

## FINRA DISPUTE RESOLUTION

In the matter of the arbitration between	§	
	§	
	§	
RICHARD C. WICK AND JUNG LIU,	§	FINRA Case No. 11-00804
	§	
Claimants,	§	
	§	
v.	§	
	§	
LASALLE ST. SECURITIES, L.L.C.,	§	
	§	
Respondent.	§	

### **MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA OF CMG PARTNERS, L.L.C.**

Behringer Harvard REIT I, Inc. ("REIT I"), a non-party to this arbitration, hereby moves for a protective order and to quash the subpoena issued to CMG Partners, L.L.C ("CMG").

### **BACKGROUND**

Until June 2011, REIT I's corporate charter contained a provision that allowed stockholders access to its stockholder list "in connection with Stockholders' voting rights, and the exercise of Stockholder rights under federal proxy laws." Affidavit of Telisa Webb Schelin, attached as Exhibit 1, ¶¶ 3-4 and Exhibits A and B thereto (*compare*, Section 11.5 of the Eighth Articles of Amendment and Restatement and the absence of that section in the Ninth Articles of Amendment and Restatement). Other than this limited authorization of the release of such stockholder list, REIT I's articles provide no other rights for anyone, stockholder or not, to obtain such list.<sup>1</sup> Exhibit B to Affidavit of Telisa Webb Schelin. Other than having provided the list to a single shareholder, described below, in response to a valid request under the now-replaced articles, REIT I holds the identities of its stockholders confidential, both to protect the privacy of its investors and because the identities of such stockholders constitute proprietary

<sup>1</sup> REIT I is a Maryland corporation. Affidavit of Telisa Webb Schelin, ¶ 2. Maryland law requires a corporation to permit the inspection of the names of stockholders by any stockholder owning five percent of the corporation's stock. Md. Corp. & Assoc. Code Ann. § 2-513 (2011). No stockholder in REIT I owns that amount, so Maryland law does not require such disclosure. Affidavit of Telisa Webb Schelin, ¶ 9.

trade secret information of REIT I. *Id.*, ¶ 5.

In 2009, CMG, a stockholder of REIT I and an institutional investor, requested a copy of the stockholder list in connection with its voting rights and the exercise of its rights under federal proxy laws. *Id.*, ¶ 6. CMG then sent letters to some or all of the stockholders, requesting to purchase their shares at a discount. *Id.*, ¶ 7.

Goodman and Nekvasil is a law firm that specializes in suing brokerage firms and their stockbrokers on behalf of investors. See [www.rightsforinvestors.com](http://www.rightsforinvestors.com) (Retrieved on December 14, 2011). Goodman and Nekvasil has been attempting to obtain from REIT I a list of its stockholders, and REIT I has refused to provide such a list because of the confidential nature of such information and the privacy rights of its stockholders. Affidavit of Telisa Schelin, ¶ 8. Presumably, Goodman and Nekvasil received a letter sent by CMG to its clients and deduced that CMG has a copy of REIT I's stockholder list as it existed at the time CMG received it. Goodman and Nekvasil has therefore used this arbitration proceeding as a pretext for obtaining that list, presumably so that it can solicit the representation of such investors against their stockbrokers and brokerage firms. As further evidence of this, REIT I has learned that Goodman and Nekvasil has attempted to subpoena the same documents on behalf of additional clients in a different arbitration. See Subpoena in *Bertrand v. Berthel, Fisher & Company Financial Services, Inc.*, attached as Exhibit 2. REIT I files this motion to protect against the disclosure of that confidential information.

### **GROUND FOR PROTECTION**

1. The document request seeks information that is not narrowly tailored to material relevant to the arbitration and is rather a broad fishing expedition. It is a transparent attempt to obtain discovery on the identities of individuals in addition to the claimants in the instant arbitration so the claimants' counsel can solicit such individuals to bring additional claims.

2. The document request in the Subpoena seeks irrelevant information not reasonably calculated to lead to the discovery of relevant information, or, in the alternative, to the extent some marginal relevance is shown, the burdensome nature of the request and its

consequences of investors in REIT I outweighs any potential benefit of the production of such documents. The only two investors at issue in this arbitration are the two complainants. Information relating to any other investors can have no bearing on this proceeding.

3. CMG Partners, LLC is not a party to this arbitration and not a FINRA member, and this arbitration panel is without jurisdiction to compel production of documents from a party in another federal judicial district from that in which the panel is located.

4. The document request applies to and seeks confidential information that is protected from discovery and/or protected from discovery without appropriate protections. Revealing the list of stockholders would reveal the private investment decisions of each of those stockholders and the assets that they hold, compromising those stockholders' privacy.

5. The document request applies to confidential personal and financial information for which no authorization and/or release has been provided. Importantly, identifying investors in REIT I, Inc., either through disclosure of communications to investors or a complete list of all investors, would reveal personal information and the investment decisions of a large number of individuals that are not a party to this arbitration.

6. CMG is a non-party to the arbitration and the burden and cost of responding to such a request is properly borne by the parties to the suit.

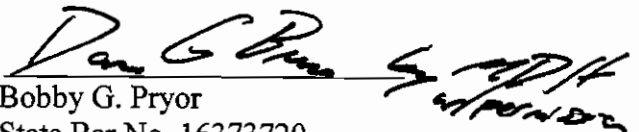
### **PRAYER**

Wherefore, REIT I requests that the arbitration panel issue a protective order against the disclosure of REIT I's stockholder list and quash the subpoena of CMG. Further, given that Complainants had no reasonable basis to request the documents they knew REIT I holds confidential, REIT I requests its reasonable attorney's fees and costs in resisting Complainants' subpoena and other relief to which REIT I may show it is entitled.

Submitted on this 15th day of December 2011.

Respectfully Submitted,

PRYOR & BRUCE

By:   
Bobby G. Pryor  
State Bar No. 16373720  
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State Bar No. 03232032

302 N. San Jacinto  
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Telephone (972) 771-3933  
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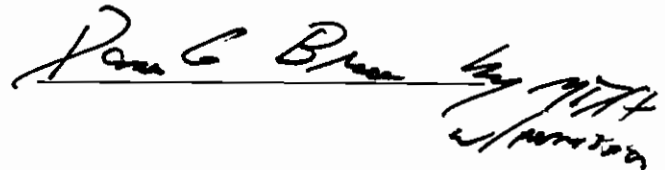
Attorneys for Behringer Harvard REIT I,  
Inc.

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document has been served via certified mail upon the following on this 15th day of December 2011:

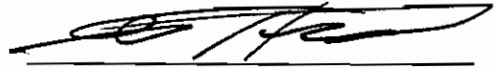
David A. Genelly, Esq.  
Vanasco Genelly & Miller  
33 N. LaSalle Street  
Suite 2200  
Chicago, IL 60602  
Facsimile: (312) 786-5111

Kaiju Nekvasil, Esq.  
Goodman & Nekvasil, P.A.  
14020 Roosevelt Boulevard, Suite 808  
Clearwater, Florida 33762  
Facsimile: (727) 524-8786



**CERTIFICATE OF CONFERENCE**

This is to certify that I attempted to reach Kaiju Nekvasil, Esq. on December 15, 2011 to confer with him about the merits of this motion and spoke with his assistant. As of late that afternoon, Mr. Nekvasil had not returned my call.

A handwritten signature in black ink, appearing to be "J. H. [unclear]", written over a horizontal line.

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Respondent.	§	

### AFFIDAVIT OF TELISA WEBB SCHELIN

STATE OF TEXAS	§
	§
COUNTY OF DALLAS	§

Before me, the undersigned authority, personally appeared Telisa Webb Schelin, who, being by me duly sworn, deposed as follows:

1. "I am over 21 years of age, of sound mind and have never been convicted of a felony or misdemeanor involving moral turpitude, and am competent to make this affidavit. I have personal knowledge of the facts stated herein and they are true and correct.

2. My name is Telisa Webb Schelin. I am employed by Harvard Property Trust, LLC as Assistant General Counsel and Vice President in the Legal Department, and I am the Senior Vice President - Legal, General Counsel, and Secretary of Behringer Harvard REIT I, Inc. ("REIT I"), a Maryland corporation. In those capacities, I am familiar with the business and organizational structure of REIT I.

3. Attached as Exhibit A is a copy of REIT I's Eighth Articles of Amendment and Restatement. Those Articles were in effect from July 2008 until June 2011.

4. Attached as Exhibit B is a copy of REIT I's Ninth Articles of Amendment and

Restatement. Those Articles have been in effect since June 2011.

5. Other than at one time having previously provided the list to shareholders in response to valid requests under the now-replaced articles, REIT I holds the identities of its stockholders confidential, both to protect the privacy of its investors and because the identities of such stockholders constitute proprietary trade secret information of REIT I.

6. In 2009, CMG Partners, L.L.C. ("CMG"), a stockholder of REIT I and an institutional investor, requested a copy of the stockholder list in connection with its voting rights and the exercise of its rights under federal proxy laws.

7. I am aware that CMG then sent letters to some or all of the stockholders requesting to purchase their shares at a discount.

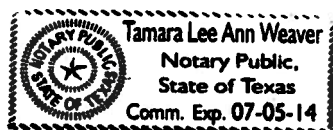
8. Goodman and Nekvasil has been attempting to obtain from REIT I a list of its stockholders, and REIT I has refused to provide such a list because of the confidential nature of such information, the privacy rights of its stockholders, and the absence of any requirement to provide such information.

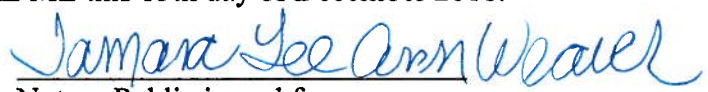
9. No person or entity owns as much as five percent of REIT I's stock.

10. Further, affiant sayeth not."

  
\_\_\_\_\_  
Telisa Webb Schelin

SUBSCRIBED AND SWORN TO BEFORE ME this 15th day of December 2011.



  
\_\_\_\_\_  
Notary Public in and for  
the State of Texas

My Commission Expires:  
07-05-14

# EXHIBIT A

## EIGHTH ARTICLES OF AMENDMENT AND RESTATEMENT OF BEHRINGER HARVARD REIT I, INC.

RECEIVED  
OFFICE OF  
TAXATION

NOV 24 P 3:32

FIRST: Behringer Harvard REIT I, Inc., a Maryland corporation, desires to amend and restate its charter as currently in effect and as hereinafter amended.

SECOND: The following provisions are all the provisions of the charter currently in effect and as hereinafter amended:

### ARTICLE I

#### NAME

The name of the corporation is Behringer Harvard REIT I, Inc. (the "COMPANY"). So far as may be practicable, the business of the Company shall be conducted and transacted under that name. Under circumstances in which the Company's Board of Directors determines that the use of the name "Behringer Harvard REIT I, Inc." is not practicable, it may use any other designation or name for the Company.

### ARTICLE II

#### PURPOSES AND POWERS

The purposes for which the Company is formed are to engage in any lawful act or activity (including, without limitation or obligation, qualifying as a real estate investment trust under Sections 856 through 860, or any successor sections, of the Internal Revenue Code of 1986, as amended (the "CODE")), for which corporations may be organized under the MGCL and the general laws of the State of Maryland as now or hereafter in force.

### ARTICLE III

#### RESIDENT AGENT AND PRINCIPAL OFFICE

The name and address of the resident agent for service of process of the Company in the State of Maryland is CSC - Lawyers Incorporating Service Company, 7 St. Paul Street, Suite 1660, Baltimore, Maryland 21202. The address of the Company's principal office in the State of Maryland is c/o CSC - Lawyers Incorporating Service Company, 7 St. Paul Street, Suite 1660, Baltimore, Maryland 21202. The Company may have such other offices and places of business within or outside the State of Maryland as the Board may from time to time determine.

### ARTICLE IV

#### DEFINITIONS

As used in the Charter, the following terms shall have the following meanings unless the context otherwise requires:

"ACQUISITION EXPENSES" means any and all expenses incurred by the Company, the Advisor, or any Affiliate of either in connection with the selection, acquisition or development of any Asset, whether or not acquired, including, without limitation, legal fees and expenses, travel and communications expenses, costs of appraisals, nonrefundable option payments on property not acquired, accounting fees and expenses, and title insurance premiums.

"ACQUISITION FEE" means any and all fees and commissions, exclusive of Acquisition Expenses, paid by any Person to any other Person (including any fees or commissions paid by or to any Affiliate of the Company or the Advisor) in connection with making or investing in Mortgages or the purchase, development or construction of a Property, including real estate commissions, selection fees, Development Fees, Construction Fees, nonrecurring management fees, loan fees, points or any other fees of a similar nature. Excluded shall be Development Fees and



Construction Fees paid to any Person not affiliated with the Sponsor in connection with the actual development and construction of a project.

"ADVISOR" or "ADVISORS" means the Person or Persons, if any, appointed, employed or contracted with by the Company pursuant to Section 8.1 hereof and responsible for directing or performing the day-to-day business affairs of the Company, including any Person to whom the Advisor subcontracts all or substantially all of such functions.

"ADVISORY AGREEMENT" means the agreement between the Company and the Advisor pursuant to which the Advisor will direct or perform the day-to-day business affairs of the Company.

"ADVISORY AGREEMENT TERMINATION" shall have the meaning as provided in Section 5.16(iii)(a) herein.

"AFFILIATE" or "AFFILIATED" means, with respect to any Person, (i) any Person directly or indirectly owning, controlling or holding, with the power to vote, 10% or more of the outstanding voting securities of such other Person; (ii) any Person 10% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held, with the power to vote, by such other Person; (iii) any Person directly or indirectly controlling, controlled by or under common control with such other Person; (iv) any executive officer, director, trustee or general partner of such other Person; and (v) any legal entity for which such Person acts as an executive officer, director, trustee or general partner.

"ASSET" means any Property, Mortgage or other investment (other than investments in bank accounts, money market funds or other current assets) owned by the Company, directly or indirectly through one or more of its Affiliates, by the Company and any other investment made, directly or indirectly through one or more of its Affiliates.

"AVERAGE INVESTED ASSETS" means, for a specified period, the average of the aggregate book value of the assets of the Company invested, directly or indirectly in equity interests in and loans secured by real estate, before deducting depreciation, bad debts or other non-cash reserves, computed by taking the average of such values at the end of each month during such period; provided, however, that during such periods in which the Company is obtaining regular independent valuations of the current value of its net assets for purposes of enabling fiduciaries of employee benefit plan stockholders to comply with applicable Department of Labor reporting requirements, "Average Invested Assets" will equal the greater of (i) the amount determined pursuant to the foregoing and (ii) the assets valuation established by the most recent such valuation report without reduction for depreciation, bad debts or other non-cash reserves.

"BOARD" means, collectively, the individuals named in Section 6.1 of the Charter and such other individuals who may be duly elected and qualified to serve as Directors thereafter to replace any such person or fill a vacancy caused by the death, removal or resignation of any such person or caused by an increase in the number of Directors.

"BYLAWS" means the Bylaws of the Company, as amended from time to time.

"CHANGE OF CONTROL" means any event (including, without limitation, issue, transfer or other disposition of Shares of capital stock of the Company or equity interests in the Operating Partnership, merger, share exchange or consolidation) after which any "person" (as that term is used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, as amended) is or becomes the "beneficial owner" (as defined in Rule 13d-3 of the Securities Exchange Act of 1934, as amended), directly or indirectly, of securities of the Company or the Operating Partnership representing greater than 50% of the combined voting power of the Company's or the Operating Partnership's then outstanding securities, respectively; provided, that a Change of Control shall not be deemed to occur as a result of any widely distributed public offering of the Common Shares.

"CHARTER" means these Eighth Articles of Amendment and Restatement and any Articles of Amendment, Articles Supplementary or other modification or amendment thereto.

"CLOSING PRICE" means, on any date, the last sale price for any class or series of the Common Shares, regular way, or, in case no such sale takes place on such day, the average of the closing bid and asked prices, regular way, for such Common Shares, in either case as reported in the principal consolidated transaction reporting system with

respect to Common Shares listed or admitted to trading on the NYSE or, if such Common Shares are not listed or admitted to trading on the NYSE, as reported on the principal consolidated transaction reporting system with respect to Common Shares listed or admitted to trading on a principal national securities exchange or, if such Common Shares are not listed or admitted to trading on any national securities exchange, the last quoted price on the Nasdaq National Market System, or, if not so quoted, the average of the high bid and low asked prices in the over-the-counter market, as reported by the principal automated quotation system or other quotation service that may then be in use or, if such Common Shares are not quoted by any such organization, the average of the closing bid and asked prices as furnished by a professional market maker making a market in such Common Shares selected by the Board.

"CODE" shall have the meaning as provided in Article II herein.

"COMMENCEMENT OF THE INITIAL PUBLIC OFFERING" shall mean the date that the Securities and Exchange Commission declares effective the registration statement filed under the Securities Act for the Initial Public Offering.

"COMMON SHARES" shall have the meaning as provided in Section 5.1 herein.

"COMPANY" shall have the meaning as provided in Article I herein.

"COMPANY VALUE" means the actual value of the Company as a going concern based on the difference between (1) the actual value of all of its assets as determined in good faith by the Board, including a majority of the Independent Directors, and (2) all of its liabilities as set forth on its then current balance sheet; provided that (A) if such Company Value is being determined in connection with a Change of Control that establishes the Company's net worth (e.g., a tender offer for the Common Shares, sale of all of the Common Shares or a merger) then the Company Value shall be the net worth established thereby, and (B) if such Company Value is being determined in connection with a Listing, then the Company Value shall be equal to the number of outstanding Common Shares multiplied by the Closing Price of a single Common Share averaged over a period of 30 trading days during which the Common Shares are listed or quoted for trading after the date of Listing. For purposes hereof, a "trading day" shall be any day on which the NYSE is open for trading whether or not the Common Shares are then listed on the NYSE and whether or not there is an actual trade of Common Shares on any such day. If the holder of Convertible Shares disagrees as to the Company Value as determined by the Board, then each of the holder of Convertible Shares and the Company shall name one appraiser and the two named appraisers shall promptly agree in good faith to the appointment of one other appraiser whose determination of the actual value of the Company as a going concern shall be final and binding on the parties as to Company Value. The cost of any such appraisal shall be split evenly between the Company and the Advisor.

"COMPETITIVE REAL ESTATE COMMISSION" means a real estate or brokerage commission paid for the purchase or sale of a Property that is reasonable, customary and competitive in light of the size, type and location of the Property.

"CONSTRUCTION FEE" means a fee or other remuneration for acting as general contractor and/or construction manager to construct improvements, supervise and coordinate projects or to provide major repairs or rehabilitations on a Property.

"CONTRACT PURCHASE PRICE" means the amount actually paid or allocated in respect of the purchase, development, construction or improvement of a Property or the amount of funds advanced with respect to a Mortgage, or the amount actually paid or allocated in respect of the purchase of other Assets, in each case exclusive of Acquisition Fees and Acquisition Expenses.

"CONVERTIBLE SHARES" shall have the meaning as provided in Section 5.1 herein.

"DEALER MANAGER" means Behringer Securities LP, an Affiliate of the Company, or such other Person selected by the Board to act as the dealer manager for an Offering.

"DEVELOPMENT FEE" means a fee for the packaging of a Property or Mortgage, including the negotiation and approval of plans, and any assistance in obtaining zoning and necessary variances and financing for a specific

Property, either initially or at a later date.

“DIRECTOR” means a member of the Company’s Board.

“DISTRIBUTIONS” means any distributions of money or other property, pursuant to Section 5.2(iii) hereof, by the Company to owners of Shares, including distributions that may constitute a return of capital for federal income tax purposes.

“GROSS PROCEEDS” means the aggregate purchase price of all Shares sold for the account of the Company through an Offering, without deduction for Selling Commissions, volume discounts, any marketing support and due diligence expense reimbursement or Organization and Offering Expenses. For the purpose of computing Gross Proceeds, the purchase price of any Share for which reduced Selling Commissions are paid to the Dealer Manager or a Soliciting Dealer (where net proceeds to the Company are not reduced) shall be deemed to be the full amount of the offering price per Share pursuant to the Prospectus for such Offering without reduction.

“INDEPENDENT APPRAISER” means a Person with no material current or prior business or personal relationship with the Advisor or the Directors and who is a qualified appraiser of Real Property of the type held by the Company or of other Assets as determined by the Board of Directors. Membership in a nationally recognized appraisal society such as the American Institute of Real Estate Appraisers or the Society of Real Estate Appraisers shall be conclusive evidence of such qualification as to Real Property.

“INDEPENDENT DIRECTOR” means a Director who is not on the date of determination, and within the last two (2) years from the date of determination has not been, directly or indirectly associated with the Sponsor, the Company, the Advisor or any of their Affiliates by virtue of (i) ownership of an interest in the Sponsor, the Advisor or any of their Affiliates, other than the Company, (ii) employment by the Company, the Sponsor, the Advisor or any of their Affiliates, (iii) service as an officer or director of the Sponsor, the Advisor or any of their Affiliates, other than as a Director of the Company, (iv) performance of services, other than as a Director of the Company, (v) service as a director or trustee of more than three (3) real estate investment trusts organized by the Sponsor or advised by the Advisor, or (vi) maintenance of a material business or professional relationship with the Sponsor, the Advisor or any of their Affiliates. A business or professional relationship is considered “material” if the aggregate gross revenue derived by the Director from the Sponsor, the Advisor and their Affiliates exceeds five percent (5%) of either the Director’s annual gross income during either of the last two (2) years or the Director’s net worth on a fair market value basis. An indirect association with the Sponsor or the Advisor shall include circumstances in which a Director’s spouse, parent, child, sibling, mother- or father-in-law, son- or daughter-in-law or brother- or sister-in-law is or has been associated with the Sponsor, the Advisor, any of their Affiliates or the Company.

“INITIAL INVESTMENT” means that portion of the initial capitalization of the Company contributed by the Sponsor or its Affiliates pursuant to Section II.A. of the NASAA REIT Guidelines.

“INITIAL PUBLIC OFFERING” means the first Offering.

“INVESTED CAPITAL” means the amount calculated by multiplying the total number of Shares purchased by Stockholders by the issue price, reduced by the portion of any Distribution that is attributable to Net Sales Proceeds and by any amounts paid by the Company to repurchase Shares pursuant to the Company’s plan for the repurchase of Shares.

“JOINT VENTURES” means those joint venture or partnership arrangements in which the Company or the Operating Partnership is a co-venturer or general partner established to acquire or hold Assets.

“LEVERAGE” means the aggregate amount of indebtedness of the Company for money borrowed (including purchase money mortgage loans) outstanding at any time, both secured and unsecured.

“LIQUIDATION EVENT” shall have the meaning as provided in Section 5.16(iii)(a) herein.

“LISTING” means the listing of the Shares on a national securities exchange, the quotation of the Shares by The Nasdaq Stock Market (“NASDAQ”) or the trading of the Shares in the over-the-counter market. Upon such Listing,

the Shares shall be deemed Listed.

"MGCL" means the Maryland General Corporation Law.

"MORTGAGES" means, in connection with mortgage financing provided, invested in, participated in or purchased by the Company, all of the notes, deeds of trust, security interests or other evidences of indebtedness or obligations, which are secured or collateralized by Real Property owed by the borrowers under such notes, deeds of trust, security interests or other evidences of indebtedness or obligations.

"NASAA REIT GUIDELINES" means the Statement of Policy Regarding Real Estate Investment Trusts adopted by the NASAA membership on September 29, 1993, and in effect on the date of this amendment.

"NET ASSETS" means the total assets of the Company (other than intangibles) at cost, before deducting depreciation, reserves for bad debts or other non-cash reserves, less total liabilities, calculated quarterly by the Company on a basis consistently applied; provided, however, that during such periods in which the Company is obtaining regular independent valuations of the current value of its net assets for purposes of enabling fiduciaries of employee benefit plan stockholders to comply with applicable Department of Labor reporting requirements, "Net Assets" shall mean the greater of (i) the amount determined pursuant to the foregoing and (ii) the assets' aggregate valuation established by the most recent such valuation report without reduction for depreciation, bad debts or other non-cash reserves.

"NET INCOME" means for any period, the Company's total revenues applicable to such period, less the total expenses applicable to such period other than additions to reserves for depreciation, bad debts or other similar non-cash reserves and excluding any gain from the sale of the Assets.

"NET SALES PROCEEDS" means in the case of a transaction described in clause (i) (A) of the definition of Sale, the proceeds of any such transaction less the amount of selling expenses incurred by or on behalf of the Company, including all real estate commissions, closing costs and legal fees and expenses. In the case of a transaction described in clause (i) (B) of such definition, Net Sales Proceeds means the proceeds of any such transaction less the amount of selling expenses incurred by or on behalf of the Company, including any legal fees and expenses and other selling expenses incurred in connection with such transaction. In the case of a transaction described in clause (i) (C) of such definition, Net Sales Proceeds means the proceeds of any such transaction actually distributed to the Company from the Joint Venture less the amount of any selling expenses, including legal fees and expenses incurred by or on behalf of the Company (other than those paid by the Joint Venture). In the case of a transaction or series of transactions described in clause (i) (D) of the definition of Sale, Net Sales Proceeds means the proceeds of any such transaction (including the aggregate of all payments under a Mortgage on or in satisfaction thereof other than regularly scheduled interest payments) less the amount of selling expenses incurred by or on behalf of the Company, including all commissions, closing costs and legal fees and expenses. In the case of a transaction described in clause (i)(E) of such definition, Net Sales Proceeds means the proceeds of any such transaction less the amount of selling expenses incurred by or on behalf of the Company, including any legal fees and expenses and other selling expenses incurred in connection with such transaction. In the case of a transaction described in clause (ii) of the definition of Sale, Net Sales Proceeds means the proceeds of such transaction or series of transactions less all amounts generated thereby which are reinvested in one or more Assets within 180 days thereafter and less the amount of any real estate commissions, closing costs, and legal fees and expenses and other selling expenses incurred by or allocated to the Company in connection with such transaction or series of transactions. Net Sales Proceeds shall also include any amounts that the Company determines, in its discretion, to be economically equivalent to proceeds of a Sale. Net Sales Proceeds shall not include any reserves established by the Company in its sole discretion.

"NYSE" means The New York Stock Exchange, Inc.

"OFFERING" means any public offering and sale of Shares pursuant to an effective registration statement filed under the Securities Act.

"OPERATING PARTNERSHIP" means Behringer Harvard Operating Partnership I LP, through which the Company may own Assets.

