USING A CO-GP STRUCTURE IN REAL ESTATE JOINT VENTURES

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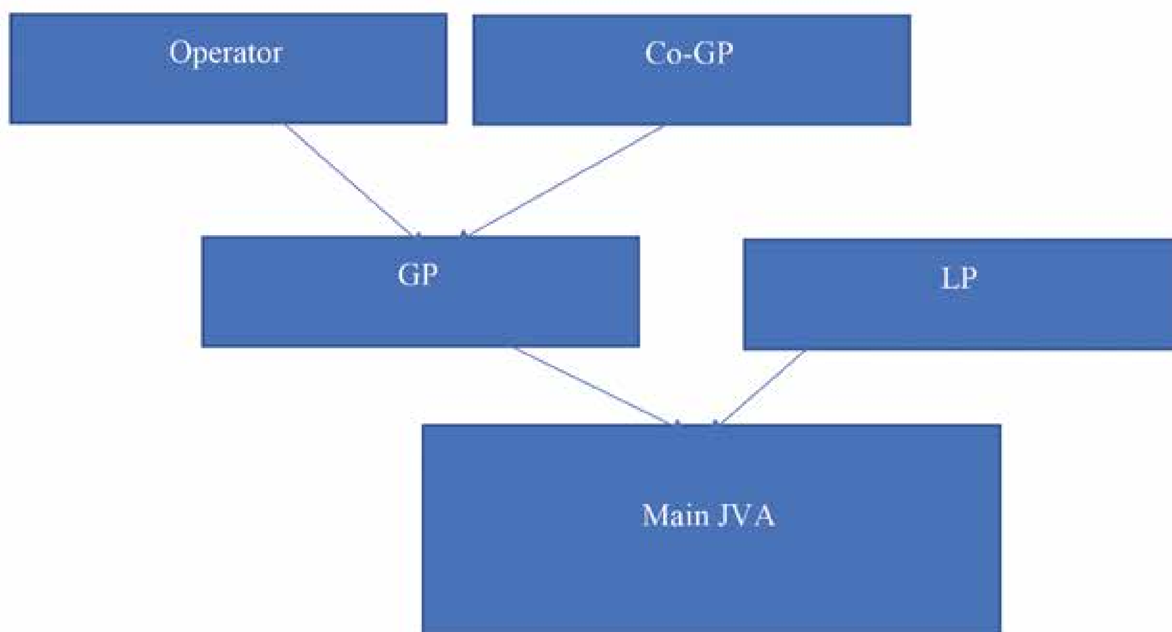
INTRODUCTION[1]

A customary real estate joint venture consists of two parties: (i) an operator or developer who typically originates the deal and does all the day-to-day work (Operator);[2] and (ii) an investor who typically provides the majority of the equity but does not have an active role in day-to-day matters (LP).[3] This structure has become extremely common as there are many institutional investors that want to invest in real estate but lack the infrastructure or expertise to originate and operate or develop the real estate themselves. Additionally, Operators can do more deals—and potentially earn a greater return on each deal (through fees and promotes, which are discussed in more detail below)—by bringing third-party investors into each deal.[4]

Occasionally, the Operator does not have sufficient capital for its share of a particular deal or has other reasons for bringing in outside capital to its side of a deal.[5] In those cases, the Operator may create an additional joint venture (GP) between the Operator and an additional investor, effectively a co-general partner (Co-GP), thereby creating two layers of joint venture agreements: (i) the main joint venture agreement between the GP and the LP (Main JVA); and (ii) a joint venture agreement (for the GP itself) between the Operator and the Co-GP (Co-GP JVA). A basic chart for this type of structure is as follows:[6]



There are a number of unique and potentially difficult issues that arise in the context of negotiating a Co-GP JVA.[7] This article identifies and describes some of these issues, discusses common ways to address them, and offers some potential solutions.

ECONOMICS

The economic arrangement between the Operator and the Co-GP is obviously a key part of the deal to negotiate. Because the Co-GP often takes on more risk in a deal than the LP, the Co-GP may require more favorable economics than the LP.

The economic components to be negotiated include: (i) the respective equity percentages and contributions between the Operator and Co-GP (including, in the case of a development deal, their respective shares of cost overruns);[8] (ii) the extent to which the Co-GP shares in the fees (e.g., acquisition, development, asset management, and disposition fees) paid by the deal to the GP; (iii) the extent to which the Co-GP shares in any promote paid by the LP; and (iv) whether the Go-GP pays any promote on its equity to the Operator.

