

REAL PROPERTY MANAGEMENT AGREEMENTS

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I. **INTRODUCTION.** For a number of years I have bemoaned the lack of legal education materials dealing with property management agreements. However, there are many property management agreements available for free on the web. They are probably worth what you pay for them. Too often a real estate practitioner must prepare or review a property management agreement without an understanding of the problem areas or the key points to be considered and negotiated. Also, most of the forms submitted for an attorney's review have been prepared by brokers, managers or organizations representing them. The focus of this paper is on the agreement to be drafted or reviewed, not on the case law arising from disputes over the agreement. However, most disputes over these agreements arise because a particular contingency or event was not adequately dealt with in the agreement. Accordingly, the cases represent a further checklist of the rocks and shoals to be avoided in drafting the agreement. This paper should not be considered the definitive work on the management agreement, but only a building block for this area of your practice. The attached form resulted from negotiations, so it is not perfect, and reflects trade offs, concessions and compromises. Therefore, as with any form, none is right for every deal. Use the form as a tool, not as the finished product. When reviewing any form, the lawyer must be concerned about what is not stated in the form. The form at Appendix A was prepared with an eye toward balancing the rights of the owner and the manager. The attached form is for a commercial, rather than a residential, transaction. This paper will not consider issues relating to the management of hotel properties as the property manager (usually a chain) will dictate a form of agreement that favors it to the exclusion of the property owner.

II. **REAL ESTATE MANAGEMENT.** "Real estate management" is a term that encompasses any number of services, as few or as many as the owner and the manager may determine. Too often the manager knows more than the owner about what services are needed. If the owner fails to have all necessary services included as part of the manager's agreed compensation, the additional services will likely be furnished at a premium price, as with change orders under a construction contract. Consequently, each party needs to be sure that the management agreement contains all the key provisions important to its side. If the manager has a brochure describing its services, the owner should get and keep a copy. The manager's reputation and ability to perform are key elements in the owner's selection of a property manager. The quality and frequency of the manager's services should not be varied during the term of the agreement. The act of "real estate management" may or may not constitute an activity which requires the manager to have a real estate or other license. Check your state's laws. A manager that operates in multiple states can have problems if it assumes that all state laws are the same. An example, segregation of security deposits. Since most property managers are also charged with leasing the property and seek to be paid or share in leasing commissions (acts which are usually subject to a real estate license act), the manager should probably have a real estate license.

A. **Key Provisions to Be Negotiated.** The key provisions of a management agreement vary with the property to be managed, the sophistication of the owner and manager,

and the extent to which the owner does or does not want to be involved in or informed about the details of the operation of the property. The following are some of the provisions to be considered.

(1) **Independent Contractor Status.** The manager is to be an independent contractor and not an employee of the owner. Remember also that too much control and direction by the owner over the manager or the manager's employees can result in a loss of the independent contractor protection for the owner. If the manager becomes an employee, the owner is liable for withholding and other tax obligations based on the manager's compensation. Therefore, the owner should establish his controls within the context of the management agreement and not by later intervention. Establish the manager's duties and responsibilities in the beginning and let it do its job. Then monitor compliance by the manager with the agreement.

(2) **Scope of and Limits on Manager's Duties and Responsibilities.** An owner should interview the prospective manager and obtain a resume' outlining services available, both basic and extras. The owner should also interview several prospective managers to get an idea of the range of services offered by each and the cost for those services. Of course, the owner could consult a real estate lawyer and other owners of similar properties to get this type of information. As clearly as possible, the management agreement should spell out what services the owner gets for its money. On the other hand, the manager should spell out the services it will not perform or will perform only for extra pay. Typically, the sophisticated owner will require more specific services and more reports from the manager. The manager's reputation and skill in managing properties similar to that of the owner should be established by owner and probably represented in the agreement. Usually a manager will inherit the owner's lease from and existing leases. Who has the responsibility for interpreting those documents?

(3) **Employees of Manager.** Name in the agreement any key employees to be involved in management and the amount of time each is to devote to the project. On-site managers, if any, need to be identified. If key employees are no longer available to manage, the owner should reserve the right to terminate the agreement. A manager's decision to change an on-site manager should be subject to owner approval if the project needs special attention. Constant changes in property managers and their employees can convey a bad image to tenants, particularly in apartment projects. The issue of on-site or off-site management should be decided. It is a cost decision, as well as one which can vary with the size and type of property. The number of employees to be used in the management of the property impacts the cost of management services. However, the owner must be assured that the manager will provide enough employees to efficiently manage the project. Consider whether management will be full or part-time. Assistant managers and other employees retained by the manager to actually perform the various tasks of property management must be designated as employees or independent contractors of manager and not subject to the control, direction or supervision of the owner. On some projects, the owner may find it necessary to reserve the right to dismiss or require the manager to dismiss key employees of manager at the project who fail to do their job.

(4) **Budget Process.** No exact formula exists for establishing a budget procedure and I would urge an owner to consult with an accountant for advice on the methods to be employed. While a budget is only a planning device, it must be flexible enough to permit, rather than restrain, proper management. To the extent possible, the budget process should look at past operations and should project the future. To a certain extent zero based budgets force both the

owner and the manager to do the planning and analysis necessary for the budget process, but all too often both sides rely on imprecise percentage adjustments to last year's numbers. Budgets that do not provide for replacement of capital items or a periodic escrow for lump sum expenses such as taxes and insurance are clearly flawed and are not useful management tools. Realistic projections of rental income, rental adjustments, periodic maintenance, ad valorem tax and utility increases and vacancies are also necessary to a "good" budget. If the projections or assumptions that underlie the budget change or are proven wrong, the budget needs to be amended to reflect the change, and the agreement needs to provide a way to initiate that process. The owner should require periodic operating reports to compare what is actually happening to the budget estimates. The agreement needs a mechanism for continuing operations in the event the parties fail to agree on a budget for a new year and possibly a termination if the impasse continues for an extended period.

