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Howard L. Alderman, Jr., Esq.,
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LAND CONDOMINIUMS:
AN ALTERNATIVE DEVELOPMENT
OPPORTUNITY

Robert M. Ercole, Esq.,
Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.

SDAT'S INTERPRETATION AND IMPLEMENTATION
OF THE NEW LAW CONCERNING TRANSFER OF
CONTROLLING INTERESTS IN RPE'S

In association with:
Myles L. Lichtenberg, Esq. & MylesTitle

Chestnut Ridge Country Club
September 25, 2008

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LAND CONDOMINIUMS
a/k/a Landominiums

September 25, 2008

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What is a Land Condominium?

“Private” division of land into legally defined units - length, width as shown in 2 dimensions
may also describe subsurface depth and airspace

Compare:

Traditional Condominium - private division of structure into legally defined units

Traditional Subdivision - governmentally approved division of land into legally defined lots/land units

Maryland Condominium Act: Real Property Article 11-101 *et seq.*, Annotated Code of Maryland

UNIT: three dimensional space identified as such in the [condominium] declaration and on the condominium plat and shall include all improvements constructed within the space except those excluded in the [condominium] declaration RP Sec. 11-101(p)

Conventional Condominium: Building divided into ‘suites’ or ‘apartments’ by reflecting dimensions on recorded condominium plat

Unit is generally described from middle of interior walls and to the inside surface of exterior walls/glass

Owner of Unit has ‘exclusive’ ownership of interior, with exterior surfaces, roof, etc. as a common element

Land areas surrounding buildings containing Units are common elements

Land Condominium Unit: Land divided into land units as described on condominium plat and in the condominium declaration

improvements are constructed within the land Unit

common elements include roadways, utilities, recreational areas, stormwater management, etc.

Condominium creation is a function of State law with little or no local governmental approval

Condominium regimes are created by recording the Declaration of Condominium Regime and the Condominium Plat among the land records of the jurisdiction [Note: residential condominium regimes must also be reviewed/approved by the Maryland Secretary of State]

A condominium is not a structure or a land area B it is a legal structure and a form of ownership of property

Why use a land condominium rather than a traditional subdivision?

Flexibility

Lack of local government review

Time element

'Size' of land Unit v. size of 'lot'

Configuration of land Unit v. 'lot' configuration

Development of Land Condominium Units

Subject to local government review; *see* Baltimore County Code Secs. 32-4-101(p)(4) [development regulations] & 33-3-101(g)(4) [forest buffer requirements]

Grading and Building Permits

Development requirements are based on the entire land area subjected to condominium regime and not individual condominium land Units

Subject to zoning density, height limits, maximum building length, parking requirements [no interior 'lot' or 'property' lines for purposes of setback]

Forest conservation, Forest buffer, open space requirements

Ownership of streets, open space, utility lines, etc.

Reciprocal Easements

Condominium Declaration & Associated Documents for Land Condominium Projects

Declaration

By-Laws

- must provide for maintenance, repair, replacement of streets, stormwater management, utilities

- must provide for insurance [*see*, Potential Problem Areas below]
- means of allocation and collection of assessments
- architectural controls
- must provide declarant/developer with the right to modify the declaration and condominium plat [consider power of attorney]

Potential Problem Areas:

Local Jurisdiction's Lack of Understanding/Exercise of Development Control:

- failure to understand that creation of land condominium does not negate local review of development of land Units
- lack of procedure for mandatory exactions
- attempt to require 'subdivision' of parcels into single, bulk parcel, before condominium regime can be created [*Compare*, RP Sec. 11-122(b) – can't impose burden/restriction on condominium not imposed on property of similar character that is not subjected to condominium regime]

Required Insurance Coverage:

- Council of Unit Owners must maintain property insurance on common elements and **UNITS**, exclusive of improvements and betterments installed in Units by Unit Owners; RP Sec. 11-114(a)(1)

Document Preparation:

- nested condominium regimes [land condominium regime and condominium regime for improvements constructed within land unit]
- continued developer control and ability to annex additional land
- comprehensive, reciprocal easements B parking, trash collection, signage

Practical Examples:

- dwelling constructed on two, presently undersized but grandfathered building lots
- multiple dwellings constructed on single lot of record
- development approved with multiple buildings, each on separately 'described' leasehold area - subsequent requirement for each building to be 'owned' individually
- multiple lots in common ownership but unable to realize all density due to environmental/physical constraints

