



Office of the Attorney General

March 24, 2005

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MP

Memorandum (Informational)

Ref: CLTC 05-0233

To: Chairman, Chamorro Land Trust Commission
Administrative Director, Chamorro Land Trust Commission

From: Attorney General

Subject: Proposed Oka Point Lease

This letter serves to (1) analyze the issues raised at our meeting on March 21, 2005; (2) analyze the issues mentioned by Attorney Michael Phillips in his letter dated March 15, 2005 to the Chamorro Land Trust Commission (the "Commission" or the "CLTC"); and (3) discuss other related issues.

This memorandum is informational only and is not written as an opinion of this office. If you wish to release it to Attorney Phillips, the decision is yours. Our office will continue to respond to the Commission's requests for assistance on a case by case only.

1. Quorum for Commission Meetings.

The Commission's enabling legislation at 5 GCA §75102(a) provides that the Commission shall be composed of five members. Usually, a board or commission's enabling legislation will specify the number of members constituting a quorum to hold a meeting. The Commission's enabling legislation, however, is silent.

Therefore, there is a question as to whether the Legislature intentionally omitted any reference to a quorum and meant for all five members to be present in order to conduct a meeting, or whether a quorum constituting a majority of the five members was intended or implied.

Section 700 of 1 GCA provides that common law rules of construction shall be used to interpret Guam's statutes unless a different intent appears in law or in a court decision.

Accordingly, the Commission may use the common law rule of construction that a quorum is composed of a simple majority. See, 2 Am. Jur. 2d Administrative Law §82,



citing *U.S. Gilmore*, 75 U.S.A. 330, 19 L.Ed. 396 (1869). However, this begs the second question which is, once there is a quorum to hold a meeting, then how many members of the Commission have to vote favorably to take action? The question posed is especially important if only three members show up and declare a quorum to hold a meeting. At such a meeting, is the vote of only two out of three needed to take action (a simple majority of those present), or is a larger number needed (a super-majority such as three, four, or even the full five members)?

The Commission's enabling legislation is again silent, and I am not aware of the Commission having passed any procedural rules, which a governing body may do to the extent not already set by law. Also, I have been unable to confirm whether the common law rule is to allow a simple majority of those present at a meeting to take action, but am almost certain that it is.

I assume that the Commission has considered the issue some time in the past and settled the question.

2. Public Notice of Commission Meetings.

Attorney Phillips seems to believe that public notice may have been lacking for some past Commission meetings and is requesting all public notices of any Commission meeting held within the last sixty days of the date of his request.

Just to restate briefly the basic legal requirements of public notice as set out in the Open Government Law (5 GCA §8101, *et seq.*) - - whether a regular or special meeting is held, the notice requirements provide that two notices must be given, one exactly five working days ahead of time, and the second at least forty-eight hours prior to the scheduled meeting. Notice may be either in a newspaper of general circulation as defined in the Open Government Law, or by radio or television in a manner reasonably calculated to give notice to the general public. These public notices are in addition to the notices which are required to be given to the Commission members themselves. The topic of a meeting must also be included in the public notice. Only an emergency will dispose of strict notice requirements. See 5 GCA §§8104, 8107, and 8108.

Otherwise, if all technical requirements are not met, a meeting may not be held. If a meeting has been held without these technical requirements, then any action taken is void and of no effect. 5 GCA §8114. However, at least one court has held that if an action is considered invalid for having been taken at a meeting violating an open government law, then the invalid action may be ratified at a later open meeting, but that the ratified action is effective only from the date of ratification done at the valid open meeting. See 2 Am. Jur. 2d Administrative Law §84, citing *City of San Antonio v. River*



City Cabaret, Ltd., 32 S.W.3d 291 (Tex. App. San Antonio 2000).