(5) **Collection of Rents and Handling of Funds.** The key thing to remember is that it's the owner's money, and if that money is not available for its use, the owner is losing the time value of that money. On the other hand, the manager has to pay the bills when they are due and the shuffling of money in and out of accounts is time consuming. A balance is necessary between the owner and the manager to establish how much money can be transferred to the owner at the earliest possible time. Typically, funds in excess of a certain amount after establishment of reserves will be transferred to the owner. The budget and the cash flow projections are probably the best places to start this process of balancing interests. Adequate reserves are necessary, but they need not be placed in the general account. They could be put in certificates of deposit or other interest bearing accounts until needed, but always under the owner's control. If the project lender is retaining reserves for such things like taxes, insurance and replacements, further funding of those reserves into accounts maintained by the owner or manager may be unnecessary. The owner should approve the bank into which project funds are placed and the amounts accumulated in those accounts. The owner should be on the signature cards along with the manager and the funds should be in an account separate from any other project of owner or manager. Be alert to possible offsets when the deposit bank is also a mortgagee of the project or a creditor of either the manager or the owner. The frequency of collection of rents and of deposits should be established. Employees handling money are to be bonded. Rent delinquencies should be pursued by manager under the guidance of legal counsel designated by owner, because the owner does not want to be the subject of a wrongful eviction claim or worse caused by hasty or unlawful acts of the manager. The manager should not file suit or take legal action except on behalf of and with prior approval of owner. However, this rule could be varied after taking into consideration the type of project and the extent of litigation.

(6) **Repairs, Capital Improvements, Emergency.** Again, these are money issues to be dealt with in the budget. Repairs of a minor or recurring nature should be ordered by manager without owner approval. Capital improvement budgets should be established and the date of replacement of capital items estimated. Subject to a bidding process, budgeted capital improvements should be carried out without further involvement by the owner. However, the unexpected will always occur and the manager needs some latitude to deal with unexpected costs without prior owner approval. The capital budget could establish amounts for which no owner approval is necessary provided a bidding process is completed before a contract is signed. Emergencies are to be expected and the agreement must give the manager the latitude to respond to the emergency and then report to the owner for further authorization.

(7) **Service Contracts.** Utility services should be in the owner's name because these costs are significant and the manager doesn't want to appear to be liable for them. However, the manager should have the authority to negotiate rates, terms and level of service. Delinquent utility service contracts may result in a cessation of services at the worst possible time and unhappy tenants are likely to try to attract attention to their plight through legal action or publicity. A good manager doesn't want its reputation ruined because a bad owner didn't pay the electric bill in the middle of the summer heat wave. Contracts having a duration in excess of some period of time agreed to by owner will have to be approved by owner. Contracts which can be terminated within 30 days should not require owner approval. Contracts for routine or recurring services (other than utilities) could be in the manager's name since they will likely not involve large sums of money. These include lawn and pool maintenance or sweeping parking areas. The owner should decide what contracts will be subject to competitive bid. Usually this is established for a particular service or for contracts with an extended duration or contracts above a certain amount of money. The owner and the manager should decide what services, if any, are to be purchased from the manager rather than third party vendors. Usually an owner is protected if the price paid to the manager for those services is competitive, but consider what will happen if the manager is terminated and the service being provided by the manager or an affiliate is no longer available. Example – computerized financial records for the project. Consider also that the manager might be furnishing a service at an unusually low rate which will change if the manager is terminated. Consider also whether the services to be purchased from the manager or third parties should have been a part of the basic services for which the management fee is being paid.

(8) **Leasing Efforts and Advertising.** Surprisingly, many management contracts do not adequately address the manager's role in leasing the property. Obviously this should be negotiated as part of the manager's duties and responsibilities. The manager should agree to use diligent efforts to lease the project at rental rates acceptable to the owner and consistent with leasing guidelines promulgated by the owner. Leasing guidelines should be amended from time to time as necessary by the owner. Leasing guidelines for an apartment project might be so simple as to specify only rental rates and minimum qualifications for a tenant such as a job reference and a satisfactory credit check. Leasing guidelines for a high rise office building will be quite different because of elements such as free rent, tenant finish allowance, renewal options and amenities. For that reason, the owner should have final approval on all new leases of that type, with the manager's authority limited to negotiating renewals and expansions for existing tenants. For every project the manager should know the owner's current leasing requirements and be obliged to adhere to them. On the other hand, the owner should expect to give an appropriate amount of autonomy to the manager, but withhold the authority to bind the owner to a lease which fails to meet the owner's guidelines. In major office projects the manager seldom, if ever, has the authority to bind the owner under a lease. The leasing guidelines should address relationships with and compensation to third party real estate agents representing prospective tenants. Advertising is also overlooked in many management contracts. The parties should decide if advertising is necessary or desirable, and if so, how often, what media and content. The owner should have final approval of all advertising and brochures, but the manager should be in charge of getting the ad agency or manager's own advertising department to produce concepts. The budget should provide for advertising costs and specify if the advertising budget is to be spread out over a period or concentrated. For projects such as condos and apartments, the owner's lawyer should review advertising material before it is released because of possible

securities, truth in lending, fair housing, handicap access, ADA and interstate land sales law violations. The manager does not want to be liable for decisions of the owner that constitute violations of applicable laws.

