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Legend:

Taxpayer =

REIT A =

Area =
City =
LLC =
Partnership =

x =
y =
z =

Dear

This responds to a letter dated May 2, 2019, requesting rulings on behalf of Taxpayer. Taxpayer requests rulings with respect to the qualification of certain items of income under section 856 of the Internal Revenue Code ("Code") in connection with the parking garages described below.

FACTS

Taxpayer and REIT A (together, "Companies") have each elected to be taxed as a real estate investment trust ("REIT") under sections 856 through 859. Companies are engaged in owning and developing certain parcels of real estate (described below) for rent that are located near Area in City. This development activity is part of a mixed-use development project spanning and required to include

.

The Parcels

Taxpayer and LLC, a REIT, plan to develop an unimproved parcel in Area that is permitted to have nearly x square feet of gross floor area containing retail and office space along with a subsurface parking garage ("Parcel 1"). Taxpayer represents that, under local law, Parcel 1 currently may not be subject to a condominium regime because it is unimproved. As soon as it is permissible under local law, Parcel 1 will be submitted to a condominium regime with two units: a unit containing at least y floors of office space (the "Parcel 1 Office Unit"), title to which will be legally conveyed to a disregarded entity of Taxpayer, and a unit containing the ground floor retail space (the "Parcel 1 Retail Unit"), title to which will be legally conveyed to a disregarded entity of LLC.

Across the street from Parcel 1 is a parcel that contains newly constructed towers containing residential and retail space and a subsurface, three-level parking garage ("Parcel 2" and, together with Parcel 1, the "Parcels"). Parcel 2 is currently subject to a condominium regime with two units: a unit containing the retail space and related amenities (the "Parcel 2 Retail Unit") and a unit containing the residential space and related amenities (the "Parcel 2 Residential Unit"). The Parcel 2 Retail Unit is indirectly owned by REIT A through a z% interest in Partnership. The Parcel 2 Residential Unit is owned by an unrelated third party.

Parking Garages

Parcel 1 Office Garage

Parcel 1 will contain an underground parking garage (the "Parcel 1 Office Garage"). The condominium documents will provide that the Parcel 1 Office Garage will either be (i) part of the condominium unit compromising the Parcel 1 Office Unit (owned by Taxpayer), or (ii) a "limited use" condominium common area separate from the Parcel 1 Office Unit but reserved for its use. In either event, the Parcel 1 Office Unit will make the Parcel 1 Office Garage available to its tenants and their guests, customers, or subtenants, as well as to the general public. Taxpayer will maintain, repair, and light the Parcel 1 Office Garage. Taxpayer will also assign and mark the reserved spaces in connection with leasing space in the Parcel 1 Office Unit to the tenants. In addition, as needed to manage the REIT itself, Taxpayer will perform fiduciary functions, such as dealing with taxes and insurance, as permitted by § 1.856-4(b)(5)(ii) of the Income Tax Regulations.

The condominium documents will provide that the Parcel 1 Office Unit leave a certain number of parking spaces available for daily public parking. Because parking is available to the public, some of the tenants, invitees, guests, customers and subtenants of LLC (owner of Parcel 1 Retail Unit) will use the Parcel 1 Office Garage. Taxpayer represents that the Parcel 1 Retail Unit does not desire or require dedicated parking as long as some amount of public parking is available nearby, and there are already

several public parking garages nearby. Certain tenants of the Parcel 1 Office Unit may, pursuant to their leases, be granted the right to use a specified number of spaces in the Parcel 1 Office Garage. Such spaces could be reserved for the exclusive use of the foregoing tenants or, alternatively, the tenants may be issued garage access cards that can be used to access the garage and park at unreserved spots.

Taxpayer represents that all income and expenses of the Parcel 1 Office Garage will inure to the benefit of, and will be borne solely by, the Parcel 1 Office Unit. Taxpayer represents that the number of spaces in the entirety of the Parcel 1 Office Garage, including the number of spaces set aside for public parking, is appropriate in size for the expected number of tenants and their respective guests, customers and subtenants of the Parcel 1 Office Unit. The Parcel 1 Office Garage is expected to be used predominantly by the Parcel 1 Office Unit's tenants, guests, subtenants, and customers and will be built for this purpose.

