



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

4942.05-01;
4945.00-00

No Third Party Contacts

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Contact Person:

Identification Number:

Contact Number:
Fax:

Employer Identification Number:

Legend

Trust =
Company =
Holding Company =
Reserve =
Plan =
R =
S =
T =
u =
v =
x =
y =
z =

Dear :

This is in reply to your request for rulings, as amended, under sections 4941, 4942, and 4945 of the Internal Revenue Code (the "Code").

Facts:

The Trust is exempt from Federal income tax as an organization described in section 501(c)(3) of the Code and is classified as a private operating foundation under sections 509(a) and 4942(j)(3). The general purpose of the Trust is to promote open space, recreation, and education on the Reserve, and potentially on additional lands outside the Reserve (together with the Reserve, the "Preservation Lands"), and to assure the preservation, enhancement, and protection of the Preservation Lands in perpetuity, all for the benefit of the public.

In particular, the Trust will protect and preserve significant wilderness and natural habitats on the Reserve, promote an exceptional range of recreation and education opportunities on the Reserve, and perpetuate the care and public enjoyment of the Reserve. The Trust was formed and will serve as a central organization for planning, management, environmental enhancement, and expansion of public access, programs and facilities to the Reserve.

The Reserve encompasses z acres within S that are committed to open space and recreational uses for the benefit of the general public. The Reserve is 83% of natural open space and wilderness lands ("Wildlands"), and 17% of developed urban park and recreation facilities ("Parklands").

R and the Company are substantial contributors to the Trust and are disqualified persons, within the meaning of section 4946 of the Code, with respect to the Trust. The Company is a developer of large-scale communities on S. Public and private parks, golf courses, bike trails and other recreational facilities are found throughout the developed areas of S. The Company has incorporated conservation and environmental enhancement of land into its master planning. R is the chairman of the Company and sole shareholder of the Holding Company, which is the sole shareholder of the Company.

The Reserve is owned in parts by the Company, political subdivisions and private parties other than the Company. The Company owns 54%, political subdivisions own 31%, and various public and private owners own 15% of the Reserve. Of the Wildlands portion of the Reserve, 63% is owned by the Company and 37% is owned by political subdivisions. Of the Parklands portion of the Reserve, 8% is owned by the Company and 92% is owned by various public agencies and private owners.

All of the Wildlands are committed to open space use. For example, certain Wildlands currently owned by the Company are committed to the Plan by an agreement executed by the Company and numerous State and Federal governmental agencies. The Plan addresses endangered and threatened species issues on a larger scale and multi-species basis, and requires the Company to permanently protect specified open space in return for development rights on other property owned by the Company. The Plan provides for the transfer of the designated open space lands to public agencies or nonprofit entities, or other methods of

permanently protecting the open space, over the next several years in conjunction with Company development projects.

The other portion of the Wildlands owned by the Company is subject to permanent conservation easements in favor of T ("Easement Lands"). The Company gave T conservation easements over x acres and a \$y commitment to underwrite planning, management, environmental enhancement and the expansion of public access to the Wildlands. T is tax exempt under section 501(c)(3) of the Code and is classified as a public charity under sections 509(a)(1) and 170(b)(1)(A)(vi) of the Code. This ruling does not address any specific issues regarding arrangements with T.

Pursuant to a management agreement between T and the Company dated v (the "Management Agreement"), T is currently providing natural resource stewardship and public access programs on all Company-owned Wildlands (including the Easement Lands) and on some Wildlands owned by public agencies. Under the management of the Company, hiking, mountain bike rides, and equestrian trail rides are now available in the Wildlands. Pursuant to the terms of the easements, the Easement Lands are committed in perpetuity for open space. In addition, the Company will transfer its fee interest in the Easement Lands by no later than u to either (i) a political subdivision, (ii) the Trust, or (iii) another section 501(c)(3) public charity (each hereinafter referred to as an "Eligible Donee," or, collectively, as "Eligible Donees").

