



# Office of the Attorney General of Guam

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July 14, 2017

## OPINION MEMORANDUM

REF: LEG 17-0094

Honorable Therese M. Terlaje, Vice Speaker  
Chairperson, Committee on Culture and Justice  
*I Mina 'Trentai Kuattro Na Liheslaturan Guahan*  
Guam Congress Building  
163 Chalan Santo Papa  
Hagåtña, Guam 96910

Re: Opinion relating to Executive Order 2017-02 and transfer of the Chamorro Village (*I Sengsong Chamorro*) from Department of Chamorro Affairs to Guam Economic Development Authority.

This Office is in receipt of your request for an opinion with respect to the legality of Executive Order 2017-02 wherein the Governor, pursuant to his Organic Act authority to reorganize the executive branch of the government of Guam, has transferred the Chamorro Village (*I Sengsong Chamorro*) from the Department of Chamorro Affairs to the Guam Economic Development Authority.

## BACKGROUND

### A. History of the Chamorro Village (*'I Sengsong Chamorro'*) and the Department of Chamorro Affairs

Public Law 14-154 (Dec. 19, 1978) created a public market and a public market revolving fund under the control of the Department of Commerce “for Guam products at such place or places as the Director may deem proper.” That public market later came to be known as the Chamorro Village.

More than twenty years later, the Legislature created “a non-stock, non-profit public corporation to be known as the ‘*Dipattamenton I Kaohao Guinahan Chamorro*’ or ‘Department of Chamorro Affairs’ (‘Corporation’).” P.L. 25-069 (July 8, 1999), codified at 5 GCA § 87101, *et seq.* Its purposes were varied:

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The purpose and authorized activities of the Corporation are to assist in the implementation of an integrated program for the preservation, development and promotion of the Chamorro Heritage of Guam, for the public benefit and to provide specific services to the Chamorro people. It is intended that this Corporation be a catalyst in the preservation, development and promotion of language, arts, humanities, historic and cultural preservation, research, restoration, presentation, museum activities and support programs significant to Guam's history and culture, and to enhance the future of the Chamorro people of Guam. It is a further purpose of this Chapter to enable the Corporation to aid private enterprise without unfairly competing with it in the expansion of cultural and historical resources for Guam.

Title 5 GCA § 87103(a).

Legislature abolished the Department of Commerce and transferred its responsibilities to the Guam Economic Development and Commerce Authority (GEDCA), now known as the Guam Economic Development Authority (GEDA). *See*, P.L. 26-076 (March 12, 2002). Section 37 of P.L. 26-076 provided that GEDCA “shall have authority over and supervise the Chamorro Village (*I Sengsong Chamorro*).” Section 39 of P.L. 26-076 further provided that GEDCA “shall maintain and operate under its control a public market, or markets, for Guam products at such place or places as the Administrator may deem proper.”

On June 24, 2002, exercising his Organic Act authority\* to reorganize the executive branch under 48 U.S.C. § 1422c(c), former Governor Carl T.C. Gutierrez issued Executive Order No. 2002-14 which, among other things, transferred the “personnel, duties and responsibilities of the Chamorro Village” to the Department of Chamorro Affairs. Three years later the Legislature ratified the governor's executive order by legislative enactment. *See*, P.L. 28-068:IV:55 (Sept. 30, 2005), codified at 5 GCA § 87103(b)(8) (“The Corporation [Dept. of Chamorro Affairs] shall have authority over and supervise the Chamorro Village (*I Sengsong Chamorro*)”). Whether by executive order or legislative enactment the Department of Chamorro Affairs has had authority over the Chamorro Village (*I Sengsong Chamorro*) since 2002.

