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**IN THE SUPERIOR COURT**
**OF THE**
**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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| **TINIAN CASINO GAMING CONTROL COMMISSION, LUCIA L. BLANCO-MARATITA, and LISA-MARIA B. AGUON,**<br><br>**Plaintiffs,**<br><br>**LYDIA F. BARCINAS, MATTHEW C. MASGA, and BERNADITA C. PALACIOS,**<br><br>**Plaintiff-Intervenors**<br><br>**v.**<br><br>**CHARLENE M. LIZAMA, in her individual and official capacities, JOEY P. SAN NICOLAS, in his individual and official capacities, and the MUNICIPALITY OF TINIAN AND AGUIGUAN,**<br><br>**Defendants.** | **CIVIL CASE NO. 15-0047**<br><br>**ORDER DENYING DECLARATORY RELIEF TO PLAINTIFFS;**<br><br>**ORDER DENYING PLAINTIFFS' SUMMARY JUDGMENT; AND**<br><br>**ORDER DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** |

## I. INTRODUCTION

THIS MATTER came before the Court on September 1, 2015, at 9:00 a.m. in the Tinian Courthouse. Plaintiffs, Tinian Casino Gaming Control Commission, Lucia L. Blanco-Maratita, and Lisa-Maria B. Aguon (collectively, "the Commission"), were represented by Attorneys Robert J. O'Connor and Joseph E. Horey. Plaintiff-Intervenors, Lydia F. Barcinas, Matthew C. Masga, and Bernadita C. Palacios, were represented by Attorney Claire Kelleher-Smith. Defendants sued in their official capacities, Charlene M. Lizama, Joey P. San Nicolas, and the Municipality of Tinian and Aguiguan (collectively, "the Tinian Government"), were

represented by Attorneys Matthew T. Gregory and Kimberlyn K. King-Hinds. Defendants sued in their individual capacities, Ms. Lizama and Mr. San Nicolas, were represented by Assistant Attorney General David Lochaby.[1]

Based on review of the filings, oral arguments, and applicable law, the Court **DENIES** declaratory relief to the Commission, finding that Article XXI does not prohibit the Tinian Legislative Delegation from amending the Revised Tinian Casino Gaming Control Act. On all other issues, the Court **DENIES** summary judgment filed by the parties: the Commission's motion for summary judgment and the Tinian Government's cross-motion for summary judgment.

## II. BACKGROUND

### A Brief Legislative History on the Development of the CNMI's Casino Gambling Laws

Casino gambling was first legalized in the Commonwealth in 1978. Notwithstanding a veto by the first governor of the Commonwealth, Governor Carlos S. Camacho, the Gaming Control Act of 1978 became law on November 7, 1978. However, a little more than a year later, on November 11, 1979, the law ceased to exist as a result of a Commonwealth-wide referendum. *Marianas General Corp. v. Gov't of the N. Mariana Islands*, 1 CR 408, 411 (Dist. Ct. App. Div. 1983).

While casino gambling itself would not return to the Commonwealth for another three decades, the Legislature continued to shape gambling laws over the course of the Commonwealth's nascent history. In 1983, the Third Northern Marianas Commonwealth Legislature enacted Public Law 3-70, as codified in 6 CMC §§ 3151–3159. The law exempted the Commonwealth from a federal law restriction on transportation of gambling devices,[2] and determined that some forms of gambling were allowed by law—and that some

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[1] The Court granted a motion to dismiss filed by Ms. Lizama and Mr. San Nicolas in their individual capacities against a claim by the Commission on September 6, 2015. *Tinian Casino Gaming Control Comm'n v. Lizama*, Civ. No. 15-0047 (NMI Super. Ct. Sept. 6, 2015) (Order Granting Defendants Charlene M. Lizama and Joey P. San Nicolas' Mot. to Dismiss in their Individual Capacities).

[2] 15 U.S.C. 1172(a) ("It shall be unlawful knowingly to transport any gambling device to any place in a State or a possession of the United States from any place outside of such State or possession . . . .") (but providing for exceptions).

were not. Specifically, the Legislature found that poker machines, bingo, raffles, bato, and cockfighting were forms of gambling that required "a higher degree of skill or knowledge to win" and were "readily acceptable by the people of the Northern Mariana Islands." PL 3-70, § 2; *see also Island Amusement Corp. v. Western Investors, Inc.*, Civ. No. 94-166 (NMI Super. Ct. Dec. 15, 1994) (Decision and Order) (unpublished) (holding that Trust Territory laws allowing certain forms of gambling were incorporated into Commonwealth law by the Covenant and the Constitution). The Legislature also found that those forms of gambling that required "relatively less skill," such as slot machines, posed a negative social impact and considered them not "socially acceptable." *Id.*

Public Law 3-70 then prohibited certain forms of gambling:

> Section 5. Gambling activities prohibited. It is unlawful for any person covered by this Act as a business to deal, play, or carry on, open, or cause to be opened, or conduct, either as owner or employee, any gambling device, game of craps, keno, faro, monte, roulette, lansquenet, punchboard, rouge-et-noir, rondo, tan, fan-tan, stud-horse poker, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other thing of value, and to play or bet at or against any of the prohibited games.

PL 3-70, § 5. The next year, the Fourth Northern Marianas Commonwealth Legislature made its gambling exemption for non-profit purposes permanent by law. PL 4-7, as codified in 6 CMC §§ 3161–3166.

