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# Memorandum

**TO:** Beth Pearce
Scott Baker
Tim Lueders-Dumont

**FROM:** Walter J. St. Onge III
Todd Cooper
Jennifer Mendonca

**DATE:** March 1, 2017 **CLIENT-MATTER NO.:** 1442866-00005

**RE:** State of Vermont Bonding Options for Clean Water Projects

You have requested our advice regarding certain bonding options outlined in the Treasurer's Clean Water Report dated January 15, 2017. In particular, you have asked us to respond to the particular potential use of bond proceeds as set forth items 1, 2 and 3 attached hereto as Exhibit A.

As a general matter, proceeds of State bonds, whether issued as tax exempt or taxable obligations, must be used for capital expenditures and not working capital (operating costs), except to the extent specifically authorized in a particular authorization[1]. Further, with certain limited exceptions, the proceeds must be used for a governmental purpose and not for the benefit of a nongovernmental entity ("private use"). If the proceeds are used for the benefit of a nongovernmental entity, however, the bonds do not automatically become taxable private activity bonds. Rather, in addition to private use, you also need to receive private payments.[2] For this reason, it is important to determine whether the bond proceeds are granted or loaned to the nongovernmental entity.

***Grants***

In many cases, State bond funds are granted to other entities, including municipalities, non-profit and possibly for-profit entities or private individuals. While grants to non-profits, for-profits or private individuals would mean the bond proceeds were being used for private use, as long as the grant is a true grant with no obligation for repayment (other than say failure to comply with the purpose of the grant), there is no private payment and such grant can be funded on a tax-exempt basis. Note that it may be necessary in some cases to confirm that a nominal grant is not, in fact, a disguised loan.

Attached to this memorandum as Exhibit C is a summary of the current grant rules that pertain to the use of tax exempt debt.

[1] In theory, the Legislature could authorize long-term bonds for working capital or operating costs, but subject to certain exceptions not relevant here, these bonds would need to be issued on a taxable basis.

[2] For a more detailed discussion of the private activity bond tests that apply to governmental bonds, see the memo attached as Exhibit B.

***Loans***

Loans of bond proceeds to municipalities and other governmental entities in the State is a permissible use of State bond proceeds. If, however, the bond proceeds are being loaned to a nongovernmental entity, the loan repayments would be considered private payments. Unless the amount of proceeds used for this purpose falls within the permissible private business use thresholds, such loan(s) could cause the bonds to become taxable private activity bonds. Accordingly, if this use of State bond proceeds is included in a capital bill, a careful analysis will be needed to determine if the bonds may be issued on a tax exempt basis.

Keeping the guidelines described above in mind, below please find our preliminary views on the ability to use tax-exempt debt for the various purposes outlined in Exhibit A. Of course, the actual facts and circumstances of particular projects will need to be examined to be certain of that conclusion, but until the specific details are known, we will apply the general principles. While there are often few absolute conclusions that can be reached when addressing these types of questions, it is likely that much of what the State would like to finance could be done on a tax exempt basis. We look forward to further discussions with you.

# ***Exhibit A***

***Item #1***

| Sources | Authorized Uses | Examples of Projects Eligible for Funding |
|---|---|---|
| State General Obligation (G.0.) Bonds | Capital projects | Developed Land/Stormwater Treatment<br>• Grants to municipalities or local and regional stormwater utilities (should be okay as tax exempt, unless costs are operating in nature)<br>• Additional contributions to Clean Water State Revolving Fund (CWSRF) (should be okay as tax exempt for loans to governmental entities; only de minimis amount permitted for private loans)<br>Agricultural<br>• Purchase of water quality-based easements (should be okay as tax exempt. See PLR 200502012 attached as Exhibit D) |
| Transportation Infrastructure Pay-Go or Bonds (TIB) | Limited by TIB Statute to: rehabilitation, reconstruction, or replacement of State and municipal bridges, culverts, roads highways. Project must have a minimum remaining useful life of 10 years. | Developed Land/Storm water Treatment<br>• Grants to municipalities for qualified highway costs related to storm water management (should be okay as tax exempt)<br>• VTrans roads and highway related stormwater management efforts (should be okay as tax exempt) |
| Clean Water Surcharge | Most flexible use of funds: Planning, design costs, restoration, training, technical assistance, operating programs, capital projects, partner support | Funds available for costs authorized by Act 64, including training, technical assistance, operating programs, private financial assistance for non-capital items, partner support, etc. that would not available from other interim sources. (most likely taxable as working capital, not capital expenditures) |

Debt Buy-Down on Farms — Farm loans are available to strengthen existing farm operations, including promoting soil and water conservation and protection. Farms could be incentivized to make investments above and beyond the Agency of Agriculture's Required Agricultural Practices (RAPs) through the creation of a program that provides capital to buy down the interest payments on loans. The program could be housed at the Vermont Economic Development Authority. (The ability to finance this program on a tax exempt basis will require that the "buy-down" or subsidy be given in the form of a grant that is contractually separate from any loan that may also be made. So long as there is no "cross-default", i.e., there is no claw back on the grant if there is a default under the loan agreement and there is no acceleration of the loan if the borrower defaults on the grant conditions, then the grants could be funded on a tax exempt basis (assuming also that the proceeds of the grant will be applied to a capital expenditure). If the expected "buy-down" is to be structured in some other fashion, we will need to do further analysis.)

***Item #2***

| Agency - Sector | Cost | Project Notes |
|---|---|---|
| ANR- Municipal Wastewater | $61,527,539 | Addison, Bennington, Castleton, Colchester FD #2, Hinesburg, Montpelier, N. Branch FD #1, Royalton, Rutland City, Ryegate, St. Albans City, St. Johnsbury, Springfield, Williston, Winooski (should be okay as tax exempt absent unusual circumstances) |
| AAFM-Agriculture | $9,000,000 | Production area Best Management Practices (BMPs) ($6M), livestock exclusion ($1.4M), technical assistance for BMPs ($1.6M) (could be okay as tax exempt if for capital costs and grants only; need more information) |
| ANR- Agriculture | $587,300 | Farm projects identified through ANR stakeholder processes (need more information to make a preliminary determination) |
| ANR- Developed Lands | $9,383,930 | Stormwater treatment for roads and developed lands (ex. parking lots) (should be okay as tax exempt if for capital costs and grants only; need more information) |
| Natural Resources | $360,518 | Projects that restore the phosphorus and sediment reduction potential of stream corridors, lakeshores, wetlands (need more information to determine the nature of the projects) |
| **Total** | **$80.272,898** | |

***Item #3- Questions from page 2***

1. Will grants to regional planning commissions, conservation districts, municipalities, fire districts, non-profits organizations or for-profit private entities from the proceeds of Vermont's general obligation bonds adversely impact the tax exempt status of those bonds? It depends on the nature of the actual project to be funded. As noted above, so long as the grant is a true grant and the project involves capital expenditures, tax exempt financing will be permissible.