In February of this year, Governor Eddie Calvo issued an executive order transferring operations and supervision of the Chamorro Village *back* to GEDA. *See*, Executive Order 2017-02 (Feb. 14, 2017). In its preamble, Governor Calvo stated that “although well intentioned, the placement of the Chamorro Village under DCA has not been to the mutual benefit to either DCA or the Chamorro Village itself, has not maximized promotion of locally-produced products, and the Chamorro Village finds itself in need of real property management and business marketing assistance.” In the Governor's view, “the Chamorro Village can be more effectively managed and

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\* Guam's Organic Act provides that the Governor “shall have the power to issue executive orders and regulations *not in conflict with any applicable law*.” 48 U.S.C. § 1422 (emphasis added). It further provides that the Governor “shall, from time to time, examine the organization of the executive branch of the government of Guam, and shall determine and carry out such changes therein as are necessary to promote effective management and to execute faithfully the purposes of this chapter and the laws of Guam.” 48 U.S.C. § 1422c(c).

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operated if completely transferred [back] to GEDA.” E.O. 2017-02, p. 2. Accordingly, the Governor has ordered as follows:

1. The Department of Chamorro Affairs and the Guam Economic Development Authority shall take all necessary steps to completely transfer the Chamorro Village to GEDA. Upon completion, the management and administration of the Chamorro Village shall be under the authority of GEDA.
2. All personnel, duties and responsibilities of the Chamorro Village, following promulgation of this Executive Order, shall fall under the authority and supervision of GEDA.
3. This Executive Order is not intended to directly or indirectly remove, harm or diminish any protections, afforded by law, to the employees of the Chamorro Village. Nor does this Executive Order create any right or benefit, substantive or procedural, enforceable at law or equity by a party against Guam, its departments, agencies or instrumentalities, its officers or employees or any other person.
4. This Executive Order is not intended to and shall not abrogate DCA's role in preserving Chamorro culture and heritage in the Chamorro Village, and the current rules and regulations of the Chamorro Village shall remain in force until amended or altered pursuant to legislation or the Administrative Adjudication Law.
5. Any prior Executive Order heretofore promulgated that is in conflict with this Executive Order is hereby repealed insofar as any conflict is concerned.

*Id.*

**B. The Governor’s Organic Act Authority to Reorganize the Executive Branch**

This Office has previously recommended that the procedure to be followed by the Governor and Legislature in this type of situation is for the Governor to reorganize by executive order, and where funds can be identified relating to the functions that are transferred from one agency to another, utilize those funds, whereupon the Legislature appropriates to the receiving agency, followed by the Legislature amending the law to reflect the changes made by the Governor.

Back in 1958 the Department of Interior advised the then-appointed Governor on these reorganization powers. Indeed, in 1952, Carlton Skinner reorganized the Customs Divisions, taking it from one agency and putting it in another, by executive

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action, an “Executive Memorandum 33-52”. This was because the Legislature had abolished all customs duties thus leaving the Division with no collection functions. See *People v. Sugiyama*, 846 F.2d 570, amended in 859 F.2d 1428 (CA9, 1988).

**The 1958 DOI memorandum said that the Governor can not only reorganize the government by sending various functions from one place to the other, but, so long as appropriation can be identified with these functions, use these even though they were made to the department that is losing a function.** The Governor may not change a substantive duty or function, however.

**At the next budget session, the Legislature would then appropriate to the receiving agency the moneys for the personnel, equipment and functions transferred. Likewise, it should amend the law to reflect the executive changes.** An example of what the Governor can do is to transfer a number of functions, along with their personnel and equipment and funding, to another agency to accomplish his consolidation, but he cannot create a new agency—only the Legislature can do that.

*Opinion to Hon. Frank B. Aguon, Jr., Vice-Speaker, 26<sup>th</sup> Guam Legislature, re: Governor’s and Legislature’s Powers in Reorganization*, pp. 2, 3 (Aug. 5, 2003) (emphasis in bold added). This is thus the historical authority for both Governor Gutierrez’s original transfer of the Chamorro Village from GEDCA (GEDA) to the DCA, and Governor Calvo’s transfer of the Chamorro Village back to GEDA.