**SDAT's INTERPRETATION AND IMPLEMENTATION
OF THE NEW TRANSFER AND RECORDATION TAX
ON CONTROLLING INTERESTS**

SEPTEMBER 25, 2008

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1. Overview of the New Law

2. SDAT Regulations
 - 2.1 "Beneficial" Ownership

 - 2.2 Step Transactions

 - 2.3 Determination of Consideration

 - 2.4 Tax Avoidance Plans

 - 2.5 Exemptions/Rulings

 - 2.6 Reporting Form

Office Use Only

REPORT OF TRANSFER OF CONTROLLING INTEREST

(Please read the instructions below before completing this form)

1. Type of filing: Regular Permissive

2. Date of final transfer: _____

3. Name of Real Property Entity whose interest is being transferred: _____

4. Mailing address for Real Property Entity: _____

5. Type of Real Property Entity: Corp LLC LP GP or Joint Venture
 Unincorporated REIT Other-specify _____

6. State of formation: _____

7. Total consideration for the controlling interest being transferred: \$ _____

8. List below the value attributable to each of the following assets:

- a) Maryland Real Property \$ _____
- b) Non-Maryland Real Property \$ _____
- c) Cash \$ _____
- d) Securities \$ _____
- e) Maryland Tangible Personal Property* \$ _____

*Provide SDAT personal property account # for each return:

- f) Non-Maryland Tangible Personal Property \$ _____
- g) Other: Attach description and method of valuation \$ _____

9. Gross value of Real Property Entity assets: \$ _____

10. Real property in Maryland directly or beneficially owned by the Real Property Entity:

Parcel 1:

County Name SDAT Account No. Address or brief description

Description of building/improvements: _____

Title holder if different from Item 3 above: _____

Consideration attributable to the parcel: \$_____

Parcel 2:*

County Name SDAT Account No. Address or brief description

Description of building/improvements: _____

Title holder if different from Item 3 above: _____

Consideration attributable to the parcel: \$_____

*If more than two parcels, attach a separate sheet and indicate total number of parcels: _____

11. Specify and explain any exemptions authorized by law being claimed with this filing:

(Attach a separate sheet if more space is required).

12. Transfer and Recordation taxes paid with this filing:

Item 7 amount: \$	<input type="text"/>	x	_____	= \$	_____	x	_____	= \$	_____
			Item 8a amount		Total amount		Co. Rate		Co. Recordation
Item 9 amount: \$	<input type="text"/>			\$	_____	x	0.5%	= \$	_____
					Total amount		St. Rate		State Transfer
				\$	_____	x	_____	= \$	_____
					Total amount		Co. Rate		Co. Transfer

Total Taxes \$_____

Add the **\$20 filing fee** to the amount of the total taxes and make the check payable to the State Department of Assessments & Taxation.

13. I hereby declare under the penalties of perjury, pursuant to § 1-201 of the Maryland Tax-Property Code Annotated, that this filing (including any accompanying forms and attachments) has been examined by me and the information contain herein, to the best of my knowledge and belief, is true, correct and complete, that I am authorized to make this filing on behalf of the Real Property Entity, that I have accurately reported the percentage of controlling interest being transferred, that I have fully reported the consideration attributable to Maryland Real Property, and that I have answered truthfully each item of information requested on the form.

Signature of authorized filer

Date

INSTRUCTIONS FOR A REPORT OF TRANSFER OF CONTROLLING INTEREST

NOTE: There is a \$20 filing fee for the submission of this form to the Department in addition to the payment of the applicable State and County recordation and transfer taxes. Once filed, the completed form will be viewable on the Department's website.

ITEM 1 - TYPE OF FILING: A regular filing is required by law, whether taxable or exempt under Tax-Property Article, § 12-117. A permissive filing occurs when either the 80% Maryland real property asset standard or the transfer of 80% of the controlling interest standard is not met but it is filed optionally pursuant to COMAR 18.13.02.05 C and D.

ITEM 2 - DATE OF FINAL TRANSFER: The date of final transfer is the date when more than 80% of the controlling interest has been transferred. In cases of multiple step transfers, see COMAR 18.13.02.04.

ITEM 3 - NAME OF REAL PROPERTY ENTITY WHOSE INTEREST IS BEING TRANSFERRED: Report the name of the entity whose interest is being transferred. It might not be the record title holder.

