked examples as unnecessary or who has never produced one as part of an operating agreement negotiation. The absence of worked examples in an attorney's JV practice is a strong indicator that the attorney has not been involved in the promote calculation disputes that worked examples prevent.*

✓ **Strong Answer:** The attorney produces a redacted worked example demonstrating a complete waterfall calculation with specific IRR methodology, catch-up mechanics, and both a base case and a stress scenario. The quality and precision of the example is a direct measure of the attorney's financial modeling capability and dispute prevention orientation.

Q7: How do you define 'Capital Member IRR' in your operating agreements, and what cash flows do you include or exclude?

▶ **What this question reveals:** The IRR definition is the most litigated economic provision in JV operating agreements. An attorney who can answer this question with specificity, explaining exactly which cash flows are included and excluded, the timing convention used, whether the calculation is pre-tax or after-tax, and how contributed capital timing affects the result, has real transactional depth in waterfall drafting.

▶ **What to listen for:** A specific, technical answer describing the IRR definition's components: the cash flow types included (contributions, distributions) and excluded (fees, taxes, transaction costs); the timing convention (daily, monthly, or annual); the compounding frequency; and whether the calculation is performed on a pre-tax or after-tax basis. The attorney should be able to explain why each choice matters economically.

⚠ **Red Flag:** *A vague answer that describes IRR in general terms without addressing the specific definitional choices that determine the calculation's outcome. An attorney who cannot explain the difference between pre-tax and after-tax IRR, or who cannot explain how including or excluding developer fees affects the result, has not seen the IRR disputes that stem from these definitional choices.*

✓ **Strong Answer:** The attorney immediately explains the core definitional tension, whether above-the-line developer fees are included in the IRR cash flow calculation, and describes how they have addressed this issue in recent transactions, including why each approach favors a different party. This level of specificity confirms deep waterfall drafting expertise.

Q8: How do you handle refinancing proceeds in the waterfall? Are they treated as Available Cash, and how have you seen this issue generate disputes?

▶ **What this question reveals:** The treatment of refinancing proceeds is one of the most commonly disputed waterfall issues in JV practice. An attorney who has seen this dispute, or who has specifically addressed it in their drafting practice, demonstrates the operational awareness that distinguishes genuine JV specialists from attorneys who draft from forms.

▶ **What to listen for:** A specific answer confirming that the attorney expressly addresses refinancing proceeds in the 'Available Cash' definition of every operating agreement they draft, including the specific language they use and why they use it. A strong answer also describes the dispute scenario that results when this issue is left unaddressed.

⚠ **Red Flag:** *An attorney who is unfamiliar with the refinancing proceeds dispute scenario, or who relies on a broad 'Available Cash' definition without specifically enumerating capital event categories. This gap in drafting awareness is a reliable indicator that the attorney has not been involved in the post-closing disputes that inadequate 'Available Cash' definitions generate.*

✓ **Strong Answer:** The attorney describes a specific transaction in which the refinancing proceeds issue arose, either as a dispute they advised a client through, or as a risk they identified and resolved during operating agreement negotiation, and explains the specific drafting language they use to prevent the dispute.

Q9: What is your approach to the clawback in a programmatic JV? How do you structure the cap, the tax gross-up, and the escrow mechanics?

▶ **What this question reveals:** The programmatic JV clawback is among the most complex economic provisions in institutional real estate practice. An attorney who can articulate a precise, nuanced approach to clawback structure, cap level, tax gross-up calculation, escrow percentage and release mechanics, has genuine programmatic JV experience. Attorneys with only single-asset JV experience will struggle with this question.

▶ **What to listen for:** A specific answer addressing the three key clawback mechanics: (a) the cap, expressed as a percentage of total promote received, typically 100%, and the reasoning for that level; (b) the tax gross-up, the methodology for calculating the after-tax clawback amount, including which tax rate is used

and how tax payments are verified; and (c) the escrow, the percentage held, the investment vehicle, the release triggers, and whether the escrow is the exclusive clawback remedy.

⚠ **Red Flag:** *An attorney who conflates the clawback with the standard waterfall's preferred return protection, or who cannot describe the specific mechanics of the tax gross-up calculation. An attorney without real programmatic JV experience will typically give a general answer about 'returning the promote' without addressing the specific financial mechanics that determine the developer member's actual economic exposure.*

✓ **Strong Answer:** The attorney provides a specific description of their preferred clawback structure, for example, a 100% cap, an after-tax calculation using the developer member's highest marginal rate with a true-up upon actual tax return filing, a 30% escrow held in a money market account with annual releases tied to portfolio-level return confirmation, and can explain why each element serves which party's interests.

Q10: How do you address the interplay between the promote vesting schedule and the clawback in a removal scenario?

▶ **What this question reveals:** The intersection of the promote vesting schedule, the clawback provision, and the removal mechanics is one of the most complex and consequential economic structures in JV documentation. An attorney who can navigate this interplay, describing how the vested promote is calculated at the removal date, how interim promote distributions affect the clawback calculation, and how the tax gross-up applies to a removal scenario, has elite-level JV economic drafting expertise.

