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## OFFICE OF THE ATTORNEY GENERAL

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May 11, 2009

### LEGAL MEMORANDUM

Ref. DPW 08-0984

TO: Lawrence P. Perez, Director, Department of Public Works  
Barbara Gumataotao, Land Agent Supervisor, Department of Public Works

FROM: Attorney General *ALG*

Subject: Request for Guidance-Closure of Mamis Street, Municipality of Mangilao

#### Introduction

The Department of Public Works (DPW) asked our Office whether the closure of Mamis Street by Ms. Jane C. Taitano, owner of Lot 2285-NEW-C, is in accordance with law. DPW shares the concerns of local residents and the community as a whole that ingress and egress across Lot 2285-NEW-C is necessary to assure that emergency vehicles are not prevented from reaching the homes and businesses in the area. Furthermore, records indicate that a traditional right of way or easement exists across Lot 2285-NEW-C.

DPW has met with the Chief Land Surveyor and officials of the Department of Land Management (DLM) to determine whether the closure of Mamis Street is an obstruction of a public right of way, public access or utility easement, or bull cart trail protected by law.

#### Issue

Whether a traditional right of way, bull cart trail or other easement exists on Lot 2285-NEW-C which prohibits the land owner from closing Mamis Street?

#### Background

In 1998, DPW improved the road running across Lot 2285-NEW-C. In 1999, Ms. Taitano requested that DLM and DPW officials allow her to close the road. Ms. Taitano insists that DLM and DPW permitted her to block the road. Subsequently, a temporary roadblock was set up across the paved road crossing the property. Recently, Ms. Taitano installed permanent posts on the property effectively blocking/closing Mamis Street.

DLM and DPW have reviewed the recorded documents pertaining to Lot 2285-NEW-C and surrounding areas. These include, but are not limited to the following: 1) Instrument No. 39109, Property Map of Lot 2285-NEW-C, Municipality of Mangilao; 2) Instrument No. 101040, Survey for Parcelling of Lot No. 5358-1, Prepared by D.L. Hotson R.L.S. No. 18, dated February 22, 1971, and approved February 24, 1971, DLM No. 352-FY71; 3) Parceling Map for Registration, Lot No. 5359, prepared by Horatio G. Carolina R.L.S. No. 9, approved October 8, 1965; 4) Instrument No. 451183, Retracement Survey Map of Lot 2285-NEWA Municipality of Barrigada, prepared by Elmer L. Gay R.L.S. No. 14, dated August 31, 1990, approved March 6, 1991; 5) Instrument No. 473186, Consolidation of Lots Nos. 2285-NEW-R3-1 and 2285-NEW-R3-R1 and 2287 PART into Lot No. 2285-NEW-E. Parental Subdivision of Lot 2285-NEW-E. prepared by Roberto R. Ventura R.L.S. 54, dated January 22, 1992, and approved June 12, 1992, LM Check No. 151FY91; 6) Instrument No. 532469 Re-Subdivision Survey Map of Lot 2285-New A, Municipality of Barrigada, prepared by Generalismo A. Villaflora, R.L.S. No. 64, dated March 5, 1995, approved August 7, 1995, LM Check No. 144FY96; 7) Instrument No. 603983 Re-Subdivision Survey Map of Lot 2284-5-1 Municipality of Mangilao, prepared by Roberto A. Moya, R.L.S. No. 61, dated November 15, 1998, approved May 17, 1998, LM Check No. 010FY99; 8) Instrument No. 774188 Consolidation Survey Map of Lot 5358-1-2 and Lot 9, Tract 275 INTO Lot 5358-1-2NEW, Municipality of Mangilao (formerly Municipality of Barrigada), prepared by Efren B. Santos R.L.S. No. 60, dated November 19, 2007, approved May 29, 2008, LM Check No. 291FY2006. 9) Plot Plan Vicinity Map Water & Sewer Connection, for Proposed Two Story Duplex, Location Lot 2285-NEW-C Manis St/Routed No. 10, Municipality of Mangilao, Owner Henry F. Taitano. Drawing No. C-1; US Naval Gov't of Guam, M.I. Land & Claims Commission Property Map, Land Square 18-Sec 2&3, Municipality of Barrigada.

The documents refer to and include property that was formerly surrounding and including the land from which Lot 2285-NEW-C was created. The documents also pertain to properties that are now adjacent to Lot 2285-NEW-C and evidence the existence of easements or access rights which affect Lot 2285-NEW-C.

The documents provide conclusive evidence that a pre-war bull cart trail or access easement exists across Lot 2285-NEW-C. For example, the Retracement Survey Map of Lot 2285-NEWA (456-FY90) notes an "old bull cart trail of variable width."

### Analysis

#### 1. Easements by Implication: Reference to Map / Bull Cart Trail

The question of whether a traditional right of way exists on any part of the paved portion of Mamis Street that traverses Lot 2285-NEW-C can be resolved by determining whether an "easement" or "bull cart trail" exists at that location.

"An easement is defined as 'an interest in land created by grant or agreement, express or implied, which confers on its owners a right to some profit or benefit, dominion, or lawful use out of or over the estate of another.'" *Lizama v. Department of Public Works*, 2005 Guam 12, at 2-3, citing *Costa Mesa Union School Dist. v. Security First Nat. Bank*, 62 Cal.Rptr. 113, 118 (Ct.App.1967).