(9) **Insurance, Liability and Indemnity.** Each party must carry appropriate hazard, liability, automobile, workers' compensation and rental loss insurance. The manager can negotiate the owner's coverages, but that is probably better left to an insurance broker. I do not counsel having the manager named as an insured on the owner's property insurance policies and this usually meets some resistance from managers, but I don't see that the manager has any insurable interest. Evidence of the required insurance coverage by owner and prior notice of cancellation is sufficient protection. The liability policy of the manager should include contractual indemnity coverage and should be an occurrence based (not claims made) policy. If the manager's liability insurance covers more than one project, the policy must have a location endorsement to prevent loss at another project from reducing coverage available at owner's project. If the manager is truly in control of the project, all liability arising from operation of the project should fall on the manager rather than the owner except those liabilities arising out of the owner's failure to timely and effectively remedy a condition brought to owner's attention by manager, such as defects and repairs. Clearly this is a very touchy area for which the manager wants as little responsibility and liability as possible. The manager can protect itself by making thorough inspections of the property and by giving the owner early and extensive reports of necessary remedial action. Otherwise, the manager takes the risk if it fails to remedy or take action. The management agreement should contain mutual waivers of right of recovery or waivers of subrogation for insured casualty losses. Most managers want to limit their indemnity obligation to injury or loss caused by their gross negligence and I think that is inappropriate. The owner needs to be alert to the problems of comparative negligence and the need for juries to find a solvent defendant in the appropriate case. Therefore, higher levels of liability insurance are recommended for the owner. The insurance industry is making liability insurance for managers prohibitively expensive because of increasing premises liability claims. Therefore, if the owner must provide liability coverage for the manager also, the manager's compensation should be adjusted accordingly. The manager should be concerned about broad indemnities that expose it to potential liability for environmental hazards that it did not create or exacerbate. If liability insurance is likely to be cancelled when a manager is terminated or the agreement expires, the parties should consider tail insurance for some period to protect against claims asserted after the relationship ends. This coverage can be very expensive.

(10) **Records, Audit and Final Audit.** Each owner, each project and each manager has its own records needs. The more sophisticated the owner, or the project, the more records and reports. A competent manager usually has a system of records and reports (and probably a computer program in place) for its business. To the extent possible, the owner's use of that records system will avoid extra accounting charges being added to the management fee. Typically, the owner of a number of projects that are managed by outside managers requires a standard system of reports and records which the manager must adopt. The frequency of reporting is critical if an owner is to react to a changing market. On the other hand, reports cost money and interpretation of them is the owner's job. However, a good manager will provide early warnings about changes (good or bad) in the market. The owner needs to know when to adjust rents and reduce or increase minimum lease terms or when to offer a new amenity. The management agreement should oblige the manager to provide that kind of advice and information to the owner on a periodic basis — sort of a report card comparing the owner's

project to others in the vicinity. The manager may or may not be assigned the responsibility of negotiating ad valorem tax adjustments and protests. Audits are appropriate and necessary. They should be performed periodically as a check and as a deterrent to fraud or theft. Audits should be performed by outsiders, and the manager must cooperate with auditors at no additional charge to owner and make all books and records available. Of course, the manager must retain necessary books and records for some period of time (including after termination of the management agreement) or the audit power is ineffective. The ownership of books and records is to be with the owner and the place books and records are kept is to be established. When a management agreement is terminated, the owner needs copies of computerized records and applicable software without additional charge. A final audit is advisable to confirm a settlement of accounts. If an audit finds irregularities or losses, the manager should be liable for those and should bear some part of that audit expense. The cost of audits should be budgeted. If the project will be mortgaged, the agreement needs to provide that the manager will provide the operating reports required by the lender in the form required by the lender.

(11) **Payment of Expenses.** Bills must be paid and the owner has the obligation to pay them, and if cash flow is inadequate the owner must put in additional money. The risk that the owner will not put in the needed money is one which the manager avoids by not putting its name on any contracts or obligations. However, a manager's vendors will often look to the manager to pay for janitor service, routine maintenance and the like. Accordingly, the management agreement must establish a priority for the payment of expenses and that priority is negotiable. Usually, the manager asks to be paid its fee off the top, but the owner wants the mortgage paid first. There is no perfect solution particularly if the project is losing money and the owner is slow to fund operating deficits. Fortunately for the manager, an owner's failure to fund deficits should allow the manager to terminate the contract for cause. The manager should not agree to advance any of its money to pay project expenses.

(12) **Manager's Overhead.** Overhead costs (usually manager's office, employee and accounting costs) should be prorated among all of the manager's properties on some agreed formula. The proportion should not be tied to a number of properties managed because that number could vary widely. The owner should be alert to overhead charges buried in other budget items. The owner might negotiate for a lid on the overhead costs to be charged to his project without his consent. Prior approval and verification of overhead charges above those included in the base management fee is advisable. This is an area of potential abuse.

(13) **Compensation of Manager.** Typical compensation for management is a stated percentage of gross rental income received for the period. Usually there are adjustments for bad checks, security deposits and prepaid rents. For leasing, a separate percentage of rental income is often paid to the manager as a commission. Remember that the manager usually has control of the funds for the project and pays itself out of those funds before the owner knows what the income and expenses are for the period. A better approach would require the manager to deposit all funds into the project bank account, report to owner and then have the owner pay the manager. Most managers would be afraid of such a system. The question of payment for extra services and out-of-pocket expenses should be addressed in the management agreement if for no purpose other than to spell out if they are contemplated, and if so, what are the limits on them. This too is an area of potential abuse. On-site apartment managers usually receive some of their compensation in the form of free rent.