ITEM 4 - MAILING ADDRESS FOR REAL PROPERTY ENTITY: This is the address where the management of the Real Property Entity wishes to receive official correspondence. However, the Real Property Entity must separately notify the Supervisor of Assessments in the county where a particular property is located to change the address for the receipt of the regular real property assessment notice or the property tax bill.

ITEM 5 - TYPE OF REAL PROPERTY ENTITY: Check the appropriate box for the type of legal entity whose controlling interest is being transferred.

ITEM 6 - STATE OF FORMATION: Indicate the jurisdiction where the current organizational documents for the Real Property Entity are on file.

ITEM 7 - TOTAL CONSIDERATION FOR THE CONTROLLING INTEREST BEING TRANSFERRED: The information requested here is the total consideration for all the interests being transferred under the plan of transfer. It also includes any mortgage or other security interest on the Maryland real property and any other debt or encumbrance of the Real Property Entity. If the transfer is being accomplished through multiple steps, it includes the total consideration for all steps.

ITEM 8 - LIST BELOW THE VALUE ATTRIBUTABLE TO EACH OF THE FOLLOWING ASSETS OF THE REAL PROPERTY ENTITY: • The filer of this form shall provide an itemization of the value allocable to each of the assets listed. These values represent the full cash value for each line item at the date of the final transfer. The amounts reported here are prior to any allocation if this transaction is less than the purchase of the entire interest in the Real Property Entity • If an amount is claimed for Maryland personal property not subject to these taxes, then the filer must provide the separate SDAT personal property account number where that personal property has been previously reported to the Department on a tax return. • If there are other deductions claimed for such assets as intangibles, then the filer must attach a

description, an explanation of the method of valuation, and enter the amount of consideration attributable to that asset.

ITEM 9 - GROSS VALUE OF REAL PROPERTY ENTITY LISTED IN ITEM 8: The information requested here is the total value of all assets listed in item 8. This amount should be reported without any reduction for a mortgage or other security interest, unsecured debt, or other liability.

ITEM 10 - REAL PROPERTY IN MARYLAND DIRECTLY OR BENEFICIALLY OWNED BY THE REAL PROPERTY ENTITY: • Each real property parcel included in the transfer of the controlling interest must be separately identified. • The information requested on the building/improvements should be a brief description of the actual buildings or type of improvements located on the property (e.g., a 100,000 square foot office building or a three story parking garage). • If the record title holder of the parcel is different than the Real Property Entity reported in Item 3 of this form, then the record title holder should be reported here. • The consideration attributable to the real property parcel should be that portion of the total consideration allocable to the parcel without reduction for mortgages or other encumbrances.

ITEM 11 - SPECIFY AND EXPLAIN ANY EXEMPTIONS CLAIMED: The filer must indicate and briefly explain any exemptions claimed under Tax-Property Article, § 12-117(c).

ITEM 12 - TRANSFER AND RECORDATION TAXES BEING PAID WITH THIS FILING: The amounts of recordation and transfer taxes being paid with this filing are reported here. Click on this link for a listing of the applicable county and State recordation and transfer tax rates. The State transfer tax rate is one-half of one percent (.5%) Fill in the individual Item amounts to perform the necessary mathematical calculation to determine the final amount subject to the recordation and transfer tax rates. The calculation is the ratio of the amount in Item 7 (Total consideration) over the amount in Item 9 (Gross value) multiplied by the amount in Item 8a (Maryland real property) and that result is multiplied by the applicable county and State tax rates.

ITEM 13 - OATH: This form is being submitted under the penalties of perjury by the filer.

ITEM 14 - CONTACT INFORMATION FOR THIS FILING: The Department needs a specific contact person in the event that there are subsequent questions about the filing. Item 14 will not be imaged and not be made part of the public documents viewable on the Department's web site.

Regulations Implementing Tax-Property Article, §§ 12-117 and 13-103

Subtitle 13 RECORDATION AND TRANSFER [TAX] TAXES

18.13.02 Transfers of Controlling Interests

Authority: Tax-Property Article, §§12-102, 12-103, 12-112, 12-117, and 13-202,

Annotated Code of Maryland

.01 Scope.

The regulations in this chapter apply to both recordation and transfer taxes administered by the Department under Tax-Property Article, Titles 12 and 13, Annotated Code of Maryland, to the extent allowed by law.