**"ORGANIZATION AND OFFERING EXPENSES"** means any and all costs and expenses incurred by and to be paid from the assets of the Company in connection with the formation, qualification and registration of the Company, and the marketing and distribution of Shares, including, without limitation, total underwriting and brokerage discounts and commissions (including fees of the underwriters' attorneys), expenses for printing, engraving, amending, supplementing, mailing and distributing costs, salaries of employees while engaged in sales activity, telephone and other telecommunications costs, all advertising and marketing expenses (including the costs related to investor and broker-dealer sales meetings), charges of transfer agents, registrars, trustees, escrow holders, depositories, experts, fees, expenses and taxes related to the filing, registration and qualification of the sale of the Shares under federal and state laws, including taxes and fees, accountants' and attorneys' fees.

**"PERSON"** means an individual, corporation, association, business trust, estate, trust, partnership, limited liability company or other legal entity.

**"PREFERRED SHARES"** shall have the meaning as provided in Section 5.1 herein.

**"PROPERTY" or "PROPERTIES"** means, as the context requires, any, or all, respectively, of the Real Property acquired by the Company, directly or indirectly through joint venture arrangements or other partnership or investment interests.

**"PROSPECTUS"** means the same as that term is defined in Section 2(10) of the Securities Act, including a preliminary prospectus, an offering circular as described in Rule 256 of the General Rules and Regulations under the Securities Act, or, in the case of an intrastate offering, any document by whatever name known, utilized for the purpose of offering and selling Securities to the public.

**"REAL PROPERTY" or "REAL ESTATE"** means land, rights in land (including leasehold interests), and any buildings, structures, improvements, furnishings, fixtures and equipment located on or used in connection with land and rights or interests in land.

**"REIT"** means a corporation, trust, association or other legal entity (other than a real estate syndication) that is engaged primarily in investing in equity interests in real estate (including fee ownership and leasehold interests) or in loans secured by real estate or both as defined pursuant to the REIT Provisions of the Code.

**"REIT PROVISIONS OF THE CODE"** means Sections 856 through 860 of the Code and any successor or other provisions of the Code relating to real estate investment trusts (including provisions as to the attribution of ownership of beneficial interests therein) and the regulations promulgated thereunder.

**"ROLL-UP ENTITY"** means a partnership, real estate investment trust, corporation, trust or similar entity that would be created or would survive after the successful completion of a proposed Roll-Up Transaction.

**"ROLL-UP TRANSACTION"** means a transaction involving the acquisition, merger, conversion or consolidation either directly or indirectly of the Company and the issuance of securities of a Roll-Up Entity to the Stockholders of the Company. Such term does not include:

(a) a transaction involving securities of the Company that have been for at least twelve (12) months listed on a national securities exchange or traded through Nasdaq's National Market System; or

(b) a transaction involving the conversion to corporate, trust or association form of only the Company, if, as a consequence of the transaction, there will be no significant adverse change in any of the following:

- (i) Stockholders' voting rights;
- (ii) the term of existence of the Company;
- (iii) Sponsor or Advisor compensation; or
- (iv) the Company's investment objectives.

"SALE" or "SALES" means (i) any transaction or series of transactions whereby: (A) the Company or the Operating Partnership directly or indirectly (except as described in other subsections of this definition) sells, grants, transfers, conveys, or relinquishes its ownership of any Property or portion thereof, including the lease of any Property consisting of a building only, and including any event with respect to any Property which gives rise to a significant amount of insurance proceeds or condemnation awards; (B) the Company or the Operating Partnership directly or indirectly (except as described in other subsections of this definition) sells, grants, transfers, conveys, or relinquishes its ownership of all or substantially all of the interest of the Company or the Operating Partnership in any Joint Venture in which it is a co-venturer or partner; (C) any Joint Venture directly or indirectly (except as described in other subsections of this definition) in which the Company or the Operating Partnership as a co-venturer or partner sells, grants, transfers, conveys, or relinquishes its ownership of any Property or portion thereof, including any event with respect to any Property which gives rise to insurance claims or condemnation awards; or (D) the Company or the Operating Partnership directly or indirectly (except as described in other subsections of this definition) sells, grants, conveys or relinquishes its interest in any Mortgage or portion thereof (including with respect to any Mortgage, all payments thereunder or in satisfaction thereof other than regularly scheduled interest payments) of amounts owed pursuant to such Mortgage and any event which gives rise to a significant amount of insurance proceeds or similar awards; or (E) the Company or the Operating Partnership directly or indirectly (except as described in other subsections of this definition) sells, grants, transfers, conveys, or relinquishes its ownership of any other Asset not previously described in this definition or any portion thereof, but (ii) not including any transaction or series of transactions specified in clause (i) (A) through (E) above in which the proceeds of such transaction or series of transactions are reinvested in one or more Assets within 180 days thereafter.

"SDAT" shall have the meaning as provided in Section 5.4 herein.

"SECURITIES" means any of the following issued by the Company, as the text requires: Shares, any other stock, shares or other evidences of equity or beneficial or other interests, voting trust certificates, bonds, debentures, notes or other evidences of indebtedness, secured or unsecured, convertible, subordinated or otherwise, or in general any instruments commonly known as "securities" or any certificates of interest, shares or participations in, temporary or interim certificates for, receipts for, guarantees of, or warrants, options or rights to subscribe to, purchase or acquire, any of the foregoing.

"SECURITIES ACT" means the Securities Act of 1933, as amended from time to time, or any successor statute thereto. Reference to any provision of the Securities Act shall mean such provision as in effect from time to time, as the same may be amended, and any successor provision thereto, as interpreted by any applicable regulations as in effect from time to time.

"SELLING COMMISSIONS" means any and all commissions payable to underwriters, dealer managers or other broker-dealers in connection with the sale of Shares, including, without limitation, commissions payable to Behringer Securities LP.

"SHARES" means shares of capital stock of the Company of any class or series, including Common Shares or Preferred Shares.

"SOLICITING DEALERS" means those broker-dealers that are members of the National Association of Securities Dealers, Inc., or that are exempt from broker-dealer registration, and that, in either case, enter into participating broker or other agreements with the Dealer Manager to sell Shares.

"SPONSOR" means any Person which (i) is directly or indirectly instrumental in organizing, wholly or in part, the Company, (ii) will manage or participate in the management of the Company, and any Affiliate of any such Person, other than a Person whose only relationship with the Company is that of an independent property manager and whose only compensation is as such, (iii) takes the initiative, directly or indirectly, in founding or organizing the Company, either alone or in conjunction with one or more other Persons, (iv) receives a material participation in the Company in connection with the founding or organizing of the business of the Company, in consideration of services or property, or both services and property, (v) has a substantial number of relationships and contacts with the Company, (vi) possesses significant rights to control Properties, (vii) receives fees for providing services to the Company which are paid on a basis that is not customary in the industry, or (viii) provides goods or services to the

Company on a basis which was not negotiated at arm's-length with the Company.

"STOCK DIVIDEND" means any dividend or other Distribution paid to Stockholders in the form of additional Shares.

"STOCKHOLDERS" means the holders of record of the Company's Shares as maintained in the books and records of the Company or its transfer agent.

"STOCKHOLDERS' 9% RETURN" means, as of any date, an aggregate amount equal to a 9% cumulative, non-compounded, annual return on Invested Capital (calculated like simple interest); provided, however, that for purposes of calculating the Stockholders' 9% Return, any Stock Dividend shall not be included as a Distribution; and provided further, that for purposes of determining the Stockholders' 9% Return, the return for each portion of Invested Capital shall commence for purposes of the calculation upon the issuance of the Shares issued in connection with such Invested Capital.

"TERMINATION DATE" means the date of termination of the Advisory Agreement.

"TERMINATION OF THE INITIAL PUBLIC OFFERING" shall mean the earlier of (i) the date on which the Initial Public Offering expires or is terminated by the Company or (ii) the date on which all shares offered in the Initial Public Offering are sold, excluding warrants offered thereunder and shares that may be acquired upon exercise of such warrants and shares offered thereunder that may be acquired pursuant to the Reinvestment Plan (as hereafter defined).

"TOTAL OPERATING EXPENSES" means all costs and expenses paid or incurred by the Company, as determined under generally accepted accounting principles, that are in any way related to the operation of the Company or to Company business, including advisory fees, but excluding (i) the expenses of raising capital such as Organization and Offering Expenses, legal, audit, accounting, underwriting, brokerage, listing, registration, and other fees, printing and other such expenses and tax incurred in connection with the issuance, distribution, transfer, registration and Listing of the Shares, (ii) interest payments, (iii) taxes, (iv) non-cash expenditures such as depreciation, amortization and bad debt reserves, (v) incentive fees paid in compliance with the NASAA REIT Guidelines; (vi) Acquisition Fees and Acquisition Expenses, (vii) real estate commissions on the Sale of Property, and (viii) other fees and expenses connected with the acquisition, disposition, management and ownership of real estate interests, mortgage loans or other property (including the costs of foreclosure, insurance premiums, legal services, maintenance, repair, and improvement of property).

"TRIGGERING EVENT" shall have the meaning as provided in Section 5.16(iii)(a) herein.

"UNIMPROVED REAL PROPERTY" means Property in which the Company has an equity interest that was not acquired for the purpose of producing rental or other operating income, that has no development or construction in process and for which no development or construction is planned, in good faith, to commence within one year.

## ARTICLE V

### STOCK

**SECTION 5.1 AUTHORIZED SHARES.** The total number of Shares that the Company shall have authority to issue is 400,000,000 Shares, of which (i) 382,499,000 shall be designated as common stock \$0.0001 par value per Share (the "COMMON SHARES"); (ii) 1,000 shall be designated as non-participating, non-voting, convertible stock \$0.0001 par value per Share (the "CONVERTIBLE SHARES"); and (iii) 17,500,000 shall be designated as preferred stock, \$0.0001 par value per Share (the "PREFERRED SHARES"). The aggregate par value of all authorized shares of stock having par value is \$40,000. If shares of one class of stock are classified or reclassified into shares of another class of stock pursuant to Section 5.2(ii) or Section 5.3 of this Article V, the number of authorized shares of the former class shall be automatically decreased and the number of shares of the latter class shall be automatically increased, in each case by the number of shares so classified or reclassified, as the case may be, so that the aggregate number of Shares of all classes that the Company has authority to issue shall not be more than the total number of Shares set forth in the first sentence of this Article. To the extent permitted by Maryland

law, the Board, without any action by the Stockholders, may amend the Charter from time to time to (i) increase or decrease the aggregate number of Shares, (ii) increase or decrease the number of Shares of any class or series that the Company has authority to issue, or (iii) classify or reclassify any unissued Shares by setting or changing the preferences, conversion or other rights, restrictions, limitations as to dividends, qualifications or terms and conditions of redemption of such Shares.

## SECTION 5.2 COMMON SHARES.

(i) COMMON SHARES SUBJECT TO TERMS OF PREFERRED SHARES. The Common Shares shall be subject to the express terms of any series of Preferred Shares.

(ii) DESCRIPTION. Each Common Share shall entitle the holder thereof to one (1) vote per share on all matters upon which Stockholders are entitled to vote pursuant to Section 11.2 hereof. Shares of a particular class of Common Shares shall have equal dividend, distribution, liquidation and other rights, and shall have no preference, cumulative, preemptive, conversion or exchange rights. The Board may classify or reclassify any unissued Common Shares from time to time in one or more classes or series of stock.

(iii) DISTRIBUTION RIGHTS. The Board from time to time may authorize and the Company may pay to Stockholders such dividends or other Distributions in cash or other property as the Board in its discretion shall determine. The Board shall endeavor to authorize, and the Company may pay, such dividends and Distributions as shall be necessary for the Company to qualify as a REIT under the REIT Provisions of the Code unless the Board has determined, in its sole discretion, that qualification as a REIT is not in the best interests of the Company; provided, however, Stockholders shall have no right to any dividend or Distribution unless and until authorized by the Board and declared by the Company. The exercise of the powers and rights of the Board pursuant to this section shall be subject to the provisions of any class or series of Shares at the time outstanding. The receipt by any Person in whose name any Shares are registered on the records of the Company or by his or her duly authorized agent shall be a sufficient discharge for all dividends or Distributions payable or deliverable in respect of such Shares and from all liability to see to the application thereof. Distributions in kind shall not be permitted, except for distributions of readily marketable securities, distributions of beneficial interests in a liquidating trust established for the dissolution of the Company and the liquidation of its assets in accordance with the terms of the Charter or distributions in which (i) the Board advises each Stockholder of the risks associated with direct ownership of the property, (ii) the Board offers each Stockholder the election of receiving such in-kind distributions, and (iii) in-kind distributions are made only to those Stockholders that accept such offer.

(iv) RIGHTS UPON LIQUIDATION. In the event of any voluntary or involuntary liquidation, dissolution or winding up, or any distribution of the assets of the Company, the aggregate assets available for distribution to holders of the Common Shares shall be determined in accordance with applicable law. Each holder of Common Shares shall be entitled to receive, ratably with each other holder of Common Shares, that portion of such aggregate assets available for distribution as the number of outstanding Common Shares held by such holder bears to the total number of outstanding Common Shares then outstanding.

(v) VOTING RIGHTS. Except as may be provided otherwise in the Charter, and subject to the express terms of any series of Preferred Shares, the holders of the Common Shares shall have the exclusive right to vote on all matters (as to which a common stockholder shall be entitled to vote pursuant to applicable law) at all meetings of the Stockholders of the Company.

SECTION 5.3 PREFERRED SHARES. The Board is hereby expressly granted the authority to authorize from time to time the issuance of one or more series of Preferred Shares. Prior to the issuance of each such class or series, the Board, by resolution, shall fix the number of shares to be included in each series, and the designation, preferences, terms, rights, restrictions, limitations, qualifications and terms and conditions of redemption of the shares of each class or series, if any. The authority of the Board with respect to each series shall include, but not be limited to, determination of the following:

(i) The designation of the series, which may be by distinguishing number, letter or title.



(ii) The dividend rate on the shares of the series, if any, whether any dividends shall be cumulative and, if so, from which date or dates, and the relative rights of priority, if any, of payment of dividends on shares of the series.

(iii) The redemption rights, including conditions and the price or prices, if any, for shares of the series.

(iv) The terms and amounts of any sinking fund for the purchase or redemption of shares of the series.

(v) The rights of the shares of the series in the event of any voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Company, and the relative rights of priority, if any, of payment of shares of the series.

(vi) Whether the shares of the series shall be convertible into shares of any other class or series or any other security of the Company or any other corporation or other entity, and, if so, the specification of such other class or series of such other security, the conversion price or prices or rate or rates, any adjustments thereof, the date or dates on which such shares shall be convertible and all other terms and conditions upon which such conversion may be made.

(vii) Restrictions on the issuance of shares of the same series or of any other class or series.

(viii) The voting rights of the holders of shares of the series subject to the limitations contained in this Section 5.3; provided, however, that the voting rights of the holders of shares of any series of Preferred Shares shall not exceed voting rights that bear the same relationship to the voting rights of the holders of Common Shares as the consideration paid to the Company for each Preferred Share bears to the book value of each outstanding Common Share.

(ix) Any other relative rights, preferences and limitations on that series, subject to the express provisions of any other series of Preferred Shares then outstanding. Notwithstanding any other provision of the Charter, the Board may increase or decrease (but not below the number of shares of such series then outstanding) the number of shares, or alter the designation or classify or reclassify any unissued shares of a particular series of Preferred Shares, by fixing or altering, in one or more respects, from time to time before issuing the shares, the terms, rights, restrictions and qualifications of the shares of any such series of Preferred Shares.

**SECTION 5.4 CLASSIFIED OR RECLASSIFIED SHARES.** Prior to issuance of classified or reclassified shares of any class or series, the Board by resolution shall: (a) designate that class or series to distinguish it from all other classes and series of stock of the Company; (b) specify the number of shares to be included in the class or series; (c) set or change, subject to the provisions of Section 5.9 and subject to the express terms of any class or series of Stock outstanding at the time, the preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications and terms and conditions of redemption for each class or series; and (d) cause the Company to file articles supplementary with the State Department of Assessments and Taxation of Maryland ("SDAT"). Any of the terms of any class or series of stock set or changed pursuant to clause (c) of this Section 5.4 may be made dependent upon facts or events ascertainable outside the Charter (including determinations by the Board or other facts or events within the control of the Company) and may vary among holders thereof, provided that the manner in which such facts, events or variations shall operate upon the terms of such class or series of Stock is clearly and expressly set forth in the articles supplementary filed with the SDAT.

**SECTION 5.5 CHARTER AND BYLAWS.** All persons who shall acquire Shares shall acquire the same subject to the provisions of the Charter and the Bylaws.

**SECTION 5.6 GENERAL NATURE OF SHARES.** All Shares shall be personal property entitling the Stockholders only to those rights provided in the Charter, the MGCL or the resolution creating any class or series of Shares. The legal ownership of the Company's assets and the right to conduct the business of the Company are vested exclusively in the Board; the Stockholders shall have no interest therein other than the beneficial interest in the Company conferred by their Shares and shall have no right to compel any partition, division, dividend or Distribution of the Company or any of the Company's assets. The death of a Stockholder shall not terminate the Company or give his or her legal representative any rights against other Stockholders, the Board, the Company or

the Company's assets, except the right, exercised in accordance with applicable provisions of the Bylaws, to require the Company to reflect on its books the change in ownership of the Shares. Holders of Shares shall not have any preemptive or other right to purchase or subscribe for any class of securities of the Company that the Company may at any time issue or sell.

**SECTION 5.7 NO ISSUANCE OF SHARE CERTIFICATES.** Until Listing, the Company shall not issue share certificates except to Stockholders who make a written request to the Company. A Stockholder's investment shall be recorded on the books of the Company. To transfer his or her Shares, a Stockholder shall submit an executed form to the Company, which form shall be provided by the Company upon request. Such transfer will also be recorded on the books of the Company. Upon issuance or transfer of Shares, the Company will provide the Stockholder with information concerning his or her rights with regard to such stock, as required by the Bylaws and the MGCL or other applicable law.

#### **SECTION 5.8 SUITABILITY OF STOCKHOLDERS.**

Until Listing, the following provisions shall apply:

(i) **INVESTOR SUITABILITY STANDARDS.** Subject to suitability standards established by individual states, to become a Stockholder in the Company, if such prospective Stockholder is an individual (including an individual beneficiary of a purchasing Individual Retirement Account), or if the prospective Stockholder is a fiduciary (such as a trustee of a trust or corporate pension or profit sharing plan, or other tax-exempt organization, or a custodian under a Uniform Gifts to Minors Act), such individual or fiduciary, as the case may be, must represent to the Company, among other requirements as the Company may require from time to time:

(a) that such individual (or, in the case of a fiduciary, that the fiduciary account or the donor who directly or indirectly supplies the funds to purchase the Shares) has a minimum annual gross income of \$45,000 and a net worth (excluding home, furnishings and automobiles) of not less than \$45,000; or

(b) that such individual (or, in the case of a fiduciary, that the fiduciary account or the donor who directly or indirectly supplies the funds to purchase the Shares) has a net worth (excluding home, furnishings and automobiles) of not less than \$150,000.

(ii) **DETERMINATION OF SUITABILITY OF SALE.** The Sponsor and each Person selling Shares on behalf of the Sponsor or the Company shall make every reasonable effort to determine that the purchase of Shares is a suitable and appropriate investment for each Stockholder. In making this determination, the Sponsor or each Person selling Shares on behalf of the Sponsor or the Company shall ascertain that the prospective Stockholder:

(a) meets the minimum income and net worth standards established for the Company; (b) can reasonably benefit from the Company based on the prospective Stockholder's overall investment objectives and portfolio structure; (c) is able to bear the economic risk of the investment based on the prospective Stockholder's overall financial situation; and (d) has apparent understanding of (1) the fundamental risks of the investment; (2) the risk that the Stockholder may lose the entire investment; (3) the lack of liquidity of the Shares; (4) the restrictions on transferability of the Shares; (5) the background and qualifications of the Sponsor or the Advisor; and (6) the tax consequences of the investment.

The Sponsor or each Person selling shares on behalf of the Sponsor or the Company shall make this determination on the basis of information it has obtained from a prospective Stockholder. Relevant information for this purpose will include at least the age, investment objectives, investment experiences, income, net worth, financial situation, and other investments of the prospective Stockholder, as well as any other pertinent factors. The Sponsor or each Person selling Shares on behalf of the Sponsor or the Company shall maintain records of the information used to determine that an investment in Shares is suitable and appropriate for a Stockholder. The Sponsor or each Person selling Shares on behalf of the Sponsor or the Company shall maintain these records for at least six years.

(iii) **MINIMUM INVESTMENT AND TRANSFER.** Subject to certain individual state requirements, no sale or transfer of Shares will be permitted of less than 100 Shares (\$1,000), and a Stockholder shall not transfer, fractionalize or subdivide such Shares so as to retain less than such minimum number thereof.

## **SECTION 5.9 RESTRICTIONS ON OWNERSHIP AND TRANSFER.**

(i) **DEFINITIONS.** For purposes of Section 5.9, the following terms shall have the following meanings:

**"BENEFICIAL OWNERSHIP"** means ownership of Shares by a Person, whether the interest in the Shares is held directly or indirectly (including by a nominee), and shall include interests that would be treated as owned through the application of Section 544 of the Code, as modified by Section 856(h)(1)(B) of the Code. The terms "Beneficial Owner," "Beneficially Owns" and "Beneficially Owned" shall have the correlative meanings.

**"BUSINESS DAY"** means any day, other than a Saturday or Sunday, that is neither a legal holiday nor a day on which banking institutions in New York City are authorized or required by law, regulation or executive order to close.

**"CHARITABLE BENEFICIARY"** means one or more beneficiaries of the Trust as determined pursuant to Section 5.9(iii)(f), provided that each such organization must be described in Section 501(c)(3) of the Code and contributions to each such organization must be eligible for deduction under each of Sections 170(b)(1)(A), 2055 and 2522 of the Code.

**"CODE"** means the Internal Revenue Code of 1986, as amended from time to time.

**"COMMON SHARE OWNERSHIP LIMIT"** means not more than 9.8% percent (in value or in number of shares, whichever is more restrictive) of the aggregate of the outstanding Common Shares of the Company, subject to adjustment pursuant to Section 5.9(ii)(h) (but not more than 9.9% percent of the aggregate of the outstanding Common Shares of the Company, as so adjusted). The number and value of outstanding Common Shares of the Company shall be determined by the Board in good faith, which determination shall be conclusive for all purposes hereof.

**"CONSTRUCTIVE OWNERSHIP"** means ownership of Shares by a Person, whether the interest in the Shares is held directly or indirectly (including by a nominee), and shall include interests that would be treated as owned through the application of Section 318(a) of the Code, as modified by Section 856(d)(5) of the Code. The terms "Constructive Owner," "Constructively Owns" and "Constructively Owned" shall have the correlative meanings.

**"EXCEPTED HOLDER"** means a Stockholder for whom an Excepted Holder Limit is created by this Charter or by the Board pursuant to Section 5.9(ii)(g).

**"EXCEPTED HOLDER LIMIT"** means, provided that the affected Excepted Holder agrees to comply with the requirements established by the Board pursuant to Section 5.9(ii)(g), and subject to adjustment pursuant to Section 5.9(ii)(h), the percentage limit established by the Board pursuant to Section 5.9(ii)(g).

**"MARKET PRICE"** on any date means, with respect to any class or series of outstanding Shares, the Closing Price for such Shares on such date. The "Closing Price" on any date shall mean the last sale price for such Shares, regular way, or, in case no such sale takes place on such day, the average of the closing bid and asked prices, regular way, for such Shares, in either case as reported in the principal consolidated transaction reporting system with respect to Shares Listed or admitted to trading on the NYSE or, if such Shares are not Listed or admitted to trading on the NYSE, as reported on the principal consolidated transaction reporting system with respect to Shares Listed on the principal national securities exchange on which such Shares are Listed or admitted to trading or, if such Shares are not Listed or admitted to trading on any national securities exchange, the last quoted price, or, if not so quoted, the average of the high bid and low asked prices in the over-the-counter market, as reported by the National Association of Securities Dealers, Inc. Automated Quotation System or, if such system is no longer in use, the principal other automated quotation system that may then be in use or, if such Shares are not quoted by any such organization, the average of the closing bid and asked prices as furnished by a professional market maker making a market in such

Shares selected by the Board or, in the event that no trading price is available for such Shares, the fair market value of the Shares, as determined in good faith by the Board.

"NYSE" means the New York Stock Exchange.

"PERSON" means an individual, corporation, partnership, estate, trust (including a trust qualified under Sections 401(a) or 501(c)(17) of the Code), a portion of a trust permanently set aside for or to be used exclusively for the purposes described in Section 642(c) of the Code, association, private foundation within the meaning of Section 509(a) of the Code, joint stock company or other entity and also includes a group as that term is used for purposes of Section 13(d)(3) of the Securities Exchange Act of 1934, as amended, and a group to which an Excepted Holder Limit applies.

"PREFERRED SHARE OWNERSHIP LIMIT" means not more than 9.8% percent (in value or in number of shares, whichever is more restrictive) of the aggregate of the outstanding Preferred Shares of the Company, subject to adjustment pursuant to Section 5.9(ii)(h) (but not more than 9.9% percent of the aggregate of the outstanding Preferred Shares of the Company, as so adjusted). The number and value of outstanding Preferred Shares of the Company shall be determined by the Board in good faith, which determination shall be conclusive for all purposes hereof.

"PROHIBITED OWNER" means, with respect to any purported Transfer, any Person who, but for the provisions of Section 5.9(ii)(a), would Beneficially Own or Constructively Own Shares, and if appropriate in the context, shall also mean any Person who would have been the record owner of the Shares that the Prohibited Owner would have so owned.

"RESTRICTION TERMINATION DATE" means the first day after the Commencement of the Initial Public Offering on which the Company determines pursuant to Section 7.2(xix) of the Charter that it is no longer in the best interests of the Company to attempt to, or continue to, qualify as a REIT or that compliance with the restrictions and limitations on Beneficial Ownership, Constructive Ownership and Transfers of Shares set forth herein is no longer required in order for the Company to qualify as a REIT.

