Index

ACQUISITION AGREEMENTS
- Asset acquisition, 5:4, 5:5
- Asset purchase transaction, 6:29
- Hybrid asset purchase agreement, 6:32
- Hybrid asset/share transaction, 6:31
- Share acquisition, 5:2, 5:3
- Share purchase transaction, 6:27

AGENCY AGREEMENT
- See business agreement

AMALGAMATION
- Government guide to amalgamation, 9:19
- Specimen amalgamation agreement, 9:20

BUSINESS AGREEMENTS
- Agency agreement, 9:27
- Agreements, 9:18
- Assumption agreement, 9:23
- Co-ownership agreement, 9:11
- Co-ownership agreement, alternate form, 9:12
- Condo construction contract, 9:16
- Cost sharing agreement, 9:22
- Development and construction management agreement, 9:26
- Early access agreement, 9:33
- Escrow agreement, 9:31
- Facilitation agreement, 9:21
- Forbearance agreement, 9:28
- Forbearance agreement, short form, 9:29
- Government guide to amalgamation, 9:19
- Indemnity agreement, 9:30
- Joint venture waterfall agreement (U.S. version), 9:14

BUSINESS AGREEMENTS —Cont'd
- Letters of intent
  - memorandum of agreement, (formation of corporation), 9:1
  - memorandum of intent, (formation of partnership), 9:2
  - real estate term sheet, 9:3
- Management agreement, 9:25
- Mortgage participation agreement, 9:17
- Partnership agreement
  - Section 97(2) income tax partnership roll-over agreement, 9:9
  - standard, 9:8
- Profit participation agreement, 9:13
- Restrictive covenants agreement, 9:32
- Section 97(2) partnership roll-over, alternate form, 9:10
- Shareholder agreement
  - checklist, 9:4
  - corporate control, 9:7
  - multiple-party, 9:6
  - two-party, 9:5
- Specimen amalgamation agreement, 9:20
- Townhouse construction contract, 9:15

CAPITAL STRUCTURE
- Leverage effect on book versus market, 6:23
- Leverage effect on company value, 6:25
- Leverage effect on discount rates, 6:21

CAPITAL STRUCTURE—Cont'd
Leverage effect on earnings, 6:20
Leverage effect on security values, 6:22
Leverage effect on share values, 6:24

CONDITIONS
Closing, 7:39
Conditional period/due diligence, 1:6
Pre-closing, 7:38

CONSTRUCTION CONTRACTS
Condo construction contract, 9:16
Development and construction management agreement, 9:26
Townhouse construction contract, 9:15

CONTENT AND STRUCTURE OF CONTRACT
Conditions, 3:7
Contracting parties, 3:2
Covenants, 3:6
Definitions, 3:3
Generally, 3:1
Purchase price, 3:4
Representations, 3:5
Schedules, 3:3
Survival/indemnity provisions, 3:8
Warranties, 3:5

COST SHARING AGREEMENTS
Business agreements, 9:22
Joint venture, 8:13, 8:28

COVENANTS
By purchaser, 7:43
By vendor, 7:42
Generally, 3:6
Restrictive covenants, 4:13, 9:32

DRAFTING PROTECTIVE PROVISIONS
Accepting unsecured warranty, 4:7
Anticipation of purchaser's willful default, 4:2

DRAFTING PROTECTIVE PROVISIONS—Cont'd
Dealing with unforeseen risk, 4:11
Generally, 4:1
Liability of purchaser, as trustee, 4:6
Nature of risk, 4:10
Protecting vendor from breach of warranty, 4:8
Purchaser's fraudulent representation, 4:5
Restrictive covenants, 4:13
Right of re-entry, 4:14
Risk assessment, 4:9
Risk management, 4:9
Unlevel playing field, 4:3
Use of words "sole discretion," 4:4
Vendor's lien, 4:12

DUE DILIGENCE
Checklist, 6:60
Conditional period, 1:6
Pre-closing conditions, 7:38
Survival/indemnity provisions, 3:8

EARN-OUT AGREEMENTS
Share and asset acquisition, 6:36, 6:47, 7:49, 7:60

ENTITY CHOICE
Acquisition by bare trustee corporation, 7:30
Acquisition by co-ownership, 7:25
Acquisition by corporation, 7:26
Acquisition by individual, 7:23
Acquisition by joint venture, 7:27
Acquisition by partnership, 7:24
Acquisition by trust, 7:29