To better facilitate management and protection of the Wildlands as a whole, the Trust is envisioned to eventually own portions of the Wildlands and be a land steward of the Reserve. To promote its vision of a single open space program preserved for the general public in the midst of urban development, the Trust will promote preservation of natural habitats throughout the Wildlands without regard to current ownership boundaries. In acting as land steward, the Trust aims to provide the public with hiking and equestrian trails, as well as other recreational and educational opportunities in the Wildlands. The Trust will also create and publish maps, sponsor public events and gatherings, develop tour routes and training materials for public tours, and engage in other activities for the Reserve, as described in greater detail below.

The Trust will enter into contracts with T to perform certain land management and improvement services on the Preservation Lands. One such contract will be substantially similar to the current Management Agreement between the Company and T, both in substance and in the land it covers. Under no condition will the Trust directly assume the Company's obligations to T under the Management Agreement or otherwise. Unless the Company and T mutually agree to terminate the Management Agreement, the Trust will not enter into any such similar contract with T. The Trust will not assume any obligations of the Company when it contracts with T, because all such obligations will have been previously extinguished. As previously noted, this ruling does not address any specific issues regarding arrangements with T.

The Parklands are part of the Reserve as they are already developed and enjoyed for recreational and educational purposes. In some instances, they provide linkages (e.g. bike trails and wildlife movement corridors) important to the recreational enjoyment and environmental preservation of all of the Reserve.

The Trust may make grants or provide services or facilities to benefit specific Parklands owned by an Eligible Donee (e.g. a nature center in a City park). The Trust will not engage in any activity to directly benefit any specific Parklands owned by the Company or other private parties. The Trust, however, will fund or provide services that generally include such Parklands as a part of the Reserve (e.g. produce public information materials regarding the Reserve and all property in the Reserve; conduct scientific wildlife studies involving all applicable portions of the Reserve).

The Trust will have at least one management level employee and other staff as necessary from time to time, such as project directors and administrative assistants. In addition, from time to time as necessary, employees of the Company, whose time will be provided at no charge by the Company to the Trust, may carry out certain activities of the Trust. The Company will also provide administrative support services, office space, and utilities to the Trust at no cost. The Trust may also contract with other commercial, public and nonprofit organizations that are not disqualified persons with respect to the Trust, as defined in section 4946 of the Code, to provide services and facilities in connection with the Reserve. The Trust will establish adequate procedures to see that such service providers fulfill their obligations under these contracts.

The Trust relies for financial support primarily from funding by the Company and R, and other section 501(c)(3) organizations supported by R. The Trust may also conduct public fund-raising activities and seek public and nonprofit organization grants to support its activities. Additionally, the Trust's financial support will come from fees that may be charged to cover costs associated with public access or use of the Reserve, such as camping fees or equestrian center fees.

The Trust will engage in the following activities on the Preservation Lands (collectively, "Preservation Activities"):

A. Prepare and communicate a comprehensive stewardship plan for the Reserve:

1. Create, publish, distribute, and promote plans for the Reserve.
2. Sponsor public events to promote and advocate plans for the Reserve.
3. Sponsor meetings and forums to discuss how Reserve landowners and community interests can work to implement a comprehensive plan for the Reserve.
4. Assist and support the creation of community organizations and government entities to support and manage Reserve lands.

B. Produce research and scientific studies to advance understanding of the Reserve and land stewardship strategies:

1. Observe habitat and species conditions/activities.
2. Set up monitoring cameras and equipment.
3. Trap, tag, photograph, and/or observe species, habitats, geological and cultural features.
4. Create test plots and other scientific experiments.
5. Produce and distribute reports and findings of research and studies, and

make recommendations on conservation.