▶ **What to listen for:** A detailed explanation of how the three provisions interact: first, the vesting schedule determines what percentage of the total promote is vested at the removal date; second, the vested promote is calculated based on a hypothetical fair market value disposition on the removal date; third, prior interim promote distributions are compared against the removal-date vested entitlement to determine whether a clawback obligation exists; and fourth, the tax gross-up adjusts the clawback for taxes paid on prior distributions.

⚠ **Red Flag:** *An attorney who treats the promote vesting schedule and the clawback as separate, unrelated provisions. This compartmentalized approach produces operating agreements in which the removal scenario's economic consequences are inconsistent with the parties' intentions, a primary source of post-removal economic litigation.*

✓ **Strong Answer:** The attorney walks through the interplay with a specific numerical example, for example, a developer member with a 20% promote is removed after achieving 60% vesting; its vested promote based on FMV at removal date is calculated; prior interim promote distributions are compared to the vested amount; and a clawback obligation (or the absence of one) is determined and tax-adjusted. The fluency of this walk-through is the most reliable indicator of elite JV economic drafting expertise.

C. GOVERNANCE AND CONTROL PROVISIONS

Assessing expertise in the provisions that determine operational reality

Governance provisions determine who actually controls the JV's day-to-day operations, what decisions require the other party's approval, and what happens when governance breaks down. The questions in this category probe the attorney's specific expertise in the governance provisions that generate the most operational friction, and the most litigation.

Q11: How do you draft the major decisions list, and how do you test it for completeness before signing?

▶ **What this question reveals:** The major decisions list is the capital member's primary governance protection and the developer member's primary operational constraint. An attorney who has a specific methodology for drafting and testing the major decisions list, not merely filling in a standard form, demonstrates the operational awareness that distinguishes superior JV counsel.

▶ **What to listen for:** A specific description of the attorney's major decisions drafting methodology: how they build the list from the transaction's specific risk profile rather than from a standard form; how they test the list against realistic scenarios to identify gaps; and how they calibrate the dollar thresholds to the project's scale and complexity. Look for mention of the 'completeness test' described in Chapter 5.

⚠ **Red Flag:** *An attorney who drafts the major decisions list by copying a standard form and making minimal modifications. Standard form major decisions lists are written for a generic transaction; they routinely omit specific decision categories that are material for specific transaction types.*

✓ **Strong Answer:** The attorney describes a specific process: they build the major decisions list by asking the capital member to describe every action the developer member could take that would harm the investment, then testing each answer against the draft list to confirm coverage. This scenario-driven approach produces a more complete and more enforceable list than any form-based approach.

Q12: How do you structure the deemed approval provision, and what are the most common ways it fails in practice?

▶ **What this question reveals:** The deemed approval provision is the developer member's most important operational protection. Without it, the capital member can block any decision simply by not responding. An attorney who understands how deemed approval provisions fail in practice, through inadequate notice requirements, overly long response periods, or carve-outs that swallow the rule, can draft one that actually works.

▶ **What to listen for:** A specific description of the attorney's deemed approval drafting approach: the response period length for different decision types, the notice requirements for starting the response period clock, the deemed approval consequence for non-response, and the carve-outs (if any) that the attorney resists. A strong answer also describes real-world scenarios in which deemed approval provisions have failed or been weaponized.

⚠ **Red Flag:** *An attorney who treats the deemed approval provision as a standard boilerplate clause requiring no particular thought or customization. The deemed approval provision's practical effectiveness depends on a series of specific drafting choices that must be calibrated to the parties' specific governance dynamics.*

✓ **Strong Answer:** The attorney describes a specific transaction in which the deemed approval provision was critical, either because it protected the developer member from a bad-faith capital member who was using non-response to block legitimate decisions, or because it was triggered inadvertently and the parties needed to address the resulting governance consequence.

Q13: How do you define 'Cause' for removal purposes, and how do you handle force majeure and market-condition carve-outs?

▶ **What this question reveals:** The cause definition is the most litigated provision in JV removal disputes. An attorney who can describe their specific approach to cause definition drafting, including the objective triggers, the force majeure carve-outs, the cure period structure, and the status quo obligation during disputes, has genuine expertise in the provisions that determine removal litigation outcomes.

▶ **What to listen for:** A specific answer describing the attorney's cause definition structure: the enumerated objective triggers (fraud, gross negligence, criminal conviction, material breach, insolvency, key man event, and performance-based triggers); the performance-based trigger's force majeure and market-condition carve-

outs; the cure period differentiation by trigger type; and the status quo management obligation during the cure period.

⚠ **Red Flag:** *An attorney who uses a cause definition that relies on subjective standards ('material underperformance,' 'failure to meet investor expectations') rather than objective triggers with specific thresholds. Subjective cause definitions are the primary source of pretextual removal litigation.*

✓ **Strong Answer:** The attorney describes their preferred cause definition structure with the specific language used for the force majeure carve-out, for example, 'budget overruns exceeding 15% of total project cost attributable to Developer Member's gross negligence or willful misconduct, expressly excluding overruns caused by Force Majeure events, market-wide construction cost inflation, or governmental actions beyond Developer Member's reasonable control', and explains why each element of this formulation protects the developer member against pretextual removal.

Q14: How do you handle the buy-sell mechanism's treatment of the developer member's promote in the buy-sell pricing, and what valuation methodology do you use?