"TRANSFER" means any issuance, sale, transfer, gift, assignment, devise or other disposition, as well as any other event that causes any Person to acquire Beneficial Ownership or Constructive Ownership, or any agreement to take any such actions or cause any such events, of Shares or the right to vote or receive dividends on Shares, including (a) the granting or exercise of any option (or any disposition of any option), (b) any disposition of any securities or rights convertible into or exchangeable for Shares or any interest in Shares or any exercise of any such conversion or exchange right and (c) Transfers of interests in other entities that result in changes in Beneficial or Constructive Ownership of Shares; in each case, whether voluntary or involuntary, whether owned of record, Constructively Owned or Beneficially Owned and whether by operation of law or otherwise. The terms "Transferring" and "Transferred" shall have the correlative meanings.

"TRUST" means any trust provided for in Section 5.9(iii)(a).

"TRUSTEE" means the Person unaffiliated with the Company and a Prohibited Owner, that is appointed by the Company to serve as trustee of the Trust.

(ii) SHARES.

(a) OWNERSHIP LIMITATIONS. During the period commencing on the date of the Company's qualification as a REIT and prior to the Restriction Termination Date:

(I) BASIC RESTRICTIONS.

(A) (1) No Person, other than an Excepted Holder, shall Beneficially Own or Constructively Own Common Shares in excess of the Common Share Ownership Limit, (2) no Person, other than an Excepted Holder, shall Beneficially Own or Constructively Own Preferred Shares in excess of the Preferred Share

Ownership Limit and (3) no Excepted Holder shall Beneficially Own or Constructively Own Shares in excess of the Excepted Holder Limit for such Excepted Holder.

(B) No Person shall Beneficially or Constructively Own Shares to the extent that such Beneficial or Constructive Ownership of Shares would result in the Company being "closely held" within the meaning of Section 856(h) of the Code (without regard to whether the ownership interest is held during the last half of a taxable year), or otherwise failing to qualify as a REIT (including, but not limited to, Beneficial or Constructive Ownership that would result in the Company owning (actually or Constructively) an interest in a tenant that is described in Section 856(d)(2)(B) of the Code if the income derived by the Company from such tenant would cause the Company to fail to satisfy any of the gross income requirements of Section 856(c) of the Code).

(C) Notwithstanding any other provisions contained herein, any Transfer of Shares (whether or not such Transfer is the result of a transaction entered into through the facilities of the NYSE or any other national securities exchange or automated inter-dealer quotation system) that, if effective, would result in Shares being beneficially owned by less than 100 Persons (determined under the principles of Section 856(a)(5) of the Code) shall be void AB INITIO, and the intended transferee shall acquire no rights in such Shares.

(II) TRANSFER IN TRUST. If any Transfer of Shares (whether or not such Transfer is the result of a transaction entered into through the facilities of the NYSE or any other national securities exchange or automated inter-dealer quotation system) occurs which, if effective, would result in any Person Beneficially Owning or Constructively Owning Shares in violation of Section 5.9(ii)(a)(I)(A) or (B),

(A) then that number of Shares the Beneficial or Constructive Ownership of which otherwise would cause such Person to violate Section 5.9(ii)(a)(I)(A) or (B) (rounded to the nearest whole share) shall be automatically transferred to a Trust for the benefit of a Charitable Beneficiary, as described in Section 5.9(iii), effective as of the close of business on the Business Day prior to the date of such Transfer, and such Person shall acquire no rights in such shares; or

(B) if the transfer to the Trust described in clause (A) of this sentence would not be effective for any reason to prevent the violation of Section 5.9(ii)(a)(I)(A) or (B), then the Transfer of that number of Shares that otherwise would cause any Person to violate Section 5.9(ii)(a)(I)(A) or (B) shall be void AB INITIO, and the intended transferee shall acquire no rights in such Shares.

(b) REMEDIES FOR BREACH. If the Board or any duly authorized committee thereof shall at any time determine in good faith that a Transfer or other event has taken place that results in a violation of Section 5.9(ii)(a) or that a Person intends to acquire or has attempted to acquire Beneficial or Constructive Ownership of any Shares in violation of Section 5.9(ii)(a) (whether or not such violation is intended), the Board or a committee thereof shall take such action as it deems advisable to refuse to give effect to or to prevent such Transfer or other event, including, without limitation, causing the Company to redeem shares, refusing to give effect to such Transfer on the books of the Company or instituting proceedings to enjoin such Transfer or other event; provided, however, that any Transfer or attempted Transfer or other event in violation of Section 5.9(ii)(a) shall automatically result in the transfer to the Trust described above, and, where applicable, such Transfer (or other event) shall be void ab initio as provided above irrespective of any action (or non-action) by the Board or a committee thereof.

(c) NOTICE OF RESTRICTED TRANSFER. Any Person who acquires or attempts or intends to acquire Beneficial Ownership or Constructive Ownership of Shares that will or may violate Section 5.9(ii)(a)(I) or any Person who would have owned Shares that resulted in a transfer to the Trust pursuant to the provisions of Section 5.9(ii)(a)(II) shall immediately give written notice to the Company of such event, or in the case of such a proposed or attempted transaction, give at least 15 days prior written notice, and shall provide to the Company such other information as the Company may request in order to determine the effect, if any, of such Transfer on the Company's status as a REIT.

(d) OWNERS REQUIRED TO PROVIDE INFORMATION. From the Commencement of the Initial Public Offering and prior to the Restriction Termination Date:

(I) every owner of more than five percent (or such lower percentage as required by the Code or the Treasury Regulations promulgated thereunder) of the outstanding Shares, within 30 days after the end of each taxable year, shall give written notice to the Company stating the name and address of such owner, the number of Shares Beneficially Owned and a description of the manner in which such Shares are held. Each such owner shall provide to the Company such additional information as the Company may request in order to determine the effect, if any, of such Beneficial Ownership on the Company's status as a REIT and to ensure compliance with the Common Share Ownership Limit and Preferred Share Ownership Limit; and

(II) each Person who is a Beneficial or Constructive Owner of Shares and each Person (including the stockholder of record) who is holding Shares for a Beneficial or Constructive Owner shall provide to the Company such information as the Company may request, in good faith, in order to determine the Company's status as a REIT and to comply with requirements of any taxing authority or governmental authority or to determine such compliance.

(e) REMEDIES NOT LIMITED. Subject to Section 7.2(ii) of the Charter, nothing contained in this Section 5.9(ii)(e) shall limit the authority of the Board to take such other action as it deems necessary or advisable to protect the Company and the interests of its stockholders in preserving the Company's status as a REIT.

(f) AMBIGUITY. In the case of an ambiguity in the application of any of the provisions of this Section 5.9(ii), Section 5.9(iii), or any definition contained in Section 5.9(i), the Board shall have the power to determine the application of the provisions of this Section 5.9(ii) or Section 5.9(iii) or any such definition with respect to any situation based on the facts known to it. In the event Section 5.9(ii) or (iii) requires an action by the Board and the Charter fails to provide specific guidance with respect to such action, the Board shall have the power to determine the action to be taken so long as such action is not contrary to the provisions of Section 5.9.

(g) EXCEPTIONS.

(I) Subject to Section 5.9(ii)(a)(I)(B), the Board, in its sole discretion, may exempt a Person from the Common Share Ownership Limit and the Preferred Share Ownership Limit, as the case may be, and may establish or increase an Excepted Holder Limit for such Person if:

(A) the Board obtains such representations and undertakings from such Person as are reasonably necessary to ascertain that no individual's Beneficial or Constructive Ownership of such Shares will violate Section 5.9(ii)(a)(I)(B);

(B) such Person does not and represents that it will not own, actually or Constructively, an interest in a tenant of the Company (or a tenant of any entity owned or controlled by the Company) that would cause the Company to own, actually or Constructively, more than a 9.9% interest (as set forth in Section 856(d)(2)(B) of the Code) in such tenant and the Board obtains such representations and undertakings from such Person as are reasonably necessary to ascertain this fact (for this purpose, a tenant from whom the Company (or an entity owned or controlled by the Company) derives (and is expected to continue to derive) a sufficiently small amount of revenue such that, in the opinion of the Board, rent from such tenant would not adversely affect the Company's ability to qualify as a REIT, shall not be treated as a tenant of the Company); and

(C) such Person agrees that any violation or attempted violation of such representations or undertakings (or other action which is contrary to the restrictions contained in Section 5.9(ii)(a) through Section 5.9(ii)(f)) will result in such Shares being automatically transferred to a Trust in accordance with Section 5.9(ii)(A)(II) and Section 5.9(iii).

(II) Prior to granting any exception pursuant to Section 5.9(ii)(g)(I), the Board may require a ruling from the Internal Revenue Service, or an opinion of counsel, in either case in form and substance satisfactory to the Board in its sole discretion, as it may deem necessary or advisable in order to determine or ensure the Company's status as a REIT. Notwithstanding the receipt of any ruling or opinion, the Board may impose such conditions or restrictions as it deems appropriate in connection with granting such exception.

(III) Subject to Section 5.9(ii)(a)(I)(B), an underwriter which participates in an Offering or a private placement of Shares (or Securities convertible into or exchangeable for Shares) may Beneficially Own or Constructively Own Shares (or Securities convertible into or exchangeable for Shares) in excess of the Common Share Ownership Limit, the Preferred Share Ownership Limit or both such limits, but only to the extent necessary to facilitate such Offering or private placement.

(IV) The Board may only reduce the Excepted Holder Limit for an Excepted Holder: (1) with the written consent of such Excepted Holder at any time, or (2) pursuant to the terms and conditions of the agreements and undertakings entered into with such Excepted Holder in connection with the establishment of the Excepted Holder Limit for that Excepted Holder. No Excepted Holder Limit shall be reduced to a percentage that is less than the Common Share Ownership Limit or the Preferred Share Ownership Limit.

(h) INCREASE IN COMMON SHARE OWNERSHIP LIMIT AND PREFERRED SHARE OWNERSHIP LIMIT. The Board may from time to time increase the Common Share Ownership Limit and the Preferred Share Ownership Limit; provided, however, that neither the Common Share Ownership Limit nor the Preferred Share Ownership Limit may be increased to a percentage that is greater than 9.9%.

(i) NOTICE TO STOCKHOLDERS UPON ISSUANCE OR TRANSFER. Upon issuance or transfer of Shares prior to the Restriction Termination Date, the Company shall provide the recipient with a notice containing information about the shares purchased or otherwise transferred, in lieu of issuance of a share certificate, in a form substantially similar to the following:

The securities of Behringer Harvard REIT I, Inc. (the "Company") are subject to restrictions on Beneficial and Constructive Ownership and Transfer for the purpose of the Company's maintenance of its status as a real estate investment trust under the Internal Revenue Code of 1986, as amended (the "Code"). Subject to certain further restrictions and except as expressly provided in the Company's charter, (i) no Person may Beneficially or Constructively Own Common Shares of the Company in excess of 9.8 percent (in value or number of shares) of the outstanding Common Shares of the Company unless such Person is an Excepted Holder (in which case the Excepted Holder Limit shall be applicable); (ii) no Person may Beneficially or Constructively Own Preferred Shares of the Company in excess of 9.8 percent (in value or number of shares) of the outstanding Preferred Shares of the Company unless such Person is an Excepted Holder (in which case the Excepted Holder Limit shall be applicable); (iii) no Person may Beneficially or Constructively Own Shares that would result in the Company being "closely held" under Section 856(h) of the Code or otherwise cause the Company to fail to qualify as a REIT; and (iv) no Person may Transfer Shares if such Transfer would result in the Shares of the Company being owned by fewer than 100 Persons. Any Person who Beneficially or Constructively Owns or attempts to Beneficially or Constructively Own Shares which causes or will cause a Person to Beneficially or Constructively Own Shares in excess or in violation of the above limitations must immediately notify the Company. If any of the restrictions on transfer or ownership are violated, the Shares represented hereby will be automatically transferred to a Trustee of a Trust for the benefit of one or more Charitable Beneficiaries. In addition, upon the occurrence of certain events, attempted Transfers in violation of the restrictions described above may be void AB INITIO. All capitalized terms in this notice have the meanings defined in the charter of the Company, as the same may be amended from time to time, a copy of which, including the restrictions on transfer and ownership, will be furnished to each holder of Shares of the Company on request and without charge.

(iii) TRANSFER OF SHARES IN TRUST.

(a) OWNERSHIP IN TRUST. Upon any purported Transfer or other event described in Section 5.9(ii)(a)(II) that would result in a transfer of Shares to a Trust, such Shares shall be deemed to have been transferred to the Trustee as trustee of a Trust for the exclusive benefit of one or more Charitable Beneficiaries. Such transfer to the Trustee shall be deemed to be effective as of the close of business on the Business Day prior to the purported Transfer or other event that results in the transfer to the Trust pursuant to Section 5.9(ii)(a)(II). The Trustee shall be appointed by the Company and shall be a Person unaffiliated with the Company and any Prohibited Owner. Each Charitable Beneficiary shall be designated by the Company as provided in Section 5.9(iii)(f).

(b) STATUS OF SHARES HELD BY THE TRUSTEE. Shares held by the Trustee shall be issued and outstanding Shares of the Company. The Prohibited Owner shall have no rights in the shares held by the

Trustee. The Prohibited Owner shall not benefit economically from ownership of any Shares held in trust by the Trustee, shall have no rights to dividends or other distributions and shall not possess any rights to vote or other rights attributable to the Shares held in the Trust.

(c) **DIVIDEND AND VOTING RIGHTS.** The Trustee shall have all voting rights and rights to dividends or other distributions with respect to Shares held in the Trust, which rights shall be exercised for the exclusive benefit of the Charitable Beneficiary. Any dividend or other distribution paid prior to the discovery by the Company that the Shares have been transferred to the Trustee shall be paid by the recipient of such dividend or distribution to the Trustee upon demand and any dividend or other distribution authorized but unpaid shall be paid when due to the Trustee. Any dividend or distribution so paid to the Trustee shall be held in trust for the Charitable Beneficiary. The Prohibited Owner shall have no voting rights with respect to shares held in the Trust and, subject to Maryland law, effective as of the date that the Shares have been transferred to the Trustee, the Trustee shall have the authority (at the Trustee's sole discretion) (i) to rescind as void any vote cast by a Prohibited Owner prior to the discovery by the Company that the Shares have been transferred to the Trustee and (ii) to recast such vote in accordance with the desires of the Trustee acting for the benefit of the Charitable Beneficiary; provided, however, that if the Company has already taken irreversible corporate action, then the Trustee shall not have the authority to rescind and recast such vote. Notwithstanding the provisions of this Section 5.9, until the Company has received notification that Shares have been transferred into a Trust, the Company shall be entitled to rely on its share transfer and other stockholder records for purposes of preparing lists of stockholders entitled to vote at meetings, determining the validity and authority of proxies and otherwise conducting votes of stockholders.

(d) **SALE OF SHARES BY TRUSTEE.** Within 20 days of receiving notice from the Company that Shares have been transferred to the Trust, the Trustee of the Trust shall sell the Shares held in the Trust to a person, designated by the Trustee, whose ownership of the Shares will not violate the ownership limitations set forth in Section 5.9(ii)(a)(I). Upon such sale, the interest of the Charitable Beneficiary in the Shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Prohibited Owner and to the Charitable Beneficiary as provided in this Section 5.9(iii)(d). The Prohibited Owner shall receive the lesser of (1) the price paid by the Prohibited Owner for the Shares or, if the Prohibited Owner did not give value for the Shares in connection with the event causing the Shares to be held in the Trust (e.g., in the case of a gift, devise or other such transaction), the Market Price of the Shares on the day of the event causing the Shares to be held in the Trust and (2) the price per Share received by the Trustee from the sale or other disposition of the Shares held in the Trust. Any net sales proceeds in excess of the amount payable to the Prohibited Owner shall be immediately paid to the Charitable Beneficiary. If, prior to the discovery by the Company that Shares have been transferred to the Trustee, such Shares are sold by a Prohibited Owner, then (i) such Shares shall be deemed to have been sold on behalf of the Trust and (ii) to the extent that the Prohibited Owner received an amount for such Shares that exceeds the amount that such Prohibited Owner was entitled to receive pursuant to this Section 5.9, such excess shall be paid to the Trustee upon demand.

(e) **PURCHASE RIGHT IN STOCK TRANSFERRED TO THE TRUSTEE.** Shares transferred to the Trustee shall be deemed to have been offered for sale to the Company, or its designee, at a price per Share equal to the lesser of (i) the price per Share in the transaction that resulted in such transfer to the Trust (or, in the case of a devise or gift, the Market Price at the time of such devise or gift) and (ii) the Market Price on the date the Company, or its designee, accepts such offer. The Company shall have the right to accept such offer until the Trustee has sold the shares held in the Trust pursuant to Section 5.9(iii)(d). Upon such a sale to the Company, the interest of the Charitable Beneficiary in the Shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Prohibited Owner.

(f) **DESIGNATION OF CHARITABLE BENEFICIARIES.** By written notice to the Trustee, the Company shall designate one or more nonprofit organizations to be the Charitable Beneficiary of the interest in the Trust such that (i) the Shares held in the Trust would not violate the restrictions set forth in Section 5.9(ii)(a)(I) in the hands of such Charitable Beneficiary and (ii) each such organization must be described in Section 501(c)(3) of the Code and contributions to each such organization must be eligible for deduction under each of Sections 170(b)(1)(A), 2055 and 2522 of the Code.

**SECTION 5.10 SETTLEMENTS.** Nothing in Section 5.9 shall preclude the settlement of any transaction with respect to the Common Shares entered into through the facilities of the NYSE or other national securities exchange



or automated inter-dealer quotation system on which the Common Shares are Listed. The fact that the settlement of any transaction occurs shall not negate the effect of any provision of Sections 5.9, and any transfer in such a transaction shall be subject to all of the provisions and limitations set forth in Section 5.9.

**SECTION 5.11 SEVERABILITY.** If any provision of Section 5.9 or any application of any such provision is determined to be void, invalid or unenforceable by any court having jurisdiction over the issue, the validity and enforceability of the remaining provisions of Section 5.9 shall not be affected and other applications of such provision shall be affected only to the extent necessary to comply with the determination of such court.

**SECTION 5.12 ENFORCEMENT.** The Company is authorized specifically to seek equitable relief, including injunctive relief, to enforce the provisions of Section 5.9.

**SECTION 5.13 NON-WAIVER.** No delay or failure on the part of the Company or the Board in exercising any right hereunder shall operate as a waiver of any right of the Company or the Board, as the case may be, except to the extent specifically waived in writing.

**SECTION 5.14 REPURCHASE OF SHARES.** The Board may establish, from time to time, a program or programs by which the Company voluntarily repurchases Shares from its Stockholders; provided, however, that such repurchase does not impair the capital or operations of the Company. The Sponsor, Advisor, members of the Board or any Affiliates thereof may not receive any fees arising out of the repurchase of Shares by the Company.

**SECTION 5.15 DISTRIBUTION REINVESTMENT PLANS.** The Board may establish, from time to time, a Distribution reinvestment plan or plans (each, a "REINVESTMENT PLAN"). Under any such Reinvestment Plan, (i) all material information regarding Distributions to the Stockholders and the effect of reinvesting such Distributions, including the tax consequences thereof, shall be provided to the Stockholders not less often than annually, and (ii) each Stockholder participating in such Reinvestment Plan shall have a reasonable opportunity to withdraw from the Reinvestment Plan not less often than annually after receipt of the information required in clause (i) above.

**SECTION 5.16 CONVERTIBLE SHARES.**

(i) **DISTRIBUTION RIGHTS.** The holders of any outstanding Convertible Shares shall not be entitled to receive dividends or other Distributions on such Convertible Shares.

(ii) **VOTING RIGHTS.**

(a) Except for the voting rights expressly conferred by Section 5.16(ii)(b) hereof, the holders of the outstanding Convertible Shares shall not be entitled to (1) vote on any matter, or (2) receive notice of, or to participate in, any meeting of Stockholders at which they are not entitled to vote.

(b) The affirmative vote of the holders of at least two-thirds (2/3) of the outstanding Convertible Shares, voting together as a single class for such purposes, shall be required for the adoption of any amendment, alteration or repeal of any provision of the Charter that materially and adversely changes the preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications or terms and conditions of redemption of the Convertible Shares (it being understood that an increase in the number of Directors is not, by itself, such a material and adverse change).

(c) Whenever the holders of Convertible Shares are entitled to vote as a single class on any matter pursuant to the provisions of Section 5.16(ii)(b) hereof, the vote required to approve such matter shall be the affirmative vote of at least two-thirds (2/3) of all the votes entitled to be cast by the holders of Convertible Shares, with each Convertible Share having one (1) vote per Convertible Share.

(iii) **CONVERSION.**

(a) Each outstanding Convertible Share shall convert into a number of Common Shares as set forth in Section 5.16(iii)(b) hereof, automatically and without any further action required, upon the occurrence of

any of the following events (each a "TRIGGERING EVENT"): (1) the date when the holders of the Common Shares have received distributions equal to or in excess of the sum of Invested Capital and the Stockholders' 9% Return (the "LIQUIDATION EVENT"); or (2) Listing. In addition, each outstanding Convertible Share shall become convertible into a number of Common Shares as set forth in Section 5.16(iii)(c) hereof, automatically and without any further action required, upon the termination or expiration without renewal of the Advisory Agreement with Behringer Advisors, LLC, a Texas limited liability company, other than a termination by the Company because of a material breach by Behringer Advisors, LLC (an "ADVISORY AGREEMENT TERMINATION").

(b) Upon the occurrence of a Triggering Event, each Convertible Share shall be converted into a number of Common Shares equal to 1/1000 of the result of (1) the product of 0.15 times the amount, if any, by which (A) the sum of the Company Value as of the date of the Triggering Event plus the total Distributions paid to holders of Common Shares through the date of the Triggering Event, exceeds (B) the sum of Invested Capital plus the Stockholders' 9% Return as of the date of the Triggering Event, with such result divided by (2) the quotient of the Company Value divided by the number of outstanding Common Shares on the date of the Triggering Event. Such conversion, in the case of conversion upon Listing, will not occur until the 31st trading day after the date of such Listing. If, in the good faith judgment of the Board, full conversion of all Convertible Shares would jeopardize the Company's status as a REIT, then only that number of Convertible Shares (or fraction thereof) shall be converted into Common Shares such that the Company's REIT status is not jeopardized, and the remaining Convertible Shares shall be deemed retired immediately upon such conversion.

(c) Upon the occurrence of an Advisory Agreement Termination prior to a Triggering Event, each Convertible Share shall become convertible (but will not convert except as provided in the next sentence of this Section 5.16(iii)(c)) into a number of Common Shares equal to 1/1000 of the result of (1) the product of 0.15 times the amount, if any, by which (A) the sum of the Company Value as of the Termination Date plus the total Distributions paid to holders of Common Shares through the Termination Date, exceeds (B) the sum of Invested Capital plus the Stockholders' 9% Return, with such result divided by (2) the quotient of the Company Value divided by the number of outstanding Common Shares on the Termination Date. Thereafter, upon the occurrence of a Triggering Event, if the Company's investors have received distributions equal to the sum of Invested Capital plus the Stockholders' 9% Return, each Convertible Share will automatically convert into the number of Common Shares determined pursuant to the preceding sentence. If, in the good faith judgment of the Board, full conversion of all Convertible Shares would jeopardize the Company's status as a REIT, then only that number of Convertible Shares (or fraction thereof) shall be converted into Common Shares such that the Company's REIT status is not jeopardized, and the remaining Convertible Shares shall be deemed retired immediately upon such conversion.

(d) As promptly as practicable after a Triggering Event, including a Triggering Event that causes the Convertible Shares to automatically convert into Common Shares pursuant to Section 5.16(iii)(c) hereof, the Company shall issue and deliver to each holder of Convertible Shares a certificate or certificates representing the number of Common Shares into which his, her or its Convertible Shares were converted (or shall cause the issuance of such Common Shares to be reflected in the Company's stock ledger, if the Common Shares are uncertificated). The person in whose name the Common Shares are issued shall be deemed to have become a Stockholder of record on the date of conversion.

(e) The issuance of Common Shares on conversion of outstanding Convertible Shares shall be made by the Company without charge for expenses or for any tax in respect of the issuance of such Common Shares.

(f) In the event of any reclassification or recapitalization of the outstanding Common Shares (except a change in par value, or from no par value to par value, or subdivision or other split or combination of Common Shares), or in case of any consolidation or merger to which the Company is a party, except a merger in which the Company is the surviving corporation and which does not result in any such reclassification or recapitalization, the Company or the successor or purchasing business entity shall provide that the holders of each Convertible Share then outstanding shall thereafter have the right to convert such Convertible Shares into the kind and amount of stock and other securities and property receivable, upon such reclassification, recapitalization, consolidation or merger, by a holder of the number of Common Shares of the Company into which such Convertible Shares might have been converted. The provisions of this Section 5.16(iii)(f) shall similarly apply to successive reclassifications, recapitalizations, consolidations or mergers.

(g) Common Shares issued on conversion of Convertible Shares shall be issued as fully paid shares and shall be nonassessable by the Company. The Company shall, at all times, reserve and keep available, for the purpose of effecting the conversion of the outstanding Convertible Shares, such number of its duly authorized Common Shares as shall be sufficient to effect the conversion of all of the outstanding Convertible Shares.

(h) Convertible Shares converted as provided herein shall be reclassified as authorized but unissued Common Shares.

(iv) EXCEPTED HOLDER LIMIT FOR HOLDER OF CONVERTIBLE SHARES. For purposes of Section 5.9 hereof, the holder of the Convertible Shares shall have an Excepted Holder Limit (as such term is defined in Section 5.9 hereof) of a 20% interest (in value or number of as-converted shares, whichever is more restrictive) of the aggregate of the outstanding Common Shares of the Company, subject to adjustment pursuant to Sections 5.9(g) and 5.9(h) hereof, including any adjustment approved by the Board.

## ARTICLE VI

### BOARD OF DIRECTORS

SECTION 6.1 NUMBER OF DIRECTORS. The number of Directors of the Company shall be five (5), which number may be increased or decreased from time to time pursuant to the Bylaws; provided, however, that the total number of Directors shall be not fewer than three (3) and not more than fifteen (15), subject to increase or decrease by the affirmative vote of 80% of the members then serving on the Board. A majority of the Board will be Independent Directors except for a period of up to 60 days after the death, removal or resignation of an Independent Director. Any vacancies, including those which arise by reason of an increase in the number of Directors, will be filled by the affirmative vote of a majority of the remaining Directors, though less than a quorum. Independent Directors shall nominate replacements for vacancies in the Independent Director positions. No reduction in the number of Directors shall cause the removal of any Director from office prior to the expiration of his term, except as may otherwise be provided in the terms of any Preferred Shares issued by the Company. For the purposes of voting for Directors, each Share of stock may be voted for as many individuals as there are Directors to be elected and for whose election the Share is entitled to be voted. Cumulative voting for Directors is prohibited.