(14) **Termination.** A well drawn management agreements will provide the grounds for termination by either side, a fixed term and any renewal rights by either party. Beware of any exclusive long-term management rights which might be a deterrent to a sale. The grounds for termination should include termination for specific breaches of law or the agreement by either party and a mutual termination right upon a minimum notice. Bankruptcy, receivership or similar financial instability by either manager or owner should be grounds for termination. Likewise, a financing or refinancing of the project might produce a termination of the manager when the lender has objections to the manager. Substantial damage to or condemnation of the project should be grounds of termination by owner. Remember that the agreement creates an agency and the owner can terminate its agent prior to the expiration of the stated term without cause, notwithstanding language to the contrary in the agreement. Of course, the owner may be held liable in damages for that termination, but the owner can't be forced to employ an agent the owner does not want. Termination by owner without cause should not be exercisable before the end of a minimum initial term without the payment of liquidated damages to the manager. This will protect the manager from a loss of start up costs. The manager's compensation should cease immediately on termination for cause and not be payable thereafter even if earned. If the agreement terminates for reasons other than cause, the manager is entitled to all compensation accrued/earned prior to termination and remaining unpaid. The manager may want to terminate the agreement if the owner defaults on the mortgage loan on the project or if the project should be seized or otherwise taken from the owner's control. The owner may want to separate termination from payment of damages. In other words, owner may want manager off the job and off the project before being obligated to make the payment. Upon termination, all owner's books, records, lease, rent rolls and other properties (advertising materials, equipment and supplies) and operating and maintenance information should be delivered/assigned to owner. Don't forget information stored on a computer and the software and instructions to access it. A change in management can be chaotic for the project and quite expensive if the termination is on unfriendly terms. As a general proposition, the manager should agree to do all things and perform all acts reasonably necessary to effect an orderly transition of management responsibility following a termination of the agreement. A transition may be made difficult if the old manager is using proprietary software or some system of its own to keep books and records and that system would not be available to a successor. The management agreement might contain a confidentiality provision that would prevent manager from disclosing financial and other project lease information to owner's competitors or to the public generally. A survival provision may be appropriate in the agreement to deal with claims asserted after termination, erroneous handling of money, post termination audit results and the like.

(15) **Sale of Project.** The manager must cooperate in the owner's efforts to sell by making information available to potential buyers and showing the project. For this cooperation the owner will usually pay the manager a fee or sales commission. An uncooperative or unfriendly manager can certainly hurt an owner's chance of selling a project. Except as stated above, the manager should not receive a brokerage fee on the sale of the property where the manager is not the procuring cause of the sale. Likewise, the owner may consider prohibiting the manager from getting a commission as a co-operating broker because such a claim may chill the efforts of brokers who want to earn only a full commission on a sale. The sale of the project should be an event which terminates the management contract. However, the agreement has to recognize that there will be a transition period from old manager to new manager and old manager will need to be cooperative during that process. Also, the contract should clearly state

that the manager will not assert any claims against the project or the new owner after a sale, but will look exclusively to the former owner for performance under the agreement.

(16) **Conflicts of Interest/Non-Compete.** Be alert to self dealing by the manager in purchasing services from a related company at non-competitive prices and by accepting the management or leasing or ownership of other projects which compete with the owner's. There are many other possible areas of conflict. The owner should require the manager to diligently perform its management services in accordance with the standards established by the owner, the highest ethical standards of the industry and the standards of any trade association or similar organization for the industry (Building Owners and Managers Association) whether or not the manager is a member. Unethical conduct is grounds for termination for cause. An owner may be concerned about retaining a manager that would also manage a competing property. While the concern may be valid, a manager is probably unwilling to forego the opportunity to get more business.

(17) **Compliance with Laws.** The manager must assume this obligation as it relates to the conduct of its business and the leasing and management of the project. Particularly an issue in the area of discrimination in leasing apartments. The manager's indemnity should cover failure to comply with laws. Also, the manager should be obligated to notify owner promptly of any violation which comes to manager's attention, particularly violations (such as zoning and fire code) which are the owner's responsibility. The manager should not be allowed to accept service of process or even accept a citation for a code violation. The manager should require some representation from the owner concerning the absence of asbestos, PCBs and hazardous substances. The manager is almost certainly an operator of the project under environmental laws. Accordingly, the manager may find it desirable to require an environmental base line inspection of the project before accepting management responsibility for it.

(18) **Mortgagee.** A lender will usually ask that the owner's rights under the management agreement be pledged as additional collateral for the loan and that the manager's rights under that agreement be subordinated to the liens securing the loan. The manager may be required to furnish reports to the lender, and if requested, the manager should agree to furnish its reports to the lender in the form required by the lender. The owner may consider putting language in the agreement similar to that found in leases which automatically subordinates manager's right to liens of present and future mortgagees.

B. **Forms.** A form of office building management agreement is attached. It was negotiated, so it should not be adopted for use in your transaction without a clear understanding of its strengths and weaknesses. For a form of apartment management agreement see 14 Real Property, Probate and Trust Journal 401 (Summer 1979). See also, Herz and Kaplin, Drafting Management Agreements, 6 The Practical Real Estate Lawyer No. 2 (March 1990.)

APPENDIX A

MANAGEMENT AGREEMENT

This Agreement dated as of the _____ day of _____, 20____, by and between _____ (“Owner”), and _____ Building Company, a Texas corporation (“Manager”).

WITNESSETH:

Owner owns and operates, and has the right to collect rents from and manage, certain properties and desires to engage Manager to manage and operate the same to the extent hereinafter specified.

NOW, THEREFORE, in consideration of the premises, the parties agree as follows:

ARTICLE 1.

PROPERTY

This Agreement relates to the _____ Building located on the block bounded by _____ Street, _____ Avenue, Street, and _____ Avenue in Houston, Harris County, Texas, and known by street address as _____ Street, Houston, Texas (“Property”). In absence of agreement in writing between the parties to this Agreement, no other tract or parcel of real property or the improvements thereon shall be subject to the terms of this Agreement.

ARTICLE 2.

COMMENCEMENT DATE

Manager’s duties and responsibilities under this Agreement shall begin as of the ____ day of _____, 20____, unless Owner at Owner’s sole option elects to choose an earlier beginning date, and shall continue for so long as _____ occupies as a tenant not less than _____ square feet of net rentable area in the Property.

ARTICLE 3.

MANAGER’S RESPONSIBILITIES

3.1 Management. To the extent herein provided and subject to the terms and conditions herein set forth, Manager shall manage, operate and maintain the Property in an efficient and satisfactory manner. Manager shall act in a fiduciary capacity with respect to the matters subject to Manager’s control and management under this Agreement. In this capacity, Manager shall deal at arm’s length with all third parties.