2. To the extent that any further analysis is necessary, does 26 C.F.R. § 1.103-8 (g) (interest on bonds to finance certain exempt facilities, in particular air and water pollution control facilities) allow grants from the proceeds of Vermont's general obligation bonds to regional planning commissions, conservation districts, municipalities, fire districts, non-profits organizations or for-profit private entities without adversely impacting the tax exempt status of those general obligation bonds? As noted in #1, if the proceeds are granted to any of these listed entities and the project involves capital expenditures, then it can be funded with tax-exempt State bond proceeds. If the intention is to loan proceeds to a nongovernmental entity, then it might be possible for the State to issue an "exempt facility bond" pursuant to this section of the Internal Revenue Code for such purpose. Further analysis would be needed to confirm the project satisfies all of the applicable exempt facility bond requirements, and an allocation of annual private activity volume cap may be needed. The details of the project and the users will determine this.

3. The Department of Environmental Conservation recognizes that a key principle in finance is to match the term of financing to the asset lifetime. With respect to grants for water pollution abatement and control projects, is there a legal requirement that the expected life of the grant-funded asset must exceed the life of the general obligation bond? General obligation governmental bonds are not subject to the same stricter useful life requirements that apply to tax exempt bonds for 501(c)(3) organizations or so-called exempt facility bonds, but nonetheless, in general the useful life should at least match the term of the bonds being issued. May the assets include land conservation, land restoration, and easements? Yes. See the PLR attached as Exhibit D with respect to conservation easements. In the case of easements or other rights to use property that may qualify as a capital expenditure, the term of the easement or other right should be generally be at least as long as the term of the bonds.

4. May the Department of Environmental Conservation award grants for non-tangible activities related to water pollution abatement and control projects consistent with the tax-exempt status of the general obligation bonds? Such non-tangible activities may include:

a. Education and outreach. No, since probably not a capital expenditure.

b. Technical assistance to promote understanding by municipalities and private entities of pollution control activities that are necessary for compliance with state and federal law. No, since not likely to be a capital expenditure.

c. Monitoring water quality. Maybe. It is possible that certain aspects of this could qualify as a capital expenditure, such as acquisition of monitoring equipment, but more details are needed to make a final determination.

d. Operation and maintenance of water pollution abatement and control projects. Not likely. By definition this is working capital and not eligible, unless solely related to start-up of a bond funded capital facility (in which case, the dollar amount is also limited).

e. Project scoping through site assessment, mapping, data analysis, and project prioritization. Maybe. Some of this, such as site assessment, may qualify as a capital expenditure, but again, more details are needed.

***Item #3B (Appendix – Public –Private Partnerships)***

The term “public-private partnership” is used broadly to refer to many different arrangements involving the use of governmental and non-governmental entities and resources to carry out a particular function or activity. The specific terms of each arrangement will determine to what extent tax exempt financing is available for all or part of a project. Often these arrangements will include multiple funding sources and depending on the nature of the project, may or may not permit the use of tax exempt financing.

In many cases, an asset may be owned by a governmental entity, but managed or used by a private one. For example, parking facilities or food services, such as a cafeteria in a public building (hospital, educational institution, correctional facility, are often managed by private entities and their use constitutes private use of the bond financed facility. The IRS has issued guidelines for determining which such arrangements are permissible. Todd Cooper recently updated a memorandum on this topic and it is attached as Exhibit D.

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***Exhibit B***

**Memorandum**

**FROM:** Locke Lord LLP

**DATE:** February 24, 2017

**RE:** Private Activity Bond Tests

# Private Activity Bond Tests

This memorandum briefly explains the application of the "private activity bond" tests of the Internal Revenue Code to tax-exempt obligations of any state or local governmental entity (the "Issuer"). In general, interest on bonds of the Issuer will become taxable if the bonds become private activity bonds. (Exceptions to this general rule apply to tax-exempt bonds issued for the benefit of 501(c)(3) organizations and certain other types of tax-exempt bonds; these exceptions are not the subject of this memo.) Further, the Issuer's documents for each issue of its tax-exempt bonds include covenants by the Issuer not to cause the bonds to become taxable. Accordingly, it is important to understand the requirements that must be met to avoid causing the Issuer's bonds to become taxable private activity bonds. Please note that the following is only a general summary of the applicable tax regulations (which run more than 40 pages of very fine print). You should feel free to contact us with any questions about the application of these rules now or in the future.

## Private Activity Bond Limits

Bonds issued by a state or local governmental entity will be private activity bonds if (i), both (a) the "private business use" limit and (b) the "private security or payment" limit are exceeded (these limits are referred to together as the "private business" limits), or (ii) the "private loan" limit is exceeded. An important point to keep in mind throughout this discussion is that each of these limits is applied separately to each tax-exempt obligation of the Issuer. Throughout this memo, the term "bond" is intended to include any tax-exempt obligation of the Issuer including general obligation bonds, special obligation bonds, if applicable, and bond anticipation notes. If a single bond issue finances multiple projects, all of the financed projects are taken into account in applying these limits. On the other hand, if a bond issue finances only a portion of a single project and no other projects, only the financed portion of the project is taken into account applying the limits.

*Private Loan Limit*

The private loan, limit generally can be easily stated and applied. The private loan limit is exceeded, and the bonds of an issue are private activity bonds, if the proceeds of the bond issue are loaned to borrowers that are not state or local governmental entities in an amount greater than the lesser of (i) $5,000,000 or (ii) 5% of the proceeds of the bond issue. Thus, for example, loans to homeowners or to charitable organizations in excess of the 5% or $5,000,000 limit will cause the bonds of the issue to be private, activity bonds. In general, it is rare to find private loan amounts that exceed these limits.

*Private Business Limits*

As stated above, the private business limits consist of the private business use limit and the private security or payment limit (the latter referred to herein as the "private payment limit"). Bonds of the Issuer will be private activity bonds because of these limits only if ***both*** limits are exceeded. Unlike the private loan limit, the private business limits frequently arise.