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) “Beneficially owned by a real property entity” means the entity holds:

(a) An ownership interest in another entity that owns the real property directly;

(b) An interest in another entity or entities that, through a series of ownership tiers, ultimately reaches an entity that owns the real property directly; or

(c) A beneficial interest in a trust that directly owns the real property or, through a series of trusts or other entities, ultimately reaches an entity that owns the real property directly.

(2) “Controlling interest” has the meaning stated in Tax-Property Article, §12-117, Annotated Code of Maryland.

(3) “Controlling interest percentage standard” means the more-than-80-percent standard in the definition of “controlling interest” as stated in Tax-Property Article, §12-117, Annotated Code of Maryland.

(4) “Directly owned by a real property entity” means the entity holds an interest in real property transferable by an instrument of writing.

(5) Final Transfer.

(a) “Final transfer” has the meaning stated in Tax-Property Article, §12-117, Annotated Code of Maryland.

(b) “Final transfer” does not include any transfers or steps in a transfer occurring before July 1, 2008.

(6) "Instrument of writing" has the meaning stated in Tax-Property Article, §12-101, Annotated Code of Maryland.

(7) "Plan of transfer" has the meaning stated in Tax-Property Article, §12-117, Annotated Code of Maryland, and includes:

(a) Transfers of interests in a real property entity to multiple grantees under one or more agreements if the totality of the transfers to the separate grantees meets the controlling interest percentage standard in any 12-month period, unless the real property entity can establish to the Department's satisfaction that the transfers were part of entirely separate, distinct, and unrelated contracts or agreements; and

(b) Transfers of interests in a real property entity that, if done by an instrument of writing for real property directly, would be taxable under Tax-Property Article, Titles 12 and 13, Annotated Code of Maryland, including articles of consolidation, articles of merger, and articles of transfer, as those terms are defined in Tax-Property Article, §12-101, Annotated Code of Maryland, whereby either:

(i) The real property entity ceases to exist; or

(ii) The parties holding the controlling interest in the real property entity and their respective allocation of distributions, profits, and losses are not identical at the beginning and end of the transaction.

(8) "Real property" has the meaning stated in Tax-Property Article, §12-117, Annotated Code of Maryland.

(9) "Real property entity" has the meaning stated in Tax-Property Article, §12-117, Annotated Code of Maryland.

(10) "Step transaction doctrine" means the legal doctrine that:

(a) Looks to the substance of a transaction over its form to determine that steps have been taken to achieve tax avoidance;

(b) Amalgamates or collapses the separate transfers or steps into one transaction where they are actually component parts of a single transaction; and

(c) Is based on the application of three separate tests as defined and applied in *Read v. Supervisor of Assessments*, 354 Md. 383, 731 A.2d 868 (1999), which are the:

(i) End result test;

(ii) Interdependence test; and

(iii) Binding commitment test.

.03 Valuation of Controlling Interests.

The valuation of a controlling interest:

A. Is not determined solely by the number of shares or other units of ownership interest and the par value or other value assigned to those interests by a real property entity; and

B. Will consider the value of the rights and benefits associated with the majority ownership of the controlling interest being transferred as reflected in the transactional documents and any other evidence considered relevant by the Department.

.04 Determination of Completed Transfer.

A. A transfer of controlling interest is considered complete when the controlling interest percentage standard is met within any 12-month period, regardless of whether other transfers may be planned or have taken place outside of the 12-month period.

B. If a final transfer of controlling interest is accomplished through multiple steps that would be considered one transaction under the step transaction doctrine, then that one transaction, including all multiple steps that make up that one transaction, is considered effective and complete upon the earlier of the date when:

(1) The last step has occurred; or

(2) The interest transferred in the multiple steps meets the controlling interest percentage standard, regardless of the fact that other steps may be planned for the future.

.05 Reports of Transfers.

A. A real property entity shall file the report required by Tax-Property Article, §12-117(d), Annotated Code of Maryland:

(1) On a form required by the Department; and

(2) Under the signed oath of an individual who has authority to bind the real property entity.

B. Reports of transfers of controlling interest shall be filed with the Department within 30 days of the final transfer, regardless of the application of any exemption.

C. If there is a transfer of an interest in an entity where the value of the real property interest held by that entity is between 70 percent and 80 percent of the value of its assets, that entity may file a report with the Department to reflect that the transfer has occurred without the payment of recordation or transfer taxes.

D. If there is a transfer of an interest in a real property entity and its value is between 50 percent and the controlling interest percentage standard, that entity may file a report with the Department to reflect that the transfer has occurred without the payment of recordation or transfer taxes.