The names of the Directors who shall serve on the Board until the next annual meeting of the Stockholders and until their successors are duly elected and qualify, subject to an increase in the number of Directors prior to the next annual meeting of the Stockholders, are:

Robert S. Aisner  
Robert M. Behringer  
Charles G. Dannis  
Steven W. Partridge  
G. Ronald Witten

SECTION 6.2 EXPERIENCE. Each Director shall have at least three (3) years of relevant experience demonstrating the knowledge and experience required to successfully acquire and manage the type of assets being acquired by the Company. At least one of the Independent Directors shall have three (3) years of relevant real estate experience.

SECTION 6.3 COMMITTEES. Subject to the MGCL, the Board may establish such committees as it deems appropriate, in its discretion, provided that the majority of the members of each committee are Independent Directors.

SECTION 6.4 TERM. Except as may otherwise be provided in the terms of any Preferred Shares issued by the Company, each Director shall hold office for one (1) year, until the next annual meeting of Stockholders and until his successor is duly elected and qualifies. Directors may be elected to an unlimited number of successive terms.

SECTION 6.5 FIDUCIARY OBLIGATIONS. The Directors and the Advisor serve in a fiduciary capacity to the Company and have a fiduciary duty to the Stockholders of the Company, including, with respect to the Directors, a

specific fiduciary duty to supervise the relationship of the Company with the Advisor.

**SECTION 6.6 RESIGNATION, REMOVAL OR DEATH.** Any Director may resign by written notice to the Board, effective upon execution and delivery to the Company of such written notice or upon any future date specified in the notice. A Director may be removed from office with or without cause only at a meeting of the Stockholders called for that purpose, by the affirmative vote of the holders of not less than a majority of the Shares then outstanding and entitled to vote generally in the election of directors, subject to the rights of any Preferred Shares to vote for such Directors. The notice of such meeting shall indicate that the purpose, or one of the purposes, of such meeting is to determine if a Director should be removed.

**SECTION 6.7 RIGHTS OF OBJECTING STOCKHOLDERS.** Holders of Shares shall not be entitled to exercise any rights of an objecting stockholder provided for under Title 3, Subtitle 2 of the MGCL unless the Board, upon the affirmative vote of a majority of the entire Board, shall determine that such rights shall apply, with respect to all or any classes or series of stock, to a particular transaction or all transactions occurring after the date of such approval in connection with which holders of such Shares would otherwise be entitled to exercise such rights.

## ARTICLE VII

### POWERS OF THE BOARD OF DIRECTORS

**SECTION 7.1 GENERAL.** The business and affairs of the Company shall be managed under the direction of the Board, and the Board shall have full, exclusive and absolute power, control and authority over the Company's assets and over the business of the Company as if it, in its own right, was the sole owner thereof, except as otherwise limited by the Charter. In accordance with the policies on investments and borrowing set forth in this Article VII and Article IX hereof, the Board shall monitor the administrative procedures, investment operations and performance of the Company and the Advisor to assure that such policies are carried out. The Board may take any action that, in its sole judgment and discretion, is necessary or desirable to conduct the business of the Company. The Charter shall be construed with a presumption in favor of the grant of power and authority to the Board. Any construction of the Charter or determination made in good faith by the Board concerning its powers and authority hereunder shall be conclusive.

**SECTION 7.2 SPECIFIC POWERS AND AUTHORITY.** Subject only to the express limitations set forth herein, and in addition to all other powers and authority conferred by the Charter by law, the Board, without any vote, action or consent by the Stockholders, shall have and may exercise, at any time or times, in the name of the Company or on its behalf the following powers and authorities:

(i) **INVESTMENTS.** Subject to Article IX and Section 12.6 hereof, the Board shall have the power and authority to invest in, purchase or otherwise acquire and to hold real, personal or mixed, tangible or intangible, property of any kind wherever located, or rights or interests therein or in connection therewith, all without regard to whether such property, interests or rights are authorized by law for the investment of funds held by trustees or other fiduciaries, or whether obligations the Company acquires have a term greater or lesser than the term of office of the Directors or the possible termination of the Company, for such consideration as the Board may deem proper (including cash, property of any kind or Securities of the Company); provided, however, that the Board shall take such actions as it deems necessary and desirable to comply with any requirements of the MGCL relating to the types of assets held by the Company.

(ii) **REIT QUALIFICATION.** The Board shall use its best efforts to cause the Company and its Stockholders to qualify for U.S. federal income tax treatment in accordance with the REIT Provisions of the Code, unless the Board, in its sole discretion, determines at any time, due to changes in tax legislation or otherwise, that qualification as a REIT is not in the best interests of the Company. Following such REIT qualification, the Board shall use its best efforts to take such actions as are necessary, and may take such actions as it deems desirable (in its sole discretion) to preserve the status of the Company as a REIT; provided, however, that in the event that the Board determines that it no longer is in the best interests of the Company to qualify as a REIT, the Board may revoke or otherwise terminate the Company's REIT election pursuant to Section 856(g) of the Code. The Board also may determine that compliance with any restriction or limitation set forth in this Charter which is intended to preserve the status of the Company as a REIT, including, without limitation, the restrictions and limitations on stock

ownership and transfers in Section 5.9 hereof, is no longer required for REIT qualification and may waive compliance with any such restriction or limitation during any period in which the Board has determined not to pursue or preserve the Company's status as a REIT.

(iii) **SALE, DISPOSITION AND USE OF COMPANY ASSETS.** Subject to Article IX and Sections 12.6 and 13.3 hereof, the Board shall have the power and authority to (A) sell, rent, lease, hire, exchange, release, partition, assign, mortgage, grant security interests in, encumber, negotiate, dedicate, grant easements in and options with respect to, convey, transfer (including transfers to entities wholly or partially owned by the Company or any Director) any or all of the Company's assets, (B) dispose of any or all of the Company's assets by deeds (including deeds in lieu of foreclosure with or without consideration), trust deeds, assignments, bills of sale, transfers, leases, mortgages, financing statements, security agreements and other instruments for any of such purposes executed and delivered for and on behalf of the Company or the Board by one or more of the Directors or by a duly authorized officer, employee, agent or nominee of the Company, on such terms as it deems appropriate, (C) give consents and make contracts relating to the Company's assets and their use or other property or matters, (D) develop, improve, manage, use, alter or otherwise deal with the Company's assets, and (E) rent, lease or hire from others property of any kind; provided, however, that the Company may not use or apply land for any purposes not permitted by applicable law.

(iv) **FINANCINGS.** The Board shall have the power and authority to borrow or, in any other manner, raise money for the purposes and on the terms it determines, which terms may (i) include evidencing the same by issuance of Securities of the Company and (ii) may have such provisions as the Board may determine; to reacquire such Securities to (A) enter into other contracts or obligations on behalf of the Company; to guarantee, indemnify or act as surety with respect to payment or performance of obligations of any Person and (B) mortgage, pledge, assign, grant security interests in or otherwise encumber the Company's assets to secure any such Securities of the Company, contracts or obligations (including guarantees, indemnifications and suretyships); and to renew, modify, release, compromise, extend, consolidate or cancel, in whole or in part, any obligation to or of the Company or participate in any reorganization of obligors to the Company; provided, however, that the Company's Leverage shall be limited by the provisions of Section 9.4(viii) hereof.

(v) **LENDING.** Subject to all applicable limitations in the Charter, the Board shall have the power and authority to lend money or other assets of the Company on such terms, for such purposes and to such Persons as it may determine.

(vi) **ISSUANCE OF SECURITIES.** Subject to the provisions of Article V hereof, the Board may authorize the issuance from time to time of Shares of any class or series, whether now or hereafter authorized, or other Securities, whether now or hereafter authorized, for such consideration as the Board may deem advisable (or without consideration in the case of a stock split or stock dividend), subject to such restrictions or limitations, if any, as may be set forth in the Charter or the Bylaws.

(vii) **EXPENSES AND TAXES.** The Board shall have the power and authority (A) to pay any charges, expenses or liabilities necessary or desirable, in the sole discretion of the Board, for carrying out the purposes of the Charter and conducting the business of the Company, including (1) compensation or fees to Directors, officers, employees and agents of the Company, and to Persons contracting with the Company and (2) any taxes, levies, charges and assessments of any kind imposed upon or chargeable against the Company, the Company's assets or the Directors in connection therewith and (B) to prepare and file any tax returns, reports or other documents and take any other appropriate action relating to the payment of any such charges, expenses or liabilities.

(viii) **COLLECTION AND ENFORCEMENT.** The Board shall have the power and authority to collect, sue for and receive money or other property due to the Company; to consent to extensions of time for the payment, or to the renewal, of any Securities or obligations; to engage or to intervene in, prosecute, defend, compound, enforce, compromise, release, abandon or adjust any actions, suits, proceedings, disputes, claims, demands, security interests or things relating to the Company, the Company's assets or the Company's affairs; to exercise any rights and enter into any agreements and take any other action necessary or desirable in connection with the foregoing.

(ix) **DEPOSITS.** The Board shall have the power and authority to deposit funds or Securities constituting part of the Company's assets in banks, trust companies, savings and loan associations, financial institutions and

other depositories, whether or not such deposits will draw interest, subject to withdrawal on such terms and in such manner as the Board may determine.

(x) **ALLOCATION; ACCOUNTS.** The Board shall have the power and authority to determine whether moneys, profits or other assets of the Company shall be charged or credited to, or allocated between, income and capital, including whether or not to amortize any premium or discount and to determine in what manner any expenses or disbursements are to be borne as between income and capital (regardless of how such items would normally or otherwise be charged to or allocated between income and capital without such determination); to treat any dividend or other distribution on any investment as, or apportion it between, income and capital; in its discretion to provide reserves for depreciation, amortization, obsolescence or other purposes in respect of any of the Company's assets in such amounts and by such methods as it determines constitute net earnings, profits or surplus in their discretion; to determine the method or form in which the accounts and records of the Company shall be maintained; and to allocate to the Stockholders' equity account less than all of the consideration paid for Securities and to allocate the balance to paid-in capital or capital surplus.

(xi) **VALUATION OF ASSETS.** The Board shall have the power and authority to determine the value of all or any part of the Company's assets and of any services, Securities, property or other consideration to be furnished to or acquired by the Company, and to revalue all or any part of the Company's assets, all in accordance with such appraisals or other information as are reasonable and necessary, in its sole judgment.

(xii) **OWNERSHIP AND VOTING POWERS.** The Board shall have the power and authority to exercise all of the rights, powers, options and privileges pertaining to the ownership of any of the Company's assets to the same extent that an individual owner might, including without limitation to vote or give any consent, request or notice or waive any notice, either in person or by proxy or power of attorney, which proxies and powers of attorney may be for any general or special meetings or action, and may include the exercise of discretionary powers.

(xiii) **OFFICERS, ETC.; DELEGATION OF POWERS.** The Board shall have the power and authority to elect, appoint or employ such officers for the Company and such committees of the Board with such powers and duties as the Board may determine, the Company's Bylaws provide or the MGCL requires; to engage, employ or contract with and pay compensation to any Person (including subject to Section 12.6 hereof, any Director and any Person who is an Affiliate of any Director) as agent, representative, Advisor, member of an advisory board, employee or independent contractor (including advisors, consultants, transfer agents, registrars, underwriters, accountants, attorneys-at-law, real estate agents, property and other managers, appraisers, brokers, architects, engineers, construction managers, general contractors or otherwise) in one or more capacities, to perform such services on such terms as the Board may determine; to delegate to one or more Directors, officers or other Persons engaged or employed as aforesaid or to committees of the Board or to the Advisor, the performance of acts or other things (including granting of consents), the making of decisions and the execution of such deeds, contracts, leases or other instruments, either in the names of the Company, the Board or as their attorneys or otherwise, as the Board may determine; and to establish such committees as it deems appropriate.

(xiv) **ASSOCIATIONS.** Subject to Section 12.6 hereof, the Board shall have the power and authority to cause the Company to enter into Joint Ventures, general or limited partnerships, participation or agency arrangements or any other lawful combinations, relationships or associations of any kind.

(xv) **REORGANIZATIONS, ETC.** Subject to Sections 13.2 and 13.3 hereof, the Board shall have the power and authority to cause to be organized or assist in organizing any Person under the laws of any jurisdiction to acquire all or any part of the Company's assets, carry on any business in which the Company shall have an interest or otherwise exercise the powers the Board deems necessary, useful or desirable to carry on the business of the Company or to carry out the provisions of the Charter, to merge or consolidate the Company with any Person; to sell, rent, lease, hire, convey, negotiate, assign, exchange or transfer all or any part of the Company's assets to or with any Person in exchange for Securities of such Person or otherwise; and to lend money to, subscribe for and purchase the Securities of, and enter into any contracts with, any Person in which the Company holds, or is about to acquire, securities or any other interests.

(xvi) **INSURANCE.** The Board shall have the power and authority to purchase and pay for out of the Company's assets insurance policies insuring the Stockholders, Company and the Company's assets against any and

all risks, and insuring the Directors, officers, Advisors and Affiliates of the Company, individually (each an "INSURED") against all claims and liabilities of every nature arising by reason of each Insured holding or having held any such status, office or position or by reason of any action alleged to have been taken or omitted by the Insured in such capacity, whether or not the Company would have the power to indemnify against such claim or liability, provided that the indemnification be limited to that permitted by Section 12.3 hereof in regard to any liability or loss resulting from negligence, gross negligence, misconduct, willful misconduct or an alleged violation of federal or state securities laws. Nothing contained herein shall preclude the Company from purchasing and paying for such types of insurance, including extended coverage liability and casualty and workers' compensation, as would be customary for any Person owning comparable assets and engaged in a similar business, or from naming the Insured as an additional insured party thereunder, provided that such addition does not add to the premiums payable by the Company. The Board's power to purchase and pay for such insurance policies shall be limited to policies that comply with all applicable state laws and the NASAA REIT Guidelines.

(xvii) DISTRIBUTIONS. The Board shall have the power and authority to authorize dividends for declaration and payment by the Company or other Distributions to Stockholders, subject to the provisions of Section 5.2 hereof.

(xviii) DISCONTINUE OPERATIONS; BANKRUPTCY. The Board shall have the power and authority to discontinue the operations of the Company (subject to Section 13.2 hereof); to petition or apply for relief under any provision of federal or state bankruptcy, insolvency or reorganization laws or similar laws for the relief of debtors; to permit any Property to be foreclosed upon without raising any legal or equitable defenses that may be available to the Company or the Directors or otherwise defending or responding to such foreclosure; to confess judgment against the Company (as hereinafter defined); or to take such other action with respect to indebtedness or other obligations of the Directors, the Company's assets or the Company as the Board, in such capacity, and in its discretion may determine.

(xix) FISCAL YEAR. Subject to the Code, the Board shall have the power and authority to adopt, and from time to time to change, the fiscal year for the Company.

(xx) SEAL. The Board shall have the power and authority to adopt and use a seal, but the use of a seal shall not be required for the execution of instruments or obligations of the Company.

(xxi) BYLAWS. The Board shall have the exclusive power and authority to adopt, implement and from time to time alter, amend or repeal the Bylaws.

(xxii) LISTING SHARES. The Board shall have the power and authority to cause the Listing of the Shares at any time after completion of the Initial Public Offering but in no event shall such Listing occur more than twelve (12) years after the Termination of the Initial Public Offering unless a majority of the Board and a majority of the Independent Directors shall approve otherwise and set a future date for such Listing with any such extension or subsequent extension subject to the Board's power to extend such date.

(xxiii) FURTHER POWERS. The Board shall have the power and authority to do all other acts and things and execute and deliver all instruments incident to the foregoing powers, and to exercise all powers that it deems necessary, useful or desirable to carry on the business of the Company or to carry out the provisions of the Charter, even if such powers are not specifically provided hereby.

**SECTION 7.3 DETERMINATION BY BOARD OF BEST INTEREST OF COMPANY.** The determination as to any of the following matters, made in good faith by or pursuant to the direction of the Board consistent with the Charter and in the absence of actual receipt of an improper benefit in money, property or services or active and deliberate dishonesty established by a court, shall be final and conclusive and shall be binding upon the Company and every holder of its Stock: the amount of the net income of the Company for any period and the amount of assets at any time legally available for the payment of dividends, redemption of its Stock or the payment of other Distributions on its Stock; the amount of paid-in surplus, net assets, other surplus, annual or other net profit, net assets in excess of capital, undivided profits or excess of profits over losses on sales of assets; the amount, purpose, time of creation, increase or decrease, alteration or cancellation of any reserves or charges and the propriety thereof (whether or not any obligation or liability for which such reserves or charges shall have been created shall have been

paid or discharged); the fair value, or any sale, bid or asked price to be applied in determining the fair value, of any asset owned or held by the Company; any matter relating to the acquisition, holding and disposition of any assets by the Company; any matter relating to the qualification of the Company as a REIT or election of a different tax status for the Company; or any other matter relating to the business and affairs of the Company.

## ARTICLE VIII

### ADVISOR

**SECTION 8.1 APPOINTMENT AND INITIAL INVESTMENT OF ADVISOR.** The Board is responsible for setting the general policies of the Company and for the general supervision of its business conducted by officers, agents, employees, advisors or independent contractors of the Company. However, the Board is not required personally to conduct the business of the Company, and it may (but need not) appoint, employ or contract with any Person (including a Person Affiliated with any Director) as an Advisor and may grant or delegate such authority to the Advisor as the Board may, in its sole discretion, deem necessary or desirable. The term of retention of any Advisor shall not exceed one (1) year, although there is no limit to the number of times that a particular Advisor may be retained. The Advisor or its Affiliates have made an initial investment of \$200,000 in the Company. The Advisor or any such Affiliate may not sell this initial investment while the Advisor remains a Sponsor but may transfer the initial investment to other Affiliates.

**SECTION 8.2 SUPERVISION OF ADVISOR.** The Board shall evaluate the performance of the Advisor before entering into or renewing an Advisory Agreement, and the criteria used in such evaluation shall be reflected in the minutes of the meetings of the Board. The Board may exercise broad discretion in allowing the Advisor to administer and regulate the operations of the Company, to act as agent for the Company, to execute documents on behalf of the Company and to make executive decisions that conform to general policies and principles established by the Board. The Board shall monitor the Advisor to assure that the administrative procedures, operations and programs of the Company are in the best interests of the Stockholders and are fulfilled. The Independent Directors are responsible for reviewing the fees and expenses of the Company at least annually or with sufficient frequency to determine that the expenses incurred are reasonable in light of the investment performance of the Company, its Net Assets, its Net Income and the fees and expenses of other comparable unaffiliated REITs. Each such determination shall be reflected in the minutes of the meetings of the Board. In addition, from time to time, but not less often than annually, a majority of the Independent Directors and a majority of Directors not otherwise interested in the transaction must approve each transaction with the Advisor or its Affiliates. The Independent Directors also will be responsible for reviewing, from time to time and at least annually, the performance of the Advisor and determining that compensation to be paid to the Advisor is reasonable in relation to the nature and quality of services performed and the investment performance of the Company and that the provisions of the Advisory Agreement are being carried out.

Specifically, the Independent Directors will consider factors such as (i) the amount of the fee paid to the Advisor in relation to the size, composition and performance of the Assets, (ii) the success of the Advisor in generating opportunities that meet the investment objectives of the Company, (iii) rates charged to other REITs and to investors other than REITs by advisors performing the same or similar services, (iv) additional revenues realized by the Advisor and its Affiliates through their relationship with the Company, including loan administration, underwriting or broker commissions, servicing, engineering, inspection and other fees, whether paid by the Company or by others with whom the Company does business, (v) the quality and extent of service and advice furnished by the Advisor, (vi) the performance of the Assets, including income, conservation or appreciation of capital, frequency of problem investments and competence in dealing with distress situations, and (vii) the quality of the Assets relative to the investments generated by the Advisor for its own account. The Independent Directors may also consider all other factors that it deems relevant, and the findings of the Independent Directors on each of the factors considered shall be recorded in the minutes of the Board. The Board shall determine whether any successor Advisor possesses sufficient qualifications to perform the advisory function for the Company and whether the compensation provided for in its contract with the Company is justified.

**SECTION 8.3 FIDUCIARY OBLIGATIONS.** The Advisor shall have a fiduciary responsibility and duty to the Company and to the Stockholders.



**SECTION 8.4 AFFILIATION AND FUNCTIONS.** The Board, by resolution or in the Bylaws, may provide guidelines, provisions or requirements concerning the affiliation and functions of the Advisor.

**SECTION 8.5 TERMINATION.** Either a majority of the Independent Directors or the Advisor may terminate the Advisory Agreement on sixty (60) days' written notice without cause or penalty, and, in such event, the Advisor will cooperate with the Company and the Board in making an orderly transition of the advisory function.

**SECTION 8.6 DISPOSITION FEE ON SALE OF PROPERTY.** The Company may pay the Advisor a real estate disposition fee upon Sale of one or more Properties, in an amount equal to the lesser of (i) one-half (1/2) of the brokerage commission paid, or (ii) three percent (3%) of the sales price of such Property or Properties. Payment of such fee may be made only if the Advisor provides a substantial amount of services in connection with the Sale of a Property or Properties, as determined by a majority of the Independent Directors. In addition, the amount paid when added to all other real estate commissions paid to unaffiliated parties in connection with such Sale shall not exceed the lesser of the Competitive Real Estate Commission or an amount equal to 6% of the sales price of such Property or Properties.

**SECTION 8.7 INCENTIVE FEES.** The Company may pay the Advisor an interest in the gain from the Sale of Assets, for which full consideration is not paid in cash or property of equivalent value, provided the amount or percentage of such interest is reasonable. Such an interest in gain from the Sale of Assets shall be considered presumptively reasonable if it does not exceed 15% of the balance of such net proceeds remaining after payment to Stockholders, in the aggregate, of an amount equal to 100% of the Invested Capital, plus an amount equal to 6% of the Invested Capital per annum cumulative. In the case of multiple Advisors, such Advisor and any of their Affiliates shall be allowed such fees provided such fees are distributed by a proportional method reasonably designed to reflect the value added to the Company assets by each respective Advisor or any Affiliate.

**SECTION 8.8 ORGANIZATION AND OFFERING EXPENSES LIMITATION.** The Company shall reimburse the Advisor and its Affiliates for Organization and Offering Expenses incurred by the Advisor or its Affiliates; provided, however, that the total amount of all Organization and Offering Expenses shall be reasonable and shall in no event exceed 15% of the Gross Proceeds of each Offering.

**SECTION 8.9 ACQUISITION FEES.** The Company may pay the Advisor and its Affiliates fees for the review and evaluation of potential investments in Assets; provided, however, that the total of all Acquisition Fees and Acquisition Expenses shall be reasonable, and shall not exceed an amount equal to 6% of the Contract Purchase Price, or, in the case of a Mortgage, 6% of the funds advanced, provided, however, that a majority of the Directors (including a majority of the Independent Directors) not otherwise interested in the transaction may approve fees and expenses in excess of this limit if they determine the transaction to be commercially competitive, fair and reasonable to the Company.

**SECTION 8.10 REIMBURSEMENT FOR TOTAL OPERATING EXPENSES.** The Company may reimburse the Advisor, at the end of each fiscal quarter, for Total Operating Expenses incurred by the Advisor; provided, however that the Company shall not reimburse the Advisor at the end of any fiscal quarter for Total Operating Expenses that, in the four consecutive fiscal quarters then ended, exceed the greater of 2% of Average Invested Assets or 25% of Net Income (the "2%/25% GUIDELINES") for such year. The Independent Directors shall have the responsibility of limiting Total Operating Expenses to amounts that do not exceed the 2%/25% Guidelines unless they have made a finding that, based on such unusual and non-recurring factors that they deem sufficient, a higher level of expenses (an "EXCESS AMOUNT") is justified. Within 60 days after the end of any fiscal quarter of the Company for which there is an Excess Amount which the Independent Directors conclude was justified and reimbursable to the Advisor, there shall be sent to the Stockholders a written disclosure of such fact, together with an explanation of the factors the Independent Directors considered in determining that such Excess Amount was justified. Any such finding and the reasons in support thereof shall be reflected in the minutes of the meetings of the Board. In the event that the Independent Directors do not determine that excess expenses are justified, the Advisor shall reimburse the Company the amount by which the expenses exceeded the 2%/25% Guidelines.

**SECTION 8.11 REIMBURSEMENT LIMITATION.** The Company shall not reimburse the Advisor or its Affiliates for services for which the Advisor or its Affiliates are entitled to compensation in the form of a separate fee.

## ARTICLE IX

### INVESTMENT OBJECTIVES AND LIMITATIONS

**SECTION 9.1 INVESTMENT OBJECTIVES.** The Company's primary investment objectives are: (i) to preserve, protect and return the Invested Capital of the Stockholders; (ii) to maximize cash available for Distribution; (iii) to realize capital appreciation upon the ultimate sale of the Assets; and (iv) to provide Stockholders with liquidity of their investment within twelve (12) years after the Termination of the Initial Public Offering through either (a) the Listing of the Shares, or (b) if Listing does not occur within twelve (12) years following the Termination of the Initial Public Offering, the dissolution of the Company and orderly liquidation of its assets unless a majority of the Board and a majority of the Independent Directors shall approve otherwise and set a future date for such Listing and dissolution with any such extension or subsequent extension subject to the Board's power to extend such date. The sheltering from tax of income from other sources is not an objective of the Company. Subject to the restrictions set forth herein, the Board will use its best efforts to conduct the affairs of the Company in such a manner as to continue to qualify the Company for the tax treatment provided in the REIT Provisions of the Code unless and until the Board determines, in its sole discretion, that REIT qualification is not in the best interests of the Company; provided, however, that no Director, officer, employee or agent of the Company shall be liable for any act or omission resulting in the loss of tax benefits under the Code, except to the extent provided in Section 12.2 hereof.

**SECTION 9.2 REVIEW OF OBJECTIVES.** The Independent Directors shall review the investment policies of the Company with sufficient frequency (not less often than annually) to determine that the policies being followed by the Company are in the best interests of its Stockholders. Each such determination and the basis therefor shall be set forth in the minutes of the meetings of the Board.

