

MEMO TO THE PARTNER

STOCK TRANSFER RESTRICTIONS FOR MARYLAND REIT

MICHAEL CRUM^{*}

TO: Law Office Partner
FROM: Associate
RE: Stock Transfer Restrictions for Maryland REIT

I. GENERAL

I attach for your review a draft of the stock¹ transfer restriction provision (the “Draft Provision”) to be included in the articles of incorporation (the “Articles of Incorporation”) of National REIT, Inc. (the “Company”). This memorandum (1) details the transactional context for which this stock transfer restriction provision is drafted, (2) describes key drafting issues relating to the stock transfer restriction provision and the manner in which the draft provision addresses these issues, and (3) analyzes the specific drafting choices that I made, both major and minor, in addressing these issues in context.

II. TRANSACTIONAL CONTEXT

The Company will be organized as a Maryland corporation.² This is not a closed corporation to which Title 4 of Maryland General Corporation Law (“MGCL”) applies. The Company desires to invest in the development of mixed-use urban apartment complexes near new or planned minor league sports stadiums and multi-purpose arenas. Five individuals, each with a net worth exceeding \$10 million (the “Initial Investors”), conceptualized the Company, and each desires to invest \$2,500,000. The Initial Investors have identified one group of 100 interested investors, each with a net worth exceeding \$1 million (the “Accredited Investors”) and another group of 25 investors, each with significant

^{*} B.S., University of Tennessee, Knoxville; J.D., The University of Tennessee College of Law. Mr. Crum is an associate in the Corporate and Securities practice group with the law firm of Bradley Arant Boult Cummings LLP in Nashville, TN. The author would like to thank Professor Joan MacLeod Heminway for her guidance and comments on earlier drafts of this work.

¹ For consistency, I will use the term “stock” to refer to equity interests in a corporation and “stockholder” to refer to holders of stock. Please note that other jurisdiction and the Model Business Corporation Act use the terms “share” and “shareholder,” respectively.

² As will be discussed, the Company desires to incorporate as a REIT. Maryland is regarded as the most popular state for REITs. Theodore S. Lynn, Micah W. Bloomfield, and David W. Lowden, REAL ESTATE INVESTMENT TRUSTS §2:3 (2013).

investing experience and a net worth between \$500,000 and \$1 million (the “Non-accredited Investors”). Collectively, the Initial Investors, Accredited Investors, and Non-accredited Investors are referred to as the “Investors.” None of the Investors has performed or plans to engage in any general solicitation of investors through any form of advertising or mass media communications. All Investors are individuals living and doing business in the United States, and no Investor shares any family relationship with another.

The Company plans to raise capital by issuing common stock but wants to have the option of later issuing non-voting preferred stock to raise additional capital. Under MGCL Section 2-201(a), a corporation may issue any class of stock provided that the Articles of Incorporation authorize the issuance.³ Further, the board of directors must adopt a resolution before the issuance of stock authorizing the issuance and setting the minimum consideration for the stock.⁴ Under the planned capital structure in the Articles of Incorporation, the Company will have the authority to issue 300,000,000 shares of common stock, \$0.01 par value per share (the “Common Stock”), and 50,000,000 shares of preferred stock, \$0.01 par value per share (the “Preferred Stock”). Together, the Common Stock and Preferred Stock are referred to as “Capital Stock.” The Company plans to issue 50,000 shares of Common Stock at an offering price of \$1,000 per share, raising a total of \$50 million.

The Securities Act of 1933, as amended (the “1933 Act”), requires that all offers or sales of securities be registered, absent an exemption.⁵ Under the 1933 Act, a security includes stock (unless the context otherwise requires).⁶ Therefore, the Common Stock being issued by the Company qualifies as a security and the planned offering of Common Stock must be registered, absent an exemption. Section 4(a)(2) of the 1933 Act exempts from registration any offering by an issuer not involving a public offering.⁷ Courts have interpreted this provision to mean that a securities offering is exempt from registration if it is not conducted through “general solicitation” (i.e., by means of television, radio, print advertisements, direct mail, and similar forms of mass communication) and if the

³ MD. CODE ANN., Corps. and Ass’ns §2-201(a) (West 2010).

⁴ *Id.* at §2-203(a).

⁵ *Id.* at §77e(a)-(c).

