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

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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4944.00-00

Contact Person:

Identification Number:

Telephone Number:

Employer Identification Number:

LEGEND:

Museum	=
Founder	=
Foundation	=
Year	=
Lease 1	=
Lease 2	=
x	=
y	=

Dear :

We have considered your ruling request dated November 30, 2012, as amended on August 23, 2013, requesting rulings under I.R.C. §§ 4941, 4942, and 4944.

FACTS

You are a tax-exempt organization recognized under § 501(c)(3) and classified as a private operating foundation under §§ 509(a) and 4942(j)(3). Your specific charitable and educational purposes include:

- The promotion, study, improvement, and advancement of the visual arts;
- Furthering the public's appreciation and understanding of art, architecture, and landscape;
- Loaning works of art to other, public charities for exhibition; and
- Holding and supporting exhibitions of postwar and contemporary works of art.

You accomplish these purposes by operating the Museum, which integrates art, architecture, and landscaping into a seamless experience. The Museum's collection consists of more than 400 pieces of post-World War II contemporary art and an extensive research library. In Year, you received x visitors.

Founder is your founder, sole substantial contributor, and one of three directors. You state that Founder is a disqualified person within the meaning of § 4946. Your bylaws include a conflict of interest policy that requires "interested directors" (i.e., "[a] director who is directly or indirectly a party to a transaction with [you]") to "disclose the material facts of the transaction and his or her interest in or relationship to such transaction to the Board of Directors . . . prior to any action by the Board . . . to authorize, approve or ratify such transaction." The policy requires the interested director to abstain from voting on such transactions.

Founder wholly owns a special purpose entity (SPE).

The Museum occupies the same parcel of land as Founder's private residence. Founder leases the Museum's facilities to you at no cost. You also own property contiguous with Founder's property (Foundation-owned property).

Master Plan

You propose to expand the Museum's operation by building a new museum facility and increasing the acreage to which you have access (Master Plan). Founder will provide funding for your Master Plan. You will also use your financial resources to fund the intended improvements. The local zoning authority has approved your plans.

The new museum facility will include a series of pavilion rooms that house permanent and temporary, single artist installations and that surround a central water garden. The new museum facility's location is a short walk from the Museum, which will continue to host temporary exhibitions of works from your collection. You anticipate that the new museum will be open to the public 5 days a week, from 10 a.m. to 5 p.m., and will receive approximately y visitors per year.

You obtained independent expert input from the architectural and the structural engineering firms working on the plans for the new museum facility and related improvements. You state that the expected useful engineering life of the new museum facility is 100 years and that the expected useful engineering life of the new parking pads, pathways, and road improvements is 25 years.

The Master Plan requires a new landscape design that integrates walking paths, restored meadows, and woodlands "in order to augment the reflective experience of visiting the Museum and viewing sculptures and other works of art." Founder will pay for any landscaping improvements made to the portion of the property including his private residence.

The Leases

In furtherance of your Master Plan, Founder and the SPE intend to lease two defined parcels of land totaling approximately 100-plus acres, which includes the existing Museum, for 99-years at no charge (Museum Sites). Founder will retain the portion of the property that includes his private residence (Personal Site).

You intend to execute two separate leases, each covering a different portion of Founder's properties. Lease 1, between you and the SPE, covers one parcel of land, and Lease 2,

between you and Founder, covers the parcel of land that includes the existing Museum facilities. Both leases:

- Acknowledge that you are subject to the self-dealing rules described in § 4941 and state that the leases are intended to qualify for the exception to the self-dealing rules for leases of property without charge as provided in § 53.4941(d)-2(b)(2);
- Limit your use of the property to operating "a first-class art museum, together with accessory and ancillary uses and for other tax-exempt purposes within the meaning of Section 501(c)(3) of the Code ("the Permitted Use"), and for no other purposes whatsoever";
- Grant you the right to quiet enjoyment "without molestation or hindrance by [Founder or the SPE] . . . , subject to the provisions of this Lease and to the Permitted Exceptions," which includes certain easements and right-of-ways; and
- Provide Founder and the SPE with the right to "self-help." If you fail to perform under either the lease, Founder or the SPE, as applicable, may "perform or correct any maintenance or repairs" with written notice.

