

**EXHIBIT 1 TO HOWARD AFFIDAVIT -  
OPERATING AGREEMENT OF ARCHER RD. VISTA LLC,  
DATED JUNE 29, 2007 [335-374.3]**

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OPERATING AGREEMENT  
OF  
ARCHER RD. VISTA LLC,  
(A New York Limited Liability Company)

This Operating Agreement (this "Agreement") is made and entered into as of June 29, 2007, by and among Gary L. Pooler ("Manager") and the other persons listed as members (individually a "Member" and collectively the "Members") on Schedule I hereto.

RECITALS

WHEREAS, the Members have organized a limited liability company under the laws of the State of New York to operate for the purposes and upon the terms and subject to the conditions set forth herein;

WHEREAS, it is anticipated that the Company will take title to a certain housing development project formerly known as the Links at Black Creek consisting of approximately 300 acres of land located on Archer Road, Troon Terrace, Prestwick Lane and Club House Drive, Chili, New York (the "Property"); and

WHEREAS, the Members desire to enter into this Agreement as the operating agreement of the Company in order to establish certain rules and procedures to govern the conduct of the business and affairs of the Company and certain agreements among themselves;

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants and agreements set forth herein, the parties hereto, intending to be bound hereby, agree as follows:

**1. DEFINITIONS.**

**1.1. Definitions.**

As used in this Agreement, the following capitalized terms have the respective meanings set forth below. Other terms defined in this Agreement shall have the meanings respectively ascribed to them.

"Act" means the New York Limited Liability Company Law, as amended from time to time, and the corresponding provisions of any succeeding law. Any reference herein to a certain Section of the Act shall also refer to such Section as amended from time to time, and the corresponding sections of any succeeding law.

"Affiliate" means, with respect to any Person, (i) any Person who directly or indirectly controls, is controlled by or is under common control with such Person, (ii) any Person owning

or controlling ten percent (10%) or more of the outstanding voting interests of such Person, (iii) any officer, director, trustee, member, manager or general partner of such Person, or (iv) any Person who is an officer, director, general partner, trustee, member, manager or holder of ten percent (10%) or more of the voting interests of any Person described in clauses (i) through (iii) of this sentence. For purposes hereof, the terms "controls," "is controlled by," and "is under common control with" shall mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

**"Allocation Year"** means (i) the period commencing on the effective date, i.e., date first written above, and ending on December 31, 2007, (ii) any subsequent period commencing on January 1 and ending on the following December 31, or (iii) any portion of the period described in clause (ii) for which the Company is required to allocate Profits, Losses, and other items of Company income, gain, loss, or deduction pursuant to Article 4.

**"Capital Account"** means, with respect to any Member, the Capital Account maintained for such Person in accordance with the following provisions:

- (a) To each Person's Capital Account there shall be credited such Person's Capital Contributions, such Person's distributive share of Profits and any items in the nature of income or gain that are specially allocated pursuant to Sections 4.3 and 4.4, and the amount of any Company liabilities assumed by such Person or that are secured by any Property distributed to such Person.
- (b) To each Person's Capital Account there shall be debited the amount of cash and the Gross Asset Value of any Property distributed to such Person pursuant to any provision of this Agreement, such Person's distributive share of Losses and any items in the nature of expenses or Losses that are specially allocated pursuant to Sections 4.3 and 4.4, and the amount of any liabilities of such Person assumed by the Company or that are secured by any property contributed by such Person to the Company.
- (c) In the event all or a portion of an interest in the Company is transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the transferred interest.
- (d) In determining the amount of any liability for purposes of subparagraphs (a) and (b) and the definition of "Adjusted Capital Contributions," there shall be taken into account Code Section 752(c) and any other applicable provisions of the Code and Regulations.

The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Regulations Section 1.704-1(b) and shall be interpreted and applied in a manner consistent with such Regulations. In the event the Manager shall determine that it is prudent to modify the manner in which the Capital Accounts, or any debits or credits thereto (including, without limitation, debits or credits relating to liabilities that are secured by contributions or distributed property or that are assumed by the Company or Members), are computed in order to comply with such Regulations, the Manager

may make such modification, provided that it is not likely to have a material adverse effect on the amounts distributed to any Person pursuant to Article 11 upon the dissolution of the Company. The Manager shall also (i) make any adjustments that are necessary or appropriate to maintain equality between the aggregate Capital Accounts of the Members and the amount of Company capital reflected on the Company's balance sheet, as computed for book purposes in accordance with Regulations Section 1.704-1(b)(2)(iv)(q) and (ii) make any appropriate modifications in the event unanticipated events might otherwise cause this Agreement not to comply with Regulations Section 1.704-1(b), provided that, to the extent that any such adjustment is inconsistent with other provisions of this Agreement and would have a material adverse effect on any Member, such adjustment shall require the consent of such Member.

**"Capital Contributions"** means, with respect to any Member, the amount of money and the initial Gross Asset Value of any property (other than money) contributed to the Company by such Person (or its predecessors in Interest) with respect to the interest in the Company held by such Person.

**"Code"** means the Internal Revenue Code of 1986, as amended from time to time, and the corresponding provisions of any succeeding law.

**"Company"** means Archer Rd. Vista LLC, a limited liability company formed, operated and governed pursuant to and in accordance with the Act, the Articles and this Agreement.

**"Depreciation"** means, for each Allocation Year, an amount equal to the depreciation, amortization, or other cost recovery deduction allowable for federal income tax purposes with respect to an asset for such Allocation Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Allocation Year, Depreciation shall be an amount that bears the same ratio to such beginning Gross Asset Value as the federal income tax depreciation, amortization, or other cost recovery deduction for such Allocation Year bears to such beginning adjusted tax basis, provided, however, that if the adjusted basis for federal income tax purposes of an asset at the beginning of such Allocation Year is zero, Depreciation shall be determined with reference to such beginning Gross Asset Value using any reasonable method selected by the Manager.

**"Gross Asset Value"** means, with respect to any asset, the asset's adjusted basis for federal income tax purposes, except as follows:

- (a) The initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as determined by the contributing Member and the Manager, provided that, if the contributing Member is a Manager, the determination of the fair market value of a contributed asset shall require the consent of a majority of the other Members;
- (b) The Gross Asset Values of all Company assets shall be adjusted to equal their respective gross fair market values, as determined by the Manager, as of the following times: (A) the acquisition of an additional interest in the Company by any new or existing Member in exchange for more than a de minimis Capital Contribution; (B) the distribution by the

Company to a Member of more than a de minimis amount of property as consideration for an interest in the Company; and (C) the liquidation of the Company within the meaning of Regulations Section 1.704-1(b)(2)(ii)(g), provided, however, that adjustments pursuant to clauses (A) and (B) above shall be made only if the Manager reasonably determines that such adjustments are necessary or appropriate to reflect the relative economic interests of the Members in the Company;

- (c) The Gross Asset Value of any Company asset distributed to any Member shall be adjusted to equal the gross fair market value of such asset on the date of distribution as determined by the distributee and the Manager, provided that, if the distributee is a Manager, the determination of the fair market value of the distributed asset shall require the consent of a majority of the Members; and
- (d) The Gross Asset Values of Company assets shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b) or Section 743(b), but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to Regulation Section 1.704-1(b)(2)(iv)(m) and subparagraph (f) of the definition of "Profits" and "Losses" in Section 1.1 or Section 4.3(f), provided, however, that Gross Asset Values shall not be adjusted pursuant to this subparagraph (d) to the extent the Manager determines that an adjustment pursuant to subparagraph (b) is necessary or appropriate in connection with a transaction that would otherwise result in an adjustment pursuant to this subparagraph (d).

If the Gross Asset Value of an asset has been determined or adjusted pursuant to subparagraphs (a), (b), (c) or (d), such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits and Losses.

**"Involuntary Withdrawal"** means, with respect to any Member, the occurrence of any of the following events:

- (a) the Member makes an assignment for the benefit of creditors;
- (b) the Member files a voluntary petition of bankruptcy;
- (c) the Member is adjudged bankrupt or insolvent or there is entered against the Member an order for relief in any bankruptcy or insolvency proceeding;
- (d) the Member files a petition seeking for the Member any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law or regulation;
- (e) the Member seeks, consents to, or acquiesces in the appointment of a trustee for, receiver for, or liquidation of the Member or of all or any substantial part of the Member's properties;

- (f) the Member files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the Member in any proceeding described in (a) through (e) above; and
- (g) any proceeding against the Member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, continues for one hundred twenty (120) days after the commencement thereof, or the appointment of a trustee, receiver, or liquidator for the Member or all or any substantial part of the Member's properties without the Member's agreement or acquiescence, which appointment is not vacated or stayed for one hundred twenty (120) days or, if the appointment is stayed, for one hundred twenty (120) days after the expiration of the stay during which period the appointment is not vacated.

"Majority in Interest" of the Members means the Member or Members holding in the aggregate a majority of all outstanding Percentage Interests of the Company.

"Manager" means the Person who is designated as such in Section 5.2 of this Agreement or who is subsequently elected and serving as the Manager of the Company pursuant to the provisions of this Agreement, provided that such Person has not ceased to be the Manager of the Company in accordance with the terms of this Agreement or otherwise.

"Membership Interest" means a Member's aggregate rights and interests in the Company, including rights as a Member of the Company under the Act, the Articles and this Agreement.

"Net Cash Flow" means all cash funds derived from operations of the Company (including interest received on reserves), or from any sales or dispositions of Company assets, refinancing of Company assets without reduction for any non-cash charges, but less cash funds used to pay current operating expenses and to pay or establish reasonable reserves for future expenses, debt payments, capital improvements, and replacements as determined by the Manager. Net Cash Flow shall be increased by the reduction of any reserve previously established.

"Percentage Interest" means, with respect to any Member, the percentage set forth opposite such Member's name on Schedule I hereto, as amended from time to time, and, with respect to any valid transferee of a Membership Interest, the Percentage Interest of the Member whose Membership Interest has been acquired by such transferee to the extent such transferee has validly succeeded to that Member's Membership Interest.

"Person" means any individual, corporation, partnership, limited liability company, joint venture, joint stock company, association, organization, agency, trust, estate, governmental or quasi-governmental authority, custodian, nominee or any other individual or entity in its own or any representative capacity.

