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Person to Contact:

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Date:

August 4, 2003

LEGEND

Agency =

Mortgagor =

State =

Bonds =

City =

Date 1 =

Date 2 =

z =

Dear

This is in response to your ruling request under § 142(d) of the Internal Revenue Code of 1986 (the "1986 Code") that certain types of leases (described below) of certain units in a residential rental project (the "Project") financed with the Bonds will not cause the Project to be treated as: (1) used on a transient basis under § 1.103-8(b)(4) of the Income Tax Regulations, or (2) unavailable to members of the general public under § 1.103-8(a)(2) for purposes of § 142(d).

FACTS AND REPRESENTATIONS

The Agency is a corporate governmental agency constituting a public benefit corporation of the State established pursuant to State law. The Agency is empowered to issue obligations on behalf of the State within the meaning of § 1.103-1(b). The Mortgagor is a State limited liability company formed solely to develop, own and operate the Project.

On Date 1 and Date 2, the Agency issued the Bonds as part of a single issue in the amount of \$z and loaned the proceeds to Mortgagor to finance a portion of the costs of the acquisition, construction, and equipping of the Project. The Mortgagor elected to apply the 20-50 test of § 142(d)(1)(A) and the deep rent skewing provisions of § 142(d)(4) to the Project. As such, at least 20 percent of the residential units are required to be occupied by individuals whose gross income will not exceed 50 percent of the area median gross income, as defined in § 142(d)(2)(B) (the “Low Income Units”). Moreover, at least 15 percent of the Low Income Units are required to be occupied by individuals whose gross income will not exceed 40 percent of the area median gross income. The remainder of the residential units are expected to be rented without regard to the income of the occupants (the “Market Rate Units”).

Each residential unit in the Project will contain complete living facilities, including a fully equipped kitchen, one or more bathrooms, and living and sleeping facilities. The Mortgagor will rent the residential units unfurnished. In addition to residential units, the Project will contain, when completed, the following facilities for use by the occupants of the Project: a fitness center, a tenant lounge, and laundry facilities. The Mortgagor will not provide or cause to be provided any maid or food services. The Mortgagor will not provide or cause to be provided any healthcare or similar services.

The Project will not hold itself out as a hotel and will not offer any common hotel services such as bell service, operator-assisted telephone service, or the ability to enter the Project and contemporaneously obtain accommodations. Neither the Project nor the residential units contained therein are subject to any federal, state, or local hotel tax. The Project has not been designated as a hotel in its certificate of occupancy or under any State or local law.

During the qualified project period (as defined in § 142(d)(2)(A)), the Mortgagor proposes to lease residential units in the Project to one or more business entities unrelated to the Mortgagor (the “Corporate Tenants”) for use as private dwelling units by individuals and families associated with a Corporate Tenant (the “Occupants”). The lease for each residential unit rented by Mortgagor to a Corporate Tenant will be separate from and not contingent upon any of the other leases entered into between the Mortgagor and that Corporate Tenant or any other tenant. Also, Corporate Tenants are expected to furnish the residential units that they provide for use by the Occupants. The Mortgagor will have no interest in and will not be a party to the financial arrangements between a Corporate Tenant and the Occupants associated with that Corporate Tenant.

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Mortgagor also proposes to lease residential units in the Project to one or more business entities (the "Conduit Tenants") which are in the business of leasing residences to the general public. The Conduit Tenants will sublease the leased residential units directly to the general public, including Corporate Tenants (the "Subleasing Occupants"). The Subleasing Occupants of these residential units will be neither related to nor associated with the Conduit Tenant or the Mortgagor. The lease for each residential unit rented by Mortgagor to the Conduit Tenant will be separate from and not contingent upon any of the other leases entered into between the Mortgagor and that Conduit Tenant or any other tenant. Conduit Tenants are expected to provide periodic linen and cleaning services to the Subleasing Occupants. Also, Conduit Tenants are expected to furnish the residential units that they lease to Subleasing Occupants. The Mortgagor will have no interest in and will not be a party to the financial arrangements between a Conduit Tenant and its Subleasing Occupants.