▶ **What this question reveals:** The buy-sell mechanism's treatment of the developer member's promote is one of the most consistently overlooked, and most economically consequential, drafting gaps in JV operating agreements. An attorney who addresses this issue proactively, with a specific valuation methodology documented in an exhibit to the operating agreement, demonstrates the foresight that sophisticated JV counsel requires.

▶ **What to listen for:** A specific description of the attorney's buy-sell promote valuation methodology: whether the promote is treated as promote-inclusive (the trigger party must factor the developer member's promote into the buy-sell price) or waterfall-applied (the buy-sell price is distributed through the waterfall, with the developer member receiving whatever the waterfall calculation produces), and a reference to the worked example that documents the chosen methodology. Look for specific mention of Exhibit G from the term sheet template.

⚠ **Red Flag:** *An attorney who treats the buy-sell as a simple price-setting mechanism without addressing the promote treatment. Operating agreements that are silent on promote treatment in buy-sell transactions create exactly the type of ambiguity that generates expensive disputes when the buy-sell is actually triggered.*

✓ **Strong Answer:** The attorney describes both promote treatment methodologies, explains which party each favors and why, describes how they have resolved this issue in recent transactions, and confirms that they document the chosen methodology in a worked example attached to the operating agreement. This combination of conceptual clarity and practical documentation confirms elite buy-sell drafting expertise.

Q15: How do you handle the construction loan covenant review as part of the JV operating agreement negotiation?

▶ **What this question reveals:** The construction loan covenant review is the most commonly skipped step in JV legal due diligence, and the source of the most common post-closing governance surprises. An attorney who treats the loan document review as an integral part of the operating agreement negotiation process, rather than as the lender's attorney's separate concern, provides a critical protection that most generalist real estate attorneys do not.

▶ **What to listen for:** A description of the attorney's standard practice for reviewing construction loan documents alongside the operating agreement, including the specific covenant categories they look for (distribution restrictions, management change provisions, transfer restrictions, leasing covenants, insurance requirements), the conflicts matrix they create, and how they coordinate the resolution of conflicts between the two documents.

⚠ **Red Flag:** *An attorney who views the construction loan document review as the lender's attorney's responsibility and who does not routinely compare the loan documents against the operating agreement for conflicts. This approach leaves the client exposed to the loan covenant surprises that are the most common source of post-closing governance dysfunction.*

✓ **Strong Answer:** The attorney immediately describes the conflicts matrix approach, a document-by-document comparison of lender consent requirements and operating agreement governance rights, and cites specific conflict categories they have identified and resolved in recent transactions. The specificity of the conflict examples (e.g., 'the lender's distribution restrictions required capital member approval of any distribution, which conflicted with the operating agreement's deemed approval mechanics for operating distributions') confirms genuine cross-document expertise.

D. TAX AND STRUCTURAL KNOWLEDGE

Confirming the attorney's ability to coordinate transactional and tax expertise

JV attorneys are not tax attorneys, but the best JV counsel understands the tax implications of every economic provision they draft well enough to identify tax issues, coordinate with tax counsel, and ensure that the operating agreement's provisions are consistent with the parties' intended tax treatment.

Q16: How do you ensure that the promote is properly structured as a profits interest, and what are the key conditions that must be satisfied?

▶ **What this question reveals:** The profits interest qualification is a tax issue, but it has direct transactional implications that the JV attorney must understand and address in the operating agreement's waterfall mechanics. An attorney who can explain the profits interest requirements, and confirm that the specific waterfall structure satisfies them, provides a critical bridge between transactional and tax counsel.

▶ **What to listen for:** A clear explanation of the profits interest requirements under IRS Revenue Procedures 93-27 and 2001-43: (a) the promote must have no liquidation value on the grant date, confirmed by the waterfall's preferred return threshold; (b) the promote must not be a substantially certain-to-be-received payment; and (c) the grant is not taxable to the developer member. The attorney should confirm that they routinely verify these conditions when drafting the waterfall.

⚠ **Red Flag:** *An attorney who is unfamiliar with the profits interest concept or who defers the question entirely to tax counsel without any understanding of how the waterfall structure affects the profits interest qualification. JV counsel who cannot discuss profits interest basics cannot effectively coordinate with tax counsel on the operating agreement's tax provisions.*

✓ **Strong Answer:** The attorney explains how the promote's liquidation value condition ties directly to the waterfall mechanics, if the capital member has not received its preferred return on the grant date, the developer member would receive nothing on liquidation, satisfying the zero-liquidation-value requirement, and confirms that they routinely coordinate with tax counsel to verify this condition before the operating agreement is signed.

Q17: How do you handle UBTI exposure analysis for tax-exempt capital members, and at what point in the transaction do you raise this issue?

▶ **What this question reveals:** UBTI exposure is a capital member-specific tax issue that must be addressed at the earliest stages of transaction structuring, before the JV structure is agreed upon, not after. An attorney who raises UBTI issues proactively at the term sheet stage, and who understands the structural solutions (blocker entities, debt limitation strategies), demonstrates the institutional investor sophistication that tax-exempt capital members require.

▶ **What to listen for:** A specific description of the attorney's approach to UBTI analysis for tax-exempt investors: when they raise the issue (at the term sheet stage, before structure is agreed upon), how they coordinate with tax counsel on the analysis, what structural solutions they have implemented in past transactions (blocker entities, debt limitation, alternative equity structures), and how the UBTI exposure affects the capital member's projected after-tax return.