3.2 Employees; Independent Contractor. Manager shall have in its employ at all times a sufficient number of capable employees, as employees of Manager and not of Owner, to enable it to properly and adequately manage, operate and maintain the Property or Manager shall engage such independent contractors as Manager deems necessary to supplement and complement Manager's employees and properly and adequately manage, operate and maintain the Property. Manager shall be responsible to Owner for all such employees and/or independent contractors. All matters pertaining to the employment, supervision, compensation, promotion and discharge of Manager's employees and others engaged by Manager for the operation and maintenance of the Property are the responsibility of Manager. Manager shall fully comply with all applicable laws and regulations having to do with workers' compensation, social security, unemployment insurance, hours of labor, wages, working conditions, and other employer-employee related subjects in connection with the Property. Manager represents that it is and will continue to be an equal opportunity employer and will advertise (to the extent Manager elects to advertise) as such. This Agreement is not one of agency by Manager for Owner but one with Manager engaged with respect to the functions undertaken by or assigned to Manager under this Agreement independently in the business of managing properties on its own behalf, as an independent contractor.

3.3 Schedule of Employees. Manager shall provide a schedule of employees with respect to all employees to be employed "on-site" in the direct management of the Property. This schedule shall include the number of employees and their title and salary range and shall also indicate which employees, if any, are bonded or are covered under Manager's comprehensive crime insurance policy. Manager shall identify in the same manner those additional employees whose salaries may from time to time be charged pro rata to the Property for direct services rendered to such Property. Employees whose salaries are eligible to be charged pro rata include, but are not limited to, engineers or others to be mutually agreed upon by Owner and Manager from time to time.

3.4 Compliance with Laws, Mortgages, etc.. Manager shall be responsible for management, operation and maintenance of the Property in compliance with federal, state and municipal laws, ordinances, regulations and orders relative to the leasing, management, operation, repair and maintenance of the Property, and with the rules, regulations or orders of the local fire inspection department, the agency or board (state or local) of casualty insurance underwriters or other similar body. Manager shall promptly remedy any violation of any such law, ordinance, rule, regulation or order which comes to its attention to the extent such remedy is within the control of Manager; provided, however, that Manager's responsibilities shall be limited to funds made available by Owner to cause such compliance.

Manager shall not knowingly commit any act of default under the terms and conditions contained in any ground lease, space lease, mortgage, deed of trust or other security instruments affecting the Property, and shall promptly notify Owner of any such default which comes to the attention and knowledge of Manager, but Manager shall not be required to incur any liability on account thereof.

3.5 Approved Budgets. Manager shall prepare and submit to Owner a proposed operating budget and a proposed capital budget for the promotion, operation, repair and maintenance of the Property for the forthcoming calendar year. The proposed budgets for the first year shall be delivered to Owner before _____ 1, 20__, and a proposed budget for

each year after the first year shall be delivered to Owner no later than December 1 of the calendar year preceding the year involved.

Owner will consider the proposed budgets and then will consult with Manager in the ensuing period prior to the commencement of the forthcoming calendar year in order to mutually agree on an operating budget (the "Approved Operating Budget") and on a capital budget (the "Approved Capital Budget").

Manager agrees to use diligence and to employ all reasonable efforts to ensure that the actual costs of maintaining and operating the Property shall not exceed the Approved Budget (Operating or Capital, as the case may be) pertaining thereto either in total or in any one accounting category. All expenses shall be charged to the proper account as specified in the relevant Approved Budget and no expense may be classified or reclassified for the purpose of avoiding an excess in the annual budgeted amount of an accounting category. Manager shall secure Owner's prior approval for any expenditure except for utilities charges that will result in an excess of 5% or more in any one accounting category of the Approved Operating Budget, however, if said expenditure is less than Five Thousand Dollars (\$5,000) no approval is necessary.

During each calendar year, Manager agrees to inform Owner of any major increases in costs and expenses that were not foreseen during the budget preparation period and thus were not reflected in either Approved Budget (Operating or Capital, as the case may be), and shall submit to Owner for approval a revised budget based upon said unforeseen costs and expenses.

3.6 Collection of Rents and Other Income. Manager will endeavor to collect all rents including escalation billings, as approved by Owner, for tenant participation in increases in operating and fixed expenses and other charges which may become due Owner at any time from any tenant, or from others, for services provided in connection with, or for the use of, the Property or any portion thereof. In addition, Manager will undertake to collect and identify any income due Owner from miscellaneous services provided to tenants or the public including, but not limited to, parking income, tenant storage, and coin operated machines of all types (e.g., vending machines and pay telephones). All monies so collected shall be deposited in the Operating Account and on or about the 6th day of each month the Manager shall remit to Owner's designated account in _____, all sums in the Operating Account in excess of those required to operate the Property for the balance of such month. A similar transfer of funds shall be made on or about the 20th of each month. Manager cannot and may not terminate any lease, lock out a tenant, institute suit for rent or for use and occupancy, or proceedings for recovery of possession, without the prior written approval of Owner. In connection with such suits or proceedings only legal counsel designated by Owner shall be retained, and all such suits or proceedings shall be brought in the name of Owner and shall be handled in such manner as Owner directs. All legal expenses incurred in bringing such suits or proceedings shall be operating expenses.

3.7 Repairs. Manager shall attend to the making and supervision of all ordinary and extraordinary repairs, decorations and alterations to the Property; however, no single expenditure which is not included in the Approved Operating Budget or the Approved Capital Budget made for such purposes shall exceed Five Thousand Dollars (\$5,000) without prior approval of the Owner. Disbursements for actual and reasonable expenses for materials and labor for such

purposes will be made from the Operating Account. Excluded from this provision are expenditures to refurbish, rehabilitate, remodel, or otherwise prepare areas covered by new leases; such expenditures are to be handled in accordance with Section 3.8.