Except as described herein, the terms and conditions of each lease offered to a Corporate Tenant or a Conduit Tenant will be substantially the same as those of leases executed by natural persons for a comparable residential unit in that: (1) The lease term will be for a one-year or two-year period; (2) The parties to the lease have termination rights provided and permitted by applicable law in the event of default under the lease; and (3) The lease is not assignable and a residential unit may not be sublet except to Occupants or Subleasing Occupants as described below, or as required by law to be permitted. Each lease to a Corporate Tenant or Conduit Tenant will contain the following provisions: (1) Each Occupant or Subleasing Occupant must occupy the leased residential unit for a period of at least 30 days; (2) The residential unit may not be used as a hotel or for transient use; and (3) The Corporate Tenant or Conduit Tenant is required to provide to the Mortgagor the identity of each Occupant and Subleasing Occupant and the expected term of the occupancy prior to any such Occupant or Subleasing Occupant taking up residence in a residential unit.

Each Corporate Tenant will be specifically permitted to enter into occupancy agreements with Occupants, including subleases, pursuant to which Occupants may be required to reimburse the Corporate Tenants for any part of the rent paid by the Corporate Tenant for the residential unit and for use of furniture. Each Conduit Tenant will be specifically permitted to sublet its residential units to Subleasing Occupants at rents higher than the rent charged by the Mortgagor to the Conduit Tenant. Except as described herein, the terms and conditions of each sublease between a Conduit Tenant and a Subleasing Occupant will be substantially the same as those of leases entered into between the Mortgagor and natural persons for a comparable residential unit. None of the residential units leased to Corporate Tenants will qualify as a Low Income Unit. A residential unit leased to a Conduit Tenant may qualify as a Low Income Unit to the extent that the income of the Subleasing Occupant (other than a Corporate Tenant) is below the applicable income limit under § 142(d). No single Corporate Tenant (directly or indirectly through a Conduit Tenant) will lease more than 5 percent of the total number of residential units in the Project at any time. In all cases, no more than 10 percent of the total number of residential units in the Project will, in the aggregate,

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be leased at any time to Corporate Tenants (directly or indirectly through a Conduit Tenant).

LAW AND ANALYSIS

Section 103(a) provides that, except as provided in § 103(b), gross income does not include interest on any state or local bond. Section 103(b)(1) provides that § 103(a) shall not apply to any private activity bond unless it is a qualified bond. Section 141(e) states that an exempt facility bond is a qualified bond.

Section 142(a)(7) provides that the term “exempt facility bond” includes any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide qualified residential rental projects. Section 142(d) defines the term “qualified residential rental project” to mean any project for residential rental property if, at all times during the qualified project period, the project meets one of the income requirements (as elected by the issuer) specified in § 142(d)(1)(A) or (B).

Comprehensive regulations have not been promulgated under § 142. Nevertheless, regulations promulgated under the corresponding provisions of the Internal Revenue Code of 1954 (the “1954 Code”) continue to apply, except as otherwise modified by § 1301 of the Tax Reform Act of 1986, 1986-3 (Vol. 1) C.B. 1, 519 (the “1986 Act”), and subsequent law.¹

Section 1.103-8(a)(2), promulgated under the 1954 Code, provides that to qualify as an exempt facility under § 103(b)(4) of the 1954 Code, the predecessor to § 142 of the 1986 Code, a facility must serve or be available on a regular basis for general public use, or be a part of a facility so used, as contrasted with similar types of facilities which are constructed for the exclusive use of a limited number of nonexempt persons in their trade or businesses. For example, a private dock or wharf owned by or leased to, and serving only a single manufacturing plant would not qualify as a facility for general public use, but a hangar or repair facility at a municipal airport, or a dock or a wharf, would qualify even if it is owned by, or leased or permanently assigned to, a nonexempt person provided that such nonexempt person directly serves the general public, such as a common passenger carrier or freight carrier. Similarly, an airport owned or operated by a nonexempt person for general public use is a facility for public use, as is a dock or wharf which is a part of a public port. However, a landing strip which, by reason of a formal or informal agreement or by reason of geographic location, will not be available for general public use does not satisfy the public use requirement.²

¹ The 1986 Act reorganized §§ 103 and 103A of the 1954 Code into §§ 103 and 141 through 150 of the 1986 Code. Congress intended that, to the extent not amended by the 1986 Act, all principles of pre-1986 Act law would continue to apply to the reorganized provisions. H.R. Conf. Rep. 99-841, at II-686 (1986), 1986-3 (Vol. 4) C.B. 686.

² The public use requirement continues to apply to facilities constructed using the proceeds of exempt facility bonds. See H.R. Rep. 99-426, at 527 (1985), 1986-3 (Vol. 2) C.B. 527.