C. Provide resource stewardship and environmental enhancement for the Reserve:

1. Document and photograph resources and resource problems.
2. Identify suitable sites for future relocation or reintroduction of native plants and animals.
3. Conduct plant and animal surveys.
4. Examine lands to identify needs for resource protection, rehabilitation and enhancement.
5. Enhance and restore habitats by eradicating non-native plants and animals, and planting, watering, feeding, transplanting and relocating native plants and animals.
6. Take actions to protect native species and habitats, such as erosion prevention, predator control, and fire management.
7. Design and execute activities – such as spraying, digging, burning, and trapping – to remove harmful species.
8. Coordinate with public entities, wildlife agencies, and adjoining land managers with respect to habitat restoration, fire management, and wildlife monitory programs.

D. Produce and distribute public education and public information regarding the Reserve:

1. Create and maintain a website about the Reserve, its features, resources, and activities.
2. Produce books, articles, newsletters, films, videos, direct mail, pamphlets, and displays about the Reserve and conservation and access activities occurring on it including maps and photographs.
3. Produce and distribute information designed to educate the public on caring for and living harmoniously with the Reserve.
4. Sponsor community events to showcase Reserve activities and achievements.
5. Plan and execute education programs, tours and seminars that feature natural, historic or cultural resources.
6. Produce and distribute field guides, maps, illustrations, and photographs.

E. Promote and facilitate educational and recreational public access on the Reserve:

1. Fund, install and maintain park-type improvements for public use and enjoyment such as biking, hiking, and equestrian trails, restrooms, drinking fountains, parking lots, access roads, viewpoints, picnic tables, public safety and information signs.
2. Develop tour routes and training materials for public tours.
3. Recruit and train docents and other volunteers.
4. Provide docent led or other public access tours and programs.
5. Create maps and other interpretive information, depicting trails and access

- opportunities.
6. Sponsor public events and gatherings.
 7. Distribute or otherwise communicate schedules and information about public access and activities.
 8. Provide site patrols and other security services for public safety.

The Trust also plans to fund, construct and maintain significant capital improvements to facilitate and promote public access, education and enjoyment of the Reserve (collectively "Improvement Activities"). These Improvement Activities will be conducted only on Easement Lands and lands owned by Eligible Donees, such as camping facilities, nature centers, interpretive centers, equestrian centers, and gardens.

Law:

Section 4941(a)(1) of the Code imposes an initial tax on each act of self-dealing between a disqualified person and a private foundation.

Section 4941(d)(1)(E) of the Code provides that the term "self-dealing" means any direct or indirect transfer to, or use by, or for the benefit of, a disqualified person of the income or assets of a private foundation.

Section 53.4941(d)-2(f)(2) of the Foundation and Similar Taxes Regulations provides that the fact that a disqualified person receives an incidental or tenuous benefit from the use by a foundation of its income or assets will not, by itself, make such use an act of self-dealing.

Example (1) of section 53.4941(d)-2(f)(9) of the regulations provides as follows: M, a private foundation, makes a grant of \$50,000 to the governing body of N City for the purpose of alleviating the slum conditions which exist in a particular neighborhood of N. Corporation P, a substantial contributor to M, is located in the same area in which the grant is to be used. Although the general improvement of the area may constitute an incidental and tenuous benefit to P, such benefit by itself will not constitute an act of self-dealing.

Example (4) of section 53.4941(d)-2(f)(9) of the regulations provides as follows: A disqualified person with respect to a private foundation contributed certain real estate to the private foundation for the purpose of building a neighborhood recreation center in a particular underprivileged area. As a condition of the gift, the private foundation agreed to name the recreation center after the disqualified person. Since the benefit to the disqualified person was only incidental and tenuous, the naming of the recreation center, by itself, was not an act of self-dealing.

Rev. Rul. 66-358, 1966-2 C.B. 218, holds, in part, that the acceptance of a gift by an exempt section 501(c)(3) organization will not affect its exempt status even though the donor retained the right to continue using a picture of a certain scenic view in the park as its brand symbol. In this case it was concluded that the benefits derived from the gift, which included maintenance and operation costs, flow principally to the general public through access to and use of the park, and its continued operation.

