

JUL-22-95 SAT 8:31

P. 01

SECTION BY SECTION ANALYSIS
OF 7/17/95 DRAFT OF ARTICLE XII

General Observations

This draft does not accomplish the two objections of strengthening and clarifying the meaning of Article XII.

Some of the new language in Section 1 (on disclosure) and Section 5 (internal control of corporations by persons of Northern Marianas descent) is beneficial, but the new language in Section 3 ("and related obligations") is ambiguous and will spawn more litigation.

The draft does serious harm. It fails to deal with Public Law 8-32 and Section 6 substitutes the term "voidable" for "void ab initio."

Section 1.

The new language relating to disclosure seems to be a good idea, but the meaning of the terms is unclear. Also, this kind of language should not be added there. It should be added

in another section, or subsection or Section 1, or it should be added to Section 6 on enforcement.

The meaning of the words used in the new disclosure clause is unclear. Disclosure of what? By whom? To whom? When? Where? Who will enforce it? What will be the consequences of failure to disclose?

How does the duty or disclosure relate to the first clause of Section 1, which contains the prohibition against ownership? It doesn't.

The meaning of the terms "fairness and timely enforcement" is unclear. Article XII has nothing to do with being "fair" or "unfair." Article XII is supposed to prohibit ownership of lands by those forbidden to own it. The framers have decided (and § 805 of the Covenant decided) that those restrictions are "fair." The only question is how to enforce them.

This provision needs more work. It is a good idea, but it will be useless when it comes to interpretation and

enforcement in the courts, unless it is made more clear and understandable.

Section 2.

The first sentence of this section should have new language added to it to make it absolutely clear that both we and the framers of the first constitution intend that Article XII prohibits every and any kind of "acquisition" no matter what false label the lawyers may put on it; no matter whether the true nature of the transaction is concealed from view; and no matter whether the parties to the transaction put false documents in the Recorder's Office.

Section 3.

The new term "related obligations," again, expresses a good idea, but the language is not clear. What does it mean? Does the "related obligations" clause apply to both purchase transactions and to lease transactions? That is not clear. It should apply to both purchases and to leases.

Section 4.

Because the date for domicile in the Northern Marianas is changed from 1950 to 1960, we should know exactly what the effect of this change will be. For example, does it have any effect on the pending Article XII case known as *Joaquin Tudela v. Commonwealth Investment Company*? That is the case involving Duty Free Shoppers. In that case, Tudela claims that Duty Free violated Article XII because Lino Fritz is not a person of Northern Marianas descent because his Chamorro mother did not come back from Palau before 1950. When did she come back?

Section 6.

The term "transaction" has been the source of much litigation in our courts. It should be explicitly defined, so that it is made clear that it covers anything and everything that the parties try to do or actually do in order to violated Article XII. This includes secret agency contracts, for example.

It will seriously weaken Article XII if we remove the

"void ab initio" sanction and use "voidable" instead. "Void ab initio" means that if the transaction violates Article XII, then the title to the land never passes out of the original owner. He or she still owns that land, just as if the transaction never took place. That is correct. That is right.

We are told that use of the term "voidable" "will allow the courts flexibility in remedies." That is just what we do not need to do. We do not need to give the courts more "flexibility." We do not need to give our own courts more "flexibility." We do not need to give the Ninth Circuit more "flexibility." The courts have used their own "flexibility" to render Article XII meaningless and useless.

Now, we need to give the courts clear and unmistakable direction. We need to make our views so clear that the courts have NO flexibility, no discretion. We need to send them a clear message that they must enforce Article XII in accordance with its clear and unmistakable terms.

The second sentence would give the Attorney General the exclusive power to enforce OR TO NOT ENFORCE Article XII.

Enforcement of Article XII should be left up to the original land owners and their private lawyers.

The Attorney General's Office came into the case of *Agulto v. Villaluz* and opposed Article XII! That was the first Article XII decision in the Commonwealth. Superior Court Judge Jose S. Dela Cruz decided that case. And he enforced Article XII in the right way, strictly and without "flexibility." He declared the illegal transaction void ab initio. Lt. Governor Borja was the lawyer for the original landowner in that case.

Then, the case was appealed to the federal court appellate division. And the Attorney General (the Alexandro C. Castro) came into the appeal court and opposed Article XII.

We do not need more bureaucracy in the enforcement of Article XII.

The six year statute of limitations is a mistake. Article XII became law in 1978. There have been thousands of violations since that time. This six year limitation means that any purchase or lease transaction which occurred before

1989 is safe from challenge, even if it violated Article XII.

Many of our people do not understand their Article XII rights. There should be no time limit on the right to bring an Article XII case to court. The transaction is void ab initio. That means it never happened.