

[REDACTED] [REDACTED] [REDACTED]  
7A (c) (1)  
[REDACTED] [REDACTED]  
[REDACTED]

December 20, 1990

Premerger Notification Office  
Bureau of Competition  
Room 303  
Federal Trade Commission

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

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 [REDACTED] [REDACTED] [REDACTED] of four industrial

[REDACTED] for a total

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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] [redacted] of the additional property [redacted] [redacted] retain other assets, including additional industrial [redacted]

approximate amount of \$4,809,050.00. The contemplated [redacted]

The total rentable square footage of all five properties is approximately 380,177. The total square footage of industrial subject properties are located, totals between 42,000,000 and [redacted]

[redacted] general partnership, which consists of [redacted] [redacted] entities which constitute the seller in the transactions. For purposes of this inquiry, we assume that [redacted] is the ultimate [redacted]

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 [redacted]

sections and regulations is to greatly restrict the type or [redacted]

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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

the shares are held beneficially by approximately 10,000 shareholders. The shares are traded on the New York Stock

In addition, REITs are subject to rules limiting their direct management of properties in such a way that they may not

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

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

4. APPLICATION OF THE EXEMPTION. BY VIRTUE OF THE INTERNAL Revenue Code and related regulations governing REITs, [redacted]

to its shareholder investors, through the income derived from

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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

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

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

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

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

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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 signature block]

12/28/90 - called [Redacted]  
8/91 - called + [Redacted]  
11/91 - called + [Redacted]

11/8/91 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 Syple, 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 HRS-R Act. Although the property to be purchased was "income producing" (and thus, under our general view, not an investment in real estate) since its business is investing in

view, not an investment in real estate, since its business is investing in apartment buildings with not more than 15 units per space, some is specifically limited by IRS rules on its ability to operate

real property for investment under 7A(C)(1).

However, this portion appears to be other real estate investment companies.

P.B. Smith