

1) Real Estate Empytoon
2) 802.20(b)

WRITER'S DIRECT NUMBER

December 27, 1989

John M. Sipple, Jr.
Chief, Premerger Notification Office
Federal Trade Commission
6th Street & Pennsylvania Avenue, N.W.
Room 303
Washington, D.C. 20580

DEC 27 5 11 PM '89
BY MESSENGER

Re: Request For Informal Interpretation Of The
Filing Requirements Under The Hart-Scott-Rodino
Antitrust Improvements Act Of 1976

Dear Mr. Sipple:

This is a request for an informal interpretation of filing requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, (the "Act"). This request is made pursuant to § 803.30 of the Premerger Notification Rules ("Rules"). Due to the complexity of this transaction, I am setting forth in this letter the underlying facts.

I represent the controlling shareholder ("Mr. A") of a Company ("the Company") involved in real estate development. The Company and a Savings and Loan Association ("Savings") are the only two partners of a general partnership ("the Partnership"). Both the Company and Savings have a 50% interest in the profits of the Partnership. The present capital account ratio of the partners is approximately 85% capital of Savings and 15% capital of the Company. The Partnership is engaged in the business of real estate development. Savings also owns 100% of the stock in a corporation ("Management") engaged in the business of management of syndicated real estate limited partnerships incidental to the Partnership's real estate activities. Management also performs property management services for real estate limited partnerships.

In 1984, Mr. A owned another corporation which was a partner in the Partnership. Savings purchased that corporation from Mr. A in exchange for notes issued by Savings. Mr. A's new

John M. Sipple, Jr.
December 27, 1989
Page 2

company, the Company, which is now a general partner of the Partnership, was then admitted to the Partnership.

The Company and Savings are currently negotiating a transaction whereby Savings will withdraw from the Partnership and receive in consideration certain distributions from the Partnership. Savings will also sell its stock in Management to Mr. A. Contemporaneously with the withdrawal of Savings from the Partnership, a limited partnership controlled by Mr. A, will acquire a 1% interest in the Partnership. ^{2.}

Mr. A's brother, Mr. B, is President of the Company. Also contemporaneously with the withdrawal of Savings, Mr. B, through a new company wholly owned by him, will acquire a 10% general partnership interest in the Partnership which will entitle him to 10% of the profits in the Partnership. After the closing the Partnership will become a limited partnership and Mr. B's interest will convert to a limited partnership interest.

The Partnership's assets are primarily real estate. The Partnership's real estate assets consist of (1) real estate projects currently under development including residential (condominiums, single family homes, and apartments) and commercial (office buildings) projects, (2) raw, undeveloped land held for residential development, (3) real estate held for rental, including an office building, a multifamily apartment project and 9 individual residential condominium units, and (4) interests in three other partnerships that are involved in multifamily and residential condominium construction. In addition the Partnership has other assets incidental to its real estate holdings, such as cash, receivables, and prepaid expenses.

A Savings and Loan has a branch office in one office building owned by the Partnership. That space is valued at approximately \$5,000,000. An apartment complex now under development is expected to have some retail space. It is as yet unfinished and not leased. The space is also valued at approximately \$5,000,000.] not for sale
not for sale
not for sale
space

In the contemplated transaction, Savings will receive on liquidation of its interest in the Partnership (1) cash, (2) future payments collateralized by certain Partnership property and property interests, (3) cancellation of notes for \$20,000,000 made by Savings and held by the Partnership, and (4) two raw land properties with a total fair market value of \$12,550,000. In addition, the parties will release each other from certain not negotiable

John M. Sipple, Jr.
December 27, 1989
Page 3

indebtedness and renegotiate certain collateralized transactions and contractual obligations with third parties in terminating the working relationship between Savings and the Company. In addition, Savings will sell its stock in Management to the Mr. A for \$14,435,000. *2. Size of A? 25 MM or more?*

Prior to the withdrawal of Savings from the Partnership, stock in six corporations now owned by the Partnership will be transferred to a company or companies controlled by Mr. A. Three of the corporations will be transferred for nominal consideration (\$1.00) and the other three will be transferred for a total price of between \$500,000 and \$3,000,000, the exact amount to be worked out between the parties. Included is the stock of a property management company, the stock in a corporation which served as the general partner in real estate limited partnerships which the Partnership participated in, and the stock in a corporation which is developing some single-family residences. *8/1/90 C
done
not sure
Test 2
all
Savings
50% to 40%
Savings 2
see 1988
2/1/90*

Following completion of the transaction, Mr. A, through the Company, will be entitled to 90% of the profits of the Partnership and Mr. B, through what will become a limited partnership interest, will be entitled to 10% of the profits.

I would like whatever guidance you can provide on whether this transaction is reportable under the Act. On the above facts, is the withdrawal from the partnership and the redemption of the partnership interest deemed to be an acquisition of less than a 100% interest in a partnership and thus not reportable? In the alternative, is this transaction deemed to be an acquisition of realty in the ordinary course of business and exempt from the reporting requirements of the Act?

This transaction will not raise any competitive issues. Two partners in a real estate development company are separating. The Act and the Rules recognize that the acquisition of real estate is unlikely to raise any competitive issues, hence the exemption. The types of real estate in question here, raw land, residential properties, and office buildings are the types of real estate that the Premerger Office has found to be included within the exemption in the past. The withdrawal of one partner from the partnership does not decrease the number of competitors but increases it by one. The enforcement of the antitrust laws provides no policy basis to require the reporting of this transaction.

John M. Sipple, Jr.
December 27, 1989
Page 4

The withdrawal from the partnership by Savings and the redemption of the partnership interest by the Partnership is neither the sale of assets nor voting securities by Savings. Mr. A, as the ultimate parent entity of the Partnership, will acquire the former interests of Savings in the partnership. Acquisition of less than 100% interest in a partnership is not a reportable transaction because a partnership interest is deemed to be neither a voting security nor an asset. See 52 F.R. 20061, May 29, 1987. If the transaction is viewed as the acquisition of less than a 100% interest in the Partnership by Mr. A, it should not be a reportable transaction.

If the acquisition is deemed to be the acquisition by Mr. A of a 100% interest in the Partnership, then the acquisition should be treated as an asset acquisition. The Partnership holds, develops, and sells realty in its normal course of business. If viewed as an asset acquisition by Mr. A, this should be treated as the acquisition of realty in the ordinary course of business. The acquisition of goods or realty transferred in the ordinary course of business is exempt from the requirements of the Act. 15 U.S.C. § 18A(c)(1).

Savings is receiving two raw land parcels as part of its consideration for withdrawing from the partnership. The acquisition by Savings of those land parcels should also be viewed as the acquisition of realty in the ordinary course of business and exempt from the requirements of the Act.

We would appreciate whatever guidance you can give us in determining whether this is a reportable transaction.

Sincerely,

PME:njs

*1/3/90 - called PME and
advised that we view A as having acquired
all of the partnership interests, i.e., the full assets
of the partnership. However, we do not view bank space
as "realty" so the purchase of assets are not reportable
(even if bank space were to be included). Also, if Management
has sales or assets of \$5 MM or more, its acquisition by A is
reportable under 802.20(b). (Same test should be applied to the
three "non-active" corporations controlled by the Partnership which will be
A's "non-active" corporations.)*