

# REAL PROPERTY EXCHANGE AGREEMENT UNDER IRC 1031

The undersigned, \_\_\_\_\_,  
hereinafter referred to as "OWNER(S)"; and \_\_\_\_\_,  
hereinafter referred to as "CORPORATION", hereby agree as follows:

WHEREAS, OWNER(S) is presently the OWNER(S) of certain real property located in the County of \_\_\_\_\_, State of \_\_\_\_\_, described on Exhibit "A" attached, hereinafter referred to as "OWNER'S Property."

WHEREAS, OWNER(S) desires to acquire certain other real property by way of an Internal Revenue Code Section 1031 Tax Deferred Exchange, hereinafter referred to as "Exchange Transaction", which property has not yet been located or cannot be concurrently acquired by OWNER(S).

WHEREAS, CORPORATION has agreed to act as a qualified intermediary to facilitate the Exchange Transaction by entering into this Agreement with OWNER(S) for the exchange of properties pursuant to which CORPORATION will:

1. Exercise the contractual obligation of OWNER(S) to transfer the OWNER'S Property to a third-party Buyer (the "Buyer");
2. Acquire other real property, hereinafter referred to as the "Replacement Property", from one or more third-party Sellers (the "Seller"); and
3. Exercise its right to cause the transfer of the Replacement Property to OWNER(S).

WHEREAS, CORPORATION is willing and able to act as a qualified intermediary to assume OWNER'S obligation to transfer OWNER'S Property to the Buyer and OWNER'S obligation to acquire the Replacement Property and thereafter transfer it to OWNER(S), but CORPORATION does not wish to appear in the recorded chain of title; therefore, CORPORATION and OWNER(S) agree that title to OWNER'S Property shall be deeded directly from OWNER(S) to the Buyer and that title to the Replacement Property shall be deeded from the Seller directly to OWNER(S).

WHEREAS, it is the intention of the parties hereto to conform to the characteristics of a successful exchange as set forth in applicable law and regulations, including Treasury Regulations Section 1.1031(k)-1, now and as the

same may hereafter be amended or modified from time to time, hereinafter referred to as the "Requirements".

NOW THEREFORE, it is agreed that:

1. EXCHANGE OF PROPERTIES. OWNER(S) agrees to transfer and convey to CORPORATION OWNER'S Property and OWNER'S obligation to transfer OWNER'S Property to the Buyer in consideration of and in exchange for the transfer and conveyance by CORPORATION to OWNER(S) of Replacement Property of "like kind" to be located and designated by OWNER(S) and acquired by CORPORATION pursuant to Section 4, below.
  
2. TERMS FOR ACQUISITION OF OWNER'S PROPERTY. OWNER(S) and CORPORATION agree that the fair market value of OWNER'S interest in OWNER'S Property shall be the sale price to be established by negotiation between OWNER(S) and Buyer, and set forth in a written sales agreement covering OWNER'S property, which value is referred to in this Agreement as the "Exchange Value". CORPORATION shall initially credit OWNER(S), in exchange for receipt of OWNER'S Property, an amount ("Exchange Credit") equal to such Exchange Value, adjusted for all of the following:
  - (a) CORPORATION's Fees as shown on Exhibit "B" attached to this Agreement;
  - (b) all settlement costs, adjustments, and prorations charged to OWNER(S) or CORPORATION in connection with the exchange, acquisition and disposition transactions contemplated by this Agreement and any other sums that may be dictated by the terms of the contemplated transactions; and
  - (c) the amount of all principal and accrued interest on any obligation secured by OWNER'S Property as of the date of conveyance of OWNER'S Property, including any prepayment penalty associated therewith and the amount of any due and payable real property taxes which are a lien on OWNER'S Property at the time at which CORPORATION accepts title thereto.
  
3. TITLE TO OWNER'S PROPERTY. OWNER(S) and CORPORATION agree that CORPORATION shall acquire all of OWNER'S rights and obligations under the real estate sale agreement to be entered into between OWNER(S) and Buyer, along with the right and power to cause OWNER(S) to transfer and convey all rights of ownership, including title by Deed directly to the ultimate Grantee thereof (Buyer).

#### 4. ACQUISITION OF REPLACEMENT PROPERTY.

- (a) If at such time as the transaction for the conveyance of OWNER'S Property to CORPORATION is ready to close, OWNER(S) has located Replacement Property which OWNER(S) is willing to accept and receive in exchange for the transfer and conveyance of OWNER'S Property to CORPORATION, CORPORATION shall acquire and thereafter cause the transfer and conveyance of ownership of the Replacement Property to OWNER in consideration of and in exchange for the concurrent transfer and conveyance by OWNER(S) of OWNER'S Property pursuant to the terms of this Agreement.
- (b) After the conveyance of the rights to OWNER'S Property to CORPORATION, and subject to the time limits set forth in the next sentence, as OWNER(S) locates the Replacement Property, OWNER(S) shall give written notice to CORPORATION, utilizing the Replacement Property Identification Form attached hereto as Exhibit "C", that such property is to constitute Replacement Property. This shall occur within forty-five (45) days of and including, the date of transfer of title to the OWNER'S Property from OWNER(S) (the "Identification Period"); provided, however that OWNER(S) shall have the right to rescind any such identification notice at any time during the Identification Period by written notice to CORPORATION. OWNER(S) shall establish with Seller of the Replacement Property the terms of acquisition thereof, shall provide CORPORATION with the form of acquisition agreement or agreements acceptable to OWNER(S), shall assign OWNER'S rights thereunder to CORPORATION and notify Seller of such assignment. CORPORATION shall substitute itself, subject to the provisions of Paragraph 5 of this Agreement, prior to close of the transaction as the purchaser of the Replacement Property in the place and stead of OWNER(S).
- (c) CORPORATION shall participate in the acquisition of Replacement Property upon specific terms and conditions as negotiated and specified in writing by OWNER(S), utilizing the proceeds held by CORPORATION as described in paragraph 2 herein, as increased by Paragraph 9 herein and as decreased by valid charges, costs, fees and expenses paid from such funds. In the event that additional cash or other consideration is required by CORPORATION to acquire Replacement Property, all of such additional cash and other consideration shall be conveyed to CORPORATION by OWNER(S) through the Exchange

Transaction. CORPORATION shall have no obligation to participate in the acquisition of Replacement Property unless all such additional consideration has been deposited in the Exchange Transaction by OWNER(S) in a timely fashion. OWNER(S) agrees that due to the complexity of exchange transactions, OWNER(S) must approve of all final terms and conditions for the acquisition of Replacement Property, as well as complete all other final approvals with regard to such acquisitions on or before One Hundred Fifty (150) days after the date on which the OWNER(S) transferred the property relinquished in the exchange, in order for CORPORATION to meet the One Hundred Eighty (180) days time requirements for acquiring and transferring the Replacement Property to OWNER(S).

5. CORPORATION'S RESERVATION OF RIGHTS. CORPORATION reserves the right, under Paragraphs 3 and 4 of this Agreement, to withhold acceptance and participation in the assignment of rights substituting CORPORATION in the contract for disposition of OWNER'S Property and the contract to acquire the Replacement Property when CORPORATION finds itself exposed to contingent liabilities without acceptable indemnification from loss from the parties to each transaction. In the event CORPORATION chooses to act under the provisions of this paragraph, CORPORATION shall transfer its rights and obligations hereunder pursuant to the procedure set forth in Paragraph 15(a).
6. TITLE TO THE REPLACEMENT PROPERTY. OWNER(S) and CORPORATION agree that CORPORATION may cause all rights of Ownership, including title to be directly conveyed to OWNER from Seller of the Replacement Property.
7. USE OF DIRECT DEEDING. OWNER(S) and CORPORATION agree that the direct deeding of property as described herein, is being accomplished solely for the purposes set forth in this Agreement and nothing contained herein shall be deemed inconsistent with OWNER'S and CORPORATION'S intent to accomplish the exchange transaction for the benefit of OWNER by having CORPORATION acquire and transfer both OWNER'S Property and all Replacement Property.
8. CORPORATION'S FEES. OWNER(S) agrees to pay as consideration for the activities undertaken by CORPORATION pursuant to the terms and conditions of this Agreement, the fees calculated pursuant to the schedule attached hereto as Exhibit "B". Such sums shall be disbursed to CORPORATION directly from the funds held by CORPORATION, without the requirement of authorization or further approvals by OWNER(S).

9. OWNER'S RIGHT TO RECEIVE BOOT.

- (a) All funds received by CORPORATION from the transactions described in Paragraph 2 hereof shall be the sole property of CORPORATION. OWNER(S) shall have no right to request or receive anything other than "like kind" real property for a period of one hundred eighty (180) days after the date of transfer of OWNER'S Property to CORPORATION (the "Exchange Period").
- (b) Notwithstanding the foregoing, CORPORATION shall distribute any unexpended portions of the Exchange Credit to OWNER(S) if (i) at the end of the Identification Period there remain no identified Replacement Properties which have not been acquired; or (ii) CORPORATION has acquired all Replacement Properties identified within the Identification Period; or (iii) OWNER(S) advises CORPORATION that it will be impossible for CORPORATION to acquire any of the remaining identified Replacement Properties due to material and substantial circumstances beyond the control of OWNER(S) and particularly described as conditions in OWNER'S identification notice.
- (c) Upon the expiration of the Exchange Period, CORPORATION shall distribute to OWNER any balance of the Exchange Credit and the appropriate amount of the Growth Factor which CORPORATION has not already used to acquire Replacement Property for conveyance to OWNER; the payment of such amounts shall be made with funds held, to the extent that CORPORATION holds such funds.