⚠ **Red Flag:** *An attorney who raises UBTI as an afterthought, after the JV structure is agreed upon and the operating agreement is nearly complete, or who is unfamiliar with the 25% benefit plan investor threshold and its implications for ERISA plan asset status. These gaps indicate limited experience with institutional investor capital member representation.*

✓ **Strong Answer:** The attorney describes a specific transaction involving a tax-exempt capital member in which UBTI analysis affected the transaction structure, for example, a decision to use a blocker entity that required reorganizing the capital stack, or a debt limitation covenant that constrained the construction loan amount below the developer member's preferred LTC ratio, and explains how they navigated the competing interests to reach a workable structure.

Q18: How do you coordinate with the parties' tax counsel during the operating agreement negotiation, and how do you handle disagreements between the legal provisions and the tax analysis?

▶ **What this question reveals:** The coordination between JV counsel and tax counsel is one of the most important, and most frequently managed poorly, aspects of JV documentation. An attorney who has a specific coordination process, who understands when to defer to tax counsel and when to push back on tax positions that would impair the economic arrangement, provides a critical integrating function that unsophisticated JV attorneys typically cannot fill.

▶ **What to listen for:** A description of the attorney's tax counsel coordination process: how early they engage tax counsel, how they communicate the operating agreement's economic provisions to tax counsel for analysis, how they incorporate tax counsel's feedback into the drafting process, and how they handle situations in which the tax analysis requires modifications to the economic provisions that one party prefers not to make.

⚠ **Red Flag:** *An attorney who completely defers all tax questions to tax counsel without any understanding of the tax implications of the economic provisions they draft. This complete deference creates a gap in the documentation process: economic provisions that are tax-inconsistent may be drafted and signed before the inconsistency is identified.*

✓ **Strong Answer:** The attorney describes a specific situation in which they identified a conflict between the economic provisions and the tax analysis, for example, a promote structure that was economically appropriate but would not qualify as a profits interest, or a developer fee structure that would generate UBTI, and describes how they coordinated with tax counsel to resolve the conflict while preserving the intended economic arrangement.

E. DISPUTE PREVENTION AND LITIGATION AWARENESS

The most important quality that separates elite JV counsel from competent transactional attorneys

Dispute prevention is the ultimate test of JV counsel quality. The provisions that generate the most expensive disputes, the IRR definition, the cause definition, the major decisions list, the post-removal economic provisions, are exactly the provisions that elite JV counsel drafts with the greatest precision. The questions in this category probe the attorney's awareness of the specific disputes that arise from specific drafting failures.

Q19: What are the three operating agreement provisions you find most frequently generate disputes when relationships deteriorate, and how do you draft them to prevent those disputes?

▶ **What this question reveals:** This open-ended question reveals the attorney's actual dispute awareness better than any targeted question. An attorney who has genuine litigation awareness will immediately identify the three most litigation-prone provisions, the waterfall definitions, the cause definition, and the post-removal economic provisions, and will describe specific drafting choices that prevent each category of dispute.

▶ **What to listen for:** Immediate, specific identification of the most litigation-prone provisions. The answer should include the waterfall definitions (particularly IRR and Available Cash), the cause definition (particularly performance-based triggers without force majeure carve-outs), and the post-removal economic provisions (particularly binary promote forfeiture). The attorney should describe the specific drafting choices that prevent each dispute category.

⚠ **Red Flag:** *A generic answer that identifies obviously contentious provisions (like the promote percentage or the preferred return rate) as the primary source of disputes. These provisions are not the primary source of litigation. They are negotiated clearly at the term sheet stage. The provisions that generate post-signing disputes are the definitional and mechanical provisions that seem clear at signing but are ambiguous in application.*

✓ **Strong Answer:** The attorney immediately names the IRR definition, the cause definition, and the post-removal promote provisions, in that order or a similar ranking, and provides specific drafting solutions for each: a precision IRR definition with a worked example for the first; an objective cause definition with force majeure carve-outs and cure periods for the second; and a milestone-based vesting schedule for the third.

Q20: Have you ever encountered a situation where a provision you drafted was disputed or interpreted differently than you intended? What did you learn from that experience?

▶ **What this question reveals:** This question invites the attorney to demonstrate intellectual honesty and a growth-oriented approach to practice. The best JV attorneys are constantly refining their drafting based on the disputes they encounter, in their own practice and in the JV litigation landscape generally. An attorney who claims to have never had a provision disputed is either inexperienced or not being candid.

▶ **What to listen for:** A thoughtful, specific answer describing a real situation in which a provision's application produced an outcome different from the intended one, and the specific drafting lesson learned. The answer should demonstrate that the attorney studied the dispute carefully, identified the precise language that created the ambiguity, and modified their drafting approach for future transactions.

⚠ **Red Flag:** *A defensive or evasive answer that avoids acknowledging any drafting limitation. All JV attorneys, including the very best, have encountered provisions that performed differently than intended when subjected to adversarial pressure. An attorney who cannot identify any such experience either lacks candor or lacks the dispute exposure necessary to produce elite-level JV documentation.*

✓ **Strong Answer:** The attorney describes a specific situation with intellectual honesty: the provision that was disputed, the competing interpretations advanced by each party, why the provision was ambiguous in the specific factual context, and the specific drafting addition, a definition, a worked example, a clarifying sentence, that would have prevented the dispute. This level of reflective specificity is a hallmark of elite professional practice.

