



Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City
Office of the General Counsel

4 September 2014

SEC-OGC Opinion No. 14-25
Re: Non-Stock Corporations;
Quorum and Voting; Voting Rights

MR. GERARDO L. ROMERO-SALAS

President
Apo Golf & Country Club, Inc.
Bago, 8000 Davao City

Sir:

This is in response to your letter dated 4 November 2013 written on behalf of Apo Golf and Country Club, Inc. ("APO"), requesting for our opinion on queries in connection with non-stock corporations, quorum and voting requirements, and voting rights.

APO is a domestic corporation registered with the Securities and Exchange Commission ("SEC") on 1 February 1962, under SEC Registration No. 0000020158.

You presented pertinent provisions of the Articles of Incorporation ("AOI")¹ and the Amended By-Laws² of APO as the basis for your queries.

¹ The Seventh Article reads:

Seventh – That the corporation shall have no shares of stock and that the membership therein and the right of participation in its assets shall be acquired and enjoyed by the Active Members of the corporation as follows: That Active Members of the corporation shall pay upon admission a membership fee of not less than P2,000 either in cash or in installments as provided in the By-Laws, Provided, that each Membership Fee Certificate will represent a pro rata equity in the assets of the Corporation, that Membership Fee Certificate will not be issued in excess of two hundred fifty (250); that the voting powers in the corporation are vested in the individuals, and no member will have more than one vote. And provided, further, that there will be no honorary members.

² The Amended By-Laws of APO provide:

ARTICLE II
KINDS OF MEMBERSHIP – THEIR RIGHTS
DUTIES AND OBLIGATIONS

x x x

Section 2 – (*Proprietary Membership defined*): Proprietary Member is a natural or juridical person in whose name a CERTIFICATE OF OWNERSHIP has been issued.

Section 3 – (*Proprietary Members Consist*): The Proprietary Members of the Club shall consist of natural and juridical persons in whose names CERTIFICATES OF OWNERSHIP had been duly issued, Provided, however: That the Certificates of ownership shall not be issued in excess of FIVE HUNDRED (500) Certificates of Ownership, so that from and after February 26, 1966 not more than one Certificate shall be issued to any Proprietary Member.

According to you, the past APO Board of Directors and Officers assumed the maximum allowable number of members to be at five hundred (500), as the By-Laws of APO provide that the issuance of Certificates of Ownership shall not exceed 500. However, the AOI limits the issuance of Membership Certificates to a maximum of 250. The current active members on record are more than two hundred fifty (250) but not more than 500. All members were issued their Certificates of Membership.

When APO sought to increase the membership to one thousand (1,000), the SEC discovered the discrepancy, and imposed a fine on APO for the unauthorized issuances of Certificates of Membership in excess of 250. The fine was correspondingly paid by APO. With the discovered inconsistencies between the AOI and the By-Laws of APO, you sought for clarifications from the SEC, through a conference with SEC's Corporate Governance and Finance Department. You were then advised to consult this Office regarding your legal concerns relevant to this affair.

The following are your queries:

1. Is APO a stock corporation or a non-stock corporation?
2. Are APO's present "Certificates of Membership" considered "Proprietary" or "Non-Proprietary?"
3. Are the provisions disallowing proxies to vote on issues related to amendment of By-Laws contrary to the provisions of the Corporation Code of the Philippines ("Code")?³

Section 4 – (*Increase of Proprietary Members*): At any time from the date of approval hereof, the number of Proprietary Members may be increased by TWO-THIRDS (2/3) VOTE of the members at a regular meeting or a special meeting called for the purpose.

x x x

Section 6 - (*Participation in Assets*): All Proprietary Members shall have a participation in the assets of the club on a *pro rata* basis.

x x x

Section 8 – (*Voting a Certificate*): A Certificate shall be voted, but if it is owned by a juridical person it shall be voted personally by the officer of the entity concerned with legal authority to do so.

ARTICLE V MEETINGS OF THE PROPRIETARY MEMBERS

x x x

Section 5 – (*Quorum in the meetings*): Fifteen percent (15%) of the Proprietary Members personally present and in good standing, shall constitute a quorum except in meetings where the law requires a greater number to determine a quorum. Proxies shall not be allowed.

Section 6 – (*Quorum when amending By-Laws*): For the purpose of amending this Amended By-Laws, at least TWO-THIRDS (2/3) of the members in good standing shall constitute a quorum at which meetings PROXIES shall be admitted in determining a quorum but shall not be allowed to vote.

³ Batas Pambansa Blg. 68 (1980).