"Profits" and "Losses" means, for each Allocation Year, an amount equal to the Company's taxable income or loss for such Allocation Year, determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss, or deduction required to be



stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income or loss), with the following adjustments:

- (a) Any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be added to such taxable income or loss;
- (b) Any expenditures of the Company described in Code Section 705(a)(2)(B) or treated as Code Section 705(a)(2)(B) expenditures pursuant to Regulations Section 1.704-1(b)(2)(iv)(i) and not otherwise taken into account in computing Profits or Losses pursuant to this definition of "Profits" and "Losses" shall be subtracted from such taxable income or loss;
- (c) In the event the Gross Asset Value of any Company asset is adjusted pursuant to subparagraphs (b) or (c) of the definition of "Gross Asset Value," the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for purposes of computing Profits or Losses;
- (d) Gain or loss resulting from any disposition of property with respect to which gain or loss is recognized for federal income tax purposes shall be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of such property differs from its Gross Asset Value;
- (e) In lieu of the depreciation, amortization, and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Allocation Year, computed in accordance with the definition of "Depreciation";
- (f) To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) or Section 743(b) is required pursuant to Regulations Section 1.704-1(b)(2)(iv)(m)(4) to be taken into account in determining Capital Accounts as a result of a distribution other than in complete liquidation of a Member's Membership Interest, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) from the disposition of the asset and shall be taken into account for purposes of computing Profits or Losses; and
- (g) Notwithstanding any other provision of this definition of "Profits" and "Losses," any items that are specially allocated pursuant to Sections 4.3 and 4.4 shall not be taken into account in computing Profits or Losses.

The amounts of the items of Company income, gain, loss, or deduction available to be specially allocated pursuant to Sections 4.3 and 4.4 shall be determined by applying rules analogous to those set forth in subparagraphs (a) through (f) above.

**"Property"** is as defined above in the Recitals.

**"Regulation"** means the income tax regulations, including any temporary regulations, from time to time promulgated under the Code.

**"Transfer,"** when used as a noun, means any transfer, sale, assignment, issuance, pledge, encumbrance, hypothecation, conveyance, grant, gift or other disposition (whether direct or indirect, voluntary, involuntary or by operation of law, and whether with or without consideration) and, when used as a verb, means to transfer, sell, assign, issue, pledge, encumber, hypothecate, convey, grant, give or otherwise dispose of (whether directly or indirectly, voluntarily, involuntarily or by operation of law, and whether with or without consideration).

## **2. THE COMPANY.**

### **2.1. Organization.**

The Company has been organized as a New York limited liability company pursuant to the provisions of the Act by the execution and filing of the Articles of Organization ("Articles") with the New York State Department of State. Except as otherwise provided in the Articles or this Agreement or as otherwise required by the non-waivable provisions of the Act, the operation, administration and internal affairs of the Company and the rights and obligations of the Manager and the Members shall be governed by this Agreement to the extent set forth herein.

### **2.2. Name.**

The name of the Company shall be "ARCHER RD. VISTA LLC", and all business of the Company shall be conducted in that name or any other or additional name or names that the Manager selects from time to time in accordance with applicable law.

### **2.3. Purposes and Powers.**

The Company has been organized to engage in any lawful act or activity for which limited liability companies may be organized under the Act.

### **2.4. Principal Office.**

The principal office of the Company shall be located at 783 Wagnum Road, Fishers, New York 14453 or at such other location as the Manager may from time to time select.

### **2.5. Term.**

The term of the Company commenced on the date upon which the Articles were filed with the New York State Department of State and shall continue indefinitely, or until the Company is earlier dissolved and its affairs wound up in accordance with the provisions hereof or by operation of law.

## 2.6. Independent Ventures.

No business opportunities other than those actually engaged in by the Company shall be deemed to be the property of the Company. The Members, the Managers and their Affiliates shall be absolutely and completely free to pursue, entitled to engage in and to hold interests in any other business and investment activity and venture of any type (including, without limitation, any activity or venture which may be competitive with or have an effect on the business of the Company or which is of a character consistent with the purpose of the Company), without having or incurring any obligation to offer any interest in such activity or venture to the Company or any Member or Manager. Neither the Company nor any Member or Manager shall, solely by virtue of the Company or this Agreement, have any right to participate in or to obtain any interest in or to any other business or investment activities or ventures of any kind in which any Member, Manager, or any Affiliate thereof, participates, or in any way derives income or other benefits. The provisions of this Section 2.6 are a material part of the consideration for the parties hereto entering into this Agreement, and are intended by the parties hereto to be a waiver of and to eliminate any right or claim by the Company or any Member or Manager to participate in any such activities or ventures, whether under any "business opportunity," "fiduciary duty" or other similar or related doctrine or otherwise.

## 3. MEMBERS, CAPITAL CONTRIBUTIONS, CAPITAL ACCOUNTS AND MEMBERSHIP INTERESTS.

### 3.1. Members.

The name, address, taxpayer identification number, amount and type of initial Capital Contribution and Percentage Interest of each Member are set forth on Schedule I hereto, as from time to time amended in accordance with the terms hereof.

### 3.2. Initial Capital Contributions.

Upon execution of this Agreement, the Members shall contribute initial Capital Contributions to the Company in cash in the amount set forth opposite their respective names on Schedule I hereto in exchange for their respective Percentage Interests as set forth in Schedule I hereto. Each Member admitted to the Company after the date of the Agreement, other than as a Substitute Member pursuant to Article 10 hereof, shall make a Capital Contribution to the Company in the amount and form required to be made by such Member in accordance with Section 3.10 hereof and such Member's subscription or contribution agreement, and the Manager shall have the authority to amend Schedule I to reflect such admission, such Capital Contribution and the resulting amended Percentage Interests.

### 3.3. Additional Capital Contributions.

- (a) If the Manager, at any time or from time to time, determines in the Manager's discretion that the Company requires additional Capital Contributions for commercially reasonable purposes, then the Manager shall give notice to each Member of (i) the total amount of additional Capital Contributions required; (ii) each Member's proportionate share of the

total additional Capital Contribution (determined in accordance with this Section 3.3(a)); (iii) the date each Member's additional Capital Contribution is due and payable, which date shall be no earlier than five (5) business days after the notice has been given; and (iv) the commercially reasonable purpose necessitating the additional Capital Contribution. A Member's share of the total additional Capital Contribution shall be equal to the product obtained by multiplying the Member's Percentage Interests and the total additional Capital Contribution required. A Member's share of the additional Capital Contribution shall be payable in cash, or by certified check, or wire transfer.

- (b) Except as provided in Section 3.3(a), no Member shall be required to contribute any additional capital to the Company, and, no Member shall have any personal liability for any debt, obligation, or liability of the Company.
- (c) If a Member fails to pay when due all or any portion of any Capital Contribution, the Manager shall request the nondefaulting Members to pay the unpaid amount of the defaulting Member's Capital Contribution (the "Unpaid Contribution"). Any Member contributing an Unpaid Contribution shall have the such amount as a loan bearing interest at the prime rate plus three percent (3%).

#### 3.4. Return of Capital Contributions.

Except as otherwise provided in this Agreement, no Member shall have the right to withdraw, borrow, demand or otherwise receive the return of all or any part of his Capital Contribution. In the event a Member is entitled to receive all or any part of any Capital Contribution, such Member shall not have the right to receive any property other than cash except as may be specifically provided herein.

#### 3.5. No Interest on Capital Contributions.

No Member shall be entitled to receive or be paid any interest, salary or draw with respect to his Capital Contributions or the amount in his Capital Account or for services rendered on behalf of the Company or otherwise solely in his capacity as a Member, except as otherwise provided in this Agreement.

#### 3.6. Capital Accounts.

The Company shall establish and maintain a separate Capital Account for each Member and for each permitted transferee of a Membership Interest. The Capital Account of each permitted transferee of a Membership Interest shall initially be equal to the Capital Account of the transferor as of the effective date of the Transfer.

### 3.7. No Requirement to Restore Negative Capital Account.

Notwithstanding any other provision in this Agreement to the contrary, no Member shall be obligated at any time, to the Company, to the other Members, to the Manager or to any creditor of the Company, to restore a negative Capital Account.

### 3.8. Loans by Members.

Any Member may, but no Member shall be obligated to, loan or advance funds or guarantee loans to the Company upon terms and conditions deemed appropriate by the Manager. Such loans may be evidenced by the Company's promissory notes. In making such loans or advances, the Member shall be treated as a creditor of the Company and not as a Member. Any such loan or advance shall constitute a loan from the Member to the Company, and shall in no event be deemed to constitute a Capital Contribution.

### 3.9. No Reliance by Creditors.

Notwithstanding anything herein to the contrary, no creditor of the Company shall be entitled to enforce the obligations of the Members under this Article 3 to make Capital Contributions to the Company.

### 3.10. Issuance of Additional Membership Interests.

Except as otherwise provided in this Article 3 and in Article 10 hereof, the Company shall not issue any additional Membership Interests, and no Person shall be admitted to the Company as a Member, without the unanimous consent of the Members.

## 4. CASH DISTRIBUTIONS AND PROFIT AND LOSS ALLOCATIONS.

### 4.1. Distributions of Net Cash Flow.

- (a) **Distributions.** Net Cash Flow for each Allocation Year shall be distributed to the Members in proportion to their respective Percentage Interests no later than 90 days after the end of such Allocation Year.
- (b) **Amounts Withheld.** All amounts withheld pursuant to the Code or any provision of any state or local tax law with respect to any payment, distribution or allocation to the Company or the Members shall be treated as amounts distributed to the Members pursuant to this Section 4.1 for all purposes under this Agreement. The Company is authorized to withhold from distributions, or with respect to allocations, to the Members and to pay over to any federal, state or local government any amounts required to be so withheld pursuant to the Code or any provisions of any other federal, state or local law, and shall allocate any such amounts to the Members with respect to which such amount was withheld.

