

C-1



September 4, 1992

VIA FACSIMILE

Mr. Patrick Sharpe
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 310
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

SEP 8 8 19 AM '92

FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE

Dear Mr. Sharpe:

This letter is a revised version of the letter I sent you on Septmeber 3, 1992. The purpose of this letter is to follow up on a telephone conversation we had on August 3, 1992, concerning whether the transaction discussed below is exempt from the filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (the "Act"). This letter contains a number of facts in addition to those I provided to you over the telephone. It also provides additional facts based on our telephone conversation this morning.

FACTUAL BACKGROUND

This transaction concerns the transfer of lease, contract and permit rights with respect to undeveloped land. Company A owns a large tract of undeveloped land in County X, which is located in State Y. Company B has entered into a contract with Company A to purchase this land for \$3 million (the "Land Contract"). Company B also has entered into a contract with County X (the "County X Contract"), under which Company B will assign all of its rights under the Land Contract, including the right to purchase the land to the County, and the County will lease the land to Company B. The County will pay Company A \$1 to obtain its fee simple interest; Company B still is obligated to pay the balance of the purchase price for the land to Company A. The lease contains an option under which Company B can purchase the land from the County at the end of the lease term at fair market value.

Potentially Reportable

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Company B's intent is that the land be used as a landfill. To this end, Company B has applied for a number of permits necessary to run the landfill, including permits from the State Environmental Department and a permit from the County allowing the land to be used for that purpose. At present, Company B has either obtained, or is the process of applying for, these various permits. When operational, the landfill will accept waste from municipalities, corporations, other businesses and individuals located in a multistate region.

Company B now intends to enter into an agreement with Company C under which Company B would assign to Company C (1) its rights under the Land Contract and the County X Contract, including its right to lease the land and to air rights over the land; (2) its rights under other contracts, including the County's agreement to exercise its condemnation power with respect to access rights to the land, and related contract rights; and (3) all permits or pending permit applications related to operation of the landfill, including the right to construct the landfill and environmental permits. Before assignment of these permits can be made final, Company C will have to submit certain information about itself to the State and County just as if it was applying for the permits itself.

Company C will pay \$2 million to Company B after permission to transfer certain permits has been obtained, along with a commitment to issue a leasehold title insurance policy satisfactory to Company C (for the title insurance to be issued upon Company C obtaining the lease interest in the land after it is sold to the County). At the same time, Company C will assume Company B's \$3 million obligation to pay for the County's purchase of the land. At the time the \$2 million is paid and the \$3 million obligation is assumed, Company C will receive all lease, permit and contract rights it is acquiring from Company B, and the land still will be undeveloped. Company C will pay an additional \$15 million to Company B after all permits have been received, the landfill has been constructed (by Company C), and the landfill has received its first waste. Finally, Company C will pay Company B a monthly royalty fee based on the number of tons of waste deposited in the landfill.

YSIS

The assignment of lease, contract and permit rights embodied in the transaction described above is exempt from the filing requirements of the Act.

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but not the lease

First, Company B's acquisition of lessee rights and related contract rights is exempt under Section 7A(c)(1) of the Act as an acquisition of "realty transferred in the ordinary course of business." 15 U.S.C. § 18a(c)(1). The FTC staff has long interpreted Section 7A(c)(1) to exempt the acquisition of a fee interest in undeveloped real estate. 50 Fed. Reg. 38742, 38756 (1985); ABA Premiermerger Notification Practice Manual (1991) ("ABA Premiermerger Manual"), Interpretation No. 6 (Commentary). Based on my discussion with you, it is my understanding that the Commission also has applied this exemption to the acquisition of an existing lease interest in undeveloped land, as is happening here. Similarly, it would seem that contractual rights closely related to this lease interest, such as the County's agreement to use its condemnation power to counter claims of access rights to the land by owners of adjacent parcels or the public, also should be considered exempt.

OK

*802. (a)
assets
incidental
to the ownership
of real
property*

In this transaction, the \$3 million liability being assumed by Company C to pay for County X's acquisition of the land is properly allocable to the lease interests and related contractual rights. See ABA Premiermerger Manual, Interpretation No. 123 (Commentary) ("Any lump sum paid by the buyer to the seller in connection with the assumption of an existing lease is presumed to constitute a premium that must be included in the acquisition price."). Thus, at least \$3 million of the purchase price should be allocated to the exempt acquisition of interests in the undeveloped land.

Second, the assignment of the permit rights also is exempt. Like the lease interest and contract rights mentioned above, these rights all relate directly to the future use of the undeveloped land. Their acquisition thus should likewise be exempt under Section 7(c)(1).

but they are not

In addition, it should be noted that if these permits were being acquired directly from that State or County, the acquisition would be exempt from the requirements of the Act under Section 7A(c)(4) (exempting transfers to or from a State or political subdivision thereof). While Company C is purchasing the permit rights from Company B, and Company B already has passed through many regulatory hurdles in getting the permits that Company C will not have to overcome, the fact that the assignments must be approved by the State and County make this

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transaction similar in many respects to the permits being granted directly by the government to Company C.1/

Finally, transfer of the permit rights should be exempt because, as a practical matter, they represent non-exclusive rights, similar in nature to a non-exclusive patent or trademark license. Under the Act, acquisition of such a license is exempt, because the grantor retains the right to use the patent or trademark, or to license it to others. ABA Premerger Manual, Interpretation No. 49; Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act, Axinn, et al., (Rev. ed. 1991), § 4.01[5], at 4-11 n. 32. Here, while the County, which only will account for a small percentage of the waste to be deposited in the landfill, has agreed that it will not grant any other entity the right to open a landfill within the County, numerous other jurisdictions in the multistate region to be served by the landfill retain the authority to issue permits to others to construct landfill facilities.

Grant
from county
is therefore
exclusive

Company C's acquisition of the permit rights thus should be exempt. Since the balance of the consideration being paid by Company C to Company B is allocable to these rights, it follows that the entire transaction is exempt.

We would appreciate your prompt response as to whether you agree with the analysis contained in this letter.

Note: Most notes in margin were from RS.

Sincerely,

[REDACTED SIGNATURE]

This is an acquisition of rights in and to unproductive property ~~for~~ and assets incidental to real property for \$20.0 mm - exempt under C-1 called [REDACTED] 8-9-92

(TH) & (RS) concurs

1/ Acquisition of the permits also is more like a direct grant to Company C because Company C expects that, with respect to the County permits, it will have to negotiate numerous changes to make the project economically viable.