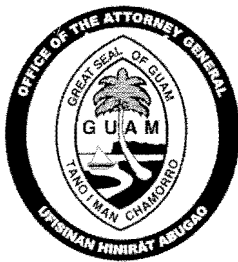


LEONARDO M. RAPADAS
Attorney General



PHILLIP J. TYDINGCO
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

May 22, 2013

VIA HAND-DELIVERY

Honorable Judith T. Won Pat, Ed.D.

Committee on Education, Public Library and Women's Affairs
I Mina'trentai Dos Na Liheslaturan Guahân
155 Hesler St.
Hagatna, Guam 96910

32-13-428
Office of the Speaker
Judith T. Won Pat, Ed. D.
Date 5/22/13
Time 2:57 PM
Received by [Signature]

Re: Proposed Settlement of the Estate of Jose Martinez Torres vs. Goodwind Development Co. and GovGuam; Superior Court of Guam Civil Case No. CV1093-06; AG File No. 06.0269

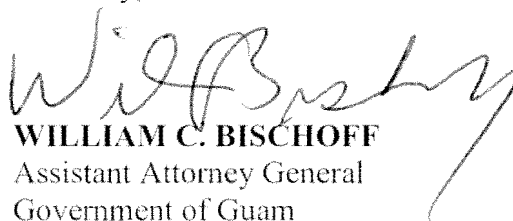
Dear Speaker Won Pat:

I write you about the attached letter delivered to your office on February 8, 2013, concerning a proposed settlement of a Superior Court case. The settlement would require Legislative approval.

On June 17, 2013, I am expected to advise the Court whether the Legislature approves of this proposed settlement.

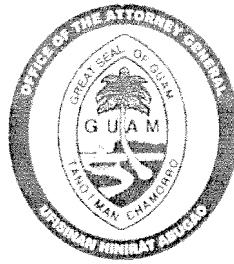
Thank you.

Sincerely,


WILLIAM C. BISCHOFF
Assistant Attorney General
Government of Guam

2013 MAY 22 PM 3:00
[Signature]

Leonardo M.
Rapadas
Attorney General



Phillip J. Tydingco
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

February 7, 2013

Honorable Judith T. Won Pat, Ed.D.
Speaker, 32nd Guam Legislature

Office of the Speaker
Judith T. Won Pat, Ed. D.
Date 2/8/13
Time 1:55 P.M.
Received by J.S. TEDIATAO

Re: Proposed Settlement of Superior Court case CV1093-06.
Estate of Jose Martinez Torres v. Goodwind Development Co. and GovGuam

Dear Speaker Won Pat,

I write you about a proposed settlement of a lawsuit that was brought against GovGuam. We were sent to court-ordered mediation after a great deal of litigation. The proposed settlement reached in the mediation would require Legislative approval.

The case involves a small lot, less than an acre, behind the Micronesian Mall. It includes part of the Fatima Street exit from the Mall. The government contemplated leasing the lot to the Mall when the Mall was being built, back in the 1980s, but the lease was never finalized. GovGuam has a power pole on the lot, serving the Mall and the surrounding area.

In November of 2002, then-Governor Gutierrez and then-Acting Attorney General Kono deeded this lot to the Guam Ancestral Lands Commission. But the lot was not federal excess land. It was not "Ancestral" land, as defined in the Ancestral Lands Act. The Honorable Judge Alberto C. Lamorena III has already ruled in this case, in an October 19, 2009 Decision and Order, that this transfer violated 21 GCA §60112. That statute requires legislative approval for the transfer of government land.

The deed by which the lot was unlawfully transferred to the Commission was apparently drafted by an attorney who with the assistance of one Mr. John Gilliam was working on behalf of heirs of the Jose Martinez Torres Estate. At that time, in 2002, Mr. Gilliam had been detailed by Governor Gutierrez to work at the Commission as its "Claims Facilitator," and to research the Estate's claim. The Estate's claim was not about a World

War II era land condemnation. It was about what the Estate says was an injustice concerning court rulings adverse to it in the years 1914-1915. This would be well before the January 1, 1930 jurisdictional cut-off date for an Ancestral Lands claim, no matter what.

After the 2002 deed to the Commission, in 2004, Mr. Gilliam appeared before the Commission now in a private capacity, on behalf of the Jose Martinez Torres Estate, and convinced the Commission to transfer the lot to the Estate. So the whole chain of events that resulted in the lot being deeded to the Estate was engineered by the Estate itself, or by people working specifically on behalf of the Estate.

The Attorney General's Office did not begin to learn about all that had happened until 2006. What happened was the Estate sued the government and the Mall (Goodwind Development Co.). The Estate sued based upon the deed it obtained from the Ancestral Lands Commission. The Estate sued demanding that the government remove its power pole and that the Mall cease utilizing the Fatima Street exit, or else pay the Estate. The Estate at one point sent a settlement offer for the government and the Mall to pay it \$750,000.00.

We filed a counterclaim that title to the lot should be quieted back into the name of the government because the lot should never have been deeded to the Ancestral Lands Commission in the first place and because the Estate did not have a valid Ancestral Lands claim to it in any event.

As already mentioned, Judge Lamorena agreed, in his October 19, 2009 Decision and Order, that the initial transfer of the lot to the Commission was unlawful. But the judge ruled there is a possibility the government could now be "estopped" from obtaining a final judgment cancelling the 2002 deed to the Commission, or the 2004 deed to the Estate. This is because the government (then-Governor Gutierrez and then-Acting AG Kono) was itself involved in the 2002 transaction. So we attended the court-ordered mediation.

Before the court-ordered mediation, the Mall reached its own settlement with the Estate. In that settlement, the Mall placed \$460,000.00 into escrow. This was to be paid to the Estate for the lot if the Estate were to win at trial and gain clear title to it.

The Estate had been offering to give the government \$23,000.00 of this money if the government would concede title of the lot to the Estate.

We thought this offer was ridiculous. We believe the government would have a strong likelihood of prevailing in a trial, and that as a matter of principle the Estate should not profit from this circumstance-of-its-own-contrivance in the first place.

The result of the mediation was the attached Memorandum Of Understanding that the funds placed in escrow by the Mall, about \$468,000.00 with interest at this time, be split equally between the Estate and the government; about \$234,000.00 going to each. Title to the lot would be transferred to the Mall, which of course agrees to grant the government the utilities easement for the power pole and any other utilities.

Given that this proposed settlement will necessarily involve a transfer of this government land to the Mall, 21 GCA §60112 requires Legislative approval of it.

We thus respectfully forward this proposed settlement of this case for consideration by the 32nd Guam Legislature.

Thank you.

Sincerely,


WILLIAM C. BISCHOFF
Assistant Attorney General

MEMORANDUM OF UNDERSTANDING

This memorandum of understanding sets out the material terms of the settlement between the Government of Guam ("Government") and the Estate of Jose M. Torres ("Estate") as a result of the mediation in Superior Court of Guam Civil Case No. CV 1093-06 (CV1093-06).

1. The funds in escrow from the sale of Lot 5007, Dededo, Guam to Goodwind Development Corporation ("Goodwind") in the approximate amount of \$468,000.00 are to be split equally between the Estate and the Government. The Estate shall execute escrow instructions reflecting this equal split of these escrow funds, which instructions shall be submitted for approval to the Government.
2. Following approval from the Guam Legislature, pursuant to 21 GCA section 60112, and the execution by the Estate of the escrow instructions for the equal division of the escrow funds, the Government shall quitclaim its interest in Lot 5007, Dededo, Guam to Goodwind.
3. The transfer of Lot 5007 to Goodwind shall be subject to the current public access and utility easement as shown on the Relocation Survey Sketch of Part of Tract 100, attached hereto.
4. The Estate shall transfer its interest in Lot 5007 to Goodwind.
5. In entering into this MOU, there is no admission or concession by either party of any ownership or any other right, title or interest of any kind in Lot 5007 or any other real property that is or may be involved in any dispute with the Government, including any and all agencies of the Government, and this settlement cannot be pled as a defense or used in any way in any other current, future or pending litigation between the parties.
6. Each party is to bear its own costs and attorneys' fees. Each party waives any right to collect, enforce, or assign in any manner any order regarding sanctions or attorneys' fees awarded against the other party or its attorneys in CV1093-06.
7. Each party agrees to cooperate with the other party, and to use its best efforts, to effectuate the settlement set out in this MOU. The parties agree to execute any other documents reasonably necessary to effectuate this settlement including, but not limited to, any releases, releases of lis pendens, a more formal settlement agreement, and deeds to Lot 5007.
8. Following the legislative approval of the Government's interest in Lot 5007, the conveyance thereof to Goodwind, and the equal distribution of the above-described funds from escrow, the parties shall then execute and file a stipulation for dismissal with prejudice of CV1093-06.

