

DUKE REALTY CORP
Form S-3
September 06, 2005

As filed with the Securities and Exchange Commission on September 6, 2005

Registration No. 333-

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

FORM S-3

**REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933**

DUKE REALTY CORPORATION

(Exact Name of Registrant as Specified in Its Charter)

Indiana
(State or Other Jurisdiction of
Incorporation or Organization)

6798
(Primary Standard Industrial
Classification Code Number)

35-1740409
(I.R.S. Employer
Identification No.)

600 East 96th Street, Suite 100

Indianapolis, Indiana 46240

(317) 808-6000

(Address, including Zip Code, and Telephone Number, including Area Code, of Registrant's Principal Executive Offices)

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Dennis D. Oklak, Chief Executive Officer

Duke Realty Corporation

600 East 96th Street, Suite 100

Indianapolis, Indiana 46240

(317) 808-6000

(Name, Address, including Zip Code and Telephone Number, including Area Code, of Agent For Service)

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Approximate date of commencement of proposed sale to public: From time to time after the effectiveness of the registration statement.

If the only securities being registered on this form are being offered pursuant to dividend or interest reinvestment plans, please check the following box.

If any of the securities being registered on this form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, other than securities offered only in connection with dividend or reinvestment plans, please check the following box.

If this form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act of 1933, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

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If this form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration number of the earlier effective registration statement for the same offering.

If delivery of the prospectus is expected to be made pursuant to Rule 434, please check the following box.

CALCULATION OF REGISTRATION FEE

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Title of Each Class of Securities to be Registered	Amount to Be Registered	Proposed Maximum Offering Price Per Share (1)	Proposed Maximum Aggregate Offering Price	Amount of Registration Fee
Common Stock, \$.01 par value	171,990	\$ 32.94	\$ 5,665,351	\$ 667.00

(1) Calculated pursuant to Rule 457(c) of the Securities Act of 1933, based on the average high and low prices reported on the New York Stock Exchange on September 1, 2005.

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Commission, acting pursuant to said Section 8(a), may determine.

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The information in this preliminary prospectus is not complete and may be changed. The selling shareholders may not sell these securities until the registration statement filed with the Securities Exchange Commission is effective. This preliminary prospectus is not an offer to sell these securities nor does it seek an offer to buy these securities in any jurisdiction where the offer or sale is not permitted.

Subject to completion, dated September 2, 2005.

171,990 Shares

Common Stock

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The selling shareholders named in this prospectus may from time to time offer and sell up to 171,990 shares of our common stock. The selling shareholders would receive these shares in exchange for common units of limited partnership interest of Duke Realty Limited Partnership that they seek to cause us to redeem.

We have registered the offering and resale of the shares to allow the selling shareholders to sell any or all of their shares of common stock on the New York Stock Exchange or in private transactions using any of the methods described in this prospectus. See Plan of Distribution. The registration of the shares does not necessarily mean that the selling shareholders will elect to cause us to redeem their units, or that any of the shares will be sold by any of the selling shareholders under this prospectus or otherwise. The purchase price of any shares offered by the selling shareholders likely will be the market price of a share of common stock at that time, but may instead be based upon privately negotiated prices. We will not receive any cash proceeds from the sale of our common stock by the selling shareholders. See Selling Shareholders.

Our common stock is listed on the New York Stock Exchange under the symbol DRE. On September 1, 2005, the last sales price of our common stock reported on the New York Stock Exchange was \$32.78 per share.

The selling shareholders and any agents or broker-dealers that participate with the selling shareholders in the distribution of common stock may be deemed to be underwriters under the Securities Act of 1933. See Plan of Distribution.

You should carefully read and consider the risk factors included in our periodic reports and other information that we file with the Securities and Exchange Commission before buying our securities.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

The date of this prospectus is _____, 2005.

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IMPORTANT INFORMATION ABOUT THIS PROSPECTUS

All references to Duke, us, we or our refers to Duke Realty Corporation. All references to this prospectus include this prospectus together with any prospectus supplements to this prospectus, as well as all information referred to, and incorporated by reference into, this prospectus.

This prospectus is part of a shelf registration statement on Form S-3 that we filed with the Securities and Exchange Commission, or the SEC, under the Securities Act of 1933, as amended, which we refer to as the Securities Act. This prospectus covers the resale of our common stock by the selling shareholders named herein.

From time to time, we may file prospectus supplements that add, update or change information contained in this prospectus and any previously filed prospectus supplements. Before you buy any of our common stock under this prospectus, it is important for you to carefully consider the information contained in this prospectus and any prospectus supplements, together with the additional information described under the caption Where You Can Find More Information, which is incorporated into this prospectus by the

reference made under that caption.

You should rely only on the information contained or incorporated by reference in this prospectus. Neither we nor any of the selling shareholders have authorized anyone to provide you with different information. You should not assume that the information contained in this prospectus, or incorporated into this prospectus by reference to another document, is accurate as of any date other than the date of the respective documents that are the source of that information. This prospectus is an offer to sell the shares registered hereunder only under circumstances and jurisdictions where it is legal to do so.

SPECIAL CAUTIONARY NOTICE REGARDING FORWARD-LOOKING INFORMATION

This prospectus contains forward-looking statements within the meaning of Section 27A of the Securities Act and Section 21E of the Securities Exchange Act of 1934, as amended, which we refer to as the Exchange Act, including, without limitation, statements containing the words believe, may, would, could, should, anticipate, expect, estimate, intend, plan, project, continue and words of similar import. We have based these forward-looking statements on our current knowledge, expectations and projections about future events and trends affecting the financial condition and operating results of our business, which may prove to be incorrect.

These forward-looking statements relate to future events and our future financial performance, and involve known and unknown risks, uncertainties and other factors which may cause our actual results, performance, achievements or industry results to be materially different from any future results, performance or achievements expressed or implied by such forward-looking statements. You should carefully consider the various factors identified in this prospectus, including, without limitation, those factors incorporated into this prospectus by reference to other documents that we file with the SEC, which could cause actual results to differ materially from the results contemplated by any forward-looking statements. While these various factors appear throughout our filings, you should pay particular attention to the information contained in our filings under the captions Risk Factors and Cautionary Statement Regarding Forward-Looking Statements.

Except to the extent required by applicable law, we undertake no obligation, and do not intend, to update any forward-looking statements or to publicly announce the result of any revisions to any of the forward-looking statements contained herein to reflect future events or developments. All forward-looking statements should be read with caution.

DUKE REALTY CORPORATION

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We are a self-administered and self-managed real estate investment trust or REIT. As of June 30, 2005, we:

owned or controlled 891 industrial, office and retail properties (including properties under development), consisting of more than 113.8 million square feet located in 13 operating platforms; and

owned or controlled approximately 4,400 acres of land with an estimated future development potential of approximately 65 million square feet of industrial, office and retail properties.

We directly or indirectly hold all of our interests in our properties and land, and conduct all of our operations, through Duke Realty Limited Partnership, which we refer to as the Operating Partnership. We control the Operating Partnership as its sole general partner and owned, as of June 30, 2005, approximately 91.4% of the Operating Partnership's outstanding common units of partnership interest. Holders of common units in the Operating Partnership (other than us) may present such common units to the Operating Partnership for redemption at any time (subject to restrictions agreed upon at the time of issuance of the common units to particular holders that may restrict such right for a period of time, generally one year from issuance). Upon presentation of the common units for redemption, either the Operating Partnership must acquire the common units in exchange for shares of our common stock or we may purchase the common units in exchange for shares of our common stock. If, however, we determine in our reasonable discretion that exchanging shares of our common stock for the common units would jeopardize our qualification as a REIT, then we may elect to purchase the units for cash. When common units are exchanged for shares of our common stock, our percentage interest in the Operating Partnership increases. We are an Indiana corporation that was originally incorporated in the State of Delaware in 1985, and we reincorporated in

the State of Indiana in 1992. Our principal executive offices are located at 600 East 96th Street, Suite 100, Indianapolis, Indiana 46240, and our telephone number at that address is (317) 808-6000.

USE OF PROCEEDS

We will not receive any of the proceeds from the sale of the common stock offered by the selling shareholders named in this prospectus.

DESCRIPTION OF OUR COMMON STOCK

General

Our authorized capital stock includes 250,000,000 shares of common stock, \$.01 par value per share. At June 30, 2005, we had 143,508,598 shares of common stock issued and outstanding.

Each outstanding share of common stock entitles the holder to one vote on all matters presented to shareholders for a vote. Holders of common stock have no preemptive rights.

Holders of common stock have no right to cumulative voting for the election of directors. Consequently, because each member of our board of directors serves only a one-year term, the holders of a majority of the shares of common stock voting are able to elect all of the directors at each of our annual shareholders' meetings.

Our shares of common stock currently outstanding are listed on the New York Stock Exchange under the symbol DRE.

All shares of common stock issued will be duly authorized, fully paid, and non-assessable. Distributions may be paid to the holders of common stock if and when declared by our board of directors out of funds legally available for such distributions. We presently intend to continue to pay quarterly dividends.

Under Indiana law, shareholders generally are not liable for any of our debts or obligations. If we liquidate, then each outstanding share of our common stock will be entitled to participate on a *pro rata* basis in our remaining assets after the payment or provision for all of our known debts and liabilities and any preferential distributions required to be made to holders of our preferred stock.

Change of Control Provisions

Under Indiana law, shareholders holding a majority of the shares voting must first approve any proposal for us to merge with or sell all or substantially all of our assets. Our articles of incorporation also contain provisions that may discourage certain types of transactions involving an actual or threatened change of control, including:

a requirement that certain mergers, sales of assets, liquidations or dissolutions, or reclassifications or recapitalizations involving persons owning 10% or more of our capital stock:

be approved by a vote of the holders of 80% of the then issued and outstanding shares of our capital stock;

be approved by three-fourths of the continuing directors; or

provide for payment to shareholders for their shares of at least a specified price;

a requirement that any amendment or alteration of certain provisions of the articles of incorporation relating to a change of control be approved by the holders of 80% of our then issued and outstanding capital stock; and

a limitation that directors may be removed only for cause and only with the affirmative vote of the holders of a majority of the shares of common stock entitled to vote in the election of directors.

The partnership agreement for the Operating Partnership also contains provisions that could discourage transactions involving an actual or threatened change of control of our company, including:

a requirement that holders of at least 90% of the outstanding partnership units held by us and other unit holders approve any voluntary sale, exchange, merger, consolidation or other disposition of all or substantially all of the assets of the Operating Partnership in one or more transactions other than a disposition occurring upon a financing or refinancing of the Operating Partnership;

a restriction against any assignment or transfer by us of our interest in the Operating Partnership; and

a requirement that holders of more than 90% of the partnership units approve:

any merger, consolidation or other combination of us with another entity, unless after the transaction substantially all of the assets of the surviving entity are contributed to the Operating Partnership in exchange for units;

any sale of all or substantially all of our assets; or

any reclassification or recapitalization or change of outstanding shares of our common stock other than certain changes in par value, stock splits, stock dividends or combinations.

Our directors who are not officers or employees and who do not hold partnership units will vote on these matters.

Restrictions on Ownership

For us to qualify as a REIT under the Internal Revenue Code:

no more than 50% in value of our outstanding capital shares may be owned, directly or indirectly, by five or fewer individuals (including certain entities) during the last half of a taxable year or during a proportionate part of a shorter taxable year; and

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our common stock must be beneficially owned by 100 or more persons during at least 335 days of a taxable year or during a proportionate part of a shorter taxable year.

Because we expect to continue to qualify as a REIT, our articles of incorporation contain restrictions on the acquisition of common stock intended to provide for compliance with these requirements. Specifically, our articles of incorporation contain restrictions that:

authorize but do not require our board of directors to refuse to give effect to a transfer of common stock which, in its opinion, might jeopardize our status as a REIT;

nullify any attempted acquisition of shares which would result in our disqualification as a REIT;

give the board of directors the authority to take any actions it deems advisable to enforce these provisions, which might include refusing to give effect to or seeking to enjoin a transfer which might jeopardize our status as a REIT; and

require any shareholder to provide us such information regarding his or her direct and indirect ownership of common stock as we may reasonably require.

These ownership restrictions could have the effect of depressing the market price of our common stock or precluding or deterring a third party from obtaining control over us without the prior approval of our board of directors.

Limitations of Liability and Indemnification of Directors and Officers

Indiana law and our articles of incorporation generally exculpate each of our directors and officers in actions by us or by our shareholders in derivative actions from liability, except in the case of:

any breach of the director's duty of loyalty to us or our shareholders;

acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;

voting for or assenting to an unlawful distribution; or

any transaction from which the director derived an improper personal benefit.

The articles of incorporation also provide that we will indemnify a present or former director or officer against expense or liability in an action to the fullest extent permitted by Indiana law. Indiana law permits a corporation to indemnify its present and former directors and officers, among others, against judgments, penalties, fines, settlements and reasonable expenses they incur in connection with any proceeding to which they are a party, so long as:

the individual's conduct was in good faith;

the individual reasonably believed, in the case of conduct in the individual's official capacity with the corporation, that the conduct was in the corporation's best interests and, in all other cases, that the individual's conduct was at least not opposed to the corporation's best interests; and

in the case of a criminal proceeding, the individual either had reasonable cause to believe the individual's conduct was lawful or had no reasonable cause to believe the individual's conduct was unlawful.

We believe that the exculpation and indemnification provisions in our articles of incorporation help induce qualified individuals to agree to serve as our officers and directors by providing an established degree of protection from liability for alleged mistakes in making decisions and taking actions. You should be aware, however, that these provisions in our articles of incorporation and Indiana law give you a more limited right of action than you otherwise would have in the absence of such provisions. We also maintain a directors' and officers' liability insurance policy

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covering certain liabilities incurred by our directors and officers in connection with the performance of their duties.

The above indemnification provisions could operate to indemnify directors, officers or other persons who exert control over us against liabilities arising under the Securities Act. Insofar as the above provisions may allow that type of indemnification, the SEC has informed us that, in their opinion, such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable.

Registrar and Transfer Agent

The registrar and transfer agent for our common stock is American Stock Transfer & Trust Company, New York, New York.

FEDERAL INCOME TAX CONSIDERATIONS

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The following discussion summarizes some of the federal income tax consequences relating to our taxation as a REIT and the ownership and disposition of our common stock that we believe may be the most important to you.

Because this summary is intended only to address some of the most material federal income tax consequences relating to the ownership and disposition of our common stock, it may not contain all the information that may be important to you. As you review this discussion, you should keep in mind that:

the tax consequences to you may vary depending upon your particular tax situation;

special rules that we do not discuss below may apply if, for example, you are a tax-exempt organization (except to the extent discussed below under the heading *Treatment of Tax-Exempt Shareholders*), a broker-dealer, a non-U.S. person (except to the extent discussed below under the heading *Special Tax Considerations for Non-U.S. Shareholders*), a trust, an estate, a regulated investment company, a financial institution, an insurance company or otherwise subject to special tax treatment under the Internal Revenue Code;

this summary generally does not address state, local or non-U.S. tax considerations;

this summary deals only with our shareholders that hold stock as *capital assets* within the meaning of Section 1221 of the Internal Revenue Code; and

we do not intend this discussion to be, and you should not construe it as, tax, financial or investment advice.

You should review the following discussion and consult with your own tax and other professional advisors to determine the effect of ownership and disposition of our common stock on your individual tax situation, including any state, local or non-U.S. tax consequences.

We base the information in this section on the current Internal Revenue Code, current final, temporary and proposed Treasury regulations, the legislative history of the Internal Revenue Code, current administrative interpretations and practices of the Internal Revenue Service, or the IRS, including its practices and policies as endorsed in private letter rulings, which are not binding on the IRS, and existing court decisions, in each case as of the date of this prospectus. Future legislation, regulations, administrative interpretations and court decisions could change current law or adversely affect existing interpretations of current law. Any change could apply retroactively. It is possible that the IRS could challenge the statements in this discussion, which do not bind the IRS or the courts, and that a court could agree with the IRS.

Taxation as a REIT

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We believe that, commencing with our taxable year ended December 31, 1986, we have been organized and have operated in such a manner as to qualify for taxation as a REIT under the Internal Revenue Code, and we intend to continue to be organized and to operate in such a manner. However, we cannot assure you that we have operated or will operate in a manner so as to qualify or remain qualified as a REIT.

If we have qualified and continue to qualify for taxation as a REIT, we generally will not be subject to federal corporate income tax on that portion of our ordinary income or capital gain that is currently distributed to shareholders. The REIT provisions of the Internal Revenue Code generally allow a REIT to deduct distributions paid to its shareholders, substantially eliminating the federal double taxation on earnings (once at the corporate level when earned and once again at the shareholder level when distributed) that usually results from investments in a corporation. Nevertheless, we will be subject to federal income tax as follows:

First, we will be taxed at regular corporate rates on our undistributed REIT taxable income, including undistributed net capital gains.

Second, under some circumstances, we may be subject to the alternative minimum tax as a consequence of our items of tax preference.

Third, if we have net income from the sale or other disposition of foreclosure property that we hold primarily for sale to customers in the ordinary course of business or other non-qualifying income from foreclosure property, we will be subject to tax at the highest corporate rate on such income.

Fourth, if we have net income from prohibited transactions (which are, in general, certain sales or other dispositions of property, other than foreclosure property, held primarily for sale to customers in the ordinary course of business), such income will be subject to a 100% tax.

Fifth, if we should fail to satisfy either the 75% gross income test or the 95% gross income test (discussed below) but have nonetheless maintained our qualification as a REIT because we have met other requirements, we will be subject to a 100% tax on the greater of the amount by which the 75% gross income test was not satisfied or the amount by which the 95% gross income test was not satisfied, in each case, multiplied by a fraction intended to reflect our profitability.

Sixth, from and after the taxable year ending December 31, 2005, if we fail to satisfy any of the REIT asset tests (described below) by more than a *de minimis* amount, due to reasonable cause, and we nonetheless maintain our REIT qualification because of specified cure provisions, we will be required to pay a tax equal to the greater of \$50,000 or the highest corporate tax rate multiplied by the net income generated by the nonqualifying assets.

Seventh, for our taxable years beginning on or after January 1, 2005, if we fail to satisfy any of the REIT qualification requirements other than the gross income and asset tests and such failure is due to reasonable cause, we may avoid disqualification as a REIT by, among other things, paying a penalty of \$50,000 or more in certain cases.

Eighth, if we fail to distribute during each year at least the sum of:

85% of our ordinary income for such year;

95% of our capital gain net income for such year; and

any undistributed taxable income from prior periods;

then we will be subject to a 4% excise tax on the excess of this required distribution amount over the amounts actually distributed.

Ninth, if we should acquire any asset from a C corporation (i.e., a corporation generally subject to full corporate-level tax) in a carryover-basis transaction and provided no election is made for the transaction to be currently taxable, and we subsequently recognize gain on the disposition of such asset during the 10-year period beginning on the date on which we acquired the asset, we generally will be subject to tax at the highest regular corporate rate on the lesser of the amount of gain that we recognize at the time of the sale or disposition and the amount of gain that we would have recognized if we had sold the asset at the time we acquired the asset, which is referred to as the Built-in Gains Tax.

Requirements For Qualification

To qualify as a REIT, we must elect to be treated as a REIT and must meet the requirements, discussed below, relating to our organization, sources of income, nature of assets and distributions.

The Internal Revenue Code defines a REIT as a corporation, trust or association:

that is managed by one or more trustees or directors;

the beneficial ownership of which is evidenced by transferable shares or by transferable certificates of beneficial interest;

that would be taxable as a domestic corporation but for application of the REIT rules;

that is neither a financial institution nor an insurance company subject to certain provisions of the Internal Revenue Code;

that has at least 100 persons as beneficial owners;

during the last half of each taxable year, not more than 50% in value of the outstanding stock of which is owned, directly or indirectly, through the application of certain attribution rules, by five or fewer individuals (as defined in the Internal Revenue Code to include certain entities);

that files an election or continues such election to be taxed as a REIT on its return for each taxable year;

that uses the calendar year as its taxable year; and

that satisfies the income tests, the asset tests, and the distribution tests, described below.

The Internal Revenue Code provides that REITs must satisfy all of the first four preceding requirements during the entire taxable year. REITs must satisfy the fifth requirement during at least 335 days of a taxable year of 12 months or during a proportionate part of a taxable year of less than 12 months. For purposes of the sixth requirement, the beneficiaries of a pension or profit-sharing trust described in Section 401(a) of the Internal Revenue Code, and not the pension or profit-sharing trust itself, are treated as REIT shareholders. We will be treated as having met the sixth requirement if we comply with certain Treasury Regulations for ascertaining the ownership of our stock for such year and if we did not know (or after the exercise of reasonable diligence would not have known) that the sixth condition was not satisfied for such year. Our articles of incorporation currently include restrictions regarding transfer of our stock that, among other things, assist us in continuing to satisfy the fifth and sixth of these requirements.

If a REIT owns a corporate subsidiary that is a qualified REIT subsidiary, the separate existence of that subsidiary will be disregarded for federal income tax purposes. Generally, a qualified REIT subsidiary is a corporation, other than a taxable REIT subsidiary, all of the capital stock of which is owned by the REIT. All assets, liabilities and items of income, deduction and credit of the qualified REIT subsidiary will be treated as assets, liabilities and items of income, deduction and credit of the REIT itself. A qualified REIT subsidiary of ours will not be subject to federal corporate income taxation, although it may be subject to state and local taxation in some states.

A REIT that is a partner in a partnership is deemed to own its proportionate share of the assets of the partnership and to earn its proportionate share of the partnership's gross income, in both cases being based on its relative capital interest in the partnership. The character of the assets and gross income of the partnership retain the same character in the hands of the REIT for purposes of the gross income and asset tests. Thus, our proportionate share of the assets, liabilities and items of gross income of the Operating Partnership (including the Operating Partnership's share of the assets, liabilities and items of income with respect to any partnership in which it holds an interest) is treated as being our assets, liabilities and items of income for purposes of applying the requirements described herein.

We own direct or indirect interests in a number of taxable REIT subsidiaries, such as Duke Realty Construction, Inc. A taxable REIT subsidiary of ours is a corporation in which we directly or indirectly own stock and that elects, together with us, to be treated as a taxable REIT subsidiary of ours. In addition, if a taxable REIT subsidiary of ours owns, directly or indirectly, securities representing 35% or more of the vote or value of a subsidiary corporation, that subsidiary will also be treated as our taxable REIT subsidiary. A taxable REIT subsidiary is subject to federal income tax, and state and local income tax where applicable, as a regular C corporation.

