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

Office of the General Counsel

15 July 2014

SEC-OGC Opinion No. 14-19
Re: Anti-Dummy Law in
Condominium Corporations

MR. ISAGANI A. ZULUETA
Makati Tuscany Condominium Corporation
6751 Ayala Avenue
Makati City 1226

Sir:

This is in response to your letter dated 18 February 2014, requesting for our opinion on questions concerning the applicability of the Anti-Dummy Law[1] on the election of directors and officers of Makati Tuscany Condominium Corporation ("MTCC").

MTCC is a condominium corporation registered with the Commission under SEC Registration No. 65690. In your letter, you disclosed that foreign nationals in MTCC owned units comprising around 11.476% or 2,798 square meters out of 24,381 square meters as of 31 January 2014.

You presented the following queries:

1. With such percentage of ownership, how many directors with foreign nationalities can be elected by the members to a 7-man Board?
2. Can the elected foreign director/s exercise management/administrative functions such as being an officer or committee chairman/member?
3. What sanctions may be imposed on the corporation or on the erring directors in violation of the Anti-Dummy Law?
4. What is the remedy if the members elect more than the allowable number of directors?

In SEC-OGC Opinion No. 09-17,[2] the Commission opined that if the condominium corporation owns the land over which the condominium project is erected, the Anti-Dummy Law applies, as ownership of land is a partially-nationalized activity. If its title over the land is other than ownership (such as, but not limited to, lease), then the same law is not applicable.

Applying the same to the case of MTCC, it has for its primary purpose, "to own or hold title to the common areas in the condominium project known as 'THE MAKATI TUSCANY CONDOMINIUM PROJECT' x x x." As such, ownership of land and its improvements, better identified as the "common areas" within the condominium project, is implied.[3] **Thus, if MTCC owns the land, the Anti-Dummy Law applies.**

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[1] Commonwealth Act No. 108, as amended.
[2] Dated 22 July 2009 addressed to Mr. John Worley.
[3] SEC Opinion dated 11 September 2002, addressed to Atty. Perseveranda A. Abrenica

It is unfortunate however that we are constrained from addressing the specific points raised in your query. Pursuant to SEC Memorandum Circular 15, series of 2003, the Commission does not render opinions on matters which are hypothetical, abstract, speculative and anticipatory in character. Also, the Commission does not render opinions on matters which involve the substantive and contractual rights of private parties who would, in all probability, contest the same in court if the opinion turns out to be adverse to their interest.

However, **for purposes of information only**, the following may be imparted.

The last part of Section 2-A of the Anti-Dummy Law provides:

> x x x And provided, finally, That the election of aliens as members of the board of directors or governing body of corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities.

The Commission has previously taken a position that Section 2-A of the Anti-Dummy Law allows foreigners to have, at the most, forty percent (40%) of the seats available in the Board of Directors where the corporation is subject to the 40% threshold in foreign equity participation, the acquisition and ownership of land being a partly nationalized activity. Note, however, that in determining the representation of foreign stockholders in the Board of Directors of a corporation engaged in a partly nationalized activity, the basis is the actual share of the foreign stockholders.[4]

Section 2-A of the Anti-Dummy Law disallows foreign nationals "*to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein*" in business activities where there is a constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise or privilege. The ban prohibits foreigners from being elected or appointed to management positions as president, vice-president, treasurer, secretary, etc.[5]

While "foreigners" are disqualified to be elected/appointed as "corporate officers" in wholly or partially nationalized business activities, they are allowed representation in the "Board of Directors" or "governing body" of said entities in proportion to their shareholdings. The reason for the exception is that the Board of Directors/governing body performs specific duties as a "body." Unlike corporate officers, each member of the Board of Directors/governing body has no individual power or authority to perform management function. The powers delegated to the Board of Directors/governing body can only be exercised by it acting as a body when a quorum is present. Hence, there can be no intervention in the management, operation, administration and control of the corporation by the members thereof in their individual capacity.[6]

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[4] SEC-OGC Opinion No. 02-12, dated 2 February 2012, addressed to Ms. Carlota Christina G. Laiño-Santiago
[5] SEC Opinion dated 8 December 1995, addressed to Mr. K.J. Mctavish
[6] SEC Opinion dated 3 June 1998, addressed to Mr. Greg Post.

The logical conclusion is that the rule allowing foreigners to sit in the Board of Directors extends to the "Executive Committee" which is authorized to act on such specific matters within the competence of the Board of Directors. **Section 35 of the Corporation Code clearly implies that the Executive Committee is a "governing body" which functions as the Board itself, and thus membership therein shall be governed by same laws/rules applicable to the Board of Directors.**[7] Accordingly, a foreigner can be a member of the Executive Committee without violating the Anti-Dummy Law, provided, however, that foreign representation in said governing body shall only be in proportion to the foreign shareholdings in the corporation, and provided further, that the foreigners shall not be given specific individual managerial responsibility.[8]

The applicable sanctions imposable in violation of the Anti-Dummy Law are as follows:

1. Imprisonment for not less than five nor more than fifteen years and by a fine of not less than the value of the right, franchise or privilege enjoyed or acquired in violation of the provisions hereof but in no case less than five thousand pesos: Provided, however, That the president, managers or persons in charge of corporations, associations or partnerships violating the provisions of this section shall be criminally liable in lieu thereof: Provided, further, That any person, corporation or association shall, in addition to the penalty imposed herein, forfeit such right, franchise, privilege, and the property or business enjoyed or acquired in violation of the provisions of the Anti-Dummy Law.[9]
2. Dissolution of the corporation upon proper court proceedings.[10]

Where the members elect more than the allowable number of directors,[11] the issue is an intra-corporate dispute, specifically, a controversy in the election of directors, and the matter is properly settled in the appropriate Trial Court. At any rate, the number of directors to be elected should be in accordance with that number fixed in the articles of incorporation.[12] Thus, an election of a greater number of directors than what is provided for and allowed in the articles of incorporation is irregular and voidable at the instance of any person aggrieved thereby.[13]

While not being able to address the specific issues you raised, we hope to have provided pertinent information, for your consideration.

Very truly yours,

CAMILO S. CORREA
General Counsel

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[7] Ibid.
[8] Ibid.
[9] Section 2-A, Anti-Dummy Law.
[10] Ibid., Section 3.
[11] We interpret this to mean electing a number of directors exceeding the number of directors allowed by the corporation's articles of incorporation.
[12] SEC Opinion dated 29 January 1996, addressed to Philippine Association of Realtors Boards, Inc.
[13] Ibid., citing 2 Fletcher, sec. 291.