Parcel 2 Retail Garage

Parcel 2 includes a parking garage. The Parcel 2 Residential Unit includes certain areas at the lower levels of the parking garage (the "Residential Parking Garage"). The Parcel 2 Retail Unit includes the remainder of the parking garage (the "Parcel 2 Retail Garage" and, together with the Parcel 1 Office Garage, the "Parking Garages" and each a "Parking Garage"). The Residential Parking Garage has a gated entry separating it from the rest of the parking garage in which it is situated and an easement for ingress and egress through the Parcel 2 Retail Parking Garage. During construction, the owner of the Parcel 2 Retail Unit and the Parcel 2 Residential Unit each decided independently on the size of their respective parking garages and whether such garage would be open to the public in light the intended use of their respective components and the available supply of public parking in a dense urban area with several public parking garages nearby. This letter contains no rulings concerning the Residential Parking Garage.

REIT A will maintain, repair, and light the Parcel 2 Retail Garage. REIT A will also assign and mark the reserved spaces in connection with leasing space in the Parcel 2 Retail Unit to the tenants. In addition, as needed to manage the REIT itself, REIT A will perform fiduciary functions, such as dealing with taxes and insurance, as permitted by § 1.856-4(b)(5)(ii). Certain tenants of the Parcel 2 Retail Unit may, pursuant to their leases, be granted the right to use a specified number of spaces in the Parcel 2 Retail Garage (through reserved spaces or access cards). The Parcel 2 Retail Garage will also be available for use by the general public. Taxpayer represents that the number of spaces in the entirety of the Parcel 2 Retail Parking Garage is appropriate in size for the tenants, guests, subtenants, and customers of the Parcel 2 Retail Unit. The Parcel 2 Retail Parking Garage is expected to be used predominantly by the Parcel 2 Retail Unit's tenants, guests, subtenants, and customers and was built for this purpose.

Garage Connection

The land-use and environmental permits for the entire mixed-use development project require the Parking Garages to be physically interconnected underground. Once physically interconnected, cars will be able to enter and exit either Parking Garage from the other Parking Garage without using the surrounding streets. To facilitate the connection, Taxpayer and REIT A will each grant the other a reciprocal easement for ingress, egress, transit and, as described herein, parking.

Once connected, it is anticipated that each Parking Garage will nonetheless be predominantly used for parking by tenants (and their customers and guests) of the REIT owning such Parking Garage. However, because there will be free access from each Parking Garage to the other, it will be possible for cars entering through the entrance to one of the Parking Garages to park in the other Parking Garage. Thus, it will be impractical to determine in which Parking Garage any individual car has been parked.

Because a car entering one Parking Garage can be parked in either Parking Garage, Taxpayer and REIT A have determined that the Parking Garages must be operated essentially as if they were one parking garage, and they intend to engage one independent contractor (the "Independent Contractor") for the Parking Garages. Taxpayer represents the Independent Contractor will be an independent contractor, as defined in section 856(d)(3), from whom neither Taxpayer nor REIT A derives or receives any income within the meaning of section 856(d)(7)(C)(i) and section 1.856-4(b)(5)(i) of the Income Tax Regulations.

The Independent Contractor will manage and operate the Parking Garages under a single management contract (the "Management Contract") with both Taxpayer and REIT A. Both Parking Garages will have parking attendants, as described in greater detail below. The Independent Contractor will employ all of the individuals (including attendants) who manage and operate the Parking Garages. The Independent Contractor will be directly responsible for providing all salary, wages, benefits, administration, and supervision of its employees. The Independent Contractor will receive arm's-length compensation. Any recurring functions unique to the reserved spaces (such as enforcement) will be provided by the Independent Contractor.