Q21: How do you approach the drafting of post-removal economic provisions, and what is your recommended vesting schedule structure?

▶ **What this question reveals:** Post-removal economic provisions, particularly the promote vesting schedule and the treatment of accrued fees, are the most frequently litigated provisions in JV removal

disputes. An attorney who has a specific, well-reasoned approach to these provisions, grounded in actual dispute experience, provides a level of protection that form-based drafting cannot replicate.

▶ **What to listen for:** A specific description of the attorney's post-removal economic framework: the milestone-based vesting schedule structure (which milestones, what vesting percentages, how the FMV is calculated at removal date), the treatment of accrued vs. future fees, and the distinction between for-cause and no-cause removal consequences. The attorney should be able to explain the economic rationale for each element of the framework.

⚠ **Red Flag:** *An attorney who recommends binary promote forfeiture upon for-cause removal, the developer member loses everything upon a valid for-cause removal, without acknowledging the perverse incentives this structure creates for the capital member to assert cause pretextually near project completion. This binary approach is the primary source of post-removal litigation.*

✓ **Strong Answer:** The attorney describes their preferred vesting schedule structure with specific milestone percentages, for example, 15% at construction loan closing, 30% at 50% construction completion, 30% at certificate of occupancy, 15% at stabilization, and 10% at final disposition, and explains why this structure balances the developer member's legitimate interest in preserving the economic value of completed work against the capital member's legitimate interest in withholding the promote from an underperforming manager.

F. SERVICE DELIVERY AND ENGAGEMENT MANAGEMENT

Confirming the attorney will actually deliver what the transaction requires

The most technically qualified attorney is only as valuable as the quality of the service they actually deliver. The questions in this category probe the attorney's engagement management practices, responsiveness, fee transparency, team structure, and the ongoing counsel services that most JV parties need but many attorneys do not provide.

Q22: Who will actually work on my transaction, you personally, or associates? And what is the supervision arrangement?

▶ **What this question reveals:** Senior attorney quality and associate execution quality are very different things. Many experienced JV attorneys originate client relationships but delegate execution to junior associates who may not have the expertise to handle complex JV documentation. Understanding who will actually do the work, and how the senior attorney will be involved in the execution, is essential before engaging any firm.

▶ **What to listen for:** A clear, honest description of the team structure: the senior attorney's personal involvement in drafting, negotiating, and reviewing key provisions; the associates who will support execution; their specific JV experience levels; and the supervision arrangement that ensures senior attorney review of all material provisions. Look for a commitment to senior attorney personal involvement in at least the key negotiating sessions and final document reviews.

⚠ **Red Flag:** *An attorney who describes a highly delegated model in which the senior attorney will 'supervise' the transaction but the drafting and negotiation will be handled primarily by associates. For complex institutional JV transactions, senior attorney personal involvement in drafting the most critical provisions, the waterfall, the cause definition, the post-removal economics, is not optional.*

✓ **Strong Answer:** The attorney describes a hybrid model: senior attorney personally drafts the critical economic and governance provisions (waterfall, cause definition, post-removal economics, major decisions list), supervises all negotiations, and conducts the final pre-execution review; associates handle due diligence, boilerplate provisions, and administrative aspects of the closing. This model balances efficiency with senior attorney quality assurance.

Q23: How do you structure your fees for JV transactions, fixed fee, hourly, or blended, and how do you handle scope changes?

▶ **What this question reveals:** Fee structure transparency is both a practical and a philosophical indicator of how an attorney approaches client relationships. Fixed fees provide cost certainty but may create incentives to underprovide services; hourly billing provides service breadth but may create uncertainty about total cost. Understanding the attorney's fee approach, and how they handle scope changes that are inevitable in complex JV negotiations, is essential before engagement.

▶ **What to listen for:** A clear, honest description of the fee structure, including the estimated total cost for a transaction of the proposed size and complexity, any fixed-fee vs. hourly components, how the estimate is derived, what triggers a scope adjustment discussion, and how scope changes are priced. The attorney should be able to provide a realistic fee range based on their recent experience with comparable transactions.

⚠ **Red Flag:** *Vague fee descriptions ('we'll send you an engagement letter') without any preliminary discussion of what comparable transactions have cost. An attorney who cannot give you a meaningful preliminary fee estimate has either not done enough transactions to know what they cost, or is not willing to commit to fee transparency early in the engagement.*

✓ **Strong Answer:** The attorney provides a specific fee range based on recent comparable transactions, explains the factors that drive cost higher or lower within that range (counterparty sophistication, number of negotiating rounds, transaction complexity), and commits to a scope change communication protocol that ensures the client is never surprised by additional fees.

Q24: What is your typical timeline for completing an operating agreement from term sheet execution to closing-ready document?

▶ **What this question reveals:** Timeline management is a critical service dimension in JV transactions, where counterparty timing pressure, construction loan commitment expiration dates, and market opportunities create real time constraints. An attorney who cannot manage their workload to meet the client's timeline, or who does not establish clear timeline expectations at engagement, imposes real costs on the transaction.

▶ **What to listen for:** A specific timeline description for a transaction of the proposed complexity: typical elapsed time from term sheet execution to first draft operating agreement, typical number of negotiating rounds, typical elapsed time from first draft to execution-ready document, and any factors that consistently extend or compress timelines in the attorney's experience. The timeline should be calibrated to the specific transaction's complexity.

⚠ **Red Flag:** *An attorney who cannot give a specific timeline estimate or who consistently describes timelines that would extend the transaction beyond the client's actual deadline. Unrealistic timeline estimates, in either direction, indicate either limited transaction experience or a failure to manage client expectations effectively.*

✓ **Strong Answer:** The attorney provides a specific timeline breakdown based on recent comparable transactions, for example, first draft within 10 business days of term sheet execution; first round of comments within 7 business days; two to three negotiating rounds over four to six weeks; execution-ready document within eight to ten weeks total, and identifies the factors most likely to extend or compress this timeline in the specific transaction.

Q25: What ongoing counsel services do you provide after the operating agreement is signed, and how do you typically structure that ongoing relationship?

▶ **What this question reveals:** JV counsel's value does not end at closing. It extends throughout the JV's lifecycle, from governance guidance and major decision approval support through dispute avoidance and disposition planning. An attorney who describes a comprehensive ongoing counsel approach, not merely

willingness to take calls, but a proactive engagement with the JV's governance dynamics, provides a level of value that closing-focused attorneys cannot match.

▶ **What to listen for:** A specific description of the ongoing counsel services the attorney provides: governance guidance on major decision approval requests; operating agreement interpretation; dispute avoidance and early-stage conflict resolution; amendment drafting when circumstances change; and disposition planning and waterfall calculation support. The attorney should be able to describe specific examples of ongoing counsel they have provided to past clients.

⚠ **Red Flag:** *An attorney who views ongoing counsel as reactive, 'call us if you have a question', without a proactive engagement model. JV relationships generate governance questions and early-stage conflicts throughout their lifecycle; the attorney who is available only when called, rather than proactively monitoring the JV's governance health, provides fundamentally less value than the attorney who is engaged throughout.*

✓ **Strong Answer:** The attorney describes specific ongoing counsel services with concrete examples: a monthly or quarterly governance check-in call with the client's investment team to review pending major decision requests and identify emerging governance issues; a standard process for reviewing capital member or developer member communications before they are sent in high-stakes situations; and a disposition planning process that begins 12 to 18 months before the projected sale to ensure the waterfall calculation and governance mechanics are all prepared in advance.

G. PRACTICE-SPECIFIC AND CONTEXTUAL QUESTIONS

Tailoring the evaluation to your specific transaction type and investor profile

The questions in categories A through F apply to every institutional JV attorney evaluation. The questions in this final category are tailored to specific transaction types, investor profiles, and market contexts. Select and ask the questions most relevant to your specific situation.

Q26: For programmatic JVs: How do you structure the investment period, exclusivity, and clawback provisions for a multi-asset programmatic program?

▶ **What this question reveals:** Programmatic JV documentation is significantly more complex than single-asset JV documentation, and many attorneys who handle single-asset JVs effectively have never worked on a programmatic structure. This question distinguishes attorneys with genuine programmatic JV expertise from those whose experience is limited to single-asset transactions.

▶ **What to listen for:** A specific description of the programmatic JV's unique structural elements: the investment period mechanics (initial period, extension rights, deemed approval for qualified investments); the exclusivity framework (ROFO on qualifying opportunities, response periods, anti-circumvention); and the clawback structure (vintage-year vs. aggregate calculation, escrow mechanics, tax gross-up). An attorney without programmatic JV experience will struggle to address all three areas with specificity.

⚠ **Red Flag:** *An attorney who conflates programmatic JV documentation with a series of single-asset JV operating agreements, without addressing the master governance framework, the portfolio-level promote calculation, or the investment period mechanics that distinguish programmatic structures from individual asset JVs.*

✓ **Strong Answer:** The attorney immediately draws the distinction between asset-level and portfolio-level promote calculations, describes the vintage-year cohort approach and why it is often preferable to a fully aggregated portfolio calculation, and explains how the clawback interacts with the investment period's deployment pace benchmarks, confirming deep, operational programmatic JV experience.

Q27: For development JVs: How do you coordinate the JV operating agreement with the construction loan documents to ensure no governance conflicts?

▶ **What this question reveals:** The construction loan coordination exercise is specific to development JVs and is the step most commonly skipped by attorneys with insufficient development JV experience. An attorney who has a specific process for this coordination, and who can describe specific conflict categories they identify and resolve, provides a critical protection for development JV clients.

▶ **What to listen for:** A description of the attorney's construction loan coordination process, including: when in the transaction they begin the loan document review; the specific conflict categories they look for (distribution restrictions, management change provisions, transfer restriction cross-references, leasing covenant interactions); how they document the conflicts in a matrix; and how they coordinate the resolution of conflicts with both the construction lender's counsel and the JV counsel for the other party.