Both leases are self-characterized as "triple net leases," indicating that you are responsible for paying all costs associated with the property other than rent such as "Non-Exempt taxes," if any; insurance; utilities; maintenance; repair and replacement; security; etc. You intend to pay your own utility, cable, and internet expenses directly to third-party providers based on metered usage and other separate contracts. The utility lines on the properties service both the Museum Sites and the Personal Site. You state that, if the utility lines servicing both the Museum Sites and the Personal Site require repair, you will make a reasonable allocation of the costs and pay that amount to third-party service providers. If the utility lines servicing only the Museum Sites require repair, you will pay the costs to third-party service providers.

The new museum facility will be located on the parcel of land governed by Lease 1. Lease 1 provides that the new museum facility's design is within your sole discretion. Lease 1 further provides that you are responsible for obtaining all permits and approvals necessary for the development and operation of the new museum facility from applicable governmental authorities and public or private utility companies. Lease 1 obligates the SPE to sign applications as necessary and to otherwise reasonably cooperate with you to obtain these permits and approvals. Lease 2 provides that you may make additional improvements under the same terms. Both leases:

- Broadly define "improvements" to include the new museum facility, the Museum, and any other improvements you construct;
- State that you own all your improvements;
- Provide that, upon expiration of the lease terms, you may elect to remove the improvements from the land or leave them in place;
- Deem that your failure to remove improvements results in the abandonment of those improvements; and
- Grants ownership of the abandoned improvements to either Founder or the SPE without obligating payment for the abandoned improvements.

Neither lease includes specific termination provisions. Upon default, both leases limit Founder's

and the SPE's remedies to any rights and remedies provided at law or in the leases. The lease remedies include seeking injunctive or equitable relief "to require [you] to perform such actions as will cure the Event of Default or to refrain from engaging in such actions as gave rise to the Event of Default." No term specifically provides for the leases' termination. Presumably, termination occurs in only two instances: (1) by the parties' mutual consent; and (2) by the lapse of the leases' 99-year terms. Additionally, the SPE may terminate Lease 1 by giving you the land for no consideration.

You state that Founder and you will add a provision to Lease 1 allowing you to extend the lease term for an additional 25 years at your sole discretion.

Museum Operation

You state that "natural landscaped lines of demarcation" separate the Museum Sites from the Personal Site (i.e. your "lot lines border a meadow, a road and natural planting lines so that the areas are readily distinguishable via defined natural borders"). You intend to add markers to areas where no clear line of demarcation exists and to train both Founder's and your staff in these boundaries.

Separate gated entrances will service the Personal Site and the Museum Sites. You will maintain the roads located exclusively on the Museum Sites. Founder will maintain the roads located exclusively on the Personal Site. Founder grants you an easement to use the roads on the Personal Site for no charge and permits you to use these roads as needed to access the Museum. The general public uses the roads during the museum's hours of operation from 10am to 5pm. You state that Founder and Founder's employees will use roads on the Museum Sites only to the same extent as the general public.

Existing walkways and cart paths cross over the Museum Sites and Foundation-owned property. Currently, the public may access these walkways and cart paths during museum operating hours from 10am to 5pm. You state that Founder and Founder's employees will use these walkways and paths only to the same extent as the general public.

You intend to house equipment used for groundskeeping and maintenance in an equipment shed on Founder's land. Founder owns and permits you to use all new and existing equipment for no charge. You may purchase certain limited pieces of equipment for your exclusive use on Museum Sites and store such equipment in Founder's shed at no charge. No formal agreement exists detailing the terms of the shed's usage.

You intend to hire most of your own employees. However, you intend to use the services of certain Founder employees and to reimburse Founder for the use of these employees' services. No formal reimbursement arrangement exists between you and Founder. You state that any compensation you pay to Founder employees will be reasonable compensation for services provided as determined based on appropriate comparability data.

Specifically, Founder employs two individuals who provide "art coordination" services. You state that these employees will spend the bulk of their time providing services to you. You will allocate actual costs between you and Founder based on time records kept by these employees. You state that the reason why Founder employs these employees and you do not

is to comply with the § 4941 "personal services" exception, which provides that no act of self-dealing occurs if a private foundation reimburses a disqualified person for the performance of certain personal services.

RULINGS REQUESTED

1. Your payment of third-party expenses relating to the construction of new museum facilities and related landscaping and horticultural improvements on the Museum Sites leased to you for 99-years at no charge will not constitute an act of self-dealing under § 4941(d) and such improvements will result in an "incidental and tenuous benefit" to Founder.

2. Your payment of an allocable amount of expenses to third-party utility companies will not constitute an act of self-dealing under § 4941(d).

