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July 24, 1995

Deanne Sierner
Legal Counsel
Third Northern Marianas Constitutional Convention
Saipan, MP
Via Fax

Re: **Article XII**

Dear Deanne:

You should have received from me yesterday a five page analysis of the how the proposed amendment to § 2 would affect the Probate Code. With further reflection, all I would add is a question as to how it would fare if challenged under the Covenant as permitting a permanent and long-term interest in real property to be held by a non-NMI descent person. I note that the Marianas Political Status Commission in its Analysis, states that § 805 permits the CNMI to define the term "acquisition." The issue may be whether excluding from acquisitions those acquisitions which are by inheritance to certain close family members is reasonable.

As to my proposed analysis of the § 6 language on voidable, a new issue has arisen. If the social policy behind Article XII is to ensure that NMI lands remain in NMI hands, then part of the flexibility we seek from voidable should be to permit the parties to cure their defect. One way in which to cure a defect may be to transfer the property to a qualified owner. "A" (a person not of NMI descent) may wish to sell a property interest which is voidable to "B" (a person of

Deanne Siemer
July 24, 1995
Page 2

NMI descent) to get his money out of the transaction. B may realize that A is selling the property because A does not qualify to own the interest. In fact, B may even be getting the property at a greatly reduced price because A realizes he has a problem. Under the concept of voidable interests, A can transfer property prior to disaffirmance. The subsequent taker is not subject to disaffirmance if he or she is a good faith purchaser for value. Here is where the issue arises: if B knows of A's defect, is B a good faith purchaser?

I believe that we have the ability to define good faith in the analysis. I know that some jurisdictions (e.g. Guam) have provided for the transfer of property to cure defects in their statutes restricting alien ownership of property. Recognizing that our policy is to encourage compliance, not to punish, and to bring all land under NMI ownership, we should provide for cure by transfer. On page 2 at the end of the first paragraph I would add the sentences shown in bold:

While a void agreement can neither be reformed or enforced, because equity will not decree a vain and useless thing, a voidable agreement may be reformed and enforced by a court of equity to make it conform to the requirements of section 1. Thus, a court has the inherent power to both sever provisions which offend Article XII and modify an agreement, limiting the rights of any party, to the extent necessary to bring the agreement into compliance with section 1. And, parties to the agreement have the ability to cure defects, such as by amending an agreement prior to disaffirmance. **Where a non-NMI descent person has acquired a permanent or long-term interest in real property, and that fact is known to a subsequent purchaser for value who is of NMI descent, that subsequent purchaser shall be treated as a good faith purchaser. Thus, the property interest may be validly transferred to a person of NMI descent.**

If this is not made explicit, it most certainly will end up becoming an issue for litigation.

I think that adopting the opposite rule would present problems. Could the holder of the land

Deanne Siemer

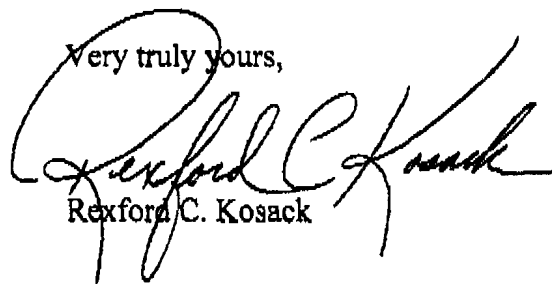
July 24, 1995

Page 3

validly transfer an interest at all to a third party? Probably not, if a reasonable investigation would turn up the fact that the holder is not a qualified owner. The only person who could take the land would be the original owner by exercising the power of disaffirmance. But, this person may refuse to disaffirm because the transaction was conducted at a favorable price. In this case, the land will go into limbo. If the improper holder can neither go forward or go backwards in transferring the property, and he or she cannot develop the property as it would be a case of putting good money after bad, the property will no longer be productive to the community. It is better to permit the property interest to go forward to a purchaser for value without being concerned whether this purchaser knew or should have known that the seller was an unqualified holder of the property. At least, the property ownership will return to a person of NMI descent and it will be able to be put to productive use.

Finally, I have reviewed Article XI and my concerns are only with the advisability of a few of the sections. As this is a matter of policy, and not a legal issue, I have no comments to add to this area.

Very truly yours,



Rexford C. Kosack

