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March 2, 2015

Ms. Deborah Arceneaux
Badge Number 1000595152
Internal Revenue Service
SE:T:GE:TEB:F: 7226
2600 CitiPlace Ct., Suite 375
Baton Rouge, LA 70808

Village Center Community Development District

Dear Ms. Arceneaux:

This letter is sent in response to Form 5701-TEB Proposed Issue #1 dated August 7, 2013, (relating to the question of whether the Village Center Community Development District (the "Center District") qualified as a political subdivision under Internal Revenue Code section 103(a)) and Form 5701-TEB Proposed Issue #2 dated December 17, 2004, (relating to the question of whether certain of the bonds issued by the Center District are "private activity bonds" within the meaning of Internal Revenue Code section 141). I don't believe that it will come as much surprise for you to hear that the Center District does not agree that it is not treated as a political subdivision for purposes of section 103 or that its bonds are private activity bonds under section 141. Attached are the Center District's responses to the two Forms 5701-TEB. Attachment A addresses the political subdivision issue and Attachment B addresses the private activity bond issue.

I would be happy to discuss these matters further with you after you have reviewed these responses.

Very truly yours,

Perry Israel

A. Response to Form 5701-TEB-TEB Dated 8/7/2013 Regarding Political Subdivision Status

I. Summary

The Form 5701-TEB dated 8/7/2013 (the "Form 5701-TEB" for purposes of this section of the response) argues that the Center District was not a political subdivision during the period of November 29, 1993, through June 1, 2004, when it issued a total of $426,200,000 principal amount of bonds (the "Bonds"). The Center District vigorously disputes this assertion. In brief:

1. The Center District was formed for public purposes as a Florida special-purpose governmental unit under Florida law and, to the extent that it is relevant, the State of Florida and the local political subdivisions creating the Center District exercise significant control over the Center District and its governing body;

2. The State of Florida and the local political subdivisions creating the Center District have the power to terminate the Center District's existence and, upon dissolution, the assets of the Center District transfer to other political subdivisions of the State of Florida; and

3. The Center District had been delegated more than an insubstantial amount of one or more of the three sovereign powers.

The Technical Advice Memorandum (the "TAM") relating to this matter, to the extent that it reaches a different conclusion, is not only incorrect as a matter of law, but posits a novel interpretation of federal tax rules that could not reasonably have been expected by the Center District given the established case law and published guidance.[1] The Center District has requested relief from the application of the TAM pursuant to Section 7805(b) of the Code and anticipates that such relief will be granted in the proper administration of the law. Even if such relief is not granted, however, we do not believe that any reasonable court would uphold the position taken by the TAM.

We have, of course, submitted substantial materials with regard to this issue before. This response is written to summarize and discuss the issue, but to be complete reference should be made to the submission made on behalf of the Center District at the time the request for technical advice was submitted to the Chief Counsel's office (attached as Exhibit 1), addressing all points relating to why the Center District is a political subdivision, and to my subsequent letter of November 1, 2012 to Jim Polfer (attached as Exhibit 2), examining in more depth the extent to which the State of Florida and the local political subdivisions control the Center District.

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[1] The TAM has been sharply criticized by the academic and legal community. *See* Ellen P. Aprill, "Municipal Bonds and Accountability To the General Electorate," Tax Notes, Nov. 4, 2013 (pp. 547 *ff.)*; National Association of Bond Lawyers, Letters to Vicky Tsilas and James Polfer, November 21, 2013 and April 30, 2014;.

II. Facts

The Form 5701-TEB contains a section that largely consists of the agreed-upon statement of facts that was submitted to the Chief Counsel when the submission was made for technical advice. Accordingly, the Center District largely adopts the facts as set forth in that section, but the Center District disagrees with certain statement of facts or the characterization put upon various transactions or facts, as pointed out below. In brief, the facts are as follows:

The Center District was created in accordance with the Florida Uniform Community Development Act of 1980, Florida Statutes Title XIII chapter 190, as amended (the "Act") by the Town of Lady Lake, Florida, on August 17, 1992. The Center District is a commercial community development district, with no residents, and a governing body elected by a landowner election. It is located within a large active adult retirement community in Central Florida known as The Villages.[2] The Villages currently has more than 104,000 residents. To provide for various facilities and amenities in The Villages, the deeds to the various residential properties sold in The Villages contain deed restrictions that require The Villages of Lake-Sumter, Inc. (the "Developer") or its assignee to provide recreational and other amenities (the "Amenities Facilities") in exchange for monthly fees to be paid by the purchaser of the residences (the "Amenities Fees"). The effect of the deed restrictions and the Amenities Fees is to create an "amenities utility."

A year after its formation, the Center District issued bonds to municipalize the water and wastewater utilities operated by Sunbelt Utilities, Inc. ("Sunbelt") through the acquisition of the assets of Sunbelt. At the time of the acquisition, Sunbelt was substantially owned by the same persons who owned Developer. With that acquisition, the Center District became the water and wastewater utility provider for all previous customers of Sunbelt.

In order to provide for self-perpetuation of the amenities utility similar to the water and wastewater utilities, the Center District determined that it would acquire from the Developer the obligation to provide the amenities service (the "Amenities Fees"), the physical amenities facilities (the "Amenities Facilities"), and the concomitant right to receive the payments funding the services and amenities.[3] On May 9, 1996, three and a half years after the Center District was formed, it issued the first of the series of the Bonds to start acquisition of the amenities utility system. As of several years ago, the Center District has taken over all of the amenities services, Amenities Facilities, and Amenities Fees in its service area.[4,5] The Center District also entered

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2 Sometimes referred to as the "Development" in the Form 5701-TEB

3 The governing board of the Center District made this decision after analyzing the public purpose and acquisition price involved, as set forth more fully on page 15 of the Form 5701-TEB.

4 The Form 5701-TEB characterizes the effect of the transactions as "the developer has in effect sold to the district a management contract between himself and the residents where the district is now obligated to provide maintenance services for up to 30 years." In fact, the effect of the transactions is that the Center District has purchased the entire amenities utility, including the obligation to provide services and the right to receive payment for those services. There is no equity interest left in the Developer. Upon dissolution of the Center District or upon action by the Town of Lady Lake, Florida, all assets of the Center District would transfer to the Town of Lady Lake. Moreover, the obligation is into perpetuity, not for 30 years.

5 The Center District's service area generally consists of that portion of The Villages north of County Road 466. The service area of the Sumter Landing Community Development District generally consists of that

into interlocal agreements with three counties, one municipality, and some ten numbered residential community development districts. Pursuant to these interlocal agreements, the Center District is obligated to provide the not only amenities services and Amenities Facilities, but also fire prevention and control services outside its geographic boundaries.

II. Discussion

The Form 5701-TEB and the TAM largely argue that the Center District was not a political subdivision at the time the Bonds were issued because it was not a division of state or local government because, they assert, the Center District was controlled by the Developer rather than the State of Florida or a local government and was not motivated by a public purpose. They further argue that the Center District was not delegated sufficient sovereign powers to be treated as a political subdivision for federal tax purposes. Both of these arguments are incorrect.

A. Background

Treasury Regulations section 1.103-1(b) provides that the term "political subdivision" means "any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit." Nearly every legal authority and every discussion in secondary materials bases its analysis of whether an entity was a "political subdivision" for purposes of section 103 of the Code upon an examination of whether the entity possessed a "not insignificant delegation" of one of the three sovereign powers: the power of eminent domain, the power of taxation, and the police power.

The materials previously submitted on behalf of the Center District discuss at length the authorities relating to the delegation of sovereign powers.[6] Not only do all applicable laws and guidance support the position of the Center District, the secondary materials relating to political subdivisions, although scant, similarly focus solely upon whether a not insignificant amount of one of the sovereign powers has been delegated. *See, e.g.*, National Association of Bond Lawyers, Fundamentals of Municipal Bond Law (2005), "Federal Tax Aspects of Municipal Bonds," pp. 14-15; *and* Ellen Aprill, "The Integral, the Essential and the Instrumental: Federal Income Tax Treatment of Governmental Affiliates," 23 The Journal of Corporation Law 803 (1998), reprinted in 23 Exempt Organizations Tax Review 263 (1999) ("An entity is a political subdivision if it has at least some of the sovereign powers of taxation, eminent domain, and police power"). Even the Service's training materials relating to tax-exempt bonds only discuss

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portion of The Villages south of County Road 466. Pursuant to an interlocal agreement, the Center District provides some services south of County Road 466.

6 *See* Exhibit 1, pages 14-30. *See also, e.g., Commissioner v. Shamberg's Estate*, 144 F.2d 990 (2d Cir. 1944), *cert. denied,* 323 U.S. 792 (1945); *Texas Learning Technology Group v. Comm'r*, 96 T.C. at 694 ("The basic question herein is whether petitioner was authorized to exercise any power which could properly be characterized as 'sovereign.'"); *Texas Learning Technology Group v. Comm'r*, 958 F.2d 122 (5th Cir. 1992); *White's Estate v. Comm'r*, 144 F2d 1019 (1944), *cert. denied,* 323 U.S. 792 (1945). *Compare Seagrave Corp. v. Comm'r*, 38 T.C. 247 (1962) (finding that, although volunteer fire departments perform a public function that is generally carried on by municipal fire departments, it is not enough that they perform a public service; they cannot be called a subdivision of the state unless there has been a delegation to them of some functions of local government); *Philadelphia Nat'l Bank v. United States*, 666 F.2d 834, 839 (3d Cir. 1981), *cert. denied* 457 U.S. 1105 (1982) (holding that Temple University was not a political subdivision because no sovereign power had been delegated).

the sovereign powers. See Module D, "Governmental and Private Activity Bonds," (Rev. 9/03) pp. D-4 through D-5. These materials were completely ignored in both the Form 5701-TEB and the TAM.