3. Your use of and access to groundskeeping equipment owned by Founder at no charge will not constitute self-dealing under § 4941(d).

4. The use by Founder and/or Founder's employees of paths and roads that cross the Museum Sites and Foundation-owned property and that are used by the general public will not constitute an act of self-dealing under § 4941(d).

5. Payment or reimbursement to Founder of an allocable amount of employee expenses for art coordination services will constitute payments for "personal services" and will not constitute self-dealing under § 4941(d).

6. The Museum Sites and any other improvements used to expand museum operations in carrying out your exempt purposes are excludable from your assets used in computing your "minimum investment return" under § 4942(e)(1)(A).

7. Expenditures you incur to build the new museum facilities on the Museum Sites in order to accomplish exempt purposes shall not be jeopardizing investments under § 4944.

LAW

I.R.C. § 4941(a) imposes a tax on each act of self-dealing between a disqualified person and a private foundation.

I.R.C. § 4941(d)(1) defines "self-dealing" as any direct or indirect—

(A) sale or exchange, or leasing, of property between a private foundation and a disqualified person;
(B) lending of money or other extension of credit between a private foundation and a disqualified person;
(C) furnishing of goods, services, or facilities between a private foundation and a disqualified person;
(D) payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person;

(E) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation; and
(F) agreement by a private foundation to make any payment of money or other property to a government official (as defined in § 4946(c)), other than an agreement to employ such individual for any period after the termination of his government service if such individual is terminating his government service within a 90-day period.

I.R.C. § 4941(d)(2)(C) provides that the furnishing of goods, services, or facilities by a disqualified person to a private foundation shall not be an act of self-dealing if the furnishing is without charge and if the goods, services, or facilities so furnished are used exclusively for the purposes specified in § 501(c)(3).

I.R.C. § 4941(d)(2)(D) provides that the furnishing of goods, services, or facilities by a private foundation to a disqualified person shall not be an act of self-dealing if such furnishing is made on a basis no more favorable than that on which such goods, services, or facilities are made available to the general public.

I.R.C. § 4941(d)(2)(E) provides that, except in the case of a government official (as defined in § 4946(c)), the payment of compensation (and the payment or reimbursement of expenses) by a private foundation to a disqualified person for personal services which are reasonable and necessary to carrying out the exempt purpose of the private foundation shall not be an act of self-dealing if the compensation (or payment or reimbursement) is not excessive.

I.R.C. § 4942(a) imposes a tax on the undistributed income of a private foundation for any taxable year.

I.R.C. § 4942(c) provides that the term "undistributed income" means, with respect to any private foundation for any taxable year as of any time, the amount by which the distributable amount for such taxable year exceeds the qualifying distributions made before such time out of such distributable amount.

I.R.C. § 4942(d) provides that the term "distributable amount" means, with respect to any foundation for any taxable year, an amount equal to the sum of the minimum investment return plus the amounts described in subsection (f)(2)(C), reduced by the sum of the taxes imposed on such private foundation for the taxable year under subtitle A and § 4940.

I.R.C. § 4942(e)(1)(A) provides that the aggregate fair market value of all assets of a private foundation other than those which are used (or held for use) directly in carrying out the foundation's exempt purpose are included in the calculation of the private foundation's minimum investment return.

I.R.C. § 4944(a) imposes a tax if a private foundation invests any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes.

I.R.C. § 4946(a)(1) provides that the term "disqualified person" with respect to a private foundation includes a person who is—

(A) a substantial contributor to the foundation,

(B) a foundation manager (within the meaning of subsection (b)(1)),

(C) an owner of more than 20 percent of—

(i) the total combined voting power of a corporation,
(ii) the profits interest of a partnership, or
(iii) the beneficial interest of a trust or unincorporated enterprise,

which is a substantial contributor to the foundation,

(D) a member of the family (as defined in subsection (d)) of any individual described in subparagraph (A), (B), or (C),

Treas. Reg. § 53.4941(d)-2(b)(1) provides that the leasing of property between a disqualified person and a private foundation shall constitute an act of self-dealing.

Treas. Reg. § 53.4941(d)-2(b)(2) provides that the leasing of property by a disqualified person to a private foundation shall not be an act of self-dealing if the lease is without charge. For purposes of this subparagraph, a lease shall be considered to be without charge even though the private foundation pays for janitorial services, utilities, or other maintenance costs it incurs for the use of the property, so long as the payment is not made directly or indirectly to a disqualified person.

