

THIRD NORTHERN MARIANA ISLANDS
CONSTITUTIONAL CONVENTION

DELEGATE AMENDMENT IN THE NATURE OF A SUBSTITUTE
ARTICLE TO BE AMENDED: ARTICLE XII, IN ITS ENTIRETY

IT IS MOVED THAT the article which was passed on first reading be amended
in its entirety to read as follows:

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.

ANALYSIS

This provision remains unchanged from the 1976 version. There was no change to section 1 in the 1985 amendments.

The intent of the Convention is to retain and reaffirm the original intent of Article XII, as envisioned by the Covenant, § 805 and as adopted by the people in 1977. Accordingly, the constitutional history contained in the Analysis of the Constitution, pages 163-167, is incorporated here to express the intent of this Convention.

The Convention has attempted to make as few changes as possible to this article, so as to preserve the original intent of the 1976 framers. Those amendments which have been made are intended to strengthen the protections provided herein and to ensure that Article XII rights will in fact be enforced by our courts in the most expeditious manner possible, consistent with the due

administration of justice.

There has been tremendous opposition to the enforcement of Article XII in the courts. It has frustrated the desire of the people to see their Article XII rights become a reality.

The Convention has examined all of the Article XII decisions in the courts and finds that the decision of the former Chief Justice Jose S. Dela Cruz, in *Agulto v. Villaluz*, Civil Action No. 86-519 (C.T.C. Jan. 19, 1998) and the decision by Associate Justice Ramon G. Villagomez in *Ferreira v. Borja*, 3 C.R. 472 (C.T.C. Sept. 13, 1988) most accurately reflect the original intent of the 1976 framers and the intent of this Convention as to the proper interpretation and enforcement of Article XII.

It is the intent of this Convention to reaffirm and strengthen the important protections of Article XII, for the benefit of all persons of Northern Marianas descent, both present and future generations.

Section 2. Acquisition. The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or other means except a transfer by inheritance or gift to a child or grandchild or a person who was adopted before the age of sixteen, a transfer by inheritance to a spouse who is not of Northern Marianas descent, as provided by law, and a transfer to a mortgagee by means of foreclosure if the mortgagee is a full service bank, federal agency or a 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.

ANALYSIS

This section is the same as the 1976 version, except that it allows transfers by inheritance or gift as recommended by the Committee on Land and Personal Rights.

It is the intent of the Convention that any *attempt* to acquire real property

in violation of Article will be subject to the void *ab initio* sanction imposed by Section 6, such as: (1) purchases using a person of Northern Marianas descent as an agent or "front," (2) purchases using a corporation of Northern Marianas descent as an agent or "front," or (3) purchases using any other indirect means to acquire a prohibited interest in Commonwealth land.

The Supreme Court decisions in *Aldan-Pierce v. Mafnas* and *Ferreira v. Borja* held that such transactions are illegal, but those decisions were reversed by the Ninth Circuit. As a result, at the present time, the Superior Court has no controlling precedent to follow in deciding all of the pending Article XII cases. Therefore, it is the intent of this Convention to make it perfectly clear what the law is in this regard.

The term "acquisition" includes any kind of "transaction," using any kind of documents, a series of related or unrelated documents, a transaction using a combination of oral and written agreements, or any attempted acquisition by means of any kind of transaction.

The courts should not rely on formalities, but rather on the real intent and purpose of the parties behind the documents and their conduct. The tenor of the documents used in the transaction must not be conclusive. The court must be free to hear any and all evidence as to the real parties involved and the true nature of the transaction.

The interpretation of the term "transaction" by Special Judge Edward C. King in his dissent in the *Ferreira v. Borja*, 2 N.Mar.Is. 514 (1992), case is expressly disapproved.

The Article XII plaintiff who is challenging such a transaction must be free to obtain all the evidence which relates to the true nature of the transaction during the discovery phase of the case and then must be free to present it in court. Then the court should scrutinize the transaction to determine its effect, in terms of Article XII.

The explanation of Section 2 contained in the 1976 Analysis is adopted as expressing the intent of this Convention, in addition to what is written here.

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.

ANALYSIS

It is clear that the original framers intended Article XII to be interpreted and applied by the Commonwealth courts in accordance with the "common law" existing at the time, that is, in 1976. The American common law of real property has been developing over a period of about 930 years. There are many different categories of "ownership."

Given the relatively precise meaning of the term "freehold interest" as defined by the American common law of real property and given the clear explanation of the meaning of the term "freehold interests" in the 1976 Analysis of the Constitution, p. 169, there is no doubt that an acquisition of an "equitable fee simple," for example, violates Article XII.

The 1976 Analysis makes it perfectly clear that a prohibited "freehold interest" "includes all types of sharing arrangements for ownership—ownership jointly vested in two or more persons, ownership vested in two or more persons as tenants in common, and ownership in two or more persons vested in succession." Analysis, p. 169.

In the decision of *Manglona v. Kaipat*, the Commonwealth Supreme Court did not hold just such a conveyance void *ab initio*. In that case, the deed ran in favor of two Chamorros, one of whom was of Northern Marianas descent and one of whom was not. Instead of invalidating the entire "transaction" the Court "reformed" the deed by making the grantor and the one eligible grantee "tenants in common" of the property.

It is the sense of this Convention that transactions like that involved in *Manglona v. Kaipat* violate Article XII, as originally conceived by the 1976 framers, and it is the intent of this Convention that such transactions violate Article XII.

The original intent of the framers of the 1976 constitution was to prohibit

any and all lease terms which, given the prevailing economic conditions and the nature of the entire transaction, would give the tenant the power to extend his control and possession of the land beyond the nominal term of the lease. This Convention reaffirms and adopts that intent.

Many of the leases which have been signed in the last 20 years contain provisions which have a high probability of preventing the landowner from ever recovering possession of the land, such as, (1) A provision which requires the landowner to purchase a multi-million dollar improvement before he can recover the land; or (2) a provision which automatically gives the tenant title to the land if and when Article XII is repealed.

Inclusion of this type of provision invalidates the entire lease, because it renders the entire transaction void ab initio. Accordingly, it is the express intent of the Convention to overrule the decision of the Commonwealth Supreme Court in *Diamond Hotel Co. Ltd. v. Matsunaga*, No. 93-023 (N.Mar.I. Jan. 19, 1995).

It is an easy matter for the lawyers to make sure that the terms of leases to persons who are not of Northern Marianas descent are plain and simple. A plain and simple lease will give the tenant a fully secure tenancy and avoid any doubt about its validity under Article XII.

The 1985 amendment relating to condominiums is deleted as inconsistent with Section 1.

The explanation of Section 3 contained in the 1976 Analysis is adopted as expressing the intent of this Convention, in addition to what is written here.

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 1950 and was a citizen of the Trust Territory of the Pacific Islands before termination of the Trusteeship

Agreement with respect to the Commonwealth.

ANALYSIS

This text of Section 4 is the one approved by the Committee on Lands and Personal Rights.

The explanation of Section 4 contained in the 1976 Analysis is adopted as expressing the intent of this Convention.

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 51% of whom are persons of Northern Marianas descent and has voting shares at least fifty-one percent of which are owned by persons of Northern Marianas descent as defined by Section 4.

ANALYSIS

This text of Section 5 re-enacts the 1976 version of Section 5 and deletes the amendments that were made to Section 5 in 1985.

The second, third and fourth sentences of the 1985 version of Section 5, relating to voting trusts and the giving of shareholder and director's proxies is deleted from the text, but it is the intent of this Convention to prohibit any such arrangements which in any way diminish the actual, complete and direct ownership and control of these corporations by persons of Northern Marianas descent.

The explanation of Section 5 contained in the 1976 Analysis is adopted as the expression of the intent of this Convention, as amplified hereinafter.

It is the sense of this Convention that the original intent of the 1975 Convention was to permit corporations to own land so that landowners could use the corporation as a means to participate in the economic development of the Commonwealth. Landowners could join with international investors, contribute land to the enterprise and then obtain (and maintain) majority ownership and control of the company. The money could be contributed by the other investors or borrowed from a lender.

The 1985 Convention found that there had been widespread violation of Article XII using "dummy" corporations. In the Article XII litigation involving corporations, the lawyers for the buyers (and the corporations) have argued that the courts cannot look behind the "face" of the corporation to see whether the Chamorro directors and stockholders are genuine.

Public Law 8-32 purports to prohibit the court from "piercing the corporate veil" and determining the identity of the real owners and directors of the company, despite the fact that the intent of the original framers must have been to prohibit any misuse of the corporate form of organization to circumvent Article XII. This Convention expressly disapproves of Public Law 8-32 in this regard.

There is a long history of corporations being misused by organized crime, drug cartels, stock swindlers, tax cheats and others for many years. It is the sense of this Convention that the intent of the original framers of Article XII was to prohibit the misuse of Commonwealth corporations to circumvent Article XII, by whatever means.

In construing and applying Article XII, the courts can should make a thorough examination of the internal affairs of any corporation which claims to be eligible to own land under Section 5, whenever a landowner files an Article XII claim.

Article XII claimants have the same rights to challenge the qualifications of a corporation involved in an Article XII transaction, as any other party who seeks to disregard the corporate personality in any other kind of case.

Section 6. Enforcement. (a) 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 which was previously acquired by the corporation shall be immediately forfeited to the Commonwealth.

(b) The right of trial by jury shall be guaranteed in all cases arising under this article, whether in the form of a claim, an affirmative defense, a counterclaim or in any other form.

(c) When demand has been made for trial by jury pursuant to subsection (b), the court shall not adjudicate the case or any claim or issue arising therein, by means of summary judgment.

(d) Any action arising under this article, shall be instituted with twenty-years of the transaction to which it relates.

ANALYSIS

This text is based on the 1976 version of Section 1, with the addition of the "shall be immediately" language which was added in 1985. Other 1985 language which has been deleted will be discussed below.

Subsections (b) and (c) are new. The purpose of these new subsections is to ensure that all parties involved in Article XII litigation will have the right to a trial by jury, if they so desire. Once a jury demand has been made by any party, then all issues must be tried to the jury. The usual power of the judge under Rule 56 of the Commonwealth Rules of Civil Procedure is superseded.

It is the sense of the Convention that this right to jury trial exists under present law, but the issue has not been resolved by the courts. Therefore, it is necessary to make it clear at this time. This provision is consistent with the fundamental purpose of Article XII, namely, to protect the people from the loss of their land and to protect the society from the loss of its land base, collectively.

Subsection (d) is new. It adopts a statute of limitations for Article XII cases

which is the same as the limitation on all land claims generally under Commonwealth law. There is need for some time limit on these claims, but there is no justification for discriminating against Article XII claims as compared with other land claims.

This article, as amended, shall apply in all pending and future litigation involving Article XII.

The explanation of Section 6 contained in the 1976 Analysis is adopted as expressing the intent of this Convention, except as noted.

The term "transaction" is intended to include any and all actions of the buyer, his agents, attorneys, or others acting in concert with him, which relate to the acquisition of a prohibited interest in Commonwealth real property.

It is the sense of this Convention that this was the original intent of the framers of the 1975 constitution, but as noted above in connection with Section 2, the parties to the Article XII litigation have fought over the meaning of the term "transaction." The term "transaction" was not given a specific definition in the 1975 Constitution.

The landowners in the Article XII litigation have argued that the term should include not just deeds, or leases or the like, but all of the activities (whether documented or not) and written agreements which reasonably relate to the ultimate passage of title from the landowner to the buyer.

The lawyers defending against the Article XII cases have argued that the court should not look beyond the face of the deed, or the corporate documents, all of which, of course, make the "transaction" appear to be in conformity with Article XII.

Because the two decisions of our Supreme Court construing Article XII have been stricken down by the Ninth Circuit, it is the intent of this Convention that Article XII should be enforced in substantially the manner in which it was enforced in the cases of *Agulto v. Villaluz*, No. 86-519 (C.T.C. Jan. 19, 1988) and in *Ferreira v. Borja*, 3 C.R. 472 (C.T.C. Sept. 13, 1988).

This Convention does not, however, approved of the action of the Ninth

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Circuit, because it regards the Ninth Circuit decisions in *Aldan–Pierce v. Mafnas*, 31 F.3d 756 (9th Cir. 1994) and in *Ferreira v. Borja*, 1 F.3d 960 (9th Cir. 1993) as unwarranted intrusions into the internal affairs of the Commonwealth, as a usurpation of the rightful judicial authority of the Commonwealth Supreme Court and as an infringement upon the right of self–government of the Commonwealth, which is guaranteed by Section 103 of the Covenant.

It is the sense of this Convention that the original intent of the 1976 framers was to have the courts apply the "void *ab initio* sanction to the entire "transaction" in which the parties sought to acquire land in violation of Article XII, including any written or oral agreements side agreements, or related agreements, for buying the land or for holding title to the land.

In the Article XII litigation which has spanned the past sixteen years, the lawyers for the defendants have used the following argument: Our clients did not violate Article XII, because they are not persons of Northern Marianas descent and therefore they cannot own land and therefore it is impossible for them to have violated Article XII. It is the intent of this Convention that the courts must first examine the "transaction" to determine the legal consequences the actions of the parties would be (including the documents used) under existing law, without regard to Article XII. Then, if the court finds that an "acquisition" of a "freehold interest" did take place, it applies the void *ab initio* sanction to invalidate the entire "transaction" as if it never happened.

By adopting this strict and categorical sanction, it is the sense of this Convention that it was the original intent of the framers that (1) no landowner's Article XII claim can be defeated in court by an affirmative defense; and (2) the defendant in an Article XII case can assert a counterclaim for restitution only under certain circumstances.

It is the sense of this Convention that the original intent of Section 6 was to both protect individual landowners from the loss of their lands and to protect the entire society from diminution of the land base. It is necessary to protect both present and all future generations from the loss of the land essential to the security of this society.

The text of the original Article XII did not deal explicitly with the question of what consequences should follow from the sanction imposed by Section 6, either

during the course of litigation or after a determination that the "transaction" is void.

The Analysis indicated that in the case of a sale, a court could require the landowner to repay any money which the putative buyer had given him or her. Analysis, pp. 178–79. Nothing was said about disposition of any improvements which the buyer may have placed on the property between the time the sale was consummated and the time the court declared the sale void.

It is the sense of this Convention, however, that when the framers adopted the severe sanction of "void *ab initio*" in 1976 they meant to accomplish one principal objective: the original landowner should recover full and complete ownership of the property, without limitation. The Analysis made it clear that any transaction which violated Article XII had no effect on the title to the property; title remained in the original landowner, despite the existence of the illegal deed. This means that an Article XII claim cannot be defeated by an affirmative defense, such as "illegality," "unjust enrichment," or "fraud."

The lawyers representing defendants in the Article XII litigation have routinely asserted a dozen or more "affirmative defenses" in an effort to defeat the Article XII claim. The courts have upheld this approach, in general. It is the intent of this Convention to overrule any such decisions, as inconsistent with the original intent of the framers and as inconsistent with the intent of this Convention.

As for counterclaims for restitution, in the case of an attempted purchase or lease of the property, the landowner is required to make restitution of the purchase price. The buyer should not, however, be permitted to use his restitution award as a means of retaining possession of the land or otherwise encumbering it to the detriment of the landowner right of possession.

If a buyer or tenant has made improvements on the property, he or she (or it, in the case of a corporation) can make a counterclaim for the fair market value, or the cost of the improvements, whichever is the lesser of the two. As a condition to obtaining the restitution award, however, the counterclaimant must be required to prove that: (1) he had good reason to believe that his acquisition of the property did not violate Article XII, and (2) that when he made the improvements, he had good reason to believe that the transaction did not violate Article XII.

If an Article XII defendant makes a claim for restitution, either for the purchase price or for the value of improvements, then the Article XII plaintiff can make a counter-counterclaim for the fair rental value of the property, for the entire period between the time of that he or she lost possession of the land as a result of the void transaction and the date of the judgment in the Article XII case.

The foregoing principles of restitution reflect the Commonwealth law of restitution as it existed in 1976. It is the sense of this Convention that the 1976 framers intended that these rules of restitution should govern the making and adjudication of restitution and related claims arising out of a case in which the court has held that the transaction is void ab initio. It is the intent of this Convention that such rules should govern.

The second sentence of the 1985 version of Section 6, relating to issuance of regulations by the Registrar of Corporations and the enactment of "enforcement laws and procedures" by the legislature should be deleted in its entirety.

From the beginning, Article XII was intended to be "self-executing" or in other words, the courts have the power to entertain cases to enforce Article XII and to interpret the language of Article XII and to enforce it on a case-by-case basis, unless the constitution expressly confer authority upon the legislature to implement the constitution.

With the sole exception of the reference in Section 2 relating to transfers to a spouse, the legislature has no authority to enact legislation with regard to this article.

The Eighth Legislature used the "enforcement laws and procedures" clause to justify the passage of Public Law 8-32. Public Law 8-32 does not "enforce" Article XII, it frustrates the enforcement of Article XII. Furthermore, the legislature had no authority to amend this article in this or any other manner. For these reasons, a provision is included in the transition provisions which repeals Public Law 8-32.

TRANSITION PROVISIONS:

Public Law 8-32 is hereby repealed in its entirety, retroactive to its effective date, or in other words, it is hereby declared to be void ab initio.