#### **SECTION 9.3 CERTAIN PERMITTED INVESTMENTS.**

(i) The Company may invest in Assets, as defined in Article IV hereof.

(ii) The Company may invest in Joint Ventures with the Sponsor, Advisor, one or more Directors or any Affiliate, only if a majority of Directors (including a majority of Independent Directors) not otherwise interested in the transaction, approve such investment as being fair and reasonable to the Company and on substantially the same terms and conditions as those received by the other joint venturers.

(iii) Subject to any limitations in Section 9.4, the Company may invest in equity securities only if a majority of Directors (including a majority of Independent Directors) not otherwise interested in the transaction approve such investment as being fair, competitive and commercially reasonable.

**SECTION 9.4 INVESTMENT LIMITATIONS.** In addition to other investment restrictions imposed by the Board from time to time, consistent with the Company's objective of qualifying as a REIT, the following shall apply to the Company's investments:

(i) Not more than 10% of the Company's total assets shall be invested in Unimproved Real Property or mortgage loans on Unimproved Real Property.

(ii) The Company shall not invest in commodities or commodity future contracts. This limitation is not intended to apply to futures contracts, when used solely for hedging purposes in connection with the Company's ordinary business of investing in real estate assets and mortgages.

(iii) The Company shall not invest in or make any Mortgage unless an appraisal is obtained concerning the underlying property except for those loans insured or guaranteed by a government or government agency. In cases in which a majority of Independent Directors so determine, and in all cases in which the transaction is with the Advisor, Sponsor, Directors, or any Affiliates thereof, such appraisal of the underlying property must be obtained from an Independent Appraiser. Such appraisal shall be maintained in the Company's records for at least five (5) years and shall be available for inspection and duplication by any Stockholder. In addition to the appraisal, a mortgagee's or owner's title insurance policy or commitment as to the priority of the mortgage or condition of the title must be obtained.

(iv) The Company shall not make or invest in any Mortgage, including a construction loan, on any one (1) property if the aggregate amount of all mortgage loans outstanding on the property, including the loans of the Company, would exceed an amount equal to eighty-five percent (85%) of the appraised value of the property as determined by appraisal unless substantial justification exists because of the presence of other underwriting criteria. For purposes of this subsection, the "aggregate amount of all mortgage loans outstanding on the property, including the loans of the Company" shall include all interest (excluding contingent participation in income and/or appreciation in value of the mortgaged property), the current payment of which may be deferred pursuant to the terms of such loans, to the extent that deferred interest on each loan exceeds five percent (5%) per annum of the principal balance of the loan.

(v) The Company shall not invest in indebtedness secured by a mortgage on real property which is subordinate to the lien or other indebtedness of the Advisor, any Director, the Sponsor or any Affiliate of the Company.

(vi) The Company shall not issue (A) equity Securities redeemable solely at the option of the holder (except that Stockholders may offer their Common Shares to the Company pursuant to any redemption plan adopted by the Board on terms outlined in the Prospectus relating to any Offering, as such plan is thereafter amended in accordance with its terms); (B) debt Securities unless the historical debt service coverage (in the most recently completed fiscal year) as adjusted for known changes is sufficient to properly service that higher level of debt; (C) equity Securities on a deferred payment basis or under similar arrangements; or (D) options or warrants to the Advisor, Directors, Sponsor or any Affiliate thereof except on the same terms as such options or warrants are sold to the general public. Options or warrants may be issued to persons other than the Advisor, Directors, Sponsor or any Affiliate thereof, but not at exercise prices less than the fair market value of the underlying Securities on the date of grant and not for consideration (which may include services) that in the judgment of the Independent Directors has a market value less than the value of such option or warrant on the date of grant. Options or warrants issuable to the Advisor, Directors, Sponsor or any Affiliate thereof shall not exceed ten percent (10%) of the outstanding Shares on the date of grant. The voting rights per share of Shares of the Company (other than the publicly held Shares of the Company) sold in a private offering shall not exceed the voting rights which bear the same relationship to the voting rights of the publicly held Shares as the consideration paid to the Company for each privately offered Share of the Company bears to the book value of each outstanding publicly held Share.

(vii) A majority of the Directors shall authorize the consideration to be paid for each Asset, ordinarily based on the fair market value of the Asset. If a majority of the Independent Directors determine, or if the Asset is acquired from the Advisor, a Director, the Sponsor or their Affiliates, such fair market value shall be determined by a qualified Independent Appraiser selected by the Independent Directors.

(viii) The aggregate Leverage shall be reasonable in relation to the Net Assets and shall be reviewed by the Board at least quarterly. The maximum amount of such Leverage shall not exceed three hundred percent (300%) of the Net Assets as of the date of any borrowing. Notwithstanding the foregoing, Leverage may exceed such limit if any excess in borrowing over such 300% level is approved by a majority of the Independent Directors. Any such excess borrowing shall be disclosed to Stockholders in the next quarterly report of the Company following such borrowing, along with justification for such excess.

(ix) The Company will continually review its investment activity to attempt to ensure that it is not classified as an "investment company" under the Investment Company Act of 1940, as amended.

(x) The Company will not make any investment that the Company believes will be inconsistent with its objectives of qualifying and remaining qualified as a REIT unless and until the Board determines, in its sole discretion, that REIT qualification is not in the best interests of the Company.

(xi) The Company shall not invest in real estate contracts of sale unless such contracts of sale are in recordable form and appropriately recorded in the chain of title.

## ARTICLE X

### CONFLICTS OF INTEREST

**SECTION 10.1 SALES AND LEASES TO COMPANY.** The Company may purchase or lease an Asset or Assets from the Sponsor, the Advisor, a Director, or any Affiliate thereof upon a finding by a majority of Directors (including a majority of Independent Directors) not otherwise interested in the transaction that such transaction is fair and reasonable to the Company and at a price to the Company no greater than the cost of the Asset to such Sponsor, Advisor, Director or Affiliate, or, if the price to the Company is in excess of such cost, that substantial justification for such excess exists and such excess is reasonable. In no event shall the purchase price of any Property to the Company exceed its current appraised value.

**SECTION 10.2 SALES AND LEASES TO THE SPONSOR, ADVISOR, DIRECTORS OR AFFILIATES.** An Advisor, Sponsor, Director or Affiliate thereof may purchase or lease Assets from the Company if a majority of Directors (including a majority of Independent Directors) not otherwise interested in the transaction determine that the transaction is fair and reasonable to the Company.

### SECTION 10.3 OTHER TRANSACTIONS.

(i) No goods or services will be provided by the Advisor or its Affiliates to the Company unless a majority of the Directors (including a majority of the Independent Directors) not otherwise interested in such transaction approve such transaction as fair and reasonable to the Company and on terms and conditions not less favorable to the Company than those available from unaffiliated third parties.

(ii) The Company shall not make loans to the Sponsor, Advisor, Directors or any Affiliates thereof except Mortgages pursuant to Section 9.4(iii) hereof or loans to wholly owned subsidiaries of the Company. The Sponsor, Advisor, Directors and any Affiliates thereof shall not make loans to the Company, or to joint ventures in which the Company is a co-venturer, unless approved by a majority of the Directors (including a majority of the Independent Directors) not otherwise interested in such transaction as fair, competitive, and commercially reasonable, and no less favorable to the Company than comparable loans between unaffiliated parties.

**SECTION 10.4 CONFLICT RESOLUTION PROCEDURES.** In the event that an investment opportunity becomes available that is suitable for both the Company and a public or private entity with which the Advisor or its Affiliates are affiliated, for which both entities have sufficient uninvested funds, then the entity that has had the longest period of time elapse since it was offered an investment opportunity will first be offered the investment opportunity. An investment opportunity will not be considered suitable for an entity if the 2%/25% Guidelines could not be satisfied if the entity were to make the investment. In determining whether or not an investment opportunity is suitable for more than one entity, the Board and the Advisor will examine such factors, among others, as the cash requirements of each entity, the effect of the acquisition both on diversification of each entity's investments by type of property and geographic area and on diversification of the tenants of its properties, the policy of each entity relating to leverage of properties, the anticipated cash flow of each entity, the income tax effects of the purchase to each entity, the size of the investment and the amount of funds available to each program and the length of time such funds have been available for investment. If a subsequent development, such as a delay in the closing of the acquisition of such investment or a delay in the construction of a property, causes any such investment, in the opinion of the Board and the Advisor, to be more appropriate for an entity other than the entity that committed to make the investment, the Advisor may determine that the other entity affiliated with the Advisors or its Affiliates will make the investment. It shall be the duty of the Board, including the Independent Directors, to ensure that the method used by the Advisor for the allocation of the acquisition of investments by two or more affiliated programs seeking to acquire similar types of Assets is applied fairly to the Company.

## ARTICLE XI

### STOCKHOLDERS

**SECTION 11.1 MEETINGS OF STOCKHOLDERS.** There shall be an annual meeting of the Stockholders, to be held at such time and place as shall be determined by or in the manner prescribed in the Bylaws, at which the

Directors shall be elected and any other proper business may be conducted. The annual meeting will be held on a date that is a reasonable period of time following the distribution of the Company's annual report to Stockholders but not less than thirty (30) days after delivery of such report. A majority of Stockholders present in person or by proxy at an annual meeting at which a quorum is present, may, without the necessity for concurrence by the Board, vote to elect the Directors. A quorum shall be fifty percent (50%) of the then outstanding Shares. Special meetings of Stockholders may be called in the manner provided in the Bylaws, including by the president or by a majority of the Directors or a majority of the Independent Directors, and shall be called by an officer of the Company upon written request of Stockholders holding in the aggregate not less than ten percent (10%) of the outstanding Shares entitled to be voted on any issue proposed to be considered at any such special meeting. Notice of any special meeting of Stockholders shall be given as provided in the Bylaws, and the special meeting shall be held not less than 15 days nor more than 60 days after the delivery of such notice. If the meeting is called by written request of Stockholders as described in this Section 11.1, the special meeting shall be held at the time and place specified in the Stockholder request; provided, however, that if none is so specified, at such time and place convenient to the Stockholders. If there are no Directors, the officers of the Company shall promptly call a special meeting of the Stockholders entitled to vote for the election of successor Directors. Any meeting may be adjourned and reconvened as the Board may determine or as otherwise provided in the Bylaws.

**SECTION 11.2 VOTING RIGHTS OF STOCKHOLDERS.** Subject to the provisions of any class or series of Shares then outstanding and the mandatory provisions of any applicable laws or regulations, the Stockholders shall be entitled to vote only on the following matters: (a) election or removal of Directors, without the necessity for concurrence by the Board, as provided in Sections 11.1, 6.4 and 6.6 hereof; (b) amendment of the Charter, without the necessity for concurrence by the Board, as provided in Section 13.1 hereof; (c) reorganization of the Company as provided in Section 13.2 hereof; and (d) merger, consolidation or sale or other disposition of all or substantially all of the Company's assets, as provided in Section 13.3 hereof. Except with respect to the foregoing matters, no action taken by the Stockholders at any meeting shall in any way bind the Board.

**SECTION 11.3 VOTING LIMITATIONS ON SHARES HELD BY THE ADVISOR, DIRECTORS AND AFFILIATES.** With respect to Shares owned by the Advisor, any Director, or any of their Affiliates, neither the Advisor, nor such Director(s), nor any of their Affiliates may vote or consent on matters submitted to the Stockholders regarding the removal of the Advisor, such Director(s) or any of their Affiliates or any transaction between the Company and any of them. In determining the requisite percentage in interest of Shares necessary to approve a matter on which the Advisor, such Director(s) and any of their Affiliates may not vote or consent, any Shares owned by any of them shall not be included.

**SECTION 11.4 RIGHT OF INSPECTION.** Any Stockholder and any designated representative thereof shall be permitted access to the records of the Company to which it is entitled under applicable law at all reasonable times, and may inspect and copy any of them for a reasonable charge. Inspection of the Company books and records by the office or agency administering the securities laws of a jurisdiction shall be provided upon reasonable notice and during normal business hours.

**SECTION 11.5 ACCESS TO STOCKHOLDER LIST.** An alphabetical list of the names, addresses and telephone numbers of the Stockholders of the Company, along with the number of Shares held by each of them (the "STOCKHOLDER LIST"), shall be maintained as part of the books and records of the Company and shall be available for inspection by any Stockholder or the Stockholder's designated agent at the home office of the Company upon the request of the Stockholder. The Stockholder List shall be updated at least quarterly to reflect changes in the information contained therein. A copy of such list shall be mailed to any Stockholder so requesting within ten (10) days of receipt by the Company of the request. The copy of the Stockholder List shall be printed in alphabetical order, on white paper, and in a readily readable type size (in no event smaller than 10-point type). The Company may impose a reasonable charge for expenses incurred in reproduction pursuant to the Stockholder request. A Stockholder may request a copy of the Stockholder List in connection with matters relating to Stockholders' voting rights, and the exercise of Stockholder rights under federal proxy laws.

If the Advisor or the Board neglects or refuses to exhibit, produce or mail a copy of the Stockholder List as requested, the Advisor and/or the Board, as the case may be, shall be liable to any Stockholder requesting the list for the costs, including reasonable attorneys' fees, incurred by that Stockholder for compelling the production of the Stockholder List, and for actual damages suffered by any Stockholder by reason of such refusal or neglect. It shall

be a defense that the actual purpose and reason for the requests for inspection or for a copy of the Stockholder List is to secure such list of Stockholders or other information for the purpose of selling such list or copies thereof, or of using the same for a commercial purpose other than in the interest of the applicant as a Stockholder relative to the affairs of the Company. The Company may require the Stockholder requesting the Stockholder List to represent that the list is not requested for a commercial purpose unrelated to the Stockholder's interest in the Company. The remedies provided hereunder to Stockholders requesting copies of the Stockholder List are in addition, to and shall not in any way limit, other remedies available to Stockholders under federal law, or the laws of any state.

**SECTION 11.6 REPORTS.** The Directors, including the Independent Directors, shall take reasonable steps to insure that the Company shall cause to be prepared and mailed or delivered to each Stockholder as of a record date after the end of the fiscal year and each holder of other publicly held Securities within one hundred twenty (120) days after the end of the fiscal year to which it relates an annual report for each fiscal year ending after the Commencement of the Initial Public Offering that shall include: (i) financial statements prepared in accordance with generally accepted accounting principles which are audited and reported on by independent certified public accountants; (ii) the ratio of the costs of raising capital during the period to the capital raised; (iii) the aggregate amount of advisory fees and the aggregate amount of other fees paid to the Advisor and any Affiliate of the Advisor by the Company and including fees or charges paid to the Advisor and any Affiliate of the Advisor by third parties doing business with the Company; (iv) the Total Operating Expenses of the Company, stated as a percentage of Average Invested Assets and as a percentage of its Net Income; (v) a report from the Independent Directors that the policies being followed by the Company are in the best interests of its Stockholders and the basis for such determination; and (vi) separately stated, full disclosure of all material terms, factors and circumstances surrounding any and all transactions involving the Company, Directors, Advisors, Sponsors and any Affiliate thereof occurring in the year for which the annual report is made, and the Independent Directors shall be specifically charged with a duty to examine and comment in the report on the fairness of such transactions.

**SECTION 11.7 PROXY TO LIQUIDATE.** At any time after twelve (12) years following the Termination of the Offering, if the Company is not then in the process of Listing or making an orderly dissolution, upon receipt by the Secretary of the Company of written requests from Stockholders holding ten percent (10%) or more of the outstanding shares of Common Stock (the "PROXY REQUEST") directing that the Company formally proxy the Stockholders holding Shares entitled to vote thereon to determine whether the Company should be dissolved (the "PROXY TO LIQUIDATE"), the Company shall send a Proxy to Liquidate to each Stockholder holding Shares entitled to vote thereon within sixty (60) days of receipt of the Proxy Request, or as soon as reasonably practicable thereafter following the receipt of independent appraisals of the Company's Assets, which the Company shall obtain as part of this proxy process, and the filing and review of such Proxy to Liquidate by the Securities and Exchange Commission. The Company shall not be required to send Proxies to Liquidate to Stockholders holding Shares entitled to vote thereon more frequently than once during every two (2) year period. To insure that Stockholders are adequately informed when casting their votes, the Proxy to Liquidate furnished to each Stockholder holding Shares entitled to vote thereon shall include financial information setting forth per Share pro forma tax and financial projections that assume that all of the Company's Assets will be sold immediately at prices consistent with their appraised values, or such other information as the Company deems appropriate and informative, provided in all such cases that the furnishing of such information to Stockholders shall not contravene applicable law or applicable rules and regulations of the Securities and Exchange Commission regarding the solicitation of proxies. The Proxy to Liquidate shall contain a forty-five (45) day voting deadline or set a meeting of the Stockholders holding Shares entitled to vote thereon no earlier than forty-five (45) days after notice thereof, and the actual voting results shall be tabulated by the Company's independent accountants who will receive the votes directly from the Stockholders holding Shares entitled to vote thereon. The Company shall disclose the complete voting results for the Proxy to Liquidate in the Company's next annual or quarterly report on Form 10-K or 10-Q sent to the Stockholders for the period following the date on which voting was completed. If a majority vote of the Stockholders holding Shares entitled to vote thereon is cast in favor of the dissolution of the Company, the Assets of the Company shall be fully liquidated within thirty (30) months from the close of the voting deadline applicable to the Proxy to Liquidate. Under no circumstances, however, shall the Board direct the Partnership to make distributions "in kind" of any Assets to the Stockholders under any dissolution conducted pursuant to this Section.

## ARTICLE XII

### LIABILITY OF STOCKHOLDERS, DIRECTORS, ADVISORS AND AFFILIATES; TRANSACTIONS BETWEEN AFFILIATES AND THE COMPANY

**SECTION 12.1 LIMITATION OF STOCKHOLDER LIABILITY.** No Stockholder shall be liable for any debt, claim, demand, judgment or obligation of any kind of, against or with respect to the Company by reason of his being a Stockholder, nor shall any Stockholder be subject to any personal liability whatsoever, in tort, contract or otherwise, to any Person in connection with the Company's assets or the affairs of the Company by reason of his being a Stockholder.

**SECTION 12.2 LIMITATION OF DIRECTOR AND OFFICER LIABILITY.** Except as otherwise limited in this Section 12.2, no Director or officer of the Company shall be liable to the Company or to any Stockholder for money damages to the extent that Maryland law, in effect from time to time, permits the limitation of the liability of directors and officers of a corporation. Notwithstanding the foregoing, no Director or officer of the Company shall be held harmless for any loss or liability suffered by the Company and may be liable to the Company and to any Stockholder for money damages unless: (i) the Director or officer of the Company has determined, in good faith, that the course of conduct that caused the loss or liability was in the best interests of the Company; (ii) the Director or officer of the Company was acting on behalf of or performing services on the part of the Company; (iii) the liability or loss was not the result of negligence or misconduct by the Director or officer of the Company, except that in the event the Director is or was an Independent Director, the liability or loss was not the result of gross negligence or willful misconduct by the Independent Director; and (iv) the agreement to hold harmless is recoverable only out of the Net Assets of the Company and not from the Stockholders.

### SECTION 12.3 INDEMNIFICATION.

(i) The Company shall indemnify and hold harmless a Director, officer, employee, agent, Advisor or Affiliate (the "INDEMNITEE") against any or all losses or liabilities reasonably incurred by the Indemnitee in connection with or by reason of any act or omission performed or omitted to be performed on behalf of the Company in such capacity, provided, that the Indemnitee has determined, in good faith, that the course of conduct that caused the loss or liability was in the best interests of the Company. The Company shall not indemnify or hold harmless the Indemnitee if: (a) in the case that the Indemnitee is a Director (other than an Independent Director), an Advisor or an Affiliate, the loss or liability was the result of negligence or misconduct by the Indemnitee, or (b) in the case that the Indemnitee is an Independent Director, the loss or liability was the result of gross negligence or willful misconduct by the Indemnitee. Any indemnification of expenses or agreement to hold harmless may be paid only out of the net assets of the Company, and no portion may be recoverable from the Stockholders.

(ii) The Company shall not provide indemnification for any loss, liability or expense arising from or out of an alleged violation of federal or state securities laws by such party unless one or more of the following conditions are met: (a) there has been a successful adjudication on the merits of each count involving alleged material securities law violations as to the Indemnitee, (b) such claims have been dismissed with prejudice on the merits by a court of competent jurisdiction as to the Indemnitee; or (c) a court of competent jurisdiction approves a settlement of the claims against the Indemnitee and finds that indemnification of the settlement and the related costs should be made, and the court considering the request for indemnification has been advised of the position of the Securities and Exchange Commission and of the published position of any state securities regulatory authority in which Securities were offered or sold as to indemnification for violations of securities laws.

(iii) Notwithstanding anything to the contrary contained in the provisions of subsection (i) and (ii) above of this Section, the Company shall not indemnify or hold harmless an Indemnitee if it is established that: (a) the act or omission was material to the loss or liability and was committed in bad faith or was the result of active or deliberate dishonesty, (b) the Indemnitee actually received an improper personal benefit in money, property or services, (c) in the case of any criminal proceeding, the Indemnitee had reasonable cause to believe that the act or omission was unlawful, or (d) in a proceeding by or in the right of the Company, the Indemnitee shall have been adjudged to be liable to the Company.

(iv) The Board may take such action as is necessary to carry out this Section 12.3 and is expressly empowered to adopt, approve and amend from time to time Bylaws, resolutions or contracts implementing such provisions. No amendment of the Charter or repeal of any of its provisions shall limit or eliminate the right of indemnification provided hereunder with respect to acts or omissions occurring prior to such amendment or repeal.

**SECTION 12.4 PAYMENT OF EXPENSES.** The Company shall pay or reimburse reasonable legal expenses and other costs incurred by an Indemnitee in advance of final disposition of a proceeding if all of the following are satisfied: (i) the proceeding relates to acts or omissions with respect to the performance of duties or services on behalf of the Company, (ii) the Indemnitee provides the Company with written affirmation of the Indemnitee's good faith belief that the Indemnitee has met the standard of conduct necessary for indemnification by the Company as authorized by Section 12.3 hereof, (iii) the legal proceeding was initiated by a third party who is not a Stockholder or, if by a Stockholder of the Company acting in his or her capacity as such, a court of competent jurisdiction approves such advancement, and (iv) the Indemnitee provides the Company with a written agreement to repay the amount paid or reimbursed by the Company, together with the applicable legal rate of interest thereon, if it is ultimately determined that the Indemnitee did not comply with the requisite standard of conduct and is not entitled to indemnification. Any indemnification payment or reimbursement of expenses will be furnished in accordance with the procedures in Section 2-418(e) of the MGCL or any successor statute.

**SECTION 12.5 EXPRESS EXCULPATORY CLAUSES IN INSTRUMENTS.** Neither the Stockholders nor the Directors, officers, employees or agents of the Company shall be liable under any written instrument creating an obligation of the Company by reason of their being Stockholders, Directors, officers, employees or agents of the Company, and all Persons shall look solely to the Company's assets for the payment of any claim under or for the performance of that instrument. The omission of the foregoing exculpatory language from any instrument shall not affect the validity or enforceability of such instrument and shall not render any Stockholder, Director, officer, employee or agent liable thereunder to any third party, nor shall the Directors or any officer, employee or agent of the Company be liable to anyone as a result of such omission.

**SECTION 12.6 TRANSACTIONS WITH AFFILIATES.** The Company shall not engage in transactions with the Advisor, the Sponsor, a Director or any of the Company's Affiliates, except to the extent that each such transaction has, after disclosure of such affiliation, been approved or ratified by the affirmative vote of a majority of the Directors (including a majority of the Independent Directors) not Affiliated with the Person who is party to the transaction and:

- (i) The transaction is fair and reasonable to the Company.
- (ii) The terms and conditions of such transaction are not less favorable to the Company than those available from unaffiliated third parties.
- (iii) If an acquisition is involved, the total consideration is not in excess of the appraised value of the Property being acquired, as determined by an Independent Appraiser.

## **ARTICLE XIII**

### **AMENDMENT; REORGANIZATION; MERGER, ETC.**

**SECTION 13.1 AMENDMENT.** The Company reserves the right from time to time to make any amendment to its Charter, now or hereafter authorized by law, including any amendment altering the terms or contract rights, as expressly set forth in the Charter, of any shares of outstanding stock. All rights and powers conferred by the Charter on Stockholders, Directors and officers are granted subject to this reservation. Except as otherwise provided in the Charter, and to the extent otherwise permitted by Maryland law, any amendment to the Charter shall be valid only if approved by the affirmative vote of a majority of all votes entitled to be cast on the matter, including without limitation, (1) any amendment which would adversely affect the rights, preferences and privileges of the Stockholders and (2) any amendment to Article IX, Article X, Article XII, Article XIV, Sections 6.2, 6.5, 6.6, 13.2 and 13.3 hereof and this Section 13.1 (or any other amendment of these Eighth Articles of Amendment and Restatement that would have the effect of amending such sections).



**SECTION 13.2 REORGANIZATION.** Subject to the provisions of any class or series of Shares at the time outstanding, the Board shall have the power (i) to cause the organization of a corporation, association, trust or other organization to take over the Company's assets and to carry on the affairs of the Company, or (ii) to merge the Company into, or sell, convey and transfer the Company's assets to any such corporation, association, trust or organization in exchange for securities thereof or beneficial interests therein, and the assumption by the transferee of the liabilities of the Company, and upon the occurrence of (i) or (ii) above, terminate the Company and deliver such securities or beneficial interests ratably among the Stockholders according to the respective rights of the class or series of Shares held by them; provided, however, that any such action shall have been approved, at a meeting of the Stockholders called for that purpose, by the affirmative vote of the holders of not less than a majority of the Shares then outstanding and entitled to vote thereon.

**SECTION 13.3 MERGER, CONSOLIDATION OR SALE OF COMPANY ASSETS.** Subject to the provisions of any class or series of Shares then outstanding, the Board shall have the power to (i) merge the Company into another entity, (ii) consolidate the Company with one (1) or more other entities into a new entity; (iii) sell or otherwise dispose of all or substantially all of the Company's assets; or (iv) dissolve or liquidate the Company, other than before the initial investment in Assets; provided, however, that such action shall have been approved, at a meeting of the Stockholders called for that purpose, by the affirmative vote of the holders of not less than a majority of the Shares then outstanding and entitled to vote thereon. Any such transaction involving an Affiliate of the Company or the Advisor also must be approved by a majority of the Directors (including a majority of the Independent Directors) not otherwise interested in such transaction as fair and reasonable to the Company and on terms and conditions not less favorable to the Company than those available from unaffiliated third parties.

