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Department of the Treasury  
Washington, DC 20224

[Third Party Communication:  
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Person To Contact:  
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Telephone Number:

Refer Reply To:  
CC:ITA:B01  
PLR-128093-19

Date:  
July 21, 2020

In re:

TY:

:

**LEGEND**

Taxpayer	=
Business1	=
Business2	=
Court	=
Date1	=
Date2	=
Date3	=
Date4	=
Development	=
Document	=
Grantee	=
Grantor	=
Location	=
Year1	=
Term	=

Utilities =

Amenities =

\$Cost1 =

\$Cost2 =

\$Cost3 =

Dear :

This ruling responds to a letter dated Date1, requesting permission to use the alternative cost method of accounting under Rev. Proc. 92-29, 1992-1 C.B. 748, for determining when common improvement costs may be included in the basis of properties sold for purposes of determining the gain or loss resulting from sales, without regard to the economic performance requirement of section 461(h) of the Internal Revenue Code. Taxpayer requests to use the alternative cost method to determine the estimated cost of common improvements without regard to the ten taxable year horizon as provided in section 2.02(2) of Rev. Proc. 92-29 with respect to certain real estate development projects.

**Facts**

Taxpayer is an accrual-method corporation incorporated in Year1 and engaged in the business of developing land for Business1 and Business2. Taxpayer's fiscal year ends on Date2. This request concerns the real estate development projects included in Taxpayer's submission to develop Development located in Location. These lots are to be sold over the course of more than ten years. The first sale of benefited property in Development occurred on Date3.

By Document, executed Date4, Grantor transferred to Grantee the following real properties located in Location:

Description	Acres

<b>Total</b>	

Taxpayer’s submission indicates that it is the developer of this land and has an exclusive right to acquire this land from Grantee. Taxpayer intends to develop the above-described acres.

Location requires a surety bond that the owner and/or developer, along with the applicable contractor, execute and deliver in connection with the approval and recordation of plats for subdivision. The surety bond obligates Taxpayer, as developer of the subdivision, to construct the necessary roads, streets, and drainage requirements, including the obligation to maintain said improvements. Specifically, the surety bond provides that the Court has promulgated certain rules, regulations, and requirements relating to subdivisions in Location, which require the owner of a subdivision to construct the roads, streets, and drainage requirements for the subdivision in accordance with certain specifications and within the time set out therein and to maintain them for a period of not less than one year from the date of completion.

Taxpayer will provide two types of improvements for Development: (i) Utilities; and (ii) Amenities. Taxpayer’s submission includes the costs of the improvements on a project-by-project basis. Taxpayer estimates that the cost of Utilities is \$Cost1 and the cost of Amenities is \$Cost2, for a total estimated improvement cost for Development of \$Cost3.

Taxpayer provided the information required by section 6.04 of Rev. Proc. 92-29 and represents that it will comply with the terms and conditions of Rev. Proc. 92-29, including, but not limited to, extending the period of limitation on the assessment of income tax with respect to its use of the alternative cost method under section 7, any annual statement requirements under section 8, and any supplemental request requirements under section 9 for all applicable years.

Taxpayer further represents that (i) it is contractually obligated or required by law to provide Utilities; (ii) it is likely to provide Utilities and Amenities; (iii) the cost of Utilities is not properly recoverable through depreciation; and (iv) the estimated cost of Utilities, as submitted, is accurate. Taxpayer has not represented that it is contractually obligated or required by law to provide Amenities but indicates such improvements are necessary to create a desirable community environment and to ultimately help sell new homes and commercial parcels.

**Law and Analysis**

Section 1.461-1(a)(2)(i) of the Income Tax Regulations provides that for an accrual method taxpayer, a liability is generally taken into account in the taxable year in which all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability. Section 1.446-1(c)(1)(ii)(B) provides that the term “liability” includes any item allowable as a deduction, cost, or expense for Federal income tax purposes. Section 461(h)(1) provides that, in determining whether an amount has been incurred with respect to any liability during any taxable year, the all-events test shall not be treated as met any earlier than when economic performance with respect to such liability occurs.