That authority, however, predates the Guam Supreme Court’s decision in *In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam (“Camacho”)*, 2004 Guam 10, which we are compelled to conclude suggests that Governor Calvo’s transfer of the Chamorro Village from the Department of Chamorro Affairs back to GEDA by executive order was “in conflict with applicable law,” 48 U.S.C. § 1422, specifically, 5 GCA § 87103(b)(8) which, as described previously, codified Governor Gutierrez’s transfer of the Chamorro Village from GEDCA to the DCA. The Supreme Court in *In re Camacho* considered an almost identical transfer as that considered here.

The Organic Act expressly provides the Governor with authority to issue executive orders, stating that: “[The Governor] shall have the power to issue executive orders and regulations not in conflict with any applicable law.” 48 U.S.C. § 1422. Although the Governor asserts that his issuance of Executive Order 2004-07 transferring the functions of the Clearinghouse to BBMR, the Bureau of Statistics and Plans, and other executive branch agencies was a proper exercise of his Organic Act power to reorganize, Request for Declaratory Judgment, at 8, his purported reorganization was nonetheless undertaken through issuance of an executive order. **Therefore, the threshold issue before us is whether Executive Order 2004-07 was validly issued pursuant to the Governor’s section 1422**

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**authority to issue executive orders which are “not in conflict with any applicable law.” 48 U.S.C. § 1422.**

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The issue in this case is whether Executive Order 2004-07 is valid. Such an executive order “is entitled to the same presumption of constitutionality that a statute enjoys and, thus, should be construed as constitutional unless its unconstitutionality is clearly apparent.” *County Road Ass’n v. Governor*, 677 N.W.2d 340, 348 (Mich.Ct.App.2004) (citing *Straus v. Governor*, 592 N.W.2d 53 (Mich.1999)). Therefore, unless we determine that the unconstitutionality of Executive Order 2004-07 is clearly apparent, we must find it to be valid. *See id.* **Since the Governor is only authorized to issue executive orders “not in conflict with any applicable law” 48 U.S.C. § 1422, if we find that Executive Order 2004-07 is in conflict with an applicable law, its unconstitutionality would be clearly apparent and Executive Order 2004-07 would be invalid.**

*In re Camacho*, 2004 Guam 10 ¶¶ 59-60 (editorial brackets in the original). The Court determined that the law applicable to the governor’s transferring the functions of the Guam State Clearinghouse to BBMR was Public Law 26-169, which created the Clearinghouse and designated the lieutenant governor as its director.

When the Governor challenged the organicity of P.L. 26-169 the Court held that it was within the Legislature’s Organic Act authority to place his office as director of the Clearinghouse; and that it was neither a violation of the governor’s appointment powers under the Organic Act nor a violation of the separation of powers doctrine to prescribe the duties of the lieutenant governor to include the directorship of the Clearinghouse. *Id.*, 2004 Guam 10 ¶ 51 (“we hold that the Governor’s appointment powers under sections 1422 and 1422c(a) of the Organic Act are not implicated by Public Law 26-169. We further hold that the provision of Public Law 26-169, designating the Lieutenant Governor as the Director of the Clearinghouse, is expressly authorized by section 1422 of the Organic Act, and is therefore a valid exercise of the Legislature’s powers.”)(citing 48 U.S.C. §§ 1422, 1423a).

Once the Court determined what the “applicable law” was, and that it was not inorganic, it turned to whether the governor’s executive order was in conflict with it.

The second step is to determine whether Executive Order 2004-07 conflicts with the applicable law, that being Public Law 26-169. We find that the conflict between the two is apparent. The Governor’s transfer of functions to BBMR, the Bureau of Statistics and Plans, and various Executive Branch bureaus, agencies and instrumentalities through Executive Order 2004-07, directly conflicts with the Legislature’s specific prescription of the identical duties to the Clearinghouse within the Lieutenant Governor’s Office. The Governor’s transfer of functions is also in direct contravention of the Legislature’s stated finding of the “need to establish a single and centralized clearinghouse within the government of Guam

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responsible for overseeing all Federal aid programs, grants ...” P.L. 26-169: 1. In addition, transferring the duties to these agencies defies the Legislature’s desire “that responsibility ... [be] vested at the highest levels of the Executive Branch of government.” *Id.*

We conclude that because Executive Order 2004-07 conflicts with an applicable law, it is not a valid exercise of the Governor’s Organic Act power to issue executive orders under 48 U.S.C. § 1422. Therefore, because its “unconstitutionality is clearly apparent[,]” *County Road*, 677 N.W.2d at 348, Executive Order 2004-07 must be struck down as inorganic.

