

EDDIE BAZA CALVO
Governor



RAY TENORIO
Lieutenant Governor

Office of the Governor of Guam

Leonardo M. Rapadas
Attorney General of Guam
287 West O'Brien Drive
Hagatna, Guam 96910

Re: Government of Guam v. 1,382,428 Square Meters, More or Less, Situated in the Municipality of Inarajan, Guam, et. al.
Superior Court of Guam Civil Case No. CV0084-08

Dear Attorney General Rapadas:

On December 10, 2012, the Superior Court of Guam issued the enclosed written Judgment in the above condemnation lawsuit against the Government of Guam. The judgment awards the plaintiff landowners of the Layon Landfill site the amount of \$25,115,683.00, inclusive of the \$3,410,000.00 that had previously been deposited into the court, as just compensation for the condemnation of their property.

At the time, your office reported that it had prevailed on all legal arguments presented in court, and that it was pleased with the outcome of the case and the amount of the judgment. The time for appeal of the judgment has now passed, the judgment is final. As such, the Government of Guam is now legally required to make payment to the plaintiff landowners.

As of February 1, 2013, the amount owed by the Government to satisfy the judgment was \$28,245,932.36 in principal plus interest. The judgment has been, and still is, accruing interest at the rate of six percent (6%) per annum from January 24, 2008 until payment is made in full. It has been calculated that every day that passes increases the total amount necessary to satisfy the judgment by \$3,558.06. ***In short, the Government is incurring more than \$110,000.00 per month in interest on top of the more than \$28 million that is already owed.***

For obvious reasons, it is extremely urgent that the Government take all action necessary to pay the judgment *immediately*. With respect to the source of funding for the judgment, Title 10 G.C.A. Section 51A803 as enacted by Public Law 30-1 and amended by Public Law 30-7, appropriates proceeds from the Government of Guam Limited Obligation (Section 30) Bonds for the purpose of paying the judgment. Moreover, according to the Guam Economic Development Authority (GEDA), there are sufficient proceeds from these bonds to satisfy the judgment and make full payment for the Government's eminent domain taking.

I understand that in the past, the District Court of Guam may have taken the position that the Section 30 funds are to be used for the closure of the Ordot Dump, and that only when the closure of the Ordot Dump has been completed will any remaining funds leftover be approved for other use. With all due respect to the District Court, this position was articulated long before there was a \$28 million judgment rendered against the Government. Moreover, such a position fails to consider that one of the primary purposes of the Section 30 Bond Indenture is to fund the acquisition of the landfill site.

Specifically, the Bond Indenture for the Consent Decree Bonds provides that the Construction Account established at the Bank of Guam (as Trustee) shall be used and withdrawn for the payment of “Project Costs” of each “Project” for which the Consent Decree Bonds were issued. [BOND INDENTURE § 3.03]. The Bond Indenture itself defines the word “Project” to mean “any capital improvement project . . . including without limitation *the acquisition of land and furnishings therefor or the payment of any claims or judgment relating thereto,*” [BOND INDENTURE § 1.01 at p. 13 (emphasis added); *See also*, SUPPLEMENTAL BOND INDENTURE § 12.01 at p. 3 [defining “Series 2009A Project” to mean and include “*acquisition . . . of the System. . . located in the Layon area of Guam.*” (emphasis added)].

The Bond Indenture further defines “Project Costs” to mean, “(1) *costs of the Government or any subdivision thereof and all contractors for land* (including franchises, license or *other interests in land*) . . . in connection with the *acquisition . . . of the Project* otherwise attributable to the Project”; as well as “(5) relocation costs and any *claims, awards or judgments relating to the Project.*” . [BOND INDENTURE §1.01 at pp. 13-14 (emphasis added)].

Despite the clear language of the Bond Indenture requiring the Government to use the bond funds to pay any judgment related to the acquisition of the Layon Landfill project, no payment or any portion therefore has yet been made. Yet according to the GEDA, there is approximately \$41 million remaining of the Bond Proceeds which can be used to pay the judgment.

If the Government does not pay the judgment immediately, there is a real possibility that the \$41 million remaining will be dissipated and that payment will therefore no longer be possible. In its quarterly reports, the Federal Receiver has consistently identified the condemnation judgment as being a “capital cost” of the Consent Decree. [See e.g., QUARTERLY REPORT OF THE RECEIVER at p. 28 (July 18, 2012) (“The remaining issues that may affect final capital cost include: . . . [litigation pending on the value of the Layon Landfill site”)]. He has also publically recognized that clear title to site is critical to the Consent Decree Projects. [U.S.A. v. Gov’t. of Guam, ORDER RE: BRIEFING FOR MOTION FOR DECLARATORY JUDGMENT, Civil 02-00022 (D. Guam Oct. 22, 2008) (“The Receiver advised the court that the cloud of the title to the Layon site must be cleared immediately or financing will be almost impossible to obtain.”)].

Despite these statements, the Federal Receiver recently reported it intends to use \$22.5 million of the bond proceeds for “new cell development.” [QUARTERLY REPORT OF THE RECEIVER at p. 39, Table 15 (July 18, 2012)]. In fact, the Federal Receiver has already

disseminated a letter to contractors requesting “expressions of interest” in building at least two new landfill cells in the coming months.

Clearly, if \$22.5 million of the Consent Decree Bond proceeds is used to pay for new landfill cells, the \$41 million remaining will be insufficient to pay for the pre-existing judgment of just compensation that is lawfully owed by the Government for the taking of the Layon Landfill site.

This scenario is illegal and unacceptable because it violates the United States Constitution, the Organic Act of Guam, and the Bond Indenture Covenants. Under the Takings Clause of the Fifth Amendment of the U.S. Constitution, private property may not be taken for public use without just compensation. The Takings Clause applies to Guam through the Organic Act. [48 U.S.C. § 1421b(u)].

The Government’s power to condemn and acquire the Layon Landfill site was constitutionally contingent upon its strict compliance with the Takings Clause by the payment of just compensation to the private landowners. The Government has provided the funds for the necessary payment of just compensation through its enactment of Public Laws 30-1 and 30-7 which specifically designated the Consent Decree Bonds to be used Consent Decree capital expenses, including “*the acquisition of land . . . or the payment of any claims or judgment relating thereto, . . .*” [BOND INDENTURE § 1.01 at p. 13 (emphasis added)].

The failure to make prompt payment without unreasonable risk or delay additionally constitutes a violation and default of the Bond Indenture. In Section 6.08 of the Bond Indenture, the Government made a covenant that it would “*promptly, fully and faithfully* with and *abide by* any statute, law, ordinance, order, rule or regulation, *judgment, decree*, direction or requirement now in force or hereafter enacted, adopted, prescribed, imposed or entered by any competent governmental authority or agency applicable to or affecting the Bond.” . [BOND INDENTURE § 6.08 (emphasis added)]. According to Section 7.01(A)(3) of the Bond Indenture, an “Event of Default” will occur “if default shall be made by the government in the observance of any of the other covenants, agreements or conditions on its part in this Indenture or in the Bonds contained. . . .”

It cannot be overstated that the consequences of failing to pay just compensation fully and promptly are dire. Not only does a default of the Bond Indenture subject the Government of Guam to legal action and liability to the Bond Trustee and the holders of the Consent Decree Bonds, but ***there is also a very real danger that the condemned land could revert back to the former landowners.***

In every case in which a government failed to pay just compensation after taking title to land, courts have concluded that title should revert back to the original landowners. [*See e.g., Commonwealth of the N. Mariana Islands v. Lot No. 353 New G*, 2012 WL 2564303 (NMI June 28, 2012) (vacating judgment granting the Commonwealth title to condemned property and ordering that title be transferred to heirs of original property owners if the commonwealth failed to provide certain and adequate means of compensation); *Peerless Weighing & Vending Mach.*

Corp. v. Pub. Bldg. Comm'n of Chicago, 290 F.Supp 877, 883 (N.D. Ill. 1962 (“Should the tile have passed and the required judgment payment not be made then the landowner has the right to have both the title revested and damages awarded for the trespassory taking.”); Bromfield v. Treasurer & Receiver Gen. 390 Mass. 665, 670 (1983) (considering constructive trust reconveying property to the plaintiffs due to government’s failure to make timely appropriation); Community Redevelopment Agency v. Force Electronics, 55 CalApp.4th 622 (1997) (landowner could repossess condemned property if not paid full amount of judgment).

It is unquestionable that the U.S. Constitution, the Organic Act, and Guam law as enacted through Public Laws 30-1 and 30-7 all mandate that the Consent Decree Bonds be used to pay just compensation to the landowners. The improvements to the Layon Landfill site have already cost the Government of Guam over \$150 million. This amount is on top of the daily accruing \$28 million debt that is owed to the former landowners. Accordingly, not only is the prompt payment of just compensation constitutionally and legally required, it unquestionably takes priority over the construction of new landfill cells.

It is extremely alarming that to date, the judgment rendered against the Government has not been paid, yet funds for the payment are available from the Consent Decree Bond proceeds. These proceeds were specifically appropriated and designated to pay for the acquisition of the Layon Landfill site. In order to avoid the severe consequences of violating the Takings Clause and the Consent Decree, including potentially losing title to the Layon Landfill entirely, it is absolutely imperative that the Government of Guam satisfy its Constitutional, contractual, and moral obligations and that it take all steps necessary to satisfy the judgment immediately.

To this end, Section 14.04 of the Supplemental Bond Indenture provides that funds from the Consent Decree Bonds may be disbursed upon the receipt of a “Joint Requisition” to pay for Project Costs associated with the Series 2009 A Project¹:

Proceeds of the Series 2009 A Bonds deposited in the Series 2009A Construction Account shall be disbursed by the Series 2009A Construction Account Depository upon receipt of a Joint Requisition to pay Project Costs of the Series 2009A Project. Each such Joint Requisition shall state the person to whom payment is to be made, the amount to be paid, the purpose for which the obligation was incurred and that such payment is a proper and lawful charge against said fund.

Section 13.02 of the Supplemental Bond Indenture appoints the Bank of Guam as the Series 2009A Construction Account Depository. As defined in Section 12.01 of the Supplemental Bond Indenture, a “*Joint Requisition*” is a written instrument, order or requisition executed both by the Governor or such other person as may be designated and authorized by the


¹ See *infra*, Bond Indenture definitions of “Project Costs” and “Project. [BOND INDENTURE §1.01 at pp. 13-14].

Governor to execute such instruments on behalf of the Government, and by David L. Manning as Special Principal Associate of the Receiver.

Therefore, in order for the Government of Guam to satisfy its obligation to pay just compensation, it must do three things: (1) it must prepare and execute a Joint Requisition in accordance with the requirements of the Bond Indenture and the Supplemental Bond Indenture to the Bank of Guam, as the Construction Account Depository, to pay the judgment, with interest; (2) it must present the Joint Requisition to the Federal Receiver for his execution; and (3) it must present the fully executed Joint Requisition to the Bank of Guam for disbursement.

For your convenience, enclosed is a draft Joint Requisition form that satisfies the requirements of Section 14.04 of the Supplemental Bond Indenture. This draft is current as of February 1, 2013, and will need to be updated upon signing to reflect the increase in interest payable. Please review the draft Joint Resolution. Upon approval, I am prepared to sign it right away and to present it to the Federal Receiver.

Senseramente,

A handwritten signature in black ink, appearing to read 'RAY S. TENORIO', is written over a large, stylized, circular scribble or flourish.

RAY S. TENORIO
Lt. Governor of Guam

Cc: David L. Manning

Enclosures

Joint Requisition to the Series 2009 Construction Account Depository

Pursuant to Section 14.04 of the Supplemental Bond Indenture, the duly authorized undersigned hereby request that payment for Consent Decree Project Costs be made by the Bank of Guam, as the Series 2009A Construction Account Depository, as set forth below:

Recipient(s) and Amount(s):

1. \$14,709,210.51 to Trust Account of Arriola, Cowan & Arriola, for Oxford Properties & Finance, Ltd., Joaquin C. Arriola, and Douglas Cushnie
2. \$13,416,817.87 to Calvo Fisher & Jacob LLP Trust Account, for Calvo's Insurance Underwriters, Inc., Valencia Investments Corporation, Jones & Guerrero Company, Inc., Alfred C. and Diana Z. Ysrael, Lee M. Holmes
3. \$119,903.98 to Young Chull Kim

Purpose for which the obligation was incurred:

These payments are necessary to satisfy the judgment entered by the Guam Superior Court against the Government of Guam in *Government of Guam v. 1,348,474 Square Meters etc.*, et al., Case No. CV0084-08. A copy of the judgment is attached hereto. The judgment was for payment of just compensation to the former landowners of the land taken by eminent domain on which the Layon Landfill was constructed. The cost of acquisition for the Layon Landfill land is a Project Cost under the Bond Indenture, which defines "Project Costs" to mean, "with respect to any given Project, ... (1) Costs of the Government or any subdivision thereof and all contractors for land (including franchises, licenses or other interests in land) ... in connection with the acquisition, construction, reconstruction, installation and equipping of the Project or otherwise attributable to the Project" and "(5) relocation costs and any claims, awards or judgments relating to the Project." (Bond Indenture, § 1.01 "Definitions," pp. 13-14.)

Dated: _____, 2013

Dated: _____, 2013

Government of Guam

Gershman, Brickner & Bratton, Inc.
(the "Receiver")

By: _____
Raymond S. Tenorio
Lieutenant Governor of Guam
Receiver Representative

By: _____
David L. Manning

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SUPERIOR COURT OF GUAM

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COURT

IN THE SUPERIOR COURT OF GUAM

GOVERNMENT OF GUAM,

CIVIL CASE NO. CV0084-08

Plaintiff,

vs.

1,382,428 SQUARE METERS, MORE OR
LESS, SITUATED IN THE
MUNICIPALITY OF INARAJAN,
GUAM, et al.,

JUDGMENT

Defendants.

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CALVO FISHER &
COB LLP

by: *[Signature]*

ARRIOLA, COWAN & ARRIOLA, HAGATNA, GUAM 96910

This eminent domain action having come before the Court without a jury for a sixteen-day trial beginning March 21, 2011 and ending October 24, 2011, Assistant Attorney General Kathy A. Fokas and Specially Appointed Assistant Attorney General Janet Bush Handy appearing as attorneys for the Government of Guam, Anita P. Arriola, Esq., appearing as attorney for Oxford Properties & Finance Ltd., Joaquin C. Arriola, and Douglas F. Cushnie and Attorneys Kathleen V. Fisher, Rodney J. Jacob and Jay D. Trickett (*pro hac vice*) appearing as attorneys for Calvo's Insurance Underwriters, Inc., Jones and Guerrero Co., Inc., Alfred C. and Diane Z. Ysrael, Lee M. and Joan S. Holmes, Valencia Investments Corp. and Henry Sy and Young Chull Kim appearing *pro se*, (collectively "Landowners"), and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court having been fully advised in the premises, and having filed herein its Findings of Facts and Conclusions of Law, and having directed that judgment be entered in accordance therewith.

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Acute

ARRIOLA, COWAN & ARRIOLA, HAGATNA, GUAM 96910

NOW THEREFORE, by reason of the law and findings aforesaid:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Landowners have judgment against the Government of Guam in the amount of \$25,115,683.00, inclusive of the amount already deposited in court by the Government of Guam in the amount of \$3,410,000.00. Interest at the rate of six percent (6%) per annum shall accrue to the amount of \$21,705,683.00 (\$25,115,683.00 minus \$3,410,000.00) from January 24, 2008 until the date of payment in full.

Dated this ___ day of November, 2012.


HONORABLE ALBERTO C. LAMORENA III
Presiding Judge, Superior Court of Guam

Submitted By:

By: Anita P. Arriola
ANITA P. ARRIOLA
Attorney for Oxford Properties and Finance, Ltd., et al.

Approved as to form:

By: Rodney J. Jacob
RODNEY J. JACOB
Attorney for Calvo's Insurance Underwriters, Inc., et al.

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Superior Court of Guam.

DEC 10 2012

By: Kathy A. Fokas
KATHY A. FOKAS
Attorney for Government of Guam

Esther L.S. Pinault
Clerk, Superior Court of Guam