Nonetheless, the Field and the TAM argue that possession of a not insignificant delegation of a sovereign power is not sufficient to create a political subdivision. In large part, this is based upon a misreading of Revenue Ruling 83-131 and its progeny. The TAM characterizes Revenue Ruling 83-131 as "concluding that certain corporations did not qualify as political subdivisions, in part because they were 'not controlled directly or indirectly by a state or local government,' but rather by a board of directors 'independent of such authority'." Because this is the only authority cited by the TAM for its notion that an entity must be "controlled" by a state or local government in order to qualify as a political subdivision under section 103 of the Code, Revenue Ruling 83-131 merits more extensive analysis.

Revenue Ruling 83-131 was a reconsideration of a previously issued ruling, Revenue Ruling 57-193. Revenue Ruling 57-193 addressed the status of electric and telephone membership corporations established under North Carolina general statutes. The Revenue Ruling says that, under those statutes,

1. The corporations are designated to be public agencies with the same rights as other political subdivisions of the state;

2. An application for formation of a corporation must be investigated and approved by the State Rural Electrification Authority;

3. Upon dissolution of a corporation, all its assets transfer to the state;

4. Properties of the corporations get the same tax exemption as that of counties and municipalities of the state;

5. The corporations can exercise the power of eminent domain; and

6. The corporations may not be organized for pecuniary profit.

Based upon these factors, Revenue Ruling 57-193 held that the corporations come within the scope of exemption from certain Federal excise taxes provided for states or political subdivisions.

However, subsequent to the 1957 ruling, the State of North Carolina amended its statutes. Revenue Ruling 83-131 reconsidered the previous ruling in light of the changes in the statutes. In particular, Revenue Ruling 83-131 notes that under the changes,

1. The corporations were no longer treated as public agencies for purposes of state law (repealing item 1 above);

2. The statutes no longer treated the corporations as political subdivisions of the state (also repealing item 1 above);

3. Upon dissolution of a corporation, its assets would be distributed to members rather than to the state (repealing item 3 above); and

4. A corporation no longer needed the Rural Electrification Authority's rulings or participation in order to exercise the right of eminent domain (repealing item 5 above).

Revenue Ruling 83-131 also states that, as was the case at the time of Revenue Ruling 57-193, the corporations were organized and controlled by user members and managed by a board of directors. Based upon the changes, Revenue Ruling 83-131 states that the corporations are not divisions of a state or local government because they are financially autonomous and not controlled by a state or local government. Revenue Ruling 57-193 was revoked because it held that those entities were political subdivisions under prior law that no longer applied.

The Center District, however, fits more closely within the facts in Revenue Ruling 57-193 **before** the changes in North Carolina law that it does under the Facts in Revenue Ruling 83-131. Community development districts, including the Center District, are designated as public agencies under State law (same as item 1 for Revenue Ruling 57-193 above); a political subdivision of the State must review and approve the formation of a community development district (same as item 2 above); upon dissolution of a community development district, all its assets transfer to the political subdivision within which it is located (same as item 3 above); the properties of a community development district get the same tax exemption as that of counties and municipalities of the State (same as item 4 above); community development districts can exercise the power of eminent domain (same as item 5 above); and community development districts may not be organized for pecuniary profit (same as item 6 above). **None** of the factors that arose in Revenue Ruling 83-131 as a result of the change in North Carolina law and that distinguished the revised facts from Revenue Ruling 57-193 apply to the Center District or other community development districts in Florida. While Revenue Ruling 57-193 has been revoked due to the changed circumstances of North Carolina's statutes and, therefore, is no longer direct and formal precedent, to suggest that Revenue Ruling 83-131 is direct or indirect support for the conclusion that the Center District is not a political subdivision is a clearly improper reading and application of the Revenue Ruling. To the contrary, a proper understanding of the Revenue Ruling leads to the clear conclusion that the Center District is a political subdivision under Federal tax law.

This conclusion is bolstered by looking at the private letter rulings[7] and technical advice memoranda that follow Revenue Ruling 83-131. (Revenue Ruling 83-131 has never been cited in a case or in published guidance.) The first four times Revenue Ruling 83-131 was cited (TAM 9103003 (October 16, 1990), TAM 9103004 (October 18, 1990), TAM 9103005 (October 18, 1990), and TAM 9107002 (November 8, 1990)), the facts were all the same: A rural water

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[7] Section 6110(k)(3) of the Code provides that private letter rulings may not be used or cited as precedent. Nonetheless, it is useful to refer to private letter rulings to confirm that the Chief Counsel has applied a reasoning that is clearly supported by the law and is consistent with the Center District's application of the law to the current facts. This principal has been applied by courts that have taken note of private letter rulings "to show inconsistent treatment under the law." *See Estate of Eliza Blackford v. Commissioner,* 77 T.C. 1245, 1253, fn. 12 (1981)(citing *Rowen Cos. v. United States,* 452 U.S. 247, as another case doing the same).

district had been formed by the county commissioners upon petition of land owners; at least half of the land owners within its boundaries had to belong to the district; and participating members elected a governing board of directors. The state law was amended in 1985 to provide that a rural water district would distribute its assets to its members, rather than to a governmental entity, upon termination of the district. Citing Revenue Ruling 83-131, the technical advice memoranda held that, because the districts' assets would accrue to the benefit of someone else other than the county on dissolution as a result of the change in law, the income of the district was not excluded from gross income under Section 115. **The sole dispositive fact in these rulings, as was instrumental in Revenue Ruling 83-131, was the change in law to eliminate the transfer of assets to a governmental entity upon dissolution.**

Following those rulings, a private letter ruling was issued that provides more insight into the Chief Counsel's thoughts on the subject. PLR 9230006 (April 22, 1992) cites two of the technical advice memoranda described above. It recites that, since the date of the memoranda, state law had been amended to provide that upon dissolution, the districts' assets must be distributed only to governmental bodies. **That is the only change from the facts recited in the technical advice memoranda.** The private letter ruling holds that, because of the amendment, the assets and revenues of the districts would not benefit private interests and that, accordingly, the districts are political subdivisions. Thus, an examination of the facts of those rulings leads to a conclusion that the most important point relating to "control" is whether the assets transfer to another political subdivision upon dissolution of the entity in question. Of course, the assets of the Center District would transfer to the Town of Lady Lake, a political subdivision of the State of Florida, upon dissolution of the Center District.

Indeed, a review of the history of Revenue Ruling 83-131, including its ancestry and limited progeny, soundly leads to the conclusion that, if there is a single important factor that is determinative of whether an entity is controlled by another governmental entity, it is the circumstance of **what happens to the assets of the subject entity upon dissolution.** There is absolutely no suggestion or support for the proposition that "controlled" is determined by reference to the means of voting for the governance of the entity. To suggest that such a proposition is the deciding factor comes from thin air and is not grounded on any precedent, certainly not Revenue Ruling 83-131, the only precedent that was cited by Chief Counsel in the TAM.

Accordingly, both Revenue Ruling 83-131 and all relevant rulings citing it support the proposition that the Center District is a political subdivision. A reading of Revenue Ruling 83-131 that merely recites the "control" language but does not look to those rulings to see what "control" means is inappropriate—particularly if "control" is given such a broad reading that it overturns a long-standing understanding of the courts, Congress,[8] and the industry that a single developer district can qualify as a political subdivision.

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[8] *See General Explanation of the Tax Reform Act of 1986,* pp. 1160 ("Many States provide for the creation of tax or utility districts that may themselves be qualified governmental units to provide essential governmental functions to an area within a larger governmental unit for which development is planned.").

However, even if it were necessary that a political subdivision be formed for a public purpose and controlled by a state or local government, the Center District meets those requirements.

B. The Center District was formed to serve public purposes

The Florida Legislature established the authority to create community development districts to accomplish governmental purposes. As stated Section 190.002(1) of the Act:

> The Legislature finds that: (a) There is a need for uniform, focused, and fair procedures in state law to provide a reasonable alternative for the establishment, power, operation, and duration of independent districts to manage and finance basic community development services; and that, based upon a proper and fair determination of applicable facts, an independent district can constitute a timely, efficient, effective, responsive, and economic way to deliver these basic services, thereby providing a solution to the state's planning, management, and financing needs for delivery of capital infrastructure in order to service projected growth without overburdening other governments and their taxpayers.

The Center District fulfills these purposes. It was established to create a perpetual and economic method to provide services to the residents of The Villages. These services include not only the amenities services and facilities, but also fire protection, water management, and beautification services. Exhibit 9 of the Petition to Create Village Center Community Development District further describes some of the public benefits served by the creation of the Center District to the State and its citizens and the Town of Lady Lake and its citizens, including management and financing of basic community development services, delivery of services without overburdening other governments and their taxpayers, development of major infrastructure, and development of a well-planned, well-managed, and well-financed commercial community. It should also be noted that, in deciding to create the Center District, the governing board of the Town of Lady Lake, which is elected by a general electorate, concluded that the Center District would serve public purposes.

