Representative Antonio P. Sablan

19th NORTHERN MARIANAS COMMONWEALTH LEGISLATURE
P.O. BOX 500586
SAIPAN, MP 96950

STANDING COMMITTEE REPORT NO. 19-96
Date: FEBRUARY 23, 2016
RE: H.B. NO. 19-102

The Honorable Rafael S. Demapan
Speaker of the House of Representatives
Nineteenth Northern Marianas
Commonwealth Legislature
Capitol Hill
Saipan, MP 96950

Dear Mr. Speaker:

Your Committee on Ways and Means to which House Bill No. 19-102 was referred, entitled:

> "To make the Department of Lands and Natural Resources responsible for collecting the Managaha Fee and removing the Department of Public Lands as recipient of the Managaha Fees; and for other purposes."

begs leave to report as follows:

I. RECOMMENDATION:

After considerable discussion, your Committee recommends that the House pass House Bill No. 19-102 in the form of House Draft 1.

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DATE 3/7/16 TIME 8:39 am

II. ANALYSIS:

A. Purpose:

The purpose of House Bill No. 19-102 is to make the Department of Lands and Natural Resources responsible for collecting the Managaha Fee and removing the Department of Public Lands as recipient of the Managaha Fees, and for other purposes.

B. Amendments:

The Committee made the following amendments to strengthen the intent of House Bill No. 19-102.

- **Page 3**
  - Line 15 to line 16:
    - After the word "of", **deleted** the following language "the Saipan" and **inserted** the following language on line 16 "a".
  - Line 16:
    - After the word "the", **deleted** the following language "Saipan".
- **Page 4**
  - Line 1 to line 7:
    - After the word "the", **inserted** the following language "payments of judgments against the CNMI Government until such time that all judgments are satisfied. Thereafter, 5% shall remain in this account for future judgments against the CNMI government and the remaining 10% shall be deposited into the fund established under §1622 (b)(i)" and **deleted** the following language on line 5 "Department of Public Safety for their supplemental efforts in tourism enhancement activities".

Technical amendments.

C. Committee Findings:

Your Committee finds that Article XI, Section 2 of the N.M.I. Constitution states "The management and disposition of submerged lands off the coast of the Commonwealth shall be as

provided by law". As provided by Submerged Lands Act (P.L. 01-23), the Department of Natural Resources, which was later renamed to the Department of Lands and Natural Resources (DLNR) by Executive Order 94-3, was and continues to be responsible for the management of submerged lands. Your Committee further finds that according to 1 CMC §2653(c), DLNR is responsible for the preservation, protection, and maintenance of the public access of Managaha. Boat carriers continuously pass through submerged lands to further carry out their operations and provide services to individuals who wish to visit and enjoy the pristine conditions of Managaha. Therefore, it would be appropriate for DLNR to be the recipient of the Managaha Landing Fees in order for them to carry out their duties more efficiently.

Your Committee finds that several land compensation claims are not being paid. Due to such claims, the CNMI Government is obligated to pay the specified amount to the landowners. The CNMI Government must alleviate such pressures in order to fulfill their obligations to the respective landowners. Doing so would allow for the CNMI Government to focus on other important issues that affect our great Commonwealth.

It is the intent of your Committee to remove the Department of Public Safety from receiving a certain portion of the funds collected and to divert that portion of the funds to the payments of judgements against the CNMI Government. Therefore, your Committee agrees with the intent and purpose of House Bill No. 19-102 and recommends its passage in the form of House Draft 1.

D. Public Comments:

Comment(s) were received from:

- Richard B. Seman, Secretary, Department of Lands and Natural Resources.
- Pedro A. Tenorio, Secretary, Department of Public Lands.

E. Legislative History:

House Bill No. 19-102 was formally introduced to the full body of the House on October 27, 2015 by Rep. Joseph Lee Pan T. Guerrero and was subsequently referred to the House Standing Committee on Ways and Means for disposition.

F. Cost-Benefit:

The enactment of House Bill No. 19-102, HD1 will result in additional costs to the CNMI Government for as it place additional responsibilities on the Department of Lands and Natural Resources to carry out the intent of this Act. However, the economic benefits realized from the enactment of House Bill No. 19-102, HD1 will far outweigh such additional costs that may arise.

III. CONCLUSION:

The Committee recommends that the House pass House Bill No. 19-102 in the form of House Draft 1.

Respectfully submitted,

Rep. Antonio P. Sablan
Chairman

Rep. Felicidad T. Ogumoro
Vice Chairman

Rep. Edwin P. Aldan
Member

Rep. Anthony T. Benavente
Member

Rep. George N. Camacho
Member

Rep. Joseph P. Deleon Guerrero
Member

Rep. Lorenzo I. Deleon Guerrero
Member

Rep. Angel A. Demapan
Member

Rep. Joseph Lee Pan T. Guerrero
Member

Rep. Glenn L. Maratita
Member

Rep. Francis S. Taimanao
Member

Rep. Ramon A. Tebuteb
Member

Reviewed By:

House Legal Counsel

Attachment:

Letter dated January 21, 2016 from the Secretary of the Department of Lands and Natural Resources; and

Letter dated January 28, 2016 from the Secretary of the Department of Public Lands.

Commonwealth of the Northern Mariana Islands
Department of Lands and Natural Resources
Lower Base, Caller Box 10007
Saipan, MP 96950

Cable Address:
Gov. NMI Saipan
Telephone: 670-322-9834
Fax: 670-322-2633

January 21, 2016

Representative Tony Sablan
Chairman, Ways and Means
19th Northern Marianas Legislature
P. O. Box 500586
Saipan, MP 96950

RECEIVED
DATE: 1/25/16

Dear Representative Sablan:

Thank you for the opportunity to comment on House Bill No. 19-102, entitled *"To make the Department of Lands and Natural Resources responsible for collecting the Managaha Fee and removing the Department of Public Lands as recipient of the Managaha Fees; and for other purposes."*

DLNR appreciates the intent of the bill, however, the bill doesn't appropriate any funding towards management of the Managaha Marine Conservation Area (MMCA). HB 19-102 only allows DLNR to collect the fee and transitions from "landing fee" to "Managaha fee." As the bill states "the fee is imposed as a license, as such term is used in 1 CMC § 2803(a), to pass over the waters and submerged lands of the Commonwealth." If it is the intent of the bill to impose a fee for travelling over submerged lands, perhaps such fees should be given directly towards DLNR under a different bill, separating it from PL 11-64.

PL 12-12 created the Managaha Marine Conservation Area, however it did not appropriate any funding towards its' management. HB 19-102 only adds the burden of "collecting fees" but does not appropriate any percentage of the fee to cover administrative and operational expenses in fulfilling the additional task.

The Managaha Landing fees continue to be a topic of discussion, perhaps due to it's large amount of yearly collections. According to an OPA report on Managaha Landing Fees, a total of $1,690,161 was collected from fiscal years 2003-2006. We request for a percentage of the landing fee to be given to DLNR for the management of Managaha Marine Conservation Area. As it presently stands, Tasi Tours, under the *Exclusive Concession Agreement* can and has accessed funds collected from landing fees. DPL's Managaha Rangers deposit landing fees at every end of their shift ***"directly"*** to Tasi Tours. Tasi Tours has full access to utilize the funds for repairs or any upkeep of Managaha. As a for-profit company, Tasi Tours has an unfair advantage on utilizing landing fee funds to upkeep facilities which they profit from, ie, concession area pavilions, souvenir shop, etc., while DLNR does not have access to the funds to manage the marine area which is the main attractant to tourist in the first place. One of the notable images of Managaha is the abundance and diversity of marine resources, but although we are

tasked with enforcing PL 12-12, PL 11-64 nor does HB 19-102 appropriate any funding towards MMCA management, while benefits are reaped by the parties of the *Exclusive Concession Agreement*.

Incidentally, DLNR DFW also monitors the habitat and nesting sites of the wedgetail shearwater (*Puffinus pacificus*) on Managaha. Accessing landing fees will help continue DLNR DFW monitoring efforts. Other bird species known to inhabit Mañagaha Island are the wedgetail shearwater (*Puffinus pacificus*); white fairy tern (*Gygis alba*); cardinal honeyeater (*Myzomela cardinalis*); collared kingfisher (*Halcyon chloris*); and Eurasian tree sparrow (*Passer montanus*).

Furthermore, HB 19-102 proposes to increase the landing fee from five dollars to twenty dollars. DLNR would like to oppose the increase as it is excessively high and may deter tourist from entering Managaha. May we suggest a feasibility study on the proposed fee hike before enacting it. The benefits we expect to calculate from the 200% increase may likely be unseen if tourist refuse to visit Managaha due to the exorbitant landing fees.

I have also enclosed a copy of CNMI Supreme Court No. 2009-SCC-0041-CQU where the CNMI Supreme Court stated that "The legislature cannot, however pass a law that infringes upon the functions of another constitutional entity." Although the slip onion was a result of PL 16-31, the Supreme Court stated "In this case, PL 16-31 infringes upon the functions of the Marianas Public Land Trust, which is constitutionally required under Article XI § 6 to receive and invest the revenues derived from public lands for the benefit of Commonwealth people who are Northern Marians Descent." In essence, the court found it unconstitutional to redirect funds from public lands.

Thank you for the opportunity to comment. If you have any questions, please let me know.

Respectfully,

Richard B. Seman
Secretary, DLNR

/mct

Attachment

cc: Hon. Governor Ralph Torres
Representative Joseph Lee Pan T. Guerrero
SAPLR
DLNR SA
File

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

DEPARTMENT OF PUBLIC LANDS,
Petitioner,

v.

THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Respondent,

SUPREME COURT NO. 2009-SCC-0041-CQU

Cite as: 2010 MP 14

Decided October 4, 2010

Braddock J. Huesman, Office of the Attorney General, Saipan, Commonwealth of the Northern Mariana Islands, for the Petitioner.
Edward Buckingham, Office of the Attorney General, Saipan, Commonwealth of the Northern Mariana Islands, for the Respondent.
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

DEMAPAN, Chief Justice:

¶ 1 The Commonwealth Legislature recently enacted Public Law 16-31, which requires the Department of Public Lands ("DPL") to satisfy land compensation judgments out of the Department's operating budget. The Secretary of the Department of Public Lands and the Attorney General, on behalf of the Commonwealth government ("Government"), have now submitted a certified question concerning the constitutionality of PL 16-31. DPL argues that PL 16-31 violates Article XI § 5(g) of the NMI Constitution, which provides that the budget of the Marianas Public Land Corporation (the entity formally tasked with the administration of public lands) shall be submitted to the legislature for informational purposes only. The Government contends that the limitations contained in § 5(g) expired in 1994 when the Corporation was dissolved and the administration of public lands was constitutionally transferred to the executive branch. The parties have requested that the Court address the following question: "To what extent is Article XI of the NMI Constitution a restriction on Legislative action, and is Public Law 16-31 constitutional?" More specifically, we must decide whether the legislature can pass a law requiring the payment of land compensation judgments out of funds derived from public lands. This Court has jurisdiction under Article IV § 11 of the Commonwealth Constitution.

¶ 2 For the reasons set forth below we find that the drafters of the NMI Constitution did not intend for the restrictions contained in Article XI § 5 to bind the Commonwealth Legislature in perpetuity. We further hold that the legislature possesses the constitutional authority under Article III § 15 to redefine the functions of executive branch departments—including DPL. The legislature cannot, however, pass a law that infringes upon the functions of another constitutional entity. In this case, PL 16-31 infringes upon the functions of the Marianas Public Land Trust, which is constitutionally required under Article XI § 6 to receive and invest the revenues derived from public lands for the benefit of Commonwealth people who are of Northern Marianas descent. Accordingly, the provision in PL 16-31 requiring the payment of land compensation judgments out of funds derived from public lands conflicts with Article XI § 6 and is therefore unconstitutional.

I

¶ 3 Article XI of the NMI Constitution governs public lands within the Commonwealth.[1]

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[1] The definition of public lands includes: (1) all lands within the Northern Mariana Islands formally held by the Trust Territory of the Pacific Islands; (2) lands leased to the U.S. government under Article VIII of the Covenant; and (3) all submerged lands off any coast of the Commonwealth. NMI Const. art. XI, § 1. Public lands do not include "lands that the [Commonwealth] government purchases or leases from private owners or acquires by eminent domain after the establishment of the Commonwealth." Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands at 144 (1976).

Section 1 provides that public lands "belong[] collectively to the people of the Commonwealth who are of Northern Marianas descent." NMI Const. art. XI, § 1. The drafters of the NMI Constitution established two constitutional entities with divided responsibilities to administer public lands as co-trustees for the benefit of the people of the Commonwealth. The Marianas Public Land Corporation was established as a temporary autonomous agency vested with the responsibility of managing and disposing of public lands. *Id.* at §§ 3, 4. The Marianas Public Land Trust was established as a permanent constitutional entity designed to receive and invest the revenues derived from the management and disposition of public lands for the benefit of Commonwealth people who are of Northern Marianas descent. *Id.* at § 6.

A. The Public Land Corporation

¶ 4 Three sections in Article XI address the establishment, functions, governance, and eventual dissolution of the Public Land Corporation. Article XI § 3 sets forth the functions of the Corporation, stating that "[t]he *management* and *disposition* of public lands except [submerged lands] shall be the responsibility of the Marianas Public Land Corporation." NMI Const. art. XI, § 3 (emphasis added). Article XI § 4 establishes the Corporation and sets forth "the basic rules of organization and governance that would ordinarily be found in the charter, articles of incorporation or bylaws of a corporation." Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands at 146 (1976).[2]

¶ 5 Article XI § 4 also provides for the dissolution of the Corporation. When the NMI Constitution became effective in 1978, § 4(f) provided that "[a]fter this Constitution has been in effect for at least ten years, the corporation may be dissolved and its functions transferred to the executive branch of government by the affirmative vote of two-thirds of the members in each house." Under the original language of § 4(f), the life span of the Corporation was ten years, at which point the Commonwealth Legislature would have the discretion to dissolve the Corporation. Section 4(f) was later amended, during the Second Constitutional Convention held in 1985, to read: "After this corporation has been in effect for at least twelve years, the Corporation shall be dissolved and its functions shall be transferred to the executive branch of government." As amended in 1985, the Corporation's life span was extended two years, but its dissolution became mandatory.