- (c) **Priority of Distributions and Development Loan.** Notwithstanding the foregoing Sections 4.1(a) and (b) directly above, the Company shall attempt to secure a development loan to develop the Property. The proceeds from such development loan shall be dispersed as follows:

- (i) First, to pay Vista Villa Homes LLC to acquire the Property under the contract for the sale and purchase of the Property less \$932,000;
- (ii) Second, to pay all outstanding costs with the development of the Property, including but not limited to, town fees, engineering, and inspections, but notwithstanding the foregoing, Gary L. Pooler shall not be entitled to a priority distribution in the amount of \$932,000 due under any development contract with any affiliate of his as this amount represents his initial Capital Contribution.
- (iii) Third, to the payment of future Property development costs as approved by all Members, whether such payment is to Pooler Enterprises, Inc. or another affiliate of the Manager;
- (iv) Fourth, to repay Members for contributions of Unpaid Contributions booked as loans pursuant to Section 3.3(c) above; and
- (v) Fifth, after a reserve of approximately \$50,000 has been retained, then all distributions to Members in proportion to their respective percentage interests.

#### 4.2. Allocation of Profits and Losses.

- (a) **Allocation of Profits.** After giving effect to the special allocations set forth in Sections 4.3 to 4.4, Profits shall be allocated among the Members in proportion to their respective Percentage Interests.
- (b) **Allocation of Losses.** After giving effect to the special allocations set forth in Sections 4.3 to 4.4, Losses shall be allocated among the Members in proportion to their respective Percentage Interests.
- (c) **Allocations in General.** The distributive shares of tax items, except for Profits and Losses, shall be allocated to the Members pro rata based upon their respective Percentage Interests during the period over which such tax items were accrued. As provided in Section 12.2(b), the Manager shall have authority to make any special allocations for compliance with the provisions of subchapter K of the Code, including without limitation sections 704(b) and 704(c) thereof, and the Regulations promulgated thereunder.

#### 4.3. Regulatory Allocations.

- (a) **Special Rule Regarding Members' Capital Accounts.** No Member shall be entitled to any allocation of Company Losses if such allocation would result in the Member having a negative Capital Account balance after increasing such Capital Account by any amount which the Member is obligated to restore or is deemed to be obligated to restore pursuant

items set forth in Regulation §1.704-1(b)(2)(ii)(d)(4)-(6) while any other Member has a positive Capital Account balance (after adjustment for such items). In such event, Company Losses shall be allocated to the Members with positive Capital Accounts, as adjusted, until such Capital Accounts, as adjusted, have been reduced to zero.

- (b) **Minimum Gain Chargeback.** Except as otherwise provided in Regulations §1.704-2(f), notwithstanding any other provision of this Article 4, if there is a net decrease in Company minimum gain during any Allocation Year, each Member shall be specially allocated items of Company income and gain for such Allocation Year (and, if necessary, subsequent Allocation Years) in an amount equal to such Member's share of the net decrease in Company minimum gain, determined in accordance with Regulations §1.704-2(g). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Regulations §1.704-2(f)(6) and 1.704-2(j)(2). This subsection (b) is intended to comply with the minimum gain chargeback requirement in Regulations §1.704-2(f) and shall be interpreted consistently therewith.
- (c) **Member Minimum Gain Chargeback.** Except as otherwise provided in Regulation §1.704-2(i)(4), notwithstanding any other provisions of this Agreement, if there is a net decrease in member nonrecourse debt minimum gain attributable to a member nonrecourse debt during any Company Allocation Year, each Member who has a share of the member nonrecourse debt minimum gain attributable to such member nonrecourse debt, determined in accordance with Regulation §1.704-2(i)(5), shall be specially allocated items of Company income and gain for such Allocation Year (and, if necessary, subsequent Allocation Years) in an amount equal to such Member's share of the net decrease in member nonrecourse debt minimum gain attributable to such member nonrecourse debt, determined in accordance with Regulation §1.704-2(i)(4). Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Member pursuant thereto. The items to be so allocated shall be determined in accordance with Regulation §1.704-2(i)(4) and 1.704-2(j)(2). This subsection (c) is intended to comply with the minimum gain chargeback requirement in Regulation §1.704-2(i)(4) and shall be interpreted consistently therewith.
- (d) **Qualified Income Offset.** Any Member who unexpectedly receives an adjustment, allocation or distribution as described in Regulation §1.704-1(b)(2)(ii)(d)(4)-(6) shall be allocated items of Company income and gain in an amount and manner to eliminate any deficit in such Member's Capital Account (after adjustment as described in Article 4 has been made as if this Subsection (d) were not in the Agreement) as quickly as possible. This provision is intended to be a "qualified income offset" as defined in Regulation §1.704-1(b)(2)(ii)(d), such Regulation being hereby incorporated by reference.
- (e) **Gross Income Allocation.** In the event any Member has a deficit Capital Account at the end of any Allocation Year which is in excess of the sum of (i) the amount such Member is obligated to restore pursuant to any provision of this Agreement, and (ii) the amount such Member is deemed to be obligated to restore pursuant to the penultimate sentences

of Regulation §§1.704-2(g)(1) and 1.704-2(i)(5), each such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible, provided that an allocation pursuant to this Section 4.2(e) shall be made only if and to the extent that such Member would have a deficit Capital Account in excess of such sum after all other allocations provided for in this Article 4 have been made as if subsection (d) hereof and this subsection (e) were not in the Agreement.

- (f) **Section 754 Adjustments.** To the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) or Section 743(b) is required, pursuant to Regulations Section 1.704-1(b)(2)(iv)(m)(2) or Section 1.704-1(b)(2)(iv)(m)(4), to be taken into account in determining Capital Accounts as the result of a distribution to a Member in complete liquidation of his interest in the Company, the amount of such adjustment to Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases such basis) and such gain or loss shall be specially allocated to the Members in accordance with their interests in the Company in the event that Regulations Section 1.704-1(b)(2)(iv)(m)(2) applies, or to the Member to whom such distribution was made in the event that Regulations Section 1.704-1(b)(2)(iv)(m)(4) applies.

#### 4.4. Curative Allocations.

The allocations set forth in Sections 4.3(b) through 4.3(e) hereof (the "Regulatory Allocations") are intended to comply with certain requirements of the Regulations. It is the intent of the Members that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other items of Company income, gain, loss or deduction pursuant to this Section 4.4. Therefore, notwithstanding any other provision of this Agreement (other than the Regulatory Allocations), the Manager shall make such offsetting special allocations of income, gain, loss or deduction in whatever manner he determines appropriate so that, after such offsetting allocations are made, each Member's Capital Account balance is, to the extent possible, equal to the Capital Account balance such Member would have had if the Regulatory Allocations were not part of the Agreement and the Company items were allocated pursuant to Sections 4.2.

#### 4.5. Distribution of Assets.

If any assets of the Company are distributed in kind to the Members, those assets shall be valued on the basis of their fair market value, and any Member entitled to any interest in those assets shall receive that interest as a tenant-in-common with all other Members so entitled. Unless the Members otherwise agree, the fair market value of the assets shall be determined in accordance with the appraisal process described in Section 11.2. The Profit or Loss for each unsold asset shall be determined as if the asset had been sold at its fair market value, and the Profit or Loss shall be allocated as provided in Section 4.2 and shall be properly credited or charged to the Capital Accounts prior to the distribution of the assets in liquidation pursuant to Section 11.2.



#### **4.6. Tax Allocations: Code Section 704(c).**

In accordance with Code Section 704(c) and the Regulations thereunder, income, gain, loss, and deduction with respect to any property contributed to the capital of the Company shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such property to the Company for federal income tax purposes and its initial Gross Asset Value (computed in accordance with subparagraph (i) of the definition of "Gross Asset Value" in Section 1.1).

In the event the Gross Asset Value of any Company asset is adjusted pursuant to subparagraph (ii) of the definition of "Gross Asset Value" in Section 1.1, subsequent allocations of income, gain, loss, and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for federal income tax purposes and its Gross Asset Value in the same manner as under Code Section 704(c) and the Regulations thereunder.

Any elections or other decisions relating to such allocations shall be made by the Managers in any manner that reasonably reflects the purpose and intention of this Agreement, provided that the Company shall elect to apply the allocation method permitted by the Regulations under Code Section 704(c). Allocations pursuant to this Section 4.6 are solely for purposes of federal, state, and local taxes and shall not affect, or in any way be taken into account in computing, any Person's Capital Account or share of Profits, Losses, other items, or distributions pursuant to any provision of this Agreement.

### **5. MANAGEMENT.**

#### **5.1. Management Generally.**

Except as otherwise expressly provided in this Agreement or as required by non-waivable provisions of the Act, the management and control of the Company shall be vested exclusively in the Manager. The Manager may, but need not be, a Member of the Company. All actions authorized and approved by the Manager pursuant to his authority hereunder shall be deemed to be authorized and approved by or on behalf of the Company and the Members.

#### **5.2. Designation of Manager.**

Gary L. Pooler shall be the initial Manager of the Company, to serve throughout the term of existence of the Company, unless he earlier dies, resigns or is removed in accordance with the terms hereof, in which event a successor Manager shall be appointed pursuant to Section 5.9 below.

#### **5.3. Power and Authority of the Manager.**

Except to the extent otherwise provided in this Agreement or required by the non-waivable provisions of the Act, the Manager shall have the full and exclusive right, power, authority, discretion and responsibility to manage, control, administer, direct and operate the business and affairs of the Company and to make all decisions and to take all actions for and on

behalf of the Company necessary, convenient, desirable, appropriate or incidental in or to the furtherance of the purposes, business and objectives of the Company, including, without limitation, the right, power and authority to:

- (a) acquire (by purchase, lease or otherwise), own, hold, manage, utilize, operate, maintain, improve, develop, construct, rehabilitate, lease (as lessor or lessee), repair, replace, grant options or easements with respect to, finance, lease, sell, dispose of, exchange, convey, assign, transfer, mortgage and pledge or otherwise dispose of any real or personal property, tangible or intangible, and any rights or interests therein;
- (b) negotiate, enter into, execute, deliver and perform any action under any agreement, contract, document, notification, statement, report, certification, instrument and filing of any kind or nature (including, without limitation, those with federal, state and local agencies and commissions) as the Manager shall determine, in his sole discretion, necessary, convenient, desirable, appropriate or incidental to or for the furtherance of the purposes of the Company, including granting or refraining from granting any waivers, covenants and approvals with respect to the foregoing; provided, however, that in the event the Manager contracts for goods or services with Persons that are Affiliates of the Manager, payments to such Persons shall not be more than the amounts that would be charged by unaffiliated third parties in arms-length negotiations for such goods or services;
- (c) negotiate, enter into, execute, deliver and perform deeds, leases, mortgages, deeds to secure debt, mortgage notes, promissory notes, bills of sale, contracts or other instruments or binding undertakings relating to or purporting to convey or encumber assets of the Company; and the signature of the Manager shall be necessary and sufficient to convey title to any real property owned by the Company or to execute any promissory notes, trust deeds, mortgages or other instruments of hypothecation, and all of the Members agree that a copy of this Agreement may be shown to the appropriate parties in order to confirm the same, and further agree that the signature of the Manager shall be sufficient to execute any documents necessary to effectuate this or any other provision of this Agreement;
- (d) care for, invest and distribute funds to the Members by way of cash, income, return of capital or otherwise;
- (e) employ, engage, retain and terminate on behalf of the Company the services of employees, consultants, independent contractors, advisors and other representatives, including attorneys, accountants, appraisers and other agents, and delegate to such Persons the duty to manage or supervise any of the assets or operations of the Company and terminate such services;
- (f) institute, prosecute, defend, settle, compromise, confess judgment and dismiss lawsuits and other judicial and administrative actions and proceedings, at law or in equity (including submissions of claims or liabilities of the Company to arbitration), brought by or on behalf of, or against, the Company, the Manager or the Members in connection with activities arising out of, connected with, or incidental to this Agreement upon such terms

as the Manager may determine and upon such evidence as he may deem sufficient and to engage counsel or others in connection therewith;

- (g) borrow money and incur obligations on behalf of, and otherwise commit the credit of, the Company; become a surety, guarantor, indemnitor or accommodation party of or to any obligation; and draw, make, accept, endorse, sign and deliver any notes, drafts, debentures or other negotiable instruments, obligations commercial paper, debt securities or other evidences of indebtedness; and secure the same by mortgage, pledge, security interest or other lien on the property of the Company;
- (h) obtain insurance for the Company and its business and properties;
- (i) incur expenses and obligations and make payments which the Manager, in his sole discretion, deems necessary, convenient, desirable, appropriate or incidental to or for the business, affairs, properties, obligations and purposes of the Company, to the extent that funds of the Company are available;
- (j) repay, prepay (in whole or in part), refinance, renew, recast, increase, modify, restructure, consolidate or extend any indebtedness or liabilities affecting any or all of the Company's property on such terms as the Manager deems appropriate;
- (k) establish, maintain and draw upon checking and other accounts in the name of the Company in such banks, brokerage firms or other financial institutions as the Manager may from time to time select, designating individuals with authority to sign or give instructions with respect to those accounts, and deposit or withdraw funds from such accounts;
- (l) convene meetings of the Members as provided herein;
- (m) establish reserves as provided herein;
- (n) make distributions to the Members as provided herein;
- (o) prepare and cause to be prepared reports, statements and other information for distribution to the Members;
- (p) prepare and file all necessary tax actions, forms, reports and statements, pay all taxes, assessments, fees and penalties applicable to the Company or its property, and withhold amounts from wages, compensation or distribution as necessary under the Code;
- (q) maintain the books and records of the Company;
- (r) determine the accounting methods and policies to be used in the preparation of any accounting or financial records, of the Company, subject to the restrictions set forth herein;

- (s) make such filings with governmental and other authorities and take such other actions as may be necessary, convenient, desirable or appropriate to maintain the limited liability of the Members and to license, register or qualify the Company as a foreign limited liability company in any jurisdiction in which the Company is required to be so licensed, registered or qualified;
- (t) effect a dissolution of the Company as provided herein;
- (u) engage in any kind of activity and perform and carry out contracts and transactions of any kind necessary, convenient, desirable, appropriate or incidental to or for the accomplishment of the purposes of the Company and the obligations of the Company and the Manager under this Agreement, as may be lawfully carried on or performed by a limited liability company under the Act; and
- (v) take and do any and all acts and exercise any and all other authority and powers with respect to the Company or its business that are lawful and not prohibited by the Articles or this Agreement in order to effectuate any of the foregoing on such terms and conditions as the Manager, in his discretion, determines to be necessary, convenient, desirable, appropriate or incidental to the purposes of the Company or the provisions of this Agreement.

#### 5.4. Limitations on Authority of the Manager.

Notwithstanding anything to the contrary in this Agreement, without the consent of a Majority in Interest of the Members, the Manager shall not have the right, power or authority to, and covenants and agrees that he shall not:

- (a) take or permit any action that would cause any Member to be personally liable for any debt, liability or obligation of the Company or of any other Member, without the prior consent of such Member;
- (b) amend or restate the Articles;
- (c) authorize or approve the sale, transfer, assignment, exchange or other disposition of all or substantially all of the assets of the Company;
- (d) authorize or approve the merger, consolidation or other combination of the Company with or into another Person; or
- (e) change or reorganize the Company into any other legal form;
- (f) admit any additional Members to the Company;
- (g) authorize or approve the Company to borrow an amount in excess of \$50,000; or
- (h) enter into any agreement, arrangement or understanding, written or oral, to do any of the foregoing.

#### 5.5. Limitation on Authority of Members.

- (a) Except as expressly provided in this Agreement, required by the non-waivable provisions of the Act, or authorized by the Manager, no Member shall have any right, power or authority to participate in the management or control of the Company or its business and affairs or to act as an agent for or on behalf of the Company or to bind the Company or any other Member.
- (b) No Member shall be required to perform services for the Company solely by virtue of being a Member. Unless authorized by the Manager, no Member shall perform any services for the Company or be entitled to compensation or reimbursement of expenses therefor.
- (c) Any Member who acts beyond the scope of the authority granted by this Agreement shall, in addition to any other remedy available to the Company, the Manager or any other Member, be personally liable in damages to the Company, the Manager and each Member for any costs, losses or damages that any of them may incur or suffer as a consequence of such unauthorized act and shall reimburse, indemnify and hold harmless the Company, the Manager and every other Member with respect to any such costs, losses and damages.
- (d) Notwithstanding the foregoing, it is anticipated that so long as William Howard is a Member of the Company and so long as he performs his duties in a competent, efficient and productive manner, shall be primarily responsible for the Property lot sales and Company relations with builders. The Manager shall be responsible for all site development on the Property.

#### 5.6. Duties, Obligations and Liability of Manager.

- (a) The Manager shall take all actions that are necessary or appropriate (i) for the continuation of the Company's valid existence as a limited liability company under the laws of the State of New York and of each other jurisdiction in which licensing, qualification or registration as a foreign limited liability company is necessary to enable the Company to conduct its business, and (ii) for the accomplishment of the Company's purposes, in accordance with the provisions of this Agreement and the Act.
- (b) The Manager shall devote such time, attention and resources to the conduct and management of the business and affairs of the Company as shall be reasonably necessary and appropriate to perform his duties hereunder and to carry out the business and purposes of the Company, but the Manager shall not be required to devote his full time to the performance of such duties.
- (c) The Manager shall perform his duties as a manager in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the Company, and with the care that an ordinarily prudent person in a similar position would use under similar circumstances.

- (d) In performing his duties or exercising his authority, the Manager is entitled to rely on information, opinions, reports or statements, including but not limited to financial statements and other financial data, that are prepared or presented by (i) one or more Members, officers or employees of the Company who the Manager reasonably believes are reliable and competent in the matters prepared or presented; and (ii) counsel, public accountants or other Persons as to matters that the Manager reasonably believes are within the Person's professional or expert competence.
- (e) To the fullest extent permitted by law, the Manager shall not be personally liable to satisfy any debt, obligation or liability of the Company, whether arising in contract, tort or otherwise, solely by reason of being the Manager. The Manager does not, in any way, guarantee (i) the return of all or any portion of the Members' Capital Contributions, (ii) any income to the Members from the operations of the Company or (iii) any distributions of Net Cash Flow to the Members.
- (f) Except as otherwise provided in this Agreement or required by the non-waivable provisions of the Act, the Manager shall not be liable, responsible or accountable, in damages or otherwise, to the Company, any Member, or any other Person for any loss, damage, expense or liability incurred by reason of the Manager taking or failing to take any action on behalf of the Company in a manner reasonably believed by him to be within the scope of the authority granted to the Manager by this Agreement unless it is proved, by clear and convincing evidence in a court of competent jurisdiction, that the Manager's action or failure to act was not in good faith, was not in a manner he reasonably believed to be in or not opposed to the best interests of the Company, was undertaken with deliberate intent to cause injury to the Company or with reckless disregard for the best interests of the Company, or resulted from the Manager's fraud or intentional breach of this Agreement. Any action performed or omitted by the Manager on advice of counsel to the Company shall be conclusively deemed to have been performed or omitted in good faith.
- (g) Notwithstanding any provision in the Agreement to the contrary, to the fullest extent permitted by law, the Manager shall not be liable, accountable or responsible, in damages or otherwise, to the Company, any Member or any other Person for any action, decision or omission by the Manager in this Agreement, unless such action, decision or omission was due to fraud, bad faith or willful misconduct by the Manager.

#### **5.7. Resignation of Manager.**

The Manager may resign from his position as the Manager of the Company at any time by giving written notice to the Company and all the Members. Such resignation shall take effect at the time specified in the written notice, or, if no time is specified, at the time of the delivery of notice to the Company. If the Manager is also a Member, then the resignation of the Manager of the Company as a Manager shall not affect the Manager's rights in the Company as a Member and shall not constitute his withdrawal as a Member.

#### 5.8. Removal of Manager.

The Manager may be removed only for "Cause" by a Majority in Interest of the Members. If the Manager is also a Member, then the removal of the Manager from his capacity as Manager shall not affect the Manager's rights in his capacity as a Member and shall not constitute his withdrawal as a Member. For purposes of this Section 5.8, "Cause" means only (i) the Manager's willful or intentional violation or reckless disregard of his duties to the Company; (ii) the Manager's bankruptcy, receivership or dissolution; (iii) the Manager's conviction of a felony or misdemeanor involving moral turpitude; (iv) the Manager's willful or intentional action or omission that causes a material adverse effect to the Company or its Members; or (v) the perpetration of fraud upon the Company or the Members.