In 1985, a majority of the delegates to the Second Constitutional Convention voted to present Article XXI of the Constitution for enactment. Article XXI states that, "Gambling is prohibited in the Northern Mariana Islands except as provided by Commonwealth law or established through initiative in the Commonwealth or in any senatorial district." Following Article XXI's enactment,[3] the electorate of two senatorial districts enacted casino gambling laws: the second senatorial district, consisting of the islands of Tinian and Aguiguan in 1989;[4] and the third senatorial district, consisting of the island of Rota, in 2007.[5]

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[3] The Court also notes the enactment of Public Law 9-29, enacted in 1995, permitting the legalization of pachinko slot machines. PL 9-29, as codified as amendments to 4 CMC §§ 1504–1508; 6 CMC §§ 3156, 3159.

[4] Tinian Casino Gaming Control Act of 1989, Tinian Local Initiative 1 (1989) (establishing the Commission). The Act was later revised following the Commonwealth Supreme Court's opinion in *Commonwealth v. Tinian Casino Gaming Control Commission*, 3 NMI 134 (1992). *See generally Commonwealth v. Tinian Casino Gaming Control Comm'n*, Civ. No. 91-0690

Finally, the 18th Northern Marianas Commonwealth Legislature enacted Public Law 18-38, "enacted pursuant to Article XXI of the Constitution, in order to authorize, establish and provide for casino gambling and wagering in the Commonwealth", in 2014, 36 years after the Commonwealth first enacted casino gambling.[6]

**The Hand That Has Been Dealt: The Cause of Action**[7]

The Commission seeks declaratory relief.[8] It requests for this Court to find the following laws invalid: Tinian Local Law 14-1, Tinian Local Law 18-5, and sections 104(d), 404(c), and 404(i) of the Tinian Local Ordinance 18-3.

**Ante: Tinian Local Law 14-1**

Tinian Local Law 14-1 amended the Revised Tinian Casino Gaming Control Act by enacting provisions, "to regulate the building and licensing of a hotel-casino in phases, to authorize and regulate the employment in the casino of persons over the age of 18 years; to reduce the casino license application fee, to reduce the penalties for fees and taxes, to authorize the Tinian Casino Gaming Control Commission to waive or defer payment of such penalties, to permit and regulate credit wagers; and for other purposes." TLL 14-1 (2004).

**Small Blind: Tinian Local Law 18-5**

Tinian Local Law 18-5 amended the Revised Tinian Casino Gaming Control Act by enacting provisions, "To amend Part VI, Section 50(3) of the Revised Tinian Casino Gaming Control Act for the

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(NMI Super. Ct. Aug. 18, 1993) (Decision) (establishing the Revised Tinian Casino Gaming Control Act of 1989).

[5] Rota Casino Act of 2007, Rota Local Initiative 1 (2007).

[6] Public Law 18-38 was subsequently repealed, amended, and re-enacted under Public Law 18-43.

[7] The Court borrows language from *Tinian Casino Gaming Control Commission*, Civ. No. 91-0690 (NMI Super. Ct. Aug. 18, 1993) (Decision), signed by the late Honorable Robert A. Hefner, then the Presiding Judge of the Commonwealth Superior Court.

[8] While the Commission's first cause of action is for declaratory and injunctive relief, the Commission has not raised the elements for injunctive relief. Therefore, the Court does not consider the requested remedy at this stage in the litigation.

purpose of updating the casino gambling tax to adapt to Asian style gaming and to boost the Asian 'High Roller' gaming market." TLL 18-5 (2013).

**Big Blind: Tinian Local Ordinance 18-3**

Sections 104(d),[9] 404(c),[10] and 404(i)[11] of the Tinian Local Ordinance 18-3, the Tinian Municipal Appropriations Act of FY (fiscal year) 2015, as the Commission alleges, "prohibits the Commission from increasing any such employee's salary, regardless of whether the total amount of compensation paid to Commission employees remain within budget notwithstanding such increase." Commission 's Compl. ¶ 16 (*citing* TLO 18-3 (2014)). The Commission argues that Tinian Local Ordinance 18-3 presents amendments to the Revised Tinian Casino Gaming Control Act, an argument that the Tinian Government does not directly address—but opposes by implication. *See* Tinian Gov't's Memo. at 16 ("TLO 18-3 merely appropriates Tinian local revenue for the Municipality, including the Commission, as required under [the] Gaming Act.").[12]

Each of these laws, the Commission argues, were enacted in excess of the local legislative bodies' constitutional authority under two theories: Article XXI and the constitutional separation of powers doctrine. The Commission also argues that each law "unduly and unreasonably" interferes with the second senatorial district's constitutional right to effectively establish gambling under the test established in *Tinian Casino Gaming Control Commission*.

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[9] TLO 18-3, § 104(d) ("During the period of this Act, no funds shall be reprogrammed from personnel and non-personnel accounts to other personnel accounts to increase any salary from its current level or the level as set forth in the attached appropriation worksheet, Appendix A.").

[10] TLO 18-3, § 404(c) ("No position or FTE pay level approved by this Act shall be increased and the funds appropriated herein shall not be reprogrammed to increase any pay level set forth in Appendix A attached to this Act.").

[11] TLO 18-3, § 404(i) ("Notwithstanding any law to the contrary and except as provided for in subsection (b) of this section, the funds appropriated pursuant to this Act shall not be used to increase the salary of any employee or position from its current level or new level as set forth and appropriated by this Act.").

[12] Because this ruling concerns declaratory relief in the form of facial challenge to the constitutionality of the challenged laws—as opposed to an as-applied challenge—the disagreements as to characterization of sections of Tinian Local Ordinance 18-3 are immaterial at this time.