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[2] Article XI § 4 sets forth the Corporation's number of directors and that they shall be appointed by the governor, NMI Const. art. XI, § 4(a); where the directors must reside, *id.* at § 4(b); the term limits of the directors, *id.* at § 4(c); that the board may only take action upon a majority vote, *id.* at § 4(d); and that the directors must submit an annual report to the people of the Commonwealth concerning the management of public lands, *id.* at § 4(e).

¶ 6 Article XI § 5 sets forth a series of "fundamental policies" that the Corporation was required to implement in carrying out its responsibilities. The "fundamental policies" include: (1) a homestead program; (2) restrictions on freehold transfers of public lands; (3) restrictions on the length, size, and location of leases of public lands; (4) a requirement for a land use strategy; and (5) a requirement that the Corporation receive and transfer all moneys generated from the management of public lands, less the amount necessary to pay for the costs of administration, to the Public Land Trust. *See* NMI Const. art. XI, § 5(a) – (g). During the Second Constitutional Convention in 1985, § 5(g) was amended as follows:

> The corporation shall receive all moneys from the public lands except those from lands in which freehold interest has been transferred to another agency of government pursuant to section 5(b), and shall transfer these moneys after the end of the fiscal year to the Marianas Public Land Trust except that the corporation shall retain the amount necessary to meet reasonable expenses of administration and management, land surveying, homestead development, and any other expenses reasonably necessary for the accomplishment of its functions. The annual budget of the corporation shall be submitted to the legislature for information purposes only.

NMI Const. art. XI, § 5(g). The most significant change to § 5(g) was the addition of the language that the "budget of the corporation shall be submitted to the legislature for information purposes only."[3] This amendment cut off any potential legislative control over the Corporation's budgetary considerations left open by the original language of § 5(g).

B. The Public Land Trust

¶ 7 Article XI § 6 establishes the Marianas Public Land Trust. Like the Corporation, the Public Land Trust is set up as autonomous constitutional entity. The constitution is rather brief in its consideration of the Public Land Trust, taking up only one section and six subsections. Article XI § 6 does not expressly state the functions of the Public Land Trust or what happens to the Trust once the Corporation is dissolved. And unlike Article XI § 5(g)—which expressly defines the interplay between the Corporation and the Public Land Trust—Article XI § 6 is silent as to the Trust's connection to the public lands.[4] However, the drafters provided ample commentary addressing the functions and operation of the Public Land Trust in the *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands* ("Analysis"). The Analysis is a memorandum, approved by the Constitutional Convention following the adoption of the

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[3] As originally drafted § 5(g) provided that "[t]he corporation shall receive all moneys from the public lands and shall transfer these moneys promptly to the Marianas Public Land Trust except that the corporation may retain the amount necessary to meet reasonable expenses of administration."

[4] For instance, while Article XI § 6(b) provides that "[t]he trustees shall make reasonable, careful and prudent investments[,]" nothing in § 6 states that the funds to be invested are derived from the administration of public lands.

constitution in 1976, that provides an explanation of each section in the Commonwealth Constitution and summarizes the intent of the Convention in approving each section. Analysis at 1; *see also*, *Rayphand v. Tenorio*, 2003 MP 12 ¶ 71. This Court has previously recognized that the Analysis "is extremely persuasive authority when one is called upon to discern the intent of the framers when the language of the Constitution presents an ambiguity." *Rayphand*, 2003 MP 12 ¶ 71. The following discussion of the Public Land Trust relies on the Analysis where Article XI § 6 is silent.

¶ 8 The Analysis makes clear that the Public Land Trust was established "to hold and invest the proceeds from leases and other transfers of public land." Analysis at 160 ("The main function of the trustees is to invest the funds derived from the public lands."). Unlike the Corporation, the Public Land Trust does not have an expiration date. That is, absent a constitutional amendment, the Trust exists in perpetuity. *Id.* ("The trust may not be dissolved except by constitutional amendment."). The Analysis also makes clear that the Trust is intended to receive the proceeds from public lands after the dissolution of the Corporation. *Id.* ("The trust will hold the proceeds from . . . [public lands] made by the corporation *or its successors* after the effective date of the Constitution.") (emphasis added). The fact that the Public Land Trust will continue to receive the proceeds from public lands after the dissolution of the Corporation is also supported by Article XI § 6(e), which provides that the trustees prepare and publish an annual report, including an "accounting for the revenues received" by the Trust. NMI Const. art. XI, § 6(e). We read the phrase "revenues received" to mean those revenues received from the entity tasked with the management and disposition of public lands.

¶ 9 Article XI § 6(d) provides that the interest earned on the trust proceeds shall be transferred to the Commonwealth general fund for appropriation by the Commonwealth Legislature. The Analysis makes clear that the funds transferred to the general fund need not be earmarked for any particular purpose, and that "[t]he legislature may allocate funds from its general revenues among the competing needs of the people of the Commonwealth as it sees fit." Analysis at 162. Finally, Article XI § 6(f) provides that the trustees shall be held to strict standards of fiduciary care.

¶ 10 In sum, Article XI established the Corporation to manage the public lands of the Commonwealth; it provided specific fundamental policies that the Corporation was to follow in order to implement its functions; it created the Public Land Trust to receive the moneys generated by the Corporation and its successors to hold in trust for the benefit of the people of the Commonwealth who are of Northern Marianas descent; and it provided for the dissolution of the

Corporation after twelve years, at which time the functions of the Corporation were to be transferred to the executive branch.

C. Transfer of Land Management to the Executive Branch

¶ 11 Under Article XI § 4(f), after the Commonwealth Constitution had been in effect for at least twelve years, the Corporation was required to be dissolved and its functions transferred to the executive branch. In 1994, the governor issued Executive Order ("EO") 94-3, which dissolved the Corporation and transferred its functions to the Division of Public Lands in the Department of Lands and Natural Resources within the executive branch. The dissolution of the Corporation by EO 94-3 was upheld by this Court in *Commonwealth v. Anglo*, 1999 MP 6 ¶¶ 17-18. Since the dissolution of the Corporation its functions have been transferred by the legislature to a number of different entities within the executive branch. *See* Public Laws 10-57, 12-33, and 12-71.

¶ 12 In 2006, the legislature passed the Public Lands Act (PL 15-2), which abolished the Marianas Public Lands Authority—the latest incarnation of the Corporation—and established the Department of Public Lands to "manage and administer the Commonwealth's public lands under the provisions of Article XI of the Constitution." PL 15-2, § 101 (codified in 1 CMC §§ 2801-2809). The Public Lands Act also provided for an Operations Fund, in which all the revenues generated through the administration of public lands would be deposited, and from which DPL would satisfy its operational expenses:

> There is hereby established a fund to be known as the DPL Operations Fund which shall be maintained by the Department of Finance. The bank account(s) for the DPL Operations Fund shall be separate and apart from the General Fund Bank Account(s) and other funds of the Commonwealth Government . . . .
>
> (1) All revenues received by the Department, from whatever source shall be deposited in the DPL Operations Fund bank account(s) in banks located in the Commonwealth that are insured by the FDIC.
>
> . . .
>
> (3) All debts, liabilities, obligations and operational expenses of the Department shall be paid from the DPL Operations Fund bank account(s).
>
> . . .

Public Lands Act of 2006, 1 CMC § 2803(c)(1) and (3).

¶ 13 Finally, in 2009, the legislature passed PL 16-31. Public Law 16-31 requires DPL to pay land compensation judgments out of its operating budget, amending 1 CMC § 2803(c)(3) to read: "All debts, liabilities, obligations, and operational expenses of the Department *including land compensation judgments* shall be paid from the DPL Operations Fund bank account(s)." PL 16-31, § 2 (emphasis added).