If the Commission finds that any meetings were held without having fully met the public notice requirements, the Commission should (a) discuss the matter at its next meeting; (b) decide how to handle any actions taken at the meeting held without proper notice; and (c) make a notation on the original minutes of the meeting held without proper notice that the meeting is without any force or effect and the reason why. The person making the notation should sign and date the notation.

3. Open Government Law; Executive Sessions.

Attorney Phillips alleges that secret meetings have been held by the Commission.

Under common law, the public has no right to attend meetings of a public body. However, the public may be granted this right by statute, as the Guam Legislature has done in the Open Government Law.

According to the Open Government Law, all meetings of a public agency are open to the public, and any action to be taken must be done during an open meeting and never in executive session. 5 GCA §§8104(a) and 8111(d).

A closed executive session is authorized only under three narrow circumstances. Those three occasions are:

- (1) to meet with the Attorney General or Chief of Police on matters threatening the public's health, safety or welfare;
- (2) to consider the appointment, employment, or dismissal of public employees or officers (unless such person requests the discussion to take place in public), but never to discuss salaries; and
- (3) to discuss litigation or threatened litigation, but only upon the written recommendation of an attorney to close the meeting. 5 GCA §8111.

If the Commission has met in executive session but none of the three exceptions applied, then those executive sessions were illegally held.

If there have been any improper executive sessions, then it would be good business if at its next meeting, the Commission were to recognize which of its prior executive sessions did not conform to law and to put on the record that such executive sessions are null and void. If the Commission has minutes of any improper executive sessions,



then the original minutes of such improper meetings should be marked with a note that the meeting was improper, the reason why, and the person so noting should sign and date the notation.

4. Freedom of Information Act.

Public documents maintained by the government of Guam are subject to disclosure according to the Freedom of Information Act (5 GCA §§10101, *et seq.*). Section 10108, however, exempts eighteen types of records from disclosure, and applies to all public agencies.

Of the eighteen non-public records, the only two with possible application to the Commission's Oka Point lease is subsection (i) concerning ". . . information expressly protected under the law" and subsection (q) concerning "draft documents."

Subsection (i) refers to other laws outside of the Freedom of Information Act protecting information. These other laws offering protection are not abrogated by the Freedom of Information Act, and must be observed.

With respect to "draft documents," the term refers to any document which has not yet been finalized. That is, if the terms and conditions of a document are still under negotiation and not yet fully agreed upon, then the document is still in a draft stage. However, once all terms and conditions are agreed upon, then the document may be considered to be a final document, even if all signatures are not yet affixed to the document, because at least in the minds of those hammering out the details, their job is done and there is nothing more to negotiate.

5. Application of Guam Procurement Law.

The Guam Procurement Law (5 GCA §5001, *et seq.*) applies only to expenditures of public funds. See, 5 GCA §5004(b). Since the leasing of Oka Point will result in income to the Commission rather than payments by the Commission, the Guam Procurement Law does not apply from this perspective.

Also, while the General Services Agency (GSA) is authorized to dispose of excess supplies belonging to the government pursuant to 5 GCA §5401 through §5403, the definition of "supplies" excludes "land and a permanent interest in land." 5 GCA §5030(u). (The definition of "supplies" also does not elaborate on the meaning of "leases of real property" which term is included in the definition, but "leases of real property" has always been interpreted to mean leases of office space, and GSA has always handled procurement of office space or delegated such authority based upon



this definition.) Therefore, GSA has no jurisdiction over the Oka Point lease which relates to "land and a permanent interest in land".

However, P.L. 25-179 which authorized the Commission to lease Oka Point also does not go into detail on the procedure to be used other than to mention "negotiations" in general. Hence, in handling the acquisition of the Oka Point lease, the Commission only needed to adopt some procedure which included negotiations.

The Request for Development Proposals (RFDP) at Section VIII, Subsection 1 on Page 11 declares that the RFDP "is issued subject to all the provisions of the Guam Procurement Act (Public Law 16-124) and the Guam Procurement Regulations." The specific procedure used in the RFDP, for the most part, appears to be the procedure for the acquisition of professional services found in detail at 2 GAR Division 4 §3114.