E. The fact that the Department accepts a permissive filing under this regulation without the payment of recordation or transfer taxes does not stop it from subsequently determining that the transfer reflected in that filing was taxable.

F. The filing of a report of transfer under Tax-Property Article, §12-117, Annotated Code of Maryland, or this regulation does not create a requirement to qualify or register with the Department under the Corporations and Associations Article, Annotated Code of Maryland, unless otherwise required by law.

.06 Determination of Consideration.

A. The Department determines the amount of consideration payable for the transfer of a controlling interest and imposes the corresponding tax based upon:

(1) The report referenced in Regulation .05 of this chapter; and

(2) Any other information secured by the Department.

B. Consideration payable for the transfer of a controlling interest includes all consideration payable under a plan of transfer, regardless of whether it has been totally paid at the time of the final transfer.

C. If the Department determines that there has been a failure to establish the consideration attributable to the transfer of the controlling interest, the Department will impose the tax upon that proportion of the fair market value of the real property directly or beneficially owned by the real property entity that equals the same proportion of the controlling interest being transferred.

D. The fair market value referenced in §C of this regulation is the value of the real property determined by the Department as of the date of finality immediately preceding the final transfer.

.07 Applicability of Exemptions.

A. The transfer of a controlling interest is exempt from recordation tax only to the extent that a specific transfer under a plan of transfer meets the criteria for an exemption set forth in Tax-Property Article, §12-117(c), Annotated Code of Maryland.

B. The transfer of a controlling interest is exempt from transfer tax only to the extent that a specific transfer under a plan of transfer meets the criteria for an exemption set forth in Tax-Property Article, §13-103(c), Annotated Code of Maryland.

C. The transfer of a portion of a controlling interest that is exempt will be considered in determining whether there has been a transfer of controlling interest.

.08 Applicability of Other Sections.

If the transfer of a controlling interest is taxable under Tax-Property Article, §§12-117, 12-105(g), and 13-205(d), Annotated Code of Maryland, recordation and transfer taxes will be imposed based only on the latter two sections.

.09 Ending Existence.

A. If a transaction, such as a merger or consolidation, ends the existence of one or more entities, the determination of whether there has been a transfer of controlling

interest of a real property entity will be based on the entity that holds the direct or beneficial interest in the real property at the beginning of the transaction.

B. If the transfer of a controlling interest of a real property entity ends the existence of that real property entity, the surviving entity or entities, regardless of whether they meet the definition of a real property entity, shall:

- (1) File a report of transfer; and
- (2) Pay any recordation and transfer tax due.

.10 Burden of Proof.

A real property entity has the burden of establishing to the satisfaction of the Department any information required to administer Tax-Property Article, §12-117, Annotated Code of Maryland, or this chapter.

.11 Examples.

A Delaware limited liability company (DE LLC) owns only Maryland real property with a value of \$10,000,000. A New Jersey corporation (NJ Corp) owns all of the membership interest in DE LLC, which represents 100 percent of NJ Corp's assets. A California corporation (CA Corp) owns all of the stock of NJ Corp and all of the membership interest in a Florida limited liability company (FL LLC), which represents 100 percent of CA Corp's assets. FL LLC owns only Florida real property valued at \$1,000,000. The following apply:

- A. The transfer of DE LLC's membership interest is subject to recordation and transfer taxes in Maryland under Tax-Property Article, §12-117, Annotated Code of Maryland;
- B. The transfer of the stock of NJ Corp is subject to recordation and transfer taxes in Maryland under Tax-Property Article, §12-117, Annotated Code of Maryland;
- C. The transfer of the stock of CA Corp is subject to recordation and transfer taxes in Maryland under Tax-Property Article, §12-117, Annotated Code of Maryland, because 80 percent of its assets are still Maryland real property; and
- D. In §C of this regulation, if FL LLC owns only Florida real property valued at \$5,000,000, the transfer of the stock of CA Corp is not subject to recordation and transfer taxes in Maryland under Tax-Property Article, §12-117, Annotated Code of Maryland, because CA Corp would no longer be a real property entity.

.12 Tax Avoidance.

The Department will administer Tax-Property Article, §12-117, Annotated Code of Maryland, and this chapter in the broadest legal manner to impose a tax when a transaction involving a transfer of controlling interest in a real property entity is structured to avoid the payment of the taxes.

C. JOHN SULLIVAN, JR., Director of Assessments and Taxation