**The Call: The Tinian Government's Opposition and Cross-Motion for Summary Judgment**

The Tinian Government filed an opposition and a cross-motion for summary judgment, seeking declaratory judgment in their favor: that the Tinian and Aguiguan Legislative Delegation ("Tinian Legislative Delegation") may amend portions of the Revised Tinian Casino Gaming Control Act under Article II, Section 6 of the Constitution[13] and the Local Law Act of 1983.[14] It further seeks for this Court to find that the laws in question do not "interfere with the right to effectively establish gambling" on the island of Tinian under Section 50(5) of the Revised Tinian Casino Gaming Control Act.[15]

## III. DISCUSSION

The Court addresses the parties' claims in the following order: (1) declaratory relief under 7 CMC § 2421 as to Article XXI's prohibition on gambling and its relationship to the Tinian Legislative Delegation's power to amend the Revised Tinian Casino Gaming Control Act; (2) facial constitutional challenges to the contested laws under the constitutional separation of powers doctrine; (3) applicability of the test established under *Tinian Casino Gaming Control Commission* to the instant matter; and (4) the Tinian Government's cross-motion for summary judgment.

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[13] Laws that relate exclusively to local matters within one senatorial district may be enacted by the legislature or by the affirmative vote of a majority of the members representing that district. The legislature shall define the local matters that may be the subject of laws enacted by the members from the respective senatorial districts, laws enacted through initiative by the voters of a senatorial district under article IX, section 1, regulations promulgated by a mayor under article VI, section 3(e), or local ordinances adopted by agencies of local government established under article VI, section 6(b).

NMI CONST. ART. II, § 6.

[14] As codified in 1 CMC §§ 1401–1409.

[15] The appropriation function of the Tinian Municipal Council with respect to the local revenues generated by the Commission shall be concurrent with the Tinian Legislative Delegation pursuant to the "Local Law Act of 1983" – 1 CMC Div. 1. Provided, however, that in the event that the Tinian Legislative Delegation does not enact the appropriation for the Commissioner's operating budget, within thirty (30) days after submission to them, then, in such event, the Commission shall have its right reserved hereunder, to have an expedited hearing in the Commonwealth Superior Court to proceed for a determination, to be proved by clear and conving proof that the failure of the Tinian Legislative Delegation to enact the appropriation for the Commissioner's operating budget interfered with the Second Senatorial District's right to effectively establish gambling.

Revised Tinian Casino Gaming Control Act, § 50(5).

## Legal Standard

The Court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NMI R. Civ. P. 56(c). In considering the motion, the court views facts and inferences in the light most favorable to the non-moving party. *Fujie v. Atalig*, 2014 MP 14 ¶ 7.

A moving party has the initial burden to show that he or she is entitled to summary judgment. *Furuoka v. Dai-Ichi Hotel (Saipan), Inc.*, 2002 MP 5 ¶ 22. If the moving party is the plaintiff, he or she must show that the undisputed facts establish every element of the presented claim. *Id.* If the defendant is the moving party, he or she must show that the undisputed facts establish every element of an asserted affirmative defense. *Id.* ¶¶ 22, 23. In the alternative, the moving party defendant must show that the undisputed facts show that there is an absence of evidence to support the plaintiff's prima facie claim. *Id.*

When a party files a cross-motion for summary judgment, the Court considers each summary judgment motion on its merits. *Deleon Guerrero v. CNMI Dep't of Public Safety*, Civ. No. 09-0186-CV (NMI Super. Ct. Feb. 1, 2011) (Order Granting in Part Pls.' and Defs.' Mot. for Summary Judgment at 5).

**1. The Rules of the Game: Declaratory relief under 7 CMC § 2421**.

While the Commission does not cite to 7 CMC § 2421 in their briefings, the Court construes its request for relief to be made under the Commonwealth's declaratory relief statute:

> In a case of actual controversy within its jurisdiction, the Commonwealth [Superior] Court, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking the declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by the judgment.

7 CMC § 2421; *Fusco v. Matsumoto*, 2011 MP 17 ¶ 23 n.6 ("A declaratory judgment or decree is one which simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done.") (quoting *Rayphand v. Tenorio*, 2003 MP 12 ¶ 25); *Tinian Casino Gaming*

*Control Comm'n*, Civ. No. 91-0690 (NMI Super. Ct. Sept. 6, 1991) (Declaratory J. at 3) ("Declaratory relief is appropriate when the judgment will serve a useful purpose in clarifying and settling the legal relations and issues, and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings.").

This Court has previously addressed the constitutionality of the Tinian Casino Gaming Control Act in *Tinian Casino Gaming Control Commission*, Civ. No. 91-0690 (NMI Super. Ct. Sept. 6, 1991) (Declaratory J.). There, this Court granted declaratory relief by determining the constitutionality of various provisions of the popularly-enacted initiative. *Contra Palacios v. Yumul*, 2012 MP 12 ¶ 3 n.6 (citing *Palacios v. Fitial*, Civ. No. 11-0280 (NMI Super. Ct. Jan. 19, 2012) (Order Granting Def.'s Mot. to Dismiss at 5–6) (Order) (declining to address the constitutional challenge under 7 CMC § 2421)). As the Tinian Government does not contest the actual controversy element under 7 CMC § 2421, this Court finds that determining declaratory relief is appropriate in this matter.

