February 18, 1977

Dear:

This is in reply to your letters of July 16, 1976, November 15, 1976, and November 24, 1976, in which you inquire whether certain parcels of property and the buildings thereon, which (Name) (the Plan) proposes to acquire from (Name), Inc. (the Employer), constitute "qualifying employer real property" under Section 407(d)(4) of the Employee Retirement Income Security Act of 1974 (the Act), and whether the acquisition by the Plan and subsequent lease-back of such property to the Employer is a prohibited transaction under Section 406(a) of the Act.

Your letters state that, among other things, the Employer is a corporation engaged in the retail sale of fried chicken through restaurants known as (Name). Currently, the Employer operates or has under construction 34 (restaurants) in (two states). Of these 34 restaurants, 29 are leased from various investors. All 29 restaurants were built by the Employer, subsequently sold to independent investors and simultaneously leased back to the Employer. The lease agreement is normally for a 20-year term with four 5-year renewal options.

Your letter further represents that the Plan is an eligible individual account plan, within the meaning of Section 407(d)(3) of the Act, that it currently does not own any employer real property, and that it wishes to acquire from the Employer and subsequently lease back to the Employer three restaurant sites (land and building) . . . There will be no commissions charged with respect to the proposed purchase and leaseback transactions.

You represent that each of the three parcels is readily adaptable to various uses without costly modifications. These uses include: another fast-food restaurant; garden or florist shop; craftshop; professional offices; pharmacy; gasoline station; and others.

Finally, you represent that in the opinion of the Plan Investment Committee, these three sites are sufficiently geographically dispersed so that adverse economic conditions peculiar to one area would not significantly affect the

economic status of the Plan as a whole and that the (three) sites would be serving and drawing from different fast food markets.

In order for parcels of "employer real property" (as defined in Section 407(d)(2) of the Act) to be considered to be "qualifying employer real property" within the meaning of Section 407(d)(4) of the Act, the following substantive requirements must be met: (1) a substantial number of the parcels must be dispersed geographically; (2) each parcel of real property and the improvements thereon must be suitable (or adaptable without excessive cost) for more than one use; and (3) the acquisition and retention of such property must comply with the provisions of Part 4 of Title I of the Act (other than Section 404(a)(1)(B) to the extent it requires diversification, and Sections 404(a)(1)(C), 406 and 407(a)).

Pursuant to Section 5.02(o) of the Advisory Opinion Procedure (ERISA Procedure 76-1, 41 FR 36281, August 27, 1976), the Department of Labor (the Department) ordinarily will not issue advisory opinions with respect to, among other things, Section 404(a) of the Act relating to fiduciary duties as applied to particular conduct. Because the definition of the term "qualifying employer real property" in Section 407(d)(4)(D) of the Act requires a determination regarding whether a particular acquisition or retention of employer real property complies with the requirements of Section 404(a) of the Act, the Department will not issue a ruling under Section 407(d)(4)(D) with respect to whether particular employer real property is "qualifying employer real property." The Department will, however, issue rulings in appropriate cases with respect to the other substantive conditions of Section 407(d)(4), such as the conditions requiring geographical dispersion of the parcels of property, and the suitability of property for more than one use.

With respect to the geographical dispersion requirement of Section 407(d)(4)(A) of the Act, your letters state the location and geographical dispersal of the parcels and represent, in connection with the question of whether each parcel is sufficiently geographically dispersed so as to provide protection for the Plan in the event of adverse economic conditions in any one area, that (Name) restaurants in these three areas would be serving and drawing from different fast food markets. If your statements and representations are correct, the requirements of

Section 407(d)(4)(A) of the Act would be met in the transactions described in your letters.

With respect to the requirement of Section 407(d)(4)(B) of the Act that each parcel of employer real property and the improvements thereon must be suitable, or adaptable without excessive cost, for more than one use, your letters state that because each restaurant site borders both the residential and business district of a city and because of the physical characteristics of the sites, they may easily be used for activities other than fast-food restaurants, such as those listed above. On the basis of the representations set forth in your letters with respect to the adaptability of the parcels in question for numerous uses, it is our view that each of these parcels meets the requirements of Section 407(d)(4)(B) of the Act.

With respect to your second inquiry, Section 406(a)(l)(A) of the Act prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect sale or exchange or leasing of any property between the plan and a party in interest. Section 3(14)(C) of the Act defines the term "party in interest" as an employer any of whose employees are covered by such plan. Thus, the proposed sale and leaseback arrangement between the Plan and the Employer would constitute a prohibited transaction under Section 406(a)(l)(A) of the Act. In addition, Section 406(a)(l)(E) and Section 406(a)(2) prohibit plan fiduciaries from knowingly causing plans to acquire or hold employer real property 1n violation of Section 407(a) of the Act.

However, Section 408(e) of the Act provides an exemption from the restrictions of Section 406 and 407 for the acquisition or sale by a plan of qualifying employer securities or qualifying employer real property if, as as here relevant, (1) such acquisition is for adequate consideration, (2) no commission is charged with respect to the acquisition, and (3) the plan is an eligible individual account plan. Thus, a prerequisite for the applicability of Section 408(e) is the acquisition by a plan of qualifying employer securities or qualifying employer real property. Because the Department will not rule on whether the subject employer real property constitutes qualifying employer real property, and because Section 5.02(a) of the Advisory Opinion Procedure provides that the Department will not ordinarily issue advisory

opinions relating to whether certain consideration constitutes "adequate consideration" within the meaning of Section 3(18) of the Act, we will not rule with respect to whether the statutory exemption provided in Section 408(e) of the Act would be available for the proposed transactions.

Sincerely,