Treas. Reg. § 53.4941(d)-2(d)(1) provides that, except as provided in § 53.4941(d)-2(d)(2) and (3) (or § 53.4941(d)-3(b)), the furnishing of goods, services, or facilities between a private foundation and a disqualified person shall constitute an act of self-dealing. This subparagraph shall apply, for example, to the furnishing of goods, services, or facilities such as office space, automobiles, auditoriums, secretarial help, meals, libraries, publications, laboratories, or parking lots.

Treas. Reg. § 53.4941(d)-2(d)(3) provides that the furnishing of goods, services, or facilities by a disqualified person to a private foundation shall not be an act of self-dealing if they are furnished without charge. Thus, for example, the furnishing of goods such as pencils, stationery, or other incidental supplies, or the furnishing of facilities such as a building, by a disqualified person to a foundation shall be allowed if such supplies or facilities are furnished without charge. For the purposes of this subparagraph, a furnishing of goods shall be considered without charge even though the private foundation pays for transportation, insurance, or maintenance costs it incurs in obtaining or using the property, so long as the payment is not made directly or indirectly to the disqualified person.

Treas. Reg. § 53.4941(d)-2(e) provides that the payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person shall constitute an act of self-dealing.

Treas. Reg. § 53.4941(d)-2(f)(2) 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.

Treas. Reg. § 53.4941(d)-3(b)(1) provides that the furnishing of goods, services, or facilities by a private foundation to a disqualified person shall not be an act of self-dealing if such goods, services, or facilities are made available to the general public on at least as favorable a basis as they are made available to the disqualified person, but only if such goods, services, or facilities are functionally related, within the meaning of § 4942(j)(5) (now § 4942(j)(4)(B)), to the exercise or performance by a private foundation of its charitable, educational, or other purpose or function constituting the basis for its exemption.

Treas. Reg. § 53.4941(d)-3(b)(2) provides that the term "general public" shall include those persons who, because of the particular nature of the activities of the private foundation, would be reasonably expected to utilize such goods, services, or facilities. This paragraph shall not apply, however, unless there is a substantial number of persons other than disqualified persons who are actually utilizing such goods, services, or facilities. Thus, a private foundation which furnishes recreational or park facilities to the general public may furnish such facilities to a disqualified person provided they are furnished to him on a basis which is not more favorable than that on which they are furnished to the general public.

Treas. Reg. § 53.4941(d)-3(c)(1) provides that the payment of compensation (and the payment or reimbursement of expenses, including reasonable advances for expenses anticipated in the immediate future) by a private foundation to a disqualified person for the performance of personal services which are reasonable and necessary to carry out the exempt purpose of the private foundation shall not be an act of self-dealing if such compensation (or payment or reimbursement) is not excessive. Examples 1, 2, and 3 provide that the term "personal services" includes legal, investment management, and general banking services.

Treas. Reg. § 53.4942(a)-2(c)(3)(i) provides that an asset is "used (or held for use) directly in carrying out the foundation's exempt purpose" only if the asset is actually used by the foundation in the carrying out of the charitable, educational, or other similar purpose which gives rise to the exempt status of the foundation.

Treas. Reg. § 53.4942(a)-2(c)(3)(ii)(b) provides that assets used (or held for use) directly in carrying out the foundation's exempt purpose include real estate or the portion of a building used by the foundation directly in its charitable, educational, or other similar exempt activities.

Treas. Reg. § 53.4944-1(a)(2)(i) provides that, except as provided in §§ 4944(c), § 53.4944-3, § 53.4944-6(a), and subdivision (ii) of this subparagraph, an investment shall be considered to jeopardize the carrying out of the exempt purposes of a private foundation if it is determined that the foundation managers, in making such investment, have failed to exercise ordinary business care and prudence, under the facts and circumstances prevailing at the time of making the investment, in providing for the long- and short-term financial needs of the foundation to carry out its exempt purposes. In the exercise of the requisite standard of care and prudence the foundation managers may take into account the expected return (including both income and appreciation of capital), the risks of rising and falling price levels, and the need for diversification within the investment portfolio (for example, with respect to type of security, type of industry, maturity of company, degree of risk and potential for return). The determination whether the investment of a particular amount jeopardizes the carrying out of the exempt purposes of a foundation shall be made on an investment by investment basis, in each case taking into

account the foundation's portfolio as a whole. No category of investments shall be treated as a per se violation of § 4944. However, the following are examples of types or methods of investment which will be closely scrutinized to determine whether the foundation managers have met the requisite standard of care and prudence: Trading in securities on margin, trading in commodity futures, investments in working interests in oil and gas wells, the purchase of "puts," "calls," and "straddles," the purchase of warrants, and selling short. The determination whether the investment of any amount jeopardizes the carrying out of a foundation's exempt purposes is to be made as of the time that the foundation makes the investment and not subsequently on the basis of hindsight. Therefore, once it has been ascertained that an investment does not jeopardize the carrying out of a foundation's exempt purposes, the investment shall never be considered to jeopardize the carrying out of such purposes, even though, as a result of such investment, the foundation subsequently realizes a loss. The provisions of § 4944 and the regulations thereunder shall not exempt or relieve any person from compliance with any Federal or State law imposing any obligation, duty, responsibility, or other standard of conduct with respect to the operation or administration of an organization or trust to which § 4944 applies. Nor shall any State law exempt or relieve any person from any obligation, duty, responsibility, or other standard of conduct provided in § 4944 and the regulations thereunder.

Rev. Rul. 76-459, 1976-2 C.B. 369, provides that the use of a private foundation museum's private road for access to the adjacent headquarters and manufacturing plant of a corporation (a disqualified person) during the same hours the road is used by the general public as a thoroughfare connecting two public streets is not an act of self-dealing. The road is made available to the disqualified person on a basis that is no more favorable than the basis on which it is made available to the general public. In addition, a substantial number of persons other than the disqualified person actually use the road. Further, the use of the road as an entrance to the foundation's museum is functionally related to the foundation's exempt purpose of operating a museum for the benefit of the general public. Accordingly, the use of the private foundation's private road by the disqualified person does not constitute an act of self-dealing within the meaning of § 4941(d)(1)(C).

In Madden v. Commissioner, 74 T.C.M. (CCH) 440 (1997), the Tax Court ruled that maintenance, janitorial, and security services provided by GMC, a disqualified person, to the Museum of Outdoor Arts (Museum), a private foundation, were not "personal services" for purposes of the exception to self-dealing. The Museum was an "outdoor" museum or a "museum without walls" that displayed sculptures and other outdoor art forms. The IRS argued that the services GMC provided were different from the legal, investment management, and general banking services described in the regulations. Petitioner, a disqualified person and 75 percent owner of GMC, argued that personal services were any activity that did not include the sale of goods and that "assist[ed] the private foundation in carrying on its legitimate business." The court rejected respondent's broad interpretation because it nullified § 4941(d)(1)(C)'s prohibition against the "furnishing of goods, services, or facilities" for a charge. According to the court, "personal services" are services that are "essentially professional and managerial in nature" such as legal services, investment management services, and general banking services. Furthermore, the court determined that "any exceptions to the self-dealing transactions rules should be construed narrowly." Therefore, the court found that the services GMC provided did not meet the definition of "personal services."

ANALYSIS

1. Payment of Third Party Expenses Relating to the Construction of New Museum Facilities and Related Landscaping and Horticultural Improvements on the Museum Sites

Your payment of third party expenses relating to the construction of the new museum facility and related landscaping and horticultural improvements on the Museum Sites leased to you for a 100-plus year term at no charge will not constitute an act of self-dealing under § 4941(d). As a threshold matter, both Founder and the SPE are disqualified persons. Section 4946(a)(1)(A) defines "disqualified person" as a substantial contributor to the foundation. Section 4946(a)(1)(E) further defines "disqualified person" as a corporation of which a person described in § 4946(a)(1)(A) owns more than a 35 percent interest. Here, you acknowledge that Founder is a disqualified person because he is your sole substantial contributor. Furthermore, Founder is the sole owner of the SPE, which makes it a disqualified person.

Section 4941(d)(1)(A) provides that the term "self-dealing" generally includes "any direct or indirect sale or exchange, or leasing, of property between a private foundation and a disqualified person." See also Treas. Reg. § 53.4941(d)-2(b)(1). You intend to construct, and pay the third party expenses related to the construction of, a new museum facility and make related landscaping and horticultural improvements on lands leased from Founder and the SPE. Under both Lease 1 and Lease 2, you own all improvements made to the land (leasehold improvements). However, upon expiration of the leases, any leasehold improvements not removed from the properties revert to Founder and the SPE, respectively. Accordingly, under the general rule, both the leases and the reversion of any leasehold improvements may constitute acts of self-dealing.

