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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

November 22, 2021

To the Honorable, the City Council,

On June 21, 2021, the City Council voted to file a Home Rule Petition with the Legislature entitled “An Act authorizing the City of Cambridge to impose a real estate transfer fee” (the “Petition”). The Petition sought to impose a real estate transfer fee equaling two percent of the portion of a purchase price exceeding \$1,000,000 on transfers of real property, with some exceptions. On October 28, 2021, we heard from the office of Representative Marjorie Decker sharing a legal analysis and proposed revisions prepared by House Counsel concerning the Petition. Attached is a red-lined version of the Petition with House Counsel’s recommend clarifying changes, and below we explain a further issue and change that House Counsel has recommended. We have analyzed the issue and are recommending that the Council accept the changes proposed by House Counsel.

In addition to the redlined clarifying changes, the issue identified by House Counsel concerns the application of the transfer fee to the transfer of a controlling interest in a trust. The Petition uses language that states that the transfer fee applies to the transfer of “(i) any real property interest in any property situated in the City; or (ii) a controlling interest in a trust, limited liability company or other entity that directly or indirectly holds an interest in any class of real property situated in the City.” House Counsel has raised a question of whether the Legislature can authorize the City to impose the transfer fee on the transfers of trusts’ or other entities’ controlling interests.

Although the transfer fee is labeled as a fee, under the legal framework for whether a payment is classified as a fee or a tax, the transfer fee is a tax. The City does not have authority to impose taxes on its own, but can do so with authority from the Legislature, which is why the City has submitted this Petition to the Legislature for approval. The Legislature may only impose taxes on certain good and commodities. The Supreme Judicial Court has held that “transactions by entities or persons that either are or could be regulated in the public interest are commodities.” Route One Liquors, Inc. v. Sec’y of Admin. & Fin., 439 Mass. 111 (2003). The SJC has also held that “commodities” include “the privilege of transacting business as a corporation, whether domestic or foreign, within the Commonwealth.” S.S. White Dental Mfg. Co. v. Commonwealth, 212 Mass. 25 (1912). The concern that House Counsel has identified is

“whether trusts and ‘other entities’ have been granted some privilege to conduct their business that gives rise to a ‘commodity’ for the General Court to impose the tax.” The creation of trusts and the transfer of a controlling interest in a trust are actions that can be taken under so-called common law powers, meaning these actions are not taken pursuant to any statute. These actions are not regulated by the Commonwealth, unlike the actions of a corporation or limited liability company which are subject to regulation by the Commonwealth. Accordingly, if the Petition is passed but then challenged, a court may find that the transfer of a controlling interest in a trust is not a commodity that can be taxed, and in this case, it cannot be subject to the transfer fee.

Additionally, House Counsel pointed out that some trusts are treated differently for tax purposes. A nominee trust is a common real estate holding instrument and the Massachusetts Department of Revenue has issued a directive that the deed excise tax established by G.L. c.64D, §1, which is the tax paid to the Commonwealth when real property is sold, is to be paid when the beneficial interest of a nominee trust is sold or transferred. Accordingly, the transfer fee may only be applicable to the transfer of any real property interest in any property situated in the City, the transfer of a beneficial interest in a nominee trust, or the transfer of a controlling interest in a limited liability company that directly or indirectly holds an interest in any class of real property situated in the City. This is a narrower power than the City is seeking in the Petition.

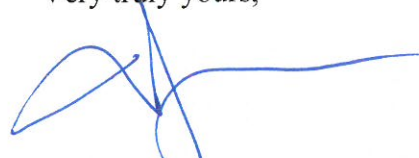
House Counsel recommends “inserting a third clause in section 1 of the legislation to apply this tax to transfers subject to deed excise taxes pursuant to G.L. c.64D, §1. This addition will broaden the coverage of this legislation and, if a court were to determine that this fee cannot be imposed on the transfer of a controlling interest in a trust, the fee will still apply to transfers subject to G.L. c.64D, §1, including nominee trusts.” This change would amend the first sentence of the first seton of the Petition as follows (the new language is in bold and italicized):

SECTION 1. There is hereby imposed a real estate transfer fee equal to 2 per cent of the portion of the purchase price exceeding \$1,000,000 upon the transfer of: (i) any real property interest in any property situated in the city of Cambridge; or (ii) a controlling interest in a trust, limited liability company or other entity that directly or indirectly holds an interest in any class of real property situated in the city of Cambridge; ***or (iii) any interest that is subject to deed excises taxes pursuant to G.L. c.64D, §1.***

We recommend that the City Council vote to accept this change for the reasons stated by House Counsel, as well as vote to accept the redlined changes in the attached version of the Petition. We note that Somerville and Boston have both also filed transfer fee home rule petitions, and both of those petitions contain the same language concerning the transfer of a controlling interest in a trust or other entity that House Counsel has flagged in Cambridge’s Petition. A hearing was held on Somerville and Boston’s petitions on October 18, 2021, and it does not appear that language was changed. We have been able to confirm with Somerville that the Legislature did not raise that issue with it. However, for the reasons set forth above, we recommend making these changes to the Petition.

I will be available to address any questions on this issue.

Very truly yours,

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

Nancy E. Glowa
City Solicitor