10. PLACEMENT OF FUNDS: GROWTH FACTOR. OWNER(S) and CORPORATION further understand and agree that during the term of this Agreement, all funds held by CORPORATION shall be placed in an interest-bearing account with CORPORATION with all interest in such account or accounts to be accrued to the benefit of CORPORATION. OWNER shall receive a "Growth Factor" on the funds to be utilized by CORPORATION pursuant to this Agreement in an amount equal to the interest earned by CORPORATION on such funds.

11. CORPORATION'S REPRESENTATION. CORPORATION represents and warrants to OWNER(S) that it is not a disqualified person as defined in Treasury Regulation 1.1031(k)-1(k).

12. OWNER'S INDEMNIFICATION OF CORPORATION. OWNER(S) agrees to indemnify, hold harmless and defend CORPORATION from any and all loss, costs, expenses, liability, damage or injury, including reasonable

attorneys' fees, in any manner arising out of or incident to CORPORATION's participation in the acquisition and/or disposition of any interest in the Relinquished or Replacement Properties or CORPORATION's holding or disposing of funds or other consideration pursuant to this Agreement. This indemnification shall apply equally with respect to CORPORATION's participation in any aspect of this Agreement or the Exchange Transaction, including, but without limitation, any and all consequential damages arising therefrom, except liability arising directly from CORPORATION's own willful misconduct or gross negligence. CORPORATION and OWNER(S) further understand and agree that CORPORATION is participating in the disposition of OWNER'S Property and the obtaining of the Replacement Property as an accommodation to OWNER(S) and in furtherance of OWNER'S desire to accomplish an Exchange Transaction.

13. SCOPE OF INDEMNIFICATION. For purposes of this Agreement, the indemnification and hold harmless by OWNER(S) shall include the active defense by attorneys satisfactory to CORPORATION of any claim made against CORPORATION, and all legal expenses and costs incurred by CORPORATION in connection therewith.
14. OWNER'S REPRESENTATIONS REGARDING ENVIRONMENTAL RISK.
  - (a) OWNER(S) represents and warrants to CORPORATION that there are no underground storage tanks on OWNER'S Property and as to any Replacement Property, that there will not be any such tanks, nor will there be any evidence on the Replacement Property of any environmental contamination by any hazardous or toxic materials as defined by any governmental agency, and that OWNER(S) has no reason to suspect the existence thereon in or upon OWNER'S Property, nor will OWNER(S) allow such suspicion to persist as to any Replacement Property. For the purposes of this paragraph, "hazardous or toxic materials" shall include but not be limited to substances defined as "hazardous substance", "Hazardous Materials", or "toxic substances" in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C Section 9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq.; the Resources Conservation and Recovery Act, 42 U.S.C. 6901, et. seq.; and corresponding statutes enacted by any state in which either OWNER'S Property or any Replacement Property is located, as any of the above mentioned laws may be amended from time to time, and in the regulations adopted and the publications promulgated pursuant to said laws.

- (b) CORPORATION is expressly relying upon these representations by OWNER(S) in entering into this Agreement. OWNER(S) agrees that the indemnity and hold harmless provisions of Paragraphs 12 and 13 shall specifically include any liability arising by reason of any contamination found to have existed on OWNER'S Property or on any Replacement Property which in any way jeopardizes or causes liability to CORPORATION. OWNER(S) hereby assigns to CORPORATION any and all rights to indemnification which OWNER(S) may have against any third party to the extent CORPORATION suffers any damage, liability and/or cost as a result of the presence of environmental contamination or hazardous or toxic materials upon OWNER'S property or any Replacement Property.
15. BREACH OF OWNER'S REPRESENTATIONS. Should CORPORATION discover or have any cause to believe that the representations and warranties of OWNER(S) in Paragraph 14 are untrue or inaccurate in any material part, then CORPORATION may, at its sole discretion:
- (a) elect to transfer its rights and duties under this Agreement to another person or entity that is a qualified intermediary, as that phrase is defined in Treasury Regulation Section 1.1031(k)-1(g)(4) and that is approved by OWNER(S) (whose approval shall not be unreasonably withheld), to act as the intermediary in the place and stead of CORPORATION in completing the transactions contemplated hereunder, or
- (b) refuse to acquire the property with respect to which said warranties and representations are untrue. The foregoing elections of CORPORATION shall be in addition to and not in lieu of any and all other rights it may have hereunder or at law.
16. NO AGENCY. OWNER(S) acknowledges that CORPORATION is acting as a principal in all the transactions contemplated by this agreement and in no way shall be deemed an agent of OWNER(S). CORPORATION shall not have any obligations to OWNER(S) as an agent of OWNER(S) nor shall OWNER(S) have any obligations to CORPORATION as a principal of CORPORATION.
17. TIME OF ESSENCE. Time is of the essence of each and every term and provision of this Agreement.
18. ATTORNEYS FEES. In the event that any legal action is necessary to enforce or interpret any term or provision of this Agreement, each party shall be responsible for its own costs and attorneys' fees.