There is no customary outcome to these negotiations, due to the varied leverage of each party, the underlying nature of the deal, and the "hot buttons" of each party. Below are some customary considerations for each component.

Respective equity

The LP may want the Operator (and sometimes its key principals) to have a minimum amount of equity in the deal, ensuring that it has sufficient "skin in the game." In a development deal where the GP bears a disproportionate share of cost overruns, the Operator and Co-GP must negotiate how those cost overruns will be divided between them. The outcome of that negotiation will often depend on how the Operator and Co-GP are sharing fees and promotes. The percentage split of cost overruns will sometimes mirror the percentage split of fees and promotes on the theory that the parties should share downside risk in the same percentage as the potential upside.[9]

Fee sharing

Fee sharing will depend somewhat on whether the fees are intended to cover the Operator's overhead or act as an additional profit component. The Operator will typically want to retain 100 percent of the fees designated for its overhead, but the rest are up for negotiation. The Operator will usually expect a higher percentage of fees because it sourced the deal and because of its "sweat equity." As a result, the Co-GP's share of fees will often be lower, on a percentage basis, than its share of the equity in the GP.

Promote sharing

The allocation of the promote sometimes depends on the additional level of risk the Co-GP is taking compared to the LP. For example, if the Co-GP or its affiliate is a party to financing guaranties or to a backstop of the main guarantor, then the Co-GP will usually want to be compensated for this additional risk in the form of promote sharing. But, like the fee sharing, the Co-GP's share of the promote is typically lower, on a percentage basis, than its share of the equity in the GP for the reasons mentioned above.

Promote paid by Co-GP

Frequently, a Co-GP will not directly pay the Operator a promote on the Co-GP's equity. But if the waterfall in the Main JVA provides that both the GP and LP pay a promote, the Co-GP (as part of the GP) will indirectly pay a promote on its equity unless the Co-GP JVA includes an appropriate adjustment. Co-GPs should pay particular attention to this issue, which is sometimes overlooked.[10]

If the Main JVA contains the right to "claw back" any promote that is overpaid under the Main JVA (or requires disproportionate capital contributions from the GP on a "reverse waterfall" basis to achieve such repayment),[11] then the Co-GP JVA should require a corresponding claw back or reverse waterfall, based on the relative portions of the promote distributed to the Operator and Co-GP.[12] Additionally, if that claw back obligation is personally guaranteed under

the Main JVA by the principals of the Operator, then the Operator may require a corresponding guaranty from the principals of the Co-GP for the Co-GP's share of the relevant clawed-back promote.

GOVERNANCE

To what extent the Co-GP participates in the management and governance of the GP (and thereby indirectly the Main JVA) is a key, and sometimes contentious, issue for all parties, including the LP.

The Co-GP will usually want at least the same level of decision making as the LP. If the Co-GP or its affiliate has liability with respect to loan guaranties or other guaranties, the Co-GP may want even more than the LP. But this can cause major concern for the LP (and, potentially, for lenders and other financing sources). When the LP makes its deal with the Operator, it often does not contemplate that there will be a Co-GP who could have veto and other rights within the GP. Many LPs will not tolerate an additional party—particularly one that they did not contract with—having the ability to block (or, even worse from the LP's perspective, affirmatively make) decisions regarding the deal. LPs will argue that there should never be a situation where both the LP and Operator want to take an action, but the Co-GP can block it.

As a result, LPs will often want to: (i) review and approve the Co-GP JVA at the time the Main JVA is executed to ensure they are comfortable with the Co-GP's level of management and veto rights; (ii) prohibit amendments to the Co-GP JVA in the future, including any that give additional management/consent rights to the Co-GP; and (iii) ensure that any future Co-GP JVAs are approved by the LP in its sole discretion. Sometimes, if the Main JVA is executed after the Co-GP JVA is already in place, the LP will require that the Co-GP give up some or all of its consent rights as a condition to the LP doing the deal. It is important that the concerns of the LP are taken into consideration at the outset of the negotiations between the Operator and the Co-GP as well as between the Operator and the LP.

