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Date:

August 17, 2004

TY:

LEGEND

Company =

Transferee =

LLC1 =

OP =

TRS =

StateA =

StateB =

StateC =

Year1 =

Year2 =

Date1 =

Date2 =

Date3 =

#a =

#b =

%a =

X =

Dear . :

This is in response to your authorized representative's letter dated April 13, 2004, requesting a private letter ruling concerning the federal income tax consequences of a proposed transaction. Additional information was received subsequently.

Taxpayer is a StateA limited liability company (hereinafter "the Company") formed in Year1 that is currently and at all times has been treated as a partnership for federal income tax purposes. The annual accounting period of the Company is the calendar year. The Company maintains its accounting books on the accrual method of accounting.

The Company currently owns, operates, acquires, develops and redevelops X properties throughout the United States. The Company owns these properties directly, through wholly-owned limited liability companies, and through joint ventures with third party institutional and high net worth individual investors (the JV Partners) in which the Company holds majority and minority capital and/or profits interests. Immediately prior to the proposed transaction, the Company will own interests in #a properties located in #b states.

The Company also manages the properties of several unrelated third parties through its wholly-owned limited liability company, LLC1. A wholly-owned subsidiary of the Company, TRS, has acted as payroll master for the Company, for cash. The Company has outstanding Class A voting and non-voting Units, as well as Class B, Class C and Class E Units. The Units are not publicly traded.

In order to access public capital markets, maximize the Company's value and increase liquidity to the members of the Company (the Members), the following transaction has been proposed:

A StateC corporation was formed on Date2 and it will elect to be taxed as a "real estate investment trust" pursuant to Code sections 856 through 860 beginning with its taxable year ending Date3 (hereinafter Transferee). Transferee will form two StateB business trusts, which will elect to be taxed as corporations and will be treated as "qualified REIT subsidiaries" as defined in Code section 856(i)(2) (each, a "QRS"). One of the QRSs will hold the sole general partner interest in OP, a newly-formed StateA limited partnership. The other QRS will hold a limited partner interest in the OP.

Members of the Company will either (i) transfer their units in the Company (the Units) to Transferee in exchange for shares of common stock and contingent convertible shares (CCSs) in Transferee (collectively, the Stock); or (ii) transfer their Units to the OP in exchange for OP units (OP Units) (certain Members have committed to transfer their Units directly to the OP); or (iii) a combination of (i), and (ii); or (iv) elect to have their Units redeemed for cash ((i) is hereinafter referred to as the Transaction, and (i), (ii) and (iii) are collectively hereinafter referred to as the Contribution)). One Member, however, will engage in a combination of (ii) and (iv). Simultaneous with the foregoing, there will be an initial offering of shares of common stock by Transferee to the public (the IPO) in exchange for cash.

The Members transferring their Units to Transferee in exchange for Stock and the members of the public transferring cash to Transferee in exchange for common stock pursuant to the IPO are collectively referred to herein as the Transferors.

Subject to certain exceptions, Members who hold voting Class A Units and are non-accredited investors under federal securities laws will be required to have their Units redeemed for cash. The Company will not redeem more than 2% of its Members by value who either elect or who are required to redeem their Units for cash.

The CCSs received by the Members will have no current voting rights, liquidation rights, or rights to participate in dividends or otherwise in the Company's growth, except upon the automatic conversion of the CCSs into shares of common stock in Transferee if certain net operating income targets relating to certain lease-up properties are met.

Upon completion of the proposed transaction, TRS and Transferee will jointly elect under Code Section 856(l) to treat TRS as a "taxable REIT subsidiary" of Transferee.

Transferee will contribute the Units and the proceeds of the IPO, via the QRSs, to the OP in exchange for OP Units (having an aggregate capital interest in OP of at least 80%).

The IPO proceeds received by the OP will be contributed to the Company and used to redeem any Members who either elected to or were required to receive cash as described above, purchase additional interests in the Company's existing properties from the JV Partners, refinance the Company's debt and existing mortgages on the property, acquire new properties with a similar risk profile to the existing properties, or pay offering expenses. In addition, a portion of the IPO proceeds will be contributed by the OP to TRS.

In connection with the transaction, the Company represented that:

- (a) No stock or securities will be issued for services rendered to or for the benefit of the Transferee in connection with the Transaction, and no stock or securities will be issued for indebtedness of the Transferee that is not evidenced by a security or for interest on indebtedness of the Transferee which accrued on or after the beginning of the holding period of the Transferors of the debt.
- (b) The Transferors neither accumulated receivables nor made extraordinary payment of payables in anticipation of the Transaction.
- (c) The Transferee will report items which, but for the transfer, would have resulted in income or deduction to a Transferor in a period subsequent to the transfer and such items will constitute income or deductions to the Transferee when received or paid by it.
- (d) The proceeds received in collection of the income items will be included as ordinary income in computing taxable income of the Transferee.
- (e) The transfer is not the result of the solicitation by a promoter, broker, or investment house.
- (f) The Transferors will not retain any rights in the property transferred to the Transferee.
- (g) The value of the Stock received in exchange for accounts receivable will be equal to the net value of the accounts transferred, i.e., the face amount of the accounts receivable previously included in income less the amount of the reserve for bad debts.
- (h) Pending a final accounting after the closing of the Transaction, the Company expects that the adjusted basis and the fair market value of the assets to be transferred by the Transferors to the Transferee will, in each instance, be equal to or exceed the sum of the liabilities deemed to be assumed by the Transferee under § 752, plus any liabilities to which the transferred property is subject.

- (i) The liabilities of the Company that are allocated to the Transferors and assumed or deemed to be assumed by the Transferee under § 752 were incurred in the ordinary course of business and are associated with the property to be transferred.
- (j) There is no indebtedness between the Transferee and the Transferors and there will be no indebtedness created in favor of the Transferors as a result of the Transaction.
- (k) The transfers and exchanges will occur under a plan agreed upon before the Transaction in which the rights of the parties are defined.
- (l) All exchanges will occur on approximately the same date.
- (m) There is no plan or intention on the part of the Transferee to redeem or otherwise reacquire any common stock (including any common stock to be issued with respect to the CCSs) or indebtedness to be issued in the Transaction.
- (n) Taking into account any issuance of additional shares of Transferee stock; any issuance of stock for services; the exercise of any Transferee stock rights, warrants, or subscriptions; a public offering of Transferee stock; and the sale, exchange, transfer by gift, or other disposition of any of the stock of the Transferee to be received in the exchange, the Transferors will be in “control” of the Transferee within the meaning of § 368(c) of the Code.
- (o) Each Transferor will receive Stock, securities, or other property approximately equal to the fair market value of the property transferred to the Transferee or for services rendered or to be rendered for the benefit of the Transferee.
- (p) The Transferee will remain in existence and, indirectly, retain and use the property transferred to it in a trade or business.
- (q) There is no plan or intention by the Transferee to dispose of the transferred property other than in the normal course of business operations.
- (r) Each of the parties to the Transaction will pay its or his/her own expenses, if any, incurred in connection with the Transaction.
- (s) To the best of Company’s knowledge, the Transferors are not under the jurisdiction of a court in a title 11 or similar case (within the meaning of § 368(a)(3)(A)) and the Stock received in the exchange (including any stock to be received with respect to the CCSs) will not be used to satisfy the indebtedness of such debtor.
- (t) The Transferee will not be a “personal service corporation” within the meaning of § 269A of the Code.

- (u) No interest in the Company is entitled to a special allocation(s) of income, gain, loss or deduction or to a guaranteed payment relating to specific partnership property.
- (v) The terms of the CCSs will comply with Rev. Proc. 77-37, 1977-2 C.B. 568, and Rev. Proc. 84-42, 1984-1 C.B. 521.
- (w) The OP will have at least two partners for federal income tax purposes as of the date of the Transaction.
- (x) The quality and level of the risks of the assets transferred to the Transferee will be substantially identical to the quality and level of risks of assets that will be held by the Transferee after the Transaction. For purposes of this representation, the quality and level of risk is determined by taking into account, among other things, the assets' relative values, nature, and mix.
- (y) The Transferee has no plan or intention to depart significantly from the investment strategy or practice of Company. For purposes of this representation, Company's investment practice is determined by taking into account, among other things, the relative values, natures, and mix of assets in its asset portfolio historically and immediately before the Transaction.
- (z) Not more than 25 percent of the value of the Company's interests in property is invested in any one property, and not more than 50 percent of the value of the Company's interests in property is invested in five or fewer properties.
- (aa) Prior to the date of the Transaction, the Transferors will not have entered into a binding agreement to sell, exchange or otherwise dispose of any of the common stock to be received in the Transaction.
- (bb) Company will not hold any interest in a RIC or REIT before or after the Transaction.
- (cc) Company has no corporate members.

Based solely on the information submitted and on the representations made, it is held as follows (unless otherwise indicated, all section references are to the applicable Internal Revenue Code):

- (1) The transfer of Company Units and money by the Transferors in exchange for Transferee Stock (including any common stock to be received with respect to the CCSs, but excluding that portion of each share, if any, representing interest) will constitute an exchange within the meaning of section 351. The transfer will not be treated as a transfer to an investment company within the meaning of section 351(e).