¶ 14 Following the enactment of PL 16-31, DPL and the Commonwealth Government petitioned this Court to address whether PL 16-31 is constitutional. In their briefs, both parties focus their arguments on whether the fundamental policies contained in Article XI § 5 remain constitutionally operative after the dissolution of the Public Land Corporation. *See* Government's Response Brief at 6 ("it becomes clear that whether Public Law 16-31 infringes on Article XI, § 5 depends on the resolution of just one question: Whether NMI Const. art. XI, § 5, the 'fundamental policies' of MPLC, is applicable to the successor entities created by the legislature (including the present DPL) after MPLC was abolished."). The parties are certainly correct that the question is an important one. Article XI § 5(g) provides that "[t]he annual budget of the corporation shall be submitted to the legislature for information purposes only." If the provisions contained in § 5 remain applicable to DPL, including the restrictions contained in § 5(g), then PL 16-31 is facially unconstitutional.

¶ 15 While we agree that the question of whether Article XI § 5 remains constitutionally operative is an important one, we disagree with the contention that it is dispositive of the question now before the Court—whether PL 16-31 is constitutional. Even if the fundamental policies contained in Article XI § 5 are no longer constitutionally operative, the legislature remains bound by the ordinary restrictions placed on the legislative branch's law making authority, two of which are relevant in this case. First, this Court has held that the legislature cannot pass a law that conflicts with any provision of the Commonwealth Constitution. *Commonwealth v. Tinian Casino Gaming Control Comm'n*, 3 NMI 134, 147-48 (1992). Second, when the constitution defines the functions of a constitutional entity—in this case the Public Land Trust—the legislature cannot transfer the functions of that entity to another governmental body absent a constitutional amendment. *See, e.g., Preece v. Rampton*, 492 P.2d 1355 (Utah 1972).

¶ 16 This Court has previously held that, in appropriate cases, we have the discretion to reframe certified questions "so as to provide the guidance actually sought." *Kabir v. Barcinas*, 2009 MP 19 ¶ 39 n.22 (Slip Opinion, Dec. 31, 2009) (citing *Shorts v. Bartholomew*, 278 S.W.3d 268 (Tenn. 2009)). The guidance actually sought in this case is whether PL 16-31 is constitutional. In order to resolve the dispute between DPL and the Government (and answer the question of whether PL 16-31 is constitutional) this Court must address two interrelated, but legally distinct, questions: (1) whether the fundamental policies contained in Article XI § 5 remain constitutionally operative after the dissolution of the Marianas Public Land Corporation; and (2) if the provisions in § 5 were not intended to survive the dissolution of the Corporation, then the next question is whether PL 16-31—requiring the payment of land compensation

judgments from moneys derived from the administration of public lands—conflicts with any other provision of the constitution.

A. Whether the "fundamental policies" contained in Article XI § 5 remain constitutionally operative after the dissolution of the Marianas Public Land Corporation

¶ 17 Whether Article XI § 5 remains constitutionally operative after the dissolution of the Corporation is a matter of constitutional interpretation. This Court has held that in dealing with such questions the starting point is the constitutional text itself, and if possible the text must be given its plain meaning. *Camacho v. N. Marianas Ret. Fund*, 1 NMI 362, 368 (1990); *see also*, 2A Sutherland, Statutory Construction § 47:01 (6th ed. Singer 2000) ("The starting point in statutory construction is to read and examine the text of the act and draw inferences concerning its meaning from its composition and structure."). When presented with a question of constitutional interpretation "[w]e are duty-bound to give effect to the intention of the framers of the NMI Constitution. *Aldan-Pierce v. Mafnas*, 2 NMI 122, 163 (1991). Furthermore, the intent of the framers may be determined through an examination of the relevant legislative history. *See Calvo v. N. Mariana Islands Scholarship Advisory Bd.*, 2009 MP 2 ¶ 23 ("Where the language is ambiguous, we may take instruction from the legislative history."); *see also*, *Songao v. Commonwealth*, 4 NMI 186, 190 (1995).

¶ 18 Beginning with the constitutional text, Article XI § 4(f) provides that upon the dissolution of the Public Land Corporation, "its functions shall be transferred to the executive branch of government." NMI Const. art. XI, § 4(f). DPL contends that the fundamental policies contained in Article XI § 5 constitute the "functions" of the Corporation and were therefore transferred to, and remain binding on, the executive branch. We disagree. Article XI § 3 states that "*[t]he management and disposition of public lands* . . . shall be the responsibility of the Marianas Public Land Corporation." NMI Const. art. XI, § 3 (emphasis added). This Court has not directly addressed the functions of the Corporation. However, in *Govendo v. Marianas Public Land Corporation*, 2 NMI 482 (1992), this Court stated that "MPLC is a public corporation created under Article XI, Section 4 of the NMI Constitution, entrusted with the management and disposition of public lands." *Id.* at 486-87; *see also*, *Lizama v. Rios*, 2 CR 569, 576 (Trial Ct. 1986) ("MPLC was established to manage and dispose of public lands . . . ."); *Marianas Pub. Land Trust v. Marianas Pub. Land Corp.*, 1 CR 968, 970 (Trial Ct. 1984); *Romisher v. Marianas Pub. Land Corp.*, 1 CR 874 (Trial Ct. 1983). According to the Analysis, "[t]he term *management* includes the preservation, improvement and use of the public lands [and] [t]he term *disposition* means sale, lease, and granting easements or other interests in the public lands." Analysis at 145-46 (emphasis added). These are rather broad duties and reading Article XI as a whole (and

looking particularly at the interplay between sections 3, 4, and 5) it is clear that the fundamental policies contained in § 5 were intended by the drafters to be particularized tools to be used by the Corporation to fulfill its constitutional functions set forth in § 3. We hold that the "functions" of the now dissolved Public Land Corporation (as contemplated by Article XI § 4) only included the management and disposition of public lands.

¶ 19 The above interpretation is also supported by the language of Article XI § 5, which provides that "[t]he Marianas Public Land Corporation shall follow certain fundamental policies in the performance of its responsibilities." We are concerned here with the drafter's use of the term "responsibilities." The definition of "responsibility" is "[s]omething for which one is accountable: Duty." Webster's II: New Riverside University Dictionary at 1001 (1984). Significantly, the ordinary meaning of "duty" is "*[f]unction* or work." *Id.* at 412 (emphasis added). We find that the drafters used the terms "responsibilities" (as that term appears in Article XI §§ 3 and 5) interchangeably with the term "functions" (as it appears in Article XI § 4). The language in § 5 clearly distinguishes between the Corporation's fundamental policies and its responsibilities. In light of the above discussion, we find that the drafters intended the fundamental policies contained in § 5 to constitute something more specific than the Corporation's functions. Indeed, looking at Article XI as a whole, it is clear that the drafters intended the fundamental policies to act as tools for the Corporation to carry out its constitutionally mandated functions of managing and disposing of public lands.

