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CONFIRMATION

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VIA TELECOPIER
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Chairman Jose R. Lifoifoi
Committee on Lands and Personal Rights
Third Northern Marian Islands
Constitutional Convention
Second Floor, Joeten Dandan Center
Caller Box 10007, Saipan MP 96950

Re: Proposed amendments to Section 5 of Article XII

Dear Chairman Lifoifoi:

We have reviewed the proposed amendments to Section 5 of Article XII of the CNMI Constitution and believe that the proposed new language is ill-advised. Lack of certainty in land titles in the Commonwealth has adversely impacted its reputation as a safe venue for significant investment in recent years and destabilized land values, and the proposed amendment introduces unnecessary and undesirable ambiguity, subjectivity and uncertainty into the issue whether a local corporation will be considered a person of Northern Marianas descent for purposes of holding title to Commonwealth real property. In addition, the propose amendments drastically change basic corporation law of the Commonwealth and is at odds with corporation law in the other states of the United States. The proposed amendments will unquestionably invite lengthy and costly litigation and constitute a constitutionally based Attorneys Retirement Plan. Section 5, under the proposed amendments, provides as follows:

Section 5: Corporations

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 one hundred percent of whom are persons of Northern Marianas descent over the age of 21 years who actually, completely and directly govern the affairs of the corporation, and has voting shares one

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hundred percent of which are actually, completely, and directly owned and voted by persons of Northern Marianas descent.

Ambiguity, Subjectivity and Uncertainty

The phrase "actually, completely, and directly" appears two times in the proposed amendment, once in reference to the directors governing the affairs of the corporation, and also in reference to the shareholders' ownership and voting of their shares of corporate stock. Each of the operative words in that phrase (*i.e.* "actually", "completely" and "directly") create subjective tests and will invite litigation. For example, even though a corporation satisfies the four criteria set forth in Article XII as to corporations (*i.e.* incorporated in the Commonwealth, principal place of business in the Commonwealth, all directors are persons of Northern Marianas descent, and all shareholders are persons of Northern Marianas descent), the corporation's status for the purpose of holding title to real property could be challenged simply on the basis that a director resides or moves off island, or becomes ill, or cannot give full attention to the corporation due to other matters. Because of such matters it will be claimed that the director was not at all times "actually", "completely" and/or "directly" governing the affairs of the corporation. The challenge could well have nothing whatever to do with allegations that such a director was "controlled" or "influenced" by an individual who was not a person of Northern Marianas descent. The capacity to hold title should not be affected by a director's level of involvement in the affairs of a corporation. In addition, even if one director was, for some reason, not fully involved in governing the affairs of the corporation for some period of time, all the remaining directors would still be persons of Northern Marianas descent. The requirement of a director being "actually, completely and directly" involved is unrealistic in the real world, extremely difficult to measure, and completely destroys the certitude of title necessary to attract investment and support land values.

The same basic ambiguity, subjectivity and uncertainty arises from the requirement that stock ownership be "actually, completely and directly" owned and voted by persons of Northern Marianas descent. There will certainly be unending litigation over the ownership of corporate stock, notwithstanding the indications thereof in corporate books and public records, in efforts to invalidate real property transactions involving Commonwealth

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corporations. Furthermore, the existing provisions in Article XII prohibiting voting trusts and proxy votes by non-Northern Mariana descent persons provide objectively discernable safeguards rather than subjective and hard/impossible to measure tests such as created by the "actually, completely and directly" standard.

Under the language of the proposed amendments no purchaser, lessee, or mortgagee could be assured of obtaining clear title whenever a corporation is in the chain of title. No title insurer will provide title insurance to protect the real property interests of purchasers, lessees or mortgagees unless there are objective and easily verifiable means of determining compliance with Article XII. The proposed amendment is a step in the wrong direction because it introduces matters which are not readily verifiable if verifiable at all.

Departure From Existing Corporation Law

Under the established law and practices in the Commonwealth and the states of the United States corporate officers as well as directors are engaged in the governing of the affairs of the corporation. Corporate presidents, for example, who are not required to be, and often are not, directors or shareholders, are commonly authorized to take general charge of the business of the corporation, preside at meetings of shareholders and directors, sign stock certificates of the corporation, and so on, as part of their regular duties. Such normal actions by a president who is not a director would be in violation of the proposed amendment because, obviously, to the extent these actions were performed by the president, the directors would not be "completely" governing the affairs of the corporation. Nor would the directors be "actually" or "directly" governing to the extent such actions were actually and directly being performed by the officers. A corporation could be denied status as a title holder in the Commonwealth simply because a president "actually, completely and directly", and properly, performed some act of corporate governance rather than a director. The proposed language strips corporate officers of their normal functions and duties.

Litigation

It is important to remove all ambiguity, subjectivity and uncertainty from constitutional provisions, particularly when such provisions relate to matters of title to real property. Such

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provisions should be clear and unambiguous. The Commonwealth courts have rejected subjective control tests, such as appear in the proposed amendment. Such tests will encourage litigation and will only benefit lawyers.

Once the four objective criteria relating to the formation, operation, directorship and ownership of Commonwealth corporations are satisfied, there should be no further inquiry relating to matters completely outside any public or private record, such as determinations of "actual, complete and direct" involvement in corporate affairs or ownership or voting of corporate stock.

The Proposed Amendment Raises More Questions Than It Answers

There are many serious questions raised by the proposed amendments. Are the directors limited in their ability to use and rely on the advice of lawyers, accountants and other specialists? At what point in time must the requirement of actual, complete and direct governance by directors apply? If improper control was exercised over some limited aspect of the corporation's affairs before land was acquired, would the corporation be forever barred from holding title? What is the result if the impermissible activity occurred after the title was secured by the corporation? What if the impermissible activity had nothing at all to do with the acquisition of title by the corporation? Do the amendments have retroactive application to pending cases involving transactions which occurred before the 1985 amendments to Article XII, as suggested in the first paragraph under the Schedule On Transitional Matters? If so, would not such application be completely unfair and essentially unconstitutional to the extent it retroactively invalidated transactions consummated in reliance on the provisions of the constitution as it then read?

The present language of Section 5 of Article XII is far superior to the proposed amendments.

Very truly yours,



JOHN F. BIEHL

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