Third Northern Mariana Islands Constitutional Convention

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July 10, 1995

TO : President

FM : Delegate Dr. Carlos S. Camacho

SUBJ : Introduction of Proposal - Article XII

I am hereby introducing the attached Delegate Proposal relative to Article XII. Please take necessary action so that the Committee on Land and Personal Rights can review it.

If you have any questions, please let me know.

DR. CARLOS S. CAMACHO
DELEGATE

attachment

Delegate Proposal No. _____

Date: July 10, 1995

It is proposed that an amendment of Article XII be prepared that does the following:

1. Section 1 should be left in its present form.

[Note: Section 1 was not amended in 1985.]

2. The first sentence of Section 2 should be amended to confirm that any *attempt* to acquire real property in violation of Article will be subject to the void *ab initio* sanction imposed by Section 6, such as: (1) purchases using a person of Northern Marianas descent as an agent or "front," (2) purchases using a corporation of Northern Marianas descent as an agent or "front," or (3) purchases using any other indirect means to acquire a prohibited interest in Commonwealth land.

[Note: This was the intent of the original framers of Article XII, and, of the 1985 Convention, but the lawyers defending against Article XII cases in

the courts during the past 10 years have argued that Article XII does permit the courts to look behind the Chamorro name on a deed, or the Chamorro names on the articles of incorporation.

These lawyers have argued that an illegal buyer can hide behind the name of a person of Northern Marianas descent and the courts are powerless to determine the identity of the true buyer and declare the transaction void *ab initio* if the transaction is illegal. They argued (and they are still arguing in pending Article XII cases) that if the name of the grantor in a deed is, for example, "Jose X. Sablan," then the court is powerless to look behind the face of the deed no matter how much proof the original landowner has to offer that "Jose X. Sablan" was nothing more than an agent who bought the land for "John P. Smith," who put up all the money and got "Jose X. Sablan" to take the title in his name and hold it for "John P. Smith."

The Supreme Court decisions in *Aldan-Pierce v. Mafnas* and *Ferreira v. Borja* held that such transactions are illegal, but those decisions were reversed by the Ninth Circuit. As a result, at the present time, the Superior Court has no controlling precedent to follow in deciding all of the pending Article XII cases. Therefore, this Convention should make it perfectly clear what the

law is in this regard.

In other words, this Convention should make it clear that the decisions of the Supreme Court in *Aldan-Pierce v. Mafnas* and in *Ferreira v. Borja* were basically a correct interpretation of Article XII, as it was conceived by the original framers.]

The new text and the constitutional history should make it clear that the term "acquisition" includes any kind of "transaction," using any kind of documents, a series of related documents, a transaction using a combination of oral and written agreements, or any attempted acquisition by means of any kind of transaction.

The constitutional history should describe the various means which have been used in illegal transactions over the past 18 years.

The emphasis should not be on formalities, but rather on the real intent and purpose of the parties behind the documents and their conduct. The tenor of the *documents* used in the transaction must not be conclusive. The court must be free to hear any and all evidence as to the real parties involved and the true nature of the *transaction*.

The lawyers defending illegal transactions in the courts have argued that the term "transaction"

as used in Section 6 of Article XII should be interpreted to include only the final document in the transaction, such as a deed which uses the name of the Chamorro front as the "grantee." By this means, they can conceal the true nature of the "transaction" from the court. Special Judge Edward C. King in his dissent in the *Ferreira v. Borja* case agreed with this narrow interpretation. (Justices Dela Cruz and Borja out-voted King.)

The Ninth Circuit agreed with Judge King and reversed our Supreme Court.

Any ineligible buyer who has gone to the trouble of trying to circumvent the restrictions, will have done his or her best to conceal the true nature of the *transaction*. The more money involved, the greater will have been the effort at deception.

The Article XII plaintiff who is challenging such a transaction must be free to obtain all the evidence which relates to the true nature of the *transaction* during the discovery phase of the case and then must be free to present it in court.]

3. The third sentence of Section 2 should be amended to

ensure that the eligibility of lending agencies to buy Commonwealth real property at a mortgage foreclosure sale and to hold title to it is no greater than is reasonably necessary for the benefit of potential borrowers of Northern Marianas descent.

[Note: Upon default, the mortgagee has the power under the Commonwealth mortgage statute to force a foreclosure sale at which the interest of the mortgagor which was mortgaged (whether leasehold or title) is then put up for public sale to the highest bidder.

Most banks in the Commonwealth will not lend money to local borrowers unless the borrower puts up security in the form of time certificates of deposit in the full amount of the loan.

Very few banks which have been willing to lend money on the security of real estate mortgages. In recent years, however, there have been quite a number of mortgage foreclosure sale notices in the local newspapers by a local bank. A bank which is well-capitalized and which loans money to risky (or desperate) borrowers on the security a mortgage of Commonwealth land, could acquire a large amount of Commonwealth land and hold it for at least 10 years. Then, when the real estate

market improves, sell it and make a huge profit.]

4. The first sentence of Section 3 should be re-written so as to confirm that the acquisition of any and all ownership interests is prohibited.

[Note: It is clear that the original framers intended Article XII to be interpreted and applied by the Commonwealth courts in accordance with the "common law" existing at the time, that is, in 1975. The American common law of real property has been developing over a period of about 930 years. There are many different categories of "ownership."

Given the relatively precise meaning of the term "freehold interest" as defined by the American common law of real property and given the clear explanation of the meaning of the term "freehold interests" in the Analysis of the Constitution, p. 169, there should have been no room to debate whether acquisition of an "equitable fee simple" violates Article XII.

But the lawyers representing Aldan-Pierce in *Aldan-Pierce v. Mafnas*, and Ferreira in *Ferreira v. Borja* argued that an "equitable fee simple" interest was not prohibited by Article XII, despite the fact that it is a "freehold interest"

under American common law.

The Analysis makes it perfectly clear that a prohibited "freehold interest" "includes all types of sharing arrangements for ownership——ownership jointly vested in two or more persons, ownership vested in two or more persons as tenants in common, and ownership in tow or more persons vested in succession." Analysis, p. 169.

In the decision of *Manglona v. Kaipat*, the Commonwealth Supreme Court did not hold just such a conveyance void *ab initio*. In that case, the deed ran in favor of two Chamorros, one of whom was of Northern Marianas descent and one of whom was not. Instead of invalidating the entire "transaction" the Court "reformed" the deed by making the grantor and the one eligible grantee "tenants in common" of the property.

This provision and the constitutional history should make it clear that any and all forms of ownership which exist under present law are prohibited.]

5. The first sentence of Section 3 should be amended to set a limit of forty years on leasehold interests.

[Note: The permissible leasehold term was

increased from 40 years to 55 years by the Second Convention. The Covenant, § 805, prohibits "long-term interests" without specifying a number of years. A 99-year lease is generally regarded as the equivalent of complete ownership. Therefore, 55 years is "long" while 40 years is "short."

Forty years will strike a better balance between allowing a long enough period to attract investors and at the same time ensuring that the land will come back into the hands of the original owners or their children for their own benefit and use. By that time, our economy should have progressed to the point where our own people can develop their land without the need of outside capital.

The constitutional history should also make it clear that the landowner is not required to lease the property for the full 40-year period. The term of the actual lease should be chosen to accommodate the "highest and best use" of the property and to permit a reasonable return on the amount invested to develop the property to its "highest and best use."]

6. The first sentence of Section 3 should be amended to confirm that the original intent of the framers of the 1975 constitution was to prohibit any and all lease terms which, given the prevailing economic conditions and the nature of the

entire transaction, would give the tenant the power to extend his control and possession of the land beyond the nominal term of the lease.

[Note: Many of the leases which have been signed in the last 20 years contain provisions which have a high probability of preventing the landowner from ever recovering possession of the land Examples: (1) A provision which requires the landowner to purchase a multi-million dollar improvement before he can recover the land; or (2) a provision which automatically gives the tenant title to the land if and when Article XII is repealed (or held to be unconstitutional).

There is no reason why the terms of leases to persons who are not of Northern Marianas descent can be plain and simple and still give the tenant a fully secure lease.]

7. The "condominium" provisions in Section 3 should be deleted entirely.

[Note: These condominium provisions were added by the 1985 amendments. They are inconsistent with the meaning of "freehold interests" elsewhere in Section 3. (And they are written in language which

creates technical problems.)

The concept of "fee simple" or complete and total ownership of land includes the land on the surface and "the sky above, all the way to heaven and the earth below, down to hell." Under Section 3 as presently written, however, a buyer who *cannot* purchase the land itself, *can* purchase the column of space extending above the land (or at least that column of space occupied by the building), from a point about 8 to 10 feet in the air, all the way to heaven.

What, then, will happen at the end of the lease term? The landowner's children will recover the land and the first story of the building. The tenant (or the tenant's buyers of condominium units) will retain absolute ownership of the space above the first story of the building.

Such an arrangement is illogical and unworkable. Can the landowners evict the condominium owners? It is far better to let the landowner retain ownership over the land and everything up to heaven and down to the center of the earth.

These provisions appear to be in violation of § 805 of the Covenant and are therefore invalid. Therefore, any conveyances which purported to give a developer who was not of Northern Marianas

descent ownership of space "above the first floor" would be invalid.]

8. Section 5, relating to corporations, should be amended to provide that a corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors at least 80% of whom are persons of Northern Marianas descent and at least 80% of the voting shares of the corporation are owned by one or more persons of Northern Marianas descent.

[Note: It is clear that the original intent of the 1975 Convention was to permit corporations to own land so that landowners could use the corporation as a means to participate in the economic development of the Commonwealth. Landowners could join with international investors, contribute land to the enterprise and then obtain (and maintain) majority ownership and control of the company. The money could be contributed by the other investors or borrowed from a lender.

The 1985 Convention found that there had been widespread violation of Article XII using "dummy" corporations. The real buyers of the land (the

Convention Journal mentioned Jack Layne, Roger Gridley and others as examples) would find one or more Chamorro friends to cooperate with them. Then, they would list those persons as "shareholders" and "directors" of the company when in fact they never paid anything for their stock, they took instructions from the true owners of the land (and the company), they were never paid for their services, etc.

When Jack Layne, for example, bought the land, he would "park" the title to the property in the name of the "dummy" corporation until a buyer was found and then the title was transferred to the name of a new dummy corporation which was owned and controlled by the new buyer.

In the Article XII litigation involving corporations, the lawyers for the buyers (and the corporations) argue that the courts cannot look behind the "face" of the corporation to see whether the Chamorro directors and stockholders are genuine.

Public Law 8-32 purports to prohibit the court from "piercing the corporate veil" and determining the identity of the real owners and directors of the company, despite the fact that the intent of the original framers must have been to prohibit any misuse of the corporate form of organization

to circumvent Article XII.

There is a long history of corporations being misused by organized crime, drug cartels, stock swindlers, tax cheats and others for many years. It is reasonable to think that the intent of the original framers of Article XII was to prohibit the misuse of Commonwealth corporations to circumvent Article XII, by whatever means.

This should be confirmed and language added in the text of Section 5 and in the constitutional history which makes it clear that the courts can and must make a thorough examination of the internal affairs of any corporation which claims to be eligible to own land under Section 5, whenever a landowner files an Article XII claim.

9. The second, third and fourth sentences of Section 5, relating to voting trusts and the giving of shareholder and director's proxies should be retained in a modified form.

[Note: The intent of the language in these three sentences is clear: to prevent manipulation and misuse of Commonwealth corporations to circumvent the restrictions of Article XII. But, the language is technically incorrect or inelegant and should be improved. That and the constitutional history

should confirm and make it clear that manipulation and misuse of a Commonwealth corporation to circumvent Article XII will result in voiding the transaction by means of which the corporation purchase the land.]

10. The first sentence of Section 6, providing the "void *ab initio*" sanction should be retained, as it is presently written, but the term "transaction" should be defined to include any and all actions of the buyer, his agents, attorneys, or others acting in concert with him, which relate to the acquisition of a prohibited interest in Commonwealth real property.

[Note: This was the original intent of the framers of the 1975 constitution, but as noted above in connection with Section 2, the parties to the Article XII litigation have fought over the meaning of the term "transaction." It was not given a specific definition in the 1975 Constitution. The landowners in the Article XII litigation have argued that the term should include not just deeds, or leases or the like, but all of the activities (whether documented or not) and written agreements which reasonably relate to the ultimate passage of title from the landowner to the buyer.

The lawyers defending against the Article XII cases have argued that the court should not look beyond the face of the deed, or the corporate documents, all of which, of course, make the "transaction" appear to be in conformity with Article XII.

Because the two decisions of our Supreme Court construing Article XII have been stricken down by the Ninth Circuit, this Convention should make it clear that the basic result of the *Aldan-Pierce* and *Ferreira v. Borja* decisions was correct.

This Convention should confirm that the original intent and the intent of this Convention is to have the courts apply the "void *ab initio* sanction to the entire "transaction" in which the parties bought land in violation of Article XII, including any written or oral agreements for buying the land or for holding title to the land.

In the Article XII litigation, the lawyers for the defendants have used the following argument: Our clients did not violate Article XII, because they are not persons of Northern Marianas descent and therefore they cannot own land and therefore it is impossible for them to have violated Article XII. The constitutional history should refute this specious argument. It should be made clear that the courts must first examine the "transaction" to

determine the legal consequences the actions of the parties (including the documents used) under existing law, without regard to Article XII. Then, if the court finds that an "acquisition" of a "freehold interest" did take place, it applies the void *ab initio* sanction to invalidate the entire "transaction" as if it never happened.]

11. A new provision should be added to Article XII to confirm and amplify the original intent of the framers that by adopting the sever sanction of "void *ab initio*" they intended that: (1) no landowner's Article XII claim cannot be defeated in court by an affirmative defense; and (2) the defendant in an Article XII case can assert a counterclaim for restitution only under certain circumstances.

[Note: The text of the original Article XII did not deal explicitly with the question of what consequences should follow from the sanction imposed by Section 6, either during the course of litigation or after a determination that the "transaction" is void.

The Analysis indicated that in the case of a sale, a court could require the landowner to repay any money which the putative buyer had given him or her. Nothing was said about disposition of any

improvements which the buyer may have placed on the property between the time the sale was consummated and the time the court declared the sale void.

It is reasonable to infer, however, that when the framers adopted the severe sanction of "void *ab initio*" they meant to accomplish one principal objective: the original landowner should recover full and complete ownership of the property, without limitation. The Analysis made it clear that any transaction which violated Article XII had no effect on the title to the property; title remained in the original landowner, despite the existence of the illegal deed. This indicates that an Article XII claim cannot be defeated by an affirmative defense, such as "illegality," "unjust enrichment," or "fraud."

The lawyers representing defendants in the Article XII litigation have routinely asserted a dozen or more "affirmative defenses" (an "affirmative defense" is a defense which completely defeats the claim; it takes only one) in an effort to defeat the Article XII claim. No court has yet decided whether a defendant who has violated Article XII can still win by asserting an affirmative defense. The lawyers argue, for example, that because a transaction which violates Article XII is "illegal," it never happened, and,

therefore, the plaintiff has no Article XII claim, because the transaction never happened.

Public Law 8-32 requires a successful Article XII plaintiff to buy the land back at fair market value *and* to buy any improvements which the buyer put on the property, at cost or fair market value. This provision, standing alone, eviscerates Article XII.

As for counterclaims, in the case of an attempted purchase or lease of the property, Article XII should provide that the landowner should be required to make restitution of the purchase price. The buyer should not, however, be permitted to use his restitution award as a means of retaining possession of the land or otherwise encumbering it to the detriment of the landowner.

If a buyer or tenant has made improvements on the property, he or she (or it, in the case of a corporation) should be allowed to make a counterclaim for the fair market value, or the cost of the improvements, whichever is the lesser of the two. As a condition to obtaining the restitution award, however, the counterclaimant must be required to prove that: (1) he had good reason to believe that his acquisition of the property did not violate Article XII, and (2) that when he made the improvements, he had good reason

to believe that the transaction did not violate Article XII.

The restitution counterclaimant should be required to prove his claim by "clear and convincing" evidence.

If an Article XII defendant makes a claim for restitution, either for the purchase price or for the value of improvements, then the Article XII plaintiff must be allowed to make a counter-counterclaim for the fair rental value of the property, for the entire period between the time of the conveyance (i.e., the deed or lease) and the date of the judgment in the Article XII case (i.e., the judgment declaring the transaction void *ab initio*).]

12. The second sentence of Section 6, relating to issuance of regulations by the Registrar of Corporations and the enactment of "enforcement laws and procedures" by the legislature should be deleted entirely.

[Note: These provisions were added in 1985, in order to put a stop the use of "dummy" corporations to circumvent Article XII. They were ill-advised and they did not work.

From the beginning, in 1975, Article XII was intended to be "self-executing" or in other words, the courts have the power to entertain cases to enforce Article XII and to interpret the language of Article XII and to enforce it on a case-by-case basis. There is not need for any action by the legislature of the Registrar of Corporations (which is actually part of the Office of the Attorney General).

The Registrar of Corporations is not a suitable governmental official to interpret the Article XII provisions relating to corporations.

The Eighth Legislature used the "enforcement laws and procedures" clause to justify the passage of Public Law 8-32. Public Law 8-32 does not "enforce" Article XII, it eradicates Article XII.]

13. A new provision should be added to Article XII which repeals Public Law 8-32 and confirms that Article XII is now and has been self-executing from the beginning.

[Note: Examination of the original text and the history of Article XII shows that the framers intended Article XII to be enforced directly in the courts by the original landowners whose land had been lost in an illegal transaction.

In other words, the values embodied in Article XII could not be entrusted to the political branches of the Commonwealth government, that is, the executive and the legislative branches.

Therefore, the Legislature exceeded its authority when it enacted Public Law 8-32. Furthermore, it is clear from a reading of the entire statute that its sole intent is to make it impossible for Article XII to be enforced in the courts, or anywhere else.]

CONSTITUTIONAL ARTICLES THAT WOULD BE AMENDED: Art. XII, §§ 2, 3, 5 and 6

CONSTITUTIONAL ARTICLES THAT WOULD BE AFFECTED: None