⁶ *Id.* at §77b(a)(1).

⁷ *Id.* at §77d(a)(2).

offerees are “sophisticated” and can “fend for themselves.”⁸ Although there is not a limit on the number of investors, fewer are better.⁹

Rule 506 of Regulation D (“Rule 506”) provides a safe harbor under Section 4(a)(2) of the 1933 Act.¹⁰ Under Rule 506, a company can raise an unlimited amount of money in a securities offering if the requirements set forth below are met.¹¹

- The Company does not use general solicitation or advertising to market the securities.¹²
- The Company may sell its securities to an unlimited number of “accredited investors” and up to 35 “non-accredited investors.”¹³ The term “accredited investor” includes individuals with a net worth exceeding \$1 million at the time of the purchase, exclusive of the value of that individual’s primary residence.¹⁴ Further, each “non-accredited investor” must be sophisticated; in other words, he, she, or it must (either alone or with a purchaser representative) have sufficient experience and knowledge in financial and business matters to understand the risk of the investment.¹⁵
- The Company can decide what information to give “accredited investors,” but it must be enough so that the “accredited investors” are not defrauded.¹⁶ However, the Company must give “non-accredited investors” more detailed information similar in nature to the information included in disclosure documents used in registration offerings.¹⁷

⁸ See SEC v. Ralston Purina Co., 346 U.S. 119, 125-26 (1953).

⁹ See *Id.* at 125 (“the statute would seem to apply to a ‘public offering’ whether to few or many. It may well be that offerings to a substantial number of persons would rarely be exempt. Indeed nothing prevents the commission, in enforcing the statute, from using some kind of numerical test in deciding when to investigate particular exemption claims”). See also 1 Law Sec. Reg. § 4.24.

¹⁰ 17 C.F.R. §230.506.

¹¹ See 1 Law Sec. Reg. § 4.25 for additional commentary on the requirements of Rule 506.

¹² *Id.* at § 230.506(b)(1) & 230.502(c).

¹³ *Id.* at § 230.506(b)(2)(i), 230.501(a)(5), & 230.501(e).

¹⁴ *Id.* at § 230.501(a)(5) & 230.502(c).

¹⁵ *Id.* at § 230.506(b)(2)(ii).

¹⁶ *Id.* at § 230.502(b)(1).

¹⁷ See *Id.* at § 230.502(b)(1) & (b)(2).

- The Company must be available to answer questions from the prospective investors.¹⁸
- The Company must file “Form D” with the Securities and Exchange Commission after it first sells the Common Stock.¹⁹

Based on the current plans for the proposed offering, as described briefly above, the Company's offering should qualify for the safe harbor of Rule 506, provided that the Company discloses proper information to Investors, makes itself available for investor inquiries, and files a compliant “Form D” in accordance with the requirements of the rule. The Accredited Investors satisfy the accredited investor definition in Rule 501 because they all have a net worth exceeding \$1 million. The Non-accredited Investors satisfy the sophistication requirement in Rule 506 because they have the requisite financial and business experience and because 25 Non-accredited Investors interested in investing in compliance with the number-of-investors limit. Finally, there is no evidence that the Company or any Investors have or will use general solicitation tactics.

If the Company's offering complies with Rule 506, it complies with an exemption from registration under Maryland's state securities laws.²⁰ Even if the state statute varied the requirements, the National Securities Markets Improvement Act of 1996 (“NSMIA”)²¹ preempts states from applying registration requirements to certain securities offerings, including specifically defined categories of “covered securities” as defined by NSMIA.²² Securities issued in a transaction exempt from registration pursuant to §4(a)(2) of the 1933 Act and the rules promulgated thereunder are defined as “covered securities.”²³ Thus, because these securities are issued under the safe harbor of Rule 506, a rule promulgated under §4(a)(2), they are covered securities under NSMIA, and federal law preempts state law requiring registration.

Because the Company's sole business will be taking equity stakes in real estate, the Company desires to be taxed as a real estate investment trust (a “REIT”) under Sections 856 through 860, or any successor sections, of the

¹⁸ *Id.* at § 230.502(b)(2)(v).

¹⁹ *Id.* at § 230.503.

²⁰ MD. CODE REGS. 02.02.04.15 (2013).

²¹ Pub. L. No. 104-209, 110 Stat. 3416 (1996) (to be codified in sections of 15 U.S.C.).

²² 15 U.S.C. §77r(a)-(b).

²³ *Id.* at §77r(b)(4)(D).

Internal Revenue Code of 1986, as amended (the “Code”).²⁴ To ensure continuing REIT compliance, the Company must impose stock restrictions on ownership and provide a mechanism to ensure compliance if those restrictions are violated. Under MGCL Section 2-104(b)(2), the Company has the authority to impose restrictions on the transfer of stock if the restrictions are consistent with the law and contained in the Articles of Incorporation.²⁵ Further, MGCL Section 2-105(a)(12) provides that a corporation’s charter can provide for restrictions on transferability or ownership to qualify as a REIT under the Code.²⁶ “Charter” includes the Articles of Incorporation as originally passed, amended, corrected, or supplemented by subsequent filings.²⁷ Therefore, the stock restrictions required for designation as a REIT, as proposed for inclusion in the Company’s Articles of Incorporation, are “consistent with the law” in the State of Maryland.

III. DRAFTING ISSUES

A. What procedural requirements must be met under state law to ensure that the stock transfer restrictions are valid and enforceable against the stockholders?

To ensure that the stock transfer restriction provision is valid and can be enforced against all stockholders, the provision must be contained in the legally specified document.

B. What specific ownership restrictions must be imposed to ensure REIT status under federal law and state law?

Ownership restrictions are necessary to ensure compliance with the Code.

C. What happens to stock that is transferred in violation of the ownership restrictions?

²⁴ A discussion of the tax benefits is outside the scope of this memorandum. At your request, I can provide a more thorough discussion.

²⁵ MD. CODE ANN., Corps. and Ass’ns §2-104(b)(2) (West 2010); *see also* *Compania de Astral, S.A. v. Boston Metals Co.*, 107 A.2d 357, 371 (Ct. App. Md. 1954) (“A corporation cannot, of its own motion and without authority from its stockholders, enter into a valid contract restricting the right of its stockholders to transfer their stock.”).

²⁶ MD. CODE ANN., Corps. and Ass’ns §2-105(a)(12) (West 2010).

²⁷ *Id.* at §1-101(f).

A mechanism to account for transfers in violation of the stock transfer restrictions is necessary to ensure compliance with the Code.

IV. ANALYSIS OF SPECIFIC DRAFTING CHOICES

A. Stock Transfer Provisions must be included in the Articles of Incorporation

The hierarchy and source of rules governing restrictions on the transfer of stock, starting with the most authoritative first, is: the statute (and any case law interpreting those statutes), charter (here, the Articles of Incorporation), bylaws, and shareholder agreements. For restrictions on the transferability of stock, statutory law is very influential in determining the document in which stock transfer restrictions should be included. In Maryland, the MGCL applies to every Maryland corporation and its corporate acts.²⁸

Under the Delaware General Corporation Law (the “DGCL”) and Model Business Corporation Act (the “MBCA”), the statutory norm is to include stock (share, in the case of the MBCA) transfer restrictions in the charter, bylaws, or a shareholder agreement²⁹ and to note the restrictions conspicuously on the certificates representing the securities.³⁰ The MGCL, however, is silent regarding a corporation’s inclusion of stock restrictions in shareholder agreements. Additionally, the MGCL does not allow board authority to be varied in a shareholder agreement, but board authority may be varied in the Articles of Incorporation or bylaws. The exclusion of such powers from shareholder agreements suggests the bylaws might serve the function of shareholder agreements in other states.

The bylaws may contain provisions not inconsistent with the law or the Articles of Incorporation.³¹ This MGCL section is substantially similar to bylaws sections in the DGCL and MBCA.³² These provisions suggest that the bylaws are less authoritative than the Articles of Incorporation by limiting the provisions of the bylaws to those not inconsistent with the Articles of Incorporation. Further,

²⁸ *Id.* at §1-102(a).

²⁹ *See* MODEL BUS. CORP. ACT §6.27(a) (1979) & 8 DEL. CODE ANN. tit. 8, §202(b) (2013).

³⁰ *See* MODEL BUS. CORP. ACT §6.27(b) (1979) & 8 DEL. CODE ANN. tit. 8, §202(a) (2013).

³¹ MD. CODE ANN., Corps. and Ass’ns §2-110(a) (West 2010). In Oregon, a court noted that the standard 9.8% ownership of any class of stock restriction in the bylaws was inappropriate when the Declaration of Trust had a less stringent standard. *Pacific Realty Trust v. APC Investment, Inc.*, 651 P.2d 163 (Or. Ct. App. 1982).

³² *See* MODEL BUS. CORP. ACT §2.06(b) (1979) & 8 DEL. CODE ANN. tit. 8, §109(b) (2013).

under the MGCL, the Articles of Incorporation are expressly permitted to include restrictions on the transfer of stock for the purpose of maintaining REIT status under the Code.³³ Additionally, the Investors are bound by the Articles of Incorporation, which provide authority for the issuance of the Common Stock and restrictions regarding the Common Stock. Moreover, the U.S. Internal Revenue Service has stated that stock transfer restrictions in a REIT's Articles of Incorporation do not defeat the requirement to qualify for a REIT that stock be "transferable" but has not yet addressed whether that requirement would be satisfied for transfer restrictions in a shareholder agreement.³⁴ Taking all of the above factors into consideration, the stock transfer restriction provision should be included in the Articles of Incorporation.

Maryland (like the DGCL and the MBCA), requires that stock transfer restrictions be noted on stock certificates³⁵ but also provides that, except as otherwise provided in Section 8-204 of the Commercial Law Article, a failure to include a transfer restriction on a stock certificate does not automatically render the restriction invalid or unenforceable *if such transfer restriction was made after the date of issuance* of the stock certificate.³⁶ Nevertheless, because the Company is being formed and the Articles of Incorporation provide for such restrictions from the beginning, this exception cannot apply to the Company, and the transfer restrictions as stated in the Articles of Incorporation must also be included on the stock certificate.

Thus, the stock transfer restrictions should be included in the Articles of Incorporation. The stock certificate must "[c]ontain a full statement of the restriction" or "[s]tate that the corporation will furnish information about the restriction to the stockholder on request and without charge."³⁷ Section 6.02(d) is included in the Draft Provision to comply with this requirement. Additionally, to ensure that the client complies with this requirement, the firm should advise the client about this requirement and implement (or help the client implement) procedures for ensuring that the certificates are legended as required.

³³ MD. CODE ANN., Corps. and Ass'ns §2-105(a)(12) (West 2010).

³⁴ I.R.S. Priv. Ltr. Rul. 9430022 (Apr. 29, 1994); *see also* Peter M. Fass, Michale E. Shaff, & Donald B. Zief, REAL ESTATE INVESTMENT TRUSTS HANDBOOK §5:4 (2013).

³⁵ MD. CODE ANN., Corps. and Ass'ns §2-211(d) (West 2010).

³⁶ *Id.* at § 2-211(e).

³⁷ *Id.* at § 2-211(d).

B. The Stock Transfer Restrictions

The primary requirements under the Code relevant to restrictions on the transfer of stock are: (1) at least 100 persons must beneficially own the REIT's stock for 335 days in a taxable year (the "Investor Minimum")³⁸ and (2) no five individuals can own more than 50% of the value of a REIT's stock (the "Ownership Requirement").³⁹ If each of the Initial Investors invests \$2.5 million and 1,000 shares of Common Stock are issued, as planned, each Initial Investor will have a 5% stake in the company, and in the aggregate, the group will have a 25% stake in the Company, safely within the latter requirement. For purposes of this draft provision, it is assumed that the Company will meet the Investor Minimum requirement. Maryland has a unique provision that helps a corporation qualify as a REIT. MGCL § 2-206(d) provides that a corporation can issue shares of stock for no consideration to qualify as a REIT under the Code. Thus, the Company can take advantage of this provision in the future to comply with the REIT requirements.

Based on my review of precedent documents, the restriction regarding the Investor Minimum requirement is straightforward. The restriction simply provides that no transfer of stock can occur resulting in fewer than 100 Persons (as defined in the Code) owning or being deemed to own (under the Code) Capital Stock and that any transfer having that effect is void *ab initio*. This restriction is provided for in Section 6.02(a)(3) of the Draft Provision.

To comply with the Ownership Requirement, provisions typically say that no REIT stockholder may own or be deemed to own more than a fixed percentage (typically between 8.0% and 9.9%) of outstanding REIT stock.⁴⁰ Based on the Articles of Amendment and Restatement of Landmark Apartment Trust of America, Inc., dated June 17, 2013 (the "Landmark AOI"), and other precedent documents that I reviewed, 9.9% was the most common fixed percentage and is used in this draft provision in the definition of "Aggregate

³⁸ I.R.C. §856(a)(5) & (b). Note that this requirement does not apply until after the first taxable year for which a REIT election is made.

³⁹ *Id.* at §§856(a)(6) & 856(h); see also Jack H. McCall, *A Primer on Real Estate Investment Trusts: The Legal Basics of REITs*, 2 TRANSACTIONS: TENN. J. BUS. L. 1, 3 (Spring 2001). The Ownership Requirement is the more specific articulation that the corporation not be closely held within the meaning of Code Section 856(h).

⁴⁰ McCall, *supra* note 25, at 13-14. Another provision in the Article containing the Draft Provision provides that the board of directors has discretion to waive the ownership requirement if it determines in good faith that the Company will still qualify as a REIT.

Stock Ownership Limit.” This restriction is included in Section 6.02(a)(1) of the Draft Provision.

The provision addressing the Ownership Requirement also helps the Company satisfy the requirement that the Company not be “closely held” under Code Section 856.⁴¹ The “closely held” determination is made under Code Sections 856(k) and (h), and Code Section 856(h) is used to define ownership for purposes of the restriction in Section 6.02(a)(1). Nevertheless, custom among the precedent documents is to address the “closely held” requirement in its own section. Section 6.02(a)(2) specifically addresses this requirement that the Company not be “closely held” under Code Section 856.

C. Putting Stock in a Trust Benefitting a Charitable Organization

The Articles of Incorporation should also provide for a mechanism to ensure continuing compliance if a stockholder makes a transfer in violation of Section 6.02(a)(1) or (a)(2) of the Draft Provision. Traditionally, that mechanism was simply that any transfer resulting in a violation of the Ownership Limit or Investor Minimum, the transfer was void *ab initio*.⁴² The trend for a violation of the Ownership Limit is to designate the excess stock causing the violation as “stock-in-trust” that are transferred into a trust for the benefit of a charitable organization and using the void *ab initio* language as an alternative.⁴³ MGCL Sections 2-103(13) & 2-203(f) specifically permit a corporation to issue stock without consideration of any kind to a charitable organization.⁴⁴ Though a similar transfer to a trust could be made for violation of Section 6.02(a)(3) of the Draft Provision under the MGCL, it is not the norm based on my review of precedent documents, such as the Landmark AOI or an American Jurisprudence form (the “AmJur Form”).⁴⁵ Transferring stock to a trust may also help maintain the Investor Minimum requirement because the trust can be considered a new person for purposes of the Investor Minimum requirement, replacing whatever stockholder transferred stock in violation of the transfer restrictions.⁴⁶

⁴¹ I.R.C. § 856(a)(6).

⁴² McCall, *supra* note 25, at 14.

⁴³ *Id.* A later provision in the Article containing the Draft Provision provides for the management of this trust.

⁴⁴ MD. CODE ANN., Corps. and Ass’ns §§2-103(13) & 2-203(f) (West 2010).

⁴⁵ 15 Am. Jur. Legal Forms 2d §218:8 (2013).

⁴⁶ I.R.C. §856(a).

Further, Section 6.02(c) of the Draft Provision provides for a failsafe mechanism to ensure compliance with the Code if the Company fails to be in compliance with requirements set forth in Article VI. That provision is not included in all precedent documents I reviewed, as demonstrated by the AmJur Form. However, the Landmark AOI included this provision, and it seems like a smart provision to include as a means of helping to ensure continuing compliance.

D. Minor Drafting Choices

The following are non-substantive, minor choices that I made in constructing the Draft Provision:

- As is standard in all precedent documents that I reviewed, Section 6.01 of Article VI contains definitions specific to that article. These defined terms are underlined for clarity and ease of reference.
- Many of the sections in Article VI are interrelated. For those sections not included in the Draft Provision, the section reference is to 6.xx, which is consistent with the format. Other associates will provide those section references when the Draft Provisions are integrated into the draft Articles of Incorporation.
- The transfer restrictions apply to outstanding Capital Stock through the Aggregate Stock Ownership Limit definition even though the Company is only issuing Common Stock as an initial matter. Drafting the definitions in this manner affords the Company more flexibility in the event that it later issues Preferred Stock.
- The AmJur Form included a provision for non-U.S. Persons. A provision for non-U.S. Persons was excluded for the Draft Provision because the Company does not want to deal with extra expense of complying with securities and tax regulations. Additionally, the Company believes it will be able to raise additional capital at a later date by issuing preferred stock without the need to seek foreign investors.
- Many precedent documents contain the concept of an “excepted holder.” An excepted holder is a stockholder that the board of directors has permitted to violate one of the restrictions contained in the Articles of Incorporation because violation of such restriction will not otherwise cause the Company to fail to qualify as a REIT under the Code. Defining “excepted holder” in the definition section and incorporating it into the restrictions, as in the Landmark

AOI, caused the provision to be cumbersome and confusing. Thus, I incorporated the structure used by DTLA Fund Office Trust Investor, Inc., a Maryland corporation, in an Articles Supplementary to its Articles of Incorporation ("DTLA Articles"). The DTLA Articles used a separate 6.xx section authorizing the board to create exceptions when the board determined the corporation would still qualify as a REIT and added exception language to the beginning of the restrictions. This style made the provision more clear to me than the Landmark AOI.

DRAFT STOCK TRANSFER RESTRICTION PROVISION

Article VI – RESTRICTION ON TRANSFER AND OWNERSHIP OF
STOCK

SECTION 6.01. *Definitions.* For the purpose of this Article VI, the following terms shall have the following meanings:

“Aggregate Stock Ownership Limit” means, with respect to each class of Capital Stock of the Company outstanding at any particular time, 9.9% of the total number of shares of such class of Capital Stock or such other percentage determined by the board of directors in accordance with Section 6.xx.

“Beneficial Ownership” means ownership of Capital Stock by a Person who is or would be treated as an owner of such Capital Stock either actually or constructively through the application of Section 544 of the Code, as modified by Section 856(h)(1)(B) and 856(h)(3) of the Code. The terms “Beneficial Owner,” “Beneficially Owns,” “Beneficially Owning,” and “Beneficially Owned” shall have the correlative meanings.

“Board of Directors” means the Board of Directors of the Company.

“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.

“Capital Stock” means shares of all classes or series of stock of the Company, including, but not limited to, the Common Stock and the Preferred Stock.

“Charitable Beneficiary” means one or more beneficiaries of the Charitable Trust as determined pursuant to Section 6.xx, 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.

“Charitable Trust” means any trust provided for in Section 6.xx.

“Code” means the Internal Revenue Code of 1986, as amended.

“Common Stock” means the shares of common stock, \$0.01 par value per share, authorized in these Articles of Incorporation, as may be amended from time to time.

“Company” means National REIT, Inc.

“Constructive Ownership” means ownership of Capital Stock by a Person who is or would be treated as an owner of such Capital Stock either actually or constructively through the application of Section 318 of the Code, as modified by Section 856(d)(5) of the Code. The terms “Constructive Owner,” “Constructively Owns,” “Constructively Owning,” and “Constructively Owned” shall have the correlative meanings.

“Initial Date” means the date on which the Articles of Incorporation containing this Article VI are accepted or record by the State Department of Assessments and Taxation of Maryland.

“Person” means an individual, corporation, partnership, limited liability company, estate, trust, association, joint stock company, charitable organization or other entity.

“Preferred Stock” means the preferred stock, \$0.01 par value per share, authorized in these Articles of Incorporation, as may be amended from time to time.

“REIT” means a “real estate investment trust” as defined in Section 856 of the Code.

“Restriction Termination Date” means the first day after the Initial Date on which the Board of Directors determines 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 Capital Stock set forth in these Articles of Incorporation 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 of Capital Stock or the right to vote or receive dividends on Capital Stock, or any agreement to take any such

actions or cause any such events, 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 Capital Stock or any interest in Capital 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 or Constructive Ownership of Capital Stock, 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.

SECTION 6.02. *Ownership Limitations.* During the period commencing on the Initial Date and prior to the Restriction Termination Date:

(a) *Basic Restrictions.*

- (1) Except as provided in Section 6.xx, no Person shall Beneficially Own or Constructively Own Capital Stock in excess of the Aggregate Stock Ownership Limit.
 - (2) Except as provided in Section 6.xx, no Person shall Beneficially Own or Constructively Own Capital Stock to the extent that the Beneficial Ownership or Constructive Ownership of Capital 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) Except as provided in Section 6.xx, any Transfer of Capital Stock that, if effective, would result in Capital Stock 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 the Capital Stock.
 - (4) Except as provided in Section 6.xx, no Person shall Beneficially Own or Constructively Own Capital Stock to the extent that such Beneficial Ownership or Constructive Ownership would otherwise cause the corporation to fail to qualify as a REIT under the Code.
- (b) *Transfer in Trust/Void Ab Initio.* If any restrictions on Transfer in Sections 6.2(a)(1), (2), or (4) are violated:

- (1) then that number of shares of Capital Stock the Beneficial Ownership or Constructive Ownership of which otherwise would cause such Person to violate Section 6.02(a)(1), (2) or (4) (rounded up to the nearest whole share) shall automatically transfer to a Charitable Trust for the benefit of a Charitable Beneficiary, as described in Section 6.xx, 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 Capital Stock; or
- (2) if the transfer to the Charitable Trust described in Section 6.02(b)(1) would not be effective for any reason to prevent the violation of Section 6.02(a)(1), (2) or (4), then the Transfer of that number of shares of Capital Stock that otherwise would cause any Person to violate Section 6.02(a)(1), (2) or (4) shall be void *ab initio*, and the intended transferee shall acquire no rights in such shares of Capital Stock.

(c) *Additional Potential Transfers in Trust.* To the extent that, upon a transfer of Capital Stock pursuant to Section 6.02(b), a violation of any provision of this Article VI would nonetheless be continuing (for example where the ownership of shares of Capital Stock by a single Charitable Trust would result in Capital Stock being Beneficially Owned by fewer than 100 Persons), then Capital Stock shall be transferred to that number of Charitable Trusts, each having a Trustee and a Charitable Beneficiary or Beneficiaries that are distinct from those of each other Charitable Trust, such that there is no violation of any provision of this Article VI.

(d) *Legend.* Any certificate representing shares of Capital Stock shall bear substantially the following legend:

The shares represented by this certificate are subject to restrictions on Beneficial Ownership, Constructive Ownership and Transfer for the purpose, among others, of the Company's maintenance of its status as a real estate investment trust (a "REIT") 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, (a) no Person shall Beneficially Own or Constructively Own Capital Stock in excess of the Aggregate Stock Ownership Limit; (b) no Person shall Beneficially Own or Constructively Own Capital Stock to the extent that the Beneficial Ownership or Constructive Ownership of Capital 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); (c) any Transfer of Capital Stock that, if effective, would result in Capital Stock 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 the Capital Stock; and (d) no Person shall Beneficially Own or Constructively Own Capital Stock to the extent that such Beneficial Ownership or Constructive Ownership would otherwise cause the corporation to fail to qualify as a REIT under the Code. Any Person who Beneficially Owns or Constructively Owns or attempts to Beneficially Own or Constructively Own shares of Capital Stock which causes or will cause a Person to Beneficially Own or Constructively Own shares of Capital Stock in excess or in violation of the above limitations must immediately notify the Company in writing (or, in the case of an attempted transaction, give at least 15 days prior written notice). If any of the restrictions on Transfer or ownership as set forth in (a), (b) or (d) above are violated, the shares of Capital Stock in excess or in violation of the above limitations will be automatically transferred to a Trustee of a Trust for the benefit of one or more Charitable Beneficiaries. In addition, the Company may redeem shares upon the terms and conditions specified by the board of directors in its sole discretion if the board of directors determines that ownership or a Transfer or other event may violate the restrictions described above. Furthermore, upon the occurrence of certain events, attempted Transfers in violation of the restrictions described in (a), (b) or (d) above may be void ab initio. All capitalized terms in this legend 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 Capital Stock on request and without charge directed to the Secretary of the Company at its principal office.

Instead of the foregoing legend, the certificate may state that the Company will furnish a full statement about certain restrictions on transferability to a stockholder on request and without charge.