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

27 January 2010

SEC Opinion No. 10-03
Assignment of Leasehold Rights

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Attention: **MR. RODERICK R.C. SALAZAR III**

Gentlemen:

This refers to your letter dated 22 September 2009 requesting opinion on whether the assignment of leasehold rights for valuable consideration by a lessee over subdivided lots is considered a sale of securities under the Securities Regulation Code[1] ("SRC").

You stated in your letter that:

1. Thunderbird Pilipinas Hotels & Resorts, Inc ("Thunderbird") is the assignee of all the rights and obligations of Thunderbird Resorts, Inc. ("TRI") in the Lease Agreement dated 15 August 2006, which was entered into with the Bases Conversion and Development Authority ("BCDA") and the Poro Point Management Corporation ("PPMC").

2. The objectives of the lease are the development, operation and management of a 65.5 hectare parcel of land ("Leased Property") located within the Poro Point Freeport Zone, Poro Point, San Fernando City, Province of La Union.

3. A portion of the Leased Property has been designated and shall be utilized for the development of a residential estate project consisting of subdivided and individual lots ("Estate Lots") on which resort-style residences ("Estate Units") shall be built.

[1] Republic Act No. 8799 (2000).

4. As assignor, Thunderbird will assign its leasehold rights over the Estate Lots to interested assignees, similar to the Camp John Hay Project.

5. The assignee shall possess and enjoy the subdivided lot for a period of 44 years with the option to construct the Estate Unit within three (3) years on the Estate lot. The construction costs shall be shouldered by the assignee.

6. The assignment is for a limited period of possession, usage, enjoyment, improvement and development, after which the Leased Property and all the improvements thereon shall be reverted back to the BCDA and the PMPC pursuant to the Lease Agreement.

Thus, the instant query.

Pertinent to the query is the definition of "securities" under Section 3.1 of the SRC, which reads:

> "Sec. 3.1 "Securities" are shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture and evidenced by a certificate, contract, instrument, whether written or electronic in character. It includes:
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> a) Shares of stock, bonds, debentures, notes, evidences of indebtedness, asset-backed securities;
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> b) Investment contracts, certificates of interest or participation in a profit sharing agreement, certificates of deposit for a future subscription;
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> c) Fractional undivided interests in oil, gas or other mineral rights;
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> d) Derivatives like option or warrants;
>
> e) Certificates of assignments, certificates of participation, trust certificates, voting trust certificates or similar instruments;
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> f) Proprietary or nonproprietary membership certificates in corporations; and
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> g) Other instruments as may in the future be determined by the Commission."

From the foregoing definition, this Office is of the opinion that the assignment of leasehold rights in this particular transaction does not fall within the definition of securities. The quoted phrase "shares, participation or interest in a corporation or in

a commercial enterprise or profit-making venture" refers to, and is suggestive of equity securities.[2] Applying the foregoing in this case, leasehold rights on subdivided portions of the property are not considered as securities as such are not shares, participation or interest in a corporation and even investments in an enterprise. By the assignment of leasehold rights for a valuable consideration, Thunderbird does not acquire shares, participation or interest in BCDA. In turn, the individual assignees only acquire the rights of the assignor to possess and enjoy the subdivided lots for a limited period with the option to construct resort-style residences within three (3) years on such property. In other words, Thunderbird is merely assigning the rights, and not shares or interest in a corporation to develop the property.

In your letter-query, it was discussed that the intended transaction does not fall under the definition of "securities" because such is not included in the enumeration of securities under SRC Section 3.1, particularly under paragraphs (a) investment contracts; (e) certificates of assignment, participation; and (f) proprietary or nonproprietary membership certificates in corporations. Having established from the foregoing paragraph that the questioned assignment of leasehold rights is not included in the general definition of "securities" under Section 3.1 of the SRC, it is no longer necessary to delve on the issue of whether the said transaction falls under any of the aforementioned enumeration. The word "includes" in Section 3.1 of the SRC presupposes that the enumeration falls under the general definition, which states that securities are "shares, participation, or interests in a corporation or profit-making venture x x x." However, for the sake of closer evaluation, it is important to discuss the intended transaction *vis a vis* an investment contract under Section 3.1(b) of the SRC.

