(c)(1) of HSR Act
Rule 802.1(b)

[redacted]

October 9, 1990

FEDERAL EXPRESS

Federal Trade Commission
Premerger Notification Division
6 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

This material may be subject to the confidentiality provision of Section 7A (h) of the Clayton Act which restricts release under the Freedom of Information Act

Attn: Richard B. Smith, Esquire
Senior Staff Attorney

Re: Exemption from premerger notification requirements under Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L. 94-435, 15 U.S.C. Sec. 18A (the "Act") and the regulations promulgated pursuant to 15 U.S.C. 18A(d) of the Act (the "Regulations")

Dear Mr. Smith:

As we discussed over the telephone, this firm represents a company which proposes to purchase a tract of property and certain improvements (altogether, the "Property").

The purpose of this letter is to confirm that, based on the facts and circumstances represented to you over the telephone, the proposed acquisition of the Property is not a reportable event pursuant to 15 U.S.C. 18A(a)(3)(B), 15 U.S.C. 18A(c)(1) and Regulation §801.15.

The purchaser will be an entity formed specifically for the purpose of purchasing the Property. It is expected that the "person" (as defined by the Regulations) within which the purchaser exists (hereinafter referred to as the "Purchasing

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Person") will be a "foreign person" (as defined by the Regulations). The Purchasing Person has a vast array of businesses and activities around the world, including, without limitation, numerous investments in both developed and undeveloped real estate. The proposed transaction would be similar to many transactions which have already been consummated and which are expected to be consummated in the future by the Purchasing Person.

The seller is a corporation which holds the Property as its primary asset. The "person" (as defined by the Regulations) within which the seller exists (hereinafter referred to as the "Selling Person") is a "foreign person" (as defined in the Regulations). Like the Purchasing Person, the Selling Person has a vast array of businesses and activities. The Selling Person has represented that its core business is property development and investment and that the Property is only one of numerous real estate investments and developments in its real estate portfolio. Only a portion of its real estate portfolio is located in the United States.

The Property is a Planned Unit Development currently consisting of approximately six thousand seven hundred acres of land, approximately seven hundred of which have been improved. Such improvements include a golf course, a clubhouse, an eighteen-unit lodge, four (4) single family and four (4) multi-family homes which were constructed by the seller on a "speculative" basis (two of the speculative homes have not been sold by the seller but are not part of this transaction), roads, and numerous lots which have been cleared and readied for construction of single family homes. The remainder of the land is unimproved and has never produced an income stream. In keeping with the Planned Unit Development status of the Property, the seller has obtained various permits and rights and made plans for the development and improvement of the entire Property. If the Property is not sold in accordance with the proposed transaction, the seller will most likely continue to dispose of the Property, lot by lot (for the construction of single family homes) and parcel by parcel (for the construction of office buildings, warehouses, another golf course, retail centers, et cetera), in accordance with its original plan.

With respect to the golf course, clubhouse, related amenities and that portion of the roads which service the foregoing improvements (collectively, the "Club Facilities"), the purchaser and seller have agreed that either: (a) the purchaser will receive from the seller at closing two hundred seventy-one (271) equity golf course memberships rather than the Club Facilities or (b) the purchaser will receive from the seller at closing, the Club Facilities and immediately after closing purchaser will be required to convey the Club Facilities to a not-for-profit golf club entity in exchange for the two hundred seventy-one (271) equity golf course memberships. The golf club entity will be controlled by the purchaser initially, but at some point in the future, control will be transferred to the Equity Members pursuant to the Articles and By-Laws of the golf club entity.

Less than $15 million of the purchase price for the Property will be allocated to the Club Facilities and the eighteen-unit lodge. Such allocation is based on: (i) the value of the two hundred seventy-one (271) equity golf memberships, which may total up to $12,195,000.00 (twenty-nine (29) memberships out of the originally available three hundred (300) memberships have been sold by the seller for approximately $45,000.00 each) and (ii) the cost to build the guest lodge of $2,160,000.00. Please note that the Purchasing Person and Selling Person believe that the figures set forth above are equal to or greater than the actual fair market value (as defined in the Regulations) of the assets described.

As you know, 15 U.S.C. 18A(a) requires each of the persons involved in the acquisition of assets to file a notice and observe a waiting period if three conditions are met. Both the Purchasing Person and the Selling Person affect commerce (as defined by the Regulations) and have assets (as defined in the Regulations) of well over $100 million. Therefore, the first two conditions of 15 U.S.C. 18(A)(a) are met. However, although the Purchasing Person is acquiring in excess of $15 million in assets of the Selling Person, calculated in accordance with Regulation §801.13(b), we contend that pursuant to 15 U.S.C. 18A(c)(1) and Regulation §801.15, the third condition of 15 U.S.C. 18A(a) is not met by the proposed transaction and, therefore, the proposed transaction is not subject to the notice requirements of 15 U.S.C. 18A(a).

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As you know, the third condition found in 15 U.S.C. 18A(a) is that, as a result of the acquisition, the acquiring person hold "an aggregate total amount of ... assets, of the acquired person in excess of $15 million." Regulation §801.15 provides that, for purposes of calculating the amount of assets held as a result of an acquisition, assets which are exempt under 15 U.S.C. 18A(c)(1) are not included. 15 U.S.C. 18A(c)(1) provides an exemption from the reporting requirements for "acquisitions of goods and realty transferred in the ordinary course of business." Therefore, if a sufficient portion of the Property is exempt (i.e. considered "realty" transferred "in the ordinary course of business,") such that the portion of the Property which is not exempt is worth less than $15 million, then the $15 million requirement set forth in 15 U.S.C. 18A(a) would not be met and the Act would not apply.

According to 15 U.S.C. 18A(d), the Federal Trade Commission, with concurrence by the Assistant Attorney General and by rule in accordance with Section 553 of Title 5, has the authority to define the terms used in the Act. You stated that the Federal Trade Commission defines "realty" as "non-income producing property". In applying this definition to the Property, as described above, it appears that the unimproved portion of the Property is "realty" because it has never produced an income stream. The vacant lots which have been readied for residential construction and the roads servicing those lots also appear to be "realty" for the same reason. The remaining property (i.e., the equity memberships, the guest lodge and the related roads) is not exempt, however, it appears that the fair market value of such property is less than $15 million.

With regard to whether the transfer is being made in the ordinary course of business, it is our contention that the Selling Person, which has numerous real estate investments, developments and holdings throughout the world, is selling the Property in the ordinary course of business. Although the Property is the seller's primary asset, the Selling Person is not leaving the business or going out of the business of investing, developing or holding real estate by virtue of the proposed transaction and is only selling a portion of its "inventory" of real estate. Further, the Purchasing Person is also an investor, developer and holder of numerous investments in real estate and, therefore, the purchase of the Property by the Purchasing Person will be another addition to its "inventory" of real estate.

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In conclusion, based on the foregoing, we contend that the purchase of the Property is not a reportable event under the Act. I will look forward to hearing from you regarding the same. Of course, if you have any questions concerning the foregoing or require any additional information relevant to the proposed transaction, please let me know.

Very truly yours,

[redacted]

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cc: [redacted]

10/12/90 called [redacted] and faxed the Premerger office agreed with his conclusion.

On page 4, paragraph 2, second sentence, advised that this office views office buildings and residential buildings as realty, even though they may be income producing if such buildings do not have more than 15% gross of non-office non-residential, i.e., retail, space in them.

RBSmith

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