In addition, the Center District is specifically charged with water management and control under Section 190.012(1)(a), which involves drainage,[9] and preventing flooding and erosion, and with the provision of water and waste water utilities. As early as 1959, the Service has ruled that the control of wind and water erosion and the reduction of damage resulting from floods is a public purpose.[10] And of course the provision of water and waste water utilities has long been considered a public purpose.

C. The State of Florida and local governments exercise sufficient control over the Center District

At the outset, it should be observed that the Developer clearly does not "control" the Center District under the bright-line rules of Treasury Regulations section 1.150-1(e), the only regulations providing guidance as to "control" for purposes of tax-exempt bonds. The Developer

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9 *See* FLA. STAT. § 190.011(11) (2011)

10 Rev. Rul. 59-373, 1959-2 C.B. 37 (July 1959).

does not have the right or power to approve and remove without cause a controlling portion of the Center District Board and the Developer does not have the right or power to require the use of funds or assets of the Center District for any purpose of the Developer. In fact, either right or power would be in violation of Florida law. Indeed, given the substantial taxing, eminent domain, and police powers of the Center District, discussed below in A.II.D. and the exhibits relating to this part A, the Center District appears by reason of Treasury Regulations section 1.150-1(e)(3) to be expressly excluded from being a controlled entity.

Moreover, even on the basis of "all the relevant facts and circumstances," referred to in Treasury Regulations section 1.150-1(e)(1), the Developer does not control the Center District. The Form 5701-TEB recites a substantial number of elements of State and local government control over the Center District on pages 6 through 7. Through this detailed recitations of elements of State and local government control of the Center District, the Form 5701-TEB very effectively sets the stage for the clear conclusion that the Center District is controlled by the State and local government entities. It (following the TAM) conveniently ignores any of these factors when it asserts that the Developer controls the Center District. However, a review shows clear control by the State and local governments of the Center District based on all the facts and circumstances.

As described above, the most important touchstone developed by the Service in its rulings for determining whether an entity is controlled by a state or local government is the disposition of the assets of the entity when it is dissolved.[11] The Act requires that the Center District, like all other community development districts, remain in existence unless (a) it is merged with another community development district; (b) all of the specific community development systems, facilities, and services that it is authorized to perform have been transferred to a general-purpose unit of local government; or (c) it is dissolved because (i) a development permit has not been obtained within 5 years of being established, (ii) it becomes inactive pursuant to Section 189.4044 of the Florida Statutes, or (iii) if, it has no outstanding financial obligations and no operating or maintenance responsibilities, it is dissolved by a nonemergency ordinance of the general-purpose local governmental entity that established the district.[12] Moreover, none of the assets of the Center District would revert to the Developer upon any dissolution; instead, **assets and liabilities of the Center District, like those of any other community development district, are transferred to another local government or political subdivision for a public purpose.**[13] Thus, the laws governing the Center District satisfy the determining factor highlighted in Revenue Ruling 83-131 and subsequent private letter rulings that for an entity to be considered a division of a state or local governmental unit, the state or local governmental unit must become the owner of the entity's assets upon dissolution of the entity.

This fact is recognized by the Internal Revenue Service. The Form 5701-TEB, dated December 17, 2014, expressly and emphatically states at page 11 that "upon dissolution, assets and liabilities of a community development district are transferred to another local government or political subdivision."

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11 *See* page 6 *above.*

12 FLA. STAT. § 190.046 (2011).

13 FLA. STAT. §§ 190.046(2)(b), 190.046(2)(c), and 189.4044 (2011).

In this context, it is also important to observe that the Act also provides that the local general purpose government within whose boundaries the Center District lies may adopt a nonemergency ordinance providing for a plan for the transfer of a specific community development service to the local general purpose government.[14] Thus, a local general purpose government can require that one or more or all of the services (and property relating to those services) be transferred from the Center District without compensation to it. **This effectively gives the local general purpose government the ability to take all services and property from the Center District and cause it to be dissolved as provided in Florida Statutes, §190.046(2)(b), accompanied by a transfer of all assets of the Center District to that government.** That alone indicates substantial accountability to the generally elected local governments.

We have discussed at great length in previous submissions the additional extensive control that the State of Florida and local governments possess and exercise over the Center District.[15] To briefly summarize, here is a list of some of the elements of control exercised over the Center District by the State and local governments:

- Its Board members are subject to oath of office, must file annual financial statements, and must notice voting conflicts
- Its Board members are subject to the laws governing State public employees, which includes:
  - A requirement to be independent and impartial
  - A prohibition from using office for private gain
  - A requirement to discharge duties in the public interest
  - A requirement to act as agents of the people, holding position for benefit of the public
  - A requirement to adopt and follow an enforceable code of ethics
- The Center District must maintain a permanent record book prescribed by the State
- Its Board meetings are required to be open to public
- The Center District is required to provide financial reports and follow procedures relating to budget
- The Center District's proposed annual budget is subject to local governmental review
- The Center District's audits must be submitted to the State annually
- The Center District is subject to public funds investment restrictions
- The Center District is subject to public bidding requirements
- The Center District is required to use a qualified public depository
- The Center District's properties are exempt from execution and sale by general creditors
- General-purpose governments can require transfer of services and properties to them from a CDD without compensation (and can effectively dissolve the CDD)
- The Center District is required to prepare and update a public facilities report

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14 FLA. STAT. §190.046(4) (2011).

15 *See* the Center District's submission to the Chief Counsel in the context of the request for technical advice, pages 8-13.

- The Center District can be compelled to provide various reports to the State and local governments
- The Center District is subject to oversight review by the State and local governments
- The Center District is required to comply with State Administrative Procedure Act when adopting and enforcing rules
- Upon dissolution, all assets of the Center District transfer to another governmental entity

As mentioned above, these factors are explicitly recognized in the Form 5701-TEB. Given this recognition of these numerous elements of control by the State and local governments, it is inexplicable as to how the IRS asserts that there is no such control.

The TAM dismisses the facts and circumstances evidencing extensive control by the State and local governments by asserting that the list of restrictions and controls "do not address the fact that the [Center District] was organized and operated to perpetuate private control and avoid indefinitely responsibility to a public electorate, either directly or through another elected State or local governmental body." This conclusion not only ignores the fact that the Center District is clearly responsible to elected State and local governmental bodies through the mandates, controls, and restrictions placed on the Center District and its governing body, but also tries to create a new, previously unheard of, requirement for an entity to be treated as a political subdivision. The language of the TAM also deliberately misinterprets actions of the Center District, which clearly follow the letter and spirit of the Florida law.

There are no cases or published rulings that support the notion that a political subdivision must have a public electorate or be responsible to a body with a public electorate. To the contrary, previous case law specifically allows landholder elections, rather than general public electorates, for political subdivisions. *See Commissioner v. Birch Ranch & Oil*, 192 F.2d 924 (9th Cir. 1951) (court rejects Commissioner's position of an economic identity between reclamation district and majority landowner, stating "Since the district met the requirements of California law, its status as a district entity, not to be confused with the [business landowners], cannot be questioned regardless of the fact that the district served but a single [business landowner]....even a single parcel of land in a single ownership, may justify the exercise of sovereign powers.") *and Rutland v. Tomlinson*, 63-1 USTC Para. 9173 (M.D. Fla. 1962) (*aff'd* as *Tomlinson v. Rutland*, 327 F.2d 668) (the principles in *Birch Ranch* are sound and require the treatment of a special district created under Florida law as separate from the corporate entity that owned all of the district's bonds and approximately 95% of the land in the district).[16] Moreover, **the Internal Revenue Service has previously ruled that a single landowner district can be a political subdivision.** In Rev. Rul. 76-45, 1976-1 C.B. 51, the Service held that taxes imposed by a municipal utility district formed and controlled by a single taxpayer would not be deductible to the extent they were used to pay for capital assets that tended to benefit the property taxed, but would be deductible to the extent they could be shown to be allocable to maintenance or interest

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16 As cited in our previously submitted materials, the United States Supreme Court has more than once held that landowner elections are a permissible manner for a state to organize local government even in the fact of the one man, one vote requirement. *See* letter to James Polfer dated November 1, 2012.

charges. The ruling states that "the utility districts are political subdivisions of the state and are subject to the supervision of the state water rights commission."

In addition, no evidence demonstrates the organization and operation of the Center District to avoid responsibility to a public electorate. To try to establish that the Center District and the developer possessed an insinuated "bad intent," the TAM asserts that border changes that removed small residential development areas from the territorial boundaries of the Center District are indicative of an attempt to avoid conversion of the Center District from landowner voting to "qualified elector" voting in order to maintain developer control of the Center District. In fact, the residents in small areas that happened to be inside the Center District would otherwise have been disadvantaged compared to their similarly situated neighbors that were outside the Center District because of the imposition of fairly steep maintenance assessments levied on properties inside the Center District compared to much smaller assessments levied on properties outside the Center District. The Center District petitioned the Town of Lady Lake for removal of those small areas to correct this inequity, and the board of the Town, which is elected by a general electorate, approved the adjustment of the boundaries. If the speculations of the IRS were correct, then the Town of Lady Lake also would have been complicit in the conspiracy to maintain landowner voting in the Center District—a highly unjustified and paranoid conclusion. **Moreover, the total number of residents living on those areas as developed is less than 120.** Accordingly, **even if those areas had remained inside the Center District, there would have been no conversion to qualified elector voting.** The unsubstantiated "bad intent" put forward by the TAM and the Field simply has no basis in fact and would not have been furthered by the adjustment of the Center District boundaries.