Rev. Rul. 73-407, 1973-2 C.B. 383, holds that the public recognition afforded by a private foundation to a disqualified person through the use of the disqualified person's name by the private foundation for 100 years is an incidental and tenuous benefit which does not constitute an act of self-dealing under section 4941(d)(1)(E) of the Code.

Rev. Rul. 77-367, 1977-2 C.B. 193, holds that a nonprofit organization formed to create and operate a replica of an early American village is engaging in educational activities similar to those of a museum and qualifies for exemption under section 501(c)(3) of the Code even though a corporation that donated land and a substantial percentage of the organization's support benefits by having the village named after it and by having its name associated with the village through both the corporations' and the organization's advertising. The ruling recognized that any benefit going to the corporation was merely incidental to the benefits flowing to the general public from access to the village and its historic structures.

Section 4942(g)(1)(A) of the Code and section 53.4942(a)-3(a)(2) of the regulations define "qualifying distribution" as any amount paid by a private foundation to accomplish one or more purposes described in section 170(c)(2)(B), other than any contribution to (i) an organization controlled (directly or indirectly) by the foundation or one or more disqualified persons, or (ii) a private foundation which is not an operating foundation.

Section 4942(j)(3) of the Code defines the term "operating foundation" to mean any organization---

(A) which makes qualifying distributions (within the meaning of paragraph (1) or (2) of subsection (g)) directly for the active conduct of the activities constituting the purpose or function for which it is organized and operated equal to substantially all of the lesser of--

(i) its adjusted net income (as defined in subsection (f)), or

(ii) its minimum investment return; and

(B)(i) substantially more than half of the assets of which are devoted directly to such activities or to functionally related businesses (as defined in paragraph (4)), or to both, or are stock of a corporation which is controlled by the foundation and substantially all of the assets of which are so devoted,

(ii) which normally makes qualifying distributions (within the meaning of paragraph (1) or (2) of subsection (g)) directly for the active conduct of the activities constituting the purpose or function for which it is organized and operated in an amount not less than two-thirds of its minimum investment return (as defined in subsection (e)), or

(iii) substantially all of the support (other than gross investment income as defined in section 509(e)) of which is normally received from the general public and from 5 or more exempt organizations which are not described in section 4946(a)(1)(H) with respect to each other or the recipient foundation; not more

than 25 percent of the support (other than gross investment income) of which is normally received from any one such exempt organization; and not more than half of the support of which is normally received from gross investment income.

Section 53.4942(b)-1(b)(1) of the regulations provides that, in general, qualifying distributions are not made by a foundation “directly for the active conduct of activities constituting its charitable, educational, or other similar exempt purpose” unless such qualifying distributions are used by the foundation itself, rather than by or through one or more grantee organizations which receive such qualifying distributions directly or indirectly from such foundation. Thus, grants made to other organizations to assist them in conducting activities which help to accomplish their charitable, educational, or other similar exempt purpose are considered an indirect, rather than direct, means of carrying out activities constituting the charitable, educational, or other similar exempt purpose of the grantor foundation, regardless of the fact that the exempt activities of the grantee organization may assist the grantor foundation in carrying out its own exempt activities. Amounts paid to acquire or maintain assets that are used directly in the conduct of the foundation's exempt activities, such as the operating assets of a museum, public park, or historic site, are considered direct expenditures for the active conduct of the foundation's exempt activities. Likewise, administrative expenses (such as staff salaries and traveling expenses) and other operating costs necessary to conduct the foundation's exempt activities (regardless of whether they are “directly for the active conduct” of such exempt activities) shall be treated as qualifying distributions expended directly for the active conduct of such exempt activities if such expenses and costs are reasonable in amount.