Revenue Procedure 92-29, 1992-1 C.B. 748, provides an exception to the economic performance requirements of section 461(h) and contains procedures for a developer of real estate to obtain the Commissioner’s consent to use the alternative cost method for determining when common improvement costs may be included in the basis of properties sold for purposes of determining the gain or loss resulting from sales. Generally, under § 1.461-4(d)(4), economic performance occurs as the taxpayer incurs costs in connection with satisfying its liability to provide property or services. However, under the alternative cost method in Rev. Proc. 92-29, a real estate developer may include in the basis of properties sold an allocable share of the estimated cost of certain common improvements notwithstanding the requirements of section 461(h).

Section 2.01 of Rev. Proc. 92-29 defines the term “common improvements” for purposes of the procedure as meaning any real property or improvements to real property that benefit two or more properties that are separately held for sale by a developer. Examples of common improvements include streets, sidewalks, sewer lines, playgrounds, clubhouses, tennis courts, and swimming pools that the developer is contractually obligated or required by law to provide and the costs of which are not properly recoverable through depreciation by the developer.

Section 2.02 of Rev. Proc. 92-29 provides that a taxpayer may estimate the cost of common improvements using a ten-taxable year horizon, consisting of the amount of common improvement costs the developer reasonably anticipates it will incur under section 461(h) during the ten succeeding taxable years, or without regard to a ten-taxable year horizon.

Section 4.01 of Rev. Proc. 92-29 provides that under the alternative cost method, a developer is permitted to include in the basis of properties sold their allocable share of the estimated cost of common improvements without regard to whether the costs are incurred under section 461(h). As of the end of any taxable year, however, the total amount of common improvement costs included in the basis of (or otherwise taken into account with respect to) the properties sold may not exceed the amount of common improvement costs that have been incurred under section 461(h) (“the alternative cost limitation”). If the alternative cost limitation precludes a developer from including the entire allocable share of the estimated cost of common improvements in the basis of the

properties sold, the costs not included may be taken into account in a subsequent taxable year to the extent additional common improvement costs have been incurred under section 461(h). The alternative cost limitation shall be applied on a project-by-project basis. Thus, the common improvement costs incurred with respect to one project may not be included in the alternative cost limitation of a second project.

Section 5 of Rev. Proc. 92-29 provides several requirements for consent to use the alternative method including:

- (1) The developer must be contractually obligated or required by law to provide the common improvements, and the cost of the common improvements must not be properly recoverable through depreciation by the developer.
- (2) The developer must file a request to use the alternative cost method on a project-by-project basis in accordance with the procedure set forth in section 6 of Rev. Proc. 92-29, including sections 6.04(5) and 6.04(6).
- (3) The developer must sign a consent extending the period of limitation on the assessment of income tax with respect to the use of the alternative cost method on a project-by-project basis as described in section 7 of Rev. Proc. 92-29.
- (4) The developer must file an annual statement for each project for which the developer has received permission to use the alternative cost method in accordance with section 8.01 of Rev. Proc. 92-29.
- (5) The developer must file a supplemental request for each project for which the developer has received permission to use the alternative cost method in accordance with section 9.01 of Rev. Proc. 92-29.

Section 6.02 of Rev. Proc. 92-29 provides that, except as provided in section 6.03, a developer requesting permission to use the alternative cost method with respect to a project that desires to determine the estimated cost of common improvements without regard to the ten-taxable year horizon must file a request for a private letter ruling within 30 days after the close of the taxable year in which the first benefitted property in the project is sold. Section 6.02 further adds that a developer will ordinarily be granted consent to use the alternative cost method with respect to the project covered by the request upon a showing: (1) that the developer is contractually obligated or required by law to provide the common improvements, (2) that the developer's estimate of the cost of common improvements is accurate, and (3) that the developer is likely to provide the common improvements.

