

7A(c)(9); 802.9

[REDACTED]

[REDACTED]

[REDACTED]

November 17, 1992

Mr. Richard Smith  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
6th Street and Pennsylvania Avenue  
Washington, D.C. 20580

VIA FACSIMILE NO.: (202) 326-2050

Re: Section 18a(c)(1) Exemption for Acquisitions of Income-Producing Real Estate  
by Real Estate Investment Trusts and § 18a(c)(9) Exemption for Acquisitions  
of Voting Securities as a Passive Investment

Dear Mr. Smith:

As we discussed in our previous telephone conversations, the [REDACTED] [the "Company"], which is based in [REDACTED] and which we represent is negotiating to purchase from [REDACTED] certain income-producing [REDACTED] for a price that could exceed \$15,000,000.00. In our conversation, you confirmed your policy as stated in my November 8, 1992, letter to you that the acquisition would be exempt under § 18A(c)(1) as an acquisition of goods or realty in the ordinary course of business. However, I indicated to you that the Company had the option, instead of paying cash, to pay for the acquisition by the issuance of its duly-registered shares of stock to [REDACTED]. You indicated that the acquisition of stock by the purchaser could potentially require compliance with the reporting requirements of the Hart-Scott-Rodino Act. We believe that the acquisition of stock by [REDACTED] would be exempt under § 18a(c)(9). However, if possible, we would request your concurrence in our opinion. The following paragraphs provide an overview of the transaction and our reasoning for the exemption under § 18a(c)(9).

As of September 30, 1992, the Company owns or has an interest in [REDACTED] operating properties, located mainly in the [REDACTED], other parts of [REDACTED] and in the neighboring states of [REDACTED]. The Company's portfolio consists primarily of [REDACTED]. The Company is presently under contract to purchase a 50% interest in the [REDACTED]. The other 50% interest in the [REDACTED] is presently owned by the Company. Further, as part of the purchase transaction, the

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Company intends to acquire the fee interest in the adjoining land (also a portion of the [redacted] and owned by [redacted] which the Company presently ground-leases on a long-term ground lease and on which the Company has previously developed a 65,000 square foot building. Under the applicable agreement, the Company can pay the purchase price for these properties, at its option, either in cash or through the issuance of 400,000 of its shares at the time of the exercise of the option to purchase by the Company. The Company has elected to pay the purchase price by the issuance of 400,000 shares of its stock (the "Payment Shares"). Under the terms of the contract, [redacted] has the right to require the Company to repurchase any of the Payment Shares owned by [redacted] on the one-year anniversary of the Closing Date of the transaction, at a stipulated price. The Company will then be obligated to repurchase such Payment Shares at a per share price which shall be an amount which, when added to the net proceeds of any shares sold by [redacted] prior to the one-year anniversary of the Closing Date, plus the value of any Payment Shares which [redacted] elects to retain (based on the average per share closing price on the New York Stock Exchange during the ten days immediately preceding the repurchase demand), would produce a total payment of \$15.2 million. It should further be noted that the Company and one of its affiliates presently manage the [redacted] and that there will be no change in the management or control of the [redacted] as a result of the above-described transaction.

[redacted] has no shopping centers in [redacted] (other than its interests in the [redacted] and does not own any [redacted] in the [redacted]. It presently has eleven [redacted] other than its interests in the [redacted] in various other parts of [redacted] (i.e., outside the [redacted] area). Of the three [redacted] presently owned by [redacted] in the 20-mile geographical radius closest to the [redacted] two of the three [redacted] are vacant. The third [redacted] is located in an industrial area and consists of retail tenants who market to and attract a lower middle class clientele. The [redacted] by contrast, is located immediately adjacent to one of the wealthiest areas of [redacted]. It is a very up-scale [redacted] and its tenants consist mostly of high-end boutique firms who market to and attract an upper middle class or affluent clientele.

Of [redacted] other [redacted]

(a) Two [redacted] centers are located in [redacted]. The Company has no [redacted] in either of these cities.

(b) Two [redacted] are located in the [redacted]. The Company has a 15% joint venture interest in a shopping center in [redacted] a suburb of [redacted] which is approximately 20 to 30 miles from [redacted].

(c) Two [redacted] shopping centers are located in [redacted]. The Company has no [redacted] in either of these cities.

(d) One [redacted] is in [redacted] (approximately 35 miles from [redacted] and consists of a [redacted]. The Company has no [redacted] in [redacted].

(e) Finally, one [redacted] center is in [redacted] (approximately 40 miles from [redacted]) and consists of a [redacted] and some small spec spaces. The Company owns a [redacted] in [redacted] which is currently under development and which adjoins [redacted] in [redacted]. The major tenant of the Company's [redacted] will be [redacted], and its space will comprise approximately 75% of that [redacted] space.

With regard to potential competition between [redacted] and the Company, it should be noted that the Company is in the business of developing and managing [redacted] and [redacted] is not. In instances in which the Company acquires [redacted] its acquisitions are generally selected because they require refurbishing, modification of their tenant-mix and other value-adding, hands-on redevelopment -- which is part of the Company's expertise. [redacted] may invest in existing developed [redacted] or acquire [redacted] through foreclosures in connection with loans it has made, but it is not in the business of developing or managing [redacted] or refurbishing and redeveloping [redacted]. Further, there appears to be little, if any, competitive significance between the Company's [redacted] in these areas and [redacted].

Further, if [redacted] elects to retain all 400,000 shares of stock, [redacted] ownership interest in the Company would be [redacted] (the Company presently has outstanding [redacted] shares with an additional [redacted] shares reserved for issuance upon conversion of the certain convertible debentures and the exercise of certain options granted to employees). [redacted] does not presently own any shares of the Company's stock. The Company's Restated Declaration of Trust (the "Declaration") also limits a person's ownership in the Company to no more than 9.2% of the outstanding shares of the Company. The Declaration further provides that any attempted transfer of shares which would cause a person to exceed the limit shall be null and void. The Declaration also has numerous provisions that may have the effect of deterring a take-over. [redacted] has represented in the contract that [redacted] has no arrangement, agreement, or understanding with any person or legal entity to encourage or participate in any manner in a distribution or placement of the shares which it will receive and that it is acquiring the shares in the ordinary course of its business.

The Declaration prohibits cumulative voting for the election of Trust Managers (a position that is the equivalent of a director in a corporation) and accordingly, [redacted] ownership interest in and of itself would be ineffective to allow it to elect any Trust

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Managers or otherwise direct the management of the Company. Further, at the present market price of the stock (and without regard to the above-mentioned repurchase obligation), the purchase price would be less than \$15 million, arguably bringing the acquisition of the securities within the exception of Rule §802.20. For example if the Company were to pay in its shares today, the purchase price would be \$14,250,000. The stock is presently trading at 35-5/8 and the average price for the past ten days has been approximately 35-1/4.

We believe that the transaction described above is exempt from the Hart-Scott-Rodino Act reporting requirements, as an acquisition of voting securities for investment purposes in the ordinary course of its business, because:

(1) This transaction takes place in circumstances and for reasons different from those underlying corporate mergers, acquisitions, tender offers and similar transactions in numerous respects. The Company routinely enters into acquisitions of this kind. [REDACTED] also frequently purchases stock for its investment portfolios.

(2) The other [REDACTED] owned by [REDACTED] in the geographical area of the [REDACTED] are either vacant or the tenants of such [REDACTED] market to a significantly disparate clientele, supporting the fact that the transaction will not have any impact on the competitiveness of [REDACTED] other [REDACTED] in the geographical area of the [REDACTED]. Of the other [REDACTED] owned by [REDACTED] in the [REDACTED] the Company either owns no [REDACTED] in that area, has a minor ownership interest in one shopping center in that area, or has a shopping center with a substantially different tenant mix. These are further facts which indicate the lack of a competitive effect of the purchase and sale transaction described in this letter.

(3) The transaction further, will have no competitive significance since management or control of the [REDACTED] will remain with the Company -- where it currently resides.

(4) Due to the restrictions contained in the Company's Declaration, [REDACTED] will not have a sufficient ownership interest in the Company to affect the management of the Company solely through the voting of its Payment Shares.

(5) Due to the Declaration's restrictions on the percentage ownership of shares by any one person, [REDACTED] would not be able to significantly affect the management of the Company, even if it were to acquire additional shares in the market.

(6) [REDACTED] has represented that it is acquiring the Payment Shares for investment purposes and in the ordinary course of its business.

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(7) The value of the Payment Shares will be less than \$15 million on the Closing Date and if the price does not increase, [redacted] has every reason to exercise the repurchase option in the contract and to sell the shares back to the Company and obtain the equivalent of the \$15.2 million cash purchase price. Obviously, the primary motivation for the Company's structuring the transaction in this manner is to allow the Company certain flexibility in the payment of the purchase price for the interests in the Center and to allow [redacted] to diversify its risk in one center by investing in the Company - not to evade the Premerger Notice or other reporting requirements. Moreover, if the Company were to pay the price in cash today, the transaction would be exempt under §18(a)(c)(1) as an acquisition of goods or realty in the ordinary course of business, and the fact that the Company is issuing its shares, in lieu of cash, should not, in light of the aforementioned facts, raise anti-trust concerns.

If you have any questions regarding this request, please contact me. We would greatly appreciate a prompt response if we have misinterpreted the various rules and the impact of this transaction. Further, if you are disposed not to concur with our views, or if you need additional information, we would appreciate the opportunity to have a conference with you before any written response to this request is transmitted.

Yours very truly,

[redacted signature block]

11/18/92 - spoke to [redacted] advised that, assuming [redacted] would be taking more than \$15MM

in the Company's stock, it appears that evidence has been presented to suggest the conclusion that [redacted] and the Company do not compete in the operation of [redacted] stated that this is her view. She also advised that [redacted] would be purely a "passive investor" in the Company's stock and could and would do no more than vote it. I advised that, since less than 10% of the Company's stock would be held by [redacted], the Section 9 exemption appeared applicable.

RTB Smith