In connection with any proposed Roll-Up Transaction, an appraisal of all of the Company's assets shall be obtained from a competent Independent Appraiser. The Company's assets shall be appraised on a consistent basis, and the appraisal shall be based on the evaluation of all relevant information and shall indicate the value of the assets as of a date immediately prior to the announcement of the proposed Roll-Up Transaction. The appraisal shall assume an orderly liquidation of the assets over a 12-month period. The terms of the engagement of the Independent Appraiser shall clearly state that the engagement is for the benefit of the Company and the Stockholders. A summary of the appraisal, indicating all material assumptions underlying the appraisal, shall be included in a report to Stockholders in connection with a proposed Roll-Up Transaction. In connection with a proposed Roll-Up Transaction, the person sponsoring the Roll-Up Transaction shall offer to Stockholders who vote against the proposed Roll-Up Transaction the choice of:

(i) accepting the securities of a Roll-Up Entity offered in the proposed Roll-Up Transaction; or

(ii) one of the following:

(a) remaining as Stockholders of the Company and preserving their interests therein on the same terms and conditions as existed previously; or

(b) receiving cash in an amount equal to the Stockholder's pro rata share of the appraised value of the net assets of the Company.

The Company is prohibited from participating in any proposed Roll-Up Transaction:

(i) that would result in the Stockholders having voting rights in a Roll-Up Entity that are less than the rights provided for in Sections 11 and 12.1 hereof;

(ii) that includes provisions that would operate as a material impediment to, or frustration of, the accumulation of Shares by any purchaser of the securities of the Roll-Up Entity (except to the minimum extent necessary to preserve the tax status of the Roll-Up Entity), or which would limit the ability of an investor to exercise the voting rights of its securities of the Roll-Up Entity on the basis of the number of Shares held by that investor;

(iii) in which investor's rights to access of records of the Roll-Up Entity will be less than those described in Sections 11.5 and 11.6 hereof; or

(iv) in which any of the costs of the Roll-Up Transaction would be borne by the Company if the Roll-Up Transaction is not approved by the Stockholders.

#### ARTICLE XIV

##### DURATION OF COMPANY

SECTION 14.1 TERMINATION UPON FAILURE TO OBTAIN LISTING. In the event that either (i) Listing does not occur on or before the twelfth anniversary of the Termination of the Initial Public Offering (unless a majority of the Board and a majority of the Independent Directors shall approve otherwise and set a future date for such Listing and the Company's dissolution) or (ii) the vote of Stockholders holding a majority of the outstanding Shares approves the termination of the Company, without necessity for concurrence by the Board and regardless of any extension by the Board, the Company shall immediately thereafter undertake an orderly liquidation and Sale of the Company's assets and will distribute any Net Sales Proceeds therefrom to Stockholders, following which the Company shall terminate and dissolve. In the event that Listing occurs on or before such date, the Company shall continue perpetually unless dissolved pursuant to the provisions contained herein or pursuant to any applicable provision of the MGCL.

#### ARTICLE XV

##### MISCELLANEOUS

SECTION 15.1 GOVERNING LAW. These Articles of Amendment and Restatement are executed by the incorporator named above and delivered in the State of Maryland with reference to the laws thereof, and the rights of all parties and the validity, construction and effect of every provision hereof shall be subject to and construed according to the laws of the State of Maryland without regard to conflicts of laws provisions thereof; provided, however, that to the extent that the MGCL conflicts with the provisions set forth in the NASAA REIT Guidelines, the NASAA REIT Guidelines control to the extent any provisions of the MGCL are not mandatory. Determinations regarding the existence of any such conflict between the NASAA REIT Guidelines and the provisions of the MGCL shall be made by the Board in accordance with the provisions of Section 15.3 hereof.

SECTION 15.2 RELIANCE BY THIRD PARTIES. Any certificate shall be final and conclusive as to any persons dealing with the Company if executed by an individual who, according to the records of the Company or of any recording office in which this Charter may be recorded, appears to be the Secretary or an Assistant Secretary of the Company or a Director; and if certifying to: (i) the number or identity of Directors, officers of the Company or Stockholders; (ii) the due authorization of the execution of any document; (iii) the action or vote taken, and the existence of a quorum, at a meeting of the Board or Stockholders; (iv) a copy of the Charter or of the Bylaws as a true and complete copy as then in force; (v) an amendment to this Charter; (vi) the dissolution of the Company; or (vii) the existence of any fact or facts that relate to the affairs of the Company. No purchaser, lender, transfer agent or other person shall be bound to make any inquiry concerning the validity of any transaction purporting to be made on behalf of the Company by the Board or by any duly authorized officer, employee or agent of the Company.

##### SECTION 15.3 PROVISIONS IN CONFLICT WITH LAW OR REGULATIONS.

(i) The provisions of this Charter are severable, and if the Board shall determine that any one or more of such provisions are in conflict with the REIT Provisions of the Code, or other applicable federal or state laws, the conflicting provisions shall be deemed never to have constituted a part of this Charter, even without any amendment of this Charter pursuant to Section 13.1 hereof; provided, however, that such determination by the Board shall not affect or impair any of the remaining provisions of this Charter or render invalid or improper any action taken or omitted prior to such determination. No Director shall be liable for making or failing to make such a determination.

(ii) If any provision of this Charter shall be held invalid or unenforceable in any jurisdiction, such holding shall not in any manner affect or render invalid or unenforceable such provision in any other jurisdiction or any other provision of this Charter in any jurisdiction.

SECTION 15.4 CONSTRUCTION. In this Charter, unless the context otherwise requires, words used in the singular or in the plural include both the plural and singular and words denoting any gender include both genders. The title and headings of different parts are inserted for convenience and shall not affect the meaning, construction or effect of this Charter. In defining or interpreting the powers and duties of the Company and its Directors and officers, reference may be made, to the extent appropriate, to the Code and to Titles 1 through 3 of the MGCL.

SECTION 15.5 RECORDATION. These Eighth Articles of Amendment and Restatement and any amendment hereto shall be filed for record with the State Department of Assessments and Taxation of Maryland and may also be filed or recorded in such other places as the Board deem appropriate, but failure to file for record these Eighth Articles of Amendment and Restatement or any amendment hereto in any office other than in the State of Maryland shall not affect or impair the validity or effectiveness of these Eighth Articles of Amendment and Restatement or any amendment hereto. Any restated Charter shall, upon filing, be conclusive evidence of all amendments contained therein and may thereafter be referred to in lieu of the original Articles of Incorporation and the various amendments thereto.

THIRD: The Eighth Articles of Amendment and Restatement of the Charter as hereinabove set forth were duly adopted by the Board of Directors of the Company, acting by written consent, on March 26, 2008 and approved by the stockholders of the Company at a meeting held on July 24, 2008 as required by the MGCL.

FOURTH: The current address of the principal office of the Company is as set forth in Article III of the foregoing Eighth Articles of Amendment and Restatement of the Charter.


FIFTH: The name and address of the Company's current resident agent are as set forth in Article III of the foregoing Eighth Articles of Amendment and Restatement of the Charter.


SIXTH: As of the date of the filing of the foregoing Eighth Articles of Amendment and Restatement of the Charter, the number of directors of the Company is five, and the names of the directors are:

Robert S. Aisner  
Robert M. Behringer  
Charles G. Dannis  
Steven W. Partridge  
G. Ronald Witten

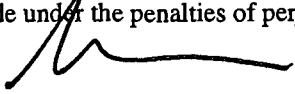
[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, Behringer Harvard REIT I, Inc. has caused these Eighth Articles of Amendment and Restatement to be signed in its name and on its behalf by its President, and attested by its Secretary, on this 24th day of July, 2008.

By:   
Robert S. Aisner  
President

ATTEST  
By:   
Telisa Webb Schelin  
Secretary

THE UNDERSIGNED, President of Behringer Harvard REIT I, Inc., who executed on behalf of said Company the foregoing Eighth Articles of Amendment and Restatement, of which this certificate is made a part, hereby acknowledges the foregoing Eighth Articles of Amendment and Restatement to be the corporate act of said Company and, as to all matters or facts required to be verified under oath, further acknowledges that, to the best of his knowledge, information and belief, these matters and facts are true in all material respects and that this statement is made under the penalties of perjury.

  
By: \_\_\_\_\_  
Robert S. Aisner  
President

CUST ID:0002163067  
WORK ORDER:0001606105  
DATE:07-25-2008 12:27 PM  
AMT. PAID:\$230.00

# EXHIBIT B

## NINTH ARTICLES OF AMENDMENT AND RESTATEMENT OF BEHRINGER HARVARD REIT I, INC.

FIRST: Behringer Harvard REIT I, Inc., a Maryland corporation, desires to amend and restate its charter as currently in effect and as hereinafter amended.

SECOND: The following provisions are all the provisions of the charter currently in effect and as hereinafter amended:

### ARTICLE I

#### NAME

The name of the corporation is Behringer Harvard REIT I, Inc. (the "Company"). So far as may be practicable, the business of the Company shall be conducted and transacted under that name. Under circumstances in which the Company's Board of Directors determines that the use of the name "Behringer Harvard REIT I, Inc." is not practicable, it may use any other designation or name for the Company.

### ARTICLE II

#### PURPOSES AND POWERS

The purposes for which the Company is formed are to engage in any lawful act or activity (including, without limitation or obligation, qualifying as a real estate investment trust under Sections 856 through 860, or any successor sections, of the Internal Revenue Code of 1986, as amended (the "Code")), for which corporations may be organized under the MGCL and the general laws of the State of Maryland as now or hereafter in force.

### ARTICLE III

#### RESIDENT AGENT AND PRINCIPAL OFFICE

The name and address of the resident agent for service of process of the Company in the State of Maryland is CSC - Lawyers Incorporating Service Company, 7 St. Paul Street, Suite 1660, Baltimore, Maryland 21202. The address of the Company's principal office in the State of Maryland is c/o CSC - Lawyers Incorporating Service Company, 7 St. Paul Street, Suite 1660, Baltimore, Maryland 21202. The Company may have such other offices and places of business within or outside the State of Maryland as the Board may from time to time determine.

### ARTICLE IV

#### DEFINITIONS

As used in the Charter, the following terms shall have the following meanings unless the context otherwise requires:

"AFFILIATE" or "AFFILIATED" means, with respect to any Person, (i) any Person directly or indirectly owning, controlling or holding, with the power to vote, 10% or more of the outstanding voting securities of such other Person; (ii) any Person 10% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held, with the power to vote, by such other Person; (iii) any Person directly or indirectly controlling, controlled by or under common control with such other Person; (iv) any executive officer, director, trustee or general partner of such other Person; and (v) any legal entity for which such Person acts as an executive officer, director, trustee or general partner.

"ASSET" means any Property, Mortgage or other investment (other than investments in bank accounts, money market funds or other current assets) owned by the Company, directly or indirectly through one or more of its

Affiliates, by the Company and any other investment made, directly or indirectly through one or more of its Affiliates.

"BOARD" means, collectively, the individuals named in Section 7.1 of the Charter and such other individuals who may be duly elected and qualified to serve as Directors thereafter to replace any such person or fill a vacancy caused by the death, removal or resignation of any such person or caused by an increase in the number of Directors.

"BYLAWS" means the Bylaws of the Company, as amended from time to time.

"CHANGE OF CONTROL" means any event (including, without limitation, issue, transfer or other disposition of shares of Equity Stock or equity interests in the Operating Partnership, merger, share exchange or consolidation) after which any "person" (as that term is used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, as amended) is or becomes the "beneficial owner" (as defined in Rule 13d-3 of the Securities Exchange Act of 1934, as amended), directly or indirectly, of Equity Stock of the Company or the Operating Partnership representing greater than 50% of the combined voting power of the Company's or the Operating Partnership's then outstanding securities, respectively; provided, that a Change of Control shall not be deemed to occur as a result of any widely distributed public offering of the Common Stock.

"CHARTER" means these Ninth Articles of Amendment and Restatement and any Articles of Amendment, Articles Supplementary or other modification or amendment thereto.

"CLOSING PRICE" means, on any date, with respect to shares of any class or series of outstanding Equity Stock, the last sale price for such shares of Equity Stock, regular way, or, in case no such sale takes place on such day, the average of the closing bid and asked prices, regular way, for such shares of Equity Stock, in either case as reported in the principal consolidated transaction reporting system with respect to securities Listed or admitted to trading on the NYSE or, if such shares of Equity Stock are not Listed or admitted to trading on the NYSE, as reported on the principal consolidated transaction reporting system with respect to securities Listed on the principal national securities exchange on which such shares of Equity Stock are Listed or, if such shares of Equity Stock are not Listed, the last quoted price, or, if not so quoted, the average of the high bid and low asked prices in the over-the-counter market, as reported by the principal automated quotation system that may then be in use or, if such shares of Equity Stock are not quoted by any such system, the average of the closing bid and asked prices as furnished by a professional market maker making a market in such shares of Equity Stock selected by the Board or, in the event that no trading price is available for such shares of Equity Stock, the estimated value of the shares of Equity Stock, as determined in good faith by the Board.

"CODE" shall have the meaning as provided in Article II herein.

"COMPANY" shall have the meaning as provided in Article I herein.

"COMPANY VALUE" means the actual value of the Company as a going concern based on the difference between (1) the actual value of all of its assets as determined in good faith by the Board and (2) all of its liabilities as set forth on its then current balance sheet; provided, that (A) if such Company Value is being determined in connection with a Change of Control that establishes the Company's net worth (e.g., a tender offer for the Common Stock, sale of all of the Common Stock or a merger) then the Company Value shall be the net worth established thereby, and (B) if such Company Value is being determined in connection with a Listing, then the Company Value shall be equal to the number of outstanding shares of Common Stock multiplied by the Closing Price of a single share of Common Stock averaged over a period of 30 trading days during which the Common Stock is Listed. For purposes hereof, a "trading day" shall be any day on which the NYSE is open for trading whether or not the Common Stock is then Listed on the NYSE and whether or not there is an actual trade of Common Stock on any such day. If the holder of Convertible Stock disagrees as to the Company Value as determined by the Board, then each of the holder of Convertible Stock and the Company shall name one appraiser and the two named appraisers shall promptly agree in good faith to the appointment of one other appraiser whose determination of the actual value of the Company as a going concern shall be final and binding on the parties as to Company Value. The cost of any such appraisal shall be split evenly between the Company and the holder of the Convertible Stock.

"DIRECTOR" means a member of the Board.

"DISTRIBUTIONS" means any distributions of money or other property, pursuant to Section 5.2(iii) hereof, by the Company to owners of Equity Stock, including distributions that may constitute a return of capital for federal income tax purposes.

"INVESTED CAPITAL" means the amount calculated by multiplying the total number of shares of Equity Stock purchased by Stockholders by the issue price, reduced by the portion of any Distribution that is attributable to Net Sales Proceeds and by any amounts paid by the Company to repurchase shares of Equity Stock pursuant to the Company's plan for the repurchase of shares of Equity Stock.

"JOINT VENTURES" means those joint venture or partnership arrangements in which the Company or the Operating Partnership is a co-venturer or general partner established to acquire or hold Assets.

"LISTING" means the listing of the shares of Equity Stock on a national securities exchange. Upon such Listing, the shares of Equity Stock shall be deemed "Listed."

"MGCL" means the Maryland General Corporation Law, as amended from time to time.

"MORTGAGES" means, in connection with mortgage financing provided, invested in, participated in or purchased by the Company, all of the notes, deeds of trust, security interests or other evidences of indebtedness or obligations, which are secured or collateralized by Real Property owed by the borrowers under such notes, deeds of trust, security interests or other evidences of indebtedness or obligations.

"NET SALES PROCEEDS" means in the case of a transaction described in clause (i) (A) of the definition of Sale, the proceeds of any such transaction less the amount of selling expenses incurred by or on behalf of the Company, including all real estate commissions, closing costs and legal fees and expenses. In the case of a transaction described in clause (i) (B) of such definition, Net Sales Proceeds means the proceeds of any such transaction less the amount of selling expenses incurred by or on behalf of the Company, including any legal fees and expenses and other selling expenses incurred in connection with such transaction. In the case of a transaction described in clause (i) (C) of such definition, Net Sales Proceeds means the proceeds of any such transaction actually distributed to the Company from the Joint Venture less the amount of any selling expenses, including legal fees and expenses incurred by or on behalf of the Company (other than those paid by the Joint Venture). In the case of a transaction or series of transactions described in clause (i) (D) of such definition, Net Sales Proceeds means the proceeds of any such transaction (including the aggregate of all payments under a Mortgage on or in satisfaction thereof other than regularly scheduled interest payments) less the amount of selling expenses incurred by or on behalf of the Company, including all commissions, closing costs and legal fees and expenses. In the case of a transaction described in clause (i)(E) of such definition, Net Sales Proceeds means the proceeds of any such transaction less the amount of selling expenses incurred by or on behalf of the Company, including any legal fees and expenses and other selling expenses incurred in connection with such transaction. In the case of a transaction described in clause (ii) of the definition of Sale, Net Sales Proceeds means the proceeds of such transaction or series of transactions less all amounts generated thereby which are reinvested in one or more Assets within 180 days thereafter and less the amount of any real estate commissions, closing costs, and legal fees and expenses and other selling expenses incurred by or allocated to the Company in connection with such transaction or series of transactions. Net Sales Proceeds shall also include any consideration (including non-cash consideration such as stock, notes or other property or securities) that the Company determines, in its discretion, to be economically equivalent to proceeds of a Sale, valued in the reasonable determination of the Company. Net Sales Proceeds shall not include any reserves established by the Company in its sole discretion.

"NYSE" means the New York Stock Exchange, or any successor exchange.

"OPERATING PARTNERSHIP" means Behringer Harvard Operating Partnership 1 LP, through which the Company may own Assets.

"PERSON" means an individual, corporation, partnership, limited liability company, estate, trust (including a trust qualified under Sections 401(a) or 501(c)(17) of the Code), a portion of a trust permanently set aside for or to be used exclusively for the purposes described in Section 642(c) of the Code, association, private foundation within the meaning of Section 509(a) of the Code, joint stock company or other entity and also includes a "group" as that term is used for purposes of Rule 13d-5(b) or Section 13(d)(3) of the Securities Exchange Act of 1934, as amended, and a group to which an Excepted Holder Limit applies.

"PROPERTY" or "PROPERTIES" means, as the context requires, any, or all, respectively, of the Real Property acquired by the Company, directly or indirectly through joint venture arrangements or other partnership or investment interests.

"REAL PROPERTY" means land, rights in land (including leasehold interests), and any buildings, structures, improvements, furnishings, fixtures and equipment located on or used in connection with land and rights or interests in land.

"REIT" means a corporation, trust, association or other legal entity (other than a real estate syndication) that is engaged primarily in investing in equity interests in real estate (including fee ownership and leasehold interests) or in loans secured by real estate or both as defined pursuant to the REIT Provisions of the Code.

"REIT PROVISIONS OF THE CODE" means Sections 856 through 860 of the Code and any successor or other provisions of the Code relating to real estate investment trusts (including provisions as to the attribution of ownership of beneficial interests therein) and the regulations promulgated thereunder.

"SALE" or "SALES" means (i) any transaction or series of transactions whereby: (A) the Company or the Operating Partnership directly or indirectly (except as described in other subsections of this definition) sells, grants, transfers, conveys, or relinquishes its ownership of any Property or portion thereof, including the lease of any Property consisting of a building only, and including any event with respect to any Property which gives rise to a significant amount of insurance proceeds or condemnation awards; (B) the Company or the Operating Partnership directly or indirectly (except as described in other subsections of this definition) sells, grants, transfers, conveys, or relinquishes its ownership of all or substantially all of the interest of the Company or the Operating Partnership in any Joint Venture in which it is a co-venturer or partner; (C) any Joint Venture directly or indirectly (except as described in other subsections of this definition) in which the Company or the Operating Partnership as a co-venturer or partner sells, grants, transfers, conveys, or relinquishes its ownership of any Property or portion thereof, including any event with respect to any Property which gives rise to insurance claims or condemnation awards; or (D) the Company or the Operating Partnership directly or indirectly (except as described in other subsections of this definition) sells, grants, conveys or relinquishes its interest in any Mortgage or other loan or portion thereof (including with respect to any Mortgage or other loan, all payments thereunder or in satisfaction thereof other than regularly scheduled interest payments) of amounts owed pursuant to such Mortgage or other loan and any event with respect to a Mortgage or other loan which gives rise to a significant amount of insurance proceeds or similar awards; or (E) the Company or the Operating Partnership directly or indirectly (except as described in other subsections of this definition) sells, grants, transfers, conveys, or relinquishes its ownership of any other Asset not previously described in this definition or any portion thereof, but (ii) not including any transaction or series of transactions specified in clause (i) (A) through (E) above in which the net proceeds of such transaction or series of transactions are reinvested in one or more Assets within 180 days thereafter.

"SDAT" means the State Department of Assessments and Taxation of Maryland.

"STOCK DIVIDEND" means any dividend or other Distribution paid to Stockholders in the form of additional shares of Equity Stock.

"STOCKHOLDERS" means the holders of record of the Company's Equity Stock as maintained in the books and records of the Company or its transfer agent.

"STOCKHOLDERS' 9% RETURN" means, as of any date, an aggregate amount equal to a 9% cumulative, non-compounded, annual return on Invested Capital (calculated like simple interest); provided, however, that for purposes of calculating the Stockholders' 9% Return, any Stock Dividend shall not be included as a Distribution;



and provided, further, that for purposes of determining the Stockholders' 9% Return, the return for each portion of Invested Capital shall commence for purposes of the calculation upon the issuance of the shares of Equity Stock issued in connection with such Invested Capital.

## ARTICLE V

### STOCK

**SECTION 5.1 AUTHORIZED SHARES.** The total number of shares of all classes or series of stock of the Company that the Company shall have authority to issue (the "Equity Stock") is 400,000,000 shares, of which (i) 382,499,000 shall be designated as common stock \$0.0001 par value per share (the "Common Stock"); (ii) 1,000 shall be designated as non-participating, non-voting, convertible stock \$0.0001 par value per share (the "Convertible Stock"); and (iii) 17,500,000 shall be designated as preferred stock, \$0.0001 par value per share (the "Preferred Stock"). The aggregate par value of all authorized shares of Equity Stock having par value is \$40,000. If shares of one class of Equity Stock are classified or reclassified into shares of another class of Equity Stock pursuant to this Article V, the number of authorized shares of the former class shall be automatically decreased and the number of shares of the latter class shall be automatically increased, in each case by the number of shares so classified or reclassified, as the case may be, so that the aggregate number of shares of Equity Stock of all classes that the Company has authority to issue shall not be more than the total number of shares of Equity Stock set forth in the first sentence of this Section 5.1. Subject to any preferential rights in favor of any class of Preferred Stock, the Board, without any action by the Stockholders, may amend this Charter from time to time to (i) increase or decrease the aggregate number of shares of Equity Stock that the Company has authority to issue, or (ii) increase or decrease the number of shares of Equity Stock of any class or series that the Company has authority to issue.

### SECTION 5.2 COMMON STOCK.

(i) **COMMON STOCK SUBJECT TO TERMS OF PREFERRED STOCK.** The Common Stock shall be subject to the express terms of any series of Preferred Stock.

(ii) **DESCRIPTION.** Subject to the provisions of Article VI and except as may otherwise be specified in the Charter, each issued and outstanding share of Common Stock shall entitle the holder thereof to one vote per share on all matters presented for a vote of Stockholders. The Board may classify or reclassify any unissued shares of Common Stock from time to time into one or more classes or series of Equity Stock.

(iii) **DISTRIBUTION RIGHTS.** The Board from time to time may authorize and the Company may pay to Stockholders such dividends or other Distributions in cash or other property as the Board in its discretion shall determine. The Board shall endeavor to authorize, and the Company may pay, such dividends and Distributions as shall be necessary for the Company to qualify as a REIT under the REIT Provisions of the Code unless the Board has determined, in its sole discretion, that qualification as a REIT is not in the best interests of the Company; provided, however, Stockholders shall have no right to any dividend or other Distribution unless and until authorized by the Board and declared by the Company. The exercise of the powers and rights of the Board pursuant to this section shall be subject to the provisions of any class or series of Equity Stock at the time outstanding. The receipt by any Person in whose name any shares of Equity Stock are registered on the records of the Company or by his or her duly authorized agent shall be a sufficient discharge for all dividends or other Distributions payable or deliverable in respect of such shares of Equity Stock and from all liability to see to the application thereof.

(iv) **RIGHTS UPON LIQUIDATION.** Subject to any preferential rights in favor of any class of Preferred Stock, upon liquidation or dissolution of the Company, each issued and outstanding share of Common Stock shall be entitled to participate pro rata in the assets of the Company remaining after payment of, or adequate provision for, all the debts and liabilities of the Company.

(v) **VOTING RIGHTS.** Except as may be provided otherwise in the Charter, and subject to the express terms of any series of Preferred Stock, the holders of the Common Stock shall have the exclusive right to vote on all matters (as to which a common stockholder shall be entitled to vote pursuant to applicable law) at all meetings of the Stockholders of the Company.

**SECTION 5.3 PREFERRED STOCK.** The Board may classify any unissued shares of Preferred Stock and reclassify any previously classified but unissued shares of Preferred Stock of any series from time to time, into one or more classes or series of Equity Stock.

**SECTION 5.4 CONVERTIBLE STOCK.**

(i) **DISTRIBUTION RIGHTS.** The holders of any outstanding shares of Convertible Stock shall not be entitled to receive dividends or other Distributions on such shares of Convertible Stock.

(ii) **VOTING RIGHTS.**

(a) Except for the voting rights expressly conferred by Section 5.4(ii)(b) hereof, the holders of the outstanding shares of Convertible Stock shall not be entitled to (1) vote on any matter, or (2) receive notice of, or to participate in, any meeting of Stockholders at which they are not entitled to vote.

(b) The affirmative vote of the holders of at least two-thirds of the outstanding shares of Convertible Stock, voting together as a single class for such purposes, shall be required for the adoption of any amendment, alteration or repeal of any provision of the Charter that materially and adversely changes the preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications or terms and conditions of redemption of the shares of Convertible Stock (it being understood that an increase in the number of Directors is not, by itself, such a material and adverse change).