GOVERNMENT OF GUAM

ESTATE OF JOSE M. TORRES

Walter C. ...

6-12-2012

[Signature]

120612

[Signature]

8/3/12

19 OCT 15 11 30 AM '07

IN THE SUPERIOR COURT OF GUAM

ESTATE OF JOSE MARTINEZ TORRES, deceased.)	CIVIL CASE NO. CV1093-06
)	
)	
Plaintiff,)	
vs.)	DECISION AND ORDER
)	
THE GOVERNMENT OF GUAM,)	
)	
Defendant.)	
.....)	

This matter came before the Honorable Alberto C. Lamorena III on February 22, 2008 on Defendant's Motion to Amend, and on January 30, 2009 on Plaintiff and Defendant's Motions for Summary Judgment. Attorney William C. Bischoff appeared on behalf of Defendant. Appearing on behalf of Plaintiff were Attorneys Joseph C. Razzano and Lawrence J. Leiker. After reading the parties' briefs and hearing the arguments, the Court took the matters under advisement. The Court now issues its Decision and Order.

FACTUAL HISTORY

This issue concerns a plot of land in the village of Dededo identified as Lot No. 5007 or Tract 100, and the easement located upon it.¹ The plot belonged to Pedro M. Duarte prior to 1914. On January 14, 1914, Mr. Duarte purported to sell land including the plot at issue to Jose Torres Martinez for \$4,000, of which Mr. Martinez immediately paid \$2,000. In 1915, assets of Mr. Duarte were seized by the Naval Government of Guam and placed up for public auction to

¹ The parties disagree on whether Lot No. 5007 was properly consolidated into Tract 100. As discussed below, this distinction is not critical to the Court's analysis.

1 cover restitution from Mr. Duarte's conviction for embezzlement during his service as
2 Postmaster. One of the assets listed for auction was the land in Dededo that included the plot at
3 issue. Mr. Martinez requested the asset be removed, and this request was initially granted by
4 Judge Luis Torres. However, the Governor of Guam declared the judgment null and void, which
5 was followed by an April 13, 1915 decree by Judge Frank Portusach that reiterated the
6 Governor's position that the existing Mortgage Law and executive general orders had not been
7 properly followed in the sale.
8

9 Mr. Martinez's attempts at appealing this decision or having his \$2,000 returned to him
10 were rebuffed, and the land was put up for auction. After no bidders matched the minimum
11 request by the government, the government had the property adjudicated to itself. In 1950 the
12 Department of the Interior conveyed the land to the Government of Guam.
13

14 On November 4, 2002 the Governor of Guam signed a grant deed, approved as to form
15 by the Acting Attorney General of Guam, purporting to transfer surplus government land, which
16 included the plot at issue, from the Government of Guam to the Ancestral Lands Commission.
17 On October 29, 2004, after a title hearing on the plot at issue on October 12, 2004, the Ancestral
18 Lands Commission issued a quitclaim deed on the plot granting it to the Plaintiff.
19

20 Plaintiff filed this case seeking to cancel the easement across the plot at issue created
21 under Instrument No. 414341, alleging it had not been approved by the Guam Legislature. The
22 Government of Guam and Goodwind Development Corporation answered and filed
23 counterclaims, including a counterclaim by the Government of Guam requesting the Court to
24 quiet title within the public access and utility easements on the plot at issue.
25

26 The Government of Guam and Goodwind Development Corporation filed a joint Motion
27 for Leave to File Amended Answer and Counterclaim on April 3, 2008. The Government of
28

1 Guam's Proposed Second Amended Answer and Counterclaim was substantially similar, with
2 the exception that the counterclaim requested the Court to quiet title to the entire property rather
3 than just the easement in the Government of Guam.

4
5 On May 16, 2008, Plaintiff filed a Motion for Summary Judgment. The Government of
6 Guam filed an opposition and its own cross-motion for summary judgment on June 18, 2008.
7 Goodwind Development Corporation settled separately with the Estate on October 23, 2008.
8 The Estate filed an opposition to the cross-motion and reply on December 5, 2008. The Court
9 now addresses these motions.

