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Subject: Municipal corporations and the executive branch, the constitutionality of P.L. 12-20 and P.L. 18-16, and the treatment of revenues derived from public lands within free-trade zones

Opinion of the Attorney General

I. QUESTIONS PRESENTED

1. Are municipal corporations within the executive branch of the Commonwealth government?

2. Are P.L. 12-18 and P.L. 18-16 constitutional?

3. Are revenues derived from public lands within free-trade zones required to be remitted to the Marianas Public Land Trust ("MPLT").

II. SHORT ANSWERS

1. No. Municipal corporations are not within the executive branch of the Commonwealth government.

2. No. P.L. 12-18 and P.L. 18-16 are unconstitutional to the extent that they grant mayors administrative powers that include the authority to sale, lease, and grant other interests in public lands.

3. Yes. Revenues generated from public lands within free-trade zones are required to be remitted to the MPLT.

III. BACKGROUND

The purpose of P.L. 12-20 is to establish free trade zones "to encourage the establishment of new business, [and] industrial and commercial activities in order to diversify the Commonwealth economy." P.L. 12-20 § 2. In drafting P.L. 12-20, the Legislature found it was in the Commonwealth's best interests to make public lands available for lease at reasonable rates and "provide incentives in the form of tax relief for desirable businesses establishing operations within

the free trade zones." *Id.* Section 4(e) of Public Law 12-20, as amended by P.L. 18-16, requires the Department of Public Lands to designate public lands "to be administered by the respective mayors in accordance with this subsection . . . and not withstanding whether such land is designated a Free Trade Zone . . . ." P.L. 18-16 § 2.

IV. ANALYSIS AND APPLICATION

A. Municipal Corporations are not Part of the Executive Branch.

Both the organization of the CNMI Constitution and the Commonwealth Code suggest that municipal corporations are not within the executive branch of the Commonwealth Government. The NMI Constitution addresses "Local Governments" and the "Executive Branch" in different articles. *Compare* NMI CONST. art. VI (addressing "Local Governments") *with* NMI CONST. art III (addressing "Executive Branch"). *See Grech v. Clayton County, Ga.*, 335 F.3d 1326, 1352–56 (11th Cir. 2003) (taking into consideration the structure of the state's constitution in determining whether sheriffs were county or state officials). Likewise, the Commonwealth Code supports the conclusion that municipalities are not within the executive branch, because the legislature has identified the offices, agencies, and instrumentalities within the executive branch in Title 1, Division 2, Part 1 of the Commonwealth Code, which provides the "Organization of the Executive Branch," and Part 1 is distinct from the statutes governing local government, which are found in Title 1, Division 5 of the Commonwealth Code.

Further, dicta in *U.S. v. Borja* also indicates that the chartered municipality form of government is not within the executive branch. CV-02-0016-ARM, (D.N. Mar. Is. Dec. 12, 2003) (Order on Motion to Dismiss First Amended Complaint). There, the CNMI sought dismissal pursuant to FED. R. CIV. P. 12(b)(6), arguing "that the First Amended Complaint and attached documents did not show that the CNMI was a party to the joint funding agreements such as to obligate the CNMI to the United States for any monies still due." *Id.* at 4–5. In response, the United States argued that the mayor of Tinian and Aguigan was an agent of the executive branch of the CNMI government and bound the CNMI when he signed the joint funding agreements. *Id.* at 5–6. The NMI District Court stated that the mayor is not "a member of the executive branch exercising executive power at the local government" and supported its conclusion by noting that NMI CONST. art. III, § 1, vests the executive power of the CNMI in the governor, the constitutional sections providing for mayors are grouped in the same article as the sections establishing municipal councils and the chartered municipality form of government—"entities clearly not related to the executive branch"—and that mayors and municipal councils exercise their powers solely for their designated jurisdictions. *Id.* at 8–9.

Because the organization of the CNMI Constitution and the Commonwealth Code suggest that municipal corporations are not within the executive branch of Commonwealth Government and the District Court for the Northern Mariana Islands has stated that the chartered municipality form of government is "clearly not related to the executive branch," it is likely that if this joint petition for certified question is submitted to the CNMI Supreme Court, the Court will hold that municipal corporations are not within the executive branch.

B. P.L. 12-20 and P.L. 18-16 Are Unconstitutional.

Public Law 12-20 and 18-16 violate NMI CONST. art. XI, § 4, because NMI CONST. art. XI, § 4(f), requires that the functions of the Marianas Public Land Corporation ("MPLC") be transferred to the executive branch, one function of MPLC is the leasing of public land, and P.L. 12-20 and 18-16 authorize mayors, who are not within the executive branch, to lease public lands.

Article XI, Section 4(f) of the NMI Constitution states that after the dissolution of the MPLC, "its functions shall be transferred to the executive branch of government." Those functions include the management and disposition of public lands. *Dept. of Pub. Lands v. Commonwealth*, 2014 MP 14 ¶ 18. The Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands states that the management of public lands includes "the preservation, improvement and use of the public lands," and defines the term "disposition" as the "sale, lease, and granting of easement or other interests in the public lands." Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 146 (1970) (cited with approval in *Dept. of Pub. Lands*, 2010 MP 14 ¶ 18). Therefore, if provisions of P.L. 12-20 or P.L. 18-16 transfer the management and disposition of public lands to entities outside the executive branch, then those provisions are unconstitutional. *See Dept. of Pub. Lands*, 2010 MP 14 ¶¶ 23–24 ("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. . . . The legislature cannot exceed its constitutional authority; it cannot pass a law that conflicts with the Commonwealth Constitution." (citing *Commonwealth v. Tinian Casino Gaming Control Comm'n*, 3 NMI 134, 147–48 (1992))).

