

199951040

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

Date: SEP 27 1999

Contact Person:

ID Number:

Telephone Number:

Legend:

"A" -

"B" -

\$xx,yyy -

Dear Sir or Madam:

This is in response to your request for a ruling, dated September 10, 1999, regarding approval for a set-aside under section 4942(g)(2) of the Internal Revenue Code in the amount of \$xx,yyy for the fiscal year ending September 30, 1999, to pay for the design and construction of a public garden.

Our records indicate that you are exempt from federal income tax under section 501(c)(3) of the Code and that you are a private foundation within the meaning of section 509(a) of the Code. Your fiscal year ends September 30. -

You intend to establish a public garden. This garden will be a place for relaxation, recreation, and horticultural and botanical education; a habitat for threatened and endangered species; and a haven of peace and tranquility in an increasingly stressful urban environment. The garden will be open to the public.

You initially entered into a joint venture protocol with "A" for the design and development of the garden. In May 1998, "A" advised you that it did not have adequate staffing and must withdraw from the protocol. After a lengthy process, starting

261

with a request for qualifications, whereby numerous unrelated third party entities submitted their qualifications and tentative bids on the design aspects of a public garden area you selected "B" to provide the overall design and management services. The agreement with "B" provides a timetable and a payment schedule.

The contract provides for "B" to design the public garden and to formulate a master plan for the implementation of the design, as well as the administration of the landscaping and construction of the public buildings as the project progresses, with the submission of the documents for construction of the public garden due no later than September 17, 1999. Once the construction documents are submitted, contractors will be selected. You and "B" estimate that construction will be completed within approximately one year after commencement.

The actual construction of the garden will require drainage, irrigation, and landscaping, and the construction of restrooms, a pavilion shelter, and other smaller structures including an information kiosk, light poles, park benches, trash receptacles, and water fountains, an open-air theater contiguous to a natural grass slope which will provide seating. A shell pathway will encircle the garden area turf and concrete parking areas and extensive plantings.

As a result of the lengthy design and construction process, many of the billings, along with the payments by you, will occur after September 30, your year-end. The consulting contract, and the construction contract, provide for billing after certain phases of the entire project have been completed. This method provides the opportunity to view the work-in-progress while paying for only that portion that has been completed, and allows the option to solve disputes, or even to find another contractor, if the work is unsatisfactory, as well as providing incentive for the contractor to complete the work on time or early. -

In order for the payments to "B" and for a portion of the actual construction costs to be considered qualifying distributions for the purpose of preventing the imposition of the 15% excise tax under IRC 4942, you request approval to set-aside \$xx,yyy as a qualifying distribution for your fiscal year ending September 30, 1999. This set-aside will allow you to establish a set-aside in the current taxable year that will result in a qualifying distribution in the current taxable year, when the funds are set aside, rather than in the year actually paid.

Your foundation manager has stated that the amount will actually be paid for the garden by September 30, 2004,

262

which is within a specified period of time that ends not more than 60 months after the date of the first set-aside.

Section 4942 of the Code imposes on the undistributed income of a private foundation for any taxable year, which has not been distributed before the first day of the second (or any succeeding) taxable year following such taxable year, a tax equal to 15 percent of the amount of such income remaining undistributed at the beginning of such (second or succeeding) taxable year.

Section 4942(g)(1) of the Code defines "qualifying distribution" as any amount paid to accomplish one or more purposes described in section 170(c)(2)(B), other than any contribution to (i) an organization controlled by the foundation or one or more disqualified persons, or (ii) a private foundation which is not an operating foundation, except as provided in paragraph (3), or any amount paid to acquire an asset used directly in carrying out and or more purposes described in section 170(c)(2)(B).

Section 4942(g)(2)(A) of the Code provides that for all taxable years beginning on or after January 1, 1975, an amount set-aside for a specific project which comes within one or more purposes described in section 170(c)(2)(B) may be treated as a qualifying distribution if it meets the requirements of subparagraph (B).

Section 4942(g)(2)(B)(i) of the Code provides that an amount set-aside for a specific project shall meet the requirements of this subparagraph if, at the time of the set-aside, the foundation establishes to the satisfaction of the Secretary that the amount will be paid for the specific project within 5 years and, at the time of the set-aside, the private foundation establishes to the satisfaction of the secretary that the project is one which can be better accomplished by such set-aside than by immediate payment of funds or the project will not be completed before the end of the taxable year of the foundation in which the set-aside is made.

Section 53.4942(a)-3(b)(1) of the Foundation and Similar Excise Taxes Regulations provide that the amount set-aside for a special project that is for one or more of the purposes described in section 170(c)(1) or (2)(B) may be treated as a qualifying distribution in the year in which set-aside if the requirements of section 4942(g)(2) and this paragraph (b) are satisfied. The requirements of paragraph (b) are satisfied if it is established that the amount set-aside will be paid for the specific project within 60 months after it is set-aside, and (i) the set-aside

199951040

satisfies the suitability test, or (ii) the private foundation satisfies the cash distribution test described in subparagraph 3 of this paragraph.

Section 53.4942(a)-3(b)(2) of the regulations provide that the "suitability test" prescribed by the Code is satisfied where the specific project is one in which relative long-term grants or expenditures must be made in order to assure the continuity of particular charitable projects or program-related investments, or where grants are made as part of a matching-grant program. Such projects include, for example, a plan to erect a building to house the direct charitable, educational, or other similar exempt activity of the foundation (such as a museum building in which paintings are to be hung), even though the exact location and architectural plans have not been finalized; a plan to purchase an additional group of paintings offered for sale only as a unit that requires an expenditure of more than one year's income; or a plan to fund a specific research program that is of such magnitude as to require an accumulation of funds before beginning the research, even though not all of the details of the program have been finalized. For good cause shown, the period for paying the amount set-aside may be extended by the Service.

Based on the information presented, we rule that your proposed set-aside of \$xx,yyy in your fiscal year ending September 30, 1999, meets the requirements of section 4942(g)(2) of the Code and section 53.4942(a)-(3)(b)(2) of the regulations.

Our approval of your set-aside is based upon our understanding that the set-aside will in fact be pledged for the specific project indicated and in the amount indicated, and that the pledged funds will be expended within the 60 month period.

Under section 53.4942(a)-3(b)(8) of the regulations, your proposed set-aside must be evidenced by the entry of a dollar amount on your books and records as a pledge or obligation to be paid at a future date or dates. Any amount which is set-aside shall be taken into account for purposes of determining your minimum investment return under section 53-4942(a)-2(c)(1) of the Regulations and any income attributable to such set-aside must be taken into account in computing adjusted net income under section 53.4942(a)-2(d).

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

264

199951040

Because this letter could help resolve questions you should keep this copy in your permanent records.

Sincerely yours,

Gerald V. Sack

Gerald V. Sack
Chief, Exempt Organizations
Rulings Branch 4

265