The Independent Contractor will provide security within the garage; collect the parking fees from those using the Parking Garages; maintain and monitor the reserved spaces; maintain the parking equipment; maintain and monitor the Parking Garages for needed repairs and maintenance; and, subject to an approved budget or the owners' approval, supervise such repairs and maintenance.

In addition, the Independent Contractor may park cars, but only in order to maximize capacity of the Parking Garages or for reasons of safety or security. The Independent Contractor may also connect or disconnect electric vehicles from charging stations or move electric vehicles close to or away from charging stations in order to

maximize the use of charging stations. No separate fee will be charged to move or park a car or to connect or disconnect an electric vehicle from a charging station. Occasionally, as a courtesy or when necessary, an attendant may provide minor, incidental, or emergency service, such as charging a battery or changing a flat tire.

Taxpayer represents that, if the Independent Contractor charges for any incidental services, neither Taxpayer nor REIT A will receive any portion of the income derived from, or bear any of the expenses incurred in, the provision of such services. Taxpayer represents that no other services will be provided at the Parking Garages.

Parking Revenues

Because of the joint operation, Taxpayer and REIT A will need to share public parking revenues (the "Parking Revenues") and expenses of the Parking Garages. Taxpayer and REIT A intend to share these items in a manner that replicates as closely as possible the revenue and expenses that each REIT would have if the Parking Garages were operated separately rather than jointly. The Parking Revenues will be apportioned pursuant to a formula that generally will be based on the square footage of each Parking Garage, adjusted for areas not used for parking spaces (e.g., areas used for mechanical equipment, storage, utilities) and also adjusted for reserved spaces (including reserved areas that are physically segregated, referred to as "nested spaces") as designated by each REIT. For reserved spaces, each REIT will earn income directly from its respective tenants.

The operating expenses of the Parking Garages (including the fee paid to the Independent Contractor) will be divided between Taxpayer and REIT A based upon the square footage of each Parking Garage, as described above, except that reserved spaces will be included in the calculation of the square footage of each respective Parking Garage. The sharing formula will ensure that neither Taxpayer nor REIT A will be apportioned Parking Revenues based upon a number of parking spaces that is in excess of the total number of parking spaces available in its Parking Garage.

LAW AND ANALYSIS

Section 856(c)(2) provides that at least 95 percent of a REIT's gross income must be derived from, among other sources, "rents from real property."

Section 856(c)(3) provides that at least 75 percent of a REIT's gross income must be derived from, among other sources, "rents from real property."

Section 856(d)(1) provides that "rents from real property" include (subject to exclusions provided in section 856(d)(2)): (A) rents from interests in real property; (B) charges for services customarily furnished or rendered in connection with the rental of real property, whether or not such charges are separately stated; and (C) rent attributable to personal property leased under, or in connection with, a lease of real

property, but only if the rent attributable to the personal property for the taxable year does not exceed 15 percent of the total rent for the tax year attributable to both the real and personal property leased under, or in connection with, such lease.

Section 1.856-4(b)(1) provides that, for purposes of sections 856(c)(2) and (c)(3), the term “rents from real property” includes charges for services customarily furnished or rendered in connection with the rental of real property, whether or not the charges are separately stated. Services rendered to tenants of a particular building will be considered customary if, in the geographic market in which the building is located, tenants in buildings of a similar class are customarily provided with the service. Parking facilities are listed as an example of services which are customarily furnished to the tenants of a particular class of buildings in many geographic marketing areas. In particular geographic areas where it is customary to furnish electricity or other utilities to tenants in buildings of a particular class, the submetering of those utilities to tenants in the buildings will be considered a customary service. To qualify as a service customarily furnished, the service must be furnished or rendered to the tenants of the REIT or, primarily for the convenience or benefit of the tenant, to the guests, customers, or subtenants of the tenant. The service must be furnished through an independent contractor from whom the REIT does not derive or receive any income.

Section 856(d)(2)(C) provides that any impermissible tenant service income is excluded from the definition of “rents from real property.” Section 856(d)(7)(A) defines “impermissible tenant service income” to mean, with respect to any real or personal property, any amount received or accrued directly or indirectly by the REIT for services furnished or rendered by the REIT to tenants at the property, or for managing or operating the property.

Section 856(d)(7)(B) provides that if the amount of impermissible tenant service income with respect to a property for any taxable year exceeds one percent of all amounts received or accrued during such taxable year directly or indirectly by the REIT with respect to such property, the impermissible tenant service income of the REIT will include all of the amounts received or accrued with respect to the property. Section 856(d)(7)(D) provides that the amounts treated as received by a REIT for any impermissible tenant service shall not be less than 150 percent of the direct cost of the REIT in furnishing or rendering the service.

Section 856(d)(7)(C) provides certain exclusions from impermissible tenant service income. Section 856(d)(7)(C)(i) provides that for purposes of section 856(d)(7)(A), services furnished or rendered, or management or operation provided, through an independent contractor from whom the REIT does not derive or receive any income or through a taxable REIT subsidiary of the REIT shall not be treated as furnished, rendered, or provided by the REIT.

Section 512(b)(3) provides, in part, that there shall be excluded from the computation of unrelated business taxable income all rents from real property and all

rents from personal property leased with such real property, if the rents attributable to such personal property are an incidental amount of the total rents received or accrued under the lease, determined at the time the personal property is placed in service.

Section 1.512(b)-1(c)(5) provides that payments for the use or occupancy of rooms and other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, motor courts or motels, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rent from real property. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas the furnishing of heat and light, the cleaning of public entrances, exits, stairways, and lobbies, and the collection of trash are not considered as services rendered to the occupant.

Section 1.856-4(b)(5)(i) provides that no amount received or accrued, directly or indirectly, with respect to any real property qualifies as “rents from real property” if the REIT furnishes or renders services to the tenants of the property or manages or operates the property, other than through an independent contractor from whom the trust itself does not derive or receive any income.

Section 1.856-4(b)(5)(ii) provides that the trustees or directors of a REIT are not required to delegate or contract out their fiduciary duty to manage the REIT itself, as distinguished from rendering or furnishing services to the tenants of its property or managing or operating the property. Thus, the trustees or directors may do all those things necessary, in their fiduciary capacities, to manage and conduct the affairs of the REIT itself. For example, the trustees and directors may deal with taxes, interest, and insurance relating to the REIT’s property.

Revenue Ruling 2004-24, 2004-1 C.B. 550, identifies circumstances in which a REIT’s income from providing parking facilities at its rental real properties qualifies as rents from real property under section 856(d). In Situation 1, the REIT provides unattended parking facilities for the use of the tenants of its buildings and their guests, customers, and subtenants. Each parking facility is located in or adjacent to a building occupied by tenants of the REIT and is appropriate in size for the number of tenants and their guests, customers, and subtenants who are expected to use the facility. The parking facilities do not have parking attendants. The REIT maintains, repairs, and lights the parking facilities as well as performs certain fiduciary functions, such as dealing with taxes and insurance, as permitted by section 1.856–4(b)(5)(ii). In Situation 2, the facts are the same as in Situation 1 except that at some of the REIT’s parking facilities, parking spaces are reserved for use by particular tenants. The REIT assigns and marks the reserved spaces in connection with leasing space in the buildings to the tenants, and any recurring functions unique to the reserved spaces (such as

enforcement) are provided by an independent contractor from whom the REIT does not derive or receive any income. In Situation 3, the facts are the same as in Situations 1 and 2 except that some of the parking facilities are available for use by the general public and have parking attendants. An independent contractor from whom the REIT does not derive or receive any income manages and operates the parking facilities under a management contract with the REIT whereby the independent contractor remits the parking fees from those using the parking facilities to the REIT and receives arm's-length compensation. The independent contractor employs all of the individuals who manage and operate the parking facilities, including the parking attendants and is directly responsible for providing all salary, wages, benefits, administration, and supervision of its employees. In addition to collecting parking fees from those using the parking facilities, the parking attendants may park cars, without charging a separate fee, and may provide minor, incidental, emergency service at a parking facility.

