



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

29 July 2011

SEC-OGC Opinion No. **11-33**
Primary purpose; secondary
purpose

MR. JESUS B. LAPUZ
Corporate Secretary
West Spring Development Corporation
Unit 903 Gold Loop Tower
Jose Maria Escriva Drive, Ortigas Center
San Antonio, Pasig City

Dear Mr. Lapuz:

This refers to your letter dated 12 July 2011¹ seeking confirmation that:

- 1) The only business your corporation, West Spring Development Corporation ("West Spring"), is authorized to conduct is that provided for in the primary purpose as stated in the Articles of Incorporation ("Articles"), which is *general construction*;
- 2) The secondary purpose(s) stated in the Articles "[t]o purchase, acquire, own lease, sell and convey real properties ... and other personal properties" may be exercised by West Spring only when such is "necessary or incidental to the conduct of the corporate business" which, as stated in the primary purpose clause, is *general construction*;
- 3) Even if not stated in the secondary purpose clause, West Spring has the power to purchase, acquire, own lease, sell and convey real and personal property, "if reasonably and necessarily required in the transaction of its lawful business", by virtue of Section 36, par. 7 of the Corporation Code of the Philippines ("Code");
- 4) If West Spring were to sell all the real property it owns in preparation for its dissolution, then its power to make such sale is authorized

¹ Received by this Office on even date.

under Section 36, par. 7 of the Code and the corporation's Articles, and as such, will not be considered as engaged in the real estate business.

It is well-settled that a corporation has only such powers as are expressly granted in its charter or in the statutes under which it is created or such powers as are necessary for the purpose of carrying out its express power.² In the determination of what businesses may be carried on by a corporation, reference must be had to its charter, and unless the power to carry on a particular business is either expressly or impliedly conferred thereby, it does not exist.³

A corporation has both express and implied or incidental powers. Express powers are those which are enumerated in Section 36 of the Corporation Code and those which are sanctioned by the State in the corporation's articles of incorporation. Implied or incidental powers, on the other hand, are the corporation's "powers, attributes and properties . . . incident to its existence",⁴ which may be "essential or necessary to carry out its purpose or purposes as stated in its articles of incorporation".⁵

If the corporate charter, in defining the powers of the corporation, enumerates certain things which it may do by words or particular and specific meaning and such enumeration is followed by general words, the general words are not to be taken in their widest sense, but are to be restricted to the things of the same general kind as those enumerated unless a contrary intent appears.⁶ Where the purpose clause of the articles of incorporation of a company embodies a variety of different and related purposes, the corporation may intend either to carry them out simultaneously or to prosecute first the primary business in which it is most interested and then embark later in anyone of the other objectives, as the need for expansion of the enterprise may warrant or the necessity for a change of business may demand.⁷

In addition, as we have previously opined⁸:

"It is the corporation's purpose clause which *confers, as well as limits*, the powers which a corporation may exercise⁹ and the character of a corporation is usually determined by the objects of its formation and the *nature of its business* as stated in

² SEC Letter dated 20 June 1989, addressed to Mr. Philipps C. Comandante, citing 13 Am. Jur. Sec. 739.

³ *Id.*, citing: *Chiwakla Line v. Disnukes*, 87 Ala. 344, 650, 122, 5LRA 100, cited in Am. Jur. Supra., sec. 743.

⁴ SEC-OGC Opinion No. 20-09, citing Section 2 of the Corporation Code.

⁵ *Id.*, citing: Section 36 (11) of the Corporation Code. Section 45 also states a similar rule.

⁶ DOJ Opinion No. 040, s. 1985 dated 20 March 1985, citing Fletcher's supra, Sec. 2483, pp. 309-310.

⁷ SEC Letter dated 27 June 1984 addressed to Mr. Alfonso Ma. Z. Corpuz of Alpha International Manpower Services, Inc., citing: SEC Letter to Filfactores Financial Corporation, dated January 2, 1973.

⁸ SEC Opinion No. 08-06, citing Campos, J., et al., The Corporation Code, Vol. I, 74 (1990).

⁹ *Id.*

the articles.¹⁰ The primary purpose of the corporation, as stated in its articles of incorporation, is the first business to be undertaken by the corporation. *Hence, the primary purpose determines its classification.*¹¹

Outside of the primary purpose, the secondary purposes might determine a corporation's classification *on the condition that the corporation is actually engaged in the business stated therein.*¹²" (emphasis ours)

Thus, in response to your queries:

- 1) Your corporation is authorized by its Articles and the Code to engage in general construction under its primary purpose. Should the corporation decide to shift from general construction to another activity as its primary purpose or main line of business, then under the Code, an amendment¹³ of the Articles is necessary - subject, of course, to the limitations under the law and the Constitution.

However, a corporation can also engage in the businesses stated in its secondary purpose provided it complies with the requisites of Section 42 of the Code which states that:

"Section 42. *Power to invest corporate funds in another corporation or business or for any other purpose.* - Subject to the provisions of this Code, a private corporation *may invest its funds in any other corporation or business or for any purpose*

¹⁰ *Supra* at note 8, citing 18A Am Jur 2d, Corporations § 204.

¹¹ *Id.*

¹² *Supra* at Note 8., citing: SEC Opinion Letters to Atty. Juan Ricardo B. Tan of Romulo Mabanta Buenaventura Sayoc & De Los Angeles dated June 6, 1995; Mr. Salvador C. Martin of the Dept. of Environment & Natural Resource (DENR), February 7, 1994; The Acting Director of the Bureau of Mines dated March 22, 1974; and Mr. Sixto S. de Guzman, Jr., August 29, 1972.