Private Business Use Limit

The private business use limit applies to limit the use of bond-financed facilities by non-state or local governmental entities (these users being referred to as "private persons"). Please note that the federal government is treated as a private person for this purpose. The types of use taken into account include ownership and leasing of bond-financed facilities by a private person. Private business use also includes management and certain other service contracts with a private person relating to the financed facilities if the contract does not satisfy a series of requirements imposed by the Internal Revenue Service. Thus, for example, a contract with a private person to manage a parking facility or provide food service in a facility such as a school or prison will result in private business use of the facility if the contract does not satisfy the IRS rules. A more detailed explanation of the management contracts rules will be provided to the Issuer in a separate Memorandum. Private business use can also result from certain other arrangements with private persons, such as a contract under which a private company buys the "naming rights" for all or a portion of a bond-financed facility, such as a sports facility, or a private person puts solar panels on Issuer property.

After identifying the private business use (if any) of the facilities financed by a tax-exempt bond issue, it is then necessary to test that use against the applicable limit. The private business use limit is 5% or 10%, depending on the nature and extent of the use. The 10% limit applies to all private business use. The 5% limit applies only (i) to private business use that is not related to any governmental use of the bond-financed facilities and (ii) to private business use that is related to that governmental use but exceeds the amount of the related governmental use. In this latter case, the 5% limit applies only to the extent of the excess of the private business use over the related governmental use. Because of the complexity in applying the 5% versus the 10% limit, it is best to be conservative and apply the 5% limit to all private business use; then, if it becomes necessary to consider applying the 10% limit, Locke Lord should be contacted to determine whether the 10% limit applies under the particular facts.

Private business use is measured by determining, on an annual basis, the amount of bond proceeds that are subject to private business use and then dividing that amount of proceeds by the total proceeds of the bonds used to pay project costs (including investment earnings on bond proceeds used to pay project costs but ignoring underwriter's discount and other issuance costs). This annual percentage is then averaged over the "measurement period," generally defined as the term of the bond issue (or, if shorter, over the expected life of the financed facilities) but disregarding any period before the financed facilities are placed in service.

For example, if 15% of the space of a building that was entirely financed with a single-purpose bond issue is leased to a private person (and there is no other private business use), 15% of that bond issue is generally considered to be subject to private business use *during the term of that lease.* (This assumes that all of the space in the building has approximately the same fair rental value. An adjustment in the private business use percentage may be required if this is not the case.) It is then necessary to determine the average private business use percentage during the measurement period. To continue the example, assume that the lease term is 10 years, that the full term of the bond issue is 20 years, that the expected useful life of the building is 40 years and that the building is acquired by purchase on the issue date of the bonds and is immediately placed in service. If this 10-year lease is the only private business use of the building during the entire term of the bond issue, the private business use (PBU) percentage for the bond issue is calculated as follows:

(15% PBU during the lease term) x (10 yr lease/20 yr bond term) = 7.50%

In this case, the 10% private business use limit (rather than the 5% private business use limit) applies because (i) a lease to a private person of space in a building that is also used in part by a governmental entity is considered "related" private business use, and (ii) the private business use under the lease is 15% of the building and thus does not exceed the governmental use of the building (85%). Accordingly, in this example the private business use limit is not exceeded.

Private Payment Limit

As a preliminary matter, please note that the private payment limit need be applied only if the private business use limit is exceeded because bonds are private activity bonds under the private business limits only if both the private business use limit and the private payment limit are exceeded. The private payment limit is generally applied by determining the amount of "private payments" with respect to a bond issue, calculating the present value of those payments as of the issue date of the bond issue and then comparing that present value to the sale proceeds of the bond issue. The private payment limit also takes into account "private security" with respect to an issue, which generally means the amount of bond-financed property that is pledged as security for the bond issue but only to the extent used for a private business use. The private security portion of this limit is confusing; it is best simply to remember that where the bond-financed property is pledged as security for the bonds, the private security percentage generally equals the private business use percentage. In the case of general obligation debt to which no other security is pledged, it would be a rare occurrence for a concern to arise about private security and only private payment should be analyzed.

"Private payments" include any revenues derived by the Issuer with respect to bond-financed facilities to the extent allocable to private business use. A clear example of a private payment is rent paid by a private person that leases space in a bond-financed building.

Private payments do not include taxes of general applicability but would include site specific taxes such as a ticket tax levied only at a specific entertainment or sports facility. Special assessments are not taxes of general applicability and would give rise to private payments, although special assessments for public infrastructure would not need analysis because there would be no accompanying private use. Payments in lieu of property taxes (PILOTs) are treated as taxes of general applicability unless a private person, such as a developer, guarantees the PILOTs, which may arise in the form of minimum service payments under a development agreement.

A more subtle example of a private payment is parking revenue received by the Issuer from a bond-financed public parking facility that is subject to private business use because it is managed by a private company under a contract that does not satisfy all of the IRS requirements to avoid private business use. Please note that the parking revenue is a private payment even though the revenue is received from members of the public that are using the parking facility rather than from the manager, which is the private business user of the parking facility. This is why the definition of private payments is stated as revenues derived "with respect to" bond-financed facilities used for a private business use rather than as revenues received from the private business user. Private payments are reduced by certain of the Issuer's operating and maintenance costs allocable to the private business use of the facility.

The issue date present value of the private payments is calculated by using as the discount rate the yield of the bond issue, as calculated for purposes of the arbitrage yield limit and rebate requirement applicable to tax-exempt bond proceeds. The present value of all of the private payments generally cannot exceed 10% of the sale proceeds of the bond issue. Further, the present value of the private payments attributable to private business use subject to the 5% limit (as described above) generally cannot exceed 5% of the sale proceeds of the bond issue. If either of these limits is exceeded, the private payment limit is exceeded, and if the private business use limit is also exceeded, the bonds are private activity bonds.

