Republic of the Philippines
Department of Finance
Securities and Exchange Commission
OFFICE OF THE GENERAL COUNSEL

18 January 2021

SEC-OGC Opinion No. 21-01
Re: Filling-up of Vacancies in the Board of Trustees

ATTY. NOEL O. BACALLA
Counsel for Cebu Green Peaks Development Inc.
Rm. 302, 8990 Corporate Center
Negros Street, Cebu Business Park
Cebu City

Dear Atty. Bacalla:

We write in response to your letter requesting for an opinion on how The Padgett Place Condominium Corp. ("TPPC Corp."), owned and developed by the Cebu Green Peaks Development Inc., may fill-up the vacancies in the Board of Trustees resulting from the resignation of some of its members.

In your letter, you stated that the By-Laws of TPPC Corp. does not provide for the procedure in filling-up vacancies in the Board of Trustees, where just recently, three (3) out of its five (5) members resigned. In particular, you would like to seek the opinion of the Commission on 1) how the vacancies will be filled-up; and 2) whether the remaining two (2) trustees have the power and authority to merely appoint the replacement of the members of the Board of Trustees who resigned.

Section 28 of the Revised Corporation Code ("RCC") provides:

> **Section 28. Vacancies in the Office of Director or Trustee; Emergency Board.** – **<u>Any vacancy occurring in the board of directors or trustees other than by removal or by expiration of term may be filled by the vote of at least a majority of the remaining directors or trustees, *if still constituting a quorum*; *otherwise*, said vacancies must be filled by the stockholders or members in a regular or special meeting called for that purpose.</u>**
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> When the vacancy is due to term expiration, the election shall be held no later than the day of such expiration at a meeting called for that purpose. When the vacancy arises as a result of removal by the stockholders or members, the election may be held on the same day of the meeting authorizing the removal and this fact must be so stated in the agenda and notice of said meeting. **In all other cases, the election must be held no later than forty-five (45) days from the time the vacancy arose. A director or trustee elected to fill a vacancy shall be referred to as replacement director or trustee and shall serve only for the unexpired term of the predecessor in office.** x x x." (*Emphasis*

supplied)

In ***SEC-OGC Opinion No. 13-06 addressed to Atty. Jeremiah V. Villanueva dated 06 May 13***[1], it was explained that:

> "Based on Section 29[2] as above-quoted, the **remaining directors or trustees can fill-up the vacancies in the Board when: (1) such vacancies were occasioned by reasons other than the removal by the stockholders or trustees or by expiration of term; and (2) such remaining directors or trustees still constitute a quorum of the Board. These conditions must concur, otherwise, the filling-up of the vacancies must be done by the stockholders or members in a regular or special meeting called for the purpose**.
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> In the case of KMBI, while the vacancies arose from the resignation of five (5) of its trustees and the death of one (1) more, still, the three (3) remaining trustees do not constitute a quorum and, hence, cannot fill-up the said vacancies. Therefore, only the second option provided in Section 29 of the Corporation Code shall apply in this instance (i.e., the stockholders or members shall fill-up the vacancy).

In requiring that vacancies in the board resulting from resignation be filled-up by the stockholders or members in a regular or special meeting called for the purpose if the remaining trustees do not constitute a quorum, the law seeks to ensure the recognition and strict implementation of the policy that only those who have been elected by the shareholders or members can rightfully exercise and discharge the duties and functions of a director or trustee, and be made fully accountable to the shareholders or members for the same. This was emphasized in *Valle Verde Country Club, Inc. v. Africa*[3] where the Supreme Court explained, to wit:

> "**The board of directors** is the directing and controlling body of the corporation. It **is a creation of the stockholders and derives its power to control and direct the affairs of the corporation from them.** The board of directors, in drawing to themselves the powers of the corporation, occupies a position of trusteeship in relation to the stockholders, in the sense that the board should exercise not only care and diligence, but utmost good faith in the management of corporate affairs.
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> **The underlying policy of the Corporation Code is that the business and affairs of a corporation must be governed by a board of directors whose members have stood for election, and who have actually been elected by the stockholders, on an annual basis. Only in that way can the directors' continued accountability to shareholders, and the legitimacy of their decisions that bind the corporation's stockholders, be assured. The shareholder vote is**

[1] SEC-OGC Opinion No. 13-06 addressed to Atty. Jeremiah V. Villanueva of the People's Law Office
[2] Now Section 28 of the RCC
[3] G.R. No. 151969, September 4, 2009

> **critical to the theory that legitimizes the exercise of power by the directors or officers over properties that they do not own.**
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> This theory of delegated power of the board of directors similarly explains why, under Section 29 of the Corporation Code, in cases where the vacancy in the corporation's board of directors is caused not by the expiration of a member's term, the successor "so elected to fill in a vacancy shall be elected only for the unexpired term of the his predecessor in office". **The law has authorized the remaining members of the board to fill in a vacancy only in specified instances, so as not to retard or impair the corporation's operations; yet, in recognition of the stockholders' right to elect the members of the board, it limited the period during which the successor shall serve only to the "unexpired term of his predecessor in office".** (Emphasis supplied)

On the basis of the foregoing, it is the opinion of this Office that the remaining two (2) members of the Board of Trustees of TPPC Corp. *cannot* fill-up the vacancies left by the three (3) other members of the board who all resigned on the ground that the remaining two (2) trustees will no longer constitute a quorum of the Board which is required under Section 28 of the RCC. Considering that the remaining two (2) members of the Board of Trustees of TPPC Corp. do not constitute a quorum, they do not have the legal authority to fill-up the vacancies by majority vote. Hence, the filling-up of the vacancies in the Board of Trustee must be done by the general membership of TPPC Corp. in a regular or special meeting called for that purpose.

It shall be understood, however, that the foregoing opinion is rendered based solely on facts and circumstances disclosed, and relevant solely to the particular issues raised therein. It shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[4] If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

ROMUALD C. PADILLA
General Counsel

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[4] SEC Memorandum Circular No. 15, s. of 2003, No.7, 16 December 2003