Section 6.04 of Rev. Proc. 92-29 requires that a request to use the alternative cost method contain certain detailed information including, but not limited to: (i) A

description of the project covered by the request including a description of the tract or tracts of land where the project covered by the request is situated using the name of the state, county, town, and the plat map number; (ii) A cost schedule including the cost or other basis of the entire tract or tracts of land where the project covered by the request is situated and a description of how the cost or other basis was determined and a listing of the lots by subdivision covered by the request; and (iii) A detailed schedule of the common improvements including the following information: (a) A description of each common improvement that the developer is contractually obligated or required by law to provide for the entire tract or tracts of land where the project covered by the request is situated, (b) The person or persons to whom the developer is contractually obligated or required by law to provide the common improvements, (c) A description of the document evidencing the contractual obligation or requirement of law and a description of the nature of the obligation contained in the document, (d) The estimated cost of common improvements, and (e) The estimated date production will begin on each common improvement and an estimated date of completion of the common improvement.

Section 10 of Rev. Proc. 92-29 provides that a developer that fails to substantially comply with the provisions of the revenue procedure will not be permitted to use the alternative cost method and therefore may not include common improvement costs that have not been incurred under section 461(h) in the basis of benefitted properties for the purpose of determining the gain or loss resulting from the sale of the properties.

Taxpayer submitted a ruling request to adopt the alternative cost method within 30 days of the end of the taxable year of the sale of the first benefitted property in Development. The first benefitted property in Development was sold on Date3. Taxpayer represents that it is contractually obligated or required by law to build Utilities for Development pursuant to the surety bond, which incorporates the requirements of the Court for subdivision owners. Taxpayer further represents that it is likely to provide the common improvements required by the Court.

Taxpayer's request includes a project-by-project list of costs in the amount of \$Cost3, which represents the total estimated costs to develop Utilities and Amenities for Development. Taxpayer represents that \$Cost3 are accurate costs of Development and are not properly recoverable through depreciation. Taxpayer has agreed to extend the period of limitation on the assessment of income tax with respect to the use of the alternative cost method on a project-by-project basis and represents that it will comply with all requirements of Rev. Proc. 92-29, including the annual statement requirements of section 8.01 and the supplemental requests requirement of section 9.01.

Based upon the facts and representations submitted, Taxpayer is granted permission to adopt the alternative cost method on a project-by-project basis for the real estate projects to develop Development, as set forth in Rev. Proc. 92-29, for its Utilities common improvement costs totaling \$Cost1 that it is contractually obligated or required

by law to provide. If Taxpayer fails to substantially comply with the provisions of Rev. Proc. 92-29, it will not be permitted to use the alternative cost method and therefore may not include common improvement costs that have not been incurred under section 461(h) in the basis of the benefitted properties for the purpose of determining the gain or loss on sales.

Taxpayer is not granted permission to adopt the alternative cost method set forth in Rev. Proc. 92-29 for costs that are not common improvement costs or for costs that Taxpayer is not contractually obligated or required by law to provide, for example Amenities common improvements totaling \$Cost2.

The ruling contained in this letter is based upon information and representations submitted by 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 the ruling, including whether the costs as submitted are properly classified as common improvement costs under Rev. Proc. 92-29, it is subject to verification on examination.

Except as specifically determined above, no opinion is expressed or implied concerning the federal income tax consequences of the facts described above. No opinion is expressed or implied as to the application of any other provision of the Code or the regulations which may be applicable under these facts.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides 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 ruling is being sent to your authorized representatives. We are also sending a copy this ruling to the Director.

This letter ruling is being issued electronically in accordance with Rev. Proc. 2020-29, 2020-21 I.R.B. 859. A paper copy will not be mailed to Taxpayer.

We are sending a copy of this letter ruling showing the deletions proposed to be made in the letter when it is disclosed under section 6110.

Sincerely,

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Norma Rotunno  
Chief, Branch 1  
Office of Associate Chief Counsel  
(Income Tax & Accounting)

CC: