7A (c) (1)

December 20, 1990

Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W..
Washington, D.C. 20580

BY FACSIMILE

Re: Request For Interpretation
In Connection With Proposed
Transaction

Gentlemen:

We are counsel for [redacted] and in that capacity are writing to seek your concurrence in our opinion that a Premerger Notice would not be necessary in connection with the completion of the real estate acquisitions described below, pursuant to the exemption provided in Section 7A(c)(1) of the Clayton Act, 15 USC §18a, for "acquisitions of goods or realty transferred in the ordinary course of business."

While we are aware that certain regulations and interpretations of the cited section have given that exemption a rather narrow focus, we believe that other transactions or opinions expressed by Federal Trade Commission staff suggest that there is room for further interpretation. We are further of the belief that the unique characteristics of [redacted] as a real estate investment trust indicate that it should fit within the plain language of the exemption.

FACTUAL BACKGROUND

1. Transaction And Asset Description. On or about October 18, 1990, [redacted] general partnership, completed the acquisition of four industrial properties in and around the metropolitan area of [redacted] The properties were acquired from [redacted] for a total

purchase price of $ 7,049,468.00. [redacted] contemplates acquiring an additional industrial property from [redacted] which property is also located in the metropolitan [redacted] area, for an additional purchase price of $9,114,463.00. Even if [redacted] completes the acquisition of the additional property, [redacted] will retain other assets, including additional industrial properties in the same area. The initial acquisitions involved the payment of approximately $2,240,420.00 in cash, and the assumption of mortgages encumbering the properties in the approximate amount of $4,809,050.00. The contemplated transaction would involve the payment of approximate $5,100,000.00 in cash, and the assumption of an existing mortgage in the amount of approximately $4,014,000.00.

The total rentable square footage of all five properties is approximately 380,177. The total square footage of industrial properties in the "close in" metropolitan [redacted] area, where the subject properties are located, totals between 42,000,000 and 50,000,000 square feet.

2. The Acquiring Party. The acquiring party is [redacted] general partnership, which consists of [redacted] as the managing general partner, holding substantially in excess of fifty percent of the partnership interests, and a limited partnership, which consists of substantially the same entities which constitute the seller in the transactions. For purposes of this inquiry, we assume that [redacted] is the ultimate parent entity of [redacted] and if a Premerger Notice was required, would be the party required to pay the filing fee.

The entities which comprise the seller, and, in their reconstituted form, the minority partner in [redacted] are unrelated to each other, and unrelated to [redacted] except for the within transaction.

3. Characteristics of [redacted] is a real estate investment trust ("REIT"), which commenced operations as such in 1980. REITs are highly regulated, and pursuant to Internal Revenue Code Section 856, receive certain special tax treatments, the principal one being that REITs are not subject to income tax at the corporate level. The purpose of the special tax treatment is to allow long term investment in real estate by small, individual investors. In exchange for the beneficial tax treatment, and as a means of compensating for what could otherwise be a competitive advantage compared to other entities investing in real estate, REITs are required to comply with complicated and precise rules set forth in Internal Revenue Code Sections 856-860 (the "Code"), and the interpretive regulations related to those sections. The thrust of the relevant Code sections and regulations is to greatly restrict the type of

activities in which a REIT may engage. Generally speaking, in order for a REIT to qualify as such in any given taxable year, at least 75% of its total assets must consist of real estate assets, cash, or governmental securities, at least 75% of its gross income must be derived from real estate activities, including rents from real property and interest on mortgage obligations, if any, and at least 95% of its gross income must consist of income derived from real estate activities, plus dividends, interest or gains from disposing of the approved class of securities. In addition, gross income from the sale or disposition of real property held for less than four years must comprise less than 30% of their gross income. The rules and regulations are clearly aimed at limiting the activities of REITs to investment in, and ownership, and operation of real estate for relatively long term investment. In fact, short term selling is discouraged by the Code through a 100% tax on the net income from such short term sales, except in certain exigent circumstances.

The Code also requires that shares of REITs be held by at least 100 shareholders, and that they annually distribute at least 95% of their income to the shareholders. In the case of [redacted] the shares are held beneficially by approximately 15,000 shareholders. The shares are traded on the New York Stock Exchange under the symbol [redacted]

In addition, REITs are subject to rules limiting their direct management of properties in such a way that they may not provide services directly to any individual tenant, as opposed to managing the property generally. As a consequence, REITs often do, and sometimes are required to, employ independent property managers to provide direct property management. In the instant transaction, [redacted] has retained one of the partners of the seller entity to manage the properties being acquired.

[redacted] status as a REIT is not incidental, but rather is fundamental to its existence, and to the interests of its shareholders. The loss of this status, by, for example, engaging in a prohibited activity, i.e., one which is outside of the real estate related activities which are acceptable, would have a material adverse effect on the shareholders. If [redacted] lost its REIT status, it would be subject to federal income tax at the corporate level on all of its taxable income and would be unable to deduct dividends paid. The result would in all likelihood be a discontinuation or a reduction in dividends to shareholders.

4. <u>Application Of The Exemption</u>. By virtue of the Internal Revenue Code and related regulations governing REITs, [redacted] neither can nor does have any business except that of investing in real estate for the purpose of providing a competitive return to its shareholder investors, through the income derived from

properties owned, and gains on sales of properties which have been held long term, and have matured to the point where it is in the best interest of the shareholders to sell the property. The ownership and operation of its real estate is not an adjunct of any other business, and its assets are not used for any other purpose. The acquisition of investment real estate for the purpose of enhancing shareholder returns is, in essence, [redacted] only business. Thus, the acquisition of these properties is an acquisition of realty transferred in the ordinary course of business.

5. General Considerations. As noted above, this acquisition is not connected to any other type of business, nor part of any other transaction. It is a real estate transaction, pure and simple. As such, it is the acquisition of fungible commercial space, and the acquisition of five parcels of industrial property in a major metropolitan area cannot reasonably be perceived as having anti-competitive aspects. It is unrealistic to expect that any entity could control the commercial real estate market in an urban area such as Seattle, Washington. The subject transactions, as noted above, constitute less than one percent of similar space in the area.

The continuing management role of a seller related entity also points to the lack of anti-competitive aspects of this transaction. As noted, the management entity is unrelated to [redacted] and, in order to get the insulation which is sometimes necessary with respect to certain property management activities, under the REIT regulations, the property manager needs to be an unaffiliated independent contractor. This is not an acquisition of a management company, but a retention, by arms length negotiation, of independent management.

Finally, the transactions have provided, and if the second part is completed will provide, substantial cash to the seller entity which continues to own real estate in the same area in which these acquisitions are taking place, thereby arguably increasing the ability of the selling entity to compete.

[redacted] and the ultimate parent, [redacted] have no other motive in acquiring this property except to obtain investment real estate as part of its ongoing business operations. The transaction was not structured or intended to constitute an evasion of the requirements of the Premerger Notice rules or any other reporting requirements.

We appreciate your taking the time to review this request. If you have any questions concerning any aspect of it, or feel the need for additional facts related to any aspect of the transaction or the affected parties, please contact the

undersigned by telephone at your earliest convenience. In addition, we would be most appreciative if we would have an opportunity to confer with you concerning this matter if you are not disposed to concur with our views.

Thank you for your attention.

Very truly yours,

[redacted]

12/28/90 - called [redacted]
[illegible]
1/4/91 - [illegible]
1/8/91 called [redacted] He said "industrial space" being bought was ongoing warehouse and small manufacturing operations involving some sixty or so tenants & the space was presently "income producing."

I advised that John Sipple, the chief of the premerger office, had determined that the proposed purchase by the subject REIT was not reportable under 7A(c)(1) of the HSR Act. Although the property to be purchased was "income producing" (and thus, under our general view, not transferred in the ordinary course of business except for office and apartment buildings with not more than $15 MM of retail space) since the REIT is specifically limited by IRS rules on its ability to operate and manage the property and since its business is investing in such property for its shareholders, the proposed purchase ~~could~~ would be viewed by the premerger office as exempt under 7A(c)(1). However, this position applied only to REITs and not to other real estate investment companies.

R B Smith