In case of emergency Manager may make expenditures for repairs which exceed the aforementioned amount without prior written approval if Manager deems such expenditure to be necessary to prevent damage or injury. Manager will inform Owner of any such emergency expenditures before the end of the next business day.

3.8 Capital Expenditures. The Approved Capital Budget shall, except as limited by this Section 3.8, constitute an authorization for Manager to expend funds in accordance with such budget only for amounts equal to, or less than, Five Thousand Dollars (\$5,000). Any capital expenditure must be specifically authorized in writing by Owner if for: (i) items not included in the Approved Capital Budget, (ii) items limited by this Section 3.8, or (iii) for amounts of more than Five Thousand Dollars (\$5,000).

With respect to the purchase and installation of major items of new or replacement equipment (including, without limitation, elevators, heating or air-conditioning equipment, furniture and furnishings, carpets or other floor coverings), Manager shall recommend that Owner purchase these items when Manager believes such purchase to be necessary or desirable. Owner may arrange to purchase and install the same itself or may authorize Manager to do so subject to such supervision and specification requirements and conditions as Owner may prescribe in any such approval. Unless Owner specifically waives such requirements, either by memorandum or as an amendment to the contract, all new or replacement equipment exceeding Five Thousand Dollars (\$5,000) shall be awarded on the basis of competitive bidding, solicited in the following manner:

(a) A minimum of two written bids will be obtained for each purchase in excess of Five Thousand Dollars (\$5,000). A minimum of three written bids will be obtained for each purchase in excess of Ten Thousand Dollars (\$10,000).

(b) Each bid will be solicited in a form approved by Owner so that uniformity will exist in the bid quotes.

(c) Manager shall provide Owner with all bid responses accompanied by Manager's recommendations as to the most acceptable bid. If Manager advises acceptance of other than the lowest bidder, Manager shall adequately support, in writing, its recommendations.

(d) Owner will approve or disapprove any and all bids and will communicate to Manager its approval or disapproval of bids within five (5) business days. If Owner does not communicate any response to Manager within five (5) business days, such bids shall be construed by Manager to be disapproved by Owner.

Owner may pay for capital expenses from its own resources or may authorize payment out of the Operating Account.

3.9 Service Contracts. Manager shall not enter into any contract for cleaning, maintaining, repairing or servicing the Property or any of the constituent parts of the Property

without the prior consent of Owner unless provided for in the Operating Budget. As a condition to obtaining such consent, Manager shall supply Owner with a copy of the proposed contract and shall state to Owner the relationship, if any, between Manager (or the person or persons in control of Manager) and the party proposed to supply such goods or services, or both. Each such service contract shall: (a) be in the name of Manager, (b) identify the Property and be assignable, at Owner's option to Owner or Owner's nominee, (c) include a provision for cancellation thereof by Owner or Manager effective upon 30 days' written notice and (d) shall require that all contractors provide evidence of sufficient insurance. If this Agreement is terminated pursuant to any provision of Article 14, Manager shall, at Owner's option, assign to Owner or Owner's nominee all service agreements pertaining to the Property and Owners or Owner's nominee shall assume all Manager's obligations thereunder.

3.10 Taxes, Mortgages. Manager shall, if such amounts are included in the Operating Budget, pay bills for real estate and personal property taxes, improvement assessments and other like charges which are or may become liens against the Property pay such items. Manager shall make payments on account of any ground lease, mortgage, deed of trust or other security instrument, if any, affecting the Property to the extent Owner directs that Manager make such payments (either in the Approved Budgets or otherwise).

3.11 Leasing. The Manager shall make every reasonable effort to obtain and keep desirable tenants for the Property; provided, however, that nothing contained herein shall restrict the right of Manager, its officers, directors and shareholders, to own, operate and/or manage other properties that compete with or might be competitive with the Property. Manager shall, so far as possible, procure references from prospective tenants, investigate such references, and use its best judgment in the selection of prospective tenants. As soon as possible following any vacancy, Manager will prepare adequate rental listings and promptly distribute them to one or more reputable and active real estate brokers. All terms and conditions of each listing agreement shall be subject to Owner's review and written approval prior to such distribution. After a vacancy is so listed, Manager will cooperate with any of such brokers in any manner likely to aid in successfully filling the vacancy. The Manager agrees to perform whatever service may be required in connection with the negotiation of leases or renewals, extensions, modifications, or cancellations thereof. Leasing commissions will be paid from the Operating Account.

3.12 Execution of Leases. All leases are to be prepared by Manager in accordance with the leasing guidelines established by Owner with respect to the Property. Except as otherwise mutually agreed by Owner and Manager in a particular case, all leases shall be prepared by Manager and submitted to Owner for execution by Owner in Owner's name.

3.13 Advertising. The Manager shall prepare advertising plans and promotional material to be used to further rentals. Such plans or material shall only be used if approved in advance by Owner, and in conformance with such approval. Manager shall not use Owner's name in any advertising or promotional material without Owner's expressed prior approval in each instance. Advertising and promotional materials shall be prepared in full compliance with federal, state and municipal laws, ordinances, regulations and orders.

ARTICLE 4.

INSURANCE

4.1 Owner, at its expense, will obtain and keep in force adequate insurance against physical damage (e.g. fire and extended coverage endorsement, boiler and machinery, etc.) and against liability for loss, damage or injury to property or persons which might arise out of the occupancy, management, operating or maintenance of the Property covered by this Agreement. Manager will be covered as an additional insured in all liability insurance maintained with respect to the Property. Owner shall save Manager harmless from any liability on account of loss, damage or injury actually insured against by Owner provided Manager:

- (a) notifies Owner within five (5) business days after Manager receives notice of any such loss, damage or injury;
- (b) takes no action (such as admission of liability) which bars Owner from obtaining any protection afforded by any policy Owner may hold; and
- (c) agrees that Owner shall have the exclusive right, at its option, to conduct the defense to any claim, demand or suit within limits prescribed by the policy or policies of insurance.

