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

20 January 2010
SEC-OGC Opinion No. 10-09
Re: Foreigners as Corporate Directors

PACIS & REYES
8th Floor Chatham House
116 Valero Street (corner V.A. Rufino Street)
Salcedo Village, Makati City

Attention: Atty. Christine P. Base

Madam:

This refers to your 21 December 2009 letter requesting confirmation of your position that Anchor Land Holdings, Inc. ("ALHI", for brevity) may elect foreigners as members of the boards of directors of its wholly-owned subsidiaries.

You stated that ALHI is a publicly listed domestic corporation engaged in real estate activities and is 60% Filipino-owned and 40% foreign-owned, and that it has several wholly-owned subsidiaries, among them are Manila Tower Development Corporation and Posh Development Properties Corporation.

You also mentioned that the foreign shareholders of ALHI wish to be represented in the said wholly-owned subsidiaries since they indirectly own 40% of these subsidiaries. You posit that the foreign stockholders are entitled to be represented in the boards of the subsidiaries in proportion to their shareholdings in ALHI. Specifically, on the assumption that there are five (5) directors, you argue that two (2) foreign directors may be elected in such wholly-owned subsidiaries, considering that 40% of ALHI is owned by the said foreign shareholders.

A corporation has a juridical personality separate from that of its stockholders. Thus, ALHI is a person in itself, distinct from its stockholders, whatever their citizenships may be. Accordingly, being the stockholder, it is ALHI itself, not its shareholders, which is entitled to elect directors in its wholly-owned subsidiaries.

It is well settled that **unless otherwise provided in the corporate by-laws, it is the prerogative of the Board of Directors of a corporation (in this case, ALHI) to appoint nominees in the Board of Directors of other corporations of which it is a stockholder (in this case, ALHI's subsidiaries), whose acts shall be under the ultimate direction of the Board of Directors of the appointing corporation**. While Section 23 of the Corporation Code requires that a Director must be a stockholder of the corporation, the Commission had

occasions to rule that "*beneficial ownership*" is not necessary and that a person who holds the legal title to stock on the books of the corporation is qualified, although the beneficial ownership may be in another. **In other words, it is sufficient that the title to the stock, as it appears on the books of the corporation, is in the nominee director, since the legal title is what counts and it is the person whose name appears as owner on the books of the company who is the stockholder and is eligible as director.** For instance, a director may hold his stock as trustee and yet be legally qualified. So a person to whom one share of stock has been transferred for the express purpose of qualifying him as a director is eligible. Thus, a non-stockholder may qualify as nominee director. **However, in order to be qualified as such, the owner of the shares represented must assign at least one qualifying share to the nominee for purposes of qualifying him to be a member of the Board, which assignment must be properly recorded in the corporate books.**[1]

In a 2009 Opinion[2], we held that a 60% Filipino-owned and 40% foreign-owned corporation engaged in leasing and financing may nominate and elect foreigners as directors of its wholly-owned subsidiary which is engaged in renting or leasing (except financial leasing). We explained our position in this wise:

> "In 2002, the Commission already had occasion to opine that a local bank can nominate a foreign national, in lieu of a qualified Filipino, as a member of the Board of Directors of a local financing company (which is 40% owned by such local bank and 60% owned by a foreign company) without violating the Anti-Dummy Law. **This is because the said law is silent as to whether a local company, e.g. local bank, is prohibited to nominate as its *"nominee"* a foreign national to the board of directors of a partially nationalized corporation, e.g. financing company.** Further, considering that no more than three (3) foreigners are in the financing company's Board of Directors, then it is within the requirements of the law."
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> Thus, in that same 2002 Opinion, the Commission reiterated that a person to whom one share of stock has been transferred for the express purpose of qualifying him as a director is qualified, provided that the transfer contains a description that the trustee holds the stock merely as a *"nominee"* for purposes of qualifying him as member of the Board. It even stressed that it is not necessary that the foreigner himself must own shares as will qualify him to be nominated as director. **Accordingly, while a corporation cannot be directly elected as a member of the Board of Directors, its duly authorized officer, agent or trustee who has been designated as *"nominee"* in accordance with the above procedure, may be eligible to be elected as director to represent the local bank.**

[1]SEC Opinion dated 10 July 1995 addressed to Mr. Jerome M. Tang.
[2]SEC-OGC Opinion No. 09-02 dated 12 January 2009 addressed to Sebastian Liganor & Galinato.

In the same vein, JPNB, undoubtedly a Philippine national who wholly-owns JPNB Rental, can legally nominate the two (2) Japanese nationals as directors of its subsidiary. This will also be well within the requirements of the Anti-Dummy Law as there will only be two (2) foreigners in the Board, in compliance with the 40% limit.

Otherwise stated, the two (2) Japanese nationals can legally become directors of JPNB Rental by virtue of the circumstance, as disclosed, that they hold shares therein as nominees or trustees of JPNB and only for the purpose of qualifying them to the five (5)-member Board of Directors. **As adverted to above, it is necessary, however, that the transfer contains a description that the trustee holds the stock merely as a '*nominee*' for purposes of qualifying him as member of the Board and that the total number of such trustees will not exceed 40% of the Board's membership.**" (Emphasis supplied).

On the assumption that the law governing or pertinent to ALHI's subsidiaries neither totally bans foreigners from becoming corporate directors (as in the case of educational institutions[3]) nor provides restrictions more stringent than those obtaining in the afore-quoted 2009 Opinion, it is our considered view that ALHI, not its foreign shareholders, may elect as directors in its individual subsidiaries two (2) foreigners who have been designated by it as "*nominee directors*" in accordance with the procedure laid down in the above-quoted authorities.

This opinion is based solely on the facts disclosed in the query 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 or upon the courts.[4] If, upon investigation, it will be disclosed that the facts relied upon are different, this Opinion shall be rendered void.

Please be guided accordingly.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel

[3]SEC Opinion dated 22 May 1991 addressed to Atty. Gregorio M. Batiller, Jr.
[4]Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.