200048048

No Third Party Contact
4942.03-07

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

Date: SEP 5 2000

Contact Person:

ID Number:

Telephone Number:

T:EO: B4

Legend:

"A" -
"B" -
"C" -
"D" -

$xx,yyy - $
$xxx,YYY - $

Dear Sir or Madam:

This is in response to your request for a ruling, dated , 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, 2000, to pay for the design and construction of a public garden and park.

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 were granted a request for set-aside, dated September 27, 1999, during the initial design phase for the garden and park.

You are in the process of establishing a public garden and park. This garden and park 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.

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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 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 construction of the garden will require drainage, irrigation, 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. The plans provide for a shell rock pathway to encircle the garden area, turf and concrete parking areas, and extensive plantings. There will also be a formal garden, fern grotto/garden area, entry plaza area, and outdoor performance area.

The geotechnical investigations for the entry road design were completed on November 3, 1999. The preliminary drainage and grading plans for the entry road and parking area were reviewed in early December 1999. You hired "C" to provide tests of the soil under the anticipated sites for the entrance road and buildings. Final construction documents for the entry road and parking area were completed in early March 2000.

Various governmental approvals are required for this project. For example, a permit application was made to "D" on March 3, 2000. As a result of unanticipated delays in obtaining the necessary permits, construction has been delayed. In addition, initial plans called for a prefabricated pavilion. However, after review the Foundation managers determined that the prefabricated pavilion was neither attractive nor aesthetically consistent with the garden and park. The design documents for the pavilion are expected to be completed by the end of September 2000.

Requests for bids have been solicited for mobilization, site work, hardscape, irrigation, and landscaping. Two bids have been submitted and are being reviewed.

"B" currently estimates that the entire public garden and park project will cost "xxx,YYY" to complete, which is an amount in excess of the aggregate of the set-aside approved last year and the requested "xx,YYY" set-aside.

The contribution and land have been received, governmental approvals are in place, and plans are under way for completion of the project. Once the plans are finalized and the contractors selected, it is anticipated that the landscaping and amphitheater can be completed within a year of the beginning of construction. As a result of the lengthy design and permitting process, many of the billings, along with your payments will occur after September 30, 2000, your current year-end. In the following year, it is contemplated that the pavilion, restrooms, pathways, and other features will be completed.

In order for these payments 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, 2000. 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 and park by September 30, 2005, which is within a specified period of time that ends not more than 60 months after the date of this 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 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 current fiscal year meets the requirements of section 4942(g)(2) of the Code and section 53.4942(a)-(3)(b)(2) of the regulations.

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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.

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
Technical Group4