



of 1929 (United States Coast and Geodetic Survey) mean sea level, Sandy Hook, N.J.”<sup>1</sup> The second parcel will be an air rights parcel that will start at the Designated Point and extend up vertically (the “Air Rights Parcel”; the Ground Fee Parcel and the Air Rights Parcel are collectively the “Parcels”). The Air Rights Parcel will include all development rights associated with the Property. Both Parcels shall extend horizontally over the existing lot.

The Parcels will be created by the filing of an RP-602 with the Department of Finance (“DOF”). Upon approval of DOF of the creation of the Parcels and the assignment by the Surveyor’s Office of two new tax lots for each of the Parcels, the Seller will convey the Air Rights Parcel to the Purchaser. The Seller will pay New York City and New York State Transfer Tax based on the consideration paid by the Purchaser to the Seller.

At the closing, Purchaser will pay to the Seller \$15,230,000 in cash. Thereafter, Purchaser will construct a new building. The new building will consist of a retail unit (the “Retail Unit”) to be located with the Ground Fee Parcel and residential units to be located within the Air Rights Parcel (the “Residential Units”). It is currently anticipated that the cost of the Retail Unit will be \$978,000 (the “Retail Construction Cost”). The Retail Construction Cost is calculated based on the improvements which the Purchaser is required to deliver under the Agreement for Sale and Purchase of Property (the “PSA”)—that being the cost to complete a “white box”. The term “white box” is used by the Purchaser and Seller to describe the construction of a basic commercial unit. Under the PSA the development of the “white box” will consist of the construction of 2300 square feet on the ground floor and 700 square feet in the cellar of white box commercial space meeting the minimum requirements of the NYC Department of Buildings codes sufficient to obtain a temporary certificate of occupancy and including specifications set forth in the letter attached to the PSA dated April 14, 2015. All further improvements to ready the space for occupancy by a tenant will be performed by Seller. The Seller will reimburse the Purchaser a portion of the costs to complete the “white box” in the amount of \$500,000 to be paid at the time that the improvements to the white box are substantially complete and simultaneously with the delivery and recordation of the quit claim deed described below. The balance of the \$478,000 plus any cost overruns (the \$478,000 plus any cost overruns (jointly, the “Overage”)) shall be paid by Purchaser.

Thereafter, Seller and Purchaser will record a zoning lot merger agreement<sup>2</sup> against the Parcels and a declaration of condominium (the “Declaration”) which will result in the creation of the Retail Unit and various Residential Units above, all within the condominium regime set forth in the recorded Declaration. The Retail Unit will be retained by the Seller and the Residential Units will be retained by the Purchaser and subsequently sold to individual purchasers.

Upon completion of construction and the formation of the condominium, the Seller and Purchaser will execute a quit claim deed in favor of the Seller, without consideration, to confirm

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<sup>1</sup> This office does not express any opinion regarding this definition or adopt this definition in any way but merely uses this term as a means to describe the RPTT ramifications of the transaction.

<sup>2</sup>Development rights generally refer to the maximum amount of floor area permissible on a zoning lot. When the actual built floor area is less than the maximum permitted floor area, the difference is referred to as “unused development rights.” Unused development rights are often described as air rights. A zoning lot merger is the joining of two or more adjacent zoning lots into one new zoning lot. Unused development rights may be shifted from one lot to another, as-of-right, only through a zoning lot merger. A transfer of development rights (TDR) allows for the transfer of unused development rights from one zoning lot to another. See [Zoning Glossary, http://www.nyc.gov/html/dcp/html/zone/glossary.shtml](http://www.nyc.gov/html/dcp/html/zone/glossary.shtml) (last visited November 4, 2015).

the fact that the Seller will be the owner of only the portion of the building which contains the Retail Unit. Simultaneously, the Seller and the Purchaser will execute a quit claim deed in favor of the Purchaser for any portion of the building outside the Retail Unit to confirm title in the Purchaser under the Declaration.

## **ISSUES**

1. How will the consideration for the Air Rights be calculated and when should the RPTT be paid?
2. Should the RPTT be imposed on the conveyance of the quit claim deeds?

## **CONCLUSION**

The transaction should be viewed in its entirety and the consideration for the transfer of the Air Rights should be calculated accordingly. The quit claim deeds are intended to confirm title that is vested under the PSA and do not result in a change of beneficial ownership. Therefore, the quitclaim deeds are exempt under the RPTT as a mere change of form.

## **DISCUSSION**

The RPTT is imposed on each deed at the time of delivery by a grantor to a grantee when consideration for the real property and any improvement thereon exceeds \$25,000. Section 11-2102.a of the Administrative Code of the City of New York (the "Code"). The RPTT is imposed at a rate of one percent of the consideration for a conveyance of a one, two or three-family house or individual residential unit where the consideration is \$500,000 or less, and 1.425 percent where the consideration is over \$500,000. For other conveyances of real property the rate is 1.425 percent where the consideration is \$500,000 or less, and 2.625 percent where the consideration is over \$500,000. Code section 11-2102.a(9)(ii).

Code section 11-2106(b) exempts from tax certain transactions that would otherwise be subject to the RPTT. Under paragraph (8) of that subdivision, a deed conveying an interest in real property that effects a mere change of identity or form of ownership is exempt from the RPTT to the extent that the beneficial ownership of the property remains the same. Under 19 Rules of the City of New York ("RCNY") section 23-05(b)(8)(iv), the determination of the beneficial ownership of real property before a transaction and the extent to which the beneficial interest remains the same following the transaction, will be based on the facts and circumstances.

Under the facts presented, the Seller is receiving consideration for the sale of the Air Rights and is paying RPTT on the consideration. The transaction described in this ruling should be viewed in its entirety. The consideration for the transfer is \$15,230,000 plus the value of a "white box" constructed by the Purchaser for the Seller less the \$500,000 that the Seller is contributing towards the construction of the "white box". The cost of the "white box" is estimated to be \$978,000. The contribution of the Seller towards the construction of the "white box" should be offset against the amount paid by the Purchaser under the PSA when determining the amount of the consideration that is subject to the RPTT. Because the Seller is contributing \$500,000 towards the construction, it is estimated that the Purchaser will have to pay \$478,000 towards the construction of the "white box". Therefore, the \$478,000 should be included in the consideration for the Air Rights for purposes of the filing of the NYC-RPT, together with the cash consideration that the Seller is receiving.

It is evident that the quit claim deeds are not part of a separate transaction but merely a mechanism to confirm and record that the Purchaser owns the portion of the building housing the Residential Units and the Seller owns the Retail Unit as provided under the PSA. The quitclaim deeds do not result in a change in beneficial ownership. Therefore, the portion of the transaction involving the quit claim deeds is exempt from the RPTT as a mere change of form. Because at the time of the closing it will not be known what the actual Retail Construction Cost will be, an amended return should be filed within thirty days of the delivery of the quit claim deed to the Seller if the Purchaser expends more than the amounts specified in the PSA.

This opinion is based on the facts as presented. The Department of Finance reserves the right to modify its opinion in the event that the facts upon which this opinion is based are other than as described above.

Very truly yours,

Diana Beinart  
General Counsel

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