**a. The House Explains: The Tinian Legislative Delegation may amend a non-gambling local law.**

Generally speaking, a local legislative body may amend a local law enacted by local initiative under Article IX, Section 1.[16] The parties do not dispute this doctrine. Under Article IX, eligible voters belonging to a senatorial district may enact a local law by local initiative. *Tinian Casino Gaming Control Comm'n*, 3 NMI at 143 ("Article IX, Section 1 of the Constitution provides for two types of initiatives: those which are local in scope and those which are Commonwealth-wide in coverage. Article XXI of the Constitution specifically empowers a senatorial district to establish gambling by local initiative."). In order for a proposed local initiative to become local law, eligible voters need to approve the proposal by a two-thirds super majority. *Id.* § 1 d). If approved, the local initiative generally becomes local law after 30 days.

The Constitution is silent as to whether a local law enacted by local initiative may be later amended by the local legislative body. Around seven years prior to the instant dispute, in 2008, the Legislature

[16] NMI CONST. ART. I, § 1 a).

recognized this specific problem and passed an amendment to the Local Law Act of 1983, Public Law No. 16-4, signed into law as codified in 1 CMC § 1409.[17] Under § 1409, a local law enacted by local initiative, "may be amended, altered repealed, superceded or altered in any fashion by the enactment of a subsequent local law enacted by the Delegation." 1 CMC § 1409.[18] Therefore, under both the Constitution and by statute, a local law enacted by local initiative may be amended by the local legislative body to the same extent as any other law absent an express constitutional prohibition.[19]

**b. First Hand: The Tinian Legislative Delegation may also amend a local gambling law.**

The primary constitutional question before this Court, then, is whether Article XXI's prohibition on

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[17] Section 1. Findings and Purpose. The Commonwealth Legislature finds that the residents of the First Senatorial District have implemented casino gambling in their district pursuant to Article XXI of the Commonwealth Constitution. The Legislature finds it must clarify issues regarding the amendment of local laws enacted by initiative. Adjustments to the Code are therefore necessary and proper. This Act is a proper use of the legislative power granted by Section I of Article II of the Commonwealth Constitution.
PL 16-4, § 1.

[18] The Law Review Commission explains in the commentary to § 1409 that it had no authority to alter the phrase "altered repealed."

[19] The Court also reviewed the popular initiative procedures of all 21 state constitutions that allow the state populace to enact laws by popular vote. *Tinian Casino Gaming Control Comm'n*, Civ. No. 91-0690 (NMI Super. Ct. Sept. 6, 1991) (Declaratory J. at 9) (explaining that, while this Court must issue its decision by considering the provisions of the Constitution, references to cases from the United States are "helpful"). Out of those 21, only California's constitution expressly prohibits the legislature from amending or repealing a statute enacted by popular initiative. CAL. CONST. ART. III, § 10(c). Nine state constitutions place restrictions on legislative amendments to or repeal of laws enacted by popular initiative. ALASKA CONST. ART. XI, § 6 (imposing a two-year moratorium on repeals but allowing post-enactment amendments); ARIZ. CONST. ART. IV, PART I, § 1, ¶ 6 (allowing amendments by three-fourths super majority, but not allowing repeals of popularly enacted laws); ARK. CONST. ART. V, § 1 (allowing amendments by two-thirds super majority); MICH. CONST. ART. II, § 9 (allowing amendments by three-fourths super majority); NEB. CONST. ART. III, § 2 (allowing amendments by two-thirds super majority); NEV. CONST. ART. 19, §§ 1, 2 (imposing a three-years moratorium on amendments); N.D. CONST. ART. III, § 8 (imposing a seven-year moratorium and two-thirds super majority requirement on amendments); WASH. ART. II, § 1(c) (imposing a two-thirds super majority requirement on amendments for two-years following enactment of a popular initiative law); WYO. CONST. ART. III, § 52(f) (allowing amendments, but not allowing repeals). Six state constitutions expressly or indirectly allow amendments to a popularly enacted law by a simple legislative majority. COLO. CONST. ART. V, § 1; MO. CONST. ART. III, § 52(b); MICH. CONST. AMEND. ART. XLVIII; OKLA. CONST. ART. V, § (7); S.D. CONST. ART. III, § 1; UTAH CONST. ART. IV, § 1. Five state constitutions, like in the CNMI, allow for popular initiatives but do not allow or prohibit amendments to or repeals of popularly enacted laws. MONT. CONST. ART. III; OHIO CONST. ART. II, § 1(g); OR. CONST. ART. IV, § 1; IDAHO CONST. ART. III, § 1; ME. CONST. ART. IV, part 3, § 18. Where there is no express prohibition on amending or repealing a popularly-enacted law, the legislature retains that authority even as to initiative statutes. *People v. Kelley*, 47 Cal.4th 1008, 1031 (2010). Thus, the overwhelming constitutional trend among the states is to allow amendments to popularly-enacted laws.

gambling contains an express constitutional prohibition on legislative amendments to local gambling laws. The Commission argues that Michigan case law and the language of Article XXI supports a finding that the Tinian Legislative Delegation may not amend the Revised Tinian Casino Gaming Control Act. However, the Court is unpersuaded for the following reasons.

