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Subject: Public Benefit Provisions in DPL Lease Agreement

Opinion of the Attorney General

I. QUESTIONS PRESENTED

Can DPL legally require a potential or existing lessee to construct homestead infrastructure or create a deposit in escrow that will provide funding for future homestead infrastructure?

II. SHORT ANSWERS

The public benefit provisions are problematic from a legal stand point. As the Mariana Public Land Corporation's (MPLC) predecessor, DPL holds public lands in trust for people of Northern Marianas Descent (NMDs). *Dep't of Public Lands v. Commonwealth*, 2010 MP 14 ¶ 12. All revenue generated from public lands goes to the Marianas Public Land Trust (MPLT). *Id.* ¶ 34. Prioritizing public benefit provisions to the detriment of rent would amount to a violation of fiduciary duty. Ultimately, public benefit clauses are legitimate if securing the public benefit does not result in lower rent.

III. LAW

The Commonwealth Supreme Court considered DPL's role in the Commonwealth's constitutional framework in *Dep't of Public Lands v. Commonwealth*, 2010 MP 14. Under the original constitution, MPLC held public lands in trust for NMDs, and all revenue from public lands was transferred to MPLT. *Id.* ¶ 6. After existing for 12 years, MPLC was dissolved and its functions were transferred to the executive branch. *Id.* ¶ 11. The current incarnation is DPL.

In 2009, the Commonwealth passed PL 16-31, which required land compensation judgments to be paid out of revenues generated from public lands. *Id.* ¶ 13. The Secretary of DPL contested the constitutionality of the measure, and a certified question between DPL and the Commonwealth was presented to the Supreme Court. *Id.* ¶ 1. DPL argued that under Commonwealth Article XI, § 5(g), DPL's budget was submitted to the legislature for "informational purposes only," and thus could not be used to pay land compensation. The Commonwealth argued that the limitations under § 5(g) expired when the functions of MPLC were transferred to the executive branch, and thus the revenue could be used for land compensation.

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The Court disagreed with both parties, holding that PL 16-31 infringed on MPLT's function of collecting revenues generated from public lands to hold in trust for NMDs. The Court explained that "the revenues generated from the management and disposition of public lands are trust funds that must go to [MPLT] to be held for the benefit of people who are of Northern Marianas descent." *Id.* ¶ 34. Therefore, by directing these trust funds to land compensation instead of to MPLT, PL 16-31 violated the Constitution.

While the holding of *Dep't of Public Lands v. Commonwealth* is narrow, its reasoning can be applied to the issue at hand.

IV. OPINION

Public benefit clauses are constitutional so long as the addition of a public benefit clause does not compromise or impair the ability of DPL to negotiate the best rent from the lease of public lands. *Dep't of Public Lands v. Commonwealth* considered a situation in which revenue already collected would be diverted away from MPLT. Under similar reasoning, any lease term that unnecessarily results in a diminution of rent would impair MPLT's function of collecting and investing the revenue from public land. First, this situation presents an inverse of the situation the Court confronted in *Dep't of Public Lands v. Commonwealth*: reducing revenue in exchange for a public benefit clause would impair MPLT's function of collecting revenue from public land. Second, DPL holds public land in trust, and the funds generated from public land are trust funds. It would be a breach of fiduciary duty to reduce the rent received in exchange for public benefit clauses. This is not to say that the purpose of this public benefit clause, i.e., providing homestead infrastructure, would not benefit NMDs. Rather, the decision as to how the trust funds should be invested and used is constitutionally vested in MPLT. Importantly, however, any public benefit clause that can be agreed without impairing the ability of DPL to negotiate the best rent from the lessee is constitutional because it would not impair the functions of MPLT.

Furthermore, a discussion of the fiduciary duties of DPL and the Secretary of DPL is necessary. DPL's enabling statute provides that the Secretary "shall be held to strict standards of fiduciary care." 1 CMC § 2802.

Black's Law Dictionary defines the word "fiduciary" as:

1. Someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure.
2. Someone who must exercise a high standard of care in managing another's money or property

Black's Law Dictionary (10th ed. 2014). Public land is held in trust by DPL for the benefit of NMDs. Under this arrangement, DPL is a fiduciary that owes a high standard of care to NMDs in managing their property (i.e., public lands). Under the Restatement (Third) of Trusts, a trustee owes a duty of prudence to the beneficiaries:

- (1) The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust.
- (2) The duty of prudence requires the exercise of reasonable care, skill, and caution.
- (3) If the trustee possesses, or procured appointment by purporting to possess, special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill.

Restatement (Third) of Trusts § 77 (2007). Therefore, DPL and the DPL Secretary are bound to use best practices and sound business judgment to manage and dispose of public land in a way that maximizes revenue without committing waste.

Applying these principles to leases of public land, DPL and the Secretary's primary consideration is, first and foremost, maximizing the rental value of the trust property. Public benefit provisions which require a lessee to agree to other obligations are a consideration of much lower priority. The primacy of rental value is apparent from DPL's enabling statutes: 1 CMC § 2808 sets out extensive requirements regarding rental price of public lands that DPL must adhere to. However, DPL's enabling statutes do not mention public benefit provisions at all. DPL and the Secretary cannot reduce the rental value of the property in order to secure a public benefit. Likewise, DPL and the Secretary cannot compromise or imperil lease negotiations by insisting on a public benefit provision which imposes other obligations rather than maximizing the rental value of the property.

Public benefit provisions are acceptable if the rental price or the lease negotiations are not imperiled by the public benefit provisions and are voluntarily entered into by the lessee. Conversely, over insistence on public benefit obligations to the detriment of the rental price or the lease negotiation itself is extremely problematic, and under certain circumstances could be considered a violation of the fiduciary duty to NMDs or abuse of public office. Therefore, a good rule of thumb is that public benefit provisions are unacceptable as they may diminish the true value of the trust land when they are forced on a lessee or become a major stumbling block in lease negotiations.

V. CONCLUSION

Public benefit clauses are legal so long as the public benefit can be secured without reducing the rent received from the property. DPL holds public lands in trust for NMDs and the revenue generated from public lands are trust funds that must be remitted to MPLT. A public benefit clause that is negotiated in return for a lower rent violates the constitution under this framework.


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