#### 5.9. Filling Vacancy in Manager Position.

The vacancy in the position of Manager of the Company occurring as the result of the death, resignation or removal of the Manager shall be filled by Gary L. Pooler as Member (or his Transferee if he no longer is a Member) nominating and submitting a name of a proposed Manager to William Howard for his approval. If Member William Howard does not approve the first so nominated Manager, Pooler shall submit a list of no less than two proposed Managers from which Howard will select the Manager. Such Person so elected shall become the Manager upon the execution and delivery of a written acceptance of such position to the Company.

#### 5.10. Compensation and Reimbursement.

The Manager, if a Member, shall be entitled to his share of the distribution and allocations to Members provided in Section 4 hereof, but shall not be entitled to any salary or other compensation (other than the reimbursement of expenses as provided below) without the written consent of a Majority in Interest of the Members. The Manager is specifically authorized to reimburse, out of Company funds, himself or any Member, officer, employee or agent of the Company (and their Affiliates) for any and all reasonable out-of-pocket costs and expenses incurred by any such Person in connection with the organization, formation or management of the Company.

#### 5.11. Transactions with Affiliates.

The Manager, on behalf of the Company, is permitted in his sole discretion to employ, retain, transact business or enter into contracts with or otherwise deal with any Person, notwithstanding that such Person is a Member or the Manager, is an Affiliate of the Company, the Manager or any Member, is otherwise employed or retained by, has a financial interest in, or has some other business relationship with the Company, any Member or the Manager, provided that such interest or relationship is known to all Managers and Members and, provided that, in the sole discretion of the Manager, such dealings are on commercially reasonable terms to the Company. If any contract, action or transaction meets the foregoing standards, then no vote of the Members shall be required to approve such contract, action or transaction solely by virtue of the affiliated relationship involved.

#### 5.12. Approval or Ratification by Members.

The Manager, in his sole discretion, may submit any contract, action or transaction for approval or ratification to the Members, and any contract, action or transaction that shall be approved or ratified by a Majority in Interest of the Members shall be as valid and binding upon the Company and upon all the Members as if it shall have been approved or ratified by each and every Member of the Company.

#### 5.13. Right to Rely on Manager.

- a) Any Person (other than a Member) dealing with the Company may conclusively rely (without duty of further inquiry) upon a certificate signed by the Manager as to: (i) the identity of the Manager or the Members of the Company; (ii) the existence or nonexistence of any fact or facts which constitute conditions precedent to acts by the Manager or any Member or are in any other manner germane to the affairs of the Company; (iii) the Person or Persons who are authorized to execute and deliver any contract, instrument or document of the Company; (iv) the authenticity of any copy of the Articles or this Agreement, and any amendments thereto or hereto; and (v) any action, decision or omission by the Company or any other matter whatsoever involving the Company, the Manager or the Members.
- ) Any Person dealing with the Company, other than a Member, may conclusively rely on the authority of the Manager or any officer in taking any action in the name of the Company without inquiry into the provisions of this Agreement or compliance herewith, regardless of whether that action actually is taken in accordance with the provisions of this Agreement, unless the Manager or such officer has in fact no authority to act for the Company in the particular matter and the Person with whom he is dealing has knowledge of the fact that the Manager does not have that authority.

The signature of the Manager shall be necessary and sufficient to bind the Company, to convey title to any property owned by the Company or to execute any promissory notes, trust deeds, mortgages or other instruments of hypothecation, and all of the Members agree that a copy of this Agreement may be shown to the appropriate parties in order to confirm the same, and further agree that the signature of the Manager shall be sufficient to execute documents necessary to effectuate this or any other provision of this Agreement.

#### 5.14. Covenants of the Company to William Howard and his Affiliates.

The Members and Manager agree that it will cause the Company to take such action as may be necessary to (a) grant a sewer easement to Westside Development, LLC, located at 420 Lantyne Road ("Westside"); (b) to grant land use for wet land mitigation to Westside; and (c) engage Prudential-K.A.R.E.S. as the exclusive listing agent for each of the Property's lots, provided however, that the Prudential-K.A.R.E.S. exclusivity as listing agent shall cease in the event that it fails to produce sales of a minimum of fifteen (15) lots per year and, further, the Manager and Prudential-K.A.R.E.S. shall meet quarterly to review listing agent's performance.



### 5.15. Indemnification.

The Members and Manager shall be indemnified and the Company's employees, officers and agent may be indemnified by the Company to the fullest extent possible under the Act.

## 6. MEETINGS OF THE MEMBERS.

### 6.1. Calling Meetings of the Members.

A meeting of the Members for any lawful purpose or purposes may be called at any time by the Manager or by any Member by delivering to the Manager a request in writing that specifies the purposes of the meeting. The Members calling the meeting shall give or cause to be given notice of such meeting to all other Members in accordance with the provisions of this Agreement and shall fix the date, time and place of the meeting in the notice. A meeting of the Members shall be held not less than fifteen (15) or more than sixty (60) days after the Manager receives a request therefor. Notwithstanding anything to the contrary herein, no annual or regular meetings of the Members are required to be held.

### 6.2. Notice of Meetings; Waiver of Notice.

- (a) **Notice.** Except as otherwise expressly required by law, written notice of each meeting of the Members shall be given not less than seven (7) nor more than sixty (60) days before the date of the meeting to each Member entitled to notice of the meeting by delivering a written or printed notice thereof personally or by mailing the notice in a postage-prepaid envelope addressed to the Member at the address set forth on Schedule I hereto or any other address furnished by such Member to the Company. If mailed, such notice shall be deemed delivered upon deposit in the United States mail addressed as set forth above. Each notice of a meeting shall state the date, time, place and purposes of the meeting. Only business within the purposes described in the notice may be conducted at the meeting.
- (b) **Waiver.** Any Member, either before or after any meeting of the Members, may waive notice thereof in writing signed by such Member and filed or entered with the records of the meeting. Notice of a meeting will be deemed to have been waived by any Member who is present at such meeting either in person or by proxy, and who does not, before or at the commencement of the meeting, protest the lack of proper notice thereof.

### 6.3. Quorum.

At any meeting of the Members, the presence, in person or by proxy, of the holders of a Majority in Interest of the Members as of the record date of the meeting shall constitute a quorum for the transaction of business. If a quorum shall not be present at any meeting of the Members, the Manager, or a majority in interest of the Members present and entitled to vote thereat may adjourn the meeting from time to time, without any notice other than announcement at the meeting of the time and place of the holding of the adjourned meeting. At any reconvening of an adjourned meeting at which a quorum shall be present, any business may be transacted which could have been transacted at the original meeting if a quorum had been present.

#### **6.4. Attendance by Electronic Equipment.**

Any Member may participate in any meeting of the Members by means of conference telephone or similar communications equipment that enables all persons participating in the meeting to hear and speak to each other, and such participation shall constitute presence in person at such meeting. Any meeting of the Members may be held telephonically.

#### **6.5. Action Without a Meeting by Consent in Writing.**

Any action which may be authorized, taken or approved by the Members at a meeting or otherwise may be authorized, taken or approved without a meeting, without prior notice and without a vote, if one or more consents in writing (including by counterparts and by facsimiles followed by the signed copies), setting forth the action so authorized, taken or approved shall be signed by Members holding the requisite amount of Percentage Interests required for the authorization, taking or approval of the action indicating the consent of such Members and delivered to the Members. If any action is authorized, taken or approved in this manner, then the Manager shall promptly send notice of such action to all Members. If any action by Members is authorized, taken or approved in writing without a meeting, any certificate or other document filed with the New York State Department of State as to such action may state, in lieu of any statement required by the Act concerning any vote of Members, that written consent has been given in accordance with the provisions of the Agreement or that the action was authorized, taken or approved at a meeting of the Members and that any written notice required by the Agreement has been given.

### **7. LIABILITY AND INDEMNIFICATION.**

#### **7.1. Limited Liability of the Members and Manager.**

- (a) Except as otherwise provided in this Agreement or required by the non-waivable provisions of the Act, (i) the debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, are solely the debts, obligations and liabilities of the Company and not of the Manager or Members, and (ii) neither the Manager nor any Member shall be personally liable to satisfy any judgment, decree or order of a court for, or shall be personally liable to satisfy in any other manner, any of the debts, liabilities or obligations of the Company, or any of the losses thereof, solely by reason of being the Manager or a Member of the Company.
- (b) The failure of the Company to observe any formalities or requirements relating to the exercise of its powers or the management of its business and affairs under any provision of this Agreement or the Act shall not be grounds for imposing personal liability on the Manager or any Member for any debt, obligation or liability of the Company.

## **8. BOOKS AND RECORDS.**

### **8.1. Maintenance of Books and Records.**

The Manager shall cause the Company to keep at its principal office complete and accurate books and records, reports and accounts pertaining to and reflecting the business and affairs of the Company, including all transactions involving the Company and minutes of all proceedings and all other consents and approvals of the Members. The books and records of the Company shall include, but not be limited to, (i) a current list of the full names, in alphabetical order, and last known business or residence addresses of each Member, along with the date upon which each Member became a Member, (ii) a copy of the Articles and any amendments thereto, (iii) a copy of this Agreement and any amendments hereto, (iv) executed copies of any written powers of attorney pursuant to which the Articles, this Agreement or any amendments thereto or hereto have been executed, (v) copies of the Company's federal, state and local income tax returns and reports for the three most recent years, (vi) copies of the financial statements of the Company for the three most recent years; (vii) a list of (A) the amount of cash, and a description and statement of the agreed value of any property or services, contributed or agreed to be contributed by each Member, (B) each time at which and each event upon which any additional Capital Contributions are to be made; (C) any right of the Company to make to a Member, or of a Member to receive, any distribution that includes a return of all or any part of his Capital Contribution, (D) each event upon the occurrence of which the Company is to be dissolved and its affairs wound up, and (viii) such other information regarding the affairs or status of the financial and business condition of the Company as the Manager deems just and reasonable.

### **8.2. Members' Inspection Rights.**

Subject to the provisions of Section 8.3 hereof, each Member or his duly authorized agent or attorney shall have the right, at reasonable times during ordinary business hours, upon reasonable written demand stating a specific purpose reasonably related to his Membership Interest, to do either of the following, at the Manager's sole discretion: (i) to examine and make copies of or abstracts from the books and records of the Company, at the requesting Member's expense, or (ii) to receive true and accurate copies of documents responsive to such a request, at the Company's expense.

