DRAFT - PRELIMINARY

July 20, 1995

COMMITTEE ON LAND AND PERSONAL RIGHTS

REPORT NO. 6: ARTICLE XI, COMMONWEALTH LANDS

The Committee met on Monday, July 10, 1995, Tuesday, July 11, 1995, Wednesday, July 12, 1995, Thursday, July 13, 1995, Friday, July 14, 1995, Monday, July 17, 1995, and Tuesday, July 18, 1995 to consider proposed amendments to Article XI: Public Lands. The Committee considered Delegate Proposals 24, 27, 90, 94, 101, 103, 116, 117, 150, 151, 152, 153, 161, 164, 165, 183, 192, 220, 256, 257, 275, 285, 359, 360, 361, 368, 407, 408, 425, 432, 437, 460, 461, 462, 491, 496, 500, 531, 533, 559, 562, 563, and 571 which had been referred to it by the Committee on Organization and Procedures. In addition, the Committee held five public hearings on land matters. The first hearing was held at the House chamber on June 16, 1995. The second and third hearings were held at Garapan Elementary School and San Vicente Elementary School in the evenings. The fourth hearing was held on Rota on June 28, 1995. The fifth hearing was held on Tinian on July 7, 1995.

A subcommittee was appointed to consider the concept of permanent land set-asides into preserves that could not be sold or turned over to private use. The subcommittee met extensively with responsible officials in the agencies with jurisdiction over public lands to ascertain their views.

The Committee decided that the constitutional structure for administering the land programs that was put in the Constitution in 1976 should be restored and revised. The 1985 amendments allowed this structure to be changed; and a change was effected by the governor in 1994.

Each of the sections is discussed below.

The title of this section has been changed from "Public Lands" to "Commonwealth Lands" to accommodate the change in the scope of coverage, as explained below.

Section 1: This section identifies the public lands. It is the same as the 1976 version.

Section 2: This section deals with submerged lands. It is the same as the 1976 version.

Section 3: This section deals with all public lands except the submerged lands. It is the same as the 1976 version.

Section 4: This section restores the former Section 4 in the 1976 Constitution, and renames the Marianas Public Land Corporation as the Marianas Land Bureau. The Committee recommends that the former name not be used for the new entity. The new section contains some different provisions, and it might be confusing to use the old name for the new entity.

Section 4(a): This provision deals with the governance of the bureau. The bureau has five directors who are appointed by the Governor with the advice and consent of the Senate. The directors serve five-year terms, with one term expiring every year so that the Governor will have an opportunity to appoint four of the five members during his first term of office. A limit of one term is imposed. The term limit will not affect the new Bureau because, as a new agency, there will be no directors who have served one term. The requirement with respect to strict standards of fiduciary duty that was added by the 1985 amendments is retained.

Section 4(b): This provision deals with the qualifications of the directors. It retains the requirements of the 1976 Constitution with respect to representation of the three islands and the Carolinian community. It also retains the requirement, added in 1985, with respect to a woman member. It retains the requirement of U.S. citizenship, but deletes U.S. national status. It retains the five-year residency requirement. The requirement with respect to felony convictions has been deleted because there is an overall provision in this regard that has been added to Article VII.

The requirement for residence in the Commonwealth for five years prior to appointment is not affected by temporary absences for military or educational purposes.

Under the Bureau's general structure and practices, it will not act in without the presence of directors from Rota and Tinian who are absent for very short medical emergencies because there are relatively few types of acts as to land on Rota and Tinian that are taken for the first and last time at a single meeting. The Bureau is not required, however, to hold up actions for the presence of directors from Rota and Tinian. It is the responsibility of these directors to get to meetings and participate in actions.

This section requires that the directors be persons who are qualified by virtue of their familiarity with landholding practices, customs and traditions in the Commonwealth. The Committee intends that persons of Northern Marianas descent be appointed to the director positions, although it recognizes the possibility that someone not of Northern Marianas descent who had long exposure to and strong ties with the Marianas might also qualify.

The Committee notes that conditions with respect to the availability and priority of uses of public lands varies among the senatorial districts. For this reason, the representatives of the three senatorial districts on the board of directors likely will want to involve advisory councils from their respective senatorial districts in order to obtain input from and to be responsive to the public with respect to land decisions.

A new requirement has been added that all directors must come from the private sector. The Committee recommends this requirement as a balance against the viewpoints of senior government employees who staff the bureau and as a means of infusing the necessary top management talent into the bureau.

Section 4(c): This section is the same as Section 4(d) of the 1976 Constitution.

Section 4(d); This section is the same as Section 4(e) of the 1976 Constitution, with the added proviso that the annual report must be delivered by the chair, in person, to a joint session of the legislature.

Section 5: This section provides for the fundamental policies that must be followed by the bureau. It follows the same general structure as the 1976 Constitution.

Section 5(a): This section provides for the homestead program. It broadens the authority of the homestead program to include a homestead housing component. The Committee recommends this broader authority as a practical way to meet the shortage of land that will cause the end of the homestead program in the foreseeable future.

When the Commonwealth was founded, nearly 80% of the land in the Commonwealth was public land. The homestead program was begun as a way to get this public land into the hands of the people and to create a stable class of landowners with a stake in the future of the Commonwealth. In the intervening 20 years, much of that public land has been transferred to homesteaders or to commercial lessees.

Housing: By empowering the Bureau to provide homesteads that are essentially condominium interests in buildings on public lands, the Constitution allows the Bureau to have the flexibility to meet the demand for homesteads and to continue the basic underlying purpose of the homestead program. The constitutional provision does not require the Bureau to get into the housing business in any particular way. It provides the authority; and allows the Bureau to implement the program in the manner most suitable to requirements in the community.

Number of grants: The language limiting each person to one agricultural and one village homestead has been deleted. The Bureau will provide for appropriate limitations in its rules. This deletion allows the Bureau to eliminate agricultural homesteads altogether on Saipan where land is scarce but to maintain the availability of agricultural homesteads on Rota and Tinian where sufficient land is available. Nothing in the Constitution limits the grant of homesteads on Rota or Tinian to residents of Saipan who wish to move to Rota or Tinian to take up their homesteads. Those who are denied agricultural homesteads on Saipan may wish to relocate in order to pursue the type of homestead they desire.

Limitation on sale or lease: The purpose of providing homesteads is not to enrich the homesteader, but to provide a stable place for the homesteader to live and an incentive for

persons of Northern Marianas descent to continue to live in the Commonwealth and to help it prosper. For that reason, the requirement of three years before title vests has been retained. This requirement was included in the 1976 Constitution. The requirement that 10 years pass before the homesteader may sell or lease the homestead has been increased to 25 years for the same reason. Homesteads may be transferred by inheritance at any time, but the inheriting person must continue to fulfill the homestead requirements that originally applied. For example, if a homesteader died six years after title is granted, the inheriting person may not sell or lease the homestead for 19 years, which, when combined with the initial 6 years, reaches the total of 25 years.

Mortgages: The former provisions of Section 5(a) with respect to mortgages have been deleted. Because of the title restrictions on homestead grants, it is usually not possible to get a commercial mortgage without compliance with government rules designed to assist in providing security. For that reason, the Bureau can provide appropriate limitations on the use of mortgage funds in its rules. The government agencies that provide mortgage funds, such as the Retirement Fund, also have requirements in their rules which are sufficient to protect the public interest.

The Committee recommends that Marianas Public Land Trust funds be made available to fund or guarantee homestead mortgages, and the Committee's draft has so provided.

Governance: The governance of the homestead program is left to the Bureau. Section 5(a) provides for requirements relating to the program by issuing rules and regulations. The Legislature may not pass laws imposing priorities, qualifications, requirements, waivers, or any other conditions with respect to the homestead program.

Clearing up conflicts and problems: The Bureau is given authority over all the land entities necessary to coordinated decisions with respect to public land matters. The Committee heard in public hearings and in its meetings with various agencies about problems that have been caused in the past when there have been conflicting decisions made about land. For example, a number of agricultural homesteads were issued on Rota following the approval of P.L. 7-11. There was a provision in P.L. 7-11 that made the effectiveness of the statute contingent upon the availability of homestead development funds. At the public hearings, Rota homesteaders referred to improvements made on assigned areas that were now in jeopardy because of the conflict with the statute. The Bureau will have a sufficiently broad jurisdiction that it can examine and act with respect to these kinds of conflicts and problems.

Section 5(b): This section allows the Bureau to transfer a freehold interest in public lands only to an agency of the Commonwealth government. The term "government agency" in this context includes all departments, agencies, and instrumentalities of the Commonwealth government including regulatory, quasi-judicial, and temporary agencies.

Government agency use: This provision covers grants of public land for use for public facilities such as schools, government buildings, roads, and other similar purposes. The

government agency that needs public land would make a request to the Bureau stating the public purpose for which the public land would be used and identifying the land to be granted. The request would be processed, a public hearing would be held, and the Bureau would make a decision. All of the current processes for obtaining the necessary approvals and sign-offs would be retained unless changed by the legislature.

Land exchanges: The Committee took note of the public dissatisfaction with the current land exchange program. The pending land exchanges could absorb a significant portion of the remaining public lands. One proposal suggested a five-year moratorium on land exchanges while the pending situation was cleaned up. Instead, the Committee recommends the use of a two year limitation period on land exchange applications and a change in the way land exchanges are done.

The Bureau may make public land available to other government agencies under Section 5(b) and those government agencies may use the public land obtained from the Bureau for the land exchanges they need to accomplish their public purposes. Under this provision, the government agency that needs the land exchange would request land from the Bureau. If the Bureau found that the request could be accommodated within the Bureau's comprehensive land use plan, and that the request was a reasonable use of the land, then the Bureau could exercise its discretion to provide the necessary land to the requesting agency. That agency would be responsible for all details of the actual exchange with the private landowner. The Bureau would be permitted to require payment by the requesting agency for the land to be transferred. If the Bureau decided against the transfer, the public agency would then have to use the eminent domain power. A determination by the Bureau not to transfer public land is sufficient under Article XIII for a finding that public lands are not available.

The Bureau would not have the authority to deal with private individuals in land exchanges. Those dealings would be done by the public agency that needs the private land that is the subject of the proposed land exchange.

Once an agency makes a request for public land for a land exchange, the Bureau would have two years to act. After two years, the Bureau would no longer have any jurisdiction and the case would be closed. This is necessary to prevent the accumulation of unresolved land exchanges. When the landowner offers an exchange of private land but asks for too much public land in return, the exchange process simply stops. Neither party goes ahead. The public blames the government agency responsible for land matters for a failure to clear up land exchange matters. But the public agency cannot do so responsibly if the private owners are asking for too much public land in their proposed exchanges. Under this provision, the process would have to be finished within two years, or the landowner would know that the exchange had been denied. Any proposed exchange not completed in two years is closed, and no exchange may be made.

As to pending land exchanges, it is the intent of the Committee that the government agencies and the Bureau give these exchanges priority and get them resolved. All pending land

exchange matters will be subject to the two year limitation. If they are not resolved within two years of the approval of these amendments, they will be deemed to be denied and may not be revived. This will give both the government agencies and the landowners an incentive to get the backlog cleared up.

While the land exchange backlog is pending, there is substantial uncertainty as to the amount of public land that will be available for homesteads and commercial leases. The Committee intends that the backlog be reduced before commercial leases consume large additional amounts of the public lands. It is for this reason that the two-year limitation period was adopted. With a concerted effort, the government agencies that need private land, and the Bureau which is in charge of making public land available for exchanges when that is warranted, can get together and dispose of the backlog. The Bureau may also hire private contractors to handle the paperwork involved in land exchanges, to do the necessary investigation and fact-finding, and to provide other support.

When a proposed land exchange has been disposed of, either by denial of the request by the Bureau or by the elapse of two years, then the landowner can go to court to get compensation from any government agency that is using the landowner's private land; or the government agency can use its eminent domain powers to pay the landowner for the fair value of the land.

The Committee took note that there are old land exchange cases pending from various military confiscations. If these cannot be resolved within the two year time period, the Bureau would send the claimant a notice to that effect, and the claimant would then have to pursue his or her rights in the courts. The sending of a notice is not a requirement, however, for a claimant to pursue these land claims in the courts. Nor would any land exchange request, pending at the time of the approval of these amendments, be extended beyond two years.

It is the intent of the Committee, and it is inherent in the two-year limitation period, that the land exchange problems be resolved before commercial leases are granted. After the two year limitation period expired, and all pending land exchanges are either resolved or expired, then the Bureau could make reasonable judgments about what public lands should be available for leases to private developers.

Section 5(c): This section governs all leases of public lands.

Conditions: This section requires that before a lease is approved by the Bureau, that a public notice be issued stating the precise terms of the lease that the Bureau proposes to enter and identifying the party with whom it will contract. That notice shall solicit and provide a reasonable opportunity for competing bids. If a better bid is received, the Bureau may not go ahead with the original lease. To do so would violate the fiduciary responsibilities of the directors. The Committee recommends this new policy as an effective means of preventing leases at concessionary terms.

Length: The Committee recommends that the term of the lease on public lands be increased to 40 years. The current constitutional provision allows 25 years with a renewal of 15 years with the approval of a 3/4 vote in the legislature.

The Committee took note of the problems that occur when foreign investors get leases, do not develop them, and hold the land for speculation. The Committee recommends that the Bureau be required to put in all leases a provision defining the expiration of the lease in three years if the commercial purpose has not been accomplished.

Approval by the Legislature: The Committee noted the extensive revisions of major leases that are required by the Legislature; in effect a separate appropriation process. This practice is undesirable. For this reason, the Committee recommends that the Legislature be required to vote, to approve or reject, on a lease and that no alterations or additional conditions be allowed. Under the language recommended by the Committee, any additions or changes by the Legislature would be of no effect.

The Committee has provided that the Legislature must approve leases of more than 25 years or more than 5 hectares.

The Committee has taken note of the possible evasion of the 5-hectare requirement that might occur if developers acquired separate parcels of less than 5 hectares and then joined them. The fiduciary responsibility of the directors requires that they investigate this possibility and require, as a lease term, that if any parcels are subsequently joined, in fact or in practical effect, to a lease of less than 5 hectares that would make the total parcel greater than 5 hectares, then the lease shall automatically expire and the legislature's approval must be sought.

The Committee has also taken note of the complaints of developers that their projects are often held hostage by the Legislature. There is no public purpose to be served by delay. For this reason, the Committee recommends a provision that if the Legislature does not act within 60 session days, the lease is deemed to be approved.

The Committee is mindful that approval of leases can take up a considerable amount of the Legislature's time. For that reason, the Committee has required that the Legislature act in joint session when it approves leases.

The 1976 Constitution contained a requirement of a 3/4 vote of the Legislature to approve an extension of a lease from 25 to 40 years. Due to the downsizing of the Legislature, and the safeguards explained above, the Committee does not recommend retaining this super-majority requirement.

Priorities: The Committee considered a delegate suggestion that no commercial leases be permitted until all land exchange matters are resolved. The Committee believes that it is not necessary to establish a rigid priority for the Bureau. The Bureau must act pursuant to a land use

plan (under Section 5(d)) and that provides sufficient discipline with respect to priorities.

Enforcement: The Bureau should involve the office of the Public Auditor, the Attorney General, and other law enforcement agencies as necessary to investigate the compliance with lease terms. If leases require that commercial activity begin within a specified time period, and the necessary level of activity has not begun, the Bureau should take action to cancel the lease. The Bureau should provide sufficient monitoring and enforcement of lease terms to ensure that land is not held for speculation.

Section 5(d): This section covers the comprehensive land use plan. A requirement for such a plan has been in the Constitution since 1976, but it has not been very effective. The Committee recommends that this requirement be strengthened in two ways: First, the Bureau should be required to act only in accordance with a plan. Second, the Bureau should adopt or amend the plan only after reasonable notice and public hearings.

The Committee considered various delegate suggestions for a timetable within which the Bureau would have to produce a comprehensive land use plan. The Committee recommends that no requirement be imposed, and that the Bureau be allowed to proceed as quickly as it is able to this end.

The Bureau will not be able to complete any land exchanges without a plan in place, so the two-year limitation on completing pending land exchanges will create sufficient pressure to complete the land use plan.

Section 5(e): This section provides for the disposition of any proceeds from the leases or sale (to other government agencies) of public lands. As in the 1976 Constitution, the moneys are to be deposited with the Marianas Public Land Trust.

The Bureau is required to submit a budget to the legislature, to be approved by the Governor, and may spend money for its administration or programs only as authorized by this budget. Once authorized, the Bureau may retain funds for administration, for the maintenance of the preserves authorized under Section 3, or for the homestead programs authorized under Section 5(a).

Section 6: This section is new. The Committee recommends that some lands on each of the islands be set aside in permanent preserves. This is the only way that land will be available for the enjoyment of future generations.

Section 6(a): Permanent preserves are those public lands that cannot be sold or dedicated to private use in any way. They are to be used for a range of public purposes that are included in recreational and cultural uses, preservation of wildlife, preservation of medicinal and plant life, and conservation of water resources. An example of a cultural use is the traditional use of the sabana lands in Rota as community farmlands.

There is flexibility under this provision with respect to short-term leases on the permanent preserves to provide visitor services and to promote recreational uses. The Committee's intent is that these lands be permanently set aside and not be in danger of being leased for private purposes or sold for land exchanges. They could, of course, be affected by subsequent constitutional amendment.

Section 6(b): This section incorporates the section protecting Isleta Managaha (Managaha Island) that was formerly in Article 14, Section 2. (That section now deals only with the islands in the Northern Islands that are permanently set aside as wildlife refuges.)

This section also covers Isleta Maigo (Bird Island) and Isleta Maigo Luao (Forbidden Island) adjacent to Saipan. It requires that these islands be maintained as uninhabited places, but permits cultural and recreational uses. The Committee decided to transfer Anyota Island adjacent to Rota from Article 14, which covers uninhabited islands preserved entirely as wildlife conservation, to Article 11 which allows recreational uses.

Section 6(c): This section covers the sandy beaches, already protected by former Section 5(e) of Article 11. This section does not change the status of the sandy beaches. This covers:

(1) Saipan: Puntan Susupe (Susupe Regional Park), Unai Chalan Kanoa (Chalan Kanoa District #4 San Isidro Beach Park), Puntan Afetna (Afetna Beach Park, San Antonio south of Pacific Island Club Resort), Unai Chalan Kiya (Civic Center Beach, Vietnam Memorial Monument, Kilili Beach), Tanapag Beach Park, Unai Makpe (Wing Beach), Unai Halaihai (Marine Beach), Unai Laolao Kattan (Tank Beach), Unai Peo (Ladder Beach), Unai Dangkolu and Unai Dikike (Denikuio and Coral Ocean Point), and Puntan Muchot (Micro Beach), Unai Fanhang (Jeffries Beach), Unai Talufofo (Talufofo Beach), Unai Hasngot (Old Man By The Sea), Unai Nanasu (Hidden Beach), and beach properties occupied by public schools .

(2) Tinian: Kammer Beach, Taga Beach, Tachogna Beach, Unai Dankulu, Unai Babui, Unai Chulu, Lasarino, and Masaolog. Tinian beaches included in the military leased lands are included in the preserves and will be protected under this section at the end of the military lease.

(3) Rota: Tatachog Beach, Taipingot Peninsula, Teteto Beach, Guata Beach, Swimming Hole Beach, and Mochong Beach.

The Bureau has jurisdiction over land surveying and therefore has the necessary capability to complete the required surveys to define these beach areas to be preserved.

Section 6(d): This section covers public land directly contiguous to any beach, whether sandy or not. If public land is connected to a beach, it will become a part of the

permanent preserves unless the Marianas Land Bureau acts to exempt all or part of this land from the preserves. The Bureau would likely make these determinations in connection with its comprehensive land use plan. This requires an affirmative action on the part of the bureau to take land out of the preserves. If no action is taken by December 31, 1997, then the land is committed to the preserves.

The Marianas Land Bureau may allow such playground and recreational facilities on these lands as are suitable for public purposes in its judgment.

Section 6(e): This section covers public land that is 500 feet or more above sea level and thus affects the ecology and scenic quality of the islands. This public land is included in the permanent preserves unless the Marianas Land Bureau acts to exempt all or part of this land from the preserves. This is similar to Section 3(d).

The Marianas Land Bureau would establish the appropriate uses of these preserves in its rules and regulations.

Section 6(f): This section covers three wildlife areas that have been set aside, and protects them permanently. These are the Kagman Wildlife Conservation Area, the Naftan Wildlife Conservation Area on Saipan; and the Chenchun Bird Sanctuary and Katan Afato Wildlife Conservation Area on Rota , and no permanent structures may be built in these preserves and no leases may be made.

Section 6(g): This section covers the sabana lands in Rota, which are set aside for community farming, conservation, bird and wildlife preservation, recreation, and village homesteads under Section 6(a). The views of the people of Rota could be obtained by the Bureau through a local initiative in the event that a part of the sabana lands were to be used for homesteads.

Section 6(h): This section provides that when the military lands are returned on Tinian, at least 100 hectares will be set aside for a permanent preserve on Tinian. The Bureau is given flexibility in dealing with this part of the preserves.

Section 6(i): This section permits the Bureau to set aside additional lands as part of the preserves. This covers:

Saipan: Garapan Central Park, Kagman Homestead Park, Maddock (Grotto), Navy Hill Softball Field, Garapan Regional Park (Matsui), As Matuis Public Park, Dandan Homestead Park

Tinian: Taga House Park

Rota: Tetnon Park (Old Japanese Cannon Park), Veteran Memorial Park, Tonga Cave Park, and As Nieves Latte House.

Section 7: This section combines all the land survey and land title functions in the executive branch under the Bureau. The Governor's reorganization effected this consolidation, and it is preserved here. The functions of the Land Commission and the functions of surveying lands are consolidated within the Bureau. This has no effect on the jurisdiction of the Superior Court to hear land cases. The adjudication function of the Bureau is an administrative one. This section has no effect on the Recorder's Office within the court system.

Section 8: This section provides for the Marianas Public Land Trust in essentially the same way as the 1976 Constitution.

Section 8(a): This section maintains the current Marianas Public Land Trust. The trust has five directors, with representation from the senatorial districts, the Carolinian community, and the women's constituency. The only substantive change made to this section is a term limit of two terms. The term limit applies retroactively, so that any current trustee who has served two terms would not be eligible to serve a third term.

Section 8(b): This section controls the kinds of investments that the trustees may make with the principal of the trust.

Bonds: This section provides that 40% of the investments must be in bonds purchased in the United States market. The trustees may not speculate in foreign markets. The bonds must be of high quality. This requires the trustees to purchase only bonds of A grade or better under the current rating system.

Stocks: This section provides that when the trustees buy stocks, they must purchase shares of companies listed on the stock exchange in the United States that has the highest qualifications for listing. At present, that is the New York Stock Exchange. This means that the trustees will be investing in companies that have a relatively high asset value. The trustees may not speculate in commodities, stocks listed on other exchanges, or foreign stocks.

Exclusive control: This section also provides that the trustees have to sole power to approve investment of Trust assets. The trustees have a fiduciary responsibility, and in order not to be placed in a situation where they are forced to take actions that are not prudent, the trustees need to have exclusive control of decisions about investments to be made with funds that belong to the trust.

Section 8(c): The trustees may retain the interest earned on the principal of the trust if they elect to invest in mortgages or loans permitted under Section 6(a) which covers the homestead and homestead housing program. Up to 40% of the interest earned in any year may be allocated to this purpose. If the trustees do not allocate interest proceeds to this purpose, they are turned over to the general fund.

The Committee notes that the final version of this section will need to be harmonized

with the provisions covering the Council on Indigenous Affairs.

Section 8(d): This section is the same as Section 6(e) of the 1976 Constitution.

The constitutional language reflecting the Committee's decisions is attached. The Committee recommends this language to the Convention.

Respectfully submitted,

Delegate JOSE R. LIFOIFOI, Chair

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Delegate CARLOS S. CAMACHO

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7/21/95

ARTICLE XI: COMMONWEALTH LANDS

Section 1: Public Lands.

The lands as to which right, title or interest have been or hereafter are transferred from the Trust Territory of the Pacific Islands to any legal entity in the Commonwealth under Secretarial Order 2969 promulgated by the United States Secretary of the Interior on December 26, 1974, the lands as to which right, title or interest have been vested in the Resident Commissioner under Secretarial Order 2989 promulgated by the United States Secretary of the Interior on March 24, 1976, the lands as to which right, title or interest have been or hereafter are transferred to or by the government of the Northern Mariana Islands under article VIII of the Covenant, and the submerged lands off the coast of the Commonwealth to which the Commonwealth now or hereafter may have a claim of ownership are public lands and belong collectively to the people of the Commonwealth who are of Northern Marianas descent.

Section 2: Submerged Lands.

The management and disposition of submerged lands off the coast of the Commonwealth shall be as provided by law.

Section 3: Other Public Lands.

The management and disposition of public lands other than those provided for by Section 2 shall be the responsibility of the Marianas Land Bureau.

Section 4: Marianas Land Bureau.

There is hereby established the Marianas Land Bureau.

a) The bureau shall have five directors appointed by the governor with the advice and consent of the senate. The directors shall be held to strict standards of fiduciary care and shall direct the affairs of the bureau for the benefit of the people of the Commonwealth who are of Northern Marianas descent. The directors shall serve terms of five years, with one term expiring each year, and shall serve not more than one term.

b) At least one director shall be a resident of each senatorial district, at least one shall be a woman and at least one shall be a representative of the Carolinian community. Each director shall be a citizen of the United States and a resident of the Commonwealth for five years immediately prior to appointment, shall have adequate knowledge of landholding practices, customs and traditions in the Commonwealth, and shall not hold any other government position.

c) The bureau shall have the powers available to a corporation under Commonwealth law and shall act only by the affirmative vote of a majority of the five directors.

d) The chair shall make an annual report in person to the people at a joint session of the legislature describing the management of the public lands and the nature and effect of transfers of interests in public land made during the preceding year and disclosing the interests of the directors in land in the Commonwealth.

Section 5: Fundamental Policies.

The bureau shall follow certain fundamental policies in the performance of its responsibilities.

a) The bureau shall use some portion of the public lands for a homestead and homestead housing program. A person may not receive a freehold interest under this subsection for three years after a grant and may not sell or lease a freehold interest in a grant for twenty five years after receipt. Other requirements relating to the program under this subsection shall be as provided by the bureau.

b) The bureau may transfer a freehold interest in public lands only to a government agency for use for a public purpose after reasonable notice and public hearing and within two years of the date of the request.

c) The bureau may transfer a leasehold interest in public lands for commercial or other purposes after reasonable notice, a solicitation for competing bids, and public hearing. A leasehold interest shall not exceed forty years including renewal rights and shall expire within three years if the commercial purpose is not accomplished. Leasehold interests of more than twenty five years, or more than five hectares, shall be submitted to the legislature. The legislature acting in a joint session may approve or reject, but may not alter, the lease presented by the bureau. If the legislature fails to act within sixty calendar days , the lease is deemed approved.

d) The bureau shall operate in accordance with a comprehensive land use plan with respect to public lands including priority of uses and shall adopt or amend the plan only after reasonable notice and public hearing.

e) The bureau shall receive all moneys from the public lands and shall transfer these moneys promptly to the Marianas Public Land Trust except that the bureau may retain the amount necessary to meet reasonable expenses of administration, costs of programs under section 5(a) and maintenance of the permanent preserves in accordance with a budget approved by the legislature and the governor.

Section 6: Permanent Preserves

a) There are hereby established permanent preserves to be used for cultural and recreational purposes, to preserve wildlife and medicinal and other plant life, and to conserve water resources. No land designated as a preserve may be sold or dedicated to any private use in any way.

b) Managaha Island, Bird Island, and Forbidden Island in the third senatorial district, and Anyota Island in the first senatorial district are permanent preserves which shall be maintained as uninhabited places used only for cultural and recreational purposes.

c) Public lands located within 150 feet of the high water mark of a sandy beach are permanent preserves which shall be maintained as uninhabited places with no structures other than facilities for public recreational purposes.

d) Public lands directly contiguous in any way to any beach are permanent preserves unless exempted by the bureau before December 31, 1997.

e) Public lands 500 feet or more above sea level are permanent preserves unless exempted by the bureau before December 31, 1997.

f) Public lands included in the Kagman wildlife conservation area, the Naftan wildlife conservation area, the Chenchun bird sanctuary, and the Katan Afato wildlife conservation area are permanent preserves upon which no permanent structures may be built and as to which no leases may be made.

g) Public lands in the sabana area of Rota are permanent preserves to be used for community farming, conservation, bird and wildlife preservation, recreation, and as provided by the bureau under section 6(a).

h) At least one hundred contiguous hectares of any land in Tinian under military lease and returned to the Commonwealth shall be designated as a permanent preserve by the bureau.

i) Other permanent preserves may be designated by the bureau.

Section 7: Land Titles

The bureau is vested with jurisdiction to investigate, survey, consider, adjudicate, and resolve land titles.

Section 8: Marianas Public Land Trust.

There is hereby established the Marianas Public Land Trust.

a) The trust shall have five trustees appointed by the governor with the advice and consent of the senate, who shall be held to strict standards of fiduciary care. At least one trustee shall be a resident of each senatorial district, at least one trustee shall be a woman and at least one trustee shall be a representative of the Carolinian community. Trustees may not hold government positions while serving as trustee. The trustees shall serve terms of five years, with one term expiring each year, and shall serve not more than two terms.

b) The trustees shall make reasonable, careful and prudent investments. At least forty percent of the investments shall be in obligations purchased in the United States with a high rating for quality and security. Investments in equities shall be purchased in companies listed on the United States stock exchange with the highest requirements for listing. The trustees have the sole power to approve investment of Trust assets.

c) The trustees may fund or guarantee the maintenance of the permanent preserves under section 3 and mortgages and loans permitted under section 6(a) to an amount not to exceed forty percent of interest earnings each year.

d) The trustees shall make an annual written report to the people accounting for the revenues received and expenses incurred by the trust and describing the investments and other transactions authorized by the trustees.

Schedule on Transitional Matters

Section____: Public Lands

Leases of public lands after June 5, 1995 shall be in accordance with Article XI.

Nothing in these amendments shall impair rights under existing contracts.

Upon ratification of these amendments, the existing departments and agencies with responsibilities for land matters covered by Article XI and all their employees; all existing

administrative policies, rules, and regulations; all pending matters; and all laws with respect to these departments and agencies shall continue to exist, remain in effect, and continue to operate as if established pursuant to this Article XI if consistent with this Article XI.

Upon ratification of these amendments, all laws pertaining to the homestead program, land exchanges, and other land programs remain in effect until such time as they are inconsistent with a rule or regulation adopted by the bureau. Rules and regulations adopted by the bureau within its jurisdiction supercede existing legislation.

Determinations to exempt lands from the permanent preserves shall be made as to individual parcels; such determinations may not be made generally.

The Governor shall specify, in appointing directors of the Marianas land bureau, which directors have terms expiring each year.

con0721g

July 21, 1995

Memorandum for the Delegates

From: The Committee on Land and Personal Rights

Re: Article 12

Attached are copies of the current Article 12 and the draft Article 12 that the Committee has prepared incorporating proposed changes.

The copy of the current Article 12 is marked in yellow to show portions deleted. The copy of the proposed Article 12 is marked in pink to show the portions added.

The Committee would like to explain its proposed changes in the Committee of the Whole today and have the Delegates ask any questions that may be raised by the Committee's draft.

ARTICLE XII: RESTRICTIONS ON ALIENATION OF LAND

Section 1: Alienation of Land.

The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 2: Acquisition.

The term acquisition used in Section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section if the owner dies without issue or with issue not eligible to own land in the Northern Mariana Islands. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition under this section if the mortgagee is a full service bank, federal agency or governmental entity of the Commonwealth and does not hold the permanent or long-term interest in real property for more than ten years beyond the term of the mortgage.

[Note: 1985 Constitutional Convention Amendment 34 amended Article XII, Section 2, by adding and substituting the underlined language. Former exemption applied if the mortgagee did not hold the permanent or long-term interest in real property for more than five years.]

Section 3: Permanent and Long-Term Interest in Real Property.

The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights, except an interest acquired above the first floor of a condominium building. Any interests acquired above the first floor of a condominium building is restricted to private lands. Any land transaction in violation of this provision shall be void. This amendment does not apply to existing leasehold agreements.

[Note: 1985 Constitutional Convention Amendment 35 amended Article XII, Section 3, by adding the

underlined language. Formerly was forty years with no provision for condominiums.]

Section 4: Persons of Northern Marianas Descent.

A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

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 and has voting shares (i.e. common or preferred) one hundred percent of which are actually owned by persons of Northern Marianas descent as defined by Section 4. Minors, as defined by applicable laws of the Commonwealth, may not be eligible to become directors of a corporation. No trusts or voting by proxy by persons not of Northern Marianas descent may be permitted. Beneficial title shall not be severed from legal title.

[Note: 1985 Constitutional Convention Amendment 36 amended Article XII, Section 5, by substituting and adding the underlined language. Formerly was fifty-one percent.]

Section 6: Enforcement.

Any transaction made in violation of Section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under Section 5, a permanent or long-term interest in land in the Commonwealth acquired by the corporation after the effective date of this amendment shall be immediately forfeited without right of

redemption to the government of the Commonwealth of the Northern Mariana Islands. The Registrar of Corporations shall issue regulations to ensure compliance, and the legislature may enact enforcement laws and procedures.

[Note: 1985 Constitutional Convention Amendment 36 amended Article XII, Section 6, by adding the underlined language.]

DRAFT

7/21/95

ARTICLE XII: RESTRICTIONS ON ALIENATION OF LAND

Section 1: Alienation of Land

The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent **and shall require disclosure sufficient to ensure fairness and timely enforcement under this article.**

Section 2: Acquisition

The term acquisition used in Section 1 includes acquisition by sale, lease, gift, or other means **except a transfer by inheritance to a child or grandchild, a transfer by inheritance of a life interest to a person who is not of Northern Marianas descent** and who is **a spouse or child who was adopted before six years of age,** and a transfer to a mortgagee by means of foreclosure if the mortgagee is a full service bank, federal agency or governmental entity of the Commonwealth and does not hold the permanent or long-term interest in real property for more than ten years **after foreclosure.**

Section 3: Permanent and Long-Term Interest in Real Property

The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights **and related obligations.**

Section 4: Persons of Northern Marianas Descent

A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by **1960** and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

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 **at least fifty one** 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 **at least fifty one** percent of which are actually, **completely, and directly** owned **and voted** by persons of Northern Marianas descent.

Section 6: Enforcement

Any transaction made in violation of Section 1 shall be **voidable. The attorney general** shall **establish an office to assist landowners, to monitor land transfers, and to assist in enforcing** this article. **Any action challenging a transaction shall be filed within six years of the transaction.**

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CONFIRMATION

July 20, 1995

VIA TELECOPIER
322-2270

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

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

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

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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June 17, 1995

Chairman Jose R. Lifoifoi
Vice-Chairman Marian Aldan-Pierce
Committee on Land and
Personal Rights
Third Constitutional Convention
Capitol Hill, Saipan
Commonwealth of the Northern
Mariana Islands

Re: Written Testimony Re: Amendment to Article XII, Section 4

Dear Chairman Lifoifoi and
Vice-Chairwoman Aldan-Pierce:

Thank you for providing me the opportunity to present this written testimony to illustrate the need to amend Article XII, Section 4, the definition of Northern Marianas descent. At present the test to determine a person's qualification is two pronged. To qualify as a person of Northern Marianas descent, a person must be 1) born or domiciled within the Northern Marianas by 1950; and, 2) a Trust Territory citizen.

An amendment is needed to clarify the meaning of the term "citizen of the Trust Territory of the Pacific Islands" as it is used in Article XII, Section 4.

The original drafters of Article XII included the requirement of citizenship in the Trust Territory so as to exclude from the group of persons eligible to own land persons who maintained their allegiance to somewhere outside the Trust Territory, as well as the children of persons

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who were stationed in the Northern Mariana Islands ("NMI") only temporarily prior to 1950. These children would have the citizenship of their parents.

In the Analysis of the Constitution, the original drafters of Article XII referenced the provisions of the Trust Territory Code adopted in 1966, as well as the treatment of the citizenship question by the U.S. administering authorities prior to the enactment of the Trust Territory Code.

Unfortunately, there were some uncertainties in the treatment of the citizenship question during the administration of the Trust Territory which have resulted today in uncertainties as to the eligibility of some persons to own land. Of particular concern is the issue of persons who were born in Guam and emigrated to the NMI and other parts of the Trust Territory during the times it was under the control of Spain and Germany, and even later during the Japanese era. Most people who consider themselves ethnically NMI Chamorros trace their lineages to such persons.

Because these persons left Guam and established their homes in the Trust Territory before 1950, it has never been determined whether they were retroactively made U.S. citizens as a result of the passage of the Organic Act of Guam. At the same time, because of the fact of their Guam birth, they did not fall into the most often applied definition of Trust Territory citizen, since they were not "born in the Trust Territory."

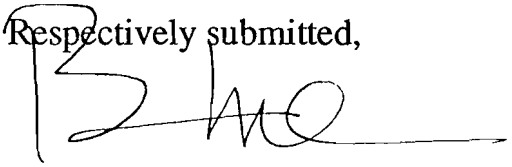
The Trust Territory Government came to recognize this problem in the mid to late 1950's and developed a naturalization procedure to resolve this question of "indeterminate" citizenship. However, only a relatively few persons ever availed themselves of the procedure. Many more died before the naturalization procedure was even established. The uncertainty as to the legal status of these persons continued up to creation of the Commonwealth.

As a consequence, there is an uncertainty still today as to the eligibility of those persons who were never "naturalized," and, by extension, some of their descendants. The precise number of the persons affected is unknown, but the group will necessarily grow with every generation, as people continue to marry and have children of their own.

Using military/Trust Territory records, I believe I have identified a class of almost 300 Chamorros living in Saipan at the time of the American invasion. These same records also indicate that virtually all of these people continued to reside in the Northern Marianas throughout the Trust Territory time. A few were naturalized, most were not. These are the base line ancestors upon which many people currently base their claim to be of Northern Marianas descent. Literally, hundreds of people are affected. In another generation, it will be thousands.

I am proposing an amendment to address this problem by more clearly specifying what is meant by the term "citizen of the Trust Territory of the Pacific Islands," as the term is used in Article XII. The definition needs to be fine tuned to resolve the uncertainty about persons born in Guam or other places who became long term inhabitants of the Trust Territory, obviously a part of the local community, but who never acquired another citizenship. The definition needs to be amended to provide that these persons, those who never maintained allegiance to somewhere outside the Trust Territory, will also be considered citizens of the Trust Territory for the purposes of Article XII. The date of September 2, 1945, coincides with the date of the surrender of Japan which ended World War II. This date is proposed in order that there is no uncertainty as to the status of inhabitants of the Trust Territory who survived World War II but died before the Trusteeship Agreement became fully effective. This would mean that persons from Guam who came to the NMI after the end of World War II would be excluded, while persons from Guam who had emigrated to the Trust Territory previously would be included.

Respectively submitted,



Brian W. McMahon

PROPOSED AMENDMENT TO ARTICLE XII, SECTION 4

The following language would be added to Section 4 of Article XII:

> The term "citizen of the Trust Territory of the Pacific Islands," as used in this Article, shall mean those persons who were natural or naturalized citizens of the Trust Territory under the Trust Territory Code and shall be deemed to include all inhabitants of the Former Japanese Mandated Islands as of September 2, 1945 who were not then citizens of another country.

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July 20, 1995

Jose R. Lifoifoi, Chair
Committee on Land and Personal Rights
Third Northern Marianas Constitutional Convention
Saipan, MP 96950

Re: **Ninth Circuit Reversal of CNMI Supreme Court in *Ferreira v. Borja***

Dear Chairman:

I am submitting this letter as supplemental testimony on Article XII. During the hearing on June 16, 1995, concern was expressed over the argument that the Ninth Circuit "rewrote" Article XII by reversing the CNMI Supreme Court in *Ferreira v. Borja*. I can understand the concern that our Supreme Court may have, in effect, been stripped of its power to interpret our Constitution by the Ninth Circuit; however, the facts reveal that this is not what happened. The controversy in *Ferreira* did not involve Article XII, but an ancient English doctrine of trust law. I hope that this letter can be made available to those members of the committee who wish to examine this situation in greater detail.

I.
The Basic Facts in *Ferreira*

The facts of *Ferreira* are unusually important. It began with a 1980 Partnership Agreement between Jim Grizzard, Bobbie Grizzard, Frank Ferreira and Diana Ferreira. The partnership was formed to sell, lease and develop part of Lot 008 B 10. The Grizzards were to

put most of the capital into the partnership, Frank Ferreira was to pay for professional services needed by the partnership (surveying, accounting, legal fees, etc.), and Diana was to purchase the property and execute a 40 year lease to the partnership. Diana bought the parcel and two others as well. The Grizzards sold all their interest in the land to Nansay Micronesia, Inc. Diana leased the three lots to Nansay Micronesia and agreed to sell her fee title to Ana Little. In order to clear her title, she filed a quiet title suit against the former owners, the Mafnas sisters. They claimed that their sale to Diana was void because it violated Article XII.

In the trial court, Judge Villagomez agreed with the defendants and held that the transaction violated Article XII. 3 C.R. 534 (January 19, 1988). He reasoned that the members of the partnership acted as though they thought *they*, and not just Diana, owned the land. Diana exercised minimum control over the land. He concluded that having "control" over the land is a form of "acquisition" of a permanent interest in land under Article XII. As this is forbidden for the three partners who are not of NMI descent, the purchase was void. What Judge Villagomez did was articulate a "control test" for transactions under Article XII.

The case was appealed to the newly-created CNMI Supreme Court.

II.
How An Article XII Analysis Is Conducted

The basic rule for Article XII is found in Section 1:

> Section 1: Alienation of Land.
> The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Logically, the steps a court must follow in analyzing the facts of a case are:

- See if there is a person who is not of NMI descent involved in a land transaction. (step 1)
- Determine, under principles of property law, what property interest the non-NMI descent person has. (step 2)
- Measure that property interest against the yard stick of Article XII: is it a "permanent" or a "long-term" interest in real property as defined in § 3? (step 3)

Section 3 reads:

> Section 3: Permanent and Long-Term Interests in Real Property.
> The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights, except an interest acquired above the first floor of a condominium building . . . .

In *Ferreira*, it was obvious that there were three persons who are not of NMI descent involved in the transactions. The Court did not have to do any Article XII analysis to determine if Jim Grizzard, Bobbi Grizzard and Frank Ferreira were of NMI descent. It was undisputed that they were all not of NMI descent. So, this first step was a non-issue.

The big issue for the Court was what property interest did the three receive (step 2). The answer to this question would not come from an analysis or an interpretation of Article XII. It would not come from the CNMI Constitution at all. To determine what property rights a person has requires that one look to property law. The area of property law is vast. The issue is what property law to rely on. The early cases relied on principles of contracts law and agency law. But, the Supreme Court rejected that law and, instead, looked to the law of trusts.

Once the Court applied trust law and came up with the nature of the property interest, the only question left was whether that interest was more than a non-NMI descent person could

possess (step 3). To answer this question, the Court looked to Article XII, § 3 for an answer. Here is where Article XII was analyzed and interpreted by the Supreme Court. But, the Court's answer to this question was not later challenged. On appeal, only the Court's application of trust law (step #2) was questioned and rejected. Its analysis of Article XII (step #3) was not questioned.

III.
The Supreme Court's First *Ferreira* Decision

The CNMI Supreme Court began its analysis by listing the three issues inherent in any Article XII case. These are the same issues, though worded differently, as the ones I pointed out above. 2 NMI 514, 523. The Court had no trouble finding that there were non-NMI descent persons involved. The question was what property interest they had. The Court pointed out that the trial court relied on the law of agency, which the Supreme Court rejected as the proper law to answer this issue:

> The trial court erroneously applied agency principles in reaching its judgment. It is the law of trust that govern since only through trust principles may one acting as an agent acquire a fee interest.

Id. at 525.

The Court held that Diana was a trustee for the Grizzards under a resulting trust theory. The Court clearly specified its legal source for this conclusion. The source is not the CNMI Constitution, but the RESTATEMENT (SECOND) OF TRUSTS:

> In RESTATEMENT (SECOND) OF TRUSTS § 440 (1959), it is stated that, "Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase

price is paid, except as stated in §§ 441, 442 and 444."

Id. at 526.

The Court reasoned that since the three parcels of land were transferred to Diana as a result of the purchase price being paid by the Grizzards, the resulting trust doctrine applied. Diana holds only bare legal title as a trustee for the Grizzards who hold equitable title. Id. From this point on, the Court spent its time discussing whether any of the exceptions to the general rule apply. Since they found that none apply, it was time to turn to the final issue of the three issues. Can the Grizzards hold an equitable fee simple interest in the property or is that a long-term or permanent interest that would violate Article XII? This is the step where the CNMI Constitution was applied. This reasoning had already been carried out in the earlier decision of the Supreme Court, Aldan-Pierce v. Mafnas. It was determined that the term "permanent and long-term interests" includes freehold interests, and "[a]n equitable interest of indeterminate duration is encompassed within a freehold interest." Id. at 17. Thus, the equitable interest acquired by a non-NMI descent person from a resulting trust is a freehold interest which violates Article XII.

III.
The Dissent In *Ferreira* Focused On The Resulting Trust Doctrine, Not Article XII.

It is important to note that the *Ferreira* court was divided (2-1) and that there was a dissenting opinion by Special Judge King. He did not question the finding that the Grizzards are not of NMI descent. He did not disagree with the Court's determination that an equitable fee simple interest would constitute a "permanent and long-term interest" under Article XII law. He

only challenged their application of trust law. He spent eight pages explaining why the resulting trust doctrine is not properly applied to these facts. Id. at 534-542. Therefore, from the date of the opinion's issuance until now, the controversy surrounding the *Ferreira* case focused on trust law and not on Article XII.

> I have serious misgivings about the Court's use of the resulting trust doctrine in this context . . . .

Id. at 534.

> The keystone of the Court's analysis in this opinion, and in the recent case of Aldan-Pierce v. Mafnas (citation omitted), is the resulting trust doctrine. For the following reasons, I do not believe this doctrine is being properly applied by the Court.

Id.

> The resulting trust doctrine is merely an analytic tool designed for the limited purpose of assisting courts to sort out the equities and relative rights between one who has furnished funds and one who holds the legal title as a result. [citation omitted]
>
> The court's attempt here to use the doctrine for the wholly unfamiliar purposes of determining whether article XII of the Constitution of the NMI has been violated and for enforcing the constitutional prohibitions against the parties who have provided funds for the purchase of land necessarily rips the resulting trust doctrine from its moorings.

Id. at 535.

It should be readily apparent that the debate in *Ferreira* was not over how to interpret and apply Article XII (step #3); instead, the controversy has centered on the issue of what property interest the non-NMI descent persons held as a result of the transaction (step #2).

III.
Where Does The Resulting Trust Doctrine Come From?

The resulting trust doctrine does not come from Article XII or from the CNMI Constitution. It is not even a matter of statute in the Commonwealth. It comes from common law. We apply common law in the Commonwealth when there is no statutory law on the subject.

> § 3401. Applicability of Common Law.
> In all proceedings, the rules of common law, as expressed in the restatements of the law approved by the American Law Institute . . . shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . .

The Commonwealth has no written law on trusts, so our only source is the common law as stated in a series of legal volumes which collect the common law called the "Restatement of the Law." The resulting trust doctrine is found at § 440 of the Restatement. It is so antiquated that the compiler of the third edition of the Restatement on Trusts has decided to drop the resulting trust doctrine from the next edition.

Judge King, in his criticism of the majority's use of this antiquated trust doctrine, said:

> [T]he Court has looked far back to an obscure doctrine of the law of trusts which emerged from the mists of medieval England.

Id. at 541.

The issues raised by the *Ferreira* and *Aldan-Pierce* decisions centered on the proper application of a medieval doctrine of trust law, and not upon the meaning or application of Article XII of the CNMI Constitution.

IV.
The Ninth Circuit's Decision in *Ferreira*

A. Where Does The Ninth Circuit Get The Authority to Review the CNMI Supreme Court?

When the Supreme Court of the Commonwealth was established, it was recognized by the Sixth Northern Marianas Commonwealth Legislature that the decisions of the new court would be subject to review on appeal by the Ninth Circuit of the United States Court of Appeals:

> It is the intent of the legislature to recognize that until the expiration of fifteen years after the enactment of Public Law 1-5 final decisions of the Commonwealth Supreme Court will be appealable to the United States Court of Appeals for the Ninth Circuit, as is provided by Section 403(a) of the Covenant, and that upon expiration of that period all final decisions of the Supreme Court will be appealable thereafter only to the United States Supreme Court.

P.L. No. 6-25, § 2.

Covenant § 403(a), after giving the CNMI a choice of whether to establish their own appellate court or refer appeals to the federal district court, provides that if an appellate court were established then for a 15 year period its decisions would be reviewable by the Ninth Circuit. This was intended to permit appeals to be taken in San Francisco, as a matter of convenience, rather than having to go to the Supreme Court of the United States in Washington, D.C.[1]

Section 403(a) "assures that the relations between federal courts and the courts of the Northern Mariana Islands will be essentially the same as the relationship between the federal courts and the courts of the states." Id. It is not unique to have a federal court reviewing a decision of the Supreme Court of any state, except that normally such review would be by the

[1]Section by Section Analysis of the Covenant to Establish A Commonwealth of the Northern Mariana Islands (Marianas Political Status Commission, February 15, 1975), p. 37.

U.S. Supreme Court. Here, for purposes of convenience, the review will be carried out for 15 years by the Ninth Circuit. After that, review of decisions of the CNMI Supreme Court will be taken directly to the U.S. Supreme Court.

B. The Ninth Circuit Gave Deference to the CNMI Supreme Court In Its Decision.

The Ninth Circuit recognized that the CNMI Supreme Court is the "ultimate expositor" of local law. *Ferreira*, 1 F.3d 960, 962 (1993). But, it also noted that it has the power to review a decision of the CNMI Supreme Court if that decision is "untenable or amounts to a subterfuge to avoid federal review of a constitutional violation." Id. The Ninth Circuit did not question the determination that the Grizzards are non-NMI descent persons (step #1). It did not question the determination that an equitable fee simple interest is a "permanent and long-term" interest in land under Article XII (step #3). It did hold that the Supreme Court's application of the ancient trust doctrine of "resulting trusts" (step #2) was untenable. Thus, the Ninth Circuit did not review the CNMI Supreme Court's interpretation of Article XII at all.

The Ninth Circuit ruled that it would be wrong for a court to use its equitable powers to create a resulting trust in favor of someone and then use the existence of the resulting trust as the basis for finding a violation of Article XII. The opinion states that courts have refused to apply the resulting trust analysis when the reason for purchasing land under the name of another person is to accomplish an illegal purpose, such as to permit a non-NMI descent person to own land. The Court ruled: "We agree with Judge King that the CNMI Supreme Court's application of the resulting trust theory was untenable." The Ninth Circuit sent the case back to the CNMI Supreme Court to re-decide. They did not tell the Court how the matter should be re-decided,

but the clear indication was that the resulting trust doctrine could not be used in the new decision.

V.
The CNMI Supreme Court Re-decides *Ferreira*

Once the Ninth Circuit returned the *Ferreira* case to it, the CNMI Supreme Court had an opportunity to reexamine its earlier decision. The Court re-heard legal arguments on the case, and without hesitation the Court agreed that the resulting trust doctrine had earlier been misapplied in its first decision:

> We agree with the Ninth Circuit in that, because the purported transaction to be accomplished had an illegal purpose, no resulting trust would have arisen in favor of third parties not of Northern Marianas descent.

The Court remanded the case to the trial court with instructions to enter a decision quieting title in the property in favor of Diana Ferreira.

Article XII was not interpreted by either the Ninth Circuit, nor by the CNMI Supreme Court in its re-decision of the case. Both were concerned only about the proper application of the common law of trusts. By properly applying trust law, the non-NMI descent persons did not acquire an equitable interest in fee simple. "All fee title and interest in the land at issue, legal and equitable" is held by Diana Ferreira. Id. at 4 (concurring opinion of Chief Justice Dela Cruz). Therefore, there is no need to engage in any Article XII analysis since it is a person of NMI descent who owns the land.

CONCLUSION

First of all, it should be apparent that it is not unusual for federal courts to review the decisions of the state supreme courts. The decisions of all state supreme courts are subject to federal review and such review is commonplace. For example, in *Powell v. Ducharme*, 998 F.2d 710, 713 (9th Cir. 1993), the Ninth Circuit stated: "Washington Supreme Court interpretations of Washington law are binding on this court unless we determine such interpretations to be untenable, or a veiled attempt to avoid review of federal questions." The U.S. Supreme Court also noted this principle in reviewing a decision of the Supreme Court of North Carolina:

> It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support.

Wolfe v. State of North Carolina, 364 U.S. 177, 185 (1960).

The decisions of the CNMI Supreme Court are subject to no greater review by the Ninth Circuit than a state supreme court decision is subject to review by the U.S. Supreme Court. The only difference is that the Supreme Court may decline to review a case while the Ninth Circuit may not. This situation, created by the framers of the Covenant in § 403(a), will last for a period of 15 years. Then, all CNMI Supreme Court decisions will be directly appealable to the U.S. Supreme Court.

Second, cases where the court is called upon to apply Article XII may or may not raise disputes as to the meaning of Article XII. In *Ferreira v. Borja*, the dispute did not involve the meaning of Article XII. Instead, the dispute was over the proper application of property law in order to determine exactly what interest was held by the Grizzards, persons clearly not of NMI

descent. The lower courts used an agency analysis and then a control analysis to determine the property interest, but the CNMI Supreme Court rejected both theories and applied a common law doctrine of trust law. The issue on appeal to the Ninth Circuit was whether the Court had properly applied this ancient doctrine of English common law. Even our Supreme Court was split on this question. The Ninth Circuit ruled that the doctrine was not applied correctly and sent it back for the Supreme Court to re-decide. In its new decision, the Court rejected the resulting trust doctrine, finding that it did not apply. Thus, the *Ferreira* case is basically a case of trust law and not a case deciding issues of Commonwealth constitutional law.

It should be apparent from these two principles that the Ninth Circuit did not usurp the power of the Commonwealth Supreme Court to interpret the CNMI Constitution. The Ninth Circuit did not strip the Supreme Court of its sovereignty. We gave the Ninth Circuit the power to review appellate decisions when the CNMI agreed to the Covenant. What happened, plain and simple, is that the Ninth Circuit reviewed the Commonwealth Supreme Court's application of trust law, not Article XII law. The Ninth Circuit said nothing about how Article XII should be applied. Statements that have been made to the contrary are taking advantage of the fact that this subject matter is quite complex and likely not to be understood by persons who are not attorneys. Sovereignty is an emotional issue and further clouds a person's understanding of this case.

I hope that this clarifies the record by showing that the reversal in *Ferreira* was on a matter of trust law and was not on the interpretation of Article XII.

Very truly yours,

Rexford C. Kosack

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July 22, 1995

Deanne Siemer
Third Northern Marianas
Constitutional Convention
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Saipan, MP 96950

Re: Proposed Changes to Article 12, Section 4

Dear Deanne:

I reviewed the proposed amendments to Article XII you faxed to me on July 18 and want to make several comments:

First, I note that the "qualifying" domicile date is extended ten years to 1960. I understand that this is being proposed as a solution to the blood dilution problem currently facing many families. To truly cover an additional generation, I suggest that the date be extended to at least 1965.

I realize that any change in the qualifying date, whether it be 1960 or later, raises an issue as to whether such change creates a new or enlarged class of people eligible to own land. For what it is worth, I don't think so.

Saipan and Tinian were administered by the Navy until July 1, 1962 and up to that time access was restricted because of the presence of the Naval Technical Training Unit (The "CIA") on Saipan. Commencing July 1, 1962, administration of the islands was transferred back to the Dept. of Interior and Saipan was designated as the provisional headquarters of the Trust Territory. Before, the Trust Territory had been headquartered in Hawaii and Guam. Significant migration to Saipan could not commence for several months while the necessary logistical and administrative changes took place. Thus, extending the date to 1965 should not significantly increase the size of the class. Those few Trust Territory citizens who may meet the domicile criteria

* Admitted to Practice in the Northern Mariana Islands, Washington State, Republic of Palau
** Admitted to Practice in the Northern Mariana Islands, District of Columbia

because of the relocation of the Trust Territory headquarters to Saipan would also have to acquire U.S. citizenship to be eligible to own land. This further decreases the impact of this proposed change.

If concerns are expressed, the matter can be determined with some certainty as complete birth and immigration records were maintained from the time American forces invaded Saipan. Using these records and the Trust Territory ID records used in my survey, it is possible to estimate the impact of any change with great specificity (it may, however, take more time than you have). At any rate, I think the change of date is helpful but suggest that it be extended at least to 1965.

Unfortunately, the change in the qualifying date is of only limited assistance to the subjects of my study, Chamorros of indeterminate status. The problem is that children born of parents of indeterminate status "inherit" that status. To my understanding, children of U.S. citizens are themselves considered U.S. citizens regardless of where born. Persons born in the Trust Territory were specifically excluded if at birth they acquired another nationality. 53 TTC 1(1). This affects all the children of those Chamorros of indeterminate status regardless of when they were born. Even if born in the Northern Marianas before 1950, they may be considered U.S. citizens because of the application of the Organic Act to their parents. (The Francisco Cruz problem.) If born after 1950, the simple fact is that their parents, unless naturalized, were not Trust Territory citizens because they were not born in the Trust Territory, and they, therefore, technically do not qualify as persons of Northern Marianas descent.

Thus, the uncertainty continues and it appears the only way to finally resolve the problem is to further define "Trust Territory citizen" to expressly include the class of Chamorros of indeterminate status. Therefore, I propose to add an additional sentence to Section 4. Read in its entirety, it would appear as follows:

> "Section 4: Persons of Northern Marianas Descent
>
> A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof. For purposes of determining Northern Marianas descents, a person shall be considered to be a full-blooded

> Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1960 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth. The term "citizen of the Trust Territory of the Pacific Islands," as used in this Article, shall mean those persons who were natural or naturalized citizens of the Trust Territory under the Trust Territory Code and shall be deemed to include all inhabitants of the Former Japanese Mandated Islands as of September 2, 1945 who were not then citizens of another country."

It is important to include in the Legislative history the reason for this approach. Because of my own time constraints, I can't provide you with annotations at this moment but I am willing to do so if you think it's appropriate. At any rate, I think the language should run along the following lines:

> A definition of a citizen of the Trust Territory was added to address the problem of the several hundreds Guam born Chamorros who migrated to the Northern Mariana Islands during the German and Japanese times. While fully integrated into the local community by the time of the American invasion in 1944, their qualification to act as baseline ancestors has always been in doubt because it is unresolved to this day whether or not they meet the criteria for Trust Territory citizen. There are two related problems. First, Trust Territory citizenship is limited to those born within the Trust Territory thus technically eliminating the entire class and disqualifying their children born after 1950. Second, descendants of this class even though born within the Trust Territory before 1950 may not qualify because it remains undetermined whether, through operation of the Organic Act, these descendants became U.S. citizens (thus rendering them ineligible for Trust Territory citizenship) because U.S. citizenship was automatically granted to their parents. This issue plagued the Trust Territory administration up until the day it ceased to exist. To eliminate this uncertainty, a Trust Territory citizen is further defined to

include all inhabitants of the former Japanese Mandated Islands as of September 2, 1945. The term former Japanese Mandated Islands is used because the date, September 2, 1945, precedes the creation of the Trust Territory. The term, however, includes the same geographical area. The date selected, the surrender of Japan, is sufficiently early to exclude any post-war migration from Guam.

Again, thanks for the opportunity to submit comments. Please tell me if I can be of further assistance.

Yours Truly

Brian W. McMahon

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TELECOPIER TRANSMITTAL

TO: **DEANNE SIEMER**
Third Northern Marianas
Constitutional Convention
Legislative Building, Capitol Hill
Saipan, MP 96950

Date: July 22, 1995

FROM: **BRIAN W. McMAHON**

FAX No.: 322-2267

Re: Proposed Changes to Article 12, Section 4

THE FOLLOWING IS (ARE) TRANSMITTED HEREWITH:

LETTER

TOTAL NUMBER OF PAGES TO BE SENT INCLUDING COVER SHEET: 5

If you are not receiving properly or should for some reason not receive all pages, please phone us immediately at (670) 234-9314 or 9315.

Thank you.

By: *Sol*

COMMENTS:

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.

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July 23, 1995
VIA FAX 670/322-2267

Deanne Siemer, Esq.
Howard P. Willens, Esq.
General Counsel
Third Constitutional Convention
Commonwealth of the Northern Mariana Islands
Saipan, MP 96950

Re: Article XII; 7/21/95 Draft

Dear Deanne and Howard:

Yesterday, while the Committee of the Whole took a recess in its discussion of this draft we discussed interpretation of the 1976 version of Article XII. That exchange was prompted by the discussion in the Committee about the differences, if any, between the "voidable" sanction in Section 6 of the July 21 draft and the "void ab initio" sanction of the present Article XII.

I began by complaining to Deanne that during the debate which preceded the recess, she had changed following hypothetical which I had written for Dr. Camacho:

> Q: A Japanese approaches a landowner and tells him that he wants to buy his land. The Japanese offers to pay a fair price for the land. The Japanese takes title in the name of a friend of his of Northern Marianas descent. Is that transaction "voidable" under Section 6 [of the July 21 draft]?

Her answer was something very much like this:

> A: Obviously that question has been written by a lawyer. Let me ask you a question: Is the transaction between two persons of Northern Marianas descent? If so, then there is nothing wrong with it.

I told her that she had taken unfair advantage of her own client when she responded to Dr. Camacho. She said (with feeling): "He's not my client, he's your client." I said: "He's your client, because he's a delegate."

Then, we (the three of us) had substantially the following dialogue:

> TRM: Suppose the following hypothetical. Suppose I approach a landowner and tell him that I want to buy his land. I offer him a "fair" price. I tell him that I want the title put in the name of my friend, a person of Northern Marianas descent. The landowner knows everything about the transaction. Does that transaction violate Article XII?
>
> DS: No, why should it? The Northern Marianas landowner understood what he was doing. It was a fair transaction. Why should it be set aside?
>
> TRM: Because I get an equitable fee simple title in the land and that is a freehold interest.
>
> DS: So long as everyone knew what was happening, why should the transaction be set aside?
>
> TRM: In other words, if everyone involved in the transaction knows that they were violating Article XII, then there is no

violation of Article XII!

HPW: Your problem is that you think that all of the local people are stupid and that they don't know what they are doing. You think that in every transaction involving a local person, the local person doesn't understand what they are doing. You are wrong.

TRM: That's not true at all. I thought that Article XII was supposed to invalidate the transaction without regard to what the landowner knew or didn't know.

TRM (to Deanne): Suppose an agent (of Northern Marianas descent) approaches a landowner and tells him that wants to buy his land. The buyer is in fact acting for an undisclosed principal. The undisclosed principal is me. The agent does not know of any reason why the landowner would not want to sell his land to me. In fact, the landowner knows me and likes me. Under the common law of agency, there is nothing wrong with an agent buying land for an undisclosed principal. The price is fair. Does that transaction violate Article XII?

DS: No. Do you want me to testify about the real intent of the original version of Article XII?

HPW: And I will show you the negotiating history of the Covenant which refutes your views.

I didn't say it at the time, but I would like to take you both

up on your offer. Howard, will you show me that negotiating history? And, Deanne, you have mentioned this before in our several discussions. Please share that part of the constitutional history with me: What was your intent in this regard when you drafted the original Article XII?

Given the fact that the Committee passed the July 21 draft on first reading yesterday and given the very few days left in the Convention, I hope you can get back to me by tomorrow.

Finally, I look forward to the consultations that you spoke about at the Committee meeting yesterday. Surely I am not the unnamed lawyer among all those you have been consulting who nearly exhausted your patience!

Sincerely,

Ted

THEODORE R. MITCHELL

faxc: Dr. Carlos S. Camacho
[CONVENT.110]

Third Northern Mariana Islands Constitutional Convention

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July 24, 1995

Theodore R. Mitchell, Esq.
P.O. Box 2020
Saipan, MP 96950

Dear Ted:

We received your letter dated July 23, 1995 in which you recounted an informal conversation held during a recess of the plenary session on July 22, 1995.

Your account is not accurate.

The Committee on Land and Personal Rights has asked that I continue to work with all of the interested lawyers as I put together the Committee's report. I will be in touch with you to schedule further meetings. In the meantime, I would appreciate any suggestions you have as to the language used to express the changes that the Convention has approved or as to the analysis of the Constitution which will contain the legislative history of these sections.

Sincerely,

Deanne

Deanne C. Siemer

July 22, 1995

MEMORANDUM FOR DELEGATES

SUBJECT: Consideration of Local Government Issues at Plenary Session of July 22, 1995

The Committee on Executive Branch and Local Government has deliberated for several days on local government issues raised by proposed amendments to Section 17 of Article III and Article VI. The Committee has made good progress on some subjects, in particular the drafting of a new Article VI that defines the enlarged responsibilities of local government in the three Senatorial districts. On other issues, however, there are profound differences among Committee members, as there undoubtedly are among Convention delegates generally. The Committee on Organization and Procedures has therefore decided that these issues should be brought to the Committee of the Whole for discussion and, if possible, resolution. If some decisions can be made, then the Committee can continue the drafting and related work. But time is of the essence and the Convention cannot afford more delays in considering all the issues before the Convention.

At the direction of the Committee on Organization and Procedures, the following agenda will be followed once this subject is reached in the Committee of the Whole.

First, we will consider the four alternative approaches to the important issues raised by proposed amendment of Section 17 of Article III set forth in the memorandum from counsel dated July 21, 1995. These alternatives were discussed at length by Committee members yesterday. They are as follows:

1) Retain Section 17 in its present form as interpreted by the Court in the Inos v. Tenorio decision.

2) Return to the language of the first Constitutional Convention in 1976 regarding the delegation to the mayors of responsibility for the delivery of public services.

3) Amend the language to make clear that the mayors have full responsibility for the enforcement of Commonwealth laws as well as the delivery of public services in the island or islands that they serve.

4) Amend the language to make clear that the mayors do not have full responsibility for the enforcement of Commonwealth laws but do have responsibility for the delivery of some, if not all, of public services in their jurisdiction.

Variations on these approaches are clearly possible, but these alternatives present basic choices for the Convention to make. If the Convention can provide direction here, the Committee and counsel can do more drafting with the objective of bringing a proposed amendment to the floor in the next day or two.

Second, I suggest that we spend some time reviewing the draft Article VI that has been prepared and the draft report that explains it. The Committee has reviewed the draft article in some detail, but some of its provisions cannot be finalized until the delegation issue is resolved. There are a few basic issues here that the Convention could respond to:

1) The Committee recommends that the Office of the Mayor for the Northern Islands be abolished. Is there agreement on this?

2) The Committee recommends that the local government be given jurisdiction over local matters -- defined as matters that affect only one Senatorial district and are not inconsistent with Commonwealth law. Any problem with the concept?

3) The Committee recommends that the mayor and council together can produce ordinances, the equivalent of local laws, and that the authority of the Commonwealth legislative delegations to promulgate local laws be eliminated.. Agreement in concept?

4) The Committee recommends that the municipal council on Saipan be elected from five precincts, whereas the councils in the other two districts will be elected at large. How do the delegates feel about this?

5) The Committee has discussed only preliminarily the issues related to the funding of local government. The Committee is considering a transitional period during which the local governments would have to develop sources of revenue to support local government. Some have suggested a time frame of five years; others propose a shorter period of time. Whatever the period is, the Committee expects that funding by the Commonwealth legislature would gradually be reduced. What are the reactions of the delegates to this general approach?

6) The Committee also wants to consider further whether some cap on the size of local government should be imposed. The draft provision suggests two possibilities -- one based on the number of employees of local governments as of June 5, 1995, and the other based on some percentage of registered voters in the district. There are other techniques that might be used. Do the delegates want the Committee to continue this search for such method for constraining the size of local government?

Third, there may be other important issues relating to local government that should be considered by the Committee. This discussion in the Committee of the Whole provides an opportunity to identify concerns and provide guidance to the Committee on Executive Branch

and Local Government.

Whatever issue is discussed today, I urge the delegates to restrain their rhetoric and treat each other with civility. These are very important issues and their resolution requires our very best cooperative effort. Thank you.

Herman T. Guerrero, President

Third Northern Mariana Islands Constitutional Convention

July 21, 1995

Ms. Agnes M. McPhetres
Northern Marianas College President
Northern Marianas College
P.O. Box 1250
Saipan, MP 96950

Dear Ms. McPhetres:

The Third Constitutional convention has under consideration the attached report and proposed amendment language, report number 5: Article XV, Education. The Convention will revisit this article for a second and final reading within the next week. Changes may still be made to the article before the Convention votes on it for the second reading. You may submit your comments to the Committee on Judiciary and Other Elected Offices before the whole Convention votes on the article again. Please address comments to Chairman Henry U. Hofschneider and deliver them to the Convention office at the Legislature Building.

As you know, the Convention has a very limited time in which to complete its work, so we would appreciate it if you could submit your comments early.

Sincerely,

Herman Guerrero

HERMAN T. GUERRERO
President

Received by: _____ Date & Time: 7/22/95 10:27 a.m.

Delivered by: _____ Date & Time: 7/22/95 10:27 a.m.
RAMONA V. MANGLONA