The first issue is whether the leases between you and Founder and between you and the SPE are acts of self-dealing under § 4941(d). Under the general rule, any lease of property between you and either the Founder or the SPE would be an act of self-dealing. However, Treas. Reg. § 53.4941(d)-2(b)(2) provides that no self-dealing occurs if the lease is without charge. Here, the leases are without charge. Therefore, the leases will not result in acts of self-dealing.

The second issue is whether the transfer of your leasehold improvements (e.g., the new museum facility) upon the termination of the leases will result in an act of self-dealing. Generally, improvements made to land leased to a private foundation by a disqualified person during the duration of the lease will not constitute an act of self-dealing. However, § 4941(d)(1)(E) provides that the transfer of a private foundation's assets, such as leasehold improvements, to a disqualified person generally is an act of self-dealing. Under the proposed leases, you will transfer leasehold improvements to the Founder or his SPE upon the termination of the leases. Nonetheless, a transfer of leasehold improvements is not an act of self-dealing where the improvements are not made during the period of the lease between the private foundation and a disqualified person or where the useful life of the improvements expires prior to the termination of the lease. In your case, the Museum existed prior to Lease 2. Therefore, the only leasehold improvement at issue is the new museum facility.

The transfer of title to the new museum facility upon termination of the lease of the underlying

land will not result in an act of self-dealing. You represent that the useful engineering life of the new museum facility exceeds Lease 1's cumulative term. You received independent expert input from architectural and structural engineering firms working on the plans for the new museum facility and related improvements. Based on this input, you expect the engineering useful life of the new museum facility to be 100 years. Lease 1's initial term is 99-years. Because the useful life of the new museum facility exceeds the initial lease term, you state that Founder and the owner of the land leased under Lease 1 have agreed to add an option to extend the lease for an additional 25-year at your sole discretion. Therefore, Lease 1's cumulative term will exceed 100 years and the new museum facility's expected useful engineering life.

In addition, Lease 1 is not easily terminable. The landlord, the SPE, does not possess the unilateral ability to terminate Lease 1. Furthermore, the SPE's only remedies for default are those remedies provided by Lease 1 or by law. The remedies provided by Lease 1 are the right to self-help or the right to injunctive or equitable relief. The right to self-help provides the SPE with an opportunity to cure a default, not to terminate the lease. The right to injunctive or equitable relief requires the initiation of a legal action. Assuming the SPE can request termination of the lease when seeking injunctive or equitable relief, the court, and not the SPE, ultimately possesses the ability to terminate the lease. Therefore, the SPE cannot trigger the transfer of title to the new museum facility (or any other improvement) by terminating Lease 1 prior to the end of its cumulative term. Accordingly, the transfer by you of title to the new museum facility upon termination of the lease will not result in an act of self-dealing under § 4941(d).

2. Payment of an Allocable Portion of Expenses to Third-Party Utility Companies

Your payment of allocable portion of expenses to third-party utility companies will not result in an act of self-dealing under § 4941(d). As previously determined, the leases between you and Founder are not acts of self-dealing under § 4941(d) because the leases are without charge. Furthermore, Treas. Reg. § 53.4941(d)-2(b)(2) provides that a lease is considered to be without charge even though the private foundation pays for janitorial services, utilities, or other maintenance costs it incurs for the use of the property, so long as the payment is not made directly or indirectly to a disqualified person. Therefore, your leases are without charge even though you pay allocable portions of utilities and related expenses to third-party utility companies. Accordingly, your leases will not result in acts of self-dealing under § 4941(d).

3. Use of and Access to Groundskeeping Equipment Owned by Founder

Your use of Founder's groundskeeping equipment and shed for no charge will not result in an act of self-dealing under § 4941(d). Section 4941(d)(1)(C) provides that the term "self-dealing" generally includes "any direct or indirect furnishing of goods, services, or facilities between a private foundation and a disqualified person." See also Treas. Reg. § 53.4941(d)-2(d)(1). However, § 4941(d)(2)(C) provides that no act of self-dealing occurs if a disqualified person furnishes the goods, services, or facilities to a private foundation without charge and if the goods, services, or facilities so furnished are used exclusively for purposes specified in § 501(c)(3). See also Treas. Reg. § 53.4941(d)-2(d)(3). In your case, Founder intends to furnish you with goods and facilities by allowing you to use Founder's groundskeeping equipment and to access the equipment shed on Founder's property. However, Founder will provide these

goods and facilities without charge. Furthermore, you intend to use the groundskeeping equipment and access to the shed to maintain your landscape, which is part of the Museum's operations. Therefore, Founder's provision of these goods and facilities will not result in an act of self-dealing within the meaning of § 4941(d).