Nothing herein shall be construed as indemnifying the Manager against any omission, deliberate wrongful act or misconduct of the Manager or its employees, contractors or agents or to indemnify the Manager against any act or omission for which insurance protection is not available; neither is the foregoing intended to affect the general requirement of this Agreement that the Property shall be managed, operated and maintained in a safe condition and in a proper and careful manners.

The Manager shall furnish whatever information is requested by Owner for the purpose of establishing the placement of insurance coverages and shall aid and cooperate in every reasonable way with respect to such insurance and any loss thereunder. Owner shall include in its hazard policy covering the Property, the personal property, fixtures and equipment located thereon (owned by either Manager or Owner), appropriate clauses pursuant to which the insurance carriers shall waive the rights of subrogation with respect to losses payable under such policies.

ARTICLE 5.

FINANCIAL REPORTING, RECORDKEEPING AND ACCOUNTING

All financial reporting, recordkeeping and accounting with respect to the Property and the ownership, leasing, management, operation, repair and maintenance thereof, as well as all collections and expenditures relating thereto shall be the responsibility of the Manager and shall be adequately maintained. Owner shall establish a Chart of Accounts (a system of classification of accounting entries) or provide a means of classification of accounting entries and Manager shall adhere to such Chart of Accounts or such classification in any relevant data furnished to

Owner by Manager.

The reports shall include a comparison of monthly and year-to-date actual income and expense with the Approved Operating Budget for the Property. As additional support to the monthly financial statements, Manager shall provide to Owner on request copies of the following:

- (a) Bank statements, bank deposit slips and bank reconciliations,
- (b) Detailed cash receipts and disbursement records,
- (c) Detailed trial balance (if available),
- (d) Paid invoices,
- (e) Summaries of adjusting journal entries, and
- (f) Supporting documentation for payroll, payroll taxes and employee benefits.

All monthly financial statements and reports required by Owner will be prepared on a modified cash basis consistently applied.

ARTICLE 6.

AUDITS

Owner may examine or cause to be examined books and records maintained by Manager with respect to any item for which Manager is reimbursed by Owner, and Owner also reserves the right to perform any and all additional audit tests relating to Manager's activities, either at the Property, or at any office of the Manager; provided such audit tests are related to those activities performed by Manager for Owner.

ARTICLE 7.

BANK ACCOUNTS

7.1 Operating Account. The Manager shall deposit all rents and other funds collected from the operation of the Property, including any and all advance funds, in a bank approved by Owner in a special account or accounts (the "Operating Account(s)") for the Property. The bank shall be informed in writing that the funds are held in trust for the Owner. Out of the Operating Account, Manager shall pay the operating expenses of the Property (including, without limitation, sums due the Manager to this Agreement) and any other payments relative to the Property as required by the terms of this Agreement. At any time that the Operating Account contains inadequate funds to meet current expenses and reasonable reserve, including all times prior to the commencement of rental income from the Property, Owner shall provide the needed funds for the Operating Account.

7.2 Security Deposits. Manager shall maintain detailed records of all security

deposits and such records will be open for inspection by Owner. Manager shall obtain approval of Owner prior to the return of such deposits to any particular tenant when the amount of such return, in any single instance, exceeds One Thousand and No/100 Dollars (\$1,000.00).

7.3 Change of Banks. Owner may direct the Manager to change a depository bank or the depository arrangements.

7.4 Access to Account. Through the use of signature cards, authorized representatives of the Owner shall be permitted access to any and all funds in the bank accounts described in Section 7.1. Manager's authority to draw against such accounts may be terminated at any time by Owner upon five (5) days notice to Manager. In the event of such a termination, Owner will assume full liability for all existing financial obligations for the Property which were incurred prior to said termination by the Manager pursuant to, and in accordance with, the terms of this Agreement.

ARTICLE 8.

PAYMENTS OF EXPENSES

8.1 Manager's Costs to be Reimbursed. All costs of the gross salary and wages (including bonuses) or pro rata share thereof, payroll taxes, insurance, worker's compensation and other benefits of the Building Manager, the Assistant Building Manager and the Building Manager's Secretary shall be deemed reimbursable costs to be charged initially to Manager in accordance with a written schedule setting out such salaries and wages and other benefits from Owner to Manager, but to be paid by Owner or for which Owner will reimburse Manager, if paid by Manager. Further, all costs of the gross salary and wages (including bonuses) or pro rata share thereof, payroll taxes, insurance, workers' compensation and other benefits of Manager's employees required to properly, adequately, safely and economically manage, operate and maintain the Property subject to this Agreement, provided that such employees and bonuses have been identified by position and enumerated on a schedule to be furnished Owner by Manager and approved by Owner.

Owner shall bear and pay directly or through Manager, or to the extent Manager shall pay the same Manager shall be reimbursed for the following:

(a) Cost to correct any violation of federal, state and municipal laws, ordinances, regulations and orders relative to the leasing, use, repair and maintenance of such Properties, or relative to the rules, regulations or orders of the local fire inspection department, the agency or board (state or local) of casualty insurance underwriters or other similar body, provided, that such cost is not a result of Manager's negligence.

(b) Actual and reasonable costs of making all repairs, decorations and alterations.

(c) Costs incurred by Manager in connection with any service agreement entered by Manager in accordance with authorization in this Agreement or approved of by Owner.

- (d) Cost of collection of delinquent rentals collected through a collection agency which has been approved in advance by Owner.
- (e) Rental charged to Manager for on-site office for Manager's personnel.
- (f) Costs of printed forms and supplies required for use at the Property.
- (g) Costs of capital expenditures subject to the restrictions in Section 3.8.
- (h) Cost of cash register, adding machines and other equipment of such type and use located at a Property and owned by the Owner.
- (i) Leasing commissions payable to third parties.
- (j) Cost of service contracts approved by Owner and cost of utilities.
- (k) Cost of Owner approved advertising.
- (l) Legal fees of attorneys provided such attorneys have been approved of (or designated pursuant to Section 3.6) by Owner in writing in advance of retention.
- (m) Cost of outside audit as required by leases and other outside audits as may be requested by Owner in writing.