Section 4(e) of Public Law 12-20 requires the Board of Public Lands[1] to designate thirty hectares of public land on Rota and thirty hectares of public land on Tinian "to be administered by the respective mayors . . . notwithstanding whether such land is designated a Free Trade Zone or not." Public Law 12-20 does not explicitly define the mayors' administrative powers; however, it does require administration be made in accordance with §§ 4(e)(1)–(5).[2] Moreover, § 4(e)(5) authorizes the mayors to lease designated public land in a Free Trade Zone. Because Article XI, Section 4(f) of the NMI Constitution requires the disposition of land be transferred to the executive branch and mayors are not within the executive branch, *see supra* analysis of Question 1, Public Law 12-20

[1] "The Board of Public Lands, which succeeded the Marianas Public Lands Corporation, was abolished by PL 12-71, § 2 (a) and replaced with the Marianas Public Lands Authority without conforming amendments to other sections of the act as enacted by PL 12-33. See comment to 1 CMC § 2801 regarding other technical deficiencies contained in PL 12-71. PL 15-2, which was enacted on February 22, 2006, abolished the Marianas Public Lands Authority and created a Department of Public Lands in its place." 1 CMC § 2801 Commission Comment.

[2] Sections 4(e)(1) provides that "[s]uch land may be put to municipal uses or leased for commercial purposes," and exempts from the Attorney General's review "leases, contracts, or other instruments employed in the mayor's administration of the designated lands . . . ." Section 4(e)(2) grants mayors the authority to enter into agreements with government agencies for assistance in the administration of the designated lands. Section 4(e)(3) states that 1 CMC § 2674(i) "shall not be construed as applying to any public benefit contribution under any public lease now." Section 4(e)(4) authorizes the mayor to reduce minimum rental requirements up to fifty percent from the amounts otherwise mandated by law. Section 4(e)(5) authorizes the mayors to lease designated public land in a Free Trade Zone on any terms conforming with Section 10(k) of P.L. 12-20, which grants the Commonwealth Free Trade Zone Authority the power and duty to represent the interests of free trade zone licensees and actual and prospective occupants in negotiating the terms of a lease with the entity controlling the property within the free trade zone.

is unconstitutional to the extent it grants mayors administrative powers that include the authority to sale, lease, and grant other interests in public lands. Likewise, P.L. 18-16 is unconstitutional because it only amends 4 CMC § 51102(e), which is the codification of P.L. 12-20, by granting administrative power to the mayor of the Northern Islands.

C. Revenues from Public Lands Within a Free-Trade Zone Must Be Remitted to MPLT.

Revenues received from public lands within a free-trade zone should not be treated differently than revenues generated from other public lands because NMI CONST. art. XI, § 1, which identifies the public lands, does not distinguish public lands within a free-trade zone from other public lands. In other words, because there is no distinction between public lands within a free-trade zone and public lands identified within § 1, there should be no distinction between the revenues each public land generates. Therefore, because revenues generated from public lands identified under § 1 are required to be remitted to MPLT pursuant to NMI CONST. art. XI, § 6, revenues generated from public lands within a free-trade zone are also required to be remitted to MPLT. *See Dept. of Pub. Lands*, 2010 MP 14 ¶ 33 ("[R]evenues generated from the management and disposition of public lands are trust funds that must go to the Public Land Trust . . . .").

In interpreting the NMI Constitution, the CNMI Supreme Court examines the constitutional text and applies its plain meaning. *Dept. of Pub. Lands*, 2010 MP 14 ¶ 17 (citing *Camacho v. N. Marianas Ret. Fund*, 1 NMI 362, 368 (1990)). Article XI, Section 1 of the NMI Constitution identifies the "public lands" as the lands transferred under Secretarial Order 2969, the lands transferred under Secretarial Order 2989, the lands transferred under the Covenant, and all submerged lands off any coast of the Commonwealth. *See also* Analysis of the Constitution, *supra* at 141. In identifying the public lands, NMI CONST. art. XI, § 1, does not indicate that public lands later classified as within a free-trade zone are not covered under § 1. Indeed, the Analysis of the Constitution identifies land not covered under § 1 as land acquired from sources other than the Trust Territory, Resident Commissioner, or the United States. Analysis of the Constitution, *supra* at 144 ("[Article XI, Section 1 of the NMI Constitution] does not cover lands that the government purchases or leases from private owners or acquires by eminent domain after the establishment of the Commonwealth."). Because the NMI Constitution does not indicate that public lands within a free-trade zone are distinct from public lands under NMI CONST. art. XI, § 1, it logically follows that revenues generated by public lands within a free-trade zone should be treated identically to revenues generated by public lands in general.

In *Dept. of Pub. Lands*, the CNMI Supreme Court held that "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." Because revenues generated by public lands within a free-trade zone should be treated identically to revenues generated by public lands, revenues generated from public lands within free-trade zone areas are required to be remitted to MPLT pursuant to NMI CONST. art. XI, § 6.

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