Apart from the important concerns of the LP, the negotiation of the management/governance rights in the Co-GP JVA will often be similar to the negotiation of those rights in the Main JVA. The Operator will typically want as much control as possible, and the Co-GP will want customary limitations on that control. This becomes even more important to the Co-GP if it, or its affiliates, have any guaranty liability or disproportionate liability for cost overruns in a development deal. Ultimately, the Co-GP may need to accept that it will have less control than it would like, particularly if it is an inexperienced real estate operator or it is brought into the deal after the agreement between the Operator and LP has been finalized. Sometimes, as a compromise, the Co-GP will be given consultation rights—rather than a veto right—for certain major decisions. This allows the Co-GP to voice its opinion on those major decisions (but without any ability to actually block them if the Operator and the LP want to proceed).

In addition to management rights, the Co-GP JVA should address the respective management obligations of the parties, including actions (such as budget preparation and reporting) that are the GP's responsibility under the Main JVA. Typically, the Co-GP JVA will impose those obligations on the Operator, but that may not be the case in all deals. And, in that regard, the Co-GP may want the Co-GP JVA to provide that: (i) before any budget or similar item is submitted to the LP for approval, the Co-GP must first approve the item (subject to the level of control and approval the Co-GP has been given); and (ii) the Operator, as manager of the Co-GP JVA, is required to perform all management obligations that are imposed on the GP under the Main JVA.

REMOVAL OF MANAGER FOR CAUSE

In a typical real estate joint venture agreement, the LP will have the right to remove the GP from any management role (and take over management or appoint a third party to do so) for "cause" (e.g., fraud, gross negligence, willful misconduct, material breach, or loss of services of a key person). If such a removal occurs, the GP will often lose its right to any

future promotes and fees. This raises several issues to be addressed in the Co-GP JVA.

First, will the Co-GP have the same removal/take-over right under the Co-GP JVA? The Co-GP will of course want this right, but such a removal/take-over will not typically be permitted under the Main JVA unless the LP consents.[13] Thus, for the Co-GP to have any assurances that it will be able to exercise those rights, it will need to get the LP's prior approval, ideally contemporaneously with the execution of the Co-GP JVA. However, that may not be practicable, particularly if the LP is doing the deal based on the Operator's expertise.

Second, if the Co-GP does obtain the consent needed to allow it to take over management of the GP, the Co-GP will typically take the position that, because of such management take over, it should be entitled to all the promote and fees paid to the GP. Those negotiations often mirror the negotiations that take place in a typical real estate joint venture agreement when an Operator is removed for "cause."

Third, if a "cause" event by the Operator gives the LP the right under the Main JVA to remove and replace the GP, the Co-GP may try to negotiate the right, in the Main JVA, to avoid such removal and replacement if, instead, it removes and replaces the Operator under the Co-GP JVA and thus takes over management of the GP. For the reasons discussed above, this is usually achievable only if the Co-GP is an experienced Operator itself and the LP has a high degree of confidence that it is the correct party to take control.

Finally, if the LP does remove the GP because of a "cause" event by the Operator, then the GP will often lose its rights to any future promote and fees and lose all material voting rights. The Main JVA may also require the GP (and/or its principals[14]) to indemnify the LP for losses resulting from such "cause" event. Thus, the Co-GP is in a position to suffer financially, be relegated to an investor in passive entity, and indirectly be required to indemnify the LP, all because of actions beyond the Co-GP's control. This is one reason a Co-GP investment can be a riskier proposition, and require more favorable economic incentives, than a typical LP investment. The Co-GP may sometimes require an indemnity from the Operator or its principals for any losses suffered because of such removal, promote loss, etc., but that is ultimately a lawsuit for damages that could be difficult to prove, and the principals of the Operator will typically resist any attempt to impose liability on them beyond their investment in the deal.

CAPITAL CALL OBLIGATIONS AND RIGHTS

As in any joint venture agreement, the Co-GP JVA needs to address: (i) the parties' respective rights to call for required capital contributions[15] under the Co-GP JVA; (ii) the parties' respective obligations to make such capital contributions; and (iii) the remedies for failing to do so.[16] However, there are additional considerations to address in the Co-GP context.

First, in any instance where a party has a right to make a capital call under the Co-GP JVA, that party should also have the right, on behalf of the GP, to make a capital call under the Main JVA, (to the extent the Main JVA allows for it) so that all parties are required to fund their respective shares of the needed capital.