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***Exhibit C***

**MANAGEMENT CONTRACTS**

**TREASURY REGULATIONS § 1.141-3(b)(4),**
**REVENUE PROCEDURE 2017-13**

## I. INTRODUCTION

The Internal Revenue Code of 1986, as amended (the "Code") sets forth limitations on the amount of proceeds of any tax-exempt obligations issued by a state or local governmental entity (i) for its own governmental purposes or (ii) the proceeds of which are loaned to a qualified 501(c)(3) organization, that may be used for private business purposes of persons other than the state or local government or qualified 501(c)(3) entity.[1] One potential source of private business activity to examine when determining whether the private business limitations of the Code have been exceeded is a management contract ("Management Contract") between a state or local governmental entity or a qualified 501(c)(3) organization (referred to collectively herein as a "Qualified User") and a private business provider of services (referred to collectively herein as a "Service Provider").

Examples of Management Contracts that could give rise to private business use include contracts under which a Qualified User engages a Service Provider to manage or provide services to operate all or selected portions of parking garages, bookstores, cafeterias, water systems, sewer systems, solid waste disposal facilities, correctional facilities, hospital facilities, convention centers, toll roads or bridges, sports facilities, museums, airports, and seaports, among many others.

The IRS has provided the following guidance on when a Management Contract will or will not give rise to private business use:

- **Treasury Regulations § 1.141-3(b)(4)** (the "Regulations"), issued on January 16, 1997, provides a list of arrangements that will not be considered Management Contracts, as well as a flexible "facts and circumstances" approach to defining a Management Contract; and

- **Revenue Procedure 2017-13** ("Rev. Proc. 2017-13"), issued January 17, 2017,[2] sets out permitted safe harbors for Management Contract arrangements.

[1] See Code Section 141(b), setting forth a 10% limitation for governmental bonds, and Code Section 145(a), setting forth a 5% limitation for qualified 501(c)(3) bonds.

[2] Rev. Proc. 2017-13 superseded Revenue Procedure 97-13, as amended by Revenue Procedure 2001-39, and as amplified by IRS Notice 2014-67 (collectively, the "97-13 Rules"). Rev. Proc. 2017-13 allows

The following is a brief overview and analysis of both the Regulations and Rev. Proc. 2017-13.

## II. THE REGULATIONS

The Regulations provide generally that the determination of whether a Management Contract between a Qualified User and a Service Provider gives rise to private business use is based upon all the facts and circumstances. The Regulations describe only two types of contracts that definitively result in private business use:

(i) a contract that provides for **compensation based upon net profits** of the bond financed facility; and

(ii) a contract under which the **Service Provider is considered the lessee or owner** of the facility for federal tax purposes, subject to some minor exceptions.

The Regulations also provide a list of arrangements that are **not** considered Management Contracts for these purposes:

(1) Incidental service contracts. Contracts for services solely incidental to the primary function of the facility (e.g., janitorial contracts, equipment repair contracts, contracts for billing services);

(2) Hospital admitting privileges. Contracts merely granting admitting privileges to doctors in hospitals, even if conditioned on the provision of de minimis services, if available to all qualified physicians in the area consistent with the size and nature of the hospital facilities;

(3) Reimbursement for public utility property management. Contracts for the operation of a facility or system of facilities consisting predominantly of "public utility property," if the only compensation is reimbursement to the Service Provider of actual and direct out-of-pocket costs paid to unrelated third parties and reasonable administrative overhead expenses of the Service Provider; and

(4) Expense reimbursement for other property. Contracts to provide services under which the only compensation is reimbursement to the Service Provider of actual and direct out-of-pocket costs paid to unrelated third parties.

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the use of all of the 97-13 Rules for Management Contracts executed prior to August 18, 2017 and incorporates certain, but not all, concepts from the 97-13 Rules on a continuing basis. The provisions of Rev. Proc. 2017-13 may be applied to Management Contracts executed on or after January 17, 2017 and must be applied to (i) new Management Contracts executed on or after August 18, 2017 or (ii) existing Management Contracts materially modified on or after August 18, 2017. **If you have an existing Management Contract to which Rev. Proc. 2017-13 does not apply, please contact your Locke Lord attorney responsible for your public finance matters or one of the authors of this Memorandum for more information on the 97-13 Rules as they apply to that existing Management Contract.**

In addition, any arrangement, including a Management Contract, will **not** result in private business use if:

(A) The term of the Management Contract, including all renewal options, does not exceed 50 days;

(B) The Management Contract is negotiated at arms-length and the compensation is at a fair market value; and

(C) The property is not financed for the principal purpose of providing that property for use by the Service Provider.[3]

If a Management Contract gives the Qualified User the right to terminate without cause and without penalty upon 50 days' notice to the vendor, that Management Contract may, under certain circumstances, be deemed to have a term of 50 days, regardless of its nominal term, and, hence, not result in private business use.

## III. REVENUE PROCEDURE 2017-13

Rev. Proc. 2017-13 sets forth, or incorporates by reference to other Treasury Regulations, some key definitions and provides a set of general principles under which a Management Contract can find a "safe harbor."

Those key definitions are:

(1) *Capitation Fee* – means a periodic fixed amount for each person for whom the Service Provider or Qualified User assumes the responsibility to provide all needed service for a specified period of time. An example of a capitation fee is a fixed dollar amount payable each month to a medical service provider for each member of a health maintenance organization. A periodic fixed amount can include an automatic increase based on a specified, objective, external standard such as the Consumer Price Index. A Capitation Fee can include a variable component of up to 20% of the total Capitation Fee.

(2) *Controlled Group* – means a group of entities controlled directly or indirectly by the same entity or group of entities where (i) direct control is evidenced by the right or power to (a) approve and remove without cause a controlling portion of the governing body of the controlled entity or (b) to require the use of funds or assets of the controlled entity for any purpose of the controlling entity, and (ii) indirect control arises when the controlled entity controls another entity or entities.

(3) *Eligible Expense Reimbursement Arrangement* – means a Management Contract under which the only compensation consists of reimbursements of actual and direct expenses paid by the Service Provider to Unrelated Parties.

[3] See Treas. Reg. § 1.141-3(d)(3)(ii).

(4) *Management Contract* – means a management, service, or incentive payment contract between a Qualified User and a Service Provider under which the Service Provider provides services for a Managed Property. A Management Contract does not include a contract or a portion of a contract for the provision of services prior to the Managed Property being placed in service, such as a construction design or construction management contract.

(5) *Managed Property* – means the portion of a Project with respect to which the Service Provider provides services. Note: The Managed Property may consist of only a portion of the Project and the Managed Property may include facilities that were not financed with the proceeds of tax-exempt bonds.

(6) *Periodic Fixed Fee* – means a stated dollar amount for services rendered for a specified period of time such as a stated dollar amount per month. The stated dollar amount can automatically increase according to a specified, objective, external standard that is not linked to the output or efficiency of the Managed Property such as the Consumer Price Index.