ESCROW AGREEMENTS
Generally, 9:31
Purchase price, 6:34

EXIT STRATEGIES
Buy/sell agreement, 8:42
Division in specie, 8:45
First right of refusal, 8:43

EXIT STRATEGIES—Cont'd
Partition and sale, 8:44
Saving failing venture, 8:46

FINANCIAL PERFORMANCE METHODS
Methods of valuation, 6:10

GENERAL DRAFTING CONSIDERATION
Agreement's skeleton, 2:4
Avoiding, ambiguous provision, 2:9
Contracts executed under seal, 2:14
Control drafting, 2:2
Definitions, 2:5
Drafting and good faith, 2:8
Formulas, 2:11
Generally, 2:1
Omission and error recognition, 2:7
Precision, 2:3
Principles of clear writing, 2:6
Proper use of representation, warranty, covenant and indemnity, 2:13
Punctuation: misplaced comma, 2:10
Use of "notwithstanding," 2:12

INDEMNITY AGREEMENTS
Drafting, 2:13

INSURANCE
Representation and warranty insurance, 6:53

JOINT VENTURE BUSINESS AGREEMENTS
Choosing partnership over co-ownership
partnership v. co-ownership, 8:49
Control of joint venture
commentary, 8:55
generally, 8:36
Corporation as joint venture vehicle
joint venture vehicle, 8:51

JOINT VENTURE BUSINESS AGREEMENTS—Cont'd
Distinguishing many form of joint venture
co-ownership, 8:9
corporation, 8:11
cost sharing, 8:13
other forms of joint venture associations, 8:15
partnership, 8:10
profit sharing, 8:14
strategic alliance, 8:12
Distribution of available funds
generally, 8:48
Essential provisions of shareholder agreement
relevant considerations, 8:54
Essential terms
formation, 8:17
generally, 8:16
management, 8:22
ownership, 8:19
profit and loss sharing, 8:20
project financing, 8:21
purpose and scope, 8:18
Exit strategies
buy/sell agreement, 8:42
division in specie, 8:45
first right of refusal, 8:43
generally, 8:41
partition and sale, 8:44
saving a failing venture, 8:46
General considerations
commentary, 8:4
contribution, 8:3
generally, 8:1
risk, 8:2
Liability and choice of joint venture
co-ownership, 8:24
corporation, 8:27
cost sharing, 8:28
general partnership, 8:25
generally, 8:23
liability protection by bare trust, 8:29

JOINT VENTURE BUSINESS AGREEMENTS—Cont'd
Liability and choice of joint venture —Cont'd
limited partnership, 8:26
Limited partnership agreement
legal elements, 8:50
Management and administration
generally, 8:47
Negotiation
art of negotiation, 8:5
compatibility, 8:7
letters of intent, 8:6
Remedies co-ownership default
generally, 8:37
permanent default, 8:40
Property Security Act, 8:39
temporary default, 8:38
Taxation and choice of joint venture
co-ownership, 8:30
contributing property to corporation, 8:35
contributing property to partnerships, 8:33
corporation, 8:34
general partnerships, 8:31
limited partnerships, 8:32
Unanimous shareholders agreement ("USA"), 8:52
managing director, 8:53
Understanding concept of contribution, 8:8

LAND ACQUISITION
Early access agreement, 7:69
Generally, 7:55
Leasehold acquisition, 7:67, 7:68
Option agreement, 7:66
Sale agreements, 7:56, 7:59, 7:61, 7:63
Serviced land, 7:61, 7:64
Unserviced land, 7:59, 7:60, 7:63

LEASEHOLD
Acquisition agreement, 7:67
Sale agreement, 7:68

LETTERS OF INTENT
Asset acquisitions, 5:4, 5:5
Drafting, 5:1
Pre-contractual agreements, 5:6, 5:7
Share acquisitions, 5:2, 5:3

LIABILITY
Limited partnership, 8:26
Protection by bare trust, 8:29
Purchaser as trustee, 4:6

MANAGEMENT AGREEMENTS
Development and construction, 9:26
Generally, 9:25
Joint venture, 8:22

NEGOTIATION
Contractual terms
conditional period/due diligence, 1:6
representations warranties, indemnities, 1:7
Generally, 1:1
Other negotiation considerations
advancing position, 1:12
attitude, 1:8
buyer's and seller's needs, 1:9
comportment, 1:14
confronting negative tactics, 1:13
negotiate, where to, 1:10
preparation, 1:11
Payment terms, 1:3
leverage financing, 1:4
the "blanket" mortgage, 1:5
Price, 1:2

OMISSION AND ERROR RECOGNITION
General drafting, 2:7

PARTNERSHIP AGREEMENTS
Formation, 9:2
Multiple-party, 9:6
Profit participation, 9:13
Section 97(2) income tax partnership roll-over, 9:9, 9:10
Standard, 9:8

PARTNERSHIP AGREEMENTS —Cont'd
Two-party, 9:5

PAYMENT TERMS
Methods of payment, 6:33
Negotiation, 1:3
Purchase price, 3:4, 6:33, 7:31

PRE-CONTRACTUAL AGREEMENTS
Letters of intent
drafting, 5:1
other pre-contractual agreements
alternate lock-up provisions, 5:7
confidentiality agreement, 5:6
specimen letters of intent
asset acquisition, 5:4
asset acquisition, alternate form, 5:5
share acquisitions, 5:2

PROPERTY ACQUISITION
Closing adjustments, 7:45
Co-ownership interest sale agreement, 7:54
Conditions, 7:33, 7:38, 7:39
Covenants, 7:42, 7:43
Earn-out provisions, 7:47
Generally, 7:1
Hotel purchase, 7:52
Payment terms, 7:31
Purchase price, 7:31, 7:37
Reciprocal easement and operating agreement, 7:53
Representations/warranties, 7:33, 7:40, 7:41
Shopping center purchase, 7:48
Title issues, 7:44

PURCHASE PRICE
Adjustment, 6:35, 7:35
Allocation, 7:37
Methods of payment, 6:33

REAL ESTATE ACQUISITIONS
Land acquisition
agreements
option agreement, 7:66
project costs, checklist, 7:65
serviced land purchase agreement, 7:64
serviced land sale agreement, 7:61
specimen provisions, 7:62
unserviced land earn-out sale agreement, 7:60
unserviced land purchase agreement, 7:63
unserviced land sale agreement, 7:59
drafting land acquisition agreement
general considerations, 7:55
general form of agreement, 7:57
sale of land agreement, 7:56
structuring form of agreement, 7:58
drafting leasehold acquisition agreement, 7:67
leasehold sale agreement, 7:68
early access agreement, 7:69
Property acquisition
choice of entity, 7:22
acquisition by bare trustee corporation, 7:30
acquisition by co-ownership, 7:25
acquisition by corporation, 7:26
acquisition by individual, 7:23
acquisition by joint venture, 7:27
acquisition by partnership, 7:24
acquisition by principal business corporation, 7:28
acquisition by trust, 7:29

REAL ESTATE ACQUISITIONS —Cont'd
Property acquisition—Cont'd
choosing proper capitalization rate, 7:4
co-ownership interest sale agreement, 7:54
drafting property acquisition agreements
conditions, 7:32
other matters, 7:34
purchase price adjustments, 7:35
purchase price and payment terms, 7:31
representations/warranties, 7:33
earnout agreement, 7:49
hotel purchase and sale agreement, 7:52
income capitalization and applications, 7:7
income capitalization methods, 7:6
preamble, 7:1
property acquisition agreements
allocation of purchase price, 7:37
assets being purchased, 7:36
closing adjustments, 7:45
closing and post-closing adjustments, 7:45
closing conditions, 7:39
covenants by purchaser, 7:43
covenants by vendor, 7:42
earn-out provisions, 7:47
other provisions, 7:46
pre-closing conditions (''due diligence period''), 7:38
property/title issues, 7:44
representations and warranties by purchaser, 7:41
representations and warranties by vendor, 7:40
reciprocal easement and operating agreement, 7:53

REAL ESTATE ACQUISITIONS —Cont'd
Property acquisition—Cont'd
rental income exceeding specified amount, 7:50
rental income lower than projected, 7:51
risk assessment, 7:8
break-even ratios, 7:16
debt coverage ratio, 7:12
nature of risk, 7:9
pay back period, 7:13
risk adjusted discount rates, 7:14
sensitivity analysis, 7:15
simulation, 7:11
utility of risk, 7:10
shopping center purchase and sale agreement, 7:48
strategies, 7:17
conditions, 7:20
payment terms, 7:19
price, 7:18
representations/warranties, 7:21
use of leverage, 7:5
value determined by future income flow, 7:3
value determined by prior sale transactions, 7:2