¶ 20 We are also persuaded that the plain language of Article XI § 5 indicates that fundamental policies were only applicable to the Corporation. As the Government points out, each of the subsections of § 5 expressly refers to the Corporation. For instance, § 5(g) states that "[t]he corporation shall receive all money from the public lands . . . ." NMI Const. art. XI, § 5(g). This Court has held that "[f]or the purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time." *Aldan-Pierce*, 2 NMI at 161 (quoting *O'Connell v. Slavin*, 452 P.2d 946 (Wash. 1969)). In this case, the repeated references to the Corporation in each of the subsections of Article XI § 5 raises the implication that the fundamental policies only applied to that entity.

¶ 21 While Article XI § 5 does not expressly state whether the fundamental policies were intended to pass on to the Corporation's successors in interest, DPL points the Court to § 5(b), which prohibits the Corporation from selling freehold interests in land for twenty years after the effective date of the Constitution. As DPL points out, "[t]he Constitution's effective date is 1978, and, thus, the prohibitions contained in Article XI § 5(b) didn't end until 1998[,]" which was after the Corporation was dissolved. Reply Brief at 4. The gist of DPL's argument is that since at least

one of the provisions in § 5 survived the dissolution of the Corporation, this Court should hold that all of the provisions in § 5 remain applicable to the Corporation's successors in interest. We find this argument compelling. DPL's position, however, is not supported by the applicable legislative history.

¶ 22 In discussing Article XI § 4(f) (the section that provides for the dissolution of the Corporation and the transfer of its functions to the executive branch), the Committee on Personal Rights and Natural Resources stated that:

> The Committee believes that much of the work with respect to the public lands may be completed within 10 years. Much of the land available for homesteading may have been transferred by that time; other portions of the land may be under long-term leases that will not be renegotiated for some years; and public uses for parks and other recreational, historic preservation, and scenic uses will have been established. The Committee recommends that a Corporation structure be used, in part, because it is easier to dismantle when it is no longer needed. This section provides for that dissolution. At any time ten years after the effective date of the Constitution, the legislature may decide to disband the Corporation . . . .

Committee Recommendation No. 5, Committee on Personal Rights and Natural Resources (Nov. 4, 1976), *reprinted in* 2 Journal of the Northern Marianas Constitutional Convention 523 (1976). While the language of the Committee Report quoted above is discussing § 4(f), the subjects referred to, homesteading and long-term leases of public land, make up part of the fundamental policies contained in § 5. The Committee Report indicates that the drafters of Article XI contemplated that at some point in the future the fundamental policies contained in § 5 would no longer be fundamental; that is, the tools established by the drafters for the initial management and disposition of public lands would eventually run their course and new policies would have to be established to carry out the Corporation's functions. Like the Committee Report, the Analysis also supports the conclusion that the fundamental policies contained in § 5 were not intended to bind the Corporation's successors. For instance, speaking to the continuation of the homestead program required by § 5(a), the Analysis indicates that when the Corporation is dissolved and a successor entity is created to take on the mantel of administering the public lands, the legislature will have a choice whether to continue the program. Analysis at 152. These statements indicate that the drafters did not intend for the fundamental policies contained in §5 to bind the legislature in perpetuity.

¶ 23 We hold that neither the text nor the legislative history of Article XI support the proposition that the fundamental policies contained in § 5 remain constitutionally operative. The legislature and executive branch are therefore free to set the policies for the body tasked with the

management and disposition of public lands as they see fit, provided that they do so within their constitutional limitations.

B. Whether the legislature can require the payment of land compensation judgments from funds derived from public lands

¶ 24 Our conclusion that Article XI § 5 is no longer constitutionally operative does not dispose of the ultimate question in this case, which is whether the legislature can require the payment of land compensation judgments out of funds derived from the administration of public lands. The legislature cannot exceed its constitutional authority; it cannot pass a law that conflicts with the Commonwealth Constitution, *Tinian Casino Gaming Control Comm'n*, 3 NMI at 147-48, and it cannot delegate the functions of a constitutional entity to another governmental body. *See Josephs v. Douglass*, 110 P. 177, 180 (Nev. 1910) ("Every constitutional officer derives his power and authority from the Constitution, the same as the Legislature does, and the Legislature, in the absence of express constitutional authority, is as powerless to add to a constitutional office duties foreign to that office, as it is to take away duties that naturally belong to it.") *overruled on other grounds* in *Harvey v. Second Judicial Ct.*, 32 P.3d 1263 (Nev. 2001); *see also*, *Thompson v. Legislative Audit Comm'n*, 448 P.2d 799 (N.M. 1968) (holding a law unconstitutional that divested the state auditor of its constitutionally defined powers). As set forth below, in passing PL 16-31, the legislature violated both of the above rules and exceeded its constitutional authority.

1. Article III § 15 of the Commonwealth Constitution

¶ 25 Article III § 15 of the Commonwealth Constitution provides in relevant part that:

> Executive branch offices, agencies and instrumentalities of the Commonwealth government and their respective functions and duties shall be allocated by law among and within not more than fifteen principal departments . . . . The functions and duties of the principal departments and of other agencies of the Commonwealth shall be provided by law. *The legislature may reallocate offices, agencies and instrumentalities among the principal departments and may change their functions and duties.* The governor may make changes in the allocation of offices, agencies and instrumentalities and in their functions and duties that are necessary for efficient administration."

NMI Const. art. III, § 15 (emphasis added). This Court has interpreted Article III § 15 in two previous cases.

¶ 26 In *Sonoda v. Cabrera*, 1997 MP 5, this Court considered the constitutionality of an executive order transferring a number of government positions out of the civil service system, thereby making the employees in those positions directly accountable to the governor. Under Article XX of the Commonwealth Constitution the legislature has the authority to exempt

government employees from the civil service system. Pursuant to that authority, the legislature established twelve exempt positions. *See* 1 CMC § 8131. In *Sonoda*, the governor attempted to add an additional group of employees to the exemption list. 1997 MP 5 ¶ 6. The plaintiff in that case argued that the executive order directly conflicted with Article XX. This Court agreed, holding that while the governor has broad authority under Article III § 15 to reorganize the departments within the executive branch for the purpose of efficient administration, that power cannot conflict with another constitutional entity's functions. *Id.* ¶ 7 ("While this Court recognizes that the Governor may reallocate offices for 'efficient administration' subject to Legislative approval . . . , the Executive may not create a system whereby employment positions would be created and appointed at his pleasure. The Governor lacks the authority, under the Constitution, to appoint such positions.").

¶ 27 This Court also addressed Article III § 15 in *Torres v. Commonwealth Utilities Corporation*, 2009 MP 14. In that case, the governor issued a series of executive orders transferring the Commonwealth Utilities Corporation ("CUC") to the Utilities Division of the Department of Public Works and then reinstituted CUC as a public corporation, but "reorganized CUC's administration in a way that significantly departed from its original form." *Id.* ¶ 3. The plaintiffs argued that the executive orders in effect created a new executive department thereby exceeding the governor's reorganization powers under Article III § 15. *Id.* ¶ 10. This Court agreed. Relying on *Sonoda v. Cabrera*, the Court stated that "[w]hile *Sonoda* did not set an exact limit on a governor's power to reorganize the executive branch, it made abundantly clear that *a governor could not take on functions that were constitutionally delegated to another branch*." *Id.* ¶ 14 (emphasis added). With this principle in mind, the Court looked to the provision in Article III § 15 that provides "[e]xecutive branch offices, agencies and instrumentalities of the Commonwealth government and their respective functions and duties shall be allocated *by law*." *Id.* ¶ 19 (emphasis in original). The Court further stated that "[s]ince Article II vests law-making authority in the legislature, and Article III, Section 15 states that agencies are created 'by law,' the framers of the Constitution likely intended the legislature to be the branch responsible for creating executive branch agencies." *Id.* In other words, this Court held that notwithstanding the powers granted to the governor in Article III § 15, the governor could not exercise his powers in a way that usurped the functions of another constitutional entity. *Id.* at § 25 ("a governor does not have the authority [under Article III § 15] to take on functions which are delegated to the legislature by the constitution.").