ARTICLE 9.

MANAGER'S COST NOT TO BE REIMBURSED

Except to the extent that such costs and expenses are approved for payment by Owner the following expenses or costs incurred by or on behalf of Manager in connection with the Property shall be at the sole cost and expense of Manager and shall not be reimbursed by Owner:

- (a) Cost of forms, papers, ledgers, and other supplies and equipment used in the Manager's office at any location off the Property.
- (b) Cost attributable to losses arising from negligence or fraud on the part of Manager or Manager's employees.
- (c) Cost of all bonuses paid by Manager to Manager's employees unless such bonuses have prior written approval of Owner.

ARTICLE 10.

CONSENTS AND APPROVALS

Owner's consents or approvals may be given only by representatives of Owner who will be designated in writing by Owner by notice pursuant to Article IS. All such consents or approvals shall be in writing to the extent set forth herein as requiring written approval.

ARTICLE 11.

SALE OF PROPERTY

If Owner executes a listing agreement with a broker for sale of the Property, the Manager shall cooperate with such broker to the end that the respective activities of Manager and broker may be carried on without friction and without interference with tenants and occupants. The Manager will permit the broker to exhibit the Property during reasonable business hours provided the broker has secured the Manager's permission in advance. Manager agrees that failure on its part to extend cooperation to a broker desiring to show the Property is a material default on its part under this Agreement and is a ground for termination of this Agreement upon thirty (30) days notice to Manager.

ARTICLE 12.

COOPERATION

Should any claims, demands, suits or other legal proceedings be made or instituted by any person against the Owner which arise out of any of the matters relating to this Agreement, the Manager shall give Owner all pertinent information and reasonable assistance in the defense or other disposition thereof. All costs and expenses incident to such proceedings shall be paid from the Operating Account.

ARTICLE 13.

COMPENSATION

Manager shall receive as consideration and remuneration for its services under this Management Agreement a fee equal to ___ percent (___%) of the gross revenues received by Owner on account of the Property on a monthly basis. In addition, the Manager shall receive a commission equal to ___ percent (___%) of the gross revenues payable under each new tenant lease obtained for the Property during the term of this Agreement and ___ percent (___%) of the gross revenues payable under each renewal of leases now or hereafter in effect for the Property during the term of this Agreement, with such commissions to be paid in cash upon the execution of each such lease. All sums due to Manager under this Agreement shall be paid out of the Operating Account prior to remitting sums in said account to the Owner.

ARTICLE 14.

TERMINATION

14.1 Termination for Cause. This Agreement will terminate immediately without further action from the Owner in the event Manager breaches any of its obligations to Owner under the terms of this Agreement (herein defined to be "Default"), and fails to cure such Default within thirty (30) days after receipt of written notice from Owner specifying the nature of such Default.

14.2 Authority to Execute Termination Notices. Notice of termination or default for the purposes of Section 14.1 must be signed by persons authorized to so act on behalf of Owner or

Manager, as the case may be.

14.3 Termination Without Notice. Dissolution or termination of the corporate existence of the Manager by merger, consolidation or otherwise; or termination or suspension of Manager's real estate brokerage license, if such license is required as a condition to Managing the Property; or cessation on the Manager's part to continue to do business; or bankruptcy, insolvency, or assignment for the benefit of the creditors of the Manager shall effect an immediate termination of the Agreement without notice. Action having for its purpose a reorganization or reconstitution of the Manager shall likewise effect an immediate termination.

14.4 Final Accounting. Upon termination of this Agreement for any reason, Manager shall deliver to Owner all records, contracts, leases, receipts for deposits, unpaid bills and other papers or documents which are in Manager's possession and which relate to the Property.

ARTICLE 15.

NOTICES

All notices, demands, consents and reports provided for in this Agreement which are required to be in writing shall be given to the parties at the addresses set forth below or at such other address as they individually may specify thereafter in writing:

FOR OWNER:

FOR MANAGER:

Such notice or other communication may be mailed by United States registered or certified mail, return receipt requested, postage prepaid and may be deposited in a United States Post Office or a depository for the receipt of mail regularly maintained by the post office. Such notices, demands, consents and reports may also be delivered by hand, or by any other method or means permitted by law.

ARTICLE 16.

NON-ASSIGNABLE, ETC.

16.1 No Assignment. This Agreement and all rights hereunder shall not be assignable by either party hereto (except as may be required by a surety company in a matter of subrogation).

16.2 Pronouns. The pronouns used in this Agreement referred to the Manager shall be understood and construed to apply whether the Manager be an individual, co-partnership, corporation or an individual or individuals doing business under a firm or trade name.

16.3 Amendments. Except as otherwise herein provided, any and all amendments, additions or deletions to this Agreement shall be null and void unless approved by the parties in writing.

16.4 Headings. All headings herein are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Agreement.

16.5 Representations. Manager represents and warrants that it is fully qualified and licensed, to the extent required by law, to manage real estate and perform all obligations assumed by Manager hereunder.

16.6 Manager's Liability. Manager shall be liable to Owner for all losses, damages, fines, penalties, costs and expenses, including attorneys' fees and court costs, sustained or incurred by Owner by reason of or arising out of Manager's breach of the duties and obligations required by this Agreement.

16.7 Complete Agreement. This Agreement and Schedule A attached hereto and made a part hereof, supersedes and takes the place of any and all previous management agreements entered into between the parties hereto.

IN WITNESS WHEREOF the parties hereto have executed this Agreement the date and year first above written.

By _____
Vice President

“OWNER”

_____ Building Company

By _____
“MANAGER”