The TAM and the Form 5701-TEB also try to demonstrate the "control" that the Developer exercises over the Center District by comparing the prices paid for the Amenities Facilities, the right and obligation to provide amenities services into the future, and the concomitant right to receive the Amenities Fees to the Developer's depreciated basis in the amenities facilities. It is not clear what relevance this comparison has; however, it should be noted that any such comparison is grossly misleading. In fact, the Service's own valuation expert has concluded (even in a form that contains gross errors understating the value of the assets acquired) that the value of all of the assets acquired is several multiples of the valuation given the physical assets by the Developer's accountants.[17]

In conclusion, even if the public purpose and control elements were required as a matter of law, the Center District both had sufficient public purposes and was sufficiently controlled to qualify as a political subdivision.

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[17] The Form 5701-TEB also points to a website maintained by a group composing less than 10% of the residents of The Villages called the Villages Property Owners Association to the effect that the Developer elects all of the supervisors of the Center District and that they are business associates, employees, or friends of the Developer. This is not a statement that can be attributed to The Villages or any representative or affiliate of The Villages. Rather, the Association that is cited by the IRS for this proposition is an independent group that has self-proclaimed that it functions as a "watchdog" organization. The information contained in this website is no more definitive than that contained in similar websites that state that the Internal Revenue Service is an illegal organization not properly empowered to assess or collect taxes. *See, e.g.,* http://www.supremelaw.org/sls/31answers.htm.

D. The Center District was delegated more than enough sovereign powers to be treated as a political subdivision

We have previously addressed at length the delegation of sovereign powers to the Center District and concluded that the Center District has more than an insignificant delegation of all three sovereign powers.[18] Importantly, the Form 5701-TEB dated December 17, 2014, describes and discusses the powers of eminent domain and taxing power that have been delegated to the Center District at pages 6 through 10. To briefly summarize just one of those powers, the Act contains two specific delegations of the power of eminent domain to community development districts, including the Center District.

The first, contained in Section 190.011(7)(a) of the Act, is the power to acquire by condemnation any public easements, dedications to public use, platted reservations for public purposes, or any reservations for those purposes authorized in the Act.[19] Apart from the limitation that the property acquired by eminent domain under this power be used for those purposes authorized in the Act, the power under Section 190.011(7)(a) is unlimited. In particular, there is no requirement that the Center District get prior approval from any entity before exercising this delegated power.

The second delegation of eminent domain power is in Section 190.011(11) of the Act, and consists of the power to take by eminent domain any property within the State, except municipal, county, State, and federal property, for the uses and purposes of the Center District relating solely to water, sewer, Center District roads, and water management, specifically including, without limitation, the power for the taking of easements for the drainage of the land of one person over and through the land of another.[20] The Act defines "water, sewer, district roads and water management" to include a broad range of purposes for which the Center District may exercise its eminent domain powers.[21] The only limitation on the Center District's ability to exercise its eminent domain power for this purpose is that, if the Center District exercises the power beyond the geographic boundaries of the Center District, it must get prior approval by resolution of the governing body of the county if the taking will occur in an unincorporated area or prior approval by resolution of the governing body of the municipality if the taking will occur

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18 *See* the Center District's submission to the Chief Counsel in the context of the request for technical advice, attached as Exhibit 1, pages 14-30.

19 FLA. STAT. § 190.011(7)(a) (2011).

20 FLA. STAT. § 190.011(11) (2011).

21 "Water system" includes plants, systems, facilities, property, additions, extensions, and improvements useful for development of sources, treatment, or purification and distribution of water, and includes dams, reservoirs, storage, tanks, mains, lines, valves, hydrants, pumping stations, chilled water distributions systems, laterals, and pipes. FLA. STAT. § 190.003(22) (2011).
"Sewer system" includes facilities for the treatment of industrial wastes resulting from any process of industry, manufacture, trade or business or from the development of any natural resource. FLA. STAT. § 190.003(20) (2011).
"District roads" means highways, streets, roads, alleys, sidewalks, landscaping, storm drains, bridges, and thoroughfares of all kinds and descriptions. FLA. STAT. § 190.003(11) (2011).
"Water management and control facilities" includes lakes, canals, ditches, reservoirs, dams, levees, sluiceways, floodways, curbs, gutters, pumping stations, or any other works, structures, or facilities for the conservation, control, development, utilization, and disposal of water. FLA. STAT. § 190.003(21) (2011).

within a municipality.[22] This limitation does not apply to the power under Section 190.011(11) if the taking is within the Center District's jurisdictional boundaries.

Any exercise of either power of eminent domain authorized by the Act results in title to condemned land being transferred to and remaining with the Center District rather than the State of Florida or any other local government jurisdiction. Additionally, any exercise of either power of eminent domain by the Center District under the Act is through and in the Center District's name rather than in the name of the State of Florida or a local government jurisdiction.

The case law and prior rulings are very clear that either of these delegations would be sufficient for the Center District to be treated as a political subdivision for purposes of Section 103 of the Code. *See, e.g., Commissioner v. White's Estate*, 144 F2d 1019 cert. denied, 323 U.S. 792 (1944) (Triborough Bridge Authority found to be a political subdivision even though it could only exercise the power of eminent domain with the consent of the city in which it was exercising that power). Moreover, although not necessary to concluding that the Center District is a political subdivision and as spelled out in our earlier submissions, the Center District also has been delegated sufficient policing and tax powers to be treated as a political subdivision.[23]

III. Conclusion

In conclusion, the Center District fully qualifies as a political subdivision for purposes of section 103 of the Code under all applicable law and guidance. To the extent that the Field or the TAM concludes otherwise, they simply misinterpret the laws and the facts applicable to this case.

If it were concluded otherwise, not only would the result be contrary to law, it would be a shocking result. Creating a new standard and applying it in the context of an examination is not an application of the tax law with integrity and fairness to all and is an arbitrary and capricious administration of the law.

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22 FLA. STAT. § 190.011(11) (2011).

23 See the Center District's submission to the Chief Counsel in the context of the request for technical advice, attached as Exhibit 1, pages 14-30.

B. Response to Form 5701-TEB Dated 12/17/2014 Regarding Private Activity Bond Status

I. Summary

The Developer does not use any assets that were financed with the Bonds.[1] Any use of the golf courses and the other Amenities Facilities by Future Residents of The Villages (or by the Developer) is only pursuant to the separate property interest retained for the benefit of the Future Residents (and accordingly not financed by the Bonds) at the times the remaining property interests in the Amenities Facilities were purchased with proceeds of the Bonds—no Bonds were used to purchase that retained property interest.

Although the fact that use by the Developer of the Amenities Facilities, if any, is pursuant to a retained easement is sufficient to establish that no Bond proceeds or Bond-financed facilities are used in a private trade or business, in any event, even if the easement had not been retained as a separate property interest, there is no use of the Amenities Facilities by the Developer that exceeds 10% of the proceeds of any issue of the Bonds, the special economic benefit rule does not apply because the Amenities Facilities are used by the general public, and the Developer does not "control" the separate legal entity that is the Center District in such a way that it should be treated as an alter ego of the Developer.

II. No Bond Proceeds Were Used to Purchase Any Assets Used by the Developer in Its Trade or Business

The Form 5701-TEB dated 12/17/2014 (referred to as the "Form 5701-TEB" in this section of the response) argues that the Amenities Facilities purchased with the proceeds of the various Bonds were used in the trade or business of the Developer because the Developer exercises control over the bond-financed property, the Developer retained special legal entitlements to the bond-financed property, and the Developer derived a special economic benefit from the bond-financed property. These arguments rest upon an assertion that the Developer has the right to sell deeds to residences in The Villages to so-called "Future Residents" that contain a right to use Amenities Facilities that have been previously transferred to the Center District. However, these arguments are incorrect because they do not properly examine exactly what was purchased with the proceeds of the Bonds. In fact, no bond-financed property is used by the Developer in its trade or business or by the Future Residents in their trades or businesses.

The Agreements for Purchase and Sale make it clear that the Amenities Facilities are being conveyed subject to a retained easement. For example, recital 6 of Exhibit I presented by the IRS as an attachment to the Form 5701-TEB states that "The Seller is willing to sell the Facilities . . . provided the Seller is able to reserve from the Facilities an easement by which Future Residents . . . may use the Facilities" (emphasis added). The actual deeds (attached as Exhibit 3) are even clearer. In general, the Special Warranty Deeds contain the following language:

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[1] The Form 5701-TEB dated 12/17/2014 only relates to the Recreational Revenue Bonds and not to the Utility Bonds. Accordingly, in this section "Bonds" only refers to the Recreational Bonds.

> The Grantor [the Developer] and the Grantee [the Center District] hereby reserve/grant unto that class of persons defined as "Future Residents" in the Agreement for Purchase and Sale between Grantor and Grantee dated December 15, 1995 ("Purchase Agreement"), a perpetual non-exclusive easement of use and enjoyment in and to property described in Exhibit "A". (Emphasis added.)