¶ 28 While this Court's holdings in *Sonoda* and *Torres* both dealt with the governor's reorganization power under Article III § 15, the reasoning applies equally to the legislature's

power under the same article. In other words, while the legislature has the power under Article III § 15 to create and to define the functions of executive branch departments, it cannot do so in a way that conflicts with another constitutional entity's functions. For example, while the legislature can add functions to executive branch departments including the Attorney General's Office, it could not grant the AG the authority to issue pardons or reprieves—a function constitutionally delegated to the governor alone. *See* NMI Const. art. III, § 9(c).

2. Whether PL 16-31 conflicts with the functions of the Public Land Trust

¶ 29 This Court has made clear that if a law conflicts with a provision of the Commonwealth Constitution, "that provision must fall." *Tinian Casino Gaming Control Comm'n*, 3 NMI at 148. Furthermore, it is well-settled in U.S. jurisprudence that neither the governor nor the legislature may take the function of a constitutionally created entity and transfer that function to another governmental entity. *See, e.g., In re House Resolution Relating to House Bill No. 349*, 21 P. 486 (Colo. 1888) (striking down a law that transferred control over public funds from the state treasurer to the governor). In this case, the legislature, through PL 16-31, has required DPL to pay land compensation claims—a function that lies outside the scope of the functions DPL inherited from the Public Land Corporation. Under *Sonoda* and *Torres*, this additional function is permissible unless it conflicts with another constitutional entity's functions.

¶ 30 The parties in this case have failed to raise the issue of how PL 16-31 may conflict with the functions of the Public Land Trust. Under Article XI § 6 the Public Land Trust is a constitutionally created entity that lasts in perpetuity absent a constitutional amendment. The drafters made clear that the functions of the Public Land Trust are to hold and invest the revenues generated from the management and disposition of public lands. Analysis at 160. The drafters likewise made clear that Public Land Trust will receive the funds generated from public lands even after the dissolution of the Public Land Corporation. *Id.* If one of the functions of the Public Land Trust is to receive the funds from public lands then any attempt by the legislature to appropriate those funds before they reach the Trust would infringe Article XI § 6 and frustrate the intent of the framers to utilize the public lands in the best interest of the people of the Commonwealth who are of Northern Marianas descent.[5]

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[5] Examining the legislature's appropriations power also implicates Public Law 15-2, which delegates to DPL the power to manage and administer public lands and provides that DPL's operations budget may be paid from DPL revenues. Operations budgets for executive branch departments are funded through legislative appropriation. However, DPL's current practice is to withhold operating expenses from the moneys generated through the management and disposition of public lands before transferring the money to the Public Land Trust. While constitutional authority for this practice existed in Article XI § 5(g), which permitted MPLC to retain funds necessary to meet reasonable administrative expenses, this section is

¶ 31 The framers of the Constitution made clear the importance of land to the people of the Commonwealth. Analysis at 165 ("Land is the only significant asset that the people of the Commonwealth have. There are no substantial mineral resources; there is no large manufacturing enterprise capable of sustaining large numbers or people; there is no valuable location on important trade routes."). Given the lack of other sources of economic development, the framers set up a constitutional institution to take advantage of the Commonwealth's most valuable asset—land—for the benefit of the people of Northern Marianas descent. That institution is the Public Land Trust. If the legislature, in a moment of economic distress, can redirect the moneys generated from the public lands away from the Trust, the Trust will not only be defunded, but it will also cease to serve the constitutional functions for which it was created.

¶ 32 In *Marianas Public Land Trust v. Marianas Public Land Corporation*, 1 CR 968, 970 (Trial Ct. 1984), the now defunct Commonwealth Trial Court discussed the nature of the funds generated from the management and disposition of public lands. In that case, the Public Land Trust filed suit against the Corporation to recover funds that had been given to the Corporation by the United States Government for the lease of property in Tinian. Under Article XI § 5 the Corporation was allowed to withhold reasonable expenses of administration from the moneys generated through the management and disposition of public lands before transferring the money to the Public Land Trust. The issue in the case was whether "land acquisition costs [could be] considered . . . reasonable expenses of administration" within the meaning of Article XI. *Id.* at 969. The court held that they were not. In its analysis, the court began from the premise that "MPLC receives funds for public lands as a Trustee . . . [and that] [t]he beneficiaries are the people of the Commonwealth who are of Northern Marianas descent." *Id.* (citing NMI Const. art. XI, § 1). The court continued:

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no longer constitutionally operative. If DPL is to continue its practice, authority for doing so must exist elsewhere.

Under the "non-delegation doctrine" the legislature is generally prohibited from delegating its legislative power to another branch of government. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) ("The integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch."); *see Reyes v. Reyes*, 2004 MP 1 ¶ 90 ("No branch may assert control over the others, except as provided in the constitution, and no branch may exercise the power granted by the constitution to another.") (citing *Sablan v. Tenorio*, 4 NMI 351, 363-64 (1996)).

We question whether Public Law 15-2 constitutes an impermissible delegation of the legislature's appropriations power to DPL, and thus to the executive branch. However, because we are not asked to determine whether Public Law 15-2 passes constitutional muster, we only express our concern on this matter and this opinion should in no way be construed as answering this distinct legal question.

> To carry out its Constitutional duties and obligations it must transfer promptly the funds received to MPLT. The latter is akin to a co-trustee. MPLC as a trustee has the duty to account to the beneficiaries as well as MPLT which is the depository for the trust funds . . . . Thus, all the MPLT need do is demand all monies received by MPLC from the public lands and the burden is on MPLC to pay the money to MPLT less the expenses of administration which MPLC can prove.

Id. at 869-70.

¶ 33 From this premise the court held that while "[t]he legislature can grant land acquisition powers to MPLC . . . there is no authority to utilize trust funds for land acquisition costs and the legislature would have to appropriate the funds." *Id.* at 970. In other words, the Trial Court contemplated the very situation now before the Court in which the legislature redefined the functions of the Corporation to include the payment of land acquisition claims and held that regardless of whether the legislature could properly assign land acquisition to the Corporation, it could not require compensation through money generated from public lands because that money is held by the Public Land Trust for the benefit of people of Northern Marianas descent. Ultimately, the court held that land acquisition costs did not constitute "reasonable expenses of administration" because land acquisition fell outside the scope of the Corporation's constitutional functions. *Id.* at 970-71 ("Land acquisition powers were not granted MPLC by the Constitution.")

