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CLTC Opinion Memorandum Issued 5-11-18

2 messages

Pauline I. Untalan <puntalan@guamag.org> Fri, May 11, 2018 at 3:08 PM
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Good Afternoon Senator Biscoe-Lee and CLTC Chair Fejeran:

Attached is the CLTC Opinion Memorandum issued by Attorney General Barrett-Anderson dated May 11, 2018. A hardcopy will be delivered to your office sometime today or Monday. Thank you and have a good weekend.

Respectfully,

Pauline I. Untalan

Special Assistant to Attorney General Elizabeth Barrett-Anderson

Administrator, Victim Service Center, Criminal Injuries Compensation

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GL# 34-18-1905
Speaker Benjamin J.F. Cruz

MAY 18 2018

Time: 3:13 ☐ A.M. ☐ P.M. File No. ____

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Benjamin J.F. Cruz <senator@senatorbjcruz.com> Fri, May 18, 2018 at 3:13 PM
To: Guam Legislature Clerks <clerks@guamlegislature.org>
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05/11/18	5/11/18	Office of the Attorney General of Guam	CLTC Opinion Memorandum Issued 5-11-18	34-18-1905

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OPINION MEMORADUM

May 11, 2018
Ref: PCF: LEG 18-0226

Honorable Senator Regine Biscoe-Lee
Committee on Innovation, Economic, Workforce and Youth Development
I Mina'trentai-Kuattro Liheslaturan Guahan
Guam Congress Building
163 Chalan Santo Papa
Hagåtña, Guam 96910

Pika P. Fejeran, Chairperson
Chamorro Land Trust Commission
Department of Land Management
590 S Marine Corps Drive, ITC Building Ste. 733
Tamuning, Guam 96913
Re: Lot 5382 and Tract 9, Barrigada Heights
Chamorro Land Trust Commission

Hafa Adai Senator and Madam Chair:

This Opinion is issued to provide guidance relative to the enforceability of certain leases granted under the Chamorro Land Trust Act ("Act") and the "Senator Paul Bordallo Rules and Regulations for the Chamorro Land Trust Commission" ("Rules")[1] in the Barrigada Heights area.

BACKGROUND

This matter was presented to this Office by a letter of concern from Senator Regine Biscoe-Lee regarding media accounts involving land leases issued by the Chamorro Land Trust Commission ("Commission") to individuals, some of whom were employees of the agency or family members of agency employees. Senator Biscoe-Lee further expressed personal concern as she is one of the recipients, although not involved in any agency relationships. Roughly 103 leases have been approved and/or issued to applicants under the Chamorro Land Trust

[1] The Chamorro Land Trust Act was established with the passage of P.L. 12-226 in 1975, which is codified in Title 21 G.C.A., Chapter 75. In 1995, Public Law 23-38 was passed establishing the rules and regulations for residential and agricultural leases, as required by the Act. The rules and regulations have the force and effect of law.

program in the Barrigada Heights area of Tract 9. These leases involve individuals who were: (1) original applicants who filed an application for Chamorro homelands in December 1995, (2) occupied lands prior to the implementation of the Act, (3) those who switched with a 1995 applicant, or (4) those who assumed a 1995 applicant's sequential priority status, subject to the date and time of the original application.

A majority of the leases were executed in 2015, 2016 and 2017. A few go as far back as 1997. The leases span the tenures of numerous Commission members. Of concern to this Office is an administrative practice that bypasses the Commission's approval. Leases were approved by the Administrative Director. Whether this practice permeates older leases, or only more recent ones is a matter for administrative review consistent with this Opinion. The legal issue presented is whether the Act or Rules authorize the Administrative Director to execute a lease without Commission approval.

A second legal issue involves the authority of an applicant to transfer or switch places with another applicant. This practice allows the later in time applicant to assume the sequential priority status given to the date and time of the original application. Our Opinion will address the legality of this practice.

DISCUSSION

Authority of the Administrative Director to Approve Leases Without Commission Approval

The Commission is authorized to enter into land leases with qualified applicants seeking an interest in Chamorro homelands. Title 21 G.C.A., Chapter 75 provides, in relevant part, for the Commission's authority:

> **§ 75105. Control by Commission of Available Lands; Return to Department.**
>
> Upon enactment of this Chapter, all available lands shall immediately assume the status of Chamorro homelands and shall be under the control of the Commission to be used and disposed of in accordance with the provisions of this Chapter. . . .
>
> **§ 75107. Leases to Chamorro, Licenses.**
>
> (a) The Commission is authorized to lease to native Chamorros the right to the use and occupancy of a tract of Chamorro homelands. . . .
>
> (b) The Commission shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the Commission, is qualified to perform the conditions of such lease.