(7) *Per Unit Fee* – means a fee based on a unit of service such as a stated dollar amount for a specified medical procedure or car parked. Just like Capitation Fees and Periodic Fixed Fees, the amount may increase according to a specified, objective external standard.

(8) *Project* – means one or more facilities or capital projects, including land, buildings, equipment, or other property, financed in whole or in part with proceeds of the issue. Note: The Project may include facilities that have not been financed with the proceeds of tax-exempt bonds.

(9) *Qualified User* – means a governmental person (a state or local governmental unit) and, for qualified 501(c)(3) bonds, a governmental person or a 501(c)(3) organization.

(10) *Related Party* – means any member of the same Controlled Group.

(11) *Service Provider* – means any person other than a Qualified User that provides services to, or for the benefit of, a Qualified User under a Management Contract.

(12) *Unrelated Parties* – means a person other than (1) a Related Party or (2) a Service Provider's employee.

The set of principles are:

(1) **In General**. If a Management Contract meets all of the applicable conditions of Rev. Proc. 2017-13, or is an Eligible Expense Reimbursement Arrangement, the Management Contract does not result in private business use. Use of the Managed Property by the Service Provider that is functionally related and subordinate to the performance of services under the Management Contract, such as use of storage areas or office space, does not result in private business use.

(2) **General Financial Requirements**.

(a) The payments to the Service Provider must be reasonable compensation for services rendered during the term of the Management Contract. Compensation includes payments to reimburse actual and direct expenses paid by the Service Provider and related administrative overhead expenses of the Service Provider.

(b) The Management Contract must not provide to the Service Provider a share of the net profits from the operation of the Managed Property. Incentive compensation will not be treated as providing a share of net profits if the eligibility for the incentive compensation is determined by the Service Provider's performance in meeting standards that measure quality of service, performance, or productivity.

(c) The Management Contract must not impose on the Service Provider a burden of bearing any net losses from the operation of the Managed Property.

(d) The Management Contract will not be treated as providing a share of net profits or requiring the Service Provider to bear net losses if the compensation is (i) based solely on a Capitation Fee, a Periodic Fixed Fee, or a Per Unit Fee, (ii) incentive compensation, or (iii) a combination of these types of compensation.

(e) Deferral of the payment of compensation to the Service Provider is permitted, and will not be treated as contingent on net profits and losses if (i) the compensation is payable at least annually, (ii) the contract imposes reasonable consequences for late payment such as late interest or late payment fees, and (iii) any deferred compensation is payable no later than the end of five years after the original due date.

(3) **Term of the Management Contract**.

(a) The term of the Management Contract cannot exceed the lesser of (i) 30 years or (ii) 80% of the weighted average reasonably expected economic life of the Managed Property. Economic life is determined as of the beginning of the term of the Management Contract. Land is not included in determining the life of the Managed Property unless 25% or more of the proceeds of the relevant bonds were used to purchase the land. Note: These requirements may make it difficult

to enter into a Management Contract near the end of the life of the Managed Property.

(b) A contract that is materially modified must be retested under this rule as of the date of the material modification. Note: Rev. Proc. 2017-13 does not define or describe what constitutes a material modification of a Management Contract.

(c) Contract renewal term options are counted against the contract term limitation only if and to the extent held by the Service Provider. Automatic renewal provisions subject to cancellation by either party (also referred to as "evergreen" provisions) are not counted against the contract term limitation.

(4) **Control of the Managed Property**. The Qualified User must exercise a significant degree of control of the Managed Property. This control requirement is met if the Management Contract requires the Qualified User to approve (i) the annual budget for the Managed Property, (ii) capital expenditures for the Managed Property, (iii) disposition of any property that is part of the Managed Property, (iv) the rates charged for the use of the Managed Property, and (v) the general nature and type of use of the Managed Property. Note: The approval of rates may be done by (I) specific approval, (II) approving a methodology for setting the rates, or (III) requiring the rates to be reasonable and customary as specifically determined by or negotiated with an independent third party (such as a medical insurance company).

(5) **Risk of Loss**. The Qualified User must bear the risk of loss of the Managed Property by damage or destruction. However, the Qualified User can insure against this loss through a third party (insurer).

(6) **No Inconsistent Tax Position**. The Management Contract must require that the Service Provider will not take any tax position inconsistent with being a service provider to the Qualified User. Thus a Service Provider cannot claim depreciation of the Managed Property or an investment tax credit with respect to the Managed Property.

(7) **Service Provider Relationship with the Qualified User**. The Service Provider or any related party to the Service Provider cannot have a role or relationship with the Qualified User that limits the Qualified User's ability to exercise its rights under the Management Contract. A Service Provider may be treated as having a prohibited role or relationship with the Qualified User if (i) more than 20% of the voting power of the governing body of the Qualified User is vested in the directors, officers, shareholders, partners, members and employees of the Service Provider, (ii) the governing body of the Qualified User includes the chief executive office or chairperson (or equivalent) of the Service Provider, or (iii) the chief executive officer of the Service Provider is the chief executive officer of the Qualified User or any related party to the Qualified User.

These broad principles allow for flexibility in designing a Management Contract but the lack of specificity in Rev. Proc. 2017-13 leaves many open questions. Thus, in evaluating a potential Management Contract or an amendment or extension of an existing Management Contract, it is advisable to consult with bond counsel early in the process if the Management Contract involves any facility that has or could, in the future, have funding from proceeds of tax-exempt obligations.

The preceding is a brief overview of the complex federal tax law rules pertaining to Management Contracts for facilities financed with tax-exempt obligations. Please call Todd Cooper at (617) 239-0160, Jennifer C. Mendonça at (617) 239-0845 or Mark-David Adams at (561) 820-0281 if you have additional questions.

# ***Exhibit D***

**Internal Revenue Service**

Number: **200502012**
Release Date: 01/14/2005
Index Number: 141.01-01

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:TEGE:EOEG:TEB
PLR-119347-04

Date:
September 28, 2004

LEGEND:

Authority =

City =

State =

Dear :

This responds to the Authority's request for a ruling that the acquisition of various interests in land (the "Property Interests") and related arrangements as described below will not give rise to private business use within the meaning of § 141 of the Internal Revenue Code. The Authority also requests a ruling that the related arrangements are uses related and not disproportionate to the government use of the proceeds.

FACTS AND REPRESENTATIONS:

The City created the Authority for the purpose of acquiring, operating, and maintaining property for the City. The Authority will acquire the Property Interests through arm's-length negotiations with the current landowners (the "Sellers"), typically farmers and ranchers. The Authority will not pay more than fair market value for any such Property Interest. By purchasing a Property Interest with respect to a parcel of property, the Authority will secure the development rights so that the parcel may be preserved as open space for the scenic enjoyment of the public, for agricultural use, and to conserve the natural habitat (the "Open Space Program").

The Authority intends to issue bonds to finance at least a portion of some of the Property Interests. The Authority will issue some of the bonds in the form of an installment sale note to the Seller (the "Note"). Payment of the Note may be secured by

the Authority's rights in the Property Interest or by a general obligation pledge from the City.

Based on the negotiations between the particular Seller and the Authority, the Authority will acquire a parcel for the Open Space Program through one of the following types of arrangements.

1) The Authority may purchase a conservation easement in perpetuity from the Seller. The conservation easement will restrict the Seller's use of the parcel subject to the easement, generally to residential and agricultural uses, so that the Seller's use will not impinge upon the Authority's use of the parcel for the Open Space Program.

2) The Authority may purchase a future interest in fee simple in the parcel, with the Seller retaining a life estate.

3) The Authority may purchase a present interest in fee simple in the parcel and enter into a lease with the Seller or a third party, granting the leaseholder certain agricultural rights to the parcel (the "Lease"). Examples of the agricultural rights include haying, grazing, raising of livestock, farming of marketable crops, and water storage.

4) The Authority may purchase a present interest in fee simple in the parcel, subject to a *profit à prendre* interest[1] retained by the Seller. The *profit à prendre* interest will allow the holder to enter the parcel for limited agricultural purposes, such as haying and grazing of animals. The rights and uses permitted under the *profit à prendre* interest will be less extensive than those under the Lease and will not impinge upon the Authority's use of the parcel.

5) Lastly, the Authority may acquire a present interest in fee simple in the parcel and convey a *profit à prendre* interest in the parcel to a third party. The *profit à prendre* interest will be exactly as that described directly above. The value of the *profit à prendre* interest conveyed by the Authority, when aggregated with other private business use of the parcel, will not exceed 10 percent of the proceeds of the issue used to acquire the parcel.

LAW:

Section 103(a) provides, in general, that gross income does not include interest on any state or local bond. Section 103(b) provides, in part, that § 103(a) shall not apply to any private activity bond that is not a qualified bond (within the meaning of § 141). Section 141(a) defines private activity bond to mean any bond issued as part of an issue which

[1] A *profit à prendre* interest is an interest in real property defined under State law as an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another. In contrast to the possessory rights of a leaseholder, the rights of a holder of a *profit à prendre* interest are non-possessory.

meets the private business use test of § 141(b)(1) and the private security or payment test of § 141(b)(2), or which meets the private loan financing test of § 141(c).

An issue meets the private business use test of § 141(b)(1) if more than 10 percent of the proceeds of the issue are to be used for any private business use. Section 141(b)(6) defines private business use as use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit. Section 141(b)(7) defines government use as any use other than a private business use.

Section 1.141-3(a)(1) of the Income Tax Regulations provides that the private business use test relates to the use of the proceeds of an issue. The 10 percent private business test of § 141(b)(1) is met if more than 10 percent of the proceeds of an issue is used in a trade or business of a nongovernmental person. For this purpose, the use of financed property is treated as the direct use of proceeds. Any activity carried on by a person other than a natural person is treated as a trade or business. Unless the context or a provision clearly requires otherwise, this section also applies to the private business use test under § 141(b)(3) (unrelated or disproportionate use).

Section 1.141-3(a)(2) provides that in determining whether an issue meets the private business use test, it is necessary to look to both the indirect and direct uses of proceeds. For example, a facility is treated as being used for a private business use if it is leased to a nongovernmental person and subleased to a governmental person or if it is leased to a governmental person and then subleased to a nongovernmental person, provided that in each case the nongovernmental person's use is in a trade or business. Similarly, the issuer's use of the proceeds to engage in a series of financing transactions for property to be used by nongovernmental persons in their trades or businesses may cause the private business use test to be met. In addition, proceeds are treated as used in the trade or business of a nongovernmental person if a nongovernmental person, as a result of a single transaction or a series of related transactions, uses property acquired with the proceeds of an issue.

Section 1.141-3(a)(3) provides that the use of proceeds by all nongovernmental persons is aggregated to determine whether the private business use test is met.

Section 1.141-3(b) provides for the types of arrangements that will be considered to give rise to private business use. Section 1.141-3(b)(1) provides that both actual and beneficial use by a nongovernmental person may be treated as private business use. In most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the issuer. In general, a nongovernmental person is treated as a private business user of proceeds and financed property as a result of ownership; actual or beneficial use of property pursuant to a lease, or a management or incentive payment contract; or certain other arrangements such as a take or pay or other output-type contract.

Section 1.141-3(b)(2) provides generally that ownership by a nongovernmental person of a financed property is private business use of that property. For this purpose, ownership refers to ownership for federal income tax purposes.

Section 1.141-3(b)(3) provides generally that the lease of financed property to a nongovernmental person is private use of that property. For this purpose, any arrangement that is properly characterized as a lease for federal income tax purposes is treated as a lease.

Section 1.141-3(b)(7) provides that any other arrangement that conveys special legal entitlements for beneficial use of bond proceeds or of financed property that are comparable to special legal entitlements such as ownership or leases (or other arrangements not relevant for this purpose) results in private business use. For example, an arrangement that conveys priority rights to the use or capacity of a facility generally results in private business use.

Section 1.141-3(g)(1) provides, in general, that the private business use of proceeds is allocated to property under § 1.141-6. The amount of private business use of that property is determined according to the average percentage of private business use of that property during the measurement period.

Section 1.141-3(g)(2) provides, in general, that the measurement period of property financed by an issue begins on the later of the issue date of that issue or the date the property is placed in service and ends on the earlier of the last date of any bond of the issue financing the property (determined without regard to any optional redemption dates).

Section 1.141-3(g)(3) provides that the average percentage of private business use is the average of the percentages of private business use during the 1-year periods within the measurement period. Appropriate adjustments must be made for beginning and ending periods of less than 1 year.

