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OFFICE OF THE ATTORNEY GENERAL

07-0397

June 21, 2007

HAND DELIVER

Senator Tina Muna-Barnes  
Senator Judith T. Won Pat  
Senator Judith P. Guthertz  
Senator Rory J. Respicio  
Senator David L.G. Shimizu  
*I Mina' Bente Nuebi Na Liheslaturan Guåhan*  
Twenty-Ninth Guam Legislature  
Hagatna, Guam 96910

OFFICE OF THE GOVERNOR  
25 JUN 2007  
DATE 10:53 AM  
LEGAL OFFICE

Re: Layon/Dandan Landfill

Dear Senators:

This is in response to a letter from Senator Judith Guthertz dated May 16, 2007, and a letter from Senators Shimizu, Muna-Barnes, Won Pat, Respicio, and again, Senator Guthertz, dated June 8, 2007. These letters implicate the legality of the Department of Public Works' efforts to comply with the Consent Decree entered in United States v. Government of Guam, Guam Dist. Ct. No. 02-00022.

As a party to this Consent Decree, the Government of Guam has the obligation to select and construct an environmentally sound location for a new landfill. The Government of Guam agrees to the urgency of this matter apart from the Consent Decree. *I Mina' Bente Nuebi Na Liheslaturan Guåhan* has expressed its view several times that the continued use of the Ordot landfill is unacceptable and that its replacement is an urgent matter. Our client in this matter, the Government of Guam, has chosen the Dandan location to meet the needs of the people of Guam. Upon legal review and analysis, we are persuaded that the choice is consistent with Guam law. The concerns expressed about the failure to follow Public Law 23-95 must be reviewed in the context of the applicable laws and their legal interpretation. When examined carefully, Public Law 23-95 contains no requirement that any particular site be selected. The confusion that has arisen on this point justifies a lengthy quotation from the statute itself.

The primary site for the new landfill shall be that area in central Guam, known as Guatali, located near the old GORCO Oil site. The government of Guam, and its agencies shall immediately commence the planning and development of this new landfill site so that it can begin to be utilized at the earliest possible date. *If for any legitimate reason*, it is found that Guatali cannot be used, the secondary site shall be that area known as Malaa. *The same conditions shall apply to Malaa as stated for Guatali if Guatali cannot be used.*

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The scheduling for the operation of the new site shall be such that operations can begin this year or early next year.

(emphasis added). P.L. 23-95:2.

The Guam Legislature expressed in Public Law 23-95:1 a definite sense of urgency which is well justified even in the absence of the Consent Decree. Nonetheless, the Consent Decree represents paramount federal law.

A consent decree represents a bargain between two or more parties who have compromised their claims in order to reach agreement. Since a consent decree may affect the interests of the public, however, it is also a judicial order and in essence, a continuing decree of injunctive relief. The language of CERCLA and the legislative history of that act indicate that once [a] consent decree is entered by a federal court, it giv[es] the decree the force of law... [C]ourts have found that consent decrees displace state law to the same extent as do judgments on the merits.

(citations and internal footnotes omitted). State of New Jersey Department of Environmental Protection v. Gloucester Environmental Management Services, Inc., 2005 WL 1129763, §12. Directly relevant to the issues that must be considered is that the preference for either site mentioned in Public Law 23-95 is one for a study, and is otherwise non-binding. After studying the site, the Government of Guam and its agencies may find "for any legitimate reason" that Guatali is not usable. If such a finding is made, then the next site to be considered is Malaa. The statute states that: "The same conditions shall apply to Malaa as stated for Guatali if Guatali cannot be used." A plain reading of the statute according to its terms indicates that these conditions are that Malaa must be studied, but if there is found "any legitimate reason" why Malaa cannot be used, then the Government of Guam and its agencies, including the Department of Public Works, have the duty to reject Malaa and act so as to prevent the project from dragging "on interminably with no fixed date in sight for accomplishment."<sup>1</sup>