**i. Express or implicit restrictions contained in Article XXI.**

The Commission relies on the Michigan Supreme Court case of *Advisory Opinion on Constitutionality of 1982 PA 47* to advance its proposition that if there is an explicit constitutional limitation on the legislature's power to act by requiring a popular vote, then there is an implied limitation on a legislative body from enacting or amending a law or laws that subverts that express constitutional mandate. 418 Mich. 49, 64–65 (1983) ("Voter approval of a legislative amendment of voter-approved legislation is not required unless it relates to a provision that the Legislature is not empowered to enact without voter approval."). The Court is not persuaded that the Commission's reading of *Advisory Opinion* results in a ruling in its favor.

There, in an advisory opinion, the Michigan Supreme Court decided the constitutionality of a legislative amendment to a popularly-enacted law under Section 15 of the finance and taxation article of the Michigan Constitution. Section 15 explicitly prohibits the state legislature from enacting any law that allows it to borrow money for a specific purpose. MICH. CONST. ART. 9, § 15. Instead, among other restrictions, Section 15 requires the state to submit to the voters for approval of any such law. *Id.* Section 15 also requires that the ballot question state: "the amount to be borrowed, the specific purpose to which the funds shall be devoted, and the method of repayment." *Id.*

The Michigan Supreme Court held that the latter questions were implicit restrictions and that the state legislature may not amend an enacted-borrowing law that alters the spirit of those three "particulars." *Advisory Opinion*, 418 Mich. at 70. It then found that the legislative amendment in question was a constitutional act because (A) a popularly-enacted law may generally be amended by the legislature under the Michigan Constitution; and that (B) the amendment in question did not violate the implicit restrictions

contained in the three particulars. *See id.* at 72.

Here, the Commission has not identified language in Article XXI that contains an express restriction on amending a local gambling law. The relevant express restriction only states that the local legislative body may not establish[20] gambling by local law. In addition, Article XXI does not contain any implicit restrictions à la Section 15. Therefore, the Court does not find that Article XXI prohibits amendments to a local gambling law.

**ii. Constitutional history of Article XXI.**

In the alternative, the Commission argues that Article XXI's language contains a restriction on amendments to any local gambling law; specifically, in the word "as."[21] The Commission argues that "as" means "in the same manner in which."[22] Therefore, according to the Commission, any amendment to the Revised Tinian Casino Gaming Control Act would defeat the same manner in which, or the particularities of the Act, as initially submitted to the voters in 1989.

The Court recognizes an inherent ambiguity in the use of the word "as."[23] However, without more, the Court is not persuaded that such ambiguity exists in the context of the plain language of Article XXI. Even if "as" resulted in an ambiguous reading of the constitutional provision, such interpretation is not supported in the constitutional history of Article XXI.[24] *Peter-Pelican v. Gov't of the Commonwealth of the*

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[20] *Tinian Casino Gaming Control Comm'n*, 3 NMI at 149 n.2 (1992) (defining establish as "to found, to create, to regulate.").

[21] *I.e.*, NMI CONST. ART. XXI ("Gambling is prohibited in the Northern Mariana Islands except as . . . established through initiative . . . in any senatorial district.").

[22] The Commission cites to the Sixth Edition of Black's Law Dictionary.

[23] *E.g.*, *compare Snyder & Blankfard Co. v. Farmers Bank of Tifton*, 178 Md. 601, 610 (1940) ("The effect to be accorded this phrase depends upon the meaning of 'as' in this context. It is an adverbial use of the word with the significance of in that degree, to that extent, so far, in like manner.") *with State ex rel. State Ry. Comm'n v. Ramsey*, 151 Neb. 333,344 (1949) ("The right to regulate 'as; the Legislature may provide means the right to regulate in the manner in which the Legislature provides. The word "as" is used in its adverbial sense as a relative adverb.").

[24] The Court turns to constitutional history, such as committee recommendations or constitutional convention transcripts when interpreting the constitution. *Palacios*, 2012 MP 12 ¶ 5.

*N. Mariana Islands*, 2012 MP 7 ¶ 6 (referring to constitutional history in the face of an ambiguity in a constitutional provision).

A little more than 30 years ago, on July 18, 1985, the delegates to the Second Constitutional Convention debated and passed the current form of Article XXI. Prior to the final passage, the delegates considered passage of Article XXI's predecessor provision, Committee Recommendation No. 42, adopted four days earlier and forwarded by the Second Constitutional Convention Committee on Finance and Other Matters. Committee Recommendation No. 42 was comprised of two sections:

> Section 1: Prohibition. Gambling shall be prohibited unless the gambling activity involves bingo, batu, cockfighting, raffles, or other activities owned and operated by religious, governmental, or nonprofit corporations.
>
> Section 2: Legalized Gambling. Other forms of gambling may be permitted if two-thirds of the registered voters in a senatorial district approve of the gambling activity within that district. Upon approval of gambling pursuant to this section, the legislature shall regulate the gambling activity by law.

COMMITTEE RECOMMENDATION NO. 42 (July 14, 1985). A specific feature of Committee Recommendation No. 42 was that it distinguished between traditional gambling (bingo, batu, cockfighting, raffles) and new or alternate forms of gambling (other activities). As part of the accompanying report, the Committee reported that, "If voters who approve gambling later desire to repeal gambling, the voters of a senatorial district may do so if the repeal is approved in a referendum." REPORT TO THE CONVENTION OF THE COMMITTEE ON FINANCE & OTHER MATTERS (1985) at 2.