The Operator and Co-GP should consider providing in the Co-GP JVA that: (i) in any instance where the GP is obligated to fund amounts under the Main JVA (or will otherwise suffer adverse consequences if it fails to do so), either party to the Co-GP JVA may make a capital call for that amount; and (ii) if the LP sends the GP a capital call under the Main JVA, each party to the Co-GP JVA should automatically be obligated to fund its share of the amount required to be funded by the GP under that capital call.

In any instance where a capital call under the Co-GP JVA is to fund amounts that the GP is required to fund under the Main JVA, the period to fund such capital call should be at least a few business days shorter than the period for the GP to fund the corresponding capital call under the Main JVA. This provides the opportunity to cure a failed capital

contribution under the Co-GP JVA before that failure becomes a default under the Main JVA.

The remedies for failing to fund a required capital contribution under the Co-GP JVA often mirror those under the Main JVA (e.g., a member loan at the same default interest rate or a squeeze down at the same punitive dilution rate). The parties to the Co-GP JVA may also want to provide that the non-funding party under the Co-GP JVA will bear 100 percent of any adverse consequences to the GP if one party fails to fund its share of a required capital call under the Co-GP JVA and the GP consequently fails to fund its full share of the corresponding capital call under the Main JVA.

Finally, the parties to the Co-GP JVA should also consider addressing what happens if the LP fails to fund its share of a capital call under the Main JVA. The parties to the Co-GP JVA will not typically be obligated to fund their share of any shortfall that results from such a failure by the LP. But they will often provide that if one party to the Co-GP JVA wants to cure that failure and the other party does not, then the party that wants to cure the failure will have the right to do so. In that case, the funding party will be entitled to 100 percent of the economic remedies that inure to the benefit of the GP as a result of such cure (e.g., 100 percent of the benefits of any member loan to the LP or squeeze down of the LP).

LOAN AND OTHER GUARANTIES

Another key issue in Co-GP transactions that will drive many areas of the negotiations (including the economic arrangement and management rights) is whether a creditworthy affiliate of the Co-GP (a Co-GP Guarantor) will be a party to the required loan and other deal guaranties (or backstop the Operator for a share of the liability under such guaranties).[17] This becomes particularly important when those guaranties include not just customary "bad boy" guaranties but also financial guaranties, such as completion guaranties, debt service and carry cost guaranties, and principal repayment guaranties.

If a Co-GP Guarantor is taking on any liability under those guaranties (whether directly or through a backstop arrangement), that substantially increases the risk to the Co-GP in the deal, potentially exposing the Co-GP principals to liability far beyond their invested equity in the deal. The Co-GP will typically expect to be compensated for that increased risk—usually in the form of a share of the promote and potentially a share of the deal fees. The Co-GP may also require a greater level of governance and control (which, as described above, may or may not be achievable, depending on the LP's position on this issue).

The Co-GP Guarantor's specific share of any such guaranty liability may drive the other economics, or vice-versa. For example, a Co-GP may take the position that its guaranty risk-sharing percentage should mirror the percentage of the promote to which it is entitled. Thus if, for example, a Co-GP invests 90 percent of the GP equity but gets only 50 percent of the promote, the Co-GP may argue that its guaranty risk-sharing percentage should be only 50 percent. In this example, the Co-GP's disproportionate upside percentage in the form of promote matches its disproportionate downside percentage in the form of guaranty liability. An Operator may take an opposite position, arguing that the Co-GP's guaranty risk-sharing percentage should equal the Co-GP's percentage share of equity in the GP.

On the flip side, if a Co-GP Guarantor will not take on any such guaranty liability (whether directly or through a backstop arrangement), then that will naturally decrease the possibility that an Operator will be willing to share a meaningful portion of the promote with the Co-GP.

If the Co-GP Guarantor is a direct party to any guaranties on a joint and several basis (or on any other basis that does not reflect the guaranty liability sharing deal between the Co-GP and Operator),[18] then the Co-GP Guarantor and Operator guarantors should execute a separate agreement[19] in which: (i) they agree to share the relevant guaranty liability in the proportion they agreed to as described above (and make appropriate payments from one to the other to achieve such sharing); (ii) they agree as to the portion of any required net worth and liquidity

under the relevant guaranty each much provide (if the guaranty only has combined net worth and liquidity tests); and (iii) depending on the nature of the guaranty, indemnify the other party for any guaranty liability the other party occurs as a result of "bad acts" of the indemnifying party.