Nevertheless, since the Guam Procurement Law does not legally apply to the Oka Point lease, the Commission may not adopt anything from the Guam Procurement Law which restricts disclosure of any document other than "draft documents" under the Freedom of Information Act. Public Law 25-179 also does not limit disclosure. Therefore, regardless of what the RFDP says about the Guam Procurement Law, the Commission must follow the Freedom of Information Act in handling Attorney Phillips's request for documents, and not the Guam Procurement Law.

6. Public Input During Meeting under the Open Government Law.

The Commission asked whether the public had a right to speak at an officially noticed and called meeting.

Subsection (b) of 5 GCA §8103 provides that the Open Government Law "does not require that a person who is admitted to a meeting of a public agency shall, because of his mere presence, be accorded an opportunity to participate in such a meeting." The Open Government Law is meant merely to expose the government's business to the public so that there is disclosure, not to allow the public to participate directly in the government's business.

However, depending upon the subject matter, a public agency may wish to hear the public's views. If the Commission decides to recognize a member of the public to speak at an official meeting, the agency is entitled to set some ground rules and let the rules be known. (Will the Commission give the opportunity to speak to everyone wishing to speak, or only a certain number? Will there be time limits?) How to handle public input may be addressed in an agency's procedural rules or on a case by case basis. The Commission may also decide to let the Administrative Director hold a public



hearing.

I note from reviewing the RFDP that the procedure calls for some public participation, but apparently at the Commission's discretion to be decided during the process itself.

7. Rules for Commercial Leases.

Attorney Phillips charges that the Commission failed to approve any rules for commercial leases "as required under the Act" as it did for residential and agricultural leases by means of P.L. 23-038. I assume Attorney Phillips was referring to the Chamorro Land Trust Act.

However, I have been unable to find any express directive in the Chamorro Land Trust Act which would require the Commission to adopt commercial leasing rules, the nature of which would cover the Oka Point lease.

Also, my reading of the Chamorro Land Trust Act is that the only commercial leasing authorized is under 21 GCA §75107(c)(2) which addresses licenses for "theaters, garages, service stations, markets, stores, and other mercantile establishments (all of which shall be owned by lessees of the Commission or by organizations formed and controlled by said lessees)." [Emphasis added.] A hotel developed by non-native Chamorros such as under the Oka Point lease is not contemplated by §75107(c)(2) and outside its scope. Therefore, if the Legislature gave the Commission any direction whatsoever for the Oka Point lease, it must have come purely from P.L. 25-179.

Section 75103 of 21 GCA does provide that the Commission shall adopt rules, regulations and policies in accordance with the rule-making procedures of the Administrative Adjudication Law ("AAL"). However, rule-making procedures are generally used for creating regulations which will have long-term use by the general public, thereby creating a uniform procedure for repetitive situations. The Oka Point lease on the other hand is a one-time transaction.

The direction provided in P.L. 25-179, Section 4 is for the Commission to "negotiate and dispose" of Oka Point. Public Law 25-179 repeats the word "negotiations" three more times. The Legislature obviously wanted negotiations as the basic means for handling the Oka Point lease. Section 4 also sets out how potential lessees would be given notice and describes the details of some of the parameters set by the Legislature for the lease. The Legislature never directed the Commission in this special piece of legislation to adopt rules under the AAL for handling the Oka Point lease. The Legislature may have even expected that Section 4 contained sufficient guidance.



Therefore, the Commission was not out of place in adopting a procedure in the RFDP without going through the AAL for a one-time transaction.

OFFICE OF THE ATTORNEY GENERAL
DOUGLAS B. MOYLAN, ATTORNEY GENERAL OF GUAM

By:

A handwritten signature in cursive script, appearing to read "Deborah Rivera".

DEBORAH RIVERA
Assistant Attorney General