(c) Whenever the holders of Convertible Stock are entitled to vote as a single class on any matter pursuant to the provisions of Section 5.4(ii)(b) hereof, the vote required to approve such matter shall be the affirmative vote of at least two-thirds of all the votes entitled to be cast by the holders of Convertible Stock, with each share of Convertible Stock having one vote per share.

(iii) **CONVERSION.**

(a) Each outstanding share of Convertible Stock shall convert into a number of shares of Common Stock as set forth in Section 5.4(iii)(b) hereof, automatically and without any further action required, upon the occurrence of any of the following events (each a "Triggering Event"): (1) the date when the holders of the Common Stock have received distributions equal to or in excess of the sum of Invested Capital and the Stockholders' 9% Return (the "Liquidation Event"); or (2) Listing. In addition, each outstanding share of Convertible Stock shall become convertible into a number of shares of Common Stock as set forth in Section 5.4(iii)(c) hereof, automatically and without any further action required, upon the termination or expiration without renewal of the Advisory Agreement with Behringer Advisors, LLC, a Texas limited liability company, other than a termination by the Company because of a material breach by Behringer Advisors, LLC (an "Advisory Agreement Termination").

(b) Upon the occurrence of a Triggering Event, each share of Convertible Stock shall be converted into a number of shares of Common Stock equal to 1/1000 of the result of (1) the product of 0.15 times the amount, if any, by which (A) the sum of the Company Value as of the date of the Triggering Event plus the total Distributions paid to holders of Common Stock through the date of the Triggering Event, exceeds (B) the sum of Invested Capital plus the Stockholders' 9% Return as of the date of the Triggering Event, with such result divided by (2) the quotient of the Company Value divided by the number of outstanding shares of Common Stock on the date of the Triggering Event. Such conversion, in the case of conversion upon Listing, will not occur until the 31st trading day after the date of such Listing. If, in the good faith judgment of the Board, full conversion of all shares of Convertible Stock would jeopardize the Company's status as a REIT, then only that number of shares of Convertible Stock (or fraction thereof) shall be converted into shares of Common Stock such that the Company's REIT status is not jeopardized, and the remaining shares of Convertible Stock shall be deemed retired immediately upon such conversion.

(c) Upon the occurrence of an Advisory Agreement Termination prior to a Triggering Event, each share of Convertible Stock shall become convertible (but will not convert except as provided in the next

sentence of this Section 5.4(iii)(c)) into a number of shares of Common Stock equal to 1/1000 of the result of (1) the product of 0.15 times the amount, if any, by which (A) the sum of the Company Value as of the date of the Advisory Agreement Termination plus the total Distributions paid to holders of Common Stock through the date of the Advisory Agreement Termination, exceeds (B) the sum of Invested Capital plus the Stockholders' 9% Return, with such result divided by (2) the quotient of the Company Value divided by the number of outstanding shares of Common Stock on the date of the Advisory Agreement Termination. Thereafter, upon the occurrence of a Triggering Event, if the Company's investors have received distributions equal to the sum of Invested Capital plus the Stockholders' 9% Return, each share of Convertible Stock will automatically convert into the number of shares of Common Stock determined pursuant to the preceding sentence. If, in the good faith judgment of the Board, full conversion of all shares of Convertible Stock would jeopardize the Company's status as a REIT, then only that number of shares of Convertible Stock (or fraction thereof) shall be converted into shares of Common Stock such that the Company's REIT status is not jeopardized, and the remaining shares of Convertible Stock shall be deemed retired immediately upon such conversion.

(d) As promptly as practicable after a Triggering Event, including a Triggering Event that causes the Convertible Stock to automatically convert into Common Stock pursuant to Section 5.4(iii)(c) hereof, the Company shall issue and deliver to each holder of Convertible Stock a certificate or certificates representing the number of shares of Common Stock into which his, her or its shares of Convertible Stock were converted (or shall cause the issuance of such Common Stock to be reflected in the Company's stock ledger, if the shares of Common Stock are uncertificated). The person in whose name the shares of Common Stock are issued shall be deemed to have become a Stockholder of record on the date of conversion.

(e) The issuance of shares of Common Stock on conversion of outstanding shares of Convertible Stock shall be made by the Company without charge for expenses or for any tax in respect of the issuance of such shares.

(f) In the event of any reclassification or recapitalization of the outstanding Common Stock (except a change in par value, or from no par value to par value, or subdivision or other split or combination of the shares of Common Stock), or in case of any consolidation or merger to which the Company is a party, except a merger in which the Company is the surviving corporation and which does not result in any such reclassification or recapitalization, the Company or the successor or purchasing business entity shall provide that the holders of each share of Convertible Stock then outstanding shall thereafter have the right to convert such shares of Convertible Stock into the kind and amount of stock and other securities and property receivable, upon such reclassification, recapitalization, consolidation or merger, by a holder of the number of shares of Common Stock of the Company into which such shares of Convertible Stock might have been converted. The provisions of this Section 5.4(iii)(f) shall similarly apply to successive reclassifications, recapitalizations, consolidations or mergers.

(g) Shares of Common Stock issued on conversion of shares of Convertible Stock shall be issued as fully paid shares and shall be nonassessable by the Company. The Company shall, at all times, reserve and keep available, for the purpose of effecting the conversion of the outstanding Convertible Stock, such number of its duly authorized shares of Common Stock as shall be sufficient to effect the conversion of all of the outstanding shares of Convertible Stock.

(h) Shares of Convertible Stock converted as provided herein shall be reclassified as authorized but unissued shares of Common Stock.

(iv) **EXCEPTED HOLDER LIMIT FOR HOLDER OF CONVERTIBLE STOCK.** For purposes of Article VI hereof, the holder of the Convertible Stock shall have an Excepted Holder Limit (as such term is defined in Section 6.1) of a 20% interest (in value or number of as-converted shares, whichever is more restrictive) of the aggregate of the outstanding shares of Common Stock, subject to adjustment pursuant to Sections 6.2(vii) and 6.2(viii) hereof, including any adjustment approved by the Board.

**SECTION 5.5 CLASSIFIED OR RECLASSIFIED EQUITY STOCK.** Prior to issuance of classified or reclassified shares of any class or series of Equity Stock, the Board by resolution shall: (i) designate that class or series to distinguish it from all other classes and series of Equity Stock of the Company; (ii) specify the number of shares to be included in the class or series; (iii) set or change, subject to the provisions of Article VI and subject to

the express terms of any class or series of Stock outstanding at the time, the preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications and terms and conditions of redemption for each class or series; and (iv) cause the Company to file Articles Supplementary with the SDAT. Any of the terms of any class or series of Equity Stock set or changed pursuant to clause (iii) of this Section 5.5 may be made dependent upon facts or events ascertainable outside the Charter (including determinations by the Board or other facts or events within the control of the Company) and may vary among holders thereof; provided, that the manner in which such facts, events or variations shall operate upon the terms of such class or series of Equity Stock is clearly and expressly set forth in the Articles Supplementary filed with the SDAT or other parts of this Charter.

**SECTION 5.6 CHARTER AND BYLAWS.** The rights of all Stockholders and the terms of all Equity Stock are subject to the provisions of the Charter and the Bylaws, as this Charter and such Bylaws may be amended from time to time.

**SECTION 5.7 PREEMPTIVE RIGHTS.** Except as may be provided by the Board of Directors in setting the terms of classified or reclassified shares of Equity Stock pursuant to Section 5.5 or as may otherwise be provided by a contract approved by the Board, no Stockholder shall, as such Stockholder, have any preemptive right to purchase or subscribe for any additional shares of Equity Stock or any other security of the Company which it may issue or sell.

**SECTION 5.8 RIGHTS OF OBJECTING STOCKHOLDERS.** Holders of shares of Equity Stock shall not be entitled to exercise any rights of an objecting stockholder provided for under Title 3, Subtitle 2 or Subtitle 7 of the MGCL or any successor statute unless the Board, upon the affirmative vote of a majority of the entire Board, shall determine that such rights shall apply, with respect to all or any classes or series of Equity Stock, to a particular transaction or all transactions occurring after the date of such determination in connection with which holders of such shares would otherwise be entitled to exercise such rights.

**SECTION 5.9 MAJORITY VOTE SUFFICIENT.** Notwithstanding any provision of law permitting or requiring any action to be taken or approved by the affirmative vote of holders of shares entitled to cast a greater proportion of votes, any such action shall be taken or approved if taken or approved by the affirmative vote of holders of shares entitled to cast a majority of all the votes entitled to be cast with respect to such action, except as may be provided otherwise in this Charter or any Articles Supplementary with respect to any particular class or series of Equity Stock.

**SECTION 5.10 STOCKHOLDER'S CONSENT IN LIEU OF MEETING.** Any action required or permitted to be taken at any meeting of Stockholders may be taken without a meeting only if a unanimous consent setting forth the action is given in writing or by electronic transmission by each Stockholder entitled to vote on the matter and filed with the minutes of proceedings of the Stockholders.

## ARTICLE VI

### RESTRICTIONS ON OWNERSHIP AND TRANSFER.

**SECTION 6.1 DEFINITIONS.** For purposes of Article VI, the following terms shall have the following meanings:

"AGGREGATE STOCK OWNERSHIP LIMIT" means not more than 9.8% (or such other amount designated by the Board pursuant to Section 6.2(viii)) in value of the aggregate of the outstanding shares of Equity Stock.

"BENEFICIAL OWNERSHIP" means ownership of Equity Stock by a Person, whether the interest in the Equity Stock is held directly or indirectly (including by a nominee), and shall include interests that would be treated as owned through the application of Section 544 of the Code, as modified by Section 856(h)(1)(B) of the Code, provided, however, that in determining the number of shares Beneficially Owned by a Person, no share shall be counted more than once. Whenever a Person Beneficially Owns shares of Equity Stock that are not actually outstanding (e.g., shares issuable upon the exercise of an option or the conversion of a convertible security) ("Option Shares"), then, whenever this Charter requires a determination of the percentage of outstanding shares of a class of Equity Stock Beneficially Owned by such Person, the Option Shares Beneficially Owned by such Person shall also

be deemed to be outstanding. The terms "Beneficial Owner," "Beneficially Owns" and "Beneficially Owned" shall have the correlative meanings.

"BUSINESS DAY" means any day, other than a Saturday or Sunday, that is neither a legal holiday nor a day on which banking institutions in New York City are authorized or required by law, regulation or executive order to close.

"CHARITABLE BENEFICIARY" means one or more beneficiaries of the Trust as determined pursuant to Section 6.3(vi); provided, that each such organization must be described in Section 501(c)(3) of the Code and contributions to each such organization must be eligible for deduction under each of Sections 170(b)(1)(A) (other than clauses (vii) and (viii) thereof), 2055 and 2522 of the Code.

"COMMON STOCK OWNERSHIP LIMIT" means not more than 9.8% (or such other amount designated by the Board pursuant to Section 6.2(viii)), in value or in number of shares, whichever is more restrictive, of the aggregate of the outstanding shares of Common Stock.

"CONSTRUCTIVE OWNERSHIP" means ownership of Equity Stock by a Person, whether the interest in the shares of Equity Stock is held directly or indirectly (including by a nominee), and shall include interests that would be treated as owned through the application of Section 318(a) of the Code, as modified by Section 856(d)(5) of the Code. The terms "Constructive Owner," "Constructively Owns" and "Constructively Owned" shall have the correlative meanings.

"EXCEPTED HOLDER" means a Stockholder for whom an Excepted Holder Limit is created by the Board pursuant to Section 6.2(vii).

"EXCEPTED HOLDER LIMIT" means, provided that the affected Excepted Holder agrees to comply with the requirements established by the Board pursuant to Section 6.2(vii), and subject to adjustment pursuant to Section 6.2(viii), the percentage limit established by the Board pursuant to Section 6.2(vii).

"INITIAL DATE" means the date upon which these Ninth Articles of Amendment and Restatement containing this Article VI are filed with and accepted for record by the SDAT.

"MARKET PRICE" on any date means, with respect to any class or series of outstanding shares of Equity Stock, the Closing Price for such Equity Stock on such date.

"NON-TRANSFER EVENT" means any event or other changes in circumstances other than a purported Transfer, including, without limitation, any change in the value of any shares of Equity Stock and any redemption of any shares of Equity Stock.

"OWNERSHIP LIMITS" means the Aggregate Stock Ownership Limit and the Common Stock Ownership Limit, subject to adjustment pursuant to Section 6.2(viii).

"PROHIBITED OWNER" means, with respect to any purported Transfer or Non-Transfer Event, any Person who, but for the provisions of Section 6.2(i), would beneficially own (determined under the principles of Section 856(a)(5) of the Code), Beneficially Own or Constructively Own shares of Equity Stock, and if appropriate in the context, shall also mean any Person who would have been the record owner of the shares of Equity Stock that the Prohibited Owner would have so owned.

"RESTRICTION TERMINATION DATE" means the first day after the Initial Date on which the Board determines pursuant to Section 7.5(ii) of the Charter that it is no longer in the best interests of the Company to attempt to, or continue to, qualify as a REIT or that compliance with any or all of the restrictions and limitations on Beneficial Ownership, Constructive Ownership and Transfers of shares of Equity Stock set forth herein is no longer required in order for the Company to qualify as a REIT, but only with respect to such restrictions and limitations.

"TRANSFER" means any issuance, sale, transfer, gift, assignment, devise or other disposition, as well as any other event that causes any Person to acquire beneficial ownership (determined under the principles of Section 856(a)(5) of the Code), Beneficial Ownership or Constructive Ownership of Equity Stock or the right to vote or receive dividends on Equity Stock, or any agreement to take any such actions or cause any such events, or the right to vote or receive dividends on Equity Stock, including (a) the granting or exercise of any option (or any disposition of any option) or entering into any agreement for the sale, transfer or other disposition of Equity Stock (or of beneficial ownership (determined under the principles of Section 856(a)(5) of the Code), Beneficial Ownership or Constructive Ownership), (b) any disposition of any securities or rights convertible into or exchangeable for Equity Stock or any interest in Equity Stock or any exercise of any such conversion or exchange right and (c) Transfers of interests in other entities that result in changes in beneficial ownership (determined under the principles of Section 856(a)(5) of the Code), Beneficial Ownership or Constructive Ownership of Equity Stock; in each case, whether voluntary or involuntary, whether owned of record, beneficially owned (determined under the principles of Section 856(a)(5) of the Code), Constructively Owned or Beneficially Owned and whether by operation of law or otherwise. The terms "Transferring" and "Transferred" shall have the correlative meanings.

"TRUST" means any trust provided for in Section 6.3(i).

"TRUSTEE" means the Person unaffiliated with the Company and any Prohibited Owner, that is a "United States person" within the meaning of Section 7701(a)(30) of the Code and is appointed by the Company to serve as trustee of the Trust.

## SECTION 6.2 EQUITY STOCK.

(i) OWNERSHIP LIMITATIONS. During the period commencing on the Initial Date and prior to the Restriction Termination Date, but subject to Section 6.4:

### (a) BASIC RESTRICTIONS.

(1) (A) No Person, other than an Excepted Holder, shall Beneficially Own or Constructively Own shares of Equity Stock in excess of the Aggregate Stock Ownership Limit, (B) no Person, other than an Excepted Holder, shall Beneficially Own or Constructively Own shares of Common Stock in excess of the Common Stock Ownership Limit and (C) no Excepted Holder shall Beneficially Own or Constructively Own shares of Equity Stock in excess of the Excepted Holder Limit for such Excepted Holder.

(2) No Person shall Beneficially Own shares of Equity Stock to the extent that such Beneficial Ownership of Equity Stock would result in the Company being "closely held" within the meaning of Section 856(h) of the Code (without regard to whether the ownership interest is held during the last half of a taxable year).

(3) No Person shall Beneficially Own or Constructively Own shares of Equity Stock to the extent that such Beneficial Ownership or Constructive Ownership of Equity Stock would result in the Company failing to qualify as a REIT.

(4) No Person shall Constructively Own shares of Equity Stock to the extent that such Constructive Ownership would cause any income of the Company that would otherwise qualify as "rents from real property" for purposes of Section 856(d) of the Code to fail to qualify as such.

(5) Any Transfer of shares of Equity Stock that, if effective, would result in the Equity Stock being beneficially owned by fewer than 100 Persons (determined under the principles of Section 856(a)(5) of the Code) shall be void *ab initio*, and the intended transferee shall acquire no rights in such shares of Equity Stock.

(b) TRANSFER IN TRUST. If any Transfer or Non-Transfer Event occurs which, if effective or otherwise, would result in any Person Beneficially Owning or Constructively Owning (as applicable) shares of Equity Stock in violation of Section 6.2(i)(a)(1), (2), (3) or (4),

(1) then that number of shares of Equity Stock the Beneficial Ownership or Constructive Ownership (as applicable) of which otherwise would cause such Person to violate Section 6.2(i)(a)(1), (2), (3) or (4) (rounded up to the nearest whole share) shall be automatically transferred to a Trust for the benefit of a Charitable Beneficiary, as described in Section 6.3, effective as of the close of business on the Business Day prior to the date of such Transfer or Non-Transfer Event, and such Person (or, if different, the direct or Beneficial Owner of such shares) shall acquire no rights in such shares (or shall be divested of its rights in such shares);

(2) if the transfer to the Trust described in clause (1) of this sentence would not be effective for any reason to prevent the violation of Section 6.2(i)(a)(1), (2), (3) or (4), then the Transfer of that number of shares of Equity Stock that otherwise would cause any Person to violate Section 6.2(i)(a)(1), (2), (3) or (4) shall be void *ab initio*, and the intended transferee shall acquire no rights in such shares of Equity Stock; or

(3) if the transfer to the Trust described in clause (1) of this sentence would not be effective for any reason to prevent the violation of Section 6.2(i)(a)(1), (2), (3) or (4), then the Non-Transfer Event that otherwise would cause any Person to violate Section 6.2(i)(a)(1), (2), (3) or (4) shall be void *ab initio* to the extent that the Company has the legal ability to void the Non-Transfer Event, and the intended transferee shall acquire no rights in such shares of Equity Stock.

(ii) **REMEDIES FOR BREACH.** If the Board or any duly authorized committee thereof shall at any time determine in good faith that a Transfer or Non-Transfer Event has taken place that results in a violation of Section 6.2(i)(a) or that a Person intends to acquire or has attempted to acquire Beneficial Ownership, Constructive Ownership or beneficial ownership (determined under the principles of Section 856(a)(5) of the Code) of any shares of Equity Stock in violation of Section 6.2(i)(a) (whether or not such violation is intended), the Board or a committee thereof shall take such action as it deems advisable to refuse to give effect to or to prevent such Transfer or Non-Transfer Event or otherwise prevent such violation, including, without limitation, causing the Company to redeem shares, refusing to give effect to such Transfer on the books of the Company or instituting proceedings to enjoin such Transfer or Non-Transfer Event; provided, however, that any Transfer or attempted Transfer in violation of Section 6.2(i)(a) (or Non-Transfer Event that results in a violation of Section 6.2(i)(a)) shall automatically result in the transfer to the Trust described above, or, if applicable, shall be void *ab initio* as provided above irrespective of any action (or non-action) by the Board or a committee thereof.

(iii) **NOTICE OF RESTRICTED TRANSFER.** Any Person who acquires or attempts or intends to acquire Beneficial Ownership-~~or~~, Constructive Ownership or beneficial ownership (determined under the principles of Section 856(a)(5) of the Code) of shares of Equity Stock that will or may violate Section 6.2(i)(a) or any Person who held or would have owned shares of Equity Stock that resulted in a transfer to the Trust pursuant to the provisions of Section 6.2(i)(b) shall immediately give written notice to the Company of such event, or in the case of such a proposed or attempted transaction, give at least 15 days prior written notice, and shall provide to the Company such other information as the Company may request in order to determine the effect, if any, of such Transfer on the Company's qualification as a REIT.

(iv) **OWNERS REQUIRED TO PROVIDE INFORMATION.** From the Initial Date and prior to the Restriction Termination Date:

(a) every owner of 5.0% or more (or such lower percentage as required by the Code or the regulations promulgated thereunder) of the outstanding shares of any class or series of Equity Stock, upon request following the end of each taxable year of the Company, shall provide in writing to the Company the name and address of such owner, the number of shares of each class and series of Equity Stock and other shares of the Equity Stock Beneficially Owned by it and a description of the manner in which such shares are held. Each such owner shall provide to the Company such additional information as the Company may request in order to determine the effect, if any, of such Beneficial Ownership on the Company's qualification as a REIT and to ensure compliance with the Ownership Limits; and

(b) each Person who is a Beneficial Owner or Constructive Owner of Equity Stock and each Person (including the Stockholder of record) who is holding Equity Stock for a Beneficial Owner or Constructive Owner shall provide in writing to the Company such information as the Company may request, in good faith, in

order to determine the Company's qualification as a REIT and to comply with requirements of any taxing authority or governmental authority or to determine such compliance.

(v) **REMEDIES NOT LIMITED.** Subject to Section 7.5(ii) of this Charter, nothing contained in this Section 6.2 shall limit the authority of the Board to take such other action as it deems necessary or advisable to protect the Company and the interests of the Stockholders in preserving the Company's qualification as a REIT.

(vi) **AMBIGUITY.** The Board shall have the power to determine the application of the provisions of this Section 6.2 and Section 6.3 and any definition contained in Section 6.1, including in the case of an ambiguity in the application of any of the provisions of this Section 6.2, Section 6.3, or any such definition, with respect to any situation based on the facts known to it. In the event Section 6.2 or 6.3 requires an action by the Board and this Charter fails to provide specific guidance with respect to such action, the Board shall have the power to determine the action to be taken so long as such action is not contrary to the provisions of Sections 6.1, 6.2 or 6.3.

(vii) **EXCEPTIONS.**

(a) Subject to Section 6.2(i)(a)(3), the Board, in its sole discretion, may prospectively exempt a Person from, or retroactively waive with respect to a Person, one or more of the ownership limitations set forth in Section 6.2(i)(a)(1)(A) and (B) and establish or increase an Excepted Holder Limit for such Person, may retroactively waive the ownership limitations set forth in Section 6.2(i)(a)(1)(C) with respect to a Person and establish or increase an Excepted Holder Limit for such Person, may prospectively exempt a Person from the provisions of Section 6.2(i)(a)(2), and may prospectively exempt a Person from, or retroactively waive with respect to a Person, the provisions of Section 6.2(i)(a)(4) if:

(1) the Board obtains such representations and undertakings from such Person as are reasonably necessary to ascertain that such Person's Beneficial Ownership and Constructive Ownership of such shares of Equity Stock in excess of the Ownership Limits or in violation of the limitations imposed by Section 6.2(i)(a)(2) or Section 6.2(i)(a)(4), as applicable, will not now or in the future jeopardize the Company's ability to qualify as a REIT under the Code; and

(2) such Person agrees that any violation or attempted violation of such representations or undertakings (or other action which is contrary to the restrictions contained in Sections 6.2(i) through 6.2(vi)) will result in such shares of Equity Stock being automatically transferred to a Trust in accordance with Sections 6.2(i)(b) and 6.3.

(b) Prior to granting any exemption or waiver or establishing or increasing any Excepted Holder Limit pursuant to Section 6.2(vii)(a), the Board may require a ruling from the Internal Revenue Service, or an opinion of counsel, in either case in form and substance satisfactory to the Board in its sole discretion, as it may deem necessary or advisable in order to determine or ensure the Company's qualification as a REIT. Notwithstanding the receipt of any ruling or opinion, the Board may impose such conditions or restrictions as it deems appropriate in connection with granting such exemption or waiver or establishing or increasing any Excepted Holder Limit.

(c) Subject to Section 6.2(i)(a)(3), an underwriter that participates in a public offering or a private placement of Equity Stock (or securities convertible into or exchangeable for Equity Stock) may Beneficially Own and Constructively Own shares of Equity Stock (or securities convertible into or exchangeable for Equity Stock) in excess of the Aggregate Stock Ownership Limit, the Common Stock Ownership Limit, or both such limits, but only to the extent necessary to facilitate such public offering or private placement.

(d) The Board may only reduce the Excepted Holder Limit for an Excepted Holder: (1) with the written consent of such Excepted Holder at any time, or (2) pursuant to the terms and conditions of the agreements and undertakings entered into with such Excepted Holder in connection with the establishment of the Excepted Holder Limit for that Excepted Holder. No Excepted Holder Limit shall be reduced to a percentage that is less than the Common Stock Ownership Limit.



(viii) INCREASE OR DECREASE IN AGGREGATE STOCK OWNERSHIP AND COMMON STOCK OWNERSHIP LIMITS. Subject to Section 6.2(i)(a)(3), the Board may from time to time increase one or both of the Ownership Limits and decrease one or both of the Ownership Limits; provided, however, that any such decreased Ownership Limit will not be effective for any Person whose percentage ownership in Equity Stock is in excess of the decreased Ownership Limit until such time as such Person's percentage of Equity Stock equals or falls below the decreased Ownership Limit, but any further acquisition of Equity Stock in excess of such percentage ownership of Equity Stock will be in violation of the Ownership Limits; and provided, further, that the new Ownership Limits would not result in the Company being "closely held" within the meaning of Section 856(h) of the Code (without regard to whether the ownership interest is held during the last half of a taxable year) if five unrelated individuals were to Beneficially Own the five largest amounts of Equity Stock permitted to be Beneficially Owned under each Excepted Holder Limit, as applied to an Excepted Holder, and such new Ownership Limits with respect to each other Stockholder, taking into account the immediately preceding proviso permitting ownership in excess of decreased Ownership Limits in certain cases.

(ix) LEGEND. Each certificate for shares of Equity Stock, if certificated, shall bear a legend that substantially describes the foregoing restrictions on transfer and ownership, or, instead of such legend, the certificate, if any, may state that the Company will furnish a full statement about certain restrictions on transferability to a Stockholder on request and without charge.

#### SECTION 6.3 TRANSFER OF EQUITY STOCK IN TRUST.

(i) OWNERSHIP IN TRUST. Upon any purported Transfer or Non-Transfer Event described in Section 6.2(i)(b) that would result in a transfer of shares of Equity Stock to a Trust, such shares of Equity Stock shall be deemed to have been transferred to the Trustee as trustee of a Trust for the exclusive benefit of one or more Charitable Beneficiaries. Such transfer to the Trustee shall be deemed to be effective as of the close of business on the Business Day prior to the purported Transfer or Non-Transfer Event that results in the transfer to the Trust pursuant to Section 6.2(i)(b). The Trustee shall be appointed by the Company and shall be a Person unaffiliated with the Company and any Prohibited Owner. Each Charitable Beneficiary shall be designated by the Company as provided in Section 6.3(vi).