¶ 34 We hold that the revenues generated from the management and disposition of public lands are trust funds that must go to the Public Land Trust to be held for the benefit of people who are of Northern Marianas descent. If the legislature wishes to add land compensation judgments to DPL's operating budget it is free to do so, but it must appropriate the money to satisfy such judgments—it may not tap into the funds derived from public lands absent a constitutional amendment or absent the abolishment of the Public Land Trust.[6]

III

¶ 35 Under Article XI § 4(f), after being in existence for twelve years, the Public Land Corporation was dissolved and its functions were transferred to the executive branch. The

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[6] On August 20, 2010, the Commonwealth Government filed supplemental authorities pursuant to NMI Sup. Ct. R. 28(j). In its filing, the Government informed the Court that an initiative will be put before the voters in the upcoming November election. The initiative seeks "To amend Article XI, Section 5(g) of the NMI Constitution to authorize the Department of Public Lands to use up to twenty percent of its revenue to pay and satisfy land compensation claims; and for other purposes." *See* House Legislative Initiative 16-18. The fact that a proposed constitutional amendment will appear on the next election ballot has no bearing on this Court's decision in this case. However, since the initiative does deal directly with the subject matter of the certified question now before the Court, in an effort to fulfill our constitutional duties under Article IV § 11, we reiterate that Article XI § 5 is no longer constitutionally operative. If the legislature wishes to propose an amendment to the NMI Constitution allowing for the payment of land compensation judgments out of funds derived from public lands, it must do so independent of Article XI § 5.

Department of Public Lands is now the entity tasked with the responsibility of managing and disposing of public lands. Article III § 15 allows the legislature to redefine the functions of the executive branch departments. Reading Article III § 15 in conjunction with Article XI § 4, we conclude that the legislature may redefine the functions of DPL. However, the legislature may not redefine the functions of any executive branch department in a manner that infringes upon another constitutional office. In this case, PL 16-31 infringes upon the Public Land Trust's constitutionally mandated functions of receiving and investing the revenues from public lands for the benefit of people of Northern Marianas descent. We therefore hold that PL 16-31 is unconstitutional.

SO ORDERED this 4th day of October 2010.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
ALEXANDRO C. CASTRO
Associate Justice

/s/
JOHN A. MANGLONA
Associate Justice

Commonwealth of the Northern Mariana Islands
Office of the Governor
DEPARTMENT OF PUBLIC LANDS

January 28, 2016 AD 16-0068

2/1/16 @

Honorable Antonio P. Sablan
Chairman, Ways and Means Committee
House of Representatives
Nineteenth Northern Marianas Legislature
P.O. Box 500586
Saipan, MP 96950

Re: House Bill 19-102 (Mañagaha Landing Fee)

Dear Chairman Sablan:

Thank you for giving us the opportunity to comment on House Bill 19-102.

House Bill 19-102 ("H.B. 19-102"), if enacted into law would divest the Department of Public Lands ("DPL") of its duty to collect the Mañagaha Landing and User Fees. This duty is part of DPL's inherent functions to manage and dispose of public lands as mandated by Article XI Section 3 of the NMI Constitution and P.L. 15-02. H.B. 19-102 proposes to transfer this duty to the Department of Lands and Natural Resources ("DLNR").

H.B. 19-102 proposes that DLNR shall be responsible for the collection of all revenues from the Mañagaha Landing and User Fees. It proposes that the fees shall be appropriated for projects and for the construction, maintenance and operation of the Saipan Cultural and Performing Arts Center, the Saipan Youth Program, Commonwealth Museum, and for the cultural heritage activities of the Indigenous and Carolinian Affairs Offices. It also proposes to use 50% for the payment of land compensation claims, and 15% for the Department of Public Safety for their supplemental efforts in tourism enhancement activities.

H.B. 19-102, if enacted into law, would also impair the obligation of DPL's existing contract with Tasi Tours, Inc., the current Mañagaha concessionaire.

After a thorough analysis on H.B. 19-102's intents, purposes and potential impact, DPL opposes such proposed legislation for the following reasons:

First, DPL, as current successor to the Marianas Public Land Corporation ("MPLC"), is vested with the proper management and disposition of public lands pursuant to Article XI Section 3 of the NMI Constitution and P.L. 15-02. H.B. 19-102, if signed into law, would infringe on DPL's fiduciary duty to manage and dispose of public lands for the best interest of all persons of Northern Marianas descent.

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The caption "Mañagaha Landing and User Fees" speaks for itself. It is clear, unambiguous, and self-explanatory. It is a user fee for nonresident passengers "landing" or "disembarking" on surface land--Mañagaha Island. H.B. 19-102's attempt to disguise the nature of the Mañagaha Landing and User Fees "as a 'license' of a right to pass over the waters of the Commonwealth," is bogus at best. One is not charge a "license fee" for merely riding in a boat and traversing across the waters of Saipan.

Second, this proposed legislation, if enacted into a law, would impair the obligation of DPL's existing contract with Tasi Tours, Inc., the current Mañagaha concessionaire, and is therefore, probably unenforceable without the consent of the parties.

On August 31, 2001, Department of Public Lands' ("DPL") predecessor, the Office of Public Lands ("OPL"), through its Board of Public Lands (the "Board") and Tasi Tours (the "Concessionaire" or "Tasi Tours") entered into an *Agreement for Special Recreational Concession* (the "Agreement"). The Agreement provided for the continued collection of Landing and User Fees on Mañagaha Island and the payment of 20% of such fees to the Mañagaha Trust Account.

The Agreement further provided that the Board would seek a determination of the validity of Public Law 11-64 ("P.L. 11-64") by submitting a certified question to the Commonwealth Supreme Court. P.L. 11-64 provided that the Mañagaha Landing and User Fees would support five different activities without specifying how the funds would be divided among the activities and without recognizing the existence of a contract which already obligated the expenditure of the funds. The Agreement further provided that if P.L. 11-64 were ruled invalid, then 75% of the Mañagaha Landing and User Fees would be deposited into the Mañagaha Trust Account.

On July 3, 2001, the Legislature enacted Public Law No. 13-16 ("P.L. 13-16"), which identifies the Mañagaha Landing and User Fees funds held by OPL and appropriated $2,600,000 from these funds to the Marianas Visitors Authority to implement the CNMI Tourism Strategic Plan, and $650,704 to the Mañagaha Trust Account. The latter funds were identified as collected prior to the effective date of P.L. 11-64 and were, therefore, not subject to appropriation.

P.L. 13-16 further provided that future collections of the Mañagaha Landing and User Fees would be deposited into the Mañagaha Trust Account. The funds are available for use by the Concessionaire as provided for in the Agreement. The law does provide for later appropriation of some of these funds by the Legislature. Commencing with the FY-2003 collections, any Landing and User Fees, except for the initial $650,704 deposit, which are collected in any fiscal year and have not been expended within that fiscal year, are subject to appropriation at the end of the fiscal year pursuant to P.L. 11-64.

Thus, P.L. 13-16 purported to affect the rights and liabilities of both the Board and the Concessionaire under the Agreement. As such, it was a law, which impaired the obligation of a contract. Under the NMI and U.S. Constitutions, the Contracts Clause provides that "[n]o law shall be made that is . . . a law impairing the obligation of contracts . . . ." *NMI*

Const. art. I, § 1, *see also* U.S. Const., art. I, § 10. Thus, P.L. 13-16 was probably not enforceable without the consent of the parties, as explained more fully below.