¹³ **Sec. 16. Amendment of Articles of Incorporation.** - Unless otherwise prescribed by this Code or by special law, and for legitimate purposes, any provision or matter stated in the articles of incorporation may be amended by a **majority vote** of the board of directors or trustees and the **vote or written assent of the stockholders representing at least two-thirds (2/3) of the outstanding capital stock**, without prejudice to the appraisal right of dissenting stockholders in accordance with the provisions of this Code, or the vote or written assent of at least two-thirds (2/3) of the members if it be a non-stock corporation.

The original and amended articles together shall contain all provisions required by law to be set out in the articles of incorporation. Such articles, as amended shall be indicated by underscoring the change or changes made, and a copy thereof duly certified under oath by the corporate secretary and a majority of the directors or trustees stating the fact that said amendment or amendments have been duly approved by the required vote of the stockholders or members, shall be submitted to the Securities and Exchange Commission.

The amendments shall **take effect upon their approval by the Securities and Exchange Commission** or from the date of filing with the said Commission if not acted upon within six (6) months from the date of filing for a cause not attributable to the corporation.

other than the primary purpose for which it was organized when approved by a majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds (2/3) of the outstanding capital stock, or by at least two thirds (2/3) of the members in the case of non-stock corporations, at a stockholder's or member's meeting duly called for the purpose. Written notice of the proposed investment and the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, That any dissenting stockholder shall have appraisal right as provided in this Code: Provided, however, That where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders or members shall not be necessary."

There is no indication in your letter that the foregoing conditions of Section 42 have been complied with.

- 2) Yes. The power of West Spring "to purchase, acquire, own lease, sell and convey real properties such as lands, buildings, factories and warehouses and machineries, equipment and other personal properties as may be necessary or incidental to the conduct of the corporate business, and to pay in case, shares of its capital stock, debentures and other evidence of indebtedness, or other securities, as may be deemed expedient, for any business or property acquired by the corporation" as stated in item 1 of what it is said to be West Spring's secondary purpose clause, can only be exercised when such is necessary or incidental to the conduct of the corporate business.
- 3) As to your third query, it should be noted that item 1 in West Spring's secondary purpose clause is substantially similar to Section 36(7) of the Corporation Code, which states:

"7. To purchase, receive, take or grant, hold, convey, sell, lease, pledge, mortgage and otherwise deal with such real and personal property, including securities and bonds of other corporations, as the transaction of the lawful business of the corporation may reasonably and necessarily require, subject to the limitations prescribed by law and the Constitution."

In this regard, we have previously opined that: "Fletcher has regarded the power to acquire and convey property as an incident to every corporation

although such power is expressly conferred to corporations incorporated in accordance with Section 36(7) of the Corporation Code. ***Therefore whether or not such power is included in what the corporation could do and perform under its articles of incorporation, it is nevertheless, deemed to be within the scope of its corporate powers by express declaration of Section 36 of the Code.***¹⁴ Section 36 contains an enumeration of powers expressly given to every corporation created under the general incorporation law. They may be exercised by the corporation whether or not any such powers are stated in the articles of incorporation or by-laws.¹⁵ Thus, even if West Spring's Articles does not so provide, it can still purchase and convey real property, as the transaction of the lawful business of the corporation may reasonably and necessarily require, because it is expressly allowed under Section 36(7) of the Corporation Code.

Therefore, item 1 under the "secondary purpose" clauses of West Spring's Articles may not be strictly construed as a secondary purpose independent or distinct from its primary purpose of general construction because it is a general power of every corporation allowed under Section 36(7).

It would be different if the qualifying phrase in item 1 of West Spring's secondary clause "as may be necessary or incidental to the conduct of the corporate business" were not present, because the buying and selling of real estate, done in the ordinary course of business, would then be considered as a business in itself, distinct and separate from the primary purpose.

- 4) The right of a corporation to take and hold real property may be treated by the purpose to which said property was acquired and the ever present intention of devoting it to a proper and necessary corporate use. Consideration should be given, in determining the right to the object of acquisition, to the intention with which the property is held, and the use to which it may be and is designated to be put, and the power of the corporation is to be limited to such real property as is reasonably necessary to such corporate purposes and uses.¹⁶

Considering the intention and use to which the property will be put, i.e. as a preparatory step to dissolving the corporation, West Spring cannot be deemed as doing business in real estate. The conveyances made pursuant to this purpose have the character of isolated transactions and evidently not for the purpose of continuing its business. Thus, we confirm that purposes for

¹⁴ Lopez, R. The Corporation Code of the Philippines, Vol. 2, 512 (1994), citing SEC Opinions dated September 6, 1982, Marble Corporation of the Philippines and January 25, 1991, Philippine Library Materials Project Foundation, Inc.)

¹⁵ De Leon, H. The Corporation Code of the Philippines Annotated, 267 (1993).

¹⁶ See Note 14, *supra* at 513, citing 6A Fletcher Cyc. Corp., 2789.

dissolution, such activity is within the powers of the corporation and its Articles and hence, is not considered as engaging in the real estate business.

The foregoing opinion rendered is based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission whether of similar or dissimilar circumstances.¹⁷ If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.


VESPER JULIUS B. GARCIA
Officer-in-Charge

¹⁷ SEC Memorandum Circular No. 15, series of 2003.