10 DISCUSSION

11 I. Motion to Amend

12
13 Defendant moves to amend its Counterclaim, seeking to modify its request for the Court
14 to quiet title from merely including the easement on the plot to including the entire plot at issue.
15 Guam Rule of Civil Procedure 15(a) provides that a party may amend the party's pleading only
16 by leave of court or by written consent of the adverse party. "In the absence of any apparent or
17 declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant,
18 repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the
19 opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave
20 sought should, as the rules require, be 'freely given.'" Foman v. Davis, 371 U.S. 178, 182
21 (1962), Arashi & Co., Inc. v. Nakashima Enterprises, Inc., 2005 Guam 21 at ¶ 16. "Under Rule
22 15 the district court may and should liberally allow an amendment to the pleadings if prejudice
23 does not result." Citizens Sec. Bank (Guam), Inc. v. Bidaure, 1997 Guam 3 at ¶ 16.

24
25
26 There is a lengthy delay between Defendant's initial Answer and his proposed
27 amendment, however it is largely due to the case having been temporarily removed to the
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1 District Court. There appears to be no bad faith or dilatory motive on Defendant's part, nor
2 would allowing this amendment appear to cause prejudice to the Plaintiff, as the Plaintiff has
3 argued its summary judgment motion as if the amendment were also being considered by the
4 Court. See, e.g., Plaintiff's Opposition and Reply, December 5, 2008 at pg. 2-3, pg. 3 footnote 1.
5 As such, the Court grants Defendant's Motion to Amend.
6

7 **II. Standard for Summary Judgment**

8 Summary judgment shall be granted if there is no genuine issue as to any material fact
9 and the moving party is entitled to judgment as a matter of law. A genuine issue exists when
10 there is sufficient evidence establishing a factual dispute requiring resolution by a fact-finder.
11 Iizuka Corp. v. Kawasho Int'l [Guam], Inc., 1997 Guam 10, at ¶ 7; T.W. Fleet Serv., Inc. v.
12 Pacific Elec. Contractors Ass'n., 809 F.2d 626, 630 (9th Cir. 1987). The factual dispute must
13 concern a material fact. *Id.* Whether a fact is material is determined by the governing
14 substantive law; if the fact may affect the outcome, it is material. Anderson v. Liberty Lobby,
15 Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Edwards Corp. v. Kawasho Int'l
16 [Guam], Inc., 2000 Guam 27, at ¶ 7.
17

18 Inferences must be drawn, and evidence must be viewed in the light most favorable to the
19 nonmoving party, and the moving party carries the burden of showing the court those portions of
20 the relevant documents which it believes demonstrate the absence of an issue of material fact.
21 Edwards Corp. v. Kawasho Int'l [Guam], Inc., 2000 Guam 27, at ¶ 7. The moving party is not
22 required to negate each element of the non-moving party's case. Rather, the moving party
23 satisfies and discharges its burden by establishing the absence of evidence to support the non-
24 moving party's case. Kim v. Hong, CVA97-007, page 3 (1997).
25
26
27
28

1 If a lack of evidence is established by the moving party, the non-moving party must
2 present specific facts showing there is a genuine issue for trial. The nonmoving party may not
3 merely rely on conclusory allegations contained in the pleadings, but must present some
4 significant probative evidence tending to support his assertion. *Id.* If the non-moving party fails
5 to make a showing sufficient to establish the existence of an element essential to that party's
6 case, for which the party will bear the burden of proof at trial, then Rule 56(c) requires entry of
7 summary judgment against the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317
8 (1986).
9

10 **III. Transfer of Lot No. 5007/Tract 100**

11 Defendant alleges that the transfer of the land at issue from the Government of Guam to
12 the Ancestral Lands Commission is invalid because there was no legislative approval of the
13 transfer as required under Title 21 G.C.A. §60112. Plaintiff argues that several public laws,
14 including P.L. 24-45, P.L. 22-145, P.L. 23-23, or P.L. 25-178 indicate the approval of the
15 legislature to transfer ancestral lands to the Commission, thus no specialized legislation is
16 required.
17

18 However, the history of the plot at issue demonstrates that it is not a member of the
19 classes of land transferred to the Ancestral Lands Commission by the aforementioned public
20 laws, nor is it one of the tracts specifically identified for transfer. Even if this Court were to
21 assume, *arguendo*, that the Plaintiff was the landowner of the plot at issue prior to its acquisition
22 by the Naval Government, the policy of the government to return lands to their estates does not
23 apply to lands clearly under existing public use, or lands acquired by the government prior to
24 January 1, 1930. See P.L. 23-23 at §2004(a)-(c), P.L. 24-45 at pg. 32.
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1 Plaintiff argues that the classification in P.L. 24-45 establishing January 1, 1930 as a
2 cutoff is unconstitutional because it deprives it of equal protection of laws. It claims that P.L.22-
3 145 gave it a vested fee simple interest in the lands, and that the enactment of P.L. 24-45
4 subjected it to disparate treatment. But as mentioned above, the plot at issue was not part of the
5 lands included in P.L. 22-145, and even if it were, Section 8 of that law exempts land used for
6 public easements, as recognized by P.L. 24-25, pg. 31 line 21. Even if this Court assumed the
7 Estate had standing to challenge the classification, as it is questionable whether the Estate could
8 be classified as an original owner of the plot at issue, and even if this Court were to find the
9 cutoff date an unconstitutional distinction, the language in both P.L. 22-145 and P.L. 24-45
10 exempting land used for public easements would prevent the transfer of the plot at issue, and
11 would easily qualify as a legitimate distinction under the rational basis standard. Fields v. Legacy
12 Health System, 413 F.3d 943, 955 (9th Cir. 2005).

