

CLIENT ALERT: LLC Agreement Questions

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PROFESSIONALS

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We are regularly returned by investor groups to highlight issues covered by a limited liability company agreement for a typical real estate development company with several equal partners. The following is the result of that effort.

PRACTICE AREAS

Corporate/Securities Law

Real Estate Law

1. What will be the name of the Company?
2. What will be the address of the Company's principal office?
3. Who will be the direct members of the Company? Will any Member hold his interest through an LLC or other entity?
4. What dollar amount of initial capital contributions, if any, will each Member be required to make and when will such initial contributions be due? Note that the Company will need to have some capital for start-up costs, hiring counsel, accountants, due diligence firms, etc.
5. Will the Members be required to make additional capital contributions if required by the Company? Would a capital call be on a pro rata basis? What are the consequences of a Member not honoring a capital call?
6. How will the Company be managed? Will one Member be designated as a Managing Member or will there be a vote of Members?
7. If one member will act as the Managing Member, will they have full fiduciary duties to the other Members?
8. Who will sign any required bank guarantees? Will they be separately compensated for that liability? Will that person be able to control decisions which might cause liability under a guarantee?
9. Who will be the officers of the Company in charge of running the daily business operations of the Company? Will there be any salaries paid to officers?
10. What percentage of voting Members will be required to approve important decisions on behalf of the Company, such as a making a call for additional capital contributions; entering into real estate and/or equipment leases or purchases; a merger or sale of the Company, undertaking bank loans/financing; determining compensation to members and hiring employees? Will there be any "tiers" of issues, some of which will require

majority approval vs. a higher percentage or even unanimous approval?

11. What will be the threshold dollar amount, if any, for any purchases, transactions, and the like, which will require unanimous (or majority/super majority) approval of all Members (and below which the Managing Member or officers can approve without such approval)?
12. Will each Member be allowed to devote substantial time to each Member's existing business ventures? Will any Member have any minimum responsibilities? What would be the consequence of not meeting those responsibilities?
13. Which Member will be designated as the tax matters partner for the Company?
14. How will profits and losses be allocated and distributed among Members, i.e., pro-rata in proportion to their membership interests or based on some other formula? If not pro-rata, would cash earn a preferred return?
15. Will any employees be entitled to an interest in profits?
16. Is it appropriate to have mandatory quarterly distributions in the amount of each member's expected tax liability so that such liability could be paid with the quarterly estimates?
17. Will there be related party agreements with one or more members? Samples include management agreements and brokerage agreements for leasing. If so, who would enforce those agreements and what vote would be required to amend the agreements?
18. Transfers of Membership interest – will transfers be allowed? Will approval of a majority of Members be required? Will there be exceptions to approval requirements, such as transfers to affiliates and intra-family transfers?
19. Rights of First Refusal – will the other Members have a right of first refusal to match any bona fide, written offer to purchase a Member's interest; and will the right be pro-rata among the remaining Members?
20. Retirement or Withdrawal of Member – will there be any restrictions on a Member's ability to withdraw from the Company? What method will be used for establishing the valuation of the withdrawing Members' interest, and what will be the terms for repayment?
21. Death of a Member – in the event of death of a Member, will the heirs of the deceased Member be entitled to succeed to the economic share and interest of the deceased member; or will the procedures applicable to a retiring/ withdrawing Member be utilized? If the economic interest may be maintained, will the heirs have voting rights?
22. Disability of a Member - In the event of the disability of a Member, for how long will that Member be entitled to receive distributions? In the event of long-term disability of a Member, will that Member be deemed to have "withdrawn" and thereby subject to the provisions governing the withdrawal of a Member?
23. Ineligibility of a Member – will any actions or omissions of a Member, such as failure to meet a capital call, the filing of a personal bankruptcy, or the conviction for a criminal offense, etc., cause a Member to become ineligible to remain a Member; and what will "ineligibility" mean in terms of voting rights, compensation, withdrawal from the Company, etc.?
24. Non-Competition – will there be any restrictions on Members engaging in transactions or investments that may compete with the Company's businesses or hiring Company employees by an individual Member's other business (es)? If so, what will be the terms of such restrictions? What would be the consequences of failure to comply with such restrictions?
25. Additional members – do you contemplate adding any additional members in the future, and if so, on what vote will be needed?

26. Dissolution – under what circumstances, if any, other than a vote of the Members, will the Company be dissolved?