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Section 1.103-8(b)(4)(i) provides generally that a residential rental project is a building or structure, together with any functionally related and subordinate facilities, containing one or more similarly constructed units –

(a) Which are used on other than a transient basis, and

(b) Which satisfy the requirements of § 1.103-8(b)(5)(i) and are available to members of the general public in accordance with the requirement of § 1.103-8(a)(2).

Section 1.103-8(b)(4)(i) further provides that substantially all of each project must contain such units and functionally related and subordinate facilities. Hotels, motels, dormitories, fraternity and sorority houses, rooming houses, hospitals, nursing homes, sanitariums, rest homes, and trailer parks and courts for use on a transient basis are not residential rental projects.

Section 1.103-8(b)(9) provides examples that illustrate the application of § 1.103-8(b). In Example (2), a city issues bonds to be used to finance the construction of an apartment building. The building is constructed adjacent to a factory and the factory employees are to be given preference in selecting tenants. The city loans the proceeds of the bonds to M, the tax owner of the project. The loan is secured by a promissory note from M and a mortgage on the project requiring annual payments sufficient to amortize the principal and interest on the bonds. M maintains 20 percent of the units in the project for low or moderate income individuals. The example concludes that the bonds are industrial development bonds and the facility is not an exempt facility under § 103(b)(4)(A) of the 1954 Code and § 1.103-8(b) because it is not a facility constructed for use by the general public.

We first address whether the leases to Corporate Tenants and Conduit Tenants will cause the Project to be used on a transient basis under § 1.103-8(b)(4)(i)(a). Each of the leases to Corporate Tenants and Conduit Tenants for a residential unit in the Project will be for one or two years subject to the rights of both the Mortgagor and the lessee under State law to terminate the lease. The occupancy of a leased unit by Occupants and Subleasing Occupants will be for a period of not less than 30 days, with notice given to the Mortgagor each time the Occupant or Subleasing Occupant changes. Thus, we conclude that the leases to Corporate Tenants and Conduit Tenants will not cause the residential units of the Project to be used on a transient basis for purposes of §§ 142(d) of the 1986 Code and 1.103-8(b)(4). In addition, the type of services and accommodations afforded at the Project (by Mortgagor, Corporate Tenants, or Conduit Tenants) are not inconsistent with those of a modern apartment building and, thus, the Project is not one of the types of prohibited facilities described in § 1.103-8(b)(4)(i).

Second, we address whether the leases to Corporate Tenants and Conduit Tenants will cause the Project not to be available for general public use under § 1.103-8(a)(2). Except as indicated above, units of the Project are to be leased to Corporate Tenants and Conduit Tenants on the same terms and conditions as other members of

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the public. Thus, in one respect, Corporate Tenants' and Conduit Tenants' right to lease residential units of the Project is no different than the right of any other member of the general public to lease a similar unit. However, unlike other tenants of the Project, Corporate Tenants and Conduit Tenants may rent multiple residential units in the Project. Notwithstanding, Conduit Tenants will lease their residential units to the general public on substantially the same terms and conditions as the Mortgagor. This is similar to the example in the regulations of an airport, or a dock or a wharf, being permissibly leased or permanently assigned to a nonexempt person provided that such nonexempt person directly serves the general public. While this is not the case with respect to Corporate Tenants, the number of residential units that may be leased by any Corporate Tenant, or to Corporate Tenants in the aggregate, will not place Corporate Tenants in a position to obtain preferential treatment from Mortgagor. This ensures that the Project will not be for the exclusive use of a limited number of nonexempt persons in their trades or businesses in the manner described in the regulations. Accordingly, we conclude that the leases to Corporate Tenants and Conduit Tenants as described herein will not cause the Project to be unavailable for general public use for purposes of § 1.103-8(a)(2).³

CONCLUSION

The leases to Corporate Tenants and Conduit Tenants as described herein will not cause the Project financed with the Bonds to be used on a transient basis under § 1.103-8(b)(4)(i) or to fail to be available for general public use under § 1.103-8(a)(2).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed or implied concerning whether the interest on the Bonds will be excludable from gross income under § 103(a) of the 1986 Code.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the 1986 Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

³ The Agency may impose additional restrictions on the number of residential units in the Project that may be used by Corporate Tenants or Conduit Tenants. These restrictions will not affect the conclusions in this letter.

Sincerely,

Assistant Chief Counsel
(Exempt Organizations/Employment
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By:

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