### **8.3. Confidentiality.**

Notwithstanding any other provision of this Agreement to the contrary, the Company shall have the right to keep confidential from the Members, for the period of time that the Manager deems reasonable, any information (i) that the Manager reasonably considers to be in the nature of trade secrets, (ii) the disclosure of which the Manager in good faith reasonably believes is not in the best interests of the Company or could damage the Company or its business, or (iii) that the Company is required by law or by agreement with a third party to keep confidential.

#### 8.4. Reports and Tax Information.

- (a) **Annual Reports.** Within ninety (90) days after the end of each Allocation Year, the Manager shall cause to be prepared and delivered to each Person who was a Member at any time during the Allocation Year or a transferee of a Membership Interest who was not admitted as a Substitute Member, financial statements of the Company consisting of a balance sheet as of the end of such Allocation Year, a statement of income or loss for such Allocation Year, a statement of the Member's Capital Account as of the end of, and changes therein for, such Allocation Year, and a statement of cash flow for the Allocation Year. Except as provided in clause (b) below, such financial statements need not be audited, compiled, or reviewed by independent public accountants, but shall be certified to by the Manager as fairly and accurately representing in all material respects the financial condition and results of operations of the Company in accordance with the Company's system of accounting.
- (b) **Member's Right to Require Audit.** Any one or more of the Members shall at any time have the right, by giving written notice to the Company, to require the financial statements of the Company to be audited by a certified public accounting firm selected by the Members. If the request is made by a Majority in Interest of the Members, the expense of the audit shall be borne by the Company; otherwise, the Member or Members requesting the audit shall bear the expense of such audit.
- (c) **Additional Reports.** The Manager may also cause to be prepared on behalf of the Company such other reports as he may deem appropriate and shall furnish to any Member such additional information as such Member may reasonably request for the purpose of enabling the Member to comply in a timely manner with any reporting or filing requirements imposed by law. The Company shall bear the costs of furnishing all such information and reports to the Members.
- (d) **Tax Information.** Within ninety (90) days after the end of each Allocation Year, the Manager shall also cause to be prepared and delivered to each Member, and to each other Person who was at any time during such Allocation Year a Member or a transferee of a Membership Interest who was not admitted as a Substitute Member, the Person's Schedule K-1 (Form 1065), and all other information reasonably necessary for the preparation of such Person's federal, state and local tax returns.

#### 8.5. Accounting Matters.

- (a) **Allocation Year.** The Allocation Year of the Company shall be the calendar year.
- (b) **Accounting Method.** The accounting books and records of the Company shall be kept on a cash or accrual basis as selected by the Manager.

#### 8.6. Accounts.

The Manager shall establish and/or maintain one or more bank and investment accounts in the Company's name for the funds of the Company. The Manager shall determine the institution or institutions at which the accounts will be established and maintained, the number and types of accounts, and the Persons who will have depositing and drawing authority with respect to such accounts.

### 9. TAXES.

#### 9.1. Tax Returns.

The Manager shall cause all federal, state and local tax returns of the Company to be prepared and timely filed at the sole expense of the Company.

#### 9.2. Tax Matters Partner.

A Majority in Interest shall designate the "tax matters partner" of the Company, as such term is defined under the Code, and the tax matters partner, as such, shall have all of the rights, powers, responsibilities and obligations given to a tax matters partner under the Code, including but not limited to representing the Company and the Members before taxing authorities and courts in tax matters affecting the Company or Members in their capacities as Members, and shall provide prompt notice to each Member of the commencement of any governmental, administrative or judicial proceedings, involving any significant Company tax matters that may come to his attention, and keep the Members informed of any material development involved in the proceedings or matters. The Company shall pay and be responsible for any and all reasonable costs and expenses incurred by the tax matters partner in performing his duties as such, including, but not limited to, fees and expenses of counsel, accountants, appraisers and other professionals. In addition, the Company shall indemnify the tax matters partner, with respect to matters relating to Member/Manager serving as the tax matters partner, to the same extent as the Company is allowed to indemnify an indemnitee and advance expenses pursuant to the Act.

#### 9.3. Tax Elections.

The Manager shall have the exclusive right, power and authority on behalf of the Company to make any and all elections as to federal, state and local tax matters, permitted under the Code or otherwise, including, without limitation, elections of methods of depreciation and amortization and elections under Code Section 754. The decision to make or revoke an election, and the election itself, shall be in the Manager's sole and absolute discretion.

## 10. TRANSFERS OF MEMBERSHIP INTERESTS AND WITHDRAWALS OF MEMBERS.

### 10.1. Restrictions on Transfers of Membership Interests.

Except as otherwise provided in this Article 10, no Transfer of all or any portion of a Membership Interest or subsequent admission of a transferee as a Member of the Company shall be permitted under this Agreement without the prior written consent of the Manager, or with respect to the Manager's Membership Interest, a Majority in Interest of the non-transferring Members, which consent may be granted or withheld in the sole discretion of the Manager or Members. Provided, however, a Member may transfer his Membership Interest without consent of the Manager or other Members by gift, by bequest, or by devise to any Person related to the Member by consanguinity, adoption or by marriage ("Qualified Person") or to any entity including a trust in which Qualified Persons and/or the Member are the beneficiaries or beneficial owners.

### 10.2. Right of First Refusal.

Subject to the provisions of Section 10.3, if a Member desires to sell any part or all of its Membership Interest (the "Selling Member"), such Selling Member shall first provide to the other Members a bona fide written offer by a third party (the "Third Party") to purchase the Membership Interest which Selling Member wishes to accept. The other Members thereupon shall have the right, but not the obligation, to purchase all, but not less than all, of such Membership Interest of Selling Member. The terms for the purchase of such Membership Interest hereunder shall be on the terms as set forth in the bona fide offer of the Third Party. Any election to purchase hereunder shall reflect the terms upon which the purchaser has elected to purchase the Membership Interest. If the other Members wish to exercise their right to purchase, they must give written notice of his intent to exercise the right within thirty (30) days after receiving the bona fide offer from Selling Members. If the other Members do not exercise their rights to purchase, Selling Member may transfer such Membership Interest to the Third Party pursuant to the terms of the original offer and the Third Party shall become a Member, subject to the requirement that any Third Party sign the written undertaking set forth in Section 10.8. The right to purchase shall be pro rata among the Purchasing Members based on their Percentage Interest.

If Selling Member does not sell all of its Membership Interest so offered within ninety (90) days (commencing on the date upon which Selling Member had given notification to the other Members of its desire to sell such Membership Interest), then such Membership Interest previously released hereunder and still owned by Selling Member shall again become subject to the terms and conditions of this Agreement.

### 10.3. Drag Along Rights.

In the event that a Member or Members ("Majority Member") holding a majority of all outstanding Percentage Interests of the Company desires to sell all of his Membership Interest in the Company and the other Members do not exercise their rights under Section 10.2, then such

Majority Member will include the Membership Interest in the Company owned by any other Members in such sale, and such other Members agree, upon request, to sell the same percentage of their Membership Interest upon the same price and terms as the Majority Member is selling his Membership Interest.

#### 10.4. Effect of Transfer in Compliance.

- (a) Upon compliance with the terms and conditions of this Article 10, a Transfer of all or any portion of a Membership Interest shall be permitted under this Agreement, shall be recognized by and binding upon the Company and the other Members, and shall not cause the dissolution, termination or winding up of the Company.
- (b) A Member who shall Transfer all of such Member's Membership Interest in accordance with this Article 10 shall cease to be a Member of the Company, and shall no longer have any rights or privileges of a Member except that, unless and until the transferee of such Member is admitted to the Company as a Substitute Member in accordance with Section 10.8 hereof, such transferring Member shall retain all the liabilities and obligations of such Member under this Agreement.

#### 10.5. Effect of Transfers Not in Compliance.

Any purported Transfer of a Membership Interest that is not made in compliance with the provisions of this Article 10 shall be invalid, null and void and of no force or effect whatsoever and shall not be recognized by the Company; provided, however, that if the Company is required to recognize a Transfer that is not in compliance with this Article 10 (or if the Company, in its sole discretion, elects to recognize a Transfer that is not in compliance with this Article 10), then the Membership Interest transferred shall be strictly limited to the transferor's rights to allocations and distributions as provided by this Agreement with respect to the transferred Membership Interest, which allocations and distributions may be applied (without limiting any other legal or equitable rights of the Company) to satisfy any debts, obligations or liabilities for damages that the transferor or transferee of such Interest may have to the Company. A Member attempting to make a Transfer not in compliance with this Article 10, notwithstanding any agreement or understanding he had with any such attempted transferee, shall retain all rights and obligations he had with respect to the Membership Interest prior to the purported Transfer.

#### 10.6. Expenses of Transfer.

In the case of a Transfer or attempted Transfer of all or any portion of a Membership Interest, the Member effecting or attempting to effect such Transfer shall pay or reimburse and indemnify and hold harmless the Company and the other Members from all costs, expenses, liabilities and damages that any of such indemnified Persons incur (including, without limitation, incremental tax liabilities and attorneys' fees and expenses) as a result of or in connection with such Transfer or attempted Transfer and efforts to enforce the indemnity granted hereby.

#### 10.7. Reasonableness of Restrictions on Transfer.

Each Member, by executing this Agreement and becoming a Member, acknowledges and agrees that the restrictions on Transfers of Membership Interests set forth in this Article 10 are reasonable in view of the purposes of the Company and this Agreement and the relationship of the Members, and are not more restrictive than necessary to accomplish those purposes.

#### 10.8. Admission of Transferees as Substitute Members.

- (a) Notwithstanding any provision of this Agreement to the contrary, no transferee shall have the right to become a Substitute Member upon the Transfer of all or any part of a Membership Interest from a Member, unless the conditions of Sections 10.1 through 10.6 hereof and all of the following additional conditions have been satisfied:
  - (i) the transferor has given in writing the transferee the right to become a Substitute Member;
  - (ii) the transferee has become a party to this Agreement as a Member, and has executed such documents and instruments as the Company has reasonably requested as may be necessary or appropriate (including, without limitation, representations regarding suitability) to confirm such transferee as a Substitute Member of the Company and such transferee's agreement to be bound by all the terms and conditions hereof; and
  - (iii) the transferee has paid or reimbursed the Company for all reasonable legal, filing and other costs that the Company incurred in connection with the admission of the transferee as a Substitute Member.
- (b) Upon the satisfaction of all of the conditions of Section 10.8(a), the transferee shall thereupon become a Substitute Member of the Company ("Substitute Member"), and become subject to and bound by all of the rights and obligations of a Member hereunder. If so admitted, the Substitute Member shall have all the rights and powers and will be subject to all the restrictions and liabilities of the Member who originally assigned the Membership Interest of the Company. The admission of a Substitute Member shall not release any Member who previously assigned the Membership Interest from liability to the Company that may have existed prior to such substitution.
- (c) This Agreement shall constitute the continuing, specific and express written consent of the Manager and all Members to the admission of any Person as a Substitute Member pursuant to a Transfer effected in accordance with the provisions of this Section 10.8.
- (d) The Manager shall have the right, power and authority to amend this Agreement and Schedule I hereto as necessary to reflect the admission of a Substitute Member.