In the course of amending and substituting the language of Recommendation No. 42, the delegates to the Second Constitutional Convention debated and weighed between the need for the Commonwealth to raise revenue through measures such as gambling[25] and the apprehension for allowing gambling (poker

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[25] Delegate Villanueva: To continue, Mr. Chairman, I'd like to repeat that I am in favor of including the poker machine because it also earmarks the revenue and medical referral. And if I can remember back, one of the reasons they have this so-called Northern Marianas Government Retirement Program is because there are games or gamblings that were thought of to be possible. Those games or gamblings were not possible but yet the' Retirement Program was implemented. And according to the.retirement people, the government,.think owes or is supposed to have paid almost $68 million to the Retirement Program on the 19.5 employer's contribution to

machines, in particular) in the aftermath of the referendum repeal of Public Law 1-14.[26] In the course of the debate, references to specific acts of gambling were removed from the proposed provision.[27] One delegate in particular, Delegate Villanueva, suggested leaving it to the Legislature to "make specific findings and allow certain conditions" for gambling laws. *See id.* However, out of concern that only a handful of people could establish gambling in a local legislative district, the delegates removed the ability for the local legislative body to establish gambling[28]—resulting in the Article XXI as it exists today.

Still, the Court notes of particular importance a statement by Delegate Villagomez:

> Delegate Villagomez: Thank you. Yes. For the record and so that the court will know what I mean when I submitted this motion which has been passed; No. 1, this amendment prohibits any type of gambling in the CNMI. No. 2, this amendment grants to the Legislature

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> the program. Thank you, Mr. Chairman.

*E.g.*, SECOND CONSTITUTIONAL CONVENTION JOURNAL 541 (July 18, 1985).

[26]

> Delegate King: Thank you, Mr. Chairman. I just like to point out a simp1e information to the delegates. This will rephrase back to the comment that was made by Delegate Mafnas, that the people here in the Northern Marianas did not really line up to get food stamps benefit because they are unemployed but because they are playing poker machines and ending up to have no money to-support their family. That's the effect of this poker machine[.]

*E.g.*, *Id.* at 538.

[27]

> We don't in the Constitution start appropriating money to certain parts of the government[.] Because of my position that this can be handled by the Legislature and because there is a strong feeling by certain members of our Convention that gambling is and of itself should be prohibited, except as the Legislature finds to be proper for the CNMI, I will vote against this recommendation and I have distributed a proposed amendment which would read as follows: "Gambling is prohibited in the Northern Mariana Islands except as provided by Commonwealth or local law or as established through initiative or referendum in the Commonwealth or in any senatorial district." For that reason, I think that we should leave this to the Legislature but prohibit just like we have done with abortion. There's a general feeling that abortion is not proper for the CNMI, so what we have done is prohibited unless the Legislature makes specific findings and allows certain conditions under which abortion could be permitted. I'm suggesting that this would be the proper way to handle the gambling also. And so we don't have to go int[o] details about appropriating money or listing individual types of gambling to be permitted or prohibited or giving the Legislature specific powers, etc., etc., for that reason I'm against the motion.

*Id.* at 536 (referring to an amended version of Committee Recommendation No. 42 suggesting that poker machines be included on the list of allowed methods of gambling).

[28] *Id.* at 546 ("Delegate Nabors: Mr. President, I have one question. On line 3, you say, Commonwealth or local law. Does that mean that the senatorial delegation would have the authority to establish casino gambling—three individuals?") (later corrected to four individuals).

> the authority to permit any kind of gambling that they see fit. No. 3, this amendment permits each of the three senatorial districts to enact for their own district to permit any kind of gambling that they see fit for their particular district. No. 4, this amendment does not repeal or prohibit or make null and void any existing gambling that is permissible by existing law, so that if batu, cockfight, raffle, poke[r] machines are currently existing because they are permitted by law, they shall continue unless that law is changed by the Legislature. Thank you.

SECOND CONSTITUTIONAL CONVENTION JOURNAL 547. Thus, the delegates to the Second Constitutional Convention placed some emphasis on the importance of a legislative body in shaping gambling laws in the Commonwealth.

Concerning whether the local legislative body could establish or permit gambling within a senatorial district, the Court notes that the delegates substituted Committee Recommendation No. 42. Accordingly, any originally-intended restriction on the local legislative body's power to amend a local gambling law no longer exists. While Article XXI places a clear restriction[29] on the local legislative body from establishing gambling in a senatorial district, there is no indication that the delegates would have expressly barred the option for legislative amendment of an enacted local gambling law. *See Peter-Pelican*, 2012 MP 7 ¶ 15 (applying common law decided on the underlying basis of judicial restraint); *cf. People v. Kelley*, 47 Cal.4th at 1031 (citing Comment, *Power of the Legislature to Amend or Repeal Direct Legislation*, 42 WASH. U. L.Q. 439, 440–42 (1942) (explaining that "decisions unanimously have held that, absent language in a charter explicitly restricting a legislature's right to amend or repeal, a state legislature retains that authority even as to initiative statutes."). Therefore, the Court does not find that an ambiguous phrase within Article XXI, one resulting from usage of the word "as," restricts the Tinian Legislative Delegation from amending the Revised Tinian Casino Gaming Control Act.

Because the Court finds that a local legislative body may amend an already-established local gambling law, the Court also finds that Article XXI does not bar the Tinian Legislative Delegation from amending the Revised Tinian Casino Gaming Control Act.

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[29] As found by the Commonwealth Supreme Court in *Palacios*. 2012 MP 12 ¶ 14 ("The delegates' consideration and ultimate rejection of the phrase 'local law' indicates a clear intent to prohibit the establishment of gambling by local law.").