Section 1.141-3(g)(4) provides for determining the average amount of private business use for a 1-year period. In general, the percentage of private business use of property for any 1-year period is the average private business use during that year. This average is determined by comparing the amount of private business use during the year to the total amount of private business use that is not private use (government use) during that year.

In general, for a facility in which government use and private business use occur simultaneously, §1.141-3(g)(4)(iii) provides that the entire facility is treated as having private business use. For example, a governmentally owned facility that is leased or managed by a nongovernmental person in a manner that results in private business use is treated as entirely used for a private business use. If, however, there is also private business use and actual government use on the same basis, the average amount of

private business use may be determined on a reasonable basis that properly reflects the proportionate benefit to be derived by the various users of the facility (for example, reasonably expected fair market value of use). For example, the average amount of private business use of a garage with unassigned spaces that is used for government use and private business use is generally based on the number of spaces used for private business use as a percentage of the total number of spaces.

For purposes of paragraphs (g)(4)(ii) through (iv) of §1.141-3, if private business use is reasonably expected as of the issue date to have a significantly greater fair market value than government use, the average amount of private business use must be determined according to the relative reasonably expected fair market values of use rather than another measure, such as average time of use. This determination of relative fair market value may be made as of the date the property is acquired or placed in service if making this determination as of the issue date is not reasonably possible (for example, if the financed property is not identified on the issue date). In general, the relative reasonably expected fair market value for a period must be determined by taking into account the amount of reasonably expected payments for private business use for the period in a manner that property reflects the proportionate benefit to be derived from the private business use.

Section 141(b)(3)(A) provides that an issue shall be treated as meeting the tests of § 141(b)(1) if such tests would be met by substituting 5 percent for 10 percent in § 141(b)(1) by taking into account only the proceeds of the issue which are to be used for any private business use which is not related to any government use of such proceeds and the disproportionate related business use proceeds of the issue.

For purposes of § 141(b)(3)(A), § 141(b)(3)(B) provides that the disproportionate related business use proceeds of an issue is an amount equal to the aggregate of the excesses (determined under the following sentence) for each private business use of the proceeds of an issue which is related to a government use of such proceeds. The excess determined under this sentence is the excess of (i) the proceeds of the issue which are to be used for the private business use, over (ii) the proceeds of the issue which are to be used for the government use to which such private business use relates.

Section 1.141-9(a) provides in general, that under §141(b)(3) (the unrelated or disproportionate use test), an issue meets the private business tests if the amount of private business use and private security or payments attributable to unrelated or disproportionate private business use exceeds 5 percent of the proceeds of the issue. For this purpose, the private business use test is applied by taking into account only use that is not related to any government use of proceeds of the issue (unrelated use) and use that is related by disproportionate to any government use of those proceeds (disproportionate use).

Under § 1.141-9(a)(2)(i), the unrelated or disproportionate use test is applied by first determining whether a private business use is related to a government use. Next, private business use that relates to a government use is examined to determine whether it is disproportionate to that government use.

Under 1.141-9(a)(2)(ii), all the unrelated use and disproportionate use financed with the proceeds of an issue are aggregated to determine compliance with the unrelated and disproportionate use test. The amount of permissible unrelated and disproportionate private business use is not reduced by the amount of private business use financed with the proceeds of an issue that is neither unrelated use nor disproportionate use.

Section 1.141-9(b)(1) provides that whether a private business use is related to a government use financed with the proceeds of an issue is determined on a case-by-case basis, emphasizing the operational relationship between government use and the private business use. In general, a facility that is used for a related private business use must be located within, or adjacent to, the governmentally used facility.

Section 1.141-9(b)(2) provides that use of a facility by a nongovernmental person for the same purpose as use by a governmental person is not treated as unrelated use if the government use is not insignificant. Similarly, a use of a facility in the same manner both for private business use that is related use and private business use that is unrelated use does not result in unrelated use if the related use is not insignificant. For example, a privately owned pharmacy in a governmentally owned hospital does not ordinarily result in unrelated use solely because the pharmacy also serves individuals not using the hospital. In addition, use of parking spaces in a garage by a nongovernmental person is not treated as unrelated use if more than an insignificant portion of the parking spaces are used for a government use (or a private business use that is related to a government use), even though the use by the nongovernmental person is not directly related to that other use.

Under § 1.141-9(c)(1), a private business use is disproportionate to a related government use only to the extent that the amount of proceeds used for that private business use exceeds the amount of proceeds for the related government use. For example, a private use of $100 of proceeds that is related to a government use of $70 of proceeds results in $30 of disproportionate use.

Section 1.141-9(c)(2) provides that if two or more private business uses of the proceeds of an issue relate to a single government use of those proceeds, those private business uses are aggregated to apply the disproportionate test.

ANALYSIS:

Private Business Use under § 141(b)(1)

In determining whether the Authority's acquisition of the various Property Interests and related arrangements will give rise to private business use of bond proceeds, we look to the use of the bond-financed property in each type of arrangement. We note that the type of property interest is not the sole factor in our determination.

1) In the case of the purchase of the conservation easement described in this case, the easement is the bond-financed property (*i.e.*, the bond-financed facility). The Authority and the Seller will have distinct property interests in the parcel, granting them different rights. The use by the Seller of the retained interest in the parcel will not impinge upon the use of the parcel by the Open Space Program. The Authority will be the owner of the easement in perpetuity, and thus the Seller will not have any interest in the easement, such as a reversionary interest. The Seller, as owner of the parcel subject to the conservation easement, will be restricted in use of the parcel by the easement. Thus, we consider only the use of the conservation easement in determining whether the Seller's use of the parcel will be private business use of the proceeds. The City and the public will have beneficial use of the easement through the Open Space Program. The Seller's only use of the easement will be as a member of the general public. Other than as a member of the general public, the Seller's use of the parcel is not use of the bond-financed property. Thus, the Authority's acquisition of the conservation easement will not give rise to private business use of the proceeds.

2) In the case of the purchase of the future interest in fee simple with the Seller retaining a life estate, the Authority is purchasing the future interest. The future interest is the bond-financed property. The Authority and the Seller will have distinct property interests, and although their rights are similar, these rights will occur at different times. The use of the parcel by the Seller during the retained life interest will not impinge upon the use by the Open Space Program during the Authority's future interest. Thus, we consider only the use of the future interest in determining whether the Seller's use will be private business use of the proceeds. Because the Seller's use of the parcel will end with the termination of the life estate, the Seller will not use the bond-financed property. Accordingly, the Authority's acquisition of the future interest in fee simple does not give rise to private business use of the proceeds.