Thus, the reserved easement is not actually held by the Developer, but is held by Future Residents,[2] who do not use the Amenities Facilities in any trade or business. However, even if the Developer had retained the right to use the Amenities Facilities under the easement, it would not result in any bond-financed property being used in the Developer's trade or business. The bond-financed property consists of what was purchased with the proceeds of the Bonds (i.e., all interests in the property except the reserved easement granted to Future Residents), not property interests that were not purchased with the Bond proceeds (i.e., the reserved easement granted to Future Residents).

Under Section 103(a) of the Internal Revenue Code, gross income does not include any interest paid on any state or local bond. Section 103(b) provides, in part, that section 103(a) shall not apply to any private activity bond that is not a "qualified bond." Section 141(a) defines a private activity bond to mean any bond issued as part of an issue (i) which meets both the private business use test of section 141(b)(1) and the private security or payment test of section 141(b)(2) or (ii) which meets the private loan financing test of section 141(c). An issue meets the private business use test of section 141(b)(1) if more than 10 percent of the proceeds of the issue are to be used for any private business use. Private business use is defined in section 141(b)(6) as use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit.

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. For this purpose, the use of **bond-financed property** is treated as the direct use of the proceeds. To apply this regulation, it is necessary to identify the actual bond-financed property. For example, if a governmental entity uses bond proceeds to purchase a condominium interest in a building, that condominium interest must be examined to determine whether the bond proceeds are being used in a private trade or business. However, the use in private trades or businesses of other units in the building not purchased with the proceeds of the bonds does not result in the government's condominium interest being used in a private trade or business and, accordingly, does not result in the bond proceeds being treated as used in a private trade or business.

A very straightforward example of this clear principle of the law would be a parking garage where the building is divided into condominium units with one unit purchased or constructed by the city using tax-exempt bond proceeds and the other unit owned by a private party and financed with taxable funds. The use of the separate property interest in the parking garage building that is owned by the private party is not attributed to the city's bond financed portion of the garage.

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[2] It should be noted that "Future Residents" become "Residents" as and when the right to receive Amenities Fees and concomitant obligation to provide Amenities are transferred from the Developer to the District.

Similarly, when an interest in property is purchased with bond proceeds, one must examine whether **that interest** is used in a private trade or business in applying the private business use test. If only a partial interest in property or a separate property interest is purchased using bond proceeds, the use of the property interests that are not purchased with bond proceeds does not affect the analysis of whether the actual bond-financed property is used in a private trade or business.

This analysis of separate property interests is discussed in Example 13 of Treasury Regulations section 1.103-7(c).[3] In the context of an electric generating facility, the example holds that **a property interest in a facility can be financed with bond proceeds if that property interest is used for governmental purposes, even though the rest of the property is used in private trades or businesses.** Legislative history to the Tax Reform Act of 1986 similarly indicates that tax-exempt bond proceeds may be used to purchase the portion of an electric generating facility that is allocable to governmental use, even though an undivided portion of the facility is used in the trade or business of a nongovernmental person under section 141.[4]

Thus, only the property interest purchased by the Center District should be analyzed in determining whether the Bonds meet the private business use test. **The easement retained in favor of the Future Residents, whether held by the Future Residents or by the Developer, is not purchased with Bond proceeds and therefore any use of such easement is irrelevant in determining whether the proceeds of the Bonds have been used in a private trade or business.**

This analysis has been used by the Chief Counsel's office in at least two private letter rulings.[5]

PLR 9311010, December 15, 1992, describes a situation where Transportation Authorities (governmental entities) used bond proceeds to acquire ownership interests in existing rail lines from a freight railroad company in order to avoid the costs of the acquisition and construction of new infrastructure needed for rail operations. The property was subject to a Retained Rail Freight Easement, pursuant to which the freight railroad company retained the right in perpetuity to use the surface and certain air rights of the property it sold to the Transportation Authorities and to operate local and long-distance freight service on the property.

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[3] Treas. Reg. section 1.103-7 interprets the former section 103(b) of the Internal Revenue Code of 1954, which was the predecessor to today's section 141. The legislative history of the Tax Reform Act of 1986 indicates that section 141 "generally retains the [then] present-law rules under which use by persons other than governmental units is determined for purposes of the trade or business test." H.R. 841, 99th Cong., 2d Sess., II-687, 1986-3 (Vol. 4) C.B. 687. There is no indication that Congress intended to eliminate the analysis of the particular property interests purchased with the bond proceeds to the exclusion of property interests excluded from the sale.

[4] H.R. Reg. 841, 99th Cong., 2d Sess., II-690, 1986-3 (Vol. 4) C.B. 690.

[5] Section 6110(k)(3) of the Code provides that private letter rulings may not be used or cited as precedent. Nonetheless, it is useful to refer to private letter rulings to confirm that the Chief Counsel has applied a reasoning that is clearly supported by the law and is consistent with the Center District's application of the law to the current facts. This principal has been applied by courts that have taken note of private letter rulings "to show inconsistent treatment under the law." *See Estate of Eliza Blackford v. Commissioner,* 77 T.C. 1245, 1253, fn. 12 (1981) (citing *Rowen Cos. v. United States,* 452 U.S. 247, as another case doing the same).

Moreover, the scope of the Retained Rail Freight Easement could contract or expand corresponding to the level of the railroad company's freight service operations, subject to the general limitation that expansion of the easement may not interfere with the rail operations of the Transportation Authorities.[6] In a similar transaction described in the same private letter ruling, another governmental entity would use bond proceeds to acquire an exclusive, permanent, rail passenger service easement over other rail properties, with the railroad company retaining the legal title to the real property.

The private letter ruling points out that the legislative history to the Tax Reform Act of 1986 affirms that the private use limitations of section 141 were not intended to prohibit tax-exempt financing of the governmentally used portion of a mixed use facility. Accordingly, it holds that the retention of the real property easements by the freight railroad would not, in itself, be treated a private business use of the proceeds of the bonds. Similarly, the retention of the fee interest by the railroad company would not affect the private business analysis of the easement purchased by the other governmental entity.

A very similar approach has been followed more recently in PLR 200502012, January 14, 2005. In that ruling, an Authority wanted to use bond proceeds to acquire property interests for conservation purposes. The bond proceeds would be used in some cases to purchase "conservation easements" on certain parcels, which would otherwise continue to be used for residential and agricultural purposes. In other cases, the bond proceeds would be used to purchase a present interest in fee simple in the parcel, subject to a *profit a prendre* interest[7] retained by the seller. The private letter ruling concludes that the Authority and the sellers would have distinct property interests, granting them different rights. The permitted uses under the agreements of the sellers would not impinge upon the use of the parcel by the Authority. Accordingly, the Chief Counsel stated that it would consider only the use of the particular property interests purchased with the bond proceeds in determining whether the bond proceeds were used in a private trade or business. Therefore, the private use of the retained property interests would not result in any private use of the property interests acquired with the bond proceeds by the Authority.

The retained easements created in the deeds transferring the Amenities Facilities to the Center District are separate, distinct property interests that do not impinge upon the use of the Amenities Facilities by the Center District and its constituents. Indeed, any use by Future Residents under the easements must be on the same basis as use by Residents, and moreover the records of the Center District show that far and away the largest use of the Amenities Facilities has been by Residents, not by Future Residents.[8] The proceeds of the Bonds were used to purchase the Amenities Facilities subject to the easements. The prices paid by the Center District for the Amenities Facilities reflect the reservation of the easement. See Exhibit I to the Form 5701-TEB, page 9, section 7: "The parties agree that the Purchase Price for the

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[6] Similar rights were reserved from the sale with respect to a fiber optics system to be used by private persons in trades or businesses using easements along the tracks of the conveyed property.

[7] Defined to be an interest in real property treated 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.

[8] See Exhibits 4 and 5, discussed below.

Purchase[d] Assets shall be $22,347,000.00 . . ., which Purchase Price reflects that the Seller is reserving an Easement Reservation" (emphasis added).

Since no proceeds of the Bonds were used to purchase the easement (bond proceeds were only used to purchase the property subject to the easement), any use of the easement by the Future Residents is irrelevant to determining whether the Bonds were used in the trade or business of any private persons. Moreover, even if the Developer were treated as a user of the Amenities Facilities under the easement or the agreement for purchase and sale, it is only a user only pursuant to the retained easement and accordingly it is not using any bond-financed facilities in its trade or business.

Accordingly, the Bonds do not meet the private business use test because of any use of bond-financed facilities by the Developer.

The existence of the retained property interest not purchased with Bond proceeds is sufficient to fully and definitively respond to the IRS' assertion that any purported "use" of the Amenities Facilities by the Developer results in private activity bond status. However, in the interest of completeness, we will address a few other points raised in the Form 5701-TEB.

III. The Developer Does Not Possess Any Special Legal Entitlements to the Amenities Facilities That Give Rise to More Than 10% Private Use of the Proceeds of Any of the Bond Issues

A. No special legal entitlement to use the Amenities Facilities in a private trade or business of the Developer arises from the ability of Future Residents to use the Amenities Facilities in the same manner they are used by Residents

The right of the Developer to sell residences with access to the publicly owned Amenities Facilities is not a special legal entitlement of the Developer. It is not different from the right of the residents of The Villages to sell their residences with access to the publicly owned Amenities Facilities, regardless of whether their current status is that of Resident or Future Resident.[9] Moreover, it is no different from the right of any developer in any city to sell newly constructed homes with access to publicly owned facilities, which does not give rise to private business use even if the developer at that time is the only person developing property in the city. And that right is no different from the right of the Developer to sell residences that attach to the facilities financed with the Center District's utilities bonds. The Form 5701-TEB cannot mean that the IRS takes the position that public utilities or other municipal facilities (e.g., schools, parks, municipal golf courses, etc.) are privately used because developers of residential projects in the municipality have the right to build residences that take advantage of those utilities and facilities and are promoting the benefit of access to these municipal facilities to potential future homeowners.

[9] There is a substantial turnover in the population of The Villages. Approximately 5% of existing homes in the Villages resell in any given year (currently, about 2,500 homes per year). The residents selling their homes also include the right to use the Amenities Facilities. This is a substantial use by the general public on the same basis as the Developer—indeed, the number of homes that resell in each year is currently only slightly less than the number of new homes sold by the Developer.

B. Even if the Developer had a special legal entitlement to bond-financed property because of the ability to offer Future Residents the right to use bond-financed Amenities Facilities, any "private use" because of that right is a temporary use pending completion of the development and is not treated as private business use

Treasury Regulation section 1.141-3(d)(4) provides that use during an initial development period by a developer of an improvement that carries out an essential governmental function is not private business use if the issuer and the developer reasonably expect on the issue date to proceed with all reasonable speed to develop the improvement and the property benefited by that improvement and to transfer the improvement to a governmental person and if the improvement is in fact transferred to a governmental person promptly after the property benefited by the improvement is developed.

The Amenities Facilities serve several essential governmental functions, including provision of recreational facilities to the residents of The Villages, provision of fire and other health and safety services, and provision of water control facilities.[10] Because of the very size of the development (currently there are more than 104,000 residents in The Villages), it was expected that the development of the Amenities Facilities and transfer of those Amenities Facilities north of County Road 466 to the Center District (and, later, south of County Road 466 to Sumter Landing Community Development District) would take some time and would operate in stages, with transfers occurring relatively promptly after the property was developed. However, it was ultimately expected that all the Amenities Facilities would be transferred to the Center District (and Sumter Landing Community Development District) in a timely fashion.[11]

Thus, "use" of the Amenities Facilities by the Developer, if any, during the development period should be disregarded in determining whether there is private business use. Instead, the development falls within the Treasury Regulation exception for temporary use. Moreover, any such "use" by the Developer would also be disregarded under the legislative history to the Tax Reform Act of 1986:

> Many States provide for the creation of tax or utility districts that are themselves qualified governmental units to provide essential governmental functions to an area within a larger such governmental unit. During an initial development period, the land in such a district may be owned by a single developer (e.g., a redevelopment agency), or a limited group of developers, who are proceeding with all reasonable speed to develop and sell the land to members of the general public for residential or commercial use. The

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[10] *See* section A.2.B., *above.*

[11] Indeed, prior to commencement of the present IRS examination, that is precisely the pattern that was being followed: a large area was developed and homes were sold, with Amenities Facilities and Amenities Fees transferred on a regular basis to the Center District (or the Sumter Landing Development District). Once the current IRS examination began, the ability to issue bonds to fund subsequent transfers became impaired. Indeed, the only transfer since the examination began was a transfer of the few remaining Amenities Fees and Amenities Facilities north of County Road 466, which were transferred to the Center District without the issuance of bonds because of the small number of Fees and Facilities transferred. The examination has effectively halted the public acquisition of Amenities Facilities and Amenities Fees south of County Road 466 by the Sumter Landing Community Development District.

committee intends that bond proceeds used in such situations to finance facilities for essential governmental functions such as extensions of municipal water systems; street paving, curbing (including storm water collection), and sidewalk and street-light installation; and sewage disposal generally not be treated as used in the trade or business of the developers. Rather the tax status of the bonds generally will be determined by reference to the ultimate (i.e., after the initial development period) use of the facilities.

Such bonds may be treated as essential function (i.e., governmental) bonds, or as exempt-facility bonds, provided that (1) the facilities are designed to serve members of the general public in the governmental unit on an equal basis; (2) ultimate ownership and operation of the facilities is with persons other than the developers (e.g., the governmental unit); and (3) development of the district for sale and occupation by the general public proceeds with reasonable speed.[12]

The legislative history recognizes that a community may be developed by a single developer but nonetheless states that if that use is temporary, it is to be disregarded in computing private business use, provided that the district is developed with reasonable speed. The Amenities Facilities are designed to serve members of the general public in The Villages on an equal basis and the ultimate ownership and operation of the Amenities Facilities is with the Center District, not the Developer. Given the size of The Villages, the development and sale of homes to Future Residents and conveyance of property to the Center District has proceeded with reasonable speed. Even if the Developer were treated as the user of the retained easements with respect to the future use of the Amenities Facilities, such use is quite brief and temporary. Accordingly, "use" by the Developer of the Amenities Facilities, if there were any, is not private business use.

C. Even if the Developer is treated as having a special legal entitlement because of the ability to sell property possessing the right to use bond-financed facilities and such use was not excepted under the temporary use exception, the amount of private business use of any bond issue does not exceed 10%

The Form 5701-TEB asserts that for each Bond issue being examined, more than 10% of the proceeds of that issue was allocable to the purchase of Amenities Facilities. It concludes that, if the Developer is treated as using the Amenities Facilities in its trade or business, it is using more than 10% of each bond issue. However, that analysis is incomplete and the assertion is incorrect. The Form 5701-TEB does not contain any factual basis or legal analysis to support the assertion that the 10% limitation has been exceeded. This glaring failing of the Form 5701-TEB must be addressed by a careful analysis pursuant to which the amount of any private use of the Amenities Facilities must be determined and allocated between the purported use by the Developer and use by the Center District.

It must be recognized that the following discussion is premised on the dubious assumption that the Developer is treated as having some private use of bond financed property, even though, for the reasons discussed above, the Developer is actually not a private user of any bond-financed property.

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[12] H.R. Reg. 841, 99th Cong., 2d Sess., II-523, 1986-3 (Vol. 4) C.B. 523.

Treasury Regulation section 1.141-3(g) states that private use is to be measured based upon the average amount of private business use for each one-year period during the measurement period. It goes on to state that, if the bond-financed facilities are used at different times, use should be measured on the basis of the actual time or amount of use. Thus, taking the golf course and other recreational facilities portion of the Amenities Facilities as an example, the private business use might be measured by comparing the number of residences ("rooftops") sold by the Developer in each period between bond issues and then dividing by the sum of the number of rooftops the Amenities Fees of which have been purchased by the Center District and the number of rooftops sold by the Developer but not yet transferred.[13] That number should then be multiplied by the percentage of each bond issue used to pay for Amenities Facilities to get total private business use for each issue.[14] Exhibit 4 shows this calculation for each year through 2004, by which time development to the north of County Road 466 was substantially complete. As shown in Exhibit 4, the total use by those rooftops not yet transferred to the Center District for each period between bond sales never exceeds 10% for any bond issue. From 2006 on, it is possible to get a more accurate measure of use by calculating the percentage that the actual number of Future Residents using the Amenities Facilities represents of the total number of Residents and Future Residents using the Amenities Facilities, and then multiplying those percentages by the percentage of bond proceeds of each issue used to purchase the Amenities Facilities.[15] As shown in Exhibit 5, any total use by Future Residents (and hence arguably by the Developer) using this methodology is also less than 10% in each year. Moreover, these numbers should be averaged over the measurement period, which would result in a lower average than the highest number for each bond issue. Accordingly, under that measurement the amount of private business use is less than 10% for each bond issue.

Alternatively, it might be said that any purported "private business use" by the Developer is simultaneous with any use of the Amenities Facilities by the Center District and the Residents and their guests. If so, then the amount of private business use should be determined on a reasonable basis that properly reflects the proportionate value to be derived by the various users.[16] Again, an appropriate and reasonable way to measure that proportionate value can be derived in the same manner by looking at the numbers of users or the numbers of transferred rooftops. Again, that results in no bond issue having private business use in excess of 10%.

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[13] This assumes that the Developer sold all residences where the Amenities Fees were transferred to the Center District in the next bond issue on the same day that tested bond issue was issued. Of course, residences were not all sold by the Developer on that date but over the time period leading up to the next bond issue, and accordingly the calculation conservatively overstates the percentage of private business use.

[14] Note that many of the Amenities Facilities, such as the drainage areas and the mail parks, are not used by the Future Residents at all. However, to simplify we will assume that all Amenities Facilities are used by both Residents and Future Residents, which also conservatively overestimates the amount of private use.

[15] Although the Center District does not have information relating to the make these calculations with respect to 2005, it can be seen that the percentage of use by Future Residents actually grows each year, so any use in the 2005 would be even less.

[16] Treas. Reg. section 1.141-3(g)(4)(iii). This is not a situation where the Amenities Facilities are leased or managed by the Developer, with the Developer having some oversight of each user, and accordingly the Amenities Facilities should not be treated as 100% used by the Developer. Instead, the purported private use is more analogous to the naming rights discussed in PLR 200323006, June 6, 2003, and accordingly relative use must be calculated based upon proportionate value.

