Republic of the Philippines
Department of Finance
Securities and Exchange Commission
COMMISSION EN BANC

FOREST HILLS GOLF AND COUNTRY CLUB, INC.,
Respondent-Appellant,

- *versus* - **SEC En Banc Case No. 07-19-459**

SECURITIES AND EXCHANGE COMMISSION – CORPORATE GOVERNANCE AND FINANCE DEPARTMENT (CGFD),
Complainant-Appellee.
X--x

DECISION

Before the Commission En Banc ("Commission") is the ***Memorandum of Appeal***[1] ("Appeal") filed by *Forest Hills Golf and Country Club, Inc.* ("Forest Hills") praying for the reversal of the Letter-Order dated 14 July 2016[2] (which were embodied in the letter-comments) issued by the Corporate Governance and Finance Department ("CGFD") directing Forest Hills to: (a) comply with Section 7 of the Corporation Code relative to its voting procedures; (b) to nominate two (2) additional candidates for the election of the Board of Directors pursuant to its Articles of Incorporation (AoI) which prescribes that the Board of Directors shall be composed of eight (8) members; and (c) to distribute the copies of the notice of meeting and the Definitive Information Statement to security holders entitled to vote.

PARTIES

Forest Hills is a corporation duly organized and existing under the laws of the Republic of the Philippines with business address at Brgy. Inarawan Cogeo, Antipolo City. It was registered with the Commission[3] on 29 June 1995.

CGFD is an operating department of the Commission which monitors, among others, issuers of membership certificates/shares, time shares, resorts or club shares and foundation's compliance with existing laws and

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[1] Filed with the Office of the General Counsel (OGC) on 3 July 2019.
[2] This affirmed its previous Letter dated 7 July 2016.
[3] SEC No: AS95006190.

regulations; and exercises administrative supervision over the foregoing entities.

RELEVANT FACTS

Forest Hills was incorporated and registered with the Commission on 29 June 1995 as a non-profit stock corporation. Its incorporators intended, and specifically declared under oath in its AoI that Forest Hills is a non-profit stock corporation, to wit:

> "THAT WE, who are all of legal age, and majority of whom are residents of the Philippines, have this day voluntarily associated ourselves together for the purpose of forming a **non-profit stock corporation** under the laws of the Republic of the Philippines." (Emphasis and underscoring supplied)

Its primary purpose, as stated in Article SECOND of its AoI, is "*to promote the social, recreational, and athletic activities on a non-profit basis among its members, the main objective and undertaking of which will be the construction and maintenance of a golf course, tennis courts, swimming pools, and other indoor and outdoor related sports and recreational activities*".

The incorporators of Forest Hills agreed to suspend the voting rights of its members who purchased or are holders of common shares until the two (2) 18-hole golf courses (the "Project") are turned over to Forest Hills. Consequently, Article SEVENTH of its AoI provides in part:

> "That the total authorized capital stock of the Corporation shall consist of Three Thousand Six Hundred (3,600) no par value common shares, divided into 1,652 Class "A" Common Shares, 600 Class "B" Common Shares, inclusive of eight (8) Founders Shares, 899 Class "C" Common Shares, and 449 Class "D" Common Shares.
>
> The Founders Shares shall have all the features of a Class "B" Common Shares. In addition, only holders of Founders Shares may vote at any meeting of the members and be elected to the Board of Directors of the Corporation for a period of five (5) years from and after the formal turn over of the project by the developer to the Corporation."[4]

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[4] The by-laws of Forest Hills limited the exclusive voting rights and the right to be voted for as members of the BOD to the holders of the Founders' Shares, to wit:

> "2.2.14 ***Founding Members shall have the sole and exclusive right to vote and hold office as Directors within a period of five (5) years counted from the time the project is formally turned over by the developer to Forest Hills Golf and Country Club, Inc.*** The five-year period may not be extended or renewed. Thus, after the lapse of the said period, all Regular Members shall have equal rights to vote, to hold office, and rights to the assets of the Club upon liquidation." (Emphasis and underscoring supplied).