3) In the case of the purchase of a present interest in fee simple with the granting of a Lease, the Authority is purchasing the fee simple. The fee simple is the bond-financed property. The Authority will then lease the bond-financed property to a nongovernmental person. Under § 1.141-3(b)(3) and (g)(4)(iii), the lease of property to a nongovernmental person is private use of that property and is treated as use of the entire property. Thus, the Lease will give rise to private business use during the term of the Lease of 100 percent of the proceeds used to acquire the parcel.

4) In the case of the purchase of a present interest in fee simple subject to the *profit à prendre* interest described in this case, the Authority will be purchasing the fee simple subject to, or less, the *profit à prendre* interest. Under the facts of this case, the fee simple subject to the *profit à prendre* interest is the bond-financed property. This is the

converse of the situation involving the conservation easement described above. This time, the Authority, as owner of the fee simple subject to the *profit à prendre* interest, will have a possessory right to use the parcel. The Seller, as holder of the *profit à prendre* interest, will have a non-possessory right to use the parcel for limited purposes. Again, however, the Authority and the Seller will have distinct interests in the parcel, granting them different rights. The permitted uses by the holder under the *profit à prendre* interest herein will not impinge upon the use of the parcel by the Open Space Program. Thus, we consider only the use of the Authority's interest in determining whether the Seller's use will be private business use of the proceeds. The Seller's only use of the Authority's interest will be as a member of the general public. Other than as a member of the general public, the Seller's use of the parcel is not use of the bond-financed property. Accordingly, the Authority's acquisition of a present interest in fee simple subject to a *profit à prendre* interest will not give rise to private business use of the proceeds.

5) In the case of the purchase of a present interest in fee simple (not subject to a *profit à prendre* interest) where the Authority conveys the *profit à prendre* interest to a third party, the fee simple (not subject to a *profit à prendre* interest) is the bond-financed property. When the Authority sells the *profit à prendre* interest, it will be conveying a portion of the fee simple to a nongovernmental person. The Authority's conveyance of the *profit à prendre* interest will result in private business use of the bond-financed property. There will be no private business use of the interest retained by the Authority. The issue then is how to measure the amount of private business use of the bond-financed property. The *profit à prendre* interest, like a discrete portion of a facility, is a distinct property interest. The holder of the *profit à prendre* interest has rights different from those of the Authority under its remaining interest in the parcel. The use of the *profit à prendre* interest by the holder will not impinge upon the use of the parcel by the Open Space Program. Therefore, it is appropriate to measure the private business use based on a reasonable basis that reflects the proportionate benefit to the users, such as the fair market value of the interests. The Authority has represented that the value of any such *profit à prendre* interest in addition to any other private business use of the parcel will not exceed 10 percent of the proceeds of the issue.

Unrelated or Disproportionate Use

The Authority also has requested a ruling regarding the applicability of § 141(b)(3) to the transactions involving the life estate, the Lease, and the *profit à prendre* interest. The questions to be considered are whether use of proceeds for these purposes is unrelated to the government use of the issue and, if not, whether such use is disproportionate related use. Because we have concluded that the acquisition of the fee simple with the reservation of the life estate will not result in private business use of proceeds, we need not address the life estate. For the same reason, we need not address the *profit à prendre* interest retained by the Seller.

Both the Lease and the *profit à prendre* interest conveyed by the Authority will result in private business use of the fee simple acquired by the Authority. The location of the government use and the private business use, thus, will be the same. The purposes of the Open Space Program are to preserve the parcel for open space for scenic enjoyment, for agricultural use, and to conserve natural habitat. The agricultural use by the holder of the Lease or the *profit à prendre* interest will be complementary and contribute to the Open Space Program. We conclude that the private business use arising under the Lease and the *profit à prendre* interest conveyed by the Authority will be uses related to the government use.

To determine whether a related use is disproportionate, we look for the excess of the proceeds used for the private business use over the proceeds used for the government use to which it relates. The Lease is treated as 100 percent use of the proceeds used to acquire the parcel for the term of the Lease. Where the terms of any such Leases on a specific parcel in the aggregate exceed the period of government use of the parcel, this excess will be the disproportionate use.

A comparison of the value of the *profit à prendre* interest to the value of remaining portion of the fee simple is needed to make a determination for this type of private business use. Where the value of the *profit à prendre* interest exceeds the value of the interest retained by the Authority, this excess will be the disproportionate use. The Authority has represented that the value of the *profit à prendre* interest will not exceed 10 percent of the issue. Thus, where the proceeds of the issue are used solely for the purpose of purchasing one fee simple parcel (such as the Note), private business use of the proceeds used to acquire the parcel will not exceed 10 percent, and accordingly, such private business use will not be disproportionate to the government use. We do not rule on this question where proceeds of the bond issue are used for purposes in addition to acquiring one fee simple parcel.

CONCLUSIONS:

1. a. The Authority's purchase of a conservation easement, purchase of a future interest in fee simple with the Seller retaining a life estate, or purchase of a present interest in fee simple with the Seller retaining a *profit à prendre* interest as described herein will not give rise to private business use.

b. The Authority's purchase of a present interest in fee simple and entering into the Lease will give rise to private business use of 100 percent of the proceeds for the term of the Lease.

c. The Authority's purchase of a present interest in fee simple with the conveyance of a *profit à prendre* interest as described herein will give rise to private business use, but not in excess of 10 percent of the issue.

2. a. The Lease will be a use related to the government use. This use will be disproportionate if the terms of any such Leases on a specific parcel in the aggregate exceed the period of government use of the parcel.

b. The conveyance of a *profit à prendre* interest will result in a use related to the government use. Where the value of the *profit à prendre* interest exceeds the value of the interest retained by the Authority, this excess will be the disproportionate use. Where the proceeds of the issue are used solely for the purpose of purchasing one fee simple parcel, the private business use will not be disproportionate.

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 on whether the conveyance of a *profit à prendre* interest will result in a private loan under § 141(c).

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the 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.

Sincerely,

Assistant Chief Counsel
(Exempt Organizations/Employment
Tax/Government Entities)

By: _____
Johanna Som de Cerff
Assistant Branch Chief
Tax Exempt Bond Branch

cc:

AM 65824039.5