#### 10.9. Obligations and Rights of Transferees.

A Transferee of a Membership Interest as a result of a Transfer that is effected in compliance with this Article 10 who is not admitted as a Substitute Member pursuant to Section 10.8 shall (unless the express terms of the Transfer otherwise provide) be deemed to have had assigned to him, and shall be entitled to receive, distributions from the Company and allocations of Profits and Losses (and items comprising Profits and Losses) of the Company attributable to the Membership Interest assigned to such transferee, but (irrespective of the terms of the Transfer) shall have no right to (i) become a Member, (ii) vote such Membership Interest with respect to any matter submitted to the Members for a vote, (iii) exercise any rights of a Member under the Act or this Agreement (including but not limited to access to information and to receipt of reports) other than those set forth in this Section 10.9, or (iv) act as an agent of the Company, the Members or any Member. A transferee of a Membership Interest who is not admitted as a Substitute Member pursuant to Section 10.8 hereof, whether or not he has accepted in writing the terms and conditions of this Agreement and assumed in writing the obligations of the transferor, shall be deemed, by acquisition of such Membership Interest, to have agreed to be subject to and bound by all the terms and conditions of this Agreement with the same effect as the transferor of such Membership Interest and, if such transferee desires to transfer such Interests, such transferee shall be subject to all the provisions of this Article 10 to the same extent and in the same manner as any Member desiring transfer of his Membership Interest. No such Transfer shall release the transferor of his obligations and duties under this Agreement.

#### 10.10. Distributions and Allocations in Respect of Transferred Membership Interests.

In the event of the Transfer of any Membership Interest during any Allocation Year of the Company in compliance with the provisions of this Article 10, Profits, Losses, each item thereof, and all other items attributable to the transferred Membership Interest for such Allocation Year shall be divided and allocated between the transferor and the transferee by taking into account their varying Membership Interests during the Allocation Year in accordance with Code Section 706(d), using any conventions permitted by law and selected by the Manager. All distributions made on or before ten (10) business days following the date the Manager receives written notice of such Transfer shall be made to the transferor, and all distributions made thereafter shall be made to the transferee. Solely for purposes of making such allocations and distributions, the Company shall recognize such Transfer not later than the end of the calendar month during which it is given notice of such Transfer; provided, however, that if the Company is given notice of a Transfer at least ten (10) business days prior to the Transfer, then the Company shall recognize such Transfer date as the date of such Transfer, and provided further that if the Company does not receive a notice stating the date such Membership Interest was transferred and such other information as the Members may reasonably require within thirty (30) days after the end of the Allocation Year during which the Transfer occurs, then all such items shall be allocated, and all distributions shall be made, to the Person who, according to the books and records of the Company, was the owner of the Membership Interest on the last day of the Allocation Year during which the Transfer occurs. No Member shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 10.10,

whether or not the Company or the Member has knowledge of any Transfer of a Membership Interest.

#### 10.11. Withdrawal by a Member.

In the event of any Involuntary Withdrawal of a Member that results in a Transfer of the entire Membership Interest of such Member to another Person, such transferee shall not become a Substitute Member, but shall have only the rights provided in Section 1705.21 of the Act.

### 11. DISSOLUTION AND WINDING UP.

#### 11.1. Dissolution Events.

The Company shall be dissolved and shall commence winding up its business and affairs only upon the occurrence of the earliest of the following events ("Dissolution Events"):

- (a) The unanimous written agreement of all Members to dissolve the Company;
- (b) The entry of a decree of judicial dissolution of the Company;
- (c) Any event which causes the number of Members to be less than the minimum number required by the Act;
- (d) The sale or other disposition of all or substantially all of the assets of the Company, unless a Majority in Interest of the Members determine in their sole discretion that it is in the best interests of the Company not to dissolve at such time; or
- (e) The happening of any other event that makes it unlawful, impossible or impractical to carry on the business of the Company.

The withdrawal of a Member is not a Dissolution Event and the remaining Members are authorized to continue the business of the Company after such withdrawal.

The Members hereby agree that, notwithstanding any provision of the Act to the contrary, the Company shall not dissolve prior to the occurrence of a Dissolution Event. If it is determined, by a court of competent jurisdiction, that the Company has dissolved prior to the occurrence of a Dissolution Event, then the Members hereby agree to continue the business of the Company without winding up its affairs or liquidating its assets.

#### 11.2. Winding Up and Liquidation.

- (a) Upon the occurrence of a Dissolution Event, the Company shall continue solely for the purposes of winding up its affairs in an orderly manner, liquidating assets, and satisfying the claims of its creditors and Members. Neither the Company nor any Member shall take any action that is inconsistent with, or not necessary to or appropriate for, the winding up of the Company's business and affairs. One or more liquidating trustees (who

may be the Manager or another Member) selected by the Manager shall be responsible for overseeing the winding up and liquidation of the Company and shall cause the Company to pay, satisfy, discharge or make provision for payment out of Company funds for all debts, liabilities and obligations of the Company, actual or contingent, and all expenses of liquidation. A liquidating trustee appointed by the Manager may (in the sole discretion of the Manager and subject to applicable laws) receive compensation for any services performed pursuant to this Article 11. The Company's affairs shall be wound up and the Company's property shall be liquidated as promptly as is consistent with obtaining the fair value thereof, and the proceeds therefrom, to the extent sufficient therefore, shall be applied and distributed in the following order:

- (i) First, to the extent permitted by law, to the creditors of the Company, including Members that are creditors, in payment and satisfaction of all the debts, liabilities and obligations of the Company (other than liabilities for distributions to Members);
  - (ii) Second, except as otherwise provided in this Agreement, to Members and former Members in satisfaction of liabilities for distributions to such Persons; and
  - (iii) The balance, if any, to Members in proportion to and to the extent of their positive Capital Account balances.
- (b) For purposes of the liquidation of Company assets, the discharge of its liabilities and the distribution of the remaining funds and/or assets among the Members as above described, the trustee shall have the authority on behalf of the Company to sell, convey, exchange or otherwise transfer the assets of the Company on such terms and conditions as he determines appropriate, subject to the terms of this Agreement. In the event that any Company property is not or cannot or should not be sold, in the sole discretion of the trustee, so that distributions in kind to the Members are appropriate or necessary, or a Member desires to purchase any Company assets, the trustee shall cause such Company assets to be appraised by a qualified appraiser. The Members shall have the right and authority to purchase any Company assets at their appraised value, provided such appraisal was made by a Person who was not an Affiliate of the Members. Any excess of fair market value, as evidenced by such appraisal, over book value of any Company assets and any excess of book value over such fair market value of any Company assets shall be deemed gains or losses of the Company, as the case may be, and subject to the provisions of Article 4. The trustee is authorized to distribute assets in kind to the Members even if the percentage of the asset so distributed to any Member is greater or less than the percentage in which the Member shares in distributions. A reasonable time shall be allowed for the orderly liquidation of the assets of the Company and the discharge of liability to creditors such as to enable the Members to minimize losses during the liquidation period, and the trustee is authorized to continue the business of the Company, in its discretion for such time as is necessary to maximize its value as a going concern for eventual sale. Any return of all or any portion of the Capital Contributions by a Member to the capital of the Company shall be made solely from or out of Company assets.

- (c) Notwithstanding the provisions of Section 11.2(a), the trustee shall have the right, in his reasonable discretion, to retain such amount as he deems necessary as a reserve for any contingent liability or obligations of the Company, which reserves, after the passage of a reasonable period of time, shall be distributed pursuant to the provisions of this Section 11.2.

#### **11.3. Notice of Dissolution, Final Accounting.**

In the event a Dissolution Event occurs, the trustee shall provide written notice thereof to each Member and each known transferee of a Membership Interest and to each known creditor of and claimant against the Company, and each other party with whom the Company regularly conducts business (as determined in the discretion of the Members). Within 90 days after the occurrence of a Dissolution Event, the trustee shall provide a statement to each Member setting forth the assets and liabilities of the Company. Upon dissolution of the Company, a final statement shall be prepared by the trustee setting forth the assets and liabilities of the Company and the distribution of cash or property of the Company as prescribed above, and a copy of such statement shall be furnished to each Member within ninety (90) days after completion of winding up of Company business.

#### **11.4. Articles of Dissolution.**

If the Company is dissolved, then the Manager shall promptly file Articles of Dissolution with the New York State Department of State in the form and within the time required by the Act.

#### **11.5. Compliance With Timing Requirements of Regulations.**

In the event the Company is "liquidated" within the meaning of Regulation §1.704-1(b)(2)(ii)(g), then distributions shall be made pursuant to this Article 11 to the Members who have positive Capital Accounts in compliance with Regulation §1.704-1(b)(2)(ii)(b)(2). In the discretion of the trustee, a pro rata proportion of the distribution that would otherwise be made to the Members pursuant to this Article 11 may be:

- (a) distributed to a trust established for the benefit of the Members for the purposes of liquidating Company assets, collecting amounts owed to the Company, and paying any contingent or unforeseen liabilities or obligations of the Company. The assets of any such trust shall be distributed to the Members from time to time, in the reasonable discretion of the trustee, in the same proportions as the amount distributed to such trust by the Company would otherwise have been distributed to the Members pursuant to this Agreement; or
- (b) withheld to provide a reasonable reserve for Company liabilities (contingent or otherwise) and to reflect the unrealized portion of any installment obligations owed to the Company, provided that such withheld amounts shall be distributed to the Members as soon as practicable.