The incorporators of Forest Hills justified the decision to limit the exercise of the voting rights to the Founders to ensure that the project will push through as planned. Thus, until the Project is formally turned over to Forest Hills, the right to vote and be voted for in the BOD has been limited in the AoI and By-Laws to the holders of the eight (8) Founders' Shares, to the exclusion of all its other members.

On 24 July 1995, Forest Hills filed a Registration Statement (RS), requesting for the issuance of a secondary license to offer its shares to the public. The Certificate of Permit to Offer Securities for Sale was issued by the Commission on 21 September 1995. The Certificate specifically provided that the same is subject to the terms and conditions provided in SEC Circular No. 3, series of 1994.

On February 1997, Forest Hills filed an updated Registration Statement ("RS") and applied for a license to sell another 1,800 shares, which was approved by the Commission on 3 April 1997 with the issuance of the Updated RS allowing the licensing of securities.

In relation to the conduct of its 2016 annual meeting scheduled to take place on 29 April 2016 pursuant to Article VI, Section 6.1 of its By-laws, Forest Hills filed on 23 March 2016 its Preliminary Information Statement in compliance with Rule 20(3) of the Securities Regulation Code ("SRC") [Form 20-IS Preliminary].

In a letter dated 30 March 2016, the CGFD informed Forest Hills that its SEC Form 20-IS Preliminary and Management Report did not comply with Section 20 of the SRC. CGFD found that the proposed amendment of Forest Hills' AoI and by-laws granting holders of Founders Shares the right to vote and be voted for a period of five (years) from the approval of the amendment by the SEC violates Section 7 of the Corporation Code[5] which limits the exclusive rights of Founders' Shares to vote and be voted for as directors to five (5) years from the approval of the original AoI. Thus, the CGFD directed Forest Hills to amend its AoI and delete the phrases "*from the approval of this amendment by the Securities and Exchange Commission.*"

On 7 April 2016, Forest Hills filed its Definitive Information Statement (Form 20-IS Definitive) where it informed the CGFD that it had already incorporated the comments of the latter except the matter relating to the right of Founders' Shares to vote and be voted within five (5) years from the approval by the SEC of the Amended AoI which, it insisted, was valid on the alleged ground that Section 7 of the Corporation Code is not applicable

[5] "Section 7. *Founders' Shares* - Founders' Shares classified as such in the articles of incorporation may be given certain rights and privileges not enjoyed by the owners of other stocks, provided that where the exclusive right to vote and be voted for in the election of directors is granted, it must be for a limited period not to exceed five (5) years subject to the approval of the Securities and Exchange Commission. xxx"

because it is not a stock corporation. Forest Hills argued that the applicable provision is Section 89 of the Corporation Code considering that it is a non-stock corporation.

In a letter dated 12 April 2016, the CGFD informed Forest Hills that the Form 20-IS Definitive filed on 7 April 2016 was not fully compliant with Rule 20 of the SRC.

The failure by Forest Hills to obtain the requisite clearance from the CGFD to distribute its Form 20-IS Definitive resulted to the postponement of its annual meeting set on 28 April 2016, and prompted its BOD to reschedule the same on 29 July 2016.

Forest Hills thereafter filed anew its Form 20-IS Preliminary for the rescheduled meeting. On 5 July 2016, Forest Hills filed its Form 20-IS Definitive alleging that it did not receive any comment from the CGFD.

On 7 July 2016, the CGFD issued a letter finding the Form 20-IS Definitive of Forest Hills not compliant with Rule 20 of the SRC.

On 11 July 2016, Forest Hills filed a Motion for Reconsideration which was denied by the CGFD in the Letter-Order which resulted to the filing of the instant Appeal.

In its Appeal, Forest Hills prayed for the setting aside of the Letter-Order on the alleged ground that Forest Hills is, by law, a non-stock corporation and may thus validly restrict or even deny voting rights to certain classes of shares pursuant to Section 89 of the Corporation Code.