Generally, a taxable REIT subsidiary may perform tenant services without causing us to receive impermissible tenant services income under the REIT income tests. However, several provisions regarding the arrangements between a REIT and its taxable REIT subsidiaries ensure that a taxable REIT subsidiary will be subject to an appropriate level of federal income taxation. For example, the Internal Revenue Code limits the ability of a taxable REIT subsidiary to deduct interest payments in excess of a certain amount made to us. In addition, we must pay a 100% tax on some payments that we receive or on certain expenses deducted by the taxable REIT subsidiary if the economic arrangements between us, our tenants and the taxable REIT subsidiary are not comparable to similar arrangements among unrelated parties. Our taxable REIT subsidiaries make interest and other payments to us and to third parties in connection with activities related to our properties. We cannot assure you that our taxable REIT subsidiaries will not be limited in their ability to deduct interest payments made to us. In addition, we cannot assure you that the IRS might not seek to impose the 100% tax on services performed by taxable REIT subsidiaries for our tenants, or on a portion of the payments received by us from, or expenses deducted by, our taxable REIT subsidiaries.

Income Tests. In order to maintain qualification as a REIT, we must satisfy two gross income requirements. First, we must derive, directly or indirectly, at least 75% of our gross income (excluding gross income from prohibited transactions) for each taxable year from investments relating to real property or mortgages on real property, including rents from real property, gains on disposition of real estate, dividends paid by another REIT and interest on obligations secured by real property or on interests in real property, or from certain types of temporary investments. Second, we must derive at least 95% of our gross income (excluding gross income from prohibited transactions) for each taxable year from any combination of income qualifying under the 75% test and dividends, interest, and gain from the sale or disposition of stock or securities. For taxable years beginning on or after January 1, 2005, income from a hedging transaction that is clearly and timely identified and hedges indebtedness incurred or to be incurred to acquire or carry real estate assets will not constitute gross income, rather than being treated as qualifying or nonqualifying income, for purposes of the 95% gross income test.

Rents received by us will qualify as rents from real property in satisfying the gross income requirements for a REIT described above only if several conditions are met. First, the amount of rent must not be based in whole or in part on the income or profits of any person but can be based on a fixed percentage of gross receipts or gross sales. Second, rents from real property generally excludes any amount received directly or indirectly from any tenant if we, or an owner of 10% or more of our outstanding stock, directly or constructively, owns 10% or more of such tenant taking into consideration the applicable attribution rules, which we refer to as a related party tenant. Third, rents from real property excludes rent attributable to personal property except where such personal property is leased in connection with a lease of real property and the rent attributable to such personal property is less than or equal to 15% of the total rent received under the lease. Finally, impermissible tenant services income is not treated as rents from real property, and if impermissible tenant service income with respect to a property exceeds 1% of the total income from such property, none of the rents with respect to such property will qualify as rents from real property. For these purposes, impermissible tenant services income generally includes income for services rendered by a REIT to tenants of a property or for managing or operating the property. Customary services that are not considered to be provided to a particular tenant (e.g., furnishing heat and light, the cleaning of public entrances, and the collection of trash), however, can be provided directly by us. Where, on the other hand, such services are not customary or are provided primarily for the convenience of the tenants or are provided to such tenants, such services must be provided by an independent contractor from whom we do not receive any income or a taxable REIT subsidiary.

We do not currently charge and do not anticipate charging rent that is based in whole or in part on the income or profits of any person. We also do not anticipate either deriving rent attributable to personal property leased in connection with real property that exceeds 15% of the total rents or receiving rent from related party tenants.

The Operating Partnership does provide some services with respect to our properties. We believe that the services with respect to the properties that are and will be provided directly are customarily rendered in connection with the rental of space for occupancy only and are not otherwise considered rendered to particular tenants and, therefore, that the provision of such services will not cause rents received with respect to the properties to fail to qualify as rents from real property. Services with respect to the properties that we believe may not be provided by us