21 G.C.A. §§ 75105 and 75107(a), (b) (2005).

The Rules further refer to the role of the Commission:

> **2.1. Mission of Trustees.**
>
> The Commission members, as trustees, shall: act exclusively in the interests of beneficiaries under the Act; hold and protect the trust property for beneficiaries under the Act; maintain and uphold their fiduciary responsibilities to the beneficiaries, and exercise such care and skill as a person of ordinary prudence would exercise in dealing with one's own property in the management of Chamorro homelands; and adhere to the terms of the trust as set forth in the Act.
>
> **3.1. Director to sign for commission.**
>
> *After approval of the Commission,* the director shall sign all. . . leases. . . . The Chairperson of the Commission shall Countersign on behalf of the Commission where approval of the Commission is required.

P.L. 23-38:2.1, 3.1 (1995) (emphasis added).

The Administrative Director's responsibility is limited to the "administration and execution of all actions approved by the commission. . . ." Rule 3.2. Although the Act and Rules specifically outline certain powers of the Administrative Director, the authority to grant approval of leases is clearly within the Commission's purview. "[A]s a general rule, powers conferred upon public agencies and officers which involve the *exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated* to subordinates in the absence of statutory authorization. '[P]ublic agencies may delegate the performance of ministerial tasks. . . .'" *Mesngon v. Gov't of Guam*, 2003 Guam 3 ¶ 22 (citations omitted) (emphasis added).

The Commission's decision-making, discretion, and judgment under the Act is non-delegable. *Id.* Neither the Act, nor the Rules, substitute, diminish or divest the Commission of its ultimate decision-making authority to approve leases. Therefore, the Commission is required by law to exercise its power of approval. The absence of such approval renders a lease voidable.

Authority to Transfer or Switch an Applicant's Sequential Priority as to Date and Time

The Act does not establish a right of transfer in the application process, however, the Rules do. Upon the death of an applicant, Rule 5.8 permits the designation of a successor to the applicant's sequential priority status subject to the date and time of the original application. While an applicant is alive there is no provision allowing for transfer of an applicant's sequential priority; nor, can applicants switch places with each other during their lifetime.

An applicant's sequential priority can only be designated to pass to a relative after the applicant's death. It allows for the following to succeed to the applicant's place in line: "husband and wife, children, widows or widowers of the brothers and sister[s], or nieces and nephews."

Rule 5.8. Furthermore, only the Commission can authorize the designation of a successor outside this limited category of succession in the event that the deceased applicant failed to make such a designation. It is, however, for the Legislature to revisit whether this prohibition is reasonable or practical considering the lineal passage of land within Chamorro families.

Open Government Law

Transparency and public accountability are important policies entrusted under the Act and Rules. Furthermore, the Commission can only exercise its authority, and can only act, in accordance with the Open Government Law. *See* 5 G.C.A. § 8102 (2005); *See Joseph v. Guam Board of Allied Health Examiners*, 2015 Guam 4 ¶ 16 (discussing the mandates of 5 G.C.A. § 8102). This assures the public that decisions, such as approving leases, are conducted in an open forum subject to public scrutiny and debate. Actions of the Commission are valid only if predicated upon the Open Government Law.

This means that all Commission meetings where a decision is made or where there is deliberation towards a decision must be noticed. *See* 5 G.C.A. § 8107 (2005). In addition to the meeting notice requirements of the Open Government Law, the Act and Rules require a public hearing in some of the following instances: (1) applicant disagrees with any action taken by the Commission, (2) lands are designated for commercial use, or (3) leases are cancelled.

In reviewing the Barrigada Heights leases in controversy, the Commission should act in a manner that affords the maximum level of public participation. The parties affected by the legal impact of this Opinion should be accorded due notice and an opportunity to be heard regarding how the Commission will address a fair and equitable remedy.

CONCLUSION

It is the Opinion of this Office that the Administrative Director does not have the authority to execute leases without the Commission's approval. In this instance, a lease that was signed without the Commission's approval — and not subject to any other defect — is voidable. The Commission should proceed to notify the parties pursuant to the Open Government Law of its intent to cancel a lease and afford the parties an opportunity to be heard. Because the leases are merely voidable and not void, parties may request that the Commission ratify these leases provided all other qualifications under the Act are otherwise met.

Further, there is no authority that allows an applicant during his lifetime to transfer or switch places with another applicant. A lease in violation of this prohibition is null and void and is not subject to the Commission's power to correct or remedy. Applicants should be permitted to resume their prior sequential status subject to the order of the date and time they applied.

///

Finally, the Commission is advised to review every lease to conform to ethics in government standards. Internal conflicts of interest, where identified and proven, should be corrected immediately so as to restore public trust and confidence in the integrity of Chamorro Land Trust program and for the protection of Chamorro homelands for all generations.

Respectfully,

ELIZABETH BARRETT-ANDERSON
Attorney General of Guam

cc: Chamorro Land Trust Commission Members
Director, Mr. Michael J.B. Borja