The Contracts Clause issue was avoided with respect to P.L. 13-16 because the Concessionaire agreed to make itself subject to P.L. 13-16 and to modify the Agreement to be consistent with the new law, although it conditioned its consent upon two requirements: (1) that the $650,704 would be paid immediately into the Mañagaha Trust Account, and (2) that no court or other body find that P.L. 13-16 amends Section 9(D)(1) of the Agreement. Section 9(D)(1) specifies when the Concessionaire may use the Landing and User Fees. The use of these fees to provide free public services, protect public safety, pay for insurance, maintain the cleanliness and appearance of Mañagaha Island, and to construct, maintain, and repair public facilities, improvements, equipment, and infrastructure was material consideration provided by the Board to the Concessionaire under the Agreement.

As with P.L. 13-16, H.B. 19-102 purports to affect the rights and liabilities of DPL and Tasi Tours under the Agreement. As such, it is a law, which impairs the obligation of a contract and is probably not enforceable without the consent of the parties pursuant to the Contracts Clauses of the NMI and U.S. Constitutions. NMI Const. art. I, § 1, U.S. Const., art. I, § 10.

The reason it is only "probably" unenforceable is because the prohibition of the Contracts Clause "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 54 S.Ct. 231 (1933). There have been laws that have survived Contracts Clause attacks, but laws are analyzed with heightened scrutiny when a state legislature attempts to pass a law affecting its own contractual obligations, as opposed to the contractual obligations of private parties. Courts have expressed the dual standard as follows:

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 25-6 (1977). Here, the Commonwealth, through DPL, has negotiated an Agreement with Tasi Tours. Part of the consideration Tasi Tours receives under the Agreement is the right to use part the Mañagaha Landing and User Fees for the specific reasons set forth in the Agreement.

Thus, the CNMI Legislature's attempt to take over 100% control of those funds will certainly draw a lawsuit by Tasi Tours. Although the outcome cannot be certain, DPL and the Commonwealth would likely face an uphill and expensive legal battle trying to defend the

law. Moreover, the relationship with Tasi Tours is already strained due to the lawsuit involving other marine sports operators.

The crucial thing to consider now is how this proposal will impact on DPL's plan regarding the concession agreement that we are about to advertise for an RFP. This "takeover" will have a major impact and will complicate a lot of issues DPL has with the management of Mañagaha Island concession.

DPL remains free to assess a Mañagaha Landing and User Fee under its authority to manage public lands, and that this statute will merely add to the cost for visitors wishing to enjoy this attraction.

Thank you again for giving us the opportunity to present our comments.

Sincerely,

PEDRO A. TENORIO
Secretary

Nineteenth Northern Marianas Commonwealth Legislature

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 27, 2015

Second Regular Session, 2015 **H. B. 19-102, HD1**

A BILL FOR AN ACT

To make the Department of Lands and Natural Resources responsible for collecting the Managaha Fee and removing the Department of Public Lands as recipient of the Managaha Fees; and for other purposes.

BE IT ENACTED BY THE NINETEENTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE:

Section 1. Findings. The Managaha Landing Fee is currently collected by the Department of Public Lands. Also, the Department of Public Lands is named as one of the permissible recipients of the Managaha Landing Fees. The legislature proposes removing the Department of Public Lands as a recipient of the Managaha Landing Fee and adds the payment of land compensation claims as a permissible use of the fees.

The Bill clarifies the nature of the Managaha Fee as a "license" of a right to pass over the waters of the Commonwealth. Art. XI, Sec. 2 of the N.M.I. Constitution provides "The management and disposition of submerged lands off the coast of the Commonwealth shall be as provided by law."

Public Law 13-16, Section 3(b) is repealed. This subsection relates to the use of future landing fees and expired when Public Law 13-16, an appropriation

bill, expired. This provision has been used by the Department of Finance as a basis for segregation of the landing fees. The provision should be repealed to eliminate any confusion over the use of the fees.

Section 2. Amendment. Title 2, Division 1, Chapter 6, Article 2, Managaha Island Landing Fee is amended as follows:

A. 2 CMC Section 1621 is amended as follows;

"A landing fee of ~~five~~ twenty dollars is imposed on each nonresident passenger who disembarks on Managaha Island by a commercial carrier from any point of embankment from Saipan and traversing over the waters of the Commonwealth. The fee is imposed as a license, as such term is used in 1 CMC §2803(a), to pass over the waters and submerged lands of the Commonwealth. Each commercial carrier engaged in the transport of passengers to Managaha Island is charged with the duty to keep a daily record of all nonresident passengers to Managaha Island. The ~~Division of Public Lands~~ Department of Lands and Natural Resources shall collect the ~~landing~~ fee under this article from all commercial carriers. The ~~Division of Public Lands~~ Secretary of Finance shall submit a report on all landing fees collected under this article at the end of each month to the ~~Secretary of Finance~~ Chairman of the Saipan and Northern Islands Legislative Delegation."

B. 2 CMC Section 1622(a) is amended to change the name of the "Saipan Cultural and Performing Arts Center, Division of Public Lands, Commonwealth

Museum, Saipan Youth Program, Indigenous Affairs Office and Carolinian Affairs Office account" to the "Managaha Fee account", as follows:

"**Section 1622. ~~Saipan Cultural and Performing Arts Center, Division of Public Lands, Commonwealth Museum, Saipan Youth Program, Indigenous Affairs Office and Carolinian Affairs Office.~~ Managaha Fee.**

(a) The Secretary of Finance shall establish a special subaccount (the Fund) which shall be designated as the "~~Saipan Cultural and Performing Arts Center, Division of Public Lands, Commonwealth Museum, Saipan Youth Program, Indigenous Affairs Office and Carolinian Affairs Office account~~ Managaha Fee Fund."

C. 2 CMC Section 1622(b) is amended as follows:

"(b) All revenues collected pursuant to this article shall be deposited into the Fund and shall be ~~expended exclusively on~~ appropriated for projects and for the construction, maintenance and operation of ~~the Saipan~~ a Cultural and Performing Arts Center, the ~~Saipan~~ Youth Programs, ~~the Division of Public Lands,~~ Commonwealth Museum, and for the cultural heritage activities of the Indigenous and Carolinian Affairs Offices, in accordance with appropriations made by the Saipan and Northern Islands Legislative Delegation except:

(i) 50% for the payment of land compensation claims; and

(ii) 15% to the payments of judgments against the CNMI Government until such time that all judgments are satisfied. Thereafter, 5% shall remain in this account for future judgments against the CNMI government and the remaining 10% shall be deposited into the fund established under §1622 (b)(i) ~~Department of Public Safety for their supplemental efforts in tourism enhancement activities~~."

Section 3. Repealer. Section 3(b) of Public Law 13-16 is repealed.

Section 4. Severability. If any provisions of this Act or the application of any such provision to any person or circumstance should be held invalid by a court of competent jurisdiction, the remainder of this Act or the application of its provisions to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

Section 5. Savings Clause. This Act and any repealer contained herein shall not be construed as affecting any existing right acquired under contract or acquired under statutes repealed or under any rule, regulation, or order adopted under the statutes. Repealers contained in this Act shall not affect any proceeding instituted under or pursuant to prior law. The enactment of the Act shall not have the effect of terminating, or in any way modifying, any liability, civil or criminal, which shall already be in existence on the date this Act becomes effective.

Section 6. Effective Date. This Act shall take effect upon its approval by the Governor, or its becoming law without such approval.

Prefiled: 10/6/15

Date: 10/6/15 Introduced By: /s/ Rep. Joseph Lee Pan T. Guerrero

Reviewed for Legal Sufficiency by:

/s/ John F. Cool
House Legal Counsel