4. Use by Founder and/or Founder's Employees of Paths and Roads that Cross the Museum Sites and Foundation-Owned Property and that are Used by the General Public

The use of your paths and roads by Founder and Founder's employees will not result in an act of self-dealing under § 4941(d). Section 4941(d)(1)(C) provides that the term "self-dealing" generally includes "any direct or indirect furnishing of goods, services, or facilities between a private foundation and a disqualified person." See also Treas. Reg. § 53.4941(d)-2(d)(1). However, under the general public exception described in § 4941(d)(2)(D), a private foundation's furnishing of goods, services, or facilities to a disqualified person is not an act of self-dealing if such goods, services, or facilities are (1) made available to the general public on at least as favorable a basis as they are made available to the disqualified person and (2) functionally related to the exercise or performance by the private foundation of one or more of its exempt purposes. See also Treas. Reg. § 53.4941(d)-3(b)(1). Treas. Reg. § 53.4941(d)-3(b)(2) provides that the term "general public" includes those persons who, because of the particular nature of the activities of the private foundation, would be reasonably expected to use such goods, services, or facilities. A substantial number of persons other than the disqualified persons must actually use such goods, services, or facilities. A private foundation which furnishes recreational or park facilities to the general public may furnish such facilities to a disqualified person provided they are furnished to him on a basis which is not more favorable than that on which they are furnished to the general public. Additionally, Rev. Rul. 76-459, 1976-2 C.B. 369, determined that a disqualified person's use of a private foundation's private road will not constitute an act of self-dealing if the disqualified person only uses the road during the same hours as, and on the same terms as, the road is used by the general public.

Your paths and roadways are functionally related to one or more of your exempt activities because they allow the public to experience the art, architecture and landscape that are the overall aesthetic of the Museum. In Year, x visitors, a substantial number, actually used your existing paths and roadways. Upon completion, you anticipate y visitors, also a substantial number, to use your paths and roadways. You state that Founder and Founder's employees will use your paths and roads only to the same extent as the general public uses such paths and roads (i.e., during your hours of operation). Therefore, Founder's and Founder's employees' use of your roads and pathways will be on a basis not more favorable than provided to the general public and will not result in an act of self-dealing under § 4941(d).

5. Payment or Reimbursement to Founder of an Allocable Portion of Employee Expenses for Art Coordination Services

Reimbursing Founder for your allocable share of the expenses related to the art coordination employees' services will not result in an act of self-dealing under § 4941(d). Whether self-dealing will result from your reimbursing Founder for your allocable share of certain services provided by Founder's employees depends on the type of service provided. Section 4941(d)(1)(D) provides that the term "self-dealing" generally includes "the payment of

compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person." See also Treas. Reg. § 53.4941(d)-2(e). However, § 4941(d)(2)(E) provides that, except in the case of a government official, the payment of compensation (and the payment or reimbursement of expenses) by a private foundation to a disqualified person for personal services which are reasonable and necessary to carrying out the exempt purpose of the private foundation shall not be an act of self-dealing if the compensation (or payment or reimbursement) is not excessive. See also Treas. Reg. § 53.4941(d)-3(c)(1). In Madden v. Commissioner, the Tax Court stated that "any exceptions to the self-dealing transactions rules should be construed narrowly." T.C. Memo. 1997-395, 74 T.C.M. (CCH) 440 (1997). Therefore, the court concluded that the "personal services" that Treas. Reg. § 53.4941(d)-3(c)(1) excepts from self-dealing are services that are "essentially professional and managerial in nature," such as legal, investment management, and general banking services.

The art coordination services provided by Founder's employees are personal services described in Treas. Reg. § 53.4941(d)-3(c)(1). First, the art coordination services are akin to the professional and managerial services described in Treas. Reg. § 53.4941(d)-3(c)(1). Next, the art coordination services these employees provide are reasonable and necessary to the Museum's operation, one of your exempt purposes. Finally, reimbursement of these employee costs is based on employee time records and is represented not to be excessive. Therefore, reimbursing Founder for your allocable portion of the costs for the art coordination employees' services will not result in an act of self-dealing under § 4941(d).

6. The Museum Sites and Any Other Improvements Used to Expand Museum Operations as Charitable Use Assets

The new museum facility, which will be considered an asset used (or held for use) directly in carrying out your exempt purposes, will be excluded from the calculation of your minimum investment return under § 4942(e). Section 4942 imposes a tax on a private foundation's undistributed income, which is the excess of a private foundation's distributable amount for a taxable year over the amount of qualifying distributions the private foundation made for that taxable year. Section 4942(d) provides that a private foundation's distributable amount is the sum of its minimum investment return plus the amounts (if any) listed in § 4942(f)(2)(C) (relating to repayments of prior years' qualifying distributions, proceeds from dispositions of certain property, and certain unused set-asides), reduced by any income taxes imposed. In general, § 4942(e)(1)(A) provides that a private foundation's minimum investment return is calculated by reference to the aggregate fair market value of all the foundation's assets. However, § 4942(e)(1)(A) excludes assets used (or held for use) directly in carrying out the foundation's exempt purpose from the computation of the foundation's minimum investment return.

Treas. Reg. § 53.4942(a)-2(c)(3)(i) provides that an asset generally is used (or held for use) directly in carrying out the foundation's exempt purpose only if the asset is actually used by the foundation in the carrying out of the charitable, educational, or other similar purpose which gives rise to the exempt status of the foundation. Treas. Reg. § 53.4942(a)-2(c)(3)(ii)(b) provides that assets used (or held for use) directly in carrying out a foundation's exempt purpose include real estate or the portion of a building used by a foundation directly in its charitable, educational, or other similar exempt activities. Here, the new museum facility will be real estate, all of which you intend to actually use in carrying out your exempt purposes. Accordingly, the new museum facility will be an asset used (or held for use) directly in carrying out one or more of your exempt

purposes. Therefore, the new museum facility will be excluded from your assets in calculating your minimum investment return under § 4942(e)(1) .

7. Expenditures Incurred to Build the New Museum Facilities on the Museum Sites in Order to Accomplish Exempt Purposes as Jeopardizing Investments

Building the new museum facility will not result in a jeopardizing investment within the meaning of § 4944(a). Section 4944(a) imposes a tax if a private foundation invests any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes. Treas. Reg. § 53.4944-1(a)(2)(i) provides that no one category of investments is a per se jeopardizing investment. However, Treas. Reg. § 53.4944-1(a)(2)(i) provides that certain investments will be scrutinized more closely, such as trading in securities on margin, trading in commodity futures, investments in working interests in oil and gas wells, the purchase of "puts," "calls," and "straddles," the purchase of warrants, and selling short. Here, you intend to use funds donated by Founder to construct the new museum facility and to make landscaping and horticultural improvements to the Museum Sites and other Foundation-owned property. You are not making an investment in the more narrow sense contemplated by § 4944. Therefore, the expenditures you will incur to build the new museum facility are not jeopardizing investments under § 4944.

CONCLUSION

Based on the foregoing, we rule as follows:

1. Your payment of third-party expenses relating to the construction of the new museum facility and related landscaping and horticultural improvements on the Museum Sites leased to the Foundation for a 100-plus year term at no charge will not constitute an act of self-dealing under § 4941(d).

2. Your payment of an allocable portion of expenses to third-party utility companies will not result in an act of self-dealing under § 4941(d).

3. Your use of Founder's groundskeeping equipment and shed at no charge will not result in an act self-dealing under § 4941(d).

4. Founder's and Founder's employees' use of paths and roads that cross the Museum Sites and Foundation-owned property on a basis not more favorable than provided to the general public will not result in an act of self-dealing under § 4941(d).

5. Reimbursing Founder for your allocable share of the expenses related to the art coordination employees' services will not result in an act of self-dealing under § 4941(d).

6. The new museum facility will be excluded from your assets in calculating your "minimum investment return" under § 4942(e).

7. Expenditures you will incur to build the new museum facilities on the Museum Sites will not be jeopardizing investments under § 4944.

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 organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

This ruling is based on the facts as they were presented and on the understanding that there will be no material changes in these facts. This ruling does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the sections described. Because it could help resolve questions concerning your federal income tax status, this ruling should be kept in your permanent records.

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.

In accordance with the Power of Attorney currently on file with the Internal Revenue Service, we are sending a copy of this letter to your authorized representative.

Sincerely,

Theodore Lieber
Manager, Exempt Organizations
Technical Group 3

Enclosure
Notice 437