The Guatali site has been determined to be the property of the United States government and is not available for construction of a landfill by the Government of Guam. The Malaa site has been rejected by a study which focused on its physical characteristics. The concerns that have been raised concerning Public Law 23-95 also formed the basis of an unsuccessful law suit filed in the Superior Court of Guam. See San Miguel, et al. vs. Department of Public Works, Superior Court of Guam Civil Case No. CV0892-04. The Superior Court found that construction of the landfill at Guatali was impossible because of federal ownership of the property. "When Public Laws 23-95, 24-06, and 25-175 were passed, Parcel A belonged to the Federal Government. The legislature did not have the power to legislate land use policy over federal property. Thus, the Court finds that, as to a requirement that the landfill be constructed on *Guatali*, Public Laws 23-95, 24-06, and 25-175 are null and void." *Id.* Decision & Order, July 6, 2005, p.8. The Superior Court further found that the Government of Guam and its agencies had given Malaa all the consideration as a landfill site that the law required before rejecting it. "Based on Dr. Melnyk's testimony and a review of the PLSSR the Court finds that the site was considered during the initial evaluations. The Court may not substitute its own judgment for the executive branch's decision if there is evidence, as here, that Malaa was seriously considered and then rejected due to land use incompatibility." *Id.* Decision and Order, September 19, 2005, p.4. The findings by the Superior Court were based on sound evidence and reasoning. These findings constitute "legitimate reason[s]" for the rejection of Guatali and Malaa. Therefore, given the basis for the Superior Court's decision, it is likely that the Court's findings will be upheld by the Supreme Court of Guam.

<sup>1</sup> The quote is from Section 1 of Public Law 23-95.

Your second question is whether the Department of Public Works' activities in Dandan constitute a trespass. From the facts we have gleaned, we conclude that they do not. It is a fundamental principle of property law that co-tenants share an undivided interest in the land which they own together. Others may use the land with the permission of only one of the owners, so long as they do not drive out the co-tenant. One discussion of this principle is found in Dinsmore, et al. vs. Renfro, et al., 225 P. 886 (Cal. 1924). That court stated the issue and the controlling rule as follows: "The action was one to enjoin a trespass and recover damages thereof, and the question presented is whether one entering upon the common lands of a cotenancy with the permission of one of the cotenants is a trespasser." *Id.* at 889. The court found that at least one member of the Dinsmore clan had given his permission for the construction of a road on the Dinsmore property. After an extensive discussion of the law of California and other states, the court concluded that this consent was legally sufficient. "We think it is beyond dispute from the foregoing authorities that the defendants are not answerable as trespassers to the cotenants of William Dinsmore, because of their acts under the license granted them by said William Dinsmore." *Id.* at 890. The law focuses on ouster<sup>2</sup> and not permission because by the definition of co-tenancy unanimous consent is irrelevant and unnecessary. The court further held that:

A cotenant has the right to divest himself of his entire interest in the common estate and thus bring into association with his former cotenants one who had theretofore been a stranger to the title, and this he can do independently and without the consent of the other interests. This being so, it would seem unreasonable to say that a cotenant could not authorize another to go upon the common land and do anything that he might do himself.

*Id.* The attachments to the May 16, 2007 and June 8, 2007 letters show that the property is subject to a co-tenancy and that one co-tenant has given the required consent. There is no claim of ouster and therefore, no claim that the law has been violated. In any case, a dissatisfied co-tenant has a variety of remedies, however, those remedies do not include or allow for the Attorney General's Office to initiate private civil disputes over property rights. It would be legally and ethically improper for the Office to become involved in protecting or advancing any private interest at the expense of the people of Guam, particularly when the Office represents the government in the case involving the Consent Decree.

If you have any questions or comments, please do not hesitate to contact Patrick Mason, Civil Division Deputy Attorney General.



ALICIA G. LIMTIACO  
Attorney General

cc: Governor's Legal Counsel  
Lawrence Perez, Director, Dept. of Public Works

AG:ds

<sup>2</sup> Ouster refers to "a species of injuries to things real, by which the wrong-doer gains actual occupation of the land, and compels the rightful owner to seek his legal remedy in order to gain possession." Black's Law Dictionary revised 4<sup>th</sup> ed. (1968).