Rev. Rul. 74-450, 1974-2 C.B. 388, states that amounts set aside to pay for the conversion of an acquired farmland into a wildlife sanctuary and public park that includes extensive tree planting, building of a large earthen dam, and construction of various fences, roads, and other public service facilities, constitute qualifying distributions directly for the active conduct of the foundation's exempt activities.

Rev. Rul. 78-315, 1978-2 C.B. 271, describes a trust which is exempt from federal income tax as an organization described in section 501(c)(3) and a private foundation whose sole activity is the operation of a cultural center. The managing trustees of the trust formed a separate corporation to act only in a fiduciary capacity on behalf of the trust in conducting the operations of the cultural center. The trust turned over substantially all of its annual adjusted net income to the corporation for disbursement in the operation of the cultural center that included contracting for goods and services on behalf of the trust. The ruling reasoned that because the corporation acted only in a fiduciary capacity on behalf of the trust, it was not a grantee organization to the trust. The payment of goods and services constituted qualifying distributions directly for the active conduct of activities constituting its exempt purposes in determining the trust's qualification as an operating foundation under section 4942(j)(3).

Section 4945 of the Code imposes a tax on any “taxable expenditure” (as defined in section 4945(d)) of the Code made by a private foundation.

Section 4945(d)(5) of the Code provides that the term “taxable expenditure” includes any amount paid or incurred by a private foundation for any purpose other than one specified in section 170(c)(2)(B).

Section 53.4945-6(b)(1) of the regulations generally provides that any payment that constitutes a qualifying distribution under section 4942(g) of the Code will not be treated as a taxable expenditure under section 4945(d)(5).

Section 4946(a)(1)(A) of the Code provides that the term “disqualified person” includes, with respect to a private foundation, a person who is a substantial contributor to the foundation.

Analysis:

The Trust was formed for the charitable purpose of preserving and protecting the Preservation Lands all for benefit of the public. The Trust will conduct Preservation Activities that include preparing and communicating a comprehensive stewardship plan for the Reserve, producing research and scientific studies to advance understanding of the Reserve and land stewardship strategies, providing resource stewardship and environmental enhancement for the Reserve, producing and distributing public education and public information regarding the Reserve, and promoting and facilitating public access on the Reserve. These Preservation Activities will promote the Trust’s exempt purpose and benefit the general public, primarily by promoting open space, recreation, and education on the Reserve, and by assuring its preservation, enhancement, and protection in perpetuity.

The Trust will also conduct Improvement Activities that include the building of camping facilities, nature centers, interpretive centers, equestrian centers, gardens, and the maintenance of such facilities all for the benefit of the public. The Trust will expend income and assets for Improvement Activities only on the Easement Lands and on lands owned by Eligible Donees and for uses that benefit the general public.

The activities will be conducted by the Trust's own staff, support services provided at no cost to the Trust by the Company, and by contracts with third party service providers. The payments for these are similar to the payments made on activities benefiting the public made by the private foundation in Rev. Rul. 74-450, *supra*, which were held qualifying distributions for the active conduct of its exempt function. In addition, we consider the Trust's payments on contracts with third party service providers to be fees for services rendered and not grants. The services rendered are directly for the conduct of activities constituting the Trust's exempt purposes. Pursuant to Rev. Rul. 78-315, such payments for services constitute qualifying distributions under section 4942(j)(3) of the Code.

Under section 4941(d)(1)(E) of the Code, “any direct or indirect transfer to, or use by, or for the benefit of, a disqualified person of the income or assets of a private foundation” generally constitutes self-dealing. The Trust will conduct Preservation and Improvement Activities that involve spending its income and assets on Easement Lands and on lands owned by Eligible Donees. Under the facts and circumstances, Company currently owns the fee interest in the Easement Lands. However, the Easement Lands are irrevocably committed in perpetuity to open space for the benefit of the public, are and will be continually used and enjoyed by the general public, and will be transferred to an Eligible Donee by no later than u. The Easement Lands cannot revert to the Company. Under these particular facts and circumstances, any present benefit, if there is present benefit, to the Company by the Trust's expenditures on the

Easement Lands will be tenuous or incidental. These benefits are analogous to the benefits provided and received by the disqualified persons in Rev. Ruls. 66-358, 73-407, and 77-367 and will not give rise to self-dealing under section 53.4941(d)-2(f)(2) of the regulations.