**2. Second Hand: The constitutional separation of powers doctrine.**

The Commission argues that Tinian Local Ordinance 18-3 is unconstitutional because it violates the constitutional separation of powers as recognized in *Marine Revitalization Corp. v. DLNR*, 2010 MP 18 ¶ 12 ("The Commonwealth Constitution provides for a tripartite system of government . . . ."). Specifically, the Commission alleges that Sections 104(d), 404(c), and 404(i) of Tinian Local Ordinance 18-3 "prohibits the Commission from increasing any such employee's salary, regardless of whether the total amount of compensation paid to Commission employees remain within budget notwithstanding such increase." Commission's Compl. ¶ 16. Here, the Court is not persuaded that the laws violate the constitutional separation of powers doctrine.

In order to show that the specified sections of Tinian Local Ordinance 18-3 is unconstitutional, the Commission must overcome the strong presumption that a statute is constitutional. *Joash v. Cabinet of Marshall Islands*, 8 TTR 498, 502 (App. Div. 1985) (citing *Monroe v. Carey*, 412 N.Y.S.2d 939, 941 (1977)) ("But a statute under constitutional attack must be afforded a strong presumption of validity and the party attacking the constitutionality of the statute bears a heavy burden."). Thus, a party seeking a statute be declared unconstitutional must show that the statute in question is manifestly in contravention of the Constitution. *See id.*

For a legislative act to infringe upon the principle of the separation of powers, the case must first involve a dispute between three co-equal branches of government. *Marine Revitalization Corp.*, 2012 MP 18 ¶ 12 ("The Commonwealth Constitution provides for a tripartite system of government. Article II sets forth the powers of the Legislature, Article III sets forth the powers of the Executive, and Article IV sets forth the powers of the Judiciary. This organization, distributing the powers among the coordinate branches of government, gives rise to the separation of powers doctrine."); *Sablan v. Tenorio*, 4 NMI 351, 363 (1996) ("The separation of powers concept came into being 'to safeguard the independence of each branch of the government and protect it from domination and interference by the others.'"); *accord In re Request of Gutierrez*, 2002 Guam 1 ¶ 32 (" . . . under the Organic Act, the government of Guam is comprised of three

separate but co-equal branches of government."). That requirement is not met here.

The current dispute before the Court involve parties contained within Article VI, which governs local government, and within Article II, which governs the legislature.[30] Because this is not a matter that strictly infringes upon the Commonwealth's tripartite system of government contained in Articles II–IV of the Constitution, the constitutional separation of powers doctrine is inapplicable. *Cf. State ex re. Chapman v. Truder*, 35 N.M. 49, 51 (1930) (holding that the constitutional separation of powers doctrine under Article III of the New Mexico Constitution does not apply to municipal offices); *cf. La Guardia v. Smith*, 288 N.Y. 1, 7 (Ct. App. 1942) (holding that under New York's system of laws, a municipal corporation is subject to the control of the legislature and,"It is for that reason that the theory of co-ordinate, independent branches of government has been held generally to apply to the national system and to the states but not to the government of cities."); *cf. City of Sparks v. Sparks Mun. Ct.*, 129 Nev. Adv. Rep. 38 (explaining that the constitutional separation of powers doctrine generally does not apply to local entities) (citing *Mowrer v. Rusk*, 95 N.M. 48 ¶ 17 (1980)). Therefore, the Commission, an agency under the local mayor's office, has not shown that it is entitled to a declaratory judgment under the existing constitutional separation of powers doctrine framework.[31]

**3. Third Hand: The "unduly and unreasonable" interference test.**

The Commission argues that the local laws at issue in this matter "unduly and unreasonably interfere with the second senatorial district's constitutional right to effectively establish gambling" under the test

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[30] NMI CONST. ART. II, § 6.

[31] The Court notes an additional concern with whether the Commission has standing to bring a claim under the constitutional separation of powers doctrine. Even if this Court were to recognize a claim under the separation of "functions" doctrine within the Second Senatorial District as the Commission suggests, the Constitution vests executive-like function in the mayor—not the agencies under the mayor's office. *Compare* NMI CONST. ART. VI, § 3(b) ("A mayor shall administer government programs, public services, and appropriations provided by law, for the island or islands served by the mayor, and shall report quarterly to the governor, relating to these programs and services or appropriations."), *with* U.S. CONST. ART. II, § 3 (vesting authority in the President, who shall "take Care that the Laws be faithfully executed.").

established in *Tinian Casino Gaming Control Commission*, 3 NMI at 148.[32] It argues, for example, that Tinian Local Law 18-5[33] is "impossible to effectively monitor or enforce . . . ." Commission's Memo. at 14. However, there are two problems with the Commission's claim. First, the Commission has not met its burden under Rule 56 to show that the material facts are undisputed. Second, the Commission has not met its burden under the "unduly and unreasonable" interference test as established by our Supreme Court.

**a. The material facts remain in dispute.**

Tinian Local Law 18-5 created a two-tier tax system where a gambling revenue tax would be assessed on "premium players," those players who open a deposit account with the local casino with a credit balance of $20,000 or more. TLL 18-5, §§ 2–4. Citing an affidavit by Maureen D. Williamson, a professional consultant providing gaming regulatory advisory services, the Commission claims that Tinian Local Law 18-5 impermissibly interferes with the effective regulation of gambling on Tinian because there is no reliable way to identify premium players—and the effect is that non-premium players are being assessed a lower tax gambling revenue tax rate. Williamson Aff. ¶ 10.

In return, the Tinian Government generally disputes the Commission's assertions. *See generally* Perez Aff. In relation to Tinian Local Law 18-5, the Tinian Government cites to an affidavit by Allen Perez, the Chief of Staff of the Tinian Mayor's Office, to show that the unpredictable gaming tax revenue stream was

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[32] The Court notes that the Commission elected to argue its case under *Tinian Casino Gaming Control Commission*, as opposed to Section 50(5) of the Revised Tinian Casino Gaming Control Act. Section 50(5) of the Act provides a special cause of action: "in the event that the Tinian Legislative Delegation does not enact the appropriation for the Commissioner's operating budget, within thirty (30) days after submission to them . . . .". Revised Tinian Casino Gaming Control Act, § 50(5). The Commission has not alleged that such condition has been met.

[33]

> **Findings and Purpose.** The Tinian and Aguiguan Legislative Delegation finds that it is in the best interest of the Second Senatorial District to modernize the casino tax structure in the Revised Tinian Casino Gaming Control Act to make it more competitive with other Asian Casino destinations, to adapt to the modem trend in Asian style gaming taxation, and to allow for an emphasis on, and better access to, the Asian "high roller 'gaming market.'"). While the Commission has also argued that Tinian Local Law 14-1 and sections of the Tinian Local Ordinance 18-3 are invalid, the Court's ruling that the "unduly and unreasonable" interference test as the Commission presents is invalid generally applies to all of the contested laws at issue.

TLL 18-5, §1.

a result of "the amount of play the casino can bring in every month." Perez Aff. ¶ 11. For the purpose of evaluating a Rule 56 motion, the Court does not weigh competing evidence. Because the Commission has not met its burden to show that the facts are undisputed, the Court denies summary judgment on this issue.

**b. The Commission does not meet its burden under the "unduly and unreasonable" interference test.**

Turning to the "unreasonable interference" test, the Court finds that the Commission has not met its burden under *Tinian Casino Gaming Control Commission*. The relevant passages are reproduced below:

> We instead are of the opinion that the proper balancing test to apply in this case involves the following three factors.
>
> First, there is a presumption that the provisions of a local initiative concerning gambling which is duly enacted pursuant to Articles IX and XXI of the Commonwealth Constitution are valid unless any provision of the local initiative conflicts with a provision of the U.S. Constitution, the Commonwealth Constitution, or a Commonwealth-wide law. The opponent of a local gambling initiative has the initial burden to show by clear and convincing evidence which provisions of the local gambling initiative are inconsistent and in conflict with which constitutional provisions or Commonwealth-wide laws, and why.
>
> Second, if any provision of the local gambling initiative conflicts with a provision of the U.S. Constitution, the Commonwealth Constitution, or a Commonwealth-wide law, that provision must fall, unless, with respect to a Commonwealth-wide law, the application of the Commonwealth-wide law would frustrate the establishment of gambling in a senatorial district.
>
> Third, once it clearly is shown that there is a conflict between a Commonwealth-wide law and a local gambling initiative, then the Commonwealth-wide law prevails, unless the proponent of the gambling initiative demonstrates by clear and convincing proof that the application of a Commonwealth-wide law would itself violate Article XXI of the Commonwealth Constitution. In this case, the appellees must show that a Commonwealth-wide law, if it were to supersede a provision of the Act, would unduly and unreasonably interfere with the second senatorial district's constitutional right to effectively establish gambling.

*Id.* at 147–48 (emphasis added). Thus, the"unduly and unreasonable" interference test is part of a balancing test to determine the constitutionality of relevant sections of a local gambling initiative in relation to the provisions of the U.S. Constitution, the Constitution, or a Commonwealth-wide law.[34] Under this test, the

[34] The Commission's proposed application of *Tinian Casino Gaming Control Commission* presents a *reverse* application of the "unduly or unreasonable" interference test—to determine whether a local legislative law is invalid, instead of whether provisions of the Revised Tinian Casino Gaming Control Act are invalid. *See* 3 NMI at 146 ("Rather, the issue, as we see it, is whether certain provisions of the Act, and the regulations promulgated thereunder, run afoul of the constitutional scheme

Commission must first show how the Revised Tinian Casino Gaming Act conflicts with constitutional provisions or Commonwealth-wide law. The Commission has not met its burden to do so at this time.

**4. The merits of the Tinian Government's Cross-Motion for Summary Judgment.**

The Court takes judicial notice that the Tinian Government has yet to file a responsive pleading in this matter. To the extent that the Tinian Government requests that the Court issue declaratory relief on the Commission's first cause of action—the request for relief is improper.[35] *See* NMI R. Civ. P. 56(a) ("FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof."). In other words, a party defending a summary judgment motion may not seek summary judgment as to his or her opponent's claim. Accordingly, the Tinian Government's cross-motion for summary judgment is denied.

**CONCLUSION**

Based on the foregoing, the Commission's request for declaratory relief is **DENIED**: Article XXI of the Constitution does not bar the Tinian Legislative Delegation from amending the Revised Tinian Casino Gaming Control Act. On all other issues, the Commission's motion for summary judgment and the Tinian Government's cross-motion for summary judgment is **DENIED**.

**SO ORDERED** this 2nd day of November, 2015.

/ s /
David A. Wiseman, Associate Judge

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pertaining to the interrelationship between Commonwealth-wide laws and local initiative as envisioned by the framers.").

[35] It is for this reason that the Court does not address the Tinian Government's request for declaratory relief that Article XXI should be interpreted to prohibit "new forms of gambling." *E.g.*, Tinian Gov't's Mot. at 15.