⚠ **Red Flag:** *An attorney who views the construction loan document review as lender's counsel's responsibility and who does not routinely compare the loan documents against the operating agreement. This approach is the primary source of post-closing development JV governance dysfunction.*

✓ **Strong Answer:** The attorney immediately describes two or three specific conflict types they have identified and resolved in recent development JV transactions, for example, a distribution restriction in the loan documents that conflicted with the operating agreement's deemed approval mechanics for operating distributions, or a management change provision that required lender consent to any removal, conflicting with the capital member's unilateral no-cause removal right.

Q28: For transactions involving tax-exempt capital members: What ERISA-specific provisions do you routinely include in the operating agreement, and how do you address the plan asset regulation?

▶ **What this question reveals:** ERISA-specific JV documentation requires a specialized overlay of provisions that general JV attorneys may not know to include. An attorney who routinely represents institutional capital members, including pension funds, endowments, and foundations, will have a specific ERISA provisions checklist that goes beyond UBTI analysis to address prohibited transaction compliance, plan asset regulation monitoring, and ERISA fiduciary obligations.

▶ **What to listen for:** A specific description of the ERISA-related provisions the attorney includes in operating agreements with tax-exempt capital members: the 25% benefit plan investor cap provision; the prohibited transaction compliance covenant; the UBTI monitoring and blocker entity activation mechanism; and the ERISA fiduciary acknowledgment. An attorney without regular institutional investor representation will struggle to describe these provisions with specificity.

⚠ **Red Flag:** *An attorney who conflates ERISA compliance with UBTI analysis, treating them as the same issue. ERISA imposes obligations that extend far beyond UBTI analysis, including prohibited transaction compliance, plan asset regulation monitoring, and fiduciary obligations that can apply to the JV's manager if plan assets are implicated. Attorneys without institutional investor experience often miss these additional obligations.*

✓ **Strong Answer:** The attorney describes their standard ERISA provision package for operating agreements with tax-exempt capital members, including the 25% benefit plan investor monitoring mechanism (with automatic notification obligations and a blocker entity activation right if the threshold is approached), and explains why the plan asset regulation has implications for the manager's fiduciary obligations that affect the governance provisions of the operating agreement.

Q29: For transactions involving foreign capital members: How do you address FIRPTA withholding in the operating agreement, and what treaty analysis do you perform?

▶ **What this question reveals:** FIRPTA compliance for foreign capital members involves a series of withholding obligations, treaty analysis, and structural considerations that must be addressed in the operating agreement before the first distribution is made. An attorney who regularly represents foreign investors will have a specific FIRPTA provision package; one without foreign investor experience may be unaware of the withholding complexity.

▶ **What to listen for:** A description of the FIRPTA-related provisions the attorney includes in operating agreements with foreign capital members: the withholding calculation and remittance obligations; the treaty benefit analysis process; the QFPF (qualified foreign pension fund) exception evaluation; the impact of FIRPTA withholding on the waterfall's effective return to the foreign investor; and how the withholding is treated for waterfall calculation purposes.

⚠ **Red Flag:** *An attorney who has never worked with a foreign capital member and who cannot describe any FIRPTA-specific operating agreement provisions. FIRPTA creates a series of compliance obligations that must be addressed in the operating agreement's distribution and dissolution provisions; failure to address them creates withholding liability that can impair the JV's distributions at closing.*

✓ **Strong Answer:** The attorney describes their standard FIRPTA provision package: the withholding obligation (15% of gross proceeds from disposition), the operating agreement provision treating withheld amounts as distributions for waterfall calculation purposes, and the treaty benefit analysis process they coordinate with international tax counsel to determine whether any reduction in withholding is available for the specific foreign investor.

Q30: How do you approach representing a client in its first institutional JV, a client that has never had an institutional capital member partner before?

▶ **What this question reveals:** The first institutional JV is among the most consequential legal engagements a developer member will ever have. The client may not fully understand institutional JV governance expectations, may not appreciate the significance of specific provisions, and may need more extensive educational support than a repeat institutional JV transactor. An attorney who has a specific approach to first-institutional-JV representation, including appropriate education, calibrated advice, and realistic expectation-setting, is particularly valuable for this client type.

▶ **What to listen for:** A description of the attorney's approach to first-institutional-JV representation: the educational component (explaining JV governance mechanics, promote economics, and institutional expectations); the expectation-setting component (helping the developer member understand what governance oversight actually feels like in practice, not just in theory); and the advocacy component (identifying the provisions most important to protect in a first institutional JV where the developer member may have less negotiating leverage than an established repeat partner).

⚠ **Red Flag:** *An attorney who treats a first-institutional-JV client exactly the same as a repeat transactor, without any recognition that the client may need additional education, context, and expectation-setting to navigate the transaction effectively. The first institutional JV client needs counsel who will educate as well as advocate. Attorneys who only do the latter leave clients poorly prepared for the governance reality of institutional partnership.*

✓ **Strong Answer:** The attorney describes a specific framework for first-institutional-JV client education: an initial session explaining the institutional capital member's governance expectations and why each major decision provision serves a legitimate purpose; a review of the promote economics using worked examples calibrated to the specific transaction's numbers; and a realistic preview of what governance oversight will feel like in practice, so the developer member enters the relationship with accurate expectations rather than governance culture shock.

Quick Reference: All 30 Questions by Category

Use this table to quickly identify and select the questions most relevant to your specific situation, transaction type, and evaluation priorities.