LIQUIDITY RIGHTS

The right of a party to create liquidity for its equity investment is an important component for any joint venture arrangement. This can be accomplished in various ways, including: (i) allowing that party to force a sale of the relevant joint venture assets (sometimes subject to a right of first offer in favor of the other party); (ii) allowing for a transfer of that party's interests in the joint venture to a third party (sometimes with the other party having a right of first offer or a tag-along right);[20] (iii) allowing that party to implement a buy-sell provision (described below); or (iv) affording that party a put option (i.e., the right of that party to sell its interest in the joint venture to the other party) if the other party does not want to sell.

For numerous reasons, this can be particularly tricky in a Co-GP JVA. First, any right of the GP to sell the relevant property, or otherwise monetize the GP position, will depend on the terms of the Main JVA. Typically, the LP will have a right to consent to such a sale (at least for a certain period) and, if the GP can sell the property without the LP's consent, the LP will often have a right of first offer to buy out the GP to avoid such a sale. A party to the Co-GP JVA may try to negotiate for the right to exercise, on behalf of the GP, any sale right the GP has under the Main JVA to sell the relevant assets (which right would include, if applicable, the right to give an "offer notice" on behalf of the GP in connection with any right of first offer in favor of the LP under the Main JVA). This of course will require negotiations between the Operator and Co-GP as to when, and under what circumstances, that can happen. In that connection, the parties to the Co-GP JVA may negotiate a right of first offer within the GP itself before a party to the Co-GP JVA can exercise rights under the Main JVA to start the property sale process. This would enable the Co-GP JVA party that does not want to sell to buy out the other party at a price determined through that process. This might not work, though, if the Operator wants to sell but the Co-GP does not, as the Main JVA will likely prevent the Co-GP from taking control of the GP without the LP's consent. And if the Co-GP wants to sell but the Operator does not, the Operator may have capital issues if it wants to exercise such a right of first offer (as a need for capital may have been why the Co-GP was brought into the deal in the first place).

The sale by the Operator or Co-GP of its interest in the GP can also be challenging. Again, it is unlikely that the LP (or, for that matter, the Co-GP)[21] will allow the Operator to sell a controlling interest to a third party, because that would mean a new entity would be taking control over the entire venture. Depending on the Co-GP rights negotiated, the Operator and LP may not want those rights to be exercised by a third party that is not approved by the Operator and the LP. Also, the more limited those rights, the less liquid and marketable the Co-GP interest is likely to be.

A buy-sell provision is sometimes a mechanism used in joint venture agreements to allow for liquidity, particularly if there is a disagreement about whether to sell the underlying assets. A buy-sell provision is a mechanism that allows the implementing party (the "initiator") to set a value for the joint venture's assets. The other party must elect to either sell its entire interest in the joint venture to the initiator or buy the entire interest of the initiator in the joint venture, at a price based on that set value. This is designed to keep the parties honest, as the party initiating and setting the value does not know if it is going to have to sell or buy at a price based on that value.[22] This is difficult to make work in a Co-GP JVA, however, because (per the terms of the Main JVA, loan documents, etc.) the Co-GP may not be permitted to be the buyer and the Operator may not have adequate capital to be the buyer. Mutual put rights have the same concerns.

Because of the complexity of these issues, each party to a Co-GP JVA will need to be comfortable with its

ability (or lack thereof) to monetize its investment in the future.

BUY-SELLS AND SIMILAR PROVISIONS IN MAIN JVA

The Main JVA may contain various exit/liquidity provisions like those described in the prior section, in which case the parties to the Co-GP JVA will need to address how the exercise of those rights (and response to the LP if the LP exercises those rights) will be determined.

For example, the Main JVA may have a buy-sell provision like the one described above, and the Co-GP JVA will need to address how the parties decide whether the GP will buy or sell in response to the LP triggering that provision. If the Operator and Co-GP agree on the decision, then it is easy. But what happens if one party to the Co-GP JVA wants the GP to sell its entire interest to the LP and the other party wants the GP to buy the LP's entire interest? One way to resolve this is to allow the party that wants the GP to buy the LP's interest to do so, but only if that party, simultaneous with the purchase of the LP's interest, also buys out the other party's interest in the Co-GP JVA based on the same valuation. However, this can be difficult to implement from a timing and logistical perspective (not to mention problematic if the buyer defaults in that obligation). Also, if the Co-GP is to be the buyer, that might not be permitted under relevant loan or other transaction documents.