IV. The Special Economic Benefit Rule Does Not Apply Because the Amenities Facilities Are Used by the General Public

As described above, under any analysis, there is no purported private business use of any Bond issue that exceeds 10%, because (i) the only property interest being used by the Future Residents (and arguably the Developer) was not financed with Bond proceeds, (ii) use by the Developer, if any, is temporary, and (iii) under any reasonable measurement procedure private business use does not exceed 10%. Each of these bases is sufficient to conclude that the Bonds are not private activity bonds. Nonetheless, the Center District wishes to address the assertion made in the Form 5701-TEB that the special economic benefit rule of Treasury Regulations section 1.141-3(b)(7)(ii) applies because the Amenities Facilities are not used by the general public. That assertion simply is not correct.

Treasury Regulations section 1.141-3(b)(7)(i) states that any arrangement that conveys special legal entitlements for the beneficial use of bond proceeds or of financed property comparable to those described in 1.141-3(b)(2) through (6) will result in private business use. Treasury Regulations section 1.141-3(b)(7)(ii) states further that, in the case of financed property that is not available for use by the general public, private business use may be established solely on the basis of special economic benefit to one or more nongovernmental persons, even if those nongovernmental persons have no special legal entitlements to the use of the property. Treasury Regulations section 1.141-3(c)(1) states that use as a member of the general public is not private business use. It goes on to provide that use of tax-exempt bond financed property by nongovernmental persons in their trades or businesses is treated as general public use only if the property is intended to be available and in fact is reasonably available for use on the same basis by natural persons not engaged in a trade or business.

The Form 5701-TEB asserts that the Amenities Facilities are not available to the general public. It states that:

> These facilities are primarily "recreational facilities", principally golf courses, swimming pools and related improvements, and also include postal and security facilities, provided as amenities benefiting on the residents of a specific private residential gated community. This is confirmed in the list of the assets purchased with the Bonds; this list includes "Guard Houses" which are all descried as "a security guardhouse, entry wall structures, and electronic gate arm designed to limit access to residents."

The foregoing statement is in stark and direct conflict with the IRS's own statement at page 12 of the Form 5701-TEB that "None of the entrances to the Center District are gated and all the roads in the Center District are public thoroughfares." In fact, as has been stated in numerous submissions to the IRS on behalf of the Center District, neither the Center District nor the numbered residential districts are "private gated communities." The guard houses are located only at those entrances to the numbered residential districts (there are no guard houses related to the Center District) that are off of high-speed thoroughfares. They are designed to slow traffic down for the largely residential areas of the numbered residential districts and to make it safe for residents, who travel not only by automobile but also by golf carts on the streets inside the numbered districts. **There are no guard houses at the entrances to the numbered residential**

districts that are not on high-speed thoroughfares. Moreover, at all of the guard houses, the gates may be opened merely by pushing a button. Entrance is not limited to residents and their guests. This was amply demonstrated in the tour of the facilities taken by IRS agents during the week of April 12, 2010.

> The Form 5701-TEB goes on to state that:
>
> The executive golf courses are not public or municipal courses, the type typically financed with governmental tax-exempt bonds. They are private courses for the exclusive use of the residents of The Development Villages [sic]. Non-residents can play on the executive golf courses only as guests of residents. Additionally some courses are designated as "residents only courses."[17] They are simply not available on any basis to the general public. (Footnote added.)

The residential population of The Villages is in excess of 104,000 persons. Based upon U.S. Census data for 2013, this population is comparable with the population of, for example, Wichita Falls, Texas, Green Bay, Wisconsin, Burbank, California, West Palm Beach, Florida, and Boulder, Colorado.[18] It would be a startling conclusion if the IRS determined that a public library in the city of Boulder, Colorado, was not available to the general public if only residents were permitted to get library cards or that the sewer system of Green Bay, Wisconsin, was not available to the general public because only residents of Green Bay are using it. On sheer numbers alone, the availability of the Amenities Facilities to all residents of The Villages must be treated as use by the general public.[19]

Moreover, any resident of The Villages may ask for any number of guest ID cards to allow use of the Amenities Facilities, including the golf courses, by guests. The attached Exhibit 6 is a copy of the Center District's Guest ID Card Program Policy. As noted, any person may get a guest ID card simply at the request of any resident, and once received the guest IDs may be renewed an unlimited number of times. In addition, a person with a guest ID need not be with a person who is a resident to use any Amenities Facilities (unless they are under 19, in which case they must be accompanied by either a resident or a person 19 or older with a valid guest ID). The attached Exhibit 7 shows the total number of guest IDs issued per year. The number of unlimited access guest IDs issued is more than a quarter of a million for each of the last three fiscal years. From any perspective, that is a lot of actual non-resident users of Amenities Facilities!

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[17] As has been pointed out in previous submissions to the IRS, this is factually incorrect. One or two courses were initially designated as "residents-only," however that designation was removed more than 7 years ago.

[18] http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[19] In the regulations proposed under section 141 of the Code, published in the Federal Register on December 30, 1994, there was a numerical test proposed that would have required that at least 25% of the reasonably expected use of a facility be by persons that individually account for no more than 1% of the use of the facility. Prop. Reg. section 1.141-3(e). Although that standard was rejected in the final regulations as being insufficiently flexible to accommodate the wide variety of state and local government financings and disproportionately affecting small local governments, it should be noted that the use of the Amenities Facilities more that meets this numerical test, which is more stringent than the general test actually promulgated.

In addition to the use of the golf courses, the other recreational facilities are subject to high volumes of usage by residents and flexible access by guests. These non-golf recreational facilities experience several hundreds of thousands of separate uses by residents and guests each year. As examples of wide-spread use by residents and non-residents, the recreational facilities are the site of public tournaments for various sporting events such as softball tournaments, archery tournaments, and senior Olympics. These events bring together teams and individuals that are residents or guests of The Villages competing against teams and individuals from all across the State of Florida. Literally, thousands of people participate in these events taking place in The Villages' recreational facilities. The assertion by the IRS in the Form 5701-TEB that the Amenities Facilities are not used by the general public is not only unsupported by the facts presented by the IRS, it is simply wrong. It is, frankly, beyond comprehension and discouraging that the IRS would make this unsupportable assertion, apparently without any investigation of the actual facts, other than apparently a very limited and cursory poking around on The Villages' website. The Amenities Facilities are indeed used by a vast number of people that, by any definition or reckoning, constitute use by the general public.

In addition to taking into account the hundreds of thousands of annual users of the Amenities Facilities that are not residents, the public use can also be understood simply by looking at the composition of The Villages residents alone and appreciating that the more than 104,000 residents of The Villages **are** the general public, not only in number, but also in the make-up of these people. The residents of The Villages come from all over the United States, indeed the world; they are all "sizes and shapes" and from every walk of life. The residents are not limited to a certain category of persons.[20] Any person may buy a house or other residence in The Villages. The Villages is not a "company town" that is restricted to employees of a particular business entity or class of persons. Furthermore, there is significant mobility within The Villages community, with a substantial number of home sales between residents and new residents, as well as short term and long term rentals to newly arriving residents.[21] The melting pot that comprises the residents of The Villages are active users of the Amenities Facilities. In this light, it is actually quite astounding that the IRS would assert that the Amenities Facilities are not used by the general public. It is equivalent to asserting that a municipal transit system is not available to the general public because only persons who can afford a ticket may ride on the system.

Clearly, there is substantial use of the Amenities Facilities not only by residents but also by persons who live outside the boundaries of the Center District and the numbered residential districts. If it were important for tax purposes that nonresidents use the Amenities Facilities for them to be treated as available to the general public (which is not a requirement in the regulations), it is obvious that the number of non-residents who use the Amenities Facilities is more than substantial. While it may be impossible to identify with accuracy the actual number of people that use the Amenities Facilities each year, between golf, swimmers, exercise classes, team sports, tournaments, clubs, and on and on and on, let's roughly say that there are maybe

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[20] *See* Rev. Rul. 98-47 (stating that making rental units in a complex available to all persons of retirement age results in the complex being treated as available to the general public).

[21] As pointed out above, there is a turnover of approximately 5% in The Villages in each year.

500,000 or maybe 1,000,000 users of Amenities Facilities each year.[22] These users of the Amenity Facilities are the general public. Without any doubt, the Amenities Facilities are used by the general public.

V. The Center District is "Controlled" by the State of Florida and the Center District Controls Its Assets, Not the Developer

The Form 5701 repeats the tired accusations previously asserted that the Center District is "controlled" by the Developer, with the apparent conclusion that the Developer has special legal entitlements to the assets of the Center District—or perhaps even the insinuation that the Center District is an alter ego of the Developer. We have previously discussed this issue to great extent in prior filings.[23] Even if the Center District were not sufficiently controlled by the State of Florida and local political subdivisions in the State to be treated as a "political subdivision" for purposes of Section 103(a) (a proposition the Center District vigorously disputes), the separate legal status of the Center District must be respected.