13 IV. Estoppel by Deed

14 Plaintiff contends that Defendant is estopped from denying Plaintiff's interest in the
15 estate under Title 21 G.C.A. §4204, which provides in part that "Every grant of an estate in real
16 property is conclusive against the grantor." It also cites Taitano v. Lujan, 2005 Guam 26² and
17 Pinsky v. Sloat, 130 Cal.App.2d 579, 588 (Cal.App.1955). However, as Pinsky acknowledges,
18 there are exceptions to this doctrine, the most critical being its modification when the
19 government is the grantor. The authority of a public officer cannot be extended by estoppel.
20 Boren v. State Personnel Bd., 234 P.2d 981 (Cal.1951). Here, the Governor did not have the
21 legal authority to transfer the land to the Ancestral Lands Commission, as Title 21 G.C.A.
22 §60112 requires the approval of the Legislature.

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² While Taitano does include a mention of §4204, it does not discuss its application in a way pertinent to this issue.

1 "...Estoppel against the government must rest on affirmative misconduct going beyond
2 mere negligence... Furthermore, estoppel will apply only where the government's wrongful act
3 will cause a serious injustice, and the public's interest will not suffer undue damage by
4 imposition of the liability." Morgan v. Heckler, 779 F.2d 544, 545 (9th Cir.1985), Mukherjee v.
5 L.N.S., 793 F.2d 1006, 1008 (9th Cir.1986). "Persons dealing with the government are charged
6 with knowing government statutes and regulations, and they assume the risk that government
7 agents may exceed their authority and provide misinformation." Mukherjee at 1009.
8 Acquiescence to illegal acts at an earlier time does not estop the government from enforcing the
9 law on a later date. Eicher v. Louisiana State Police, Riverboat Gaming Enforcement Div., 710
10 So.2d 799 (La.Ct.App.1st Cir. 1998).

13 Here, the Court has little factual information on the process or motive behind the
14 Governor's decision to sign the deed, and the Attorney General's decision to approve the deed as
15 to form.⁵ The Court does not know whether the executive branch was relying upon a
16 representation by the Plaintiff or Ancestral Lands Commission that the aforementioned public
17 laws fulfilled the requirement of legislative approval, whether the Governor mistook the
18 Attorney General's approval to form as an approval to content, or whether the executive branch
19 was aware of the deficiency and proceeded regardless. There is also no evidence regarding the
20 potential damage to the public's interest if the Court were to acknowledge the estoppel. Because
21 both parties are moving for summary judgment, and neither side has established an absence of
22 evidence on the part of the opposing party in support of its position, the Court cannot make a
23 legal ruling on the issue of estoppel at this time, as material facts are still at issue. Because the
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27 ⁵ The Court is concerned regarding the legal effect of an "approval as to form", especially as to how it affects a
28 governmental entity's susceptibility to an argument of estoppel.

1 issue of estoppel is determinative in this matter, the Court does not address the other issues
2 presented in the parties' briefs.

3
4 **CONCLUSION**

5 Based on the above, Defendant's Motion to Amend is GRANTED. Defendant's and
6 Plaintiff's Motions for Summary Judgment are DENIED.

7
8 **IT IS SO ORDERED** this 19th day of October, 2009.

9 **Original Signed By:**
10 **Hon. Alberto C. Lamorena, III**

11
12 Alberto C. Lamorena III
13 Presiding Judge
14 Superior Court of Guam

15
16
17
18 I do hereby certify that the foregoing
19 is a full true and correct copy of the
20 original of the Court of Guam
21 based at Hagåtña, Guam.

22 OCT 19 2009

23 **Domingo M. Nege**
24 Deputy Clerk, Superior Court of Guam