As correctly pointed out in your letter-query, the assignment of leasehold rights by assignor TRI to assignee Thunderbird may not be deemed as an **investment contract**. In the landmark case of *SEC vs. W.J. Howey Co.*[3], the Court established the tripartite test to determine whether a particular financial instrument constitutes an investment contract, namely: (1) the investment of money, (2) in a common enterprise, and (3) with an expectation of profits to be derived solely from the efforts of the promoter or a third party. After a careful scrutiny of the nature of the transaction, we opine that there is no investment of money. The consideration paid by Thunderbird pursuant to the Deed of Assignment of Leasehold Rights is not an investment of money to a common enterprise. It is a consideration for the transfer of rights acquired by TRI from BCDA to possess, enjoy and develop the property for a period of forty four (44) years, after which the same property including its improvements shall be reverted back to BCDA. Further, the transaction

[2] R. Morales, The Philippines Securities Regulation Code (Annotated), 11 (2005 Edition).
[3] 328 U.S. 293 (1946).

is not for the purpose of generating profits from the efforts of others. It is worthy of note that the assignment of leasehold rights to Thunderbird grants them the authority to develop the assigned subdivided portion by building resort-style residences at its own expense, with the privilege of possessing and enjoying the said property including the improvements and the profits thereof for a limited period. Meanwhile, during the existence of the leasehold agreement, the BCDA shall not be entitled to the proceeds of the income from the leased property, but shall regain possession of the said property including the improvements after the expiration of such agreement.

It is likewise imperative to determine whether the current transaction falls under the definition of "securities" under RSA Section 2(a).[4] RSA Section 2(a) provided a definition by example, for it did not actually set out the essential elements of a security. It merely enumerated all possible types of papers or instruments classified as securities and divided them into three (3) categories, namely:[5]

1. Interests or instruments commonly considered to be "securities" – These would include bonds, debentures and shares of stock;

2. Commercial papers evidencing indebtedness; and

3. Investment contracts involving an appreciation of capital and enjoyment of particular privileges and services – These include proprietary or non-proprietary membership certificates, life plans and pre-need plans.

From the foregoing, the Commission opines that the assignment of leasehold rights in question, likewise, does not fall under the definition of "securities" under RSA Section 2(a). It is of consequence to note that the old definition of securities

[4] "Section 2(a) 'Securities' shall include bonds, debentures, notes, evidences of indebtedness, shares in a company, pre-organization certificates or subscriptions, investment contracts, certificates of interest or participation in a profit sharing agreement, collateral trust certificates, equipment trust certificates (including conditional sale contracts or similar interests or instruments serving the same purpose), voting trust certificates, certificates of deposit for a security, or fractional undivided interest in oil, gas, or other mineral rights, or, in general, interests or instruments commonly considered to be "securities", or certificates of interests or participation in, temporary or interim certificates for, receipts for, guarantees of, or warrants or rights to subscribe to or buy or sell any of the foregoing; or commercial papers evidencing indebtedness of any person, financial or non-financial entity, irrespective of maturity, issued, endorsed, sold, transferred or in any manner conveyed to another, with or without recourse, such as promissory notes, repurchase agreements, certificates of assignments, certificates of participation, trust certificates or similar instruments; or proprietary or non-proprietary membership certificates, commodity futures contracts, transferable stock options, pre-need plans, pension plans, life plans, joint venture contracts, and similar contracts and investments where there is no tangible return on investments plus profits but an appreciation of capital as well as enjoyment of particular privileges and services."

[5] R. Morales, The Philippines Securities Regulation Code (Annotated), 11 (2005 Edition).

under this law includes "similar contracts and investments where there is no tangible return on investments plus profits but an appreciation of capital as well as enjoyment of particular privileges and services." On initial evaluation, it may appear that the transaction scheme falls under the said definition. However, the phrase "similar contracts and investments" must be construed as in the nature of an investment contract for the enjoyment of particular privileges and services, as indicated under the third classification. Hence, having ascertained that the transaction in question is not an investment contract, such transaction does not fall within the definition of "securities" under RSA Section 2(a).

Based on the above premises and the facts surrounding this particular query, this Office is of the opinion that the assignment of leasehold rights for a valuable consideration over subdivided lots to interested assignees is not considered as sale of securities under both SRC Section 3.1(b) and RSA Section 2(a), which requires registration with the Commission.

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. If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel