

To: Deanne Seimer Fax 670/322-2270

From: Dick Pierce of White, Pierce, Mailman & Nutting

I was just leaving for vacation when I received a draft dated 7/17/95 of proposed changes to Article XII. This fax comes from a hotel in Chicago, so excuse the informality.

I gather that you have been counselling the convention that the constitution should not be a super - legislature, but rather it has the task of setting broad principles from which the three branches of government should operate. In relation to Article XII though, that philosophy can be a mischief. Broad principles, unless interpreted liberally to protect property rights, will promote Article XII litigation and uncertainty of title. It is vital to the economic and social well being of the Commonwealth that non-NMDs have certainty of title. If certainty of title is not provided, the economic dream of the Marianas people will not materialize and the Marianas will continue to be known as a place where fairness to outsiders is questionable.

Section 1 adds a requirement of disclosure. The note states that this deals with the concerns about agents, etc. There is no direction as to whom disclosure must be made, who must make disclosure, the extent of disclosure, or when disclosure must be made. Nor does it mention the effects of non disclosure. As written, the disclosure requirements will either be meaningless or a litigation trap for lessees. If the Convention believes that disclosure should be made, then the Convention should state specifically the parameters of that disclosure. Further, the use of the term to "ensure fairness" is an invitation to the Court to exercise discretion. Where property rights are concerned, clear meaning rather than uncertain terms should prevail.

Section 3 uses the phrase including renewal rights and "related obligations." The lack of precision in terminology will promote litigation and uncertainty. I will not be able to counsel a client as to what a related obligation is nor will I be able to counsel a client as to how a court will construe "related obligation."

Section 4 eliminates adopted children from the definition of NMD and changes the beginning date from 1950 to 1960. I believe that NMD should include all persons who became citizens under the Covenant and who were Trust Territory citizens prior to that date. (November 4, 1986 if I recall correctly).

Section 5 changes the definition of corporate NMD by using imprecise terms: "actually, completely, and directly." The note states that the language has been cleaned up to reduce court cases. I have not heard of any problems with corporations and Article XII since the 1985 change to 100% NMD stock ownership. The added phrase could cause problems in debt financing. For instance, a bank or other lender might want to impose certain conditions on a corporation in order to loan the corporation money. Those conditions could be construed to take complete control out of the hands of the NMI. Raising capital is difficult enough in the Commonwealth without further handicapping NMDs. I see little mischief in having the voting shares actually, completely, and directly owned by NMDs, but that proposed change appears unnecessary. This new language should only apply to acquisitions of land occurring after the effective date of the amendment. Otherwise, the Convention will cause mischief with pending cases.

Section 6 has important changes. The statute of limitations is vital for certainty of title. Placing enforcement authority in the hands of the attorney general will be of significance only if the attorney general has exclusive authority. If the seller or lessor continues to have standing to enforce Article XII, such private enforcement will make enforcement by the AG superfluous. The change related to "voidable" should also include a change related to "transaction" so that the judiciary knows that only the offending portions of an instrument should be given no effect.

Conclusion — Non NMDs can live with the 55 year limitation, but there has to be certain knowledge of what the 55-year limit entails. If the NMDs want to exclude buy back provisions, for instance, then it should be said specifically. Any language that gives the judiciary discretion to determine constitutional intent, fairness, or sufficient disclosure will cause mischief and litigation. NMDs must accept that as long as other US citizens and aliens are allowed and even encouraged to live and invest in the Commonwealth, they must have certainty in their property rights. Finally, the convention should not use its power to alter pending cases related to corporations.

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