REPRESENTATIONS AND WARRANTIES
Generally, 3:5, 6:37, 7:21, 7:40, 7:41
By purchaser, 7:41
By vendor, 7:40
Insurance, 6:53
Knowledge, 6:38
Materiality, 6:39

RISK
Assessment, 4:9, 7:8
Break-even ratios, 7:16
Debt coverage ratio, 7:12
Nature, 4:10, 7:9

RISK—Cont'd
Pay back period, 7:13
Risk adjusted discount rates, 7:14
Sensitivity analysis, 7:15
Simulation, 7:11
Utility, 7:10

SCHEDULES
Definitions, 3:3

SHARE AND ASSET ACQUISITIONS AGREEMENTS
Corporate asset acquisitions
asset purchase agreement, long form, 6:63
asset purchase agreement, short form, 6:64
Corporate share acquisitions
due diligence, checklist, 6:60
share purchase agreement, long form, 6:61
share purchase agreement, short form, 6:62
Drafting
closing conditions, 6:43
''sign and close'' agreement, 6:44
executory agreement, 6:45
determining value of a company's shares or asset, 6:1
basic thoughts and principles, 6:2
commentary, 6:7
determining worth of private company, 6:3
intrinsic value, 6:5
market value, 6:6
what constitutes value, 6:4
earn-out agreement, 6:57
general considerations
hybrid asset/share transaction, 6:31
why choose asset purchase transaction, 6:29

SHARE AND ASSET ACQUISITIONS AGREEMENTS—Cont'd
Drafting—Cont'd
general considerations—Cont'd
why choose share purchase transaction, 6:27
general contract provisions, 6:54
entire agreement, 6:56
notice, 6:55
hybrid asset purchase agreement, 6:32
intrinsic value of seller's company
commentary, 6:16
cost of capital, 6:12
determining projected cash flow, 6:14
discounting projected cash flow, 6:13
economics of risk, 6:11
illustrative case in point, 6:15
market value of seller's company
commentary, 6:19
determining purchase price, 6:17
determining transaction's synergy value, 6:18
methods of valuation
asset valuation method, 6:9
comparable worth method, 6:8
financial performance method, 6:10
post-closing covenants, 6:46
post-closing access, 6:47
taxes and tax returns, 6:48
pre-closing covenants, 6:40
best-efforts, 6:41
ordinary course, 6:42
pro forma agenda and timetable, 6:59
project plan, 6:58
purchase price
adjustments, 6:35
earn-out, 6:36

SHARE AND ASSET ACQUISITIONS AGREEMENTS—Cont'd
Drafting—Cont'd
purchase price—Cont'd
escrows, 6:34
methods of payment, 6:33
representation and warranty insurance, 6:53
representations and warranties, 6:37
knowledge, 6:38
materiality, 6:39
survival and indemnities
indemnification, 6:50
indemnity caps, 6:52
negotiating suggestion, 6:51
survival, 6:49
tax considerations
asset purchase transaction, 6:30
share purchase transaction, 6:28
value and company's capital structure
commentary, 6:26
leverage effect on book versus market: table 1-4, 6:23
leverage effect on company's value: table 1-6, 6:25
leverage effect on discount rates: table 1-2, 6:21

SHARE AND ASSET ACQUISITIONS AGREEMENTS—Cont'd
Drafting—Cont'd
value and company's capital structure—Cont'd
leverage effect on earnings: table 1, 6:20
leverage effect on security value: table 1-3, 6:22
leverage effect on share value: table 1-5, 6:24
Related agreements
non-competition agreement, 6:65
non-competition agreement, alternate form, 6:66
non-negotiable subordinated note, 6:67

SHAREHOLDER AGREEMENT
Corporate control, 9:7
Multiple-party, 9:6
Two-party, 9:5

SURVIVAL/INDEMNITY PROVISIONS
Generally, 3:8
Indemnification, 6:50
Indemnity caps, 6:52

TAX CONSIDERATIONS
Asset purchase transaction, 6:30
Share purchase transaction, 6:28
Taxes and tax returns, 6:48