(ii) STATUS OF SHARES HELD BY THE TRUSTEE. Shares of Equity Stock held by the Trustee shall be issued and outstanding shares of Equity Stock. The Prohibited Owner shall have no rights in the shares held by the Trustee. The Prohibited Owner shall not benefit economically from ownership of any shares held in trust by the Trustee, shall have no rights to dividends or other distributions and shall not possess any rights to vote or other rights attributable to the shares held in the Trust.

(iii) DIVIDEND AND VOTING RIGHTS. The Trustee shall have all voting rights and rights to dividends or other distributions with respect to shares of Equity Stock held in the Trust, which rights shall be exercised for the exclusive benefit of the Charitable Beneficiary. Any dividend or other distribution paid prior to the discovery by the Company that the shares of Equity Stock have been transferred to the Trustee shall be paid by the recipient of such dividend or distribution to the Trustee upon demand and any dividend or other distribution authorized but unpaid shall be paid when due to the Trustee. Any dividend or distribution so paid to the Trustee shall be held in trust for the Charitable Beneficiary. The Prohibited Owner shall have no voting rights with respect to shares held in the Trust and, subject to Maryland law, effective as of the date that the shares of Equity Stock have been transferred to the Trust, the Trustee shall have the authority (at the Trustee's sole discretion) (a) to rescind as void any vote cast by a Prohibited Owner prior to the discovery by the Company that the shares of Equity Stock have been transferred to the Trustee and (b) to recast such vote in accordance with the desires of the Trustee acting for the benefit of the Charitable Beneficiary; provided, however, that if the Company has already taken irreversible corporate action, then the Trustee shall not have the authority to rescind and recast such vote. Notwithstanding the provisions of this Article VI, until the Company has received notification that shares of Equity Stock have been transferred into a Trust, the Company shall be entitled to rely on its share transfer and other Stockholder records for purposes of preparing lists of Stockholders entitled to vote at meetings, determining the validity and authority of proxies and otherwise conducting votes of Stockholders.

(iv) SALE OF SHARES BY TRUSTEE. As soon as reasonably practicable after receiving notice from the Company that shares of Equity Stock have been transferred to the Trust (and no later than 20 days after

receiving notice in the case of shares of Equity Stock that are Listed or admitted to trading on any national securities exchange), the Trustee of the Trust shall sell the shares held in the Trust to a person whose ownership of the shares will not violate the ownership limitations set forth in Section 6.2(i)(a). Upon such sale, the interest of the Charitable Beneficiary in the shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Prohibited Owner and to the Charitable Beneficiary as provided in this Section 6.3(iv). The Prohibited Owner shall receive the lesser of (a) the price paid by the Prohibited Owner for the shares or, if the Prohibited Owner did not give value for the shares in connection with the event causing the shares to be held in the Trust (e.g., in the case of a gift, devise or other such transaction), the Market Price of the shares on the day of the event causing the shares to be held in the Trust and (b) the sales proceeds received by the Trustee (net of any commissions and other expenses of sale) from the sale or other disposition of the shares held in the Trust. The Trustee may reduce the amount payable to the Prohibited Owner by the amount of dividends and other distributions which has been paid to the Prohibited Owner and is owed by the Prohibited Owner to the Trustee pursuant to Section 6.3(iii). Any net sales proceeds in excess of the amount payable to the Prohibited Owner shall be immediately paid to the Charitable Beneficiary. If, prior to the discovery by the Company that shares of Equity Stock have been transferred to the Trustee, such shares are sold by a Prohibited Owner, then (1) such shares shall be deemed to have been sold on behalf of the Trust and (2) to the extent that the Prohibited Owner received an amount for such shares that exceeds the amount that such Prohibited Owner was entitled to receive pursuant to this Section 6.3(iv), such excess shall be paid to the Trustee upon demand.

(v) **PURCHASE RIGHT IN STOCK TRANSFERRED TO THE TRUSTEE.** Shares of Equity Stock transferred to the Trustee shall be deemed to have been offered for sale to the Company, or its designee, at a price per share equal to the lesser of (a) the price per share in the transaction that resulted in such transfer to the Trust (or, in the case of a devise or gift, the Market Price at the time of such devise or gift) and (b) the Market Price on the date the Company, or its designee, accepts such offer. The Company shall have the right to accept such offer until the Trustee has sold the shares held in the Trust pursuant to Section 6.3(iv). Upon such a sale to the Company, the interest of the Charitable Beneficiary in the shares sold shall terminate and the Trustee shall distribute the net proceeds of the sale to the Prohibited Owner; provided, however, that the Trustee may reduce the amount payable to the Prohibited Owner by the amount of dividends and other distributions which has been paid to the Prohibited Owner and is owed by the Prohibited Owner to the Trustee pursuant to Section 6.3(iii). Any net sales proceeds in excess of the amount payable to the Prohibited Owner shall be immediately paid to the Charitable Beneficiary.

(vi) **DESIGNATION OF CHARITABLE BENEFICIARIES.** By written notice to the Trustee, the Company may change the Charitable Beneficiary by designating one or more nonprofit organizations to be the Charitable Beneficiary of the interest in the Trust such that (a) the shares of Equity Stock held in the Trust would not violate the restrictions set forth in Section 6.2(i)(a) in the hands of such Charitable Beneficiary and (b) each such organization must be described in Section 501(c)(3) of the Code and contributions to each such organization must be eligible for deduction under each of Sections 170(b)(1)(A) (other than clauses (vii) and (viii) thereof), 2055 and 2522 of the Code. Neither the failure of the Company to make such designation nor the failure of the Company to appoint the Trustee before the automatic transfer provided for in Section 6.2(i)(b)(1) shall make such transfer ineffective, provided that the Company thereafter makes such designation and appointment. The designation of a nonprofit organization as a Charitable Beneficiary shall not entitle such nonprofit organization to serve in such capacity and the Company may, in its sole discretion, designate a different nonprofit organization as the Charitable Beneficiary at any time and for any or no reason. Any determination by the Company with respect to the application of this Article VI shall be binding on each Charitable Beneficiary.

**SECTION 6.4 NYSE TRANSACTIONS.** Nothing in this Article VI shall preclude the settlement of any transaction entered into through the facilities of the NYSE or any other national securities exchange or automated inter-dealer quotation system. The fact that the settlement of any transaction occurs shall not negate the effect of any other provision of this Article VI and any transferee in such a transaction shall be subject to all of the provisions and limitations set forth in this Article VI.

**SECTION 6.5 ENFORCEMENT.** The Company is authorized specifically to seek equitable relief, including injunctive relief, to enforce the provisions of this Article VI.

SECTION 6.6 NON-WAIVER. No delay or failure on the part of the Company or the Board in exercising any right hereunder shall operate as a waiver of any right of the Company or the Board, as the case may be, except to the extent specifically waived in writing.

## ARTICLE VII

### BOARD OF DIRECTORS

SECTION 7.1 NUMBER OF DIRECTORS. The number of Directors of the Company shall be five, which number may be increased or decreased from time to time only by the Board pursuant to the Bylaws; provided, however, that the total number of Directors shall be not fewer than the minimum number required by the MGCL. The Company elects pursuant to Section 3-804(c) of the MGCL that, except as may be provided by the Board in setting the terms of any class or series of Equity Stock, any and all vacancies on the Board may be filled only by the affirmative vote of a majority of the remaining Directors in office, even if the remaining Directors do not constitute a quorum, and any Director elected to fill a vacancy shall serve for the remainder of the full term of the directorship in which such vacancy occurred and until his or her successor is duly elected and qualifies.

The names of the Directors who shall serve on the Board until the next annual meeting of the Stockholders and until their successors are duly elected and qualify, subject to an increase in the number of Directors prior to the next annual meeting of the Stockholders, are:

Robert S. Aisner  
Robert M. Behringer  
Charles G. Dannis  
Steven W. Partridge  
G. Ronald Witten

SECTION 7.2 INDEPENDENT DIRECTORS. A majority of the Board shall be Independent Directors, except for a period of up to 60 days after the death, removal or resignation of an Independent Director. For purposes of this Section 7.2, "Independent Director" shall mean a Director who satisfies the independence requirements under the rules and regulations of the NYSE as in effect from time to time.

SECTION 7.3 COMMITTEES. The Board may establish such committees as it deems appropriate, in its discretion, as provided in the Bylaws.

SECTION 7.4 REMOVAL. Subject to the rights of holders of one or more classes or series of Preferred Stock to elect or remove one or more Directors, a Director may only be removed from office for cause at an annual or special meeting of Stockholders by the affirmative vote of the shares entitled to cast a majority of all of the votes entitled to be cast generally in the election of Directors. For purposes of this paragraph, "cause" shall mean with respect to any particular Director, conviction of a felony or a final judgment of a court of competent jurisdiction holding that such Director caused demonstrable, material harm to the Company through bad faith or active and deliberate dishonesty.

### SECTION 7.5 DUTIES AND POWERS.

(i) GENERAL. The business and affairs of the Company shall be managed under the direction of the Board, and the Board shall have full, exclusive and absolute power, control and authority over the Company's assets and over the business of the Company as if it, in its own right, was the sole owner thereof, except as otherwise limited by the Charter or the Bylaws. The Board may take any action that, in its sole judgment and discretion, is necessary or desirable to conduct the business of the Company. The Charter shall be construed with a presumption in favor of the grant of power and authority to the Board. Any construction of the Charter or determination made in good faith by the Board concerning its powers and authority hereunder shall be conclusive. The enumeration and definition of particular powers of the Board included in this Charter or in the Bylaws shall in no way be construed or deemed by inference or otherwise in any manner to exclude or limit the powers conferred upon the Board under the MGCL, the general laws of the State of Maryland or any other applicable laws as now or hereafter in force.

(ii) **REIT QUALIFICATION.** The Board shall use its reasonable best efforts to cause the Company to qualify for U.S. federal income tax treatment in accordance with the REIT Provisions of the Code or corresponding provisions of subsequent revenue laws applicable to a REIT. In furtherance of the foregoing, the Board shall use its reasonable best efforts to take such actions as are necessary, and may take such actions as it deems desirable (in its sole discretion) to preserve the status of the Company as a REIT. Notwithstanding the foregoing, if a majority of the Board determines that it no longer is in the best interests of the Company to continue to have the Company qualify as a REIT, the Board may revoke or otherwise terminate the Company's REIT election.

(iii) **ISSUANCE OF SECURITIES; AUTHORITY TO DECLARE STOCK DIVIDENDS OF DIFFERENT CLASSES.** Subject to the provisions of Article V hereof, the Board may authorize the issuance from time to time of shares of Equity Stock of any class or series, whether now or hereafter authorized, or other securities or rights convertible into shares of its Equity Stock of any class or series, whether now or hereafter authorized, for such consideration as the Board may deem advisable (or without consideration in the case of a stock split or stock dividend), subject to such restrictions or limitations, if any, as may be set forth in the Charter or the Bylaws. Subject to any preferential rights in favor of any class of Preferred Stock, the Board, in accordance with Section 2-309(c)(5)(i) of the MGCL, is hereby specifically authorized to, at any time, cause the Company to declare and pay a dividend payable in shares of any one class or multiple classes of Equity Stock to the holders of shares of any other class or classes of Equity Stock without obtaining Stockholder approval.

(iv) **DISTRIBUTION REINVESTMENT PLAN.** The Directors may adopt a distribution reinvestment plan on such terms and conditions as they determine to be appropriate.

**SECTION 7.6 DETERMINATION BY BOARD OF BEST INTEREST OF COMPANY.** The determination as to any of the following matters, made in good faith by, or pursuant to, the direction of the Board consistent with the Charter, shall be final and conclusive and shall be binding upon the Company and every holder of its Equity Stock: (i) the amount of the net income of the Company for any period and the amount of assets at any time legally available for the payment of dividends, redemption of its Equity Stock or the payment of other Distributions on its Equity Stock; (ii) the amount of paid-in surplus, net assets, other surplus, annual or other cash flow, funds from operations, net profit, net assets in excess of capital, undivided profits or excess of profits over losses on sales of assets; (iii) the amount, purpose, time of creation, increase or decrease, alteration or cancellation of any reserves or charges and the propriety thereof (whether or not any obligation or liability for which such reserves or charges shall have been created shall have been paid or discharged); (iv) any interpretation of the terms, preferences, conversion or other rights, voting powers or rights, restrictions, limitations as to dividends or other distributions, qualifications or terms or conditions of redemption of any class or series of Equity Stock; (v) the fair value, or any sale, bid or asked price to be applied in determining the fair value, of any asset owned or held by the Company or any shares of Equity Stock of the Company; (vi) any matters relating to the acquisition, holding or disposition of any assets by the Company; (vii) the number of shares of Equity Stock of any class; or (viii) any other matter relating to the business and affairs of the Company or required or permitted by applicable law, the Charter or Bylaws or otherwise to be determined by the Board.

## ARTICLE VIII

### CONFLICTS OF INTEREST

**SECTION 8.1 SALES AND LEASES TO THE COMPANY.** The Company may purchase or lease an Asset or Assets from Behringer Harvard Holdings, LLC, Behringer Advisors, LLC, or any Director or any of their respective Affiliates (for purposes of this Article VIII, collectively, the "Conflicted Parties" and each, a "Conflicted Party") only upon a finding by a majority of Directors not otherwise interested in the transaction directly or through an Affiliate that such transaction is fair and reasonable to the Company and at a price to the Company no greater than the cost of the Asset to such Conflicted Party, or, if the price to the Company is in excess of such cost, that substantial justification for such excess exists and such excess is reasonable.

**SECTION 8.2 SALES AND LEASES TO CONFLICTED PARTIES.** A Conflicted Party may purchase or lease Assets from the Company only if a majority of Directors not otherwise interested in the transaction directly or through an Affiliate determines that the transaction is fair and reasonable to the Company.

**SECTION 8.3 OTHER TRANSACTIONS.** The Company shall not make loans to any Conflicted Party, unless approved by a majority of the Directors not otherwise interested in the transaction directly or through an Affiliate as fair and reasonable, and no less favorable to the Company than comparable loans between unaffiliated parties. Further, the Company shall not make mortgage loans to any Conflicted Party, unless an appraisal is obtained, from an independent appraiser, concerning the property under which the loan will be secured, except for those loans insured or guaranteed by a government or government agency. Conflicted Parties shall not make loans to the Company, or to joint ventures in which the Company is a co-venturer, unless approved by a majority of the Directors not otherwise interested in such transaction as fair and reasonable, and no less favorable to the Company than comparable loans between unaffiliated parties.

## ARTICLE IX

### LIMITATION OF LIABILITY AND INDEMNIFICATION

**SECTION 9.1 LIMITATION OF STOCKHOLDER LIABILITY.** No Stockholder shall be personally liable for any debt, claim, demand, judgment or obligation of any kind of, against or with respect to the Company by reason of his being a Stockholder, nor shall any Stockholder be subject to any personal liability whatsoever, in tort, contract or otherwise, to any Person or entity in connection with the Company's assets or the affairs of the Company by reason of his being a Stockholder.

**SECTION 9.2 LIMITATION OF DIRECTOR AND OFFICER LIABILITY.** To the maximum extent that Maryland law, in effect from time to time, permits the limitation of the liability of directors and officers of a corporation, no present or former Director or officer of the Company shall be liable to the Company or to any Stockholder for money damages. Neither the amendment nor repeal of this Section 9.2, nor the adoption or amendment of any other provision of this Charter inconsistent with this Section 9.2, shall apply to or affect in any respect the applicability of this Section 9.2 with respect to any act or failure to act which occurred prior to such amendment, repeal or adoption.

### SECTION 9.3 INDEMNIFICATION.

(i) The Company shall have the power, to the maximum extent permitted by Maryland law in effect from time to time, to obligate itself to indemnify, and to pay or reimburse reasonable expenses in advance of final disposition of a proceeding to, (a) any individual who is a present or former Director or officer of the Company and who is made or threatened to be made a party to the proceeding by reason of his or her service in that capacity or (b) any individual who, while a Director or officer of the Company and at the request of the Company, serves or has served as a Director, officer, partner, member, manager or trustee of another corporation, real estate investment trust, partnership, limited liability company, joint venture, trust, employee benefit plan or other enterprise from and against any claim or liability to which such person may become subject or which such person may incur by reason of his or her service in such capacity. The Company shall have the power, with the approval of the Board or any duly authorized committee thereof, to provide such indemnification and advancement of expenses to a person who served a predecessor of the Company in any of the capacities described in (a) or (b) above and to any employee or agent of the Company or a predecessor of the Company.

(ii) The Company may purchase and maintain insurance on behalf of any person who is or was a Director, officer, employee or agent of the Company or its affiliates, or is or was serving at the request of the Company as a Director, officer, employee or agent of another corporation, partnership, limited liability company, joint venture, trust or other enterprise against any liability asserted against him or her and incurred by him/her in any such capacity, or arising out of his or her status as such, whether or not he or she is indemnified against such liability under the provisions of this Article IX.

## ARTICLE X

### AMENDMENT

The Company reserves the right from time to time to make any amendment to this Charter, now or hereafter authorized by law, including any amendment altering the terms or contract rights, as expressly set forth in this Charter, of any unissued shares of Equity Stock. All rights and powers conferred by this Charter on Stockholders, Directors and officers are granted subject to this reservation. All references to this Charter shall include all amendments thereto.

## ARTICLE XI

### DURATION OF COMPANY

**SECTION 11.1 PROXY TO LIQUIDATE.** At any time after February 19, 2017, if the Company is not then in the process of Listing or making an orderly dissolution, upon receipt by the Secretary of the Company of written requests from Stockholders holding 10% or more of the outstanding shares of Common Stock (the "Proxy Request") directing that the Company formally proxy the Stockholders holding shares of Equity Stock entitled to vote thereon to determine whether the Company should be dissolved (the "Proxy to Liquidate"), the Company shall send a Proxy to Liquidate to each Stockholder holding shares of Equity Stock entitled to vote thereon within sixty days of receipt of the Proxy Request, or as soon as reasonably practicable thereafter following the receipt of independent appraisals of the Company's Assets, which the Company shall obtain as part of this proxy process, and the filing and review of such Proxy to Liquidate by the Securities and Exchange Commission. The Company shall not be required to send Proxies to Liquidate to Stockholders holding shares of Equity Stock entitled to vote thereon more frequently than once during every two year period. To insure that Stockholders are adequately informed when casting their votes, the Proxy to Liquidate furnished to each Stockholder holding shares of Equity Stock entitled to vote thereon shall include financial information setting forth per share pro forma tax and financial projections that assume that all of the Company's Assets will be sold immediately at prices consistent with their appraised values, or such other information as the Company deems appropriate and informative, provided that in all such cases the furnishing of such information to Stockholders shall not contravene applicable law or applicable rules and regulations of the Securities and Exchange Commission regarding the solicitation of proxies. The Proxy to Liquidate shall contain a forty-five day voting deadline or set a meeting of the Stockholders holding shares of Equity Stock entitled to vote thereon no earlier than forty-five days after notice thereof, and the actual voting results shall be tabulated by the Company's independent accountants who will receive the votes directly from the Stockholders holding shares of Equity Stock entitled to vote thereon. The Company shall disclose the complete voting results for the Proxy to Liquidate in the Company's next annual or quarterly report on Form 10-K or 10-Q sent to the Stockholders for the period following the date on which voting was completed. If the Board declares the dissolution of the Company advisable and the Stockholders holding shares of Equity Stock cast a majority of the votes entitled to be cast on the matter in favor of the dissolution of the Company, the Assets of the Company shall be fully liquidated within thirty months from the close of the voting deadline applicable to the Proxy to Liquidate.

**SECTION 11.2 DISSOLUTION UPON FAILURE TO OBTAIN LISTING.** In the event that either (i) Listing does not occur on or before February 19, 2017 (unless a majority of the Board shall approve otherwise and set a future date for such Listing and the Company's dissolution) or (ii) the Stockholders holding a majority of the outstanding shares of Equity Stock approve the dissolution of the Company, the Company shall immediately thereafter undertake an orderly liquidation and Sale of the Company's assets and will distribute any Net Sales Proceeds therefrom to Stockholders, following which the Company shall terminate and dissolve. In the event that Listing occurs on or before such date, the Company shall continue perpetually unless dissolved pursuant to the provisions contained herein or pursuant to any applicable provision of the MGCL.

## ARTICLE XII

### MISCELLANEOUS

**SECTION 12.1 EFFECT UPON LISTING.** In the event of, and immediately upon, a Listing, Sections 7.2, 11.1 and 11.2 of this Charter shall no longer apply to the Company.

**SECTION 12.2 TENDER OFFERS.** If any Person makes a tender offer, including, without limitation, a "mini-tender" offer, such Person must comply with all of the provisions set forth in Regulation 14D of the Securities Exchange Act of 1934, as amended, including, without limitation, disclosure and notice requirements, that would be applicable if the tender offer was for more than five percent (5.0%) of the outstanding shares of Equity Stock; provided, however, that, unless otherwise required by the Securities Exchange Act of 1934, as amended, such documents are not required to be filed with the Securities and Exchange Commission. In addition, any such Person must provide notice to the Company at least ten business days prior to initiating any such tender offer. If any Person initiates a tender offer without complying with the provisions set forth above (a "Non-Compliant Tender Offer"), the Company, in its sole discretion, shall have the right to redeem such non-compliant Person's shares of Equity Stock and any shares of Equity Stock acquired in such tender offer (collectively, the "Tendered Shares") at the lesser of (i) the most recently disclosed estimated value per share as determined in accordance with the Company's valuation policy, as such valuation policy is amended from time to time or (ii) the lowest tender offer price offered in such Non-Compliant Tender Offer. The Company may purchase such Tendered Shares upon delivery of the purchase price to the Person initiating such Non-Compliant Tender Offer and, upon such delivery, the Company may instruct any transfer agent to transfer such purchased shares of Equity Stock to the Company. In addition, any Person who makes a Non-Compliant Tender Offer shall be responsible for all expenses incurred by the Company in connection with the enforcement of the provisions of this Section 12.2, including, without limitation, expenses incurred in connection with the review of all documents related to such tender offer and expenses incurred in connection with any purchase of Tendered Shares by the Company. The Company maintains the right to offset any such expenses against the dollar amount to be paid by the Company for the purchase of Tendered Shares pursuant to this Section 12.2. In addition to the remedies provided herein, the Company may seek injunctive relief, including, without limitation, a temporary or permanent restraining order, in connection with any Non-Compliant Tender Offer. This Section 12.2 shall be of no force or effect with respect to any shares of Equity Stock that are then listed on a national securities exchange.

**THIRD:** The amendment to and restatement of this Charter as hereinabove set forth have been duly advised by the Board and approved by the Stockholders of the Company as required by law.

**FOURTH:** The current address of the principal office of the Company is as set forth in Article III of the foregoing amendment and restatement of this Charter.

**FIFTH:** The name and address of the Company's current resident agent are as set forth in Article III of the foregoing amendment and restatement of this Charter.


**SIXTH:** The number of directors of the Company and the names of those currently in office are as set forth in Article VII of the foregoing amendment and restatement of this Charter.

**SEVENTH:** The undersigned acknowledges these Ninth Articles of Amendment and Restatement to be the corporate act of the Company and as to all matters or facts required to be verified under oath, the undersigned acknowledges that, to the best of his knowledge, information and belief, these matters and facts are true in all material respects and that this statement is made under the penalties for perjury.

[SIGNATURES ON FOLLOWING PAGE]

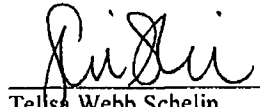
IN WITNESS WHEREOF, Behringer Harvard REIT I, Inc. has caused these Ninth Articles of Amendment and Restatement to be signed in its name and on its behalf by its President, and attested by its Secretary, on this 24th day of June, 2011.

By:

  
Robert S. Aisner  
President

ATTEST:

By:

  
Telsa Webb Schelin  
Secretary

CUST ID:0002609025  
WORK ORDER:0003825605  
DATE:06-28-2011 10:02 AM  
AMT. PAID:\$212.00



**ARBITRATION TRIBUNALS OF THE  
FINANCIAL INDUSTRY REGULATORY AUTHORITY**

*In the Matter of the Arbitration Between:*

**STEPHEN BERTRAND AND CATHERINE M.  
BERTRAND,**

**CLAIMANTS,**

**Case No. 10-04780**

**vs.**

*Subpoena Duces Tecum/  
Order of Production*

**BERTHEL, FISHER & COMPANY FINANCIAL  
SERVICES, INC.,**

**RESPONDENT.**

**THE PEOPLE OF THE STATE OF CALIFORNIA**

**TO: Custodian of Records  
CMG Partners, LLC**

**GREETINGS:**

**YOU ARE HEREBY COMMANDED**, pursuant to Section 7 of the Federal Arbitration Act, 9 U.S.C. §7, applicable state law, and §12512(a) of the *FINRA Code Of Arbitration Procedure*, that all business and excuses being laid aside, to produce at the offices of Goodman & Nekvasil, P.A., 14020 Roosevelt Blvd., Suite 808, Clearwater, Florida 33762 within ten (10) days of receipt of this *Subpoena*, the following documents and/or things now in your custody or control:

1. All communications with investors in Behringer Harvard REIT I, Inc., including but not limited to Stephen Bertrand and Catherine M. Bertrand, the Claimants in this case.
2. A complete list of all investors in Behringer Harvard REIT I, Inc., including their names and addresses.

**EXHIBIT 2**

YOU MAY COMPLY with this *Subpoena* by providing legible copies of the documents to be produced to the attorney whose name appears on this *Subpoena* on or before the scheduled date of production. If you fail to comply with this *Subpoena*, you may be in contempt. You are subpoenaed by the undersigned and unless excused from this *Subpoena* by the undersigned or the FINRA arbitration panel, you shall respond as directed.

Requested by:

Kalju Nekvasil, Esq.  
Goodman & Nekvasil, P.A.  
P.O. Box 17709  
Clearwater, Florida 33762  
727-524-8485  
Attorney for Claimants

Issued by:

Kenneth W. Palmer  
Chairperson/Arbitrator  
on behalf of the full Panel

Dated: 12-08, 2011