(2) Gain will be recognized by the Members upon the transfer of Company Units to Transferee in exchange for Transferee Stock to the extent that, with respect to any such Member, the sum of the liabilities assumed exceeds the total of the adjusted basis of the Company Units transferred (sections 351 and 357(c)). No loss will be recognized by the Transferors upon the transfer of Company Units and money to Transferee in exchange for Transferee Stock (section 351).

(3) No gain or loss will be recognized by Transferee upon the receipt of Company Units and money in exchange for Transferee Stock (section 1032(a)).

(4) The basis of the Transferee common stock received by the Transferors (including any common stock to be received with respect to the CCSs, but excluding that portion of each share, if any, representing interest) will be the same as that of the property exchanged, decreased by the amount of liabilities assumed, and increased by the amount of any gain recognized on the exchange (section 358). Until the final distribution of the total number of shares of Transferee common stock to be issued in the exchange is made, the interim basis of the Transferee common stock received in the exchange by the Transferors (not including that portion of each share, if any, representing interest) will be determined, pursuant to section 358, as though the maximum number of shares to be issued (not including that portion of each share, if any, representing interest) has been received by the Transferors (see Rev. Rul. 75-237, 1975-1 C.B. 116; Rev. Proc. 84-42, 1984-1 C.B. 521).

(5) The Transferee's basis in the property received shall be the same as it would be in the hands of the Transferors, increased by the amount of any gain recognized to the Transferors on the exchange (subject to any limitation on basis increase under section 362(d)) (section 362(a)).

(6) The holding period of the Transferee common stock received by the Transferors (including any common stock to be received with respect to the CCSs, but excluding that portion of each share, if any, representing interest) will include the holding period for the property transferred, provided such property was held as a capital asset or section 1231 asset on the date of the exchange (section 1223(1)).

(7) The exchange of 50 percent or more of Company Units will cause a termination of the Company under section 708(b)(1)(B). As a result, the following is deemed to occur: The Company contributes all of its assets and liabilities to a new partnership in exchange for interests in the new partnership and, immediately thereafter, the Company distributes interests in the new partnership to the partners in proportion to their respective interests in the Company in liquidation of the Company for the continuation of the business by the new partnership (§1.708-1(b)(4)). Section 704(c) principles will apply to the assets contributed to the new partnership as a result of the termination of the Company (§1.704-3(a)). Moreover, because the exchange of Company Units will cause a termination of the Company, the Company is treated as exchanging its entire interest in the capital and profits of lower-tier partnerships (§1.708-1(b)(2)).

(8) Under section 1223(1), §1.1223-3(a)(2) and (e) and section 735(b), the holding period of the interests in the new partnership received as a result of the termination of the Company under section 708(b)(1)(B) may be divided. The portions of the interests in the new partnership received in exchange for assets that are neither capital assets nor section 1231 assets will begin on the day following the day of the exchange. The Members' and the Transferee's holding period in the OP Units received in exchange for property (not including cash) will be similarly divided (section 1223).

(9) Members and Transferee will recognize gain upon their transfer of Company Units to OP in exchange for OP Units to the extent that any net deemed distribution under sections 752(a) and (b) (taking into account Company liabilities from which the aforementioned transferors are relieved and the OP liabilities that are allocated to the aforementioned transferors) exceeds their adjusted bases. Members will recognize no loss on such exchanges (section 731(a)(2)).

Except for the specific rulings above, we express no opinion concerning the federal tax consequences of the transactions described under any other provision of the Code. For example, no ruling was requested or given concerning whether any entity, or any part of this transaction, qualifies under section 856 and no ruling was requested or given with respect to section 483. Moreover, no opinion is expressed or implied regarding whether the contribution of money by the OP to the Company, followed by the redemption of certain of the Units in the Company for cash, should be characterized as a sale of those Units that may result in significantly different tax treatment of any gain recognized by the Member than would respecting the transaction as a redemption of those Units (see, for example, §1.1(h)-1(b)(3)(ii)). Finally, we express or imply no opinion regarding the appropriate interaction of the regulations under sections 752 and 357(d), the effects of any refinancing of the Company's or OP's liabilities, the effects under section 465 of the transactions described, or whether use of a partnership is

consistent with the intent of subchapter K (see, for example, §1.701-2(d), Example 4).

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant.

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

Sincerely,

*Thomas I. Russell*

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Thomas I. Russell  
Assistant Branch Chief  
Office of Associate Chief Counsel  
(Corporate)