As recognized by the IRS, the Center District is a local unit of special-purpose government of the State of Florida, created pursuant to State law by an ordinance adopted by the Town of Lady Lake (a political subdivision of the State of Florida).[24] As such, it is clearly a separate legal entity from the Developer. As shown in the deeds and in the agreements of purchase and sale, the Center District, not the Developer, is clearly the owner of the bond-financed assets.[25]

The Developer clearly does not "control" the Center District under the bright-line rules of Treasury Regulations section 1.150-1(e), the only regulations providing guidance as to "control" for purposes of bonds. The Developer does not have the right or power to approve and remove without cause a controlling portion of the Center District Board and the Developer does not have the right or power to require the use of funds or assets of the Center District for any purpose of the Developer. In fact, either right or power would be in violation of Florida law. Indeed, given the substantial taxing, eminent domain, and police powers of the Center District, discussed above in Part A II.E. of this submission and in Exhibit 1, the Center District appears by reason of Treasury Regulations section 1.150-1(e)(3) to be expressly excluded from being a controlled entity.

Even on the basis of "all the relevant facts and circumstances," referred to in Treasury Regulations section 1.150-1(e)(1), the Developer does not control the Center District. If anything, the Center District is controlled by the State of Florida and the local governments that formed it. The Form 5701-TEB recites a substantial number of elements of State and local government control over the Center District on pages 6 through 7. It conveniently ignores any of these factors when it asserts that the Developer controls the Center District. However, as

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[22] There are about 750,000 rounds of golf played on the Amenities Facilities owned by the Center District in each year alone.

[23] *See, e.g.,* Exhibits 1 and 2.

[24] *See* page 12 of the Form 5701-TEB.

[25] For example, all risk of loss or opportunity for potential gain with respect to the Center District's assets, including the Amenities Facilities, belong to the Center District.

indicated by those very factors recited in the Form 5701-TEB, the Center District is controlled by the State of Florida and by the local political subdivision in which it is located. Under Florida state law, the Center District is governed by a five-member Board of Supervisors. Pursuant to Florida law, Board Members are required to take the same oath that all other State and local political subdivision officers and employees must take to uphold all laws of the State of Florida, which includes laws against self-dealing.[26] State law further subjects the Board Members to the laws governing public employees,[27] which includes a requirement that the Board Members be independent and impartial, a prohibition against using office for personal gain, a requirement that the Board Members discharge their duties in the public interest, a requirement that they act as agents of the people, and a requirement that they hold their position for the benefit of the public.

Florida law requires that all meetings of the Board be public meetings and that they adhere to the State of Florida Code of Ethics for Public Officials.[28] Moreover, under Florida law, the Center District, like all community development districts, is subject to information reporting, audits, and oversight by the State of Florida and the local political subdivisions that created the Center District. In addition, both the State and the local political subdivisions have the ability to dissolve the Center District and take ownership of all its assets without the requirement to make any compensation payments—a step which would surely have been taken if the Board Members acted for the benefit of the Developer rather than for the good of the public. Such a taking of property from a private entity or individual would not be permitted under the U.S. Constitution.

The Form 5701-TEB repeats prior speculations of the IRS as to why the boundaries of the Center District have been changed from time to time and avers that those changes were done in order to preserve landowner voting in the Center District. The Center District has previously pointed out that the changes were made to ensure that residential units across the street from each other would have the same assessment structure—had those areas remained in the Center District, residents living in those areas would have been subjected to the much higher assessments imposed in the Center District. Moreover, under Florida law, any changes in the geographic boundaries of the Center District may only be made by the local government that formed the Center District. The Board may petition for changes in its boundaries, but it cannot change them on its own. The Town of Lady Lake specifically approved the changes in the boundaries. If the speculations of the IRS were correct, then the Town of Lady Lake also would have been complicit in the conspiracy to maintain landowner voting in the Center District—a highly unjustified and paranoid conclusion. **In any event, had those areas remained in the Center District, there would still be fewer than 250 residents in the Center District** and landowner voting would still be permitted under Florida law—contrary to the assertions of the Form 5701-TEB, it would not have been necessary to remove these areas to maintain landowner voting.

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[26] Fl. Stat. §876.05. Please note that Chapter 876 of the Florida Statutes was reorganized and renumbered in the last legislative session. We will continue to refer to the numbering prior to the reorganization, since that is used in the Form 5701-TEB.

[27] Fl. Stat. Chapter 112.

[28] Ibid.

It is true that the Developer or related entities held a majority of the landowner votes within the Center District for a number of years. However, the ability to elect a governing board of a political entity does not mean that the political entity is "controlled by" or is an "alter ego" of the electors, even if there is only one elector. Florida law clearly requires that the Board Members act as fiduciaries of the public trust and not as employees or representatives of their electors.[29] **Moreover, the principle that a governmental entity is not "controlled by" or an "alter ego" of its voters, even where there is a limited number of voters, is long-standing and well established.** For example, in *Commissioner v. Birch Ranch & Oil,* 192 F.2d 924 (9th Cir. 1951), the court rejected the Service's position that there was an economic identity between a reclamation district and its majority landowner. There the court stated:

> Since the district met the requirements of California law, its status as a district entity, not to be confused with the [business landowners], cannot be questioned regardless of the fact that the district served but a single [business landowner]....even a single parcel of land in a single ownership, may justify the exercise of sovereign powers.

Similarly, in *Rutland v. Tomlinson,* 63-1 USTC Para. 9173 (*aff'd* as *Tomlinson v. Rutland,* 327 F. 2d 668, 5th Cir. 1964), the court held that the principles espoused in Birch Ranch (13 T.C. 930, 1949) are sound and require the treatment of a special district created under Florida law as separate from the corporate entity that owned all of the district's bonds and approximately 95% of the land in the district. These two cases alone are sufficient controlling precedent that must be honored by the IRS. The Field should not ride roughshod over long-established law.

In addition to these controlling legal principles, the facts demonstrate that the Center District and its Board control the Center District's activities and assets, including the bond-financed assets. The Board, acting in it its fiduciary role, and not the Developer, hires the Center District's manager, who manages the day-to-day operations of the Center District. The Board handles all long-term planning for the Center District. The Board, acting in its fiduciary capacity, has the sole capacity to determine whether and when it will enter into interlocal agreements or purchase facilities (including Amenities Facilities) or Amenities Fees that it has not already committed to purchase. The Board follows a careful and delineated procedure, including public meetings and input from residents to determine whether it is in the best interest of the Center District and its constituents to purchase facilities and the price that it will pay for them. Prior to the purchase of the Amenities Facilities by the Center District, the Center District has imposed contractual obligations on the Developer as to the quality, quantity, and nature of the Amenities Facilities being developed.[30] With respect to the Amenities Facilities and the Amenities Fees that have been purchased by the Center District, the Center District controls the use and maintenance of the facilities and the amount of the Amenities Fees.

In particular, the Developer does not retain any legal rights to control how the Amenities Facilities and the Amenities Fees are used after their transfer to the Center District. By contrast,

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[29] One point made in the Form 5701-TEB is that a number of the Board Members have been officers or employees of the Developer. However, surely the IRS is not suggesting that the fact that an officer of a political entity is an employee of a corporation does not mean that the corporation "controls" the assets of the political entity. Such a result would be shocking.

[30] See Exhibit Q to the Form 5701-TEB..

in *Example 5*, contained in Treasury Regulations section 1.141-3(f), which is cited in the Form 5701-TEB, the corporation retained legally enforceable rights to compel use of the transferred property as a parking garage and to set the fees charged for the persons parking. The Developer does not have similar rights to the Amenities Facilities or the Amenities Fees purchased by the Center District using proceeds of the Bonds.

Perhaps the fact best demonstrating the independence of the Center District from the Developer is that, despite several years of examination and valuation analysis by the IRS, there has been no evidence that any transactions between the Center District and the Developer took place at anything other than arms'-length. As we have discussed in previous submissions, the valuations prepared by the IRS, when corrected for obvious error, show that fair market value was paid for the assets purchased by the Center District from the Developer. Surely if the Developer "controlled" the Center District, it would have caused the Center District to pay inflated prices for the assets and fattened its wallet.

Thus, the activities of the Center District in operating the Amenities Facilities are consistent with and governed by the Interlocal Agreements authorized by Florida Statutes, Section 163.01, duly adopted by elected governing bodies of the Town of Lady Lake, Lake County, Sumter County, and Marion County. They are also consistent with Florida law and the fiduciary responsibilities of the Board Members of the Center District. The Developer does not continue to own, directly or indirectly, the Bond-financed assets, nor does it have any legal rights to control the operations of the Board or the Center District or control over the Center District's facilities, whether or not financed with tax-exempt bonds. Accordingly, the Developer is not treated as "using" any of the bond-financed facilities in its trade or business as a result of its alleged "control" of the Center District or of assets purchased by the Center District.

VI. Conclusion

Any use by the Developer or the Future Residents of the Amenities Facilities is pursuant to reserved easements that were not purchased with proceeds of any Bonds. Moreover, even if the bond proceeds had been used to purchase the entire property without the easement, there is no private use of bond-financed assets that exceeds 10% of the amount of proceeds of any Bond issue. In any event, the Amenities Facilities are in fact used by the general public and any analysis of "special economic benefit" is inappropriate. Finally, a governmental entity, regardless of whether it qualifies as a "political subdivision" under Section 103, is a separate legal entity and private business use does not arise because the voters who elect the governing body of such governmental entity are small in number. Moreover, the law and the facts demonstrate that the Center District is not "controlled" by the Developer or other landowner voters, but by the State of Florida and other governmental entities.

Any of these is sufficient to establish that there is no private business use of the bond-financed facilities in excess of 10% of any bond issue. Accordingly, the Bonds are not private activity bonds.