Another potential solution is to allow the party that wants to buy to make that election on behalf of the GP and have the GP designate that party as the buyer (assuming the Main JVA allows for that). The same potential timing and default issues discussed above apply here as well. Additionally, the parties may not be comfortable having the buying party step into the shoes of, and have the same rights as, the LP. Because of the above complexities, the Co-GP JVA may provide that if the Operator and Co-GP cannot agree on whether the GP should be the buyer or seller in response to a buy/sell provision triggered by the LP, the default position is for the GP to be the seller. But this can result in potential gaming by the LP, particularly if it knows about such a provision. For the above reasons, the GP may push to have any buy-sell provisions eliminated from the Main JVA when it is being negotiated.

Many of the same issues arise when an LP gives the GP a right of first offer to buy the LP's interest (in connection with a proposed sale by the LP of the joint venture assets or the LP's interests) or a tag-along right in connection with a sale of the LP's interest to a third party.

In addition to the above, the Co-GP JVA should address whether, and under what circumstances, a party to the Co-GP JVA may implement, on behalf of the GP, any buy-sell or similar provisions under the Main JVA. The simplest solution is to provide that such a decision requires both the consent of the Operator and Co-GP (and that is often how that is addressed). But, as noted in the previous section, this can potentially limit the exit/liquidity rights of the parties, and exceptions may need to be negotiated.

CONCLUSION

Although this article is not intended to address every possible issue that will need to be negotiated in a Co-GP JVA, it is a summary of the issues that the author most frequently encounters in these arrangements—including many that are easily overlooked by those who do not regularly practice in this area. For the reasons discussed above, these issues require a lot of thought and attention to make them work for all the parties. Failure to do so could result in adverse, and unexpected, outcomes to the Operator and Co-GP.

Notes

1 An earlier version of this article was published in the N.Y. Real Property Law Journal.

2 For simplicity, we are referring to this party as the "Operator" (even in situations where they might more commonly be referred to as the "developer").

3 Most real estate joint ventures use a limited liability company as the joint venture vehicle. However, some may use a limited partnership or other structure (usually for tax reasons). Notwithstanding that most real estate joint ventures are limited liability companies, it is common parlance to refer to the operator/developer as the GP and the majority investor as the LP. In this article there are two relevant entities on the GP side; therefore, we refer to the operator/developer as the Operator, its co-GP investor (described below) as the Co-GP, and the joint venture between them as the GP.

4 In a typical real estate joint venture, the Operator will be entitled to a disproportionate share of profits—referred to as a promote—from the deal after the LP achieves certain minimum returns. The flow of funds to the parties in that regard is commonly referred to as the waterfall. The Operator will often be paid various fees from the deal, and these can be in the form of acquisition fees, development management fees, asset management fees, property management fees, leasing fees, and disposition fees (but most deals include only some, rather than all, of these).

5 Other reasons may include: (i) having an additional party to share guaranty liability (particularly if the LP is not bearing its share of that liability), whether because the principals of the Operator want to limit their guaranty exposure or because they do not have sufficient financial wherewithal to satisfy the relevant counterparty; (ii) giving a party with which the Operator has a strategic relationship the opportunity to invest in a deal where that party cannot otherwise be the LP; and (iii) bringing in a party with a needed area of experience or infrastructure.

6 These entities will typically be single-purpose entities formed just for the relevant joint venture.

7 A number of these issues arise because many of the rights of the parties under the Co-GP JVA are subject to the terms of the Main JVA and may not be exercisable without the LP's consent. This is similar to negotiating a sublease (with the Co-GP JVA being analogous to a sublease and the Main JVA being analogous to the main lease).

8 In many development deals, the GP is solely responsible for certain types of cost overruns.

9 The same issues can arise in other areas where the Main JVA requires the GP to bear a disproportionate share of costs, such as purchase agreement deposits and dead deal costs.

10 For example, if the waterfall in the Main JVA has a tier as follows, then the GP is effectively paying a share of the promote to itself (and thus the Co-GP is paying its share of such promote): "Second, (1) 20% to the GP as a promote, and (2) 80% to the members in proportion to their respective percentage interests." Under such a tier of the waterfall, assuming the respective percentage interests of the LP and GP are 90 percent and 10 percent and $100 were being distributed under such tier, the GP would receive $20 as a promote and $8 for its equity investment (10 percent of the $80 balance remaining after the promote is paid). If, instead, such $100 were merely distributed to the GP and the LP according to their respective percentage interests, then the GP would receive $10 on account of its equity investment. Thus, in this example, the GP is, under the Main JVA, effectively paying itself $2 as a promote (i.e., 10 percent of the total promote payment in this tier). If, in a Co-GP JVA where the Operator's and Co-GP's respective capital contribution percentages are 20 percent and 80 percent, but all promote is split 50/50, the Operator and Co-GP would each get $1 of such $2 of promote paid by the GP—instead of the Co-GP getting $1.60 (80 percent) and the Operator getting $0.40 (20 percent) of such $2 paid by the GP (resulting in the Co-GP paying $0.60 of such promote to the Operator and thus paying a promote on its equity). If that is not the intent of the parties to the Co-GP JVA, then the Co-GP JVA will need to address promote sharing in a way that makes it clear that such sharing is limited to the portion of the promote that is paid by the LP (with the balance to be shared by the Operator and Co-GP based on their proportionate shares of non-promote cash flow).

11 In some cases, a GP may be paid a promote before the main joint venture entity is liquidated. If that happens, there can be situations occurring after that promote payment that would result in the GP being entitled to less promote than it was actually paid (e.g., in a portfolio transaction, one property is sold for a large gain, but the next one is sold for a loss; or significant capital contributions are required after a promote payment). In those cases, a joint venture agreement will often require a "claw back" where the GP must return the excess promote it was paid. It might also require a "reverse waterfall" where the GP funds a disproportionate share of future capital contributions so that the excess promote is returned in that manner.

12 If relevant, this same concept applies to tax distributions. The GP will sometimes receive a disproportionate share of distributions to cover the tax liability of the ultimate GP principals, treated as an advance against future distributions. But if those future distributions are not sufficient to cover that advance, then the GP (and sometimes its principals) will often be required to return the amount of that insufficiency.

13 Such a takeover will usually also be prohibited under loan documents, franchise agreements (if applicable), and similar agreements, unless the Co-GP is preapproved by the applicable counterparties.

14 If the principals of the Co-GP are also a party to any such indemnification obligation (such that they can be responsible for acts of the Operator and its affiliates), then there should be a contribution and indemnity agreement be-

tween the principals of the Operator and the principals of the Co-GP, so that the party that causes the issue is wholly responsible for any liability to the LP.

15 A request for required capital contributions is commonly referred to as a "capital call."

16 These rights and obligations are negotiated on a case-by-case basis, but usually include: (i) the right for each party to require capital contributions for budgeted and certain non-discretionary expenses; and (ii) remedies in favor of a funding party against the non-funding party for the failure of the non-funding party to make a required capital contribution. Examples of remedies include: (i) the right of the funding party to fund the non-funding party's share as a loan to the non-funding party at a punitive interest rate (to be repaid out of any distributions that would otherwise be made to the non-funding party); (ii) the right of the funding party to fund the non-funding party's share as a capital contribution by the funding party, with a disproportionate dilution of the non-funding party's interest in the joint venture (commonly referred to as a "squeeze down"); and/or (iii) the right of the funding party to loan both its and the non-funding party's share to the joint venture as a priority loan to the joint venture (to get repaid before any other distributions to the parties).

17 These guaranties may include, among others: (i) for loan transactions, non-recourse carveout or "bad boy" guaranties; environmental indemnities; completion guaranties (for development or value add deals); interest and carry guaranties (also for development or value add deals); and partial or full principal guaranties; (ii) for hospitality transactions, franchise guaranties; and (iii) for development-oriented ground lease deals, completion guaranties (and potentially full lease guaranties until completion is accomplished).

18 If the Co-GP Guarantor will not be a direct party to any guaranties but will backstop the Operator guarantors for the Co-GP Guarantor's share of liability under the relevant guaranties, then the parties will need to execute a separate agreement that reflects that arrangement.

19 These are customarily referred to as "contribution and indemnity agreements" or "cross-indemnity agreements."

20 A "tag-along" right is a right that gives a party to a joint venture agreement the right to sell its interests on the same terms, and in the same proportion, as another member is then selling (or proposing to sell) its joint venture interests to a third party.

21 Lenders, franchisors, and similar parties will also have the same concern.

22 A buy-sell provision is like the process I used with my young kids when they would share a cookie: one would split the cookie, and the other would pick which half each would get. This resulted in amazing precision to try to cut the cookie right down the middle.