#### 11.6. Deemed Distribution and Recontribution.

Notwithstanding any other provision of this Article 11, in the event the Company is "liquidated" within the meaning of Regulation §1.704-1(b)(2)(ii)(g) but no Dissolution Event has occurred, then the Company shall not be liquidated, the Company's liabilities shall not be paid or discharged, and the Company's affairs shall not be wound up. Instead, the Company shall be deemed to have distributed its property in kind to the Members, who shall be deemed to have assumed and taken subject to all Company liabilities, all in accordance with their respective Capital Accounts. Immediately thereafter, the Members shall be deemed to have recontributed the property in kind to the Company, which shall be deemed to have assumed and taken subject to all such liabilities.

#### 11.7. Rights and Obligations of Members.

Except as otherwise provided in this Agreement, the Members shall look solely to the assets of the Company for the return of their Capital Contributions and shall have no right or power to demand or receive property, other than cash from the Company, in return for their Capital Contributions.

### 12. MISCELLANEOUS

#### 12.1. Power of Attorney.

Each Member hereby irrevocably makes, constitutes and appoints the Manager as his true and lawful attorney-in-fact, granting unto such attorney-in-fact full power and authority for him and in his name, place and stead, from time to time, to make, execute, sign, acknowledge, certify, swear to, verify, deliver, file and record: (i) Articles or one or more amended Articles or amendments to the Articles approved as provided in this Agreement; (ii) all instruments which evidence an amendment to this Agreement pursuant to the terms of this Agreement (whether or not such Member voted in favor of or otherwise approved such action); (iii) all documents which may be required to effect the dissolution and winding up of the Company and the cancellation of its Articles under the terms of this Agreement; (iv) all fictitious, trade or assumed name certificates required or permitted to be filed on behalf of the Company, (v) all certificates, forms, reports and other instruments necessary in order for the Company to be qualified, registered or licensed as a foreign limited liability company in any jurisdiction outside New York in the discretion of the Members; (vi) all documents necessary to reflect the admission, substitution, removal, withdrawal or termination of any Person as a Member in the Company in accordance with this Agreement; and (vii) all other documents, certificates and instruments which may be required or permitted by law to be filed on behalf of the Company or which the Manager deems to be necessary to file and which are not inconsistent with this Agreement. The foregoing is a special and durable power of attorney coupled with an interest and (a) shall be irrevocable and survive the withdrawal of a Member from the Company and the Transfer of all or any portion of his Membership Interest, and (b) shall survive and not be affected by the death, disability, withdrawal, bankruptcy, insolvency, merger, consolidation, reorganization, dissolution or receivership of a Member.

### 12.2. Amendments.

- (a) This Agreement may only be amended or modified upon the consent of the Manager and a Majority in Interest of the other Members (except that amendments of provisions relating to a specified percentage vote must be approved by that percentage vote). Upon the approval of an amendment, all Members shall be deemed to have consented to the amendment, except as provided below.
- (b) Except as provided below, this Agreement shall not be amended without the consent of each Member adversely affected if such amendment would (i) adversely affect the federal income tax treatment to be afforded a Member, (ii) increase or modify the liabilities or obligations of a Member or create an obligation by a Member to contribute additional funds or to loan funds or guarantee loans to the Company, or (iii) alter the method of determining, allocating or distributing the Company's Profits, Losses, Net Cash Flow or other items of like tenor. Provided, however, amendments to this Agreement which, in the opinion of counsel for the Company, are necessary to maintain the status of the Company as a "partnership" for federal or state tax law purposes, or to comply with subchapter K of the Code, may be made by the Manager without the necessity of the consent of any of the Members.

### 12.3. Non-Disclosure.

The Members and Manager recognize and acknowledge that the Members and Manager will have access to trade secrets and other confidential information of the Company and that such trade secrets and confidential information constitute valuable, special and unique property of the Company. Each Member agrees not to communicate or otherwise divulge to, or use for the benefit of, anyone other than the Company, either during or after Member's association with the Company, any trade secrets or confidential information of the Company. It is understood and agreed that this restriction against disclosure will survive the termination of this Agreement and will last as long as all or any part of the trade secret or confidential information continues to have value to the Company and has not become generally known to the public.

### 12.4. Governing Law.

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflict of laws, rule or principle that might require the governance or the construction of this Agreement under the laws of another jurisdiction. In the event of a direct conflict between any provision of this Agreement and (a) any provision of the Articles, or (b) any mandatory provision of the Act or (to the extent such statutes are incorporated into the Act) the laws of the State of New York, the applicable provision of the Articles, the Act or the laws of the State of New York, as the case may be, shall control.

### 12.5. Jurisdiction and Venue.

Any suit involving any dispute or matter arising under this Agreement may be brought in the courts of the State of New York, Monroe County, or such other county where the Company may relocate its principal place of business. Each Member hereby irrevocably consents to the exercise of personal jurisdiction by any such court with respect to such proceedings.

#### 12.6. Notices.

Except as otherwise expressly set forth in this Agreement, all notices, demands, requests, approvals, consents, waivers or other communications required or permitted under this Agreement shall be in writing and shall be deemed to have been duly given: (a) upon receipt, if delivered personally or if transmitted by facsimile transmission (if transmission is confirmed in writing); (b) one business day after being delivered to a reputable overnight courier service, if properly marked for next day delivery; and (c) three business days after being mailed if sent by registered or certified mail, return receipt requested, postage prepaid, to the address set forth below:

If to the Company, to the address set forth in Section 2.4 hereof or such other address as the Company shall have notified the Members.

If to a Member, to the address of such Member as set forth on the books and records of the Company.

If to the Manager, to the address of the Company as set forth above.

#### 12.7. Binding Effect.

Except as otherwise provided in this Agreement, this Agreement shall be binding upon and inure to the benefit of the Manager and Members and their respective heirs, legatees, legal representatives, successors and permitted assigns and transferees.

#### 12.8. Headings.

Section and other headings contained in this Agreement are for convenience of reference purposes only and are not intended to describe, interpret, define or limit the scope, extent or intent of this Agreement or any provision hereof.

#### 12.9. Severability.

Each provision of this Agreement is intended to be severable from each other provision, so that if any term or provision hereof is illegal, invalid or unenforceable for any reason whatsoever, such illegality, invalidity or unenforceability shall not affect the legality, validity or enforceability of the remainder of this Agreement, which shall remain in full force and effect.

#### 12.10. Further Assurances.

Each Member, upon the request of the Manager, shall execute, acknowledge, deliver and/or file such additional certificates, documents and instruments and shall perform such additional acts as the Manager deems reasonably necessary or appropriate for the Company to carry out its purposes or the provisions of this Agreement or to comply with applicable laws, rules and regulations.

#### **12.11. Specific Performance.**

Each Member and the Manager agrees that the Members and the Manager would be irreparably damaged if any of the provisions of this Agreement are not performed in accordance with their specific terms and that monetary damages would not provide an adequate remedy in such event. Accordingly, the Members and the Manager agree that, in addition to any other remedy to which the nonbreaching Members or Manager may be entitled, at law or in equity, the nonbreaching Members and Manager shall be entitled to temporary, preliminary and/or permanent injunctive relief to prevent actual or threatened breaches of the provisions of this Agreement and specifically to enforce the terms and provisions hereof.

#### **12.12. Rights and Remedies Cumulative.**

The rights and remedies provided by this Agreement are cumulative and the use of any one right or remedy by any party shall not preclude or waive the right to use any or all other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise.

#### **12.13. Waiver of Partition.**

No Member or any successor-in-interest to any Member shall have the right while this Agreement remains in effect to have the assets or properties of the Company partitioned, or to file a complaint or institute any proceeding at law or in equity to have the property of the Company partitioned, and each Member, on behalf of itself, his successors, representatives, heirs and assigns, hereby irrevocably waives any such right.

#### **12.14. Effect of Waiver or Consent.**

A waiver or consent, express or implied, of or to any breach or default by any Person in the performance by that Person of his obligations hereunder is not a consent or waiver to or of any other breach or default in the performance by that Person of the same or any other obligations of that Person hereunder. Failure on the part of any Person to seek redress for any violation of or to insist upon strict adherence to any term or condition of this Agreement or to declare any Person in default, irrespective of how long such failure continues, does not constitute a waiver by that Person of his rights with respect to that or any subsequent breach or default.

#### **12.15. No Third Party Beneficiaries.**

This Agreement is entered into among the Members and the Manager for the exclusive benefit of the Company, its Members and the Manager and their successors and permitted



assignees. This Agreement is expressly not intended for the benefit of any creditor of the Company or any other Person. Except and only to the extent provided by applicable law, no creditor or third party shall have any rights under this Agreement or any agreement between the Company and any Member or the Manager with respect to any Capital Contribution or otherwise.

**12.16. Entire Agreement.**

Except as otherwise provided herein, this Agreement constitutes the entire agreement and understanding of the Members and the Manager relating to affairs of the Company and the conduct of its business and supersedes all prior agreements and understandings, whether oral or written, with respect thereto.

**12.17. Counterparts.**

This Agreement may be executed in any number of counterparts, including counterparts signed by less than all of the parties hereto, each of which shall be deemed an original and all of which, when taken together shall constitute one and the same agreement.

**[SIGNATURE PAGE FOLLOWS]**

IN WITNESS WHEREOF, the parties have executed this Operating Agreement as of the date first set forth above.

**MANAGER:**

Gary L. Pooler manager  
Gary L. Pooler, Manager

**MEMBERS:**

Gary L. Pooler member  
Gary L. Pooler

William Howard  
William Howard

**THE COMPANY:**

ARCHER RD. VISTA LLC

By: Gary L. Pooler manager  
Gary L. Pooler, Manager

Schedule I  
to  
Operating Agreement

Name, Address and Taxpayer Identification Number of Members	Initial Capital Contribution	Percentage Interest <sup>*</sup>
Gary L. Pooler <i>Gary L. Pooler member</i> SS# [REDACTED]	\$932,316.52	60%*
William Howard <i>William Howard</i> SS# [REDACTED]	\$909,000.00	40%*

\* Notwithstanding the 60% - 40% Percentage Interests set forth above, for all decisions requiring a vote of the Members, the Percentage Interests shall be 50% Gary L. Pooler and 50% William Howard. The Percentage Interests shall not be adjusted for purposes of allocating Profits, Losses and Distributions pursuant to Article 4 of this Agreement.