#	Question Summary	Category	Most Relevant For
Q1	Volume of recent JV operating agreement experience	A: Experience	All parties
Q2	Both-sides representation experience	A: Experience	All parties
Q3	Asset type and structure match to your transaction	A: Experience	All parties
Q4	Current market read on preferred return, promote, major decisions	A: Experience	All parties
Q5	JV litigation / arbitration exposure and lessons learned	A: Experience	All parties
Q6	Worked numerical waterfall examples, use and quality	B: Waterfall	All parties
Q7	Capital Member IRR definition, specific cash flows included/excluded	B: Waterfall	Both parties, critical
Q8	Refinancing proceeds in Available Cash definition	B: Waterfall	Capital members, developer members
Q9	Clawback structure, cap, tax gross-up, escrow in programmatic JVs	B: Waterfall	Programmatic JV parties
Q10	Promote vesting and clawback interplay in removal scenarios	B: Waterfall	Developer members especially
Q11	Major decisions list drafting methodology and completeness testing	C: Governance	Capital members especially
Q12	Deemed approval provision, drafting and real-world failure modes	C: Governance	Developer members especially

#	Question Summary	Category	Most Relevant For
Q13	Cause definition, objective triggers, force majeure carve-outs	C: Governance	Developer members especially
Q14	Buy-sell promote valuation methodology	C: Governance	Both parties
Q15	Construction loan covenant review and conflicts matrix	C: Governance	Development JV parties
Q16	Profits interest qualification and waterfall mechanics coordination	D: Tax	Developer members especially
Q17	UBTI analysis timing and structural solutions for tax-exempt CMs	D: Tax	Tax-exempt capital members
Q18	Tax counsel coordination process and conflict resolution	D: Tax	All parties
Q19	Top three dispute-generating provisions and prevention drafting	E: Disputes	All parties, critical
Q20	Honest reflection on provisions that performed unexpectedly	E: Disputes	All parties
Q21	Post-removal economic framework and vesting schedule structure	E: Disputes	Developer members especially
Q22	Team structure, who personally works on the transaction	F: Service	All parties
Q23	Fee structure, cost estimate, and scope change handling	F: Service	All parties
Q24	Typical timeline from term sheet to closing-ready document	F: Service	All parties
Q25	Ongoing counsel services after operating agreement execution	F: Service	All parties

#	Question Summary	Category	Most Relevant For
Q26	Programmatic JV, investment period, exclusivity, clawback	G: Contextual	Programmatic JV parties
Q27	Development JV, construction loan coordination process	G: Contextual	Development JV parties
Q28	ERISA provisions and plan asset regulation for tax-exempt CMs	G: Contextual	Tax-exempt capital members
Q29	FIRPTA provisions and treaty analysis for foreign CMs	G: Contextual	Foreign capital members
Q30	First institutional JV, education, calibration, and advocacy approach	G: Contextual	First-time institutional JV parties

Evaluating Attorney Responses: A Scoring Framework

After conducting an attorney evaluation using the questions above, use the following framework to assess the candidate's overall suitability for your JV transaction:

Evaluation Area	Indicators of Strong Qualification	Weight
Current Transaction Volume	Can name 5+ recent JV transactions with specific details; active current pipeline; no gap in practice	**Critical**
Both-Sides Experience	Has recently represented both developer members and capital members; can articulate both perspectives with equal sophistication	**High**
Asset Type Match	Has recent experience in your specific asset type and development stage; can describe asset-specific documentation differences	**High**
Current Market Knowledge	Can quote current preferred return rates, promote ranges, and major decision threshold ranges with transaction-specific support	**High**
Litigation Awareness	Has seen JV disputes, in own practice or as transactional adviser, and can describe specific provisions that generated disputes and what would have prevented them	**Critical**

Evaluation Area	Indicators of Strong Qualification	Weight
Waterfall Drafting Depth	Uses worked numerical examples; can explain IRR definition components; addresses refinancing proceeds specifically; understands clawback mechanics	**Critical**
Governance Expertise	Has specific major decisions drafting methodology; understands deemed approval failure modes; drafts objective cause definitions with FM carve-outs	**High**
Tax Coordination	Understands profits interest qualification; raises UBTI issues proactively for tax-exempt investors; has structured coordination process with tax counsel	**Medium**
Service Delivery Clarity	Provides specific fee estimate; describes team structure honestly; commits to senior attorney involvement in critical provisions; describes ongoing counsel model	**Medium**
Dispute Prevention Orientation	Immediately identifies the most litigation-prone provisions; has honest, specific examples of provisions that performed unexpectedly; views drafting precision as professional obligation	**Critical**

After working through the evaluation questions above, there is one final question that cuts through any remaining uncertainty about whether a prospective attorney is right for your transaction:

"Can you describe, specifically, what you would do differently in drafting my operating agreement that a general real estate attorney who has not focused on JV practice would not do?"

A specialized JV attorney will answer this question immediately and specifically, with reference to the IRR definition precision, the force majeure carve-out in the cause definition, the promote vesting schedule, the construction loan conflicts matrix, the worked numerical example, and the other specific drafting choices that distinguish expert JV documentation from competent general practice.

A generalist attorney will struggle to answer this question, because the honest answer is that they would not do very much differently. They would use their standard form, make modifications based on the negotiated terms, and produce a document that reads well but may not withstand the stress of a deteriorating JV relationship.