In *Lizama v. DPW*, the Guam Supreme Court held that “[a]n easement by implication may arise where a deed or instrument of conveyance makes reference to a map or plat which shows lots and streets, including the claimed easement.” *Lizama v. DPW*, supra at 24 citing *Danielson v. Sykes*, 109 P. 87, 88 (Cal.1910); *Tract Dev. Serv., Inc. v. Kepler*, 246 Cal.Rptr. 469, 474 (Ct.App.1988). The rule is:

When a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed. If the map exhibits streets and alleys it necessarily implies or expresses a design that such passageway shall be used in connection with the lots and for the convenience of the owners in going from each lot to any and all the other lots in the tract so laid off. The making and filing of such a plat duly signed and acknowledged by the owner, ... is equivalent to a declaration that such right is attached to each lot as an appurtenance. A subsequent deed for one of the lots, referring to the map for the description, carries such appurtenance as incident to the lot.

*Id.* “Where land is conveyed with reference to a map or plat showing streets, there is an implied grant of easements with respect to such streets.” *Id.* “The reference to a map rule has been recognized in a majority of jurisdictions as a method of creating an easement by implication.” *Id.*

Most importantly, for purposes of the Lot 2285-NEW-C, “[o]nce an easement is created by an initial reference to the subdivision map, the easement is appurtenant, and passes with subsequent conveyances, even if the subsequent conveyances do not similarly reference the map.” *Id.*, citing 21 GCA § 4201 (emphasis added). Pursuant to 21 GCA § 4201:

**A transfer of real property transfers all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.**

21 GCA § 4201 (emphasis added).

In the present matter, the recorded and unrecorded survey maps of Lot 2285-NEW-C, together with the excerpts from the abstract of title indicate that a pre-war bull cart trail traverses the property. A bull cart trail is an easement, and can be by prescriptive or customary use, or created as a matter of law. See 21 GCA § 65103(c) (“The term Traditional right-of-way means any road, trail, bull cart road, easement, or right-of-way, by whatever terms known and described (and)... shall include any road, way, trail, bull cart road, easement, or right-of-way, by whatever term known and described, and which has been included by delineation, description, narrative, or reference in any map, report, writing, or official document produced by, for, or under the supervision of, the United States Naval Government of Guam.”)

Accordingly, the paved portion of Mamis Street crossing Lot 2285-NEW-C is a traditional right of way. It is an easement which must remain open to the public and cannot be closed by the landowner, even if the documents recorded by the landowner do not reflect or acknowledge the existence of an easement.

B. Remedy / Notice of Violation or Citation for Obstructing the Public Way under Title 9 GCA § 61.35

DPW can issue a Notice of Violation pursuant to 5 GCA § 53108, Removal of Encroachment, which states:

The Department may remove any encroachment on the failure of the owner to comply with the notice provided for in this Chapter. The owner shall be liable for all expenses of such removal and in addition thereto, the sum of Ten Dollars for each day such encroachment remains after the expiration of five days from the service of the notice.

*See* 5 GCA § 53108.

The notice of violation can also refer to 9 GCA § 61.35, Obstructing the Public Way, which provides that if an easement is public, it is a petty misdemeanor to block a public road.

Specifically, 9 GCA § 61.35(a) and (c) provide:

(a) A person commits a petty misdemeanor if he unreasonably obstructs the free passage of foot or vehicular traffic on any public way, and refuses to cease or remove the obstruction upon a lawful order to do so given him by a law enforcement office.

(c) As used in this Section, **public way means any public highway or sidewalk, private way laid out under authority of statute, way dedicated to public use, or way upon which the public has a right of access or has access as invitees or licensees.**

*See* 9 GCA § 61.35(a) and (c) (emphasis added).

On July 31, 1995, the Office of the Attorney General issued a memorandum to DPW concerning this issue. The memorandum states that “[u]nder this statute, once a person who is blocking a public easement is informed to remove the obstruction by a law enforcement officer, and fails to do so, the person can then be charged with a petty misdemeanor.” The remedy advised, at that time, was that:

DPW may, once it is informed that an individual is blocking a public easement, wish to inform the individual of the criminal code section cited above. If the individual fails to cease or remove the obstruction, DPW may call the Guam Police Department for assistance. However, DPW is under no obligation to pursue this if it chooses not to. The developer or the private individuals asserting the right to use the public easement may also call upon the Guam Police Department for assistance in these matters. Again, the authority to remove the obstruction rests with the Guam Police Department, not DPW.

*See* Memorandum dated July 31, 1995.

This statute was enforced and upheld by the Guam Supreme Court in *People v. Perez*, 2000 WL 515944 (Guam Terr.), 2000 Guam 15. The Court found that sufficient evidence was introduced to prove all the elements of Obstructing the Public Way under 9 GCA § 61.35. The defendant asserted that the road at issue was not a "right of way," but the Court found that the record revealed "that Carl T.C. Gutierrez, Governor of Guam, as well as a representative of [DLM] testified that the road in question was indeed a "public way".

#### Conclusion

The recorded maps and abstracts of title indicate that the pre-war bull cart trail is of undetermined width and that an access easement exists across Lot 2285-NEW-C. Accordingly, under the analysis presented in prior memoranda from this Office and upon DLM's and DPW's review of the documents and abstracts of title pertaining to Lot 2285-NEW-C, the landowner does not have the legal right to close Mamis Street.

DPW should work with the landowner to open access to Mamis Street. DPW, however, may issue a Notice of Violation if the landowner persists in closing access to Mamis Street.

DPW and DLM can then work to perform the survey work necessary to determine the exact width and specific metes and bounds of the pre-war bull cart trail. This work will take time as the Chief Land Surveyor has advised that the numerous private surveys conducted in the vicinity will have to be reconciled. Regardless of the final width of the bull cart trail, it is undisputed that it crosses and is completely contained within Lot 2285-NEW-C.

If you have any questions or additional concerns regarding this matter, please do not hesitate to contact me at 475-3324 ext. 149.

  
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