4. If APO is considered to be a stock corporation and there are no provisions providing for the process of amendment of the AOI in both the AOI and By-Laws, will proxies be allowed to vote in such amendment?
5. If Article V, Sections 5 and 6 of the By-Laws provide that only members personally present and "in good standing" are to be considered in the determination of quorum for meetings and amendment of By-Laws, does it mean that only members "in good standing" shall be the basis regardless if the number of members has been significantly reduced?
6. In a meeting to amend the By-Laws of APO, is the required vote, (a) two-thirds of all members in good standing; (b) two-thirds of the members present and constituting a quorum in such meeting to amend the AOI; or (c) two-thirds of all the members whether in good standing or not?
7. If APO is considered to be a non-stock corporation and there are no provisions providing for the process of amending APO's AOI in both the AOI and By-Laws, will Section 16 of the Code apply to APO where written assent of two-thirds (2/3) of its members in good standing be sufficient to ratify such amendment?
8. With Article II Section 4 of APO's By-Laws providing for a requirement of two-thirds (2/3) vote of the members at a regular or special meeting to increase the number of Proprietary Members, will written assent as abovementioned or proxies still be allowed, if APO is considered as non-stock corporation or stock corporation, respectively?
9. If APO is considered to be a non-stock corporation, will each "Certificate of Membership" be entitled to one vote? Or should each member be entitled to only one vote regardless of the number of "Certificate of Membership" one member holds?
10. With the payment of the abovementioned fine for the issuance of the additional membership certificates based on Article II, Section 3 of the SEC-approved Amended By-Laws, what is now the authorized membership of APO? Is it 500 members or 250 members?

As to the first query, APO is a non-stock corporation. As aptly defined in Section 87 of the Corporation Code, "a non-stock corporation is one where no part of its income is distributed as dividends to its members, trustees, or officers, x x x." It is one which exists for purposes other than profit,⁴ or for those purposes mentioned in Section 88 of the Code.⁵

APO's purposes, as provided for in its AOI, are "to foster, promote and conduct legitimate athletic exercises, sports, and entertainment of all kinds; to establish, maintain and conduct a club house or a club room; to purchase, lease or otherwise acquire such real and personal property, athletic or other equipment as may be necessary or convenient in connection with the conduct of affairs of the corporation; and, generally, to do and perform such acts and things, and to exercise such powers as are ordinarily done, performed and exercised by social and athletic clubs and associations." Further, under the Seventh Article of APO's AOI, the corporation shall have no shares of stock and that the members shall only

⁴ De Casa, Handbook on Private Corporations (2009), p. 561.

⁵ Section 88. Purposes. - Non-stock corporations may be formed or organized for charitable, religious, educational, professional, cultural, fraternal, literary, scientific, social, civic service, or similar purposes, like trade, industry, agricultural and like chambers, or any combination thereof x x x.

have participation in its assets. As APO's purposes are primarily not for profit, coupled with the absence of shares of stock, APO is considered a non-stock corporation.

In relation to the second query, APO's membership certificates are proprietary. The Implementing Rules and Regulations ("IRR") of the Securities Regulation Code ("SRC")⁶ defines a *proprietary share or certificate* as an evidence of interest or participation or privilege in a corporation which not only entitles the holder to enjoy the use of a specific property but also to dividends or earnings of said company. Upon liquidation of the company, a holder of a proprietary share shall have proportionate ownership right over its assets.⁷ If, in addition to the use of a specific property, the certificate entitles the holder only to a share in the corporate assets upon liquidation and not to dividends or the corporation's earnings, the certificate does not lose its proprietary character.

The Seventh Article APO's AOI and Section 6, Article II of its By-Laws provide that the Membership Fee Certificate that APO will issue represents a pro rata equity in the assets of the corporation. Hence, the said certificates are proprietary certificates.

Concerning the third query, Section 89 of the Code provides that unless otherwise provided in the articles of incorporation or the by-laws of a non-stock corporation, a member may vote by proxy in accordance with the provisions of the Code. Hence, the articles of incorporation or by-laws of a non-stock corporation may prohibit proxy voting in any meeting or measure of the non-stock corporation.⁸ In case of APO, its By-Laws, as you pointed out, deny proxy voting.⁹

With regard to the fourth query, Section 58 of the Code, which is a general provision applicable to both stock and non-stock corporations,¹⁰ expressly allows stockholders/members to vote by proxy. Thus, in any stock corporation, proxies may vote on corporate matters, including amendment of the AOI and the By-Laws. Moreover, a by-law provision prohibiting proxy voting in stock corporations, being contrary to law, is void.¹¹

About the fifth query, we answer it in the affirmative. As a rule, a majority of members is a quorum for the transaction of a corporation's business and other corporate acts unless otherwise provided in the Code or in the by-laws.¹² Save in cases in which the Code imposes a different rule, the by-laws may provide for more or less than the majority of the members.¹³ However, in cases where the Code requires or fixes a minimum stockholders' or members' vote for a certain corporate action (e.g., 2/3 of the stockholders representing the outstanding capital stock or the members, for amendment of the articles of incorporation), then there must necessarily be present or represented such number of members or stocks

⁶ Republic Act No. 8799 (2000).

⁷ Rule 3, Section 1(L).

⁸ SEC Opinion No. 05-12, dated 24 October 2005, addressed to LIBRA LAW.

⁹ Article V, Sections 5 and 6 of the Amended By-Laws.

¹⁰ SEC Opinion dated 10 March 1988, addressed to Philippine Women Bowling Association, Inc.

¹¹ SEC Opinion dated 16 October 1990, addressed to Belo Abierra and Associates.

¹² B.P. 68, Section 52.

¹³ Fisher, *The Philippine Law of Stock corporations* (1929), p. 197.

needed to make the required minimum vote. In other words, this required minimum vote would in effect also be the required quorum in such cases.¹⁴

It must be noted that the basis for determining the existence of quorum is the group of stockholders or members whose stockholder or membership rights are NOT lost due to delinquency pursuant to Section 71¹⁵ of the Code. Disenfranchisement due to delinquency is also applicable to the members of a non-stock corporation, pursuant to Section 87 of the Code.¹⁶ Accordingly, delinquent stockholders or members are not included in determining the existence of quorum.¹⁷

Concerning the sixth query, Section 48 of the Code requires the vote of a majority of the trustees and of a majority of the members of a non-stock corporation, at a regular or special meeting duly called for the purpose, for the amendment or repeal of the by-laws or the adoption of new by-laws. However, the articles of incorporation or by-laws of a corporation may prescribe a number of votes higher than a simple majority for this matter.¹⁸ In relation thereto, the basis of this majority, whether simple or greater, is the group of non-delinquent members. Therefore, to effect an amendment of the By-Laws, a vote of at least such a majority of the non-delinquent members is required.

With regards the seventh query, we answer it in the affirmative. In cases where no rules are provided for in the articles of incorporation or the by-laws of a corporation, the provisions of the Code, being the law governing corporations, shall apply. Under Section 16 of the Code, any provision or matter stated in the articles of incorporation of a non-stock corporation may be amended by a majority vote of the board of directors or trustees and the vote or written assent of at least two-thirds (2/3) of the members. A members' meeting is not necessary in amending the articles of incorporation, as mere written assent of the members will suffice.¹⁹ However, if the amendment consists in extending or shortening the corporate term, a meeting of the members is necessary under Section 37 of the Code.²⁰

As for the eighth query, the increase in the number of Proprietary Members is a matter requiring the amendment of APO's By-Laws. Amendment or adoption of new By-Laws may be done only during a meeting duly called for the purpose,²¹ regardless of whether APO is a stock or non-stock corporation. Hence, written assent of stockholders or members will not suffice for the amendment of the By-Laws. As to the matter of allowing proxies to vote in that particular matter, it will depend on the nature of the corporation. Hence, we reiterate our answers in the third and fourth queries: if APO is a stock corporation, proxies

¹⁴ Campos, *The Corporation Code* (1990), p. 419.

¹⁵ Section 71. Effect of delinquency. – No delinquent stock shall be voted for or be entitled to vote or to representation at any stockholder's meeting, **nor shall the holder thereof be entitled to any of the rights of a stockholder** except the right to dividends in accordance with the provisions of this Code x x x.

¹⁶ SEC Opinion dated 29 September 2000, addressed to Mr. Antonio M. Elicano.

¹⁷ SEC Opinion dated 13 March 1998, addressed to Atty. Jose A. Feria, Jr.

¹⁸ De Leon, *The Corporation Code of the Philippines Annotated* (2006), p. 478.

¹⁹ SEC Opinion dated 31 May 1996, addressed to Atty. Euney Marie J. Mata.

²⁰ De Leon, p.171.

²¹ B.P. 68, Section 48.

are allowed to vote; if it is non-stock, proxies are also allowed to vote, unless otherwise provided in its AOI or By-Laws.

In connection with the ninth query, Section 89 of the Code provides that the right of the members of any class or classes to vote may be limited, broadened or denied to the extent specified in the articles of incorporation or the by-laws, and unless so limited, broadened or denied, each member, regardless of class, shall be entitled to one vote. The provision in the Seventh Article of APO's AOI is very clear: "no member will have more than one vote."

As for the tenth query, the question arose from what appears to be a conflict between the AOI and the By-Laws of APO. When the by-laws of a corporation are inconsistent with the articles of incorporation, the latter shall be controlling, as the by-laws are subordinate to,²² and cannot contravene,²³ the corporate charter. As provided for in the AOI, the maximum permitted number of Certificates of Membership issued by APO is limited to 250, and no member shall be issued more than one Certificate. Hence, the maximum number of members is the maximum number of Certificates that may be issued, that is, 250, by virtue of the AOI, and not 500 as stated in the by-laws.

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances. If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.²⁴

Please be guided accordingly.

Very truly yours,


CAMILO S. CORREA
General Counsel

²² SEC Opinion dated 4 October 2001, addressed to Attys. Zenaida L. Salipsip and Atty. Teodulo G. San Juan, Jr.

²³ B.P. 68, Section 47.

²⁴ SEC Memorandum Circular No. 15, Series of 2003.