The Trust will expend funds on Improvement Activities (building camping facilities, interpretive centers, equestrian centers, gardens, etc.) on only (i) lands owned by an Eligible Donee and (ii) Easement Lands. In contrast, the Trust will engage in other activities to promote its exempt purposes. These Preservation Activities include: preparing and communicating a comprehensive stewardship plan for the Reserve, producing research and scientific studies to advance understanding of the Reserve and land stewardship strategies, providing resource stewardship and environmental enhancement for the Reserve, producing and distributing public education and public information regarding the Reserve, and promoting and facilitating public access on the Reserve. These Preservation Activities will promote the Trust's exempt purpose and benefit the general public, primarily by promoting open space, recreation, and education on the Reserve, and by assuring its preservation, enhancement, and protection in perpetuity. Because of their broad nature, these activities involve all Preservation Lands, including lands owned by the Company. Because all Wildlands under Company ownership are already committed to open space use, any benefits derived by the Company will also be "incidental or tenuous" under section 53.4941(d)-2(f)(2) of the regulations and therefore will not give rise to self-dealing.

Lastly, because the Preservation Activities promote the Trust's charitable purpose to promote open space, recreation, environmental preservation, and education on the Preservation Lands for the public benefit, the expenditure of funds for Preservation Activities will not constitute taxable expenditures under section 4945(d)(5) of the Code. Because the expenditures are treated as qualifying distributions under section 4942, as discussed earlier, they are not taxable expenditures pursuant to section 53.4945-6(b)(1) of the regulations.

Based on the foregoing and the representations made, we rule as follows:

1. Payments by the Trust made with respect to the Preservation Lands, including capital improvements to the Preservation Lands and amounts paid to commercial, public, and nonprofit service providers, none of whom will be disqualified persons, for services related to preserving and enhancing the Preservation Lands, will constitute qualifying distributions directly for the active conduct of the Trust's charitable activities within the meaning of section 4942(g)(1)(A) and section 4942(j)(3)(A) of the Code.
2. Payments by the Trust for Preservation Activities and Improvement Activities (as described above) on (i) the Easement Lands and on (ii) lands owned by an Eligible Donee will not constitute acts of self-dealing under section 4941(d) of the Code or taxable expenditures under section 4945(d).
3. Payments by the Trust for Preservation Activities (as described above) on all Preservation Lands, including lands owned by the Company, will not constitute acts of self-dealing under section 4941(d) of the Code or taxable expenditures under section 4945(d).

4. The contribution of land to the Trust by the Company, which land is legally required to be transferred by the Company to one or more public entities, followed by the transfer by the Trust of such land to one or more public entities will not constitute acts of self-dealing under section 4941(d) of the Code or taxable expenditures under section 4945(d).

Except as we have ruled above, we express no opinion as to the tax consequences of the activities under the cited Code provisions or under any other provisions of the Code. Further, this does not purport to opine on any charitable contribution deductibility issues under section 170 of the Code.

This ruling will be made available for public inspection under section 6110 of the Code after certain deletions of identifying information are made. For details, see enclosed Notice 437, *Notice of Intention to Disclose*. A copy of this ruling with deletions that we intend to make available for public inspection is attached to Notice 437. If you disagree with our proposed deletions, you should follow the instructions in Notice 437.

This ruling is directed only to the parties who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

Lois G. Lerner
Director, Exempt Organizations
Rulings & Agreements

Enclosure
Notice 437