



Republic of the Philippines  
Department of Finance  
**Securities and Exchange Commission**  
SEC Bldg. EDSA, Greenhills, Mandaluyong City



16 February 2009  
SEC-OGC Opinion No. 09-04  
Re: Registration of Securities

**MACAM LARCIA ULEP & BORGE LAW OFFICES**

Unit 1008, 10/F Atlanta Center, Annapolis Street,  
Greenhills, San Juan, Metro Manila

**Attention: Atty. Augusto M. Macam**

**Sir:**

This refers to your 21 August 2007 letter, as supplemented by your letters of 7 September 2007 and 26 September 2007, requesting confirmation of your position on a legal matter stated therein.

It appears that your client, Boracay Multiple Properties Developers, Inc. ("BMPDI", for brevity), was incorporated on 13 April 2007 to engage in general real estate business with authorized capital stock of One Hundred Million Pesos (P100,000,000.00) divided into one hundred thousand (100,000) common class shares with par value of One Thousand Pesos (P1,000.00) per share.

You mentioned that on 19 July 2007, BMPDI amended its articles of incorporation, reclassifying its shares of stock into common shares and non-participating preferred shares -- with the same par value of One Thousand Pesos (P1,000.00) per share -- but maintaining its authorized capital stock. On 9 August 2007, further amendment of said articles was made to delete the one percent (1%) stipulated preferred dividend to each holder of a non-participating preferred share. The pertinent provision, as last amended, provides in part:

"SEVENTH: That the authorized capital stock of the corporation is ONE HUNDRED MILLION PESOS (P100,000,000.00) in lawful money of the Philippines, divided into the following classes:

1. NINETY THOUSAND (90,000) Common Shares with par value of One Thousand Pesos (P1,000.00) per share which can be issued or sold, irrespective of nationality, to any individual or entity, partnership or association duly organized and existing under Philippine laws or any other foreign laws; and
2. TEN THOUSAND (10,000) Non-Participating Preferred Shares with par value of One Thousand Pesos (P1,000.00) per share.

xxx

xxx

xxx.

The Non-Participating Preferred Shares shall be entitled to preferred dividends to be allocated and distributed subject to the availability of unrestricted retained earnings or surplus profits arising from the business of the corporation to the extent the Board may determine from time to time subject to the filing of enabling resolution to form part of the Articles of Incorporation. **A holder of this type of share is entitled to own one (1) Condominium Unit of the corporation now under construction and development in Boracay, Municipality of Malay, Province of Aklan, or may opt to acquire and own additional similar class or type of condominium unit to such other places the corporation may further decide to construct and develop and likewise to be made available to any such holder of this type of share. This share shall be deemed redeemed from the holder thereof by the corporation upon the availability of title thereto, to be determined by the Board of Directors and the Stockholders representing at least 2/3 of the outstanding capital stock of the corporation.**"

According to you, the reason for the issuance and entitlement of the non-participating preferred share to its investor or condominium unit buyer is because of the peculiar possessory and ownership nature of the properties in the Islands of Boracay which to date are not yet registered or titled. Apparently, such a share is intended as an additional protection or guarantee to the possession and ownership of the condominium units so acquired.

We referred the matter to our Corporation and Finance Department ("CFD") for its comment and it is there where you directly filed your afore-mentioned supplemental letter dated 7 September 2007<sup>1</sup>. In that letter, you disclosed the additional information that you issued three hundred ninety-six (396) and five hundred twenty-eight (528) non-participating preferred shares to J. King and Sons Company, Inc. ("J. King") and to Fuente Triangle Realty Development Corporation ("Fuente"), respectively. You believe that the said issuances are exempt transactions under Subsection 10.1 (k)<sup>2</sup> of Republic Act No. 8799, otherwise known as the Securities Regulation Code ("SRC"), for which you submitted Notice(s) of Exemption (SEC Form 10-1).

Thereafter, you filed a supplemental letter dated 26 September 2007. You mentioned therein that the construction of the building complex consisting in part of three hundred eighty-one (381) condominium units for which non-participating preferred shares were/would be issued is beyond the legal mandate of the Housing and Land Use Regulatory Board ("HLURB"), per the attached HLURB Opinion. Further, you expressed the belief that the acquisition of the unit is actually an investment in security making the investors part owner of the company.

You thus seek confirmation of your view that BMPDI can issue such non-participating preferred shares without securing a secondary license or registration thereof from the Commission since the company is already so authorized under its charter.

We disagree with your position.

<sup>1</sup> A copy of which was furnished this Office on 19 September 2007 by the CFD.

<sup>2</sup> "Sec. 10. Exempt Transactions. - 10.1. The requirement of registration under Subsection 8.1 shall not apply to the sale of any security in any of the following transactions: xxx (k) The sale of securities by an issuer to fewer than twenty (20) persons in the Philippines during any twelve-month period."

It is now settled that the Articles of Incorporation only operates to confer to a corporation its primary franchise or its separate juridical personality and not the secondary license or any other authority required by law for engaging in certain types of businesses or activities. In the same vein that a financing or a recruitment company needs to obtain a secondary license to operate as such despite the purpose clause of its Articles of Incorporation, a corporation must still comply with registration requirements under the SRC, **if legally necessary**, even if its Articles of Incorporation apparently so authorize.

Subsection 8.1 of the SRC mandates that "*securities shall not be sold or offered for sale or distribution within the Philippines, without a registration statement duly filed with and approved by the Commission.*" This provision is substantially identical to Section 4 (a) of the SRC's precursor, the Revised Securities Act ("RSA").<sup>3</sup>

The above registration requirements are applicable if the registrant or someone acting for it intends a public offering or distribution of the registrant's securities.<sup>4</sup>

Thus, while BMPDI may issue non-participating preferred shares under its Articles of Incorporation, such issuance(s) must not constitute a public offering; otherwise, the registration requirements will apply, subject to certain well-defined exemptions.

Whether a particular transaction involves a public offering depends on all the surrounding circumstances; the test is: "Is there a sufficient subsisting connection between the company or the person making the offer and the persons to whom the offer is made as friends, customers, or co-adventurers, etc. or are the persons mere outsiders? If they are mere outsiders the offer is made to the public, and in such case the fact that the offer is made to a limited class, e.g., to the members of a single company (not being the company offering its shares), or to the members of a few companies, or to the members of a particular profession, or to the investors in a particular class of companies, does not make it less an offer to the public."<sup>5</sup>

Under Paragraph 1(N) of SRC Rule 3, "*public offering*" means a random or indiscriminate offering of securities in general to anyone who will buy, whether solicited or unsolicited. A sale is presumed a public offering if made in any form of publication, in any on-line or e-mail system, or through flyers, brochures or any offering material in a public or commercial place, including the mailing thereof.

Accordingly, that the non-participating preferred shares would only be issued to the investors in condominium units **does not necessarily mean that such issuances were not public offering(s) as afore-defined**. It should be pointed out that, as disclosed, such shares would be issued as additional protection or guarantee to the possession and ownership of the condominium units, and that you believe the acquisition of the unit is actually an investment in security. Hence, any public offering of the condominium units would in effect constitute public offering of the shares.

<sup>3</sup> "Sec. 4. Requirement of registration of securities. - (a) No securities, except of a class exempt under any of the provisions of Section five hereof or unless sold in any transaction exempt under any of the provisions of Section six hereof, shall be sold or offered for sale or distribution to the public within the Philippines unless such securities shall have been registered and permitted to be sold as hereinafter provided."

<sup>4</sup> De Leon, *The Corporation Code of the Philippines, Annotated*, 1993 Ed., p. 758.

<sup>5</sup> *Ibid.*, citing Watson on Federal Securities Act, 29 Illinois Law Review, May, 1934.

By way of exemption, the above registration requirements shall not apply to any of the classes of securities listed under Subsection 9.1 ("exempt securities") of the SRC or to the sale of any security in any of the transactions enumerated under Subsection 10.1 ("exempt transactions") of the same law.

To be exempt, it is thus necessary to show and/or defend, as you did with respect to your transactions with J. King and Fuente (i.e. sale of securities by an issuer to fewer than twenty (20) persons in the Philippines during any twelve-month period), that such issuance from the unissued capital stock<sup>6</sup> falls under any of the exempt transactions enumerated in Subsection 10.1 of the SRC.

The opinion is based solely on the facts disclosed in the queries and relevant solely to the particular issues raised therein. It shall likewise be understood that the foregoing shall not be used in the nature of a standing rule binding upon the Commission in other cases<sup>7</sup> and shall likewise be without prejudice to any finding or ruling by the appropriate government agency with respect to the titling of the condominium units and/or the land on which the condominium is constructed.

Please be guided accordingly.

Very truly yours,



**VERNETTE G. UMALI-PACO**  
General Counsel

<sup>6</sup> Issuance of shares out of the unissued capital stock is not considered exempt per se from the registration requirements (SEC Opinion dated 2 July 1992 addressed to Mr. Miguel M. Gonzales; SEC Opinion dated 14 December 1984 addressed to Meralco Industrial Engineering Services Corporation).

<sup>7</sup> Paragraph 7; SEC Memorandum Circular No. 15, Series of 2003.