*Id.*, 2004 Guam 10 ¶¶ 69, 70 (editorial ellipses and brackets in original; footnote omitted).<sup>†</sup>

Six years later, the Supreme Court reiterated its holding in *In re Camacho*.

The Organic Act expressly authorizes the Governor to issue executive orders, but also limits the scope of that authority, stating that the Governor “shall have the power to issue executive orders and regulations *not in conflict with any applicable law.*” 48 U.S.C.A. § 1422 (emphasis added). If an executive order directly conflicts with applicable statutory law, the order is inorganic and invalid. *In re Camacho*, 2004 Guam 10 ¶ 61; *cf. Bell v. Luis*, 528 F.Supp. 846-51 (D.C. V.I. 1981) (stating that an executive order promulgated by the governor of the Virgin Islands was inorganic and consequently null and void when it conflicted with existing legislation).

*Guerrero v. Santo Thomas*, 2010 Guam 11 ¶ 41.

### C. Application to the Question Presented

As in *In re Camacho*, we are presented with the question whether E.O. 2017-02 is “in conflict with any applicable law,” specifically 5 GCA § 87103(b)(8) (“The [Department of Chamorro Affairs] shall have authority over and supervise the Chamorro Village (*I Sengsong Chamorro*).”). The Supreme Court’s decision in *In re Camacho* compels us to conclude that it is.

The Governor may urge that there are differences between the executive order considered in *In re Camacho* and the executive order under consideration here. For instance, the DCA is

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<sup>†</sup> Having determined that “Executive Order 2004-07 fails the threshold determination of validity,” the Court found it “unnecessary to address the issue of the Governor’s attempt to exercise his Organic Act reorganization authority under 48 U.S.C. § 1422c(c). *Id.* 2004 Guam 10 ¶ 71. That is somehow unsatisfying. It may not be immediately obvious why the Court declined to address what seems on the surface to present its own separation of powers concerns. But the answer lies in the wording of the Organic Act, which restricts whatever changes the governor’s reorganization plan may propose to those which are “as are necessary to the purposes of this chapter *and the laws of Guam.*” 48 U.S.C. § 1422c(c) (emphasis added).

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statutorily organized as a non-stock non-profit corporation, *see*, 5 G.C.A. § 87101, whose principal purpose is to serve as a “catalyst in the preservation, development and promotion of language, arts, humanities, historic and cultural preservation, research, restoration, presentation, museum activities and support programs significant to Guam’s history and culture, and to enhance the future of the Chamorro people of Guam,” 5 GCA § 87103(a), whereas other than its name there is nothing particularly culturally significant about the Chamorro Village, especially considering that it was originally intended in P.L. 14-154 as nothing more or less than a public market for Guam products. The Governor’s conclusions that “although well intentioned, the placement of the Chamorro Village under DCA has not been to the mutual benefit to either DCA or the Chamorro Village itself, has not maximized promotion of locally-produced products,” and ... “can be more effectively managed and operated if completely transferred [back] to GEDA,” E.O. 2017-02, p. 2, may very well be true. But under the Organic Act as construed by the Supreme Court of Guam, that is a determination for the Legislature to make.

**CONCLUSION**

Because E.O. 2017-02 conflicts with the express language of 5 GCA § 87103(b)(8), it is in conflict with applicable law, and is therefore inorganic.

We trust we have sufficiently addressed your inquiry. For further information concerning this matter, please use the reference number shown above.



**ELIZABETH BARRETT-ANDERSON**  
Attorney General

Cc: Governor of Guam