19. SUCCESSORS AND ASIGNS. This Agreement shall be binding upon and shall inure to the benefit of the respective heirs, successors and assigns of the parties hereto, provided, however, that OWNER(S) shall have no right to assign OWNER'S interest hereunder without the prior written consent of CORPORATION.
20. SEVERABILITY. If any part of this Agreement is determined to be illegal or unenforceable, all other parts of this Agreement shall be given effect separately and this Agreement shall not be defeated in its entirety.
21. TAX ADVICE. OWNER(S) acknowledges and agrees that CORPORATION, its employees, agents and assigns, do not make any determination whether the exchange, the parties or the properties qualify under IRC 1031 and/or Treasury Regulations, Revenue Rulings, etc. for tax deferred treatment. The OWNER(S) is advised to seek advice from their tax professional on the tax implications of this exchange. CORPORATION'S sole role is to act as the qualified intermediary, unless explicitly stated otherwise in writing by the CORPORATION.
22. ADMENDMENTS. This Agreement may be amended only by a writing executed by all parties.
23. COUNTERPARTS. This Agreement may be executed in counterparts.

IN WITNES WHEREOF, we have executed this Real Property Exchange Agreement this \_\_\_ day of \_\_\_\_\_, 20\_\_.

CORPORATION

By: \_\_\_\_\_

Title: \_\_\_\_\_

OWNER(S)

\_\_\_\_\_

\_\_\_\_\_

**EXHIBIT A**

**PROPERTY DESCRIPTION**

Legal Description:

**EXHIBIT B**

**FEE SCHEDULE**

CORPORATION's Fee Schedule for acting as an intermediary in a delayed exchange:

Set Up Fee	\$ 500.00
For each \$100,000, or portion thereof	\$ 100.00

Total Fees:

Set up Fee	\$ 500.00
------------	-----------

Asset Fee ( Sale price _____ )	\$ xxx.00
--------------------------------	-----------

Total Fee:	\$ xxx.00
------------	-----------

**AGREEMENT OF ASSIGNMENT AND SUBSTITUTION**

Re: (Legal Description)

THIS AGREEMENT OF ASSIGNMENT AND SUBSTITUTION is made  
\_\_\_\_\_ 20\_\_\_ by and between \_\_\_\_\_ (“OWNER(S)”  
\_\_\_\_\_, (“CORPORATION”) and  
\_\_\_\_\_ (“Acquiring Party”)

OWNER(S) and Acquiring Party have entered into that certain Real Estate Purchase Agreement, copy attached as Exhibit “1” (The “Purchase Contract”), wherein OWNER(S) agreed to dispose of, by means of a sale, their interest in that certain real property described in said Exhibit “1” (the “Relinquished Property”).

OWNER(S) and CORPORATION desire to relieve OWNER(S) of OWNER’S obligations set forth in the Purchase Contract to dispose of the Relinquished Property and to substitute CORPORATION in the place of OWNER(S).

THEREFORE, OWNER(S) hereby transfers and assigns to CORPORATION all of OWNER’S right, title and interest in the Purchase Contract and CORPORATION hereby assumes and relieves OWNER(S) of OWNER’S right, title and interest in and to all of OWNER’S obligations under said Purchase Contract.

At the time this Agreement becomes effective, OWNER(S) will cause any deposit which has been made under the Purchase Contract and released to OWNER(S) to be delivered to CORPORATION.

IN WITNES WHEREOF, the parties hereto have executed this Agreement, to be effective immediately before the close of the transaction for the Relinquished Property, which the parties reasonably anticipate will be on or before \_\_\_\_\_ 20\_\_\_. However, this Agreement shall be null and void in the event Acquiring Party or its assignee does not acquire title to the Relinquished Property pursuant to the terms of the Purchase Contract.

OWNER(S)

CORPORATION:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Title: \_\_\_\_\_

**Exhibit C**

Attach copy of W-9