On 30 July 2019, the CGFD filed its Comment to the Memorandum on Appeal praying for the dismissal of the Appeal for alleged lack of merit. The CGFD argued that Forest Hills' AoI and the RS which enabled it to issue proprietary shares show that it is a stock corporation.

Forest Hills thereafter filed a Motion for Leave to File Reply where it reiterated its position that it is a non-stock corporation by virtue of the provision in its AoI prohibiting the declaration or distribution of dividends, hence, it may validly restrict or even deny voting rights to certain classes of shares or members.

On 15 October 2019, the CGFD filed a Motion for Leave to File Pleading with Rejoinder to Respondent-Appellant's Reply praying for the dismissal of the Appeal for lack of merit. The CGFD pointed out that Forest Hills' reliance on the cases which it cited in support of its position that it is a non-stock corporation is misplaced as the facts and the issues therein are not identical with that of the instant case. The CFGD argued that to sustain a restrictive reliance on the Corporation Code will quash the policy established in the SRC.

ISSUE

The sole issue presented to the Commission is whether the CGFD committed reversible error in finding that Forest Hills violated Rule 20 of the SRC when it restricted or denied voting rights to certain classes of shares after the lapse of five (5) years from the approval of its AoI.

DISCUSSION

The Commission finds no cogent reason to reverse the findings of CGFD and hereby resolves to deny the Appeal for lack of merit.

A careful examination of the records will readily show that the instant case arose as a consequence of the CGFD's finding that both the 20-IS Preliminary and Definitive of Forest Hill did not comply with Rule 20 of the SRC on the ground that its AoI[6] allegedly violated Section 7 of the Corporation Code which provides that right of the Founders Shares to vote and be voted for is limited to five (5) years from the date of approval of its AoI. Forest Hill's refusal to comply with the directive of CGFD to modify its Form 20-IS Definitive so that the same does not violate Section 7 of the Corporation Code resulted in the denial of the same for non-compliance with Rule 20 of the SRC.

Forest Hills vigorously disagreed with the finding and position of the CGFD and maintained that its act of limiting or even denying voting rights to certain classes of shares which is provided in its AoI is valid, arguing that it is a non-stock corporation. Forest Hills posited that it is Section 89, and not Section 7, of the Corporation Code which applies in the instant case.

The conflict and disagreement between CGFD and Forest Hills on an entry in the latter's Form 20-IS Definitive relating to the period of the grant to Founders Shares of the right to vote and be voted is the central issue in the instant case.

I. The CGFD correctly found that Article SEVENTH of the AoI of

[6] CGFD maintained that Article SEVENTH of the AOI of Forest Hills which granted Founders Shares the right to vote and be voted for a period of five (5) years from and after the formal turn over of the project by the developer to the Corporation **and** the proposed Amended AOI which provides that the Founders Shares shall have the exclusive right to vote and be voted for the election of directs for a period of five (5) years from the approval of this amendment by the Securities and Exchange Commission.

Forest Hills violated Section 7 of the Corporation Code.

In its Appeal, Forest Hills maintained that the CGFD committed reversible error in directing the nomination of two (2) additional candidates for election to the Board of Directors, and the distribution of copies of the Notice of Meeting and the 20-IS Definitive to all members based on a finding that Article SEVENTH of its AOI contravened Section 7 of the Corporation Code. Forest Hills argued that the CGFD erroneously applied Section 7 of the Corporation Code because it is a non-stock corporation, and the said provision is applicable and proper only to stock corporations. On account thereof, Forest Hills concluded and insisted that Section 89 of the Corporation Code is the applicable provision in the instant case, and its act of granting to Founders Shares the exclusive right to vote and be voted is valid. Conversely, Forest Hills posited that under Section 89 of the Corporation Code which is the applicable provision, it can validly restrict or even deny voting rights to certain classes of shares or members.

We do not agree with Forest Hills.

Section 7 of the Corporation Code[7] provides:

> "**Founders' shares classified as such in the articles of incorporation may be given certain rights and privileges** not enjoyed by the owners of other stocks, **provided that where the exclusive right to vote and be voted for in the election of directors is granted, it must be for a limited period not to exceed five (5) years** subject to the approval of the Securities and Exchange Commission. The five (5) year period shall commence **from the date of the aforesaid approval by the Securities and Exchange Commission**." (Emphasis supplied)

As discussed earlier, the undisputed facts relative to Forest Hill's 20-IS are entries, among others, relating to Article SEVENTH of its AoI which grants to Founders Shares the exclusive right to vote and be voted as members of the Board of Directors for a period of five (5) years from and after the formal turn-over of the project by the developer to the Corporation. The records also show that the BOD of Forest Hills approved the amendment of Article SEVENTH of its AoI to further extend the period of enjoyment by the holders of the Founders Shares to five (5) years from the approval of the amendment by the Commission. These are the items that were objected to by the CGFD for allegedly being violative of Section 7 of the Corporation Code. The failure of Forest Hills to comply with the directive of the CGFD which was meant to implement the provisions of Section 7 of the Corporation Code resulted in the denial of the former's Form 20-IS Definitive.

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[7] Batas Pambansa Blg. 68 (May 1, 1980)

The Commission holds that the CGFD correctly denied the 20-IS Definitive of Forest Hills for its failure to comply with Rule 20 of the SRC. The records show that Item 4 (Voting Securities and Principal Holders Thereof) in the 20-IS Definitive of Forest Hills limited to the Founders Shares the enjoyment and exercise of the right to receive the notice of meeting and the right to vote and be voted as members of the BOD for a period in excess of five (5) years from the approval of its AoI. This clearly constituted a clear violation of Section 7 of the Corporation Code which provides that the grant to Founders Shares of the right to vote and be voted shall be limited to a period of five (5) years from the approval of the AoI by the Commission.

Forest Hills' position that Section 89 of the Corporation Code is applicable since the same is proper to non-stock corporations is misplaced and baseless. It bears emphasis that what is at issue is the validity of the grant by Forest Hills to Founders Shares of the right to vote and be voted for a period of five (5) years from and after the formal turn-over of the project by the developer to the Corporation. This is necessarily governed by Section 7 of the Corporation Code which is the specific provision on shares which are classified in the Articles of Incorporation as Founders Shares, and which provides for the limitations on the rights enjoyed by the same.

The foregoing is consistent with the established principle in statutory construction that a special provision on a specific matter prevails over the general one. This finds affirmation in *Remo v. Secretary of Foreign Affairs*[8], where the Supreme Court held that:

> "It is a familiar rule of statutory construction that to the extent of any necessary repugnancy between a general and a special law or provision, the latter will control the former without regard to the respective dates of passage."

It bears emphasis that Section 7 of the Corporation Code did not provide that the Founders Shares should only be limited to those issued by stock corporations. Contrary to the position of Forest Hills, Section 7 of the Corporation Code governs ALL Founders Shares which are classified as such in the Articles of Incorporation, regardless of the nature of the corporation. The moment a corporation classifies and issues Founders Shares pursuant to its Articles of Incorporation, the rights granted to the same, specifically the right to vote and be voted are automatically made subject to the limitations provided in Section 7 of the Corporation Code. Given this, it is thus immaterial that the corporation that issued Founders Shares and granted the same the right to vote and be voted is a non-stock corporation because Section 7 of the Corporation Code categorically provides that the same shall be governed by it. A contrary interpretation that Founders Shares issued by stock corporations are governed by Section 7 of the Corporation Code while those that are issued

[8] G.R. No. 169202, March 5, 2010

by non-stock corporation are governed by Section 89 of the Corporation Code, specifically insofar as the right to vote and be voted is concerned is legally baseless.

In *Forest Hills Golf and Country Club, Inc. v. Kings Properties Corp*.[9], the Supreme Court ruled that:

> "Section 7 refers particularly to founders' shares, while Section 89 refers to all classes of members in a non-stock corporation. The provision of Section 89 therefore should be treated as a general provision for non-stock corporations applicable only in the absence of a specific provision in the Corporation Code on a particular subject matter. **In the case of founders' shares, Section 7 of the Corporation Code specifically provides for their rights, privileges and limitations**.
>
> To this extent, Forest Hills can lawfully suspend or define the voting rights of its members. **But with respect to founders' shares, Forest Hills must observe the limitations imposed under Section 7. In other words, the exclusive right to vote and be voted for of the founders' shares should expire after five years from the approval of the SEC**." (Emphasis supplied)

On basis of the foregoing, the Founders Shares issued by Forest Hills are thus subject to the limitations provided in Section 7 of the Corporation Code. Considering that Forest Hills was incorporated on 29 June 1995, the right of the Founders Shares to vote and be voted terminated by operation of law on June 2000, and CGFD was correct in requiring Forest Hills to nominate two (2) additional candidates for the election of the Board of Directors pursuant to its Articles of Incorporation (AoI) which prescribes that the Board of Directors shall be composed of eight (8) members, and to distribute the copies of the notice of meeting and the Definitive Information Statement (DIS) to security holders entitled to vote. The failure of Forest Hills to comply with the said directive resulted in non-compliance with Rule 20 of the SRC and warranted the denial of its Form 20-IS Definitive.

II. Forest Hills is a Stock Corporation pursuant to its AoI.

The above disquisition on Forest Hills' non-compliance with Rule 20 of the SRC has effectively disposed of and resolved the issue presented in the instant case. However, the Commission deems it necessary to address the issue presented by Forest Hills in support of its position that Section 7 of the Corporation Code is not applicable i.e. that it is a non-stock corporation.

In its Appeal, Forest Hills argued that it is a non-stock corporation notwithstanding the fact that its AoI specifically provided that it is a "non-

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[9] G.R. No. 212833. August 7, 2019.

profit stock corporation" and that it had sold proprietary shares to the public pursuant to the Registration Statement applied for and granted by the Commission because Article SEVENTH (Fourth Restrictive Condition) of its AoI provides that no dividend shall at anytime be declared and/or paid.[10] In support thereof, Forest Hills cited a number of decisions issued by the Supreme Court and argued that based thereon, the decisive and operative component/factor in determining whether a corporation is stock or non-stock is its authority to distribute dividends to its members.[11] Forest Hills argued that as long as the return on investment is not in the form of dividends or allotment of surplus profits on the basis of the shares held, the corporation will remain as a non-stock corporation notwithstanding the issuance of proprietary shares.[12]

In its Comment, the CGFD maintained that Forrest Hills is a stock corporation arguing that its AoI bore all the features of a stock corporation as defined in the Corporation Code. In particular, the CGFD pointed out that: (a) the Preamble in its AoI provides that it is a "non-profit stock corporation", (b) Article SIXTH uses the term "board of directors" instead of "board of trustees", (c) it has an authorized capital stock divided into shares, and (d) grants pre-emptive rights to original subscribers. The CGFD thus concluded that the argument of Forest Hills that it is not authorized to distribute dividends to its members does not make it a non-stock corporation.

CGFD also argued that the act of Forest Hills in issuing proprietary shares further confirmed that it is a stock corporation on the ground that the holders of such shares bought the same at a premium with the objective of benefiting and/or profiting from the whole project in 2000/2003/2004.[13]

In relation to the issue of whether or not Forest Hills is a stock corporation, the Commission **takes administrative notice of its Decision in *Forest Hills Golf and Country Club, Inc. –versus- Company Registration and Monitoring Department*[14] ("Forest Hills v. CRMD") where We affirmed the finding of the CRMD that Forest Hills is a stock corporation**. Considering that the circumstances, issues and allegations presented in the said case are similar to that of the instant case, the Commission finds no cogent reason to depart from its previous position and decision, absent a decision of an appellate court reversing the same.

In *Forest Hills v. CRMD*[15], this Commission found that the purpose provided in the AoI of Forest Hills was inconsistent with the character of, and

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[10] Paragraph 46 of the Appeal
[11] Paragraphs 43-45 of the Appeal
[12] Paragraph 22 of the Reply.
[13] Page 5 of the Rejoinder.
[14] SEC En Banc Case No. 06-14-334 (23 July 2019).
[15] Forest Hills Golf and Country Club, Inc. versus CRMD, SEC EB Case No. 06-14-334 (July 23, 2019)

contradicted the very nature of a non-stock corporation.[16] The Commission emphasized that it has consistently recognized that golf clubs issuing proprietary shares have been registered as stock, non-profit corporations on the basis of SEC Opinion dated 28 April 1997 addressed to Patrick T. Lugue. In the said case, We held that the admissions and actuations of Forest Hills affirmed our finding that it is a stock corporation, to wit:

> "*First*, FOREST HILLS identified itself as a **stock** corporation in its Articles of Incorporation.
>
> *Second*, FOREST HILLS issues stock. Not just "proprietary membership" but plain and simple **common shares**, defined by the Commission thus:
>
> xxx
>
> Features of common shares may be altered in the articles of incorporation, such as adding a right of first refusal, but **the authority to declare dividends is inherent in a common share**. Of course, the corporation may *choose* to stipulate that "no dividends will at any time be declared and/or paid."
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> In other words, **FOREST HILLS is authorized to distribute profit by the very existence of common shares, although it has chosen to withhold or waive the declaration of dividends**.
>
> xxx
>
> *Third*, FOREST HILLS' choice not to declare dividends is not a conclusive factor in determining whether it should be regarded as a non-stock. **We assert that the determining factor is "non-profit" purpose**.
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> xxx
>
> *Fourth*, **FOREST HILLS' shares are subject to market forces, they appreciate and depreciate in value. They are an investment. Such a "profitable business" purpose cannot co-exist with non-profit purposes**.
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> While the law does exempt "incidental" business activities, **the investment in golf/country club shares are not incidental because it is the very means by which membership is acquired**. In other words, the monetary value and property rights attached to a golf/country club share are **fundamental** to the existence of the corporation.
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> Moreover, the accumulated profit from golf/country club shares that have increased in value translates to a claim over such profits via the common shares as discussed above. **The shareholders of a golf/country can look forward, in most cases, to a return that far exceeds their initial investment**.

[16] Section 14 (2) of the Corporation Code, now Section 13 (b) of the Revised Corporation Code.

Fifth, FOREST HILLS' shareholders have an **inchoate right to the assets** of the corporation, viz.

> That the ownership of all shares of stock of this Club is subject to the following restrictive conditions:
>
> xxx xxx xxx
>
> 4. No profit shall inure to the benefit of any member. Hence, no dividend shall at any time be declared and/or paid. Members shall be entitled only to a **pro-rata share of the assets of the Corporation** at the time of its dissolution or liquidation.

Thus, FOREST HILLS' **members** can look forward to acquiring **ownership** of the club's assets." (Emphasis supplied)

On account of the foregoing, the Commission affirms the finding of the CGFD that Forest Hills is a stock corporation, and its directive to comply with Rule 20 of the SRC in relation to Sections 7 and 50 of the Corporation Code.

WHEREFORE, premises considered, the ***Memorandum of Appeal*** filed by Forest Hills Golf and Country Club, Inc. is hereby **DENIED** for lack of merit. The Letter-Order dated 14 July 2016 of the Corporate Governance and Finance Department is hereby AFFIRMED.

Let a copy of this **DECISION** be furnished to the Corporate Governance and Finance Department (CGFD) and to the Company Registration and Monitoring Department (CRMD) for their information and appropriate action.

SO ORDERED.

Pasay City, Philippines; 10 September 2020.

EMILIO B. AQUINO
Chairperson

EPHYRO LUIS B. AMATONG
Commissioner

JAVEY PAUL D. FRANCISCO
Commissioner

KELVIN LESTER K. LEE
Commissioner

KARLO S. BELLO
Commissioner