Revenue Ruling 2004-24 quotes from the conference report underlying the 1986 revision of section 856(d) ("the 1986 conference report").[1] The 1986 conference report provides guidance on services performed directly by REITs, as well as services performed through an independent contractor, and it provides, in part:

> The conferees intend, for example, that a REIT may provide customary services in connection with the operation of parking facilities for the convenience of tenants of an office or apartment building, or shopping center, provided that the parking facilities are made available on an unreserved basis without charge to the tenants and their guests or customers. On the other hand, the conferees intend that income derived from the rental of parking spaces on a reserved basis to tenants, or income derived from the rental of parking spaces to the general public, would not be considered to be rents from real property unless all services are performed by an independent contractor. Nevertheless, the conferees intend that the income from the rental of parking facilities properly would be considered rents from real property (and not merely income from services) in such circumstances if services are performed by an independent contractor.

Revenue Ruling 2004-24 holds that amounts received by the REIT for furnishing unattended parking facilities, under the circumstances described in Situations 1 and 2, and for furnishing attended parking facilities, under the circumstances described in Situation 3, qualify as rents from real property under section 856(d).

Based on Taxpayer's representations, the Parking Garages are similar to the parking facility in Situation 3 of Revenue Ruling 2004-24. As in Situation 3, each Parking Garage is part of a property that includes office, retail, or multi-family residential use, and each Parking Garage is located in or adjacent to a building occupied by

[1] 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-220 (1986), 1986-3 (Vol. 4) C.B. 220.

tenants of the owner of that Parking Garage. As in Situation 3, the owners of the Parking Garages will make the Parking Garages available to tenants (including some on a reserved basis) and their guests, customers, subtenants, and the general public. As in Situation 3, the Parking Garages are appropriate in size for the expected number of tenants, guests, customers and subtenants. Unlike the parking facilities in Situation 3, however, each Parking Garage is connected to the other Parking Garage, so that the Parking Revenues received by Taxpayer may not represent the exact amounts attributable to cars parked in the Parcel 1 Office Garage. Based on Taxpayer's representations that the connection of the Parking Garages is required by the permits for the project, that each Parking Garage will be used for parking predominantly by tenants (and their customers and guests) of the REIT owning such Parking Garage, and that Parking Revenues and expenses will be shared so as to replicate as closely as possible the revenue and expenses that each REIT would have if the Parking Garages were operated separately, the Parking Garages are sufficiently similar to the parking facilities described in Situation 3 of Revenue Ruling 2004-24 that the Parking Revenues should be subject to the same analysis as the parking income received in Situation 3.

Based on Taxpayer's representations, the parking services to be provided in the Parking Garages are also similar to those provided in Situation 3 of Revenue Ruling 2004-24. As in Situation 3, all services rendered at the Parking Garages will be services customarily furnished or rendered in connection with the rental of space in parking garages in the geographic area in which the Parcels are located. As in Situation 3, an independent contractor from whom Taxpayer and REIT A derive no income will, under the Management Contract and in exchange for arm's-length compensation, manage and operate the Parking Garages, employ the attendants and other individuals who manage and operate the Parking Garages, and perform all recurring functions unique to reserved spaces. Therefore, as in Situation 3, the services furnished or rendered, or management or operation provided by the Independent Contractor in connection with the Parcel 1 Office Garage will not be considered furnished, rendered, or provided by Taxpayer.

CONCLUSION

Based on the information submitted and the representations made, we conclude that, under the circumstances described above, Taxpayer's share of the Parking Revenues will qualify as rents from real property for purposes of section 856(d).

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. In particular, no opinion is expressed concerning whether Taxpayer otherwise qualifies as a REIT under part II of subchapter M of chapter 1 of the Code. Additionally, we express no opinion as to whether the Independent Contractor qualifies as an independent contractor under section 856(d)(3) of the Code.

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.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalties 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.

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

Sincerely,

_____

Steven Harrison
Chief, Branch 1
Office of Associate Chief Counsel
(Financial Institutions & Products)

cc: