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 tow 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 the 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

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 the 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.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH TRIAL COURT

MARIA AGULTO, et al., Plaintiffs, vs. IGNACIA VILLALUZ, et al., Defendants and Third-Party Plaintiff, vs. COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Third-Party Defendant, vs. DIONICIO R. CABRERA, Fourth-Party Defendant.	CIVIL ACTION NO. 86-519 ORDER: RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

Partlow Borja Herald Sterling

Plaintiffs' motion for summary judgment and defendant Villaluz's cross-motion for summary judgment were heard by the court on October 7, 1987, and on October 29, 1987, after which the court took the matter under advisement.

FOR PUBLICATION

I. THE PLEADINGS.

On June 2, 1986, the plaintiffs Maria Agulto and Seventh-Day Adventist Mission of the Trust Territory of the Pacific Islands (hereinafter "Agulto" and/or "SDA") filed an action to quiet title to Lot No. 462 NEW-REM, containing an area of 5,499 square meters, more or less, and situated at Chalan Piao, Saipan.

The defendant Ignacia B. Villaluz (hereinafter "Villaluz") filed her answer on June 23, 1986, denying the allegations that she has no interest in said parcel of land. Villaluz asserted in defense that Agulto was not a bona fide purchaser for value, without notice; and she further asserted that the February 4, 1983 Warranty Deed from Dionicio Cabrera (hereinafter "Cabrera") to Agulto was in violation of Article XII of the Northern Marianas Constitution and thus was void ab initio.

Villaluz further counterclaimed against both plaintiffs and sought to quiet title in her own name by virtue of her Deed of Sale from Cabrera, executed July 17, 1981. She also filed a third-party complaint against the Northern Mariana Islands Land Commission, (hereinafter "Land Commission") seeking damages based on negligence in the event the court decides in favor of the plaintiffs.

Land Commission thereafter filed its answer denying negligence on its part, and also filed a Fourth Party Complaint against the original landowner, Cabrera, to assess damages against the latter for, in effect, selling the land twice, in the event the court finds Land Commission to be negligent.

II. THE FACTS.

In conjunction with the parties' cross-motions for summary judgment, the movants agreed to the following facts:

"1. On or about February 11, 1983, the Rev. Robert E. Gibson and Dr. Stephen Fisher entered into an agreement to purchase Lot No. 462 NEW-REM containing an area of 5,499 square meters, more or less, located on Saipan (hereinafter "the property") from Dionicio R. Cabrera and Cecelia M. Cabrera. A true and accurate copy of said agreement is attached hereto as Exhibit "A" and incorporated by this reference. Dr. Fisher was included as a party to the sales agreement inasmuch as Rev. Gibson was leaving Saipan in the near future and Dr. Fisher would handle the payments to Cabrera after Gibson's departure.

2. The purchase of the property was negotiated by Rev. Gibson who intended to donate the property to the Seventh-Day Adventist Mission for the purpose of building and operating a school. The agreed upon consideration for the purchase of the property was $25,000.

3. Rev. Gibson paid Cabrera at least $12,800 for the property.

4. Neither Rev. Gibson nor Dr. Fisher was a person of Northern Marianas descent and, as such, they were unable to hold title to property on Saipan. Therefore, an agreement was reached with Maria Agulto (hereinafter "Agulto"), a long-time employee of the Saipan SDA Dental Clinic and citizen of Northern Marianas descent, that fee title would be conveyed to her. Agulto agreed

to take the steps necessary to effectuate Rev. Gibson's intent that the property be transferred to the SDA Mission for the purposes of building and operating a school.

5. On or about February 4, 1983, Cabrera executed a warranty deed to the property in favor of Agulto. The warranty deed was recorded at the Land Registry, Susupe, Saipan, as Document No. 16615 on February 23, 1983. A true and accurate copy of said deed is attached hereto as Exhibit "B" and incorporated herein by this reference.

6. In or about July of 1981, Cabrera agreed to sell the property to Ignacia B. Villaluz (hereinafter "Villaluz") for $3,000 which amount was paid to Cabrera on or about July 17, 1981.

7. On July 17, 1981, Cabrera executed a deed of sale to the property in favor of Villaluz which deed was recorded at the Land Registry, Susupe, Saipan as Document No. 12926 on September 22, 1981. A true and accurate copy of said deed is attached hereto as Exhibit "C" and incorporated herein by this reference. Despite the prior transaction with Villaluz, Cabrera procured the issuance of a certificate of title to the property in his name on November 24, 1982. A true and accurate copy of the certificate of title is attached hereto as Exhibit "D" and incorporated herein by this reference.

8. On or about May 16, 1983, Agulto conveyed the property to Cavities, Ltd. for the stated consideration of ten dollars ($10.00). A true and accurate copy of said deed is attached hereto as Exhibit "E" and incorporated herein by this reference.

9. On or about May 27, 1986, for the stated consideration of one dollar ($1.00), Cavities, Ltd. reconveyed the property by quitclaim deed to Agulto. A true and accurate copy of said deed is attached hereto as Exhibit "F" and incorporated herein by this reference.

10. On May 27, 1986, Agulto leased the property to the SDA Mission for a term of fifty-five (55) years. Said lease was recorded with the Commonwealth Recorder as File No. 86-1079 on May 27, 1986.

11. Agulto paid none of the consideration for the purchase of the property from her personal funds.

12. In or about the mid-part of 1983, Agulto and the SDA Mission started to clear the property. At that time, Villaluz learned for the first time that Cabrera had deeded the property to Agulto in May 1983 and Agulto and the SDA Mission learned for the first time that Cabrera had deeded the same property to Villaluz in July of 1981."

In addition to the above agreed facts, the court further finds the following to be undisputed facts based on the pleadings, depositions and interrogatories.

13. Villaluz is a person of Northern Marianas descent.

14. The deed from Dionicio Cabrera to Villaluz dated July 17, 1981, was not acknowledged, but was registered by Land Commission on September 22, 1981. Such deed was subsequently misplaced at Land Commission, was thereafter missing and not found until after this lawsuit was filed.

15. On September 29, 1982, through a decree of distribution in CTC Civil Action No. 80-67, Dionicio Cabrera was adjudged the owner of the land at issue herein. Prior to then he had an undivided interest therein as an heir of Jesus Sn. Cabrera, deceased.

16. On October 31, 1983, in Criminal Action No. 83-96, Dionicio Cabrera was convicted by the court of obtaining money by false pretenses, as a result of having twice sold the land at issue; first to Villaluz and then subsequently to Rev. Gibson. [See First Amended Information therein.]

III. SUMMARY JUDGMENT STANDARD.

The standard for granting or denying summary judgment is laid out in Rule 56(c), Comm. R. Civ. P., which provides, in part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See generally Government of the Northern Mariana Islands v. Micronesian Insurance Underwriters, Inc., 2 CR 1164, 1171-1172, (DCA, 1987).

IV. THE AGULTO/SDA MOTION.

Agulto and SDA's motion for summary judgment rests on their claim that Agulto has superior title to the land at issue; that she is a bona fide purchaser for value without notice (actual or constructive) of Villaluz's prior deed from Cabrera. Plaintiffs

further assert that the Villaluz deed, although registered with the Land Commission prior to the Agulto deed, was registered without any acknowledgment in violation of Section 230.11 of Chapter 5, Title 67 of the Rules and Regulations promulgated by the Chief of Lands and Surveys and published in the Territorial Register No. 6 at page 184 on December 15, 1974. That section reads, in pertinent part:

> "To entitle any conveyance or any other instrument to be registered, there shall be endorsed, appended, or attached thereto an acknowledgment."

A bona fide purchaser (BFP) is one who takes property upon payment for value, in good faith, without notice of any defect in title. Himes v. Schiro (Colo 1985), 711 P.2d 1281, 1283.

Clearly, the facts here show that the Villaluz deed of February 4, 1983, was not acknowledged and, under then existing regulations, it was not entitled for registration. However, Land Commission did in fact register such instrument, contrary to such regulation, on September 22, 1981.

The fact that the unacknowledged deed was registered is of little relevance here because Land Commission misplaced (or lost) the Villaluz deed. If such deed were in fact on file at Land Commission, and Agulto, SDA, or the latter's attorney had searched the file, found the deed there, and went ahead and purchase the land in the name of Agulto, Agulto would have been on notice of Villaluz' apparent interest in the land, regardless of whether it was erroneously registered.

The Villaluz deed after being lost subsequent to registration was found by Land Commission sometime after this lawsuit was instituted. In between the loss and finding of the Villaluz deed, several things happened: the probate distribution order in CTC Civil Action No. 80-67 was rendered, and Cabrera thereafter re-sold the land at issue to Reverend Gibson with title placed in the name of plaintiff Agulto.

Agulto and SDA only became aware of Villaluz' claim to the property when SDA started clearing the land in mid-1983. Before then, the plaintiffs had no knowledge of the Villaluz deed, constructive, actual or otherwise.

Villaluz contends, in opposition to the plaintiffs' motion, that the full purchase price has not in fact been fully paid, and Agulto cannot be accorded bona fide purchaser (BFP) status. The facts appear to support defendant's contention that less than the $25,000 recited purchase price was paid. Villaluz relies on a line of cases that one cannot be accorded BFP status if payment of the purchase price has not been fully made. Whether the full purchase price has in fact been paid or not, and whether the case authorities cited by defendant is good law for the Commonwealth to follow are questions of fact and issues of law that should be addressed at trial. Such material facts appear to be in dispute.

Villaluz argues that a purchaser of real estate is not entitled to BFP status if at the time he receives notice only a part of the purchase price has been paid, citing Grogg v. Stevens, 6 F.2d 862 (4th Cir., 1915). See also Sequin v. Maloney

(Or. 1953), 253 P.2d 252, 258, which says that so long as any portion of the purchase price remains unpaid, the contract is executory and title stays with the vendor.

But another line of cases hold otherwise and would accord a purchaser bona fide purchaser status even if holding only equitable title and further would allow that purchaser to receive legal title upon payment of the full purchase price. See Perry v. O'Donell, (9th Cir., 1984) 749 F.2d 1346; Utley v. Smith (Cal. 1955), 285 P.2d 986.

Here, of course, the issue of consideration appears in dispute, i.e. how much remains to be paid if any, and why the balance has not been paid.

For the foregoing reasons, the plaintiffs' motion for summary judgment is hereby DENIED.

V. THE VILLALUZ MOTION.

Villaluz's motion for summary judgment is based on her assertion that the February 4, 1983 deed from Cabrera to Agulto was procured in violation of Article XII of the Northern Marianas Constitution, which restricts the acquisition of permanent and long term interests in real property within the Commonwealth to persons of Northern Marianas descent. See Article XII, section 1, Northern Marianas Constitution. She asserts that Agulto was merely a "front" holding title for the Seventh Day Adventist Mission, and, therefore, the deed to Agulto was void ab initio.

The term "acquisition" is defined in the Constitution to include acquisition by sale, lease, gift, inheritance or other

means. Article XII, section 2, Northern Marianas Constitution. The term acquisition is all inclusive.

Next, permanent and long-term interests in real property include freehold interests and leasehold interests of more than 40 years including renewal rights. Article XII, section 3, Northern Marianas Constitution, prior to the 1985 constitutional amendment.

Finally, any transaction made in violation of the Article XII, section 1 restriction "shall be void ab initio." Article XII, section 6, Northern Marianas Constitution. It is mandatory.

Agulto and SDA opposed Villaluz's motion and argued that there is a factual dispute as to the issue of whether Agulto has an interest after the SDA lease expires. They also assert that it is disputed factually whether Cavities, Ltd., a locally formed corporation, was established solely for the benefit of SDA. They further assert that there is a disputed factual issue as to whether the land sales contract and deed were for the sole benefit of SDA.

The only factual issue which is material here is whether the Cabrera/Agulto land transaction was made in violation of the Article XII, section 1 prohibition.

The undisputed facts reveal that Reverend Gibson was the progenitor of what subsequently transpired. He wanted to buy land and donate it to SDA for a school. He and Dr. Stephen Fisher, as purchasers, entered into a contract for the sale of unimproved property, i.e. Lot No. 462 NEW-REM. The sellers were

Cabrera and his wife Cecelia. The contract was executed on February 11, 1983. The purchase price was $25,000, to be paid in installments. Gibson was to pay the purchase price using his own personal funds.

The facts further show that Gibson negotiated the purchase with Cabrera. Neither Gibson nor Fisher were persons of Northern Marianas descent, and neither were able to hold title to the property. They, therefore, asked Agulto, an SDA Dental Clinic employee and a person of Northern Marianas descent, to hold title to the land.

Agulto had little, if any, participation in such transaction. She expended no money at all towards the purchase of the land. Legal documents were drafted, prepared, and paid for at the behest of Rev. Gibson.

A few months later, on May 16, 1983, Agulto conveyed by deed her interest in the land at issue to Cavities, Ltd, for the nominal consideration of $10.00.

In mid-1983, SDA started clearing the land. Villaluz then became aware of the problem and apprised SDA of her interest in the land.

Thereafter, Cabrera was criminally charged with and convicted of the crime of obtaining money by false pretenses.

The plaintiffs argue that Agulto is a person of Northern Marianas descent and thus capable of holding title to land in the Commonwealth. There is, of course, no dispute as to that assertion. The issue here, however, is whether Agulto could

legally hold title to land on behalf of and for the benefit of one who is not of Northern Marianas descent, be it Reverend Gibson, Dr. Fisher, or the Seventh Day Adventist Mission.

The critical deed here is not the May 26, 1986 reconveyance deed from Cavities, Ltd., back to Agulto but the February 4, 1983, deed from Cabrera to Agulto. If the latter deed was in fact obtained in violation of Article XII, then it is void from the beginning and all subsequent transactions emanating from the Agulto 1983 deed would have no validity. Therefore, the circumstances surrounding the 1983 deed from Cabrera to Agulto must be carefully examined.

Agulto was an SDA Dental Clinic employee. She did not participate in the land sales contract. She did not use any personal funds to purchase the property. She was merely named as the titleholder on behalf of and for the benefit of Reverend Gibson and the SDA Mission. Further, Agulto three months later conveyed her interest to Cavities, Ltd., and a few months later SDA started clearing the premises.

Agulto, in 1983, could not have a future or residual interest in the land. She so stated in her deposition. Agulto Deposition, p. 5. She never had an interest or participation in the transaction. Agulto Deposition, p. 4. It was not until about three years later after Cavities reconveyed the land back to her that she felt that the property would be at her disposition after the SDA lease expires. Agulto Deposition, p. 6.

Further, Agulto stated that she got the title back from Cavities on May 27, 1986, so she could lease it back to "them," i.e. SDA. In 1986, she had already long become aware of Villaluz's interest in the property. Thus, if the issue were to revolve around the 1986 reconveyance deed from Cavities, Ltd., to Agulto, the latter clearly would have been already aware of Villaluz claim to and asserted interest in the property. If such 1986 deed were at issue, then the so-called "shelter rule" would protect Agulto, if, but only if, the 1983 deed from Cabrera to Agulto were in fact valid.

The Northern Marianas Constitution forbids a person not of Northern Marianas descent from acquiring a permanent or long term interests in real property in the Commonwealth. It defines "acquisition" to include "acquisition by sale, lease, gift, inheritance, or other means." [Emphasis added]

At the time of the Cabrera/Agulto land transaction a lease to a person of non Northern Marianas descent could not exceed 40 years, including renewal rights. As amended by the Second Northern Marianas Constitutional Convention in 1985, the maximum leasehold interest which could be acquired was lengthened to 55 years.

Here, of course, the facts are clear that the sale was, first and foremost, made to Rev. Gibson using his own personal funds. He acquired the land. His intention was to donate the land purchased as a gift to the SDA school. The co-purchaser, Dr. Fisher, was made a party to the transaction to oversee the matter after Rev. Gibson left the Commonwealth.

The facts also show that Agulto was merely a conduit to accomplish Gibson's intent. The fact that his intent was noble and laudable should not detract from the issue of whether the arrangement survives constitutional muster.

Rev. Gibson and/or Dr. Fisher could have easily and validly leased the property from Cabrera for the 40 year maximum, as then permitted by the Constitution. They chose to do otherwise and decided to obtain a fee simple interest, using Agulto as titleholder.

This is not a situation where Rev. Gibson donated money to acquire land as a gift to Agulto, subject to a lease in favor of SDA. The intent for all practical purpose was to build and operate the SDA school. It was a gift of land; not to Agulto, but to SDA.

The plaintiffs, in opposition, assert that Agulto was not an agent of Gibson and/or Fisher, because there was no writing. There was, however, a de facto agency relationship between Gibson and Fisher on one hand, and Agulto on the other. Agulto was an SDA employee and a member of the SDA church. Her actions (or lack of it) bespoke an agency relationship.

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Restatement of Agency 2d, section 1. See also, Grace Line, Inc. v. Todd Shipyards Corp., (9th Cir., 1974) 500 F.2d 361, 373. This is so if an agreement was reached

between the principal and the agent, even if the parties do not call it agency and did not intend the legal consequences of the relation to follow. See Comment b to Section 1(1), Restatement of Agency 2d. See also, Crowe v. Hertz Corp., (5th Cir., 1967) 382 F.2d 681, 687.

Further, Section 14(b) of the Restatement of Agency 2d states:

> One who has title to property which he agrees to hold for the benefit and subject to the control of another is an agent-trustee and is subject to the rules of agency.

In this case it cannot be reasonably disputed that Agulto obtained title to the property for the benefit and on behalf of Reverend Gibson and ultimately SDA. The property was to be transferred to SDA to build and operate a school.

Agulto was subject to the control of Gibson and Fisher. The chain of events beginning with the 1983 negotiation to purchase by Gibson and ending with the 1986 lease to SDA shows that control. The land was transferred first to Agulto, then from Agulto to Cavities, Ltd., then back to Agulto who leased it to SDA in 1986. Agulto's expectation of a remainder interest is one that appears to have arisen on hindsight in 1986 when the land was reconveyed back to her, but definitely not in 1983.

Plaintiffs' present a number of legal theories and arguments in opposition to Villaluz's motion. The first is that Section

805 of the Covenant to Establish a Commonwealth in Political Union with the United States (hereinafter "the Covenant") violates the United Nations Trusteeship Agreement, Article 6, prohibiting discrimination within all elements of the population of the Trust Territory. They further argue that §805 of the Covenant violates the Equal Protection Clause of the U.S. Constitution, which restricts the United States from approving a provision which violates the U.S. Constitution.

Section 805 of the Covenant allows the Government of the Northern Mariana Islands to regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Marianas descent. Two reasons for the provision are: (1) the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and (2) to protect them against exploitation and to promote their economic advancement and self-sufficiency.

As to the first prong of plaintiffs' argument, the people of the Northern Mariana Islands negotiated and voted in favor of Section 805 and the entire Covenant, as part of their right to self-determination. At the time of negotiation the Northern Mariana Islands was a part of the United Nations Trust Territory. It no longer is, and the Trusteeship Agreement has since been replaced by the Covenant, which became fully implemented by Presidential Proclamation on November 3, 1986.

With respect to the constitutionality of Section 805 of the Covenant, this issue has been analyzed and addressed in Wabol, et al. v. Muna, et al (D.C. App. Div., 1987), 2 CR 963. In Wabol the court noted that the U.S. Congress cannot pass a law which violates the United States Constitution, citing U.S. v. Odneal (9th Cir., 1977), 565 F.2d 598, Cert. denied 435 U.S. 952, 98 S.Ct. 1581 (1978). Wabol, however, found the provision of Section 805 of the Covenant to have "a rationale relation to Congress' unique obligation to the peoples of the Northern Mariana Islands." Wabol, at 976. It determined that Section 805 survives (under the rationale relations test) scrutiny under the federal Constitution's 5th Amendment Equal Protection component.

This court agrees with and is bound by stare decisis to follow Wabol's rationale and ruling, and hereby reaffirms that the land alienation prohibition of Section 805 of the Covenant survives federal constitutional scrutiny, applying the rationale relations test, as opposed to the strict scrutiny standard urged by plaintiffs.

That being so, plaintiffs next assert that Article XII of the Northern Marianas Constitution, as the vehicle which implements Section 805 of the Covenant, does not survive equal protection scrutiny. Wabol, supra, touched on the constitutionality of Article XII of the Northern Marianas Constitution in conjunction with Section 805 of the Covenant, and found it to survive rationale relations scrutiny.

Article XII's source of authority is Section 805 of the Covenant. Article XII does not completely discriminate among all segments of the Commonwealth. It is limited as to both scope and time, and at the same time permits those adversely affected to an interest in land which is of substantial duration, i.e. previously a 40-year lease; now, 55 years.

Article XII provides that the acquisition of permanent and long-term interests in real property shall be limited to persons of Northern Marianas descent, i.e. Chamorros and Carolinians. Such a person must have been born or domiciled in the Northern Mariana Islands by 1950 (the cut-off date) and a citizen of the Trust Territory before termination of the Trusteeship with respect to the Commonwealth. See Article XII, section 4, of the Northern Marianas Constitution.

The line drawn by Article XII, section 4, of the Constitution appear intended to cover the broadest possible segment of the Commonwealth who were the indigenous population of the Trust Territory, and for whose protection Section 805 of the Covenant was intended. It did not rule ineligible children who are not full blooded Chamorros or Carolinians. In fact, it provides for a mathematical determination as to eligibility for those offsprings who are at least one-quarter Chamorro or Carolinian, using the year 1950 as a basis for full-bloodship.

Further, Article XII is circumscribed as to time, by Section 805 of the Covenant. The restriction on land alienation is permitted for a period not to exceed twenty-five years after

termination of the Trusteeship Agreement, unless otherwise extended.

The above factors lead this court to conclude that Article XII is rationally related to the goals and objectives of Section 805 of the Covenant, is limited in scope and duration, was not arbitrarily or capriciously drawn and, therefore, survives equal protection scrutiny, applying a rationale relations test.

Based on the foregoing, therefore, the court rules as follows:

1. The February 4, 1983, deed from Dionicio Cabrera to plaintiff Agulto was made in violation of Article XII of the Northern Marianas Constitution and therefore, such deed was void ab initio. Further, all transactions subsequently emanating from the Agulto 1983 deed are of no force, effect, or validity, including Agulto's 1986 lease to SDA.

2. Article XII of the Northern Marianas Constitution and Section 805 of the Covenant (i.e. U.S. Public Law 94-241) are not violative of the U.S. Constitution's Equal Protection Clause. Neither are they in violation of the U.N. Trusteeship Agreement's Article 6 non-discrimination clause, since the Covenant has superseded the Trusteeship Agreement.

Therefore, based on the foregoing findings and conclusions:

IT IS ORDERED that defendant Villaluz's motion for summary judgment be and is hereby GRANTED.

Dated at Saipan, MP, this 19th day of January, 1988.

Jose S. Dela Cruz, Associate Judge