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

RAMON C. MAFNAS)	Civil Action No. 90-550
)	
Plaintiff,)	
)	
v.)	DECISION AND ORDER ON
)	CROSS-MOTIONS FOR
)	SUMMARY JUDGMENT
MATAO C. YOKENO, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

This matter came before the Court on July 28, 1993 on the parties' cross-motions for summary judgment as to Plaintiff's Second Cause of Action. Plaintiff Ramon C. Mafnas claims that a set of documents executed on May 22, 1980 constitute a single land transaction between him and Defendant Randall T. Fennell. Plaintiff contends that this transaction violated Article XII of the Commonwealth Constitution and is therefore void ab initio. Defendant Matao Yokeno argues that the May 1980 documents constitute two separate transactions, neither of which violated Article XII.

FOR PUBLICATION

1 I. FACTS

2 The parties do not dispute the essential facts. In April
3 1980, Mr. Mafnas executed an exclusive listing agreement with Mr.
4 Fennell authorizing him to lease or sell a parcel of property,
5 described as Lot No. 008 B 16, located in San Roque, Saipan. By
6 early May 1980, Mr. Fennell had expressed a desire to lease the
7 property himself, or in conjunction with other persons. Mr.
8 Fennell is not a person of Northern Marianas descent ("NMD").

9 On May 22, 1980, Mr. Mafnas executed three documents relating
10 to the land, each one drafted by Mr. Fennell:

- 11 1. A ground lease, in which Mr. Fennel and two non-NMD
12 partners agreed to lease the land for a term of forty
13 years, for a total consideration of \$75,000 (including
14 a brokerage fee to Mr. Fennell) payable over five years;
- 15 2. A Memorandum of Agreement, the stated purpose of which
16 was "to provide lessee with any and all other incidents
17 and benefits of ownership in the property which may be
18 lawfully conferred by Mafnas under the restrictions
19 imposed in the Constitution;"
- 20 3. A warranty deed to the property, signed by Mr. Mafnas
21 but left blank as to the grantee, and delivered to Mr.
22 Fennell, who had the power to designate the grantee
23 under the terms of the Memorandum of Agreement.

24 The parties fulfilled their respective obligations under the
25 lease, and it remained operative until assigned to Defendant
26 Nansay Micronesia Inc., on October 8, 1987.

27 However, the 1980 blank deed was never used. Instead, on
28 December 27, 1984, Mr. Mafnas executed another warranty deed to

1 the property in favor of Antonia C. Villagomez, who was at that
2 time Mr. Fennell's secretary, and who is an NMD. The evidence
3 indicates that Mr. Mafnas had expressed a desire to accelerate the
4 payments due on the lease, and that he executed the deed in favor
5 of Ms. Villagomez in consideration for such an acceleration. The
6 deed also recites a consideration of \$10, although there is
7 disputed evidence as to whether this amount was ever paid, and if
8 so, by whom. See Plaintiff's *Further Brief re Summary Judgment*
9 *Motions*, at 10. There is no dispute that Mr. Fennell and his
10 partners provided the accelerated lease payments and directed Mr.
11 Mafnas to convey the deed to Ms. Villagomez.

12 On November 25, 1985, Ms. Villagomez deeded the property to
13 Marian Aldan-Pierce, a close friend of Mr. Fennell and also an
14 NMD. This transaction was executed in consideration for Mr.
15 Fennell's forbearance from pressing Ms. Villagomez for restitution
16 of money he discovered that she had embezzled from him.

17 On October 8, 1987, the day Mr. Fennell and his partners
18 assigned the ground lease to Nansay,^{1/} Aldan-Pierce deed the
19 property to Ana Deleon Guerrero Little. Also on that day, Nansay
20 and Ms. Little rescinded the 1980 ground lease and executed a new
21 lease with a term of fifty-five years. Finally, on May 13, 1990,
22 Nansay assigned its rights under the 1987 lease to Matao Yokeno.

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^{1/} In consideration for this assignment, Nansay executed a mortgage in favor of Fennell, as trustee for the partnership, securing a promissory note in the amount of \$497,564.

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II. ISSUES

Three issues are presented for this Court's determination:

1. Do the three documents executed by Mr. Mafnas on May 22, 1980 constitute a single "transaction" for the purposes of Article XII?
2. Did the 1980 "transactions" transfer a long-term interest in the San Roque property to a non-NMD in violation of Article XII?
3. Did the 1984 warranty deed from Mr. Mafnas to Ms. Villagomez, in effect, transfer a long-term interest in the property to Mr. Fennell in violation of Article XII?

III. ANALYSIS

A. SUMMARY JUDGMENT STANDARD

Summary judgment is entered against a party, if, viewing the undisputed facts in the light most favorable to the non-moving party, the Court finds as a matter of law that the moving party is entitled to the relief requested. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172 (1990). On cross-motions for summary judgment, the Court views each moving party's contentions in the light most favorable to the opposing party. Here, the parties have stipulated that there are no disputes of material fact.^{2/} Therefore, the Court finds both motions ripe for summary judgment.

^{2/} The parties do dispute whether the 1984 conveyance from Mr. Mafnas to Ms. Villagomez constituted a gift from Mr. Fennell. However, as discussed in Part D, *infra*, recent changes in applicable law have rendered that factual dispute immaterial to this Court's decision.

1 **B. THE 1980 DOCUMENTS: A SINGLE TRANSACTION?**

2 The provisions of Article XII of the Commonwealth
3 Constitution are well-known and do not require recitation here.
4 In assessing possible violations of Article XII, courts should
5 "scrutinize carefully any transaction entered into by a non-NMD
6 person to determine whether the transaction would result in
7 acquisition of a long-term interest by a non-NMD person, or in
8 having the land pass out of the hands of the people of the NMI."
9 *Ferreira v. Mafnas*, 1 F.3d 960, 962 (9th Cir. 1993), citing
10 *Ferreira v. Borja*, No. 90-047, slip op. at 33 (N.M.I. Feb. 18,
11 1992) (King, J., dissenting). The term "transaction" has a
12 "flexible meaning" defined in light of the purposes behind Article
13 XII. *Manglona v. Kaipat*, No. 91-020, slip op. at 10-11 (N.M.I.
14 Dec. 29, 1992).

15 In *Manglona*, the Court found a deed of gift granting property
16 to an NMD and a non-NMD to be two separate "transactions,"
17 clarifying that in the Article XII context, a "transaction" is
18 defined more narrowly than it is for purposes of Com. R. Civ. P.
19 13. *Id.*, at 10, n.6. Likewise, in *Ferreira*, Special Judge King
20 dissented from the view that a deed of title to an NMD grantee and
21 a partnership agreement between that grantee and non-NMD's
22 constituted a single "transaction." Slip op. at 41. On appeal,
23 the Ninth Circuit cited Special Judge King's dissent with
24 approval. *Ferreira, supra*, 1 F.3d at 962.

25 Moreover, the Legislature has recently enacted 2 CMC § 4951,
26 which mandates that the purposes of Article XII "should be
27 achieved by the least restrictive means possible, so as to disrupt
28 the economic expectations of the parties [...] to the least extent

1 consistent with the purposes of Article XII" (emphasis added).

2 Section 4952(b) further provides:

3 If the parties to the agreement have provided in the
4 Agreement that its provisions are to be considered in the
5 event any provision is determined to be void, it shall be
6 conclusively presumed for purposes of this article that any
7 provision which is not so void can be enforced without
8 unjustly enriching or prejudicing either party and any such
9 provision shall be enforced.

10 Here, the facts involve three documents -- a ground lease, a
11 blank warranty deed, and a Memorandum of Agreement -- executed the
12 same day, between the same parties, and involving the same
13 consideration. However, the parties' intent, as expressed in the
14 documents themselves, was that these agreements should not be
15 considered as a single agreement. The Memorandum of Agreement, at
16 ¶ 10, states:

17 The lease has been executed, delivered and made effective for
18 all purposes prior to the execution of this Memorandum of
19 Agreement. The leasehold estate thereby created shall be
20 deemed separate and distinct from any estate or rights
21 created in this Memorandum of Agreement in the property. It
22 is the intent of the parties that this Memorandum of
23 Agreement shall have only such effect, if any, as may be
24 permitted by law. [...] To the extent that any [...]
25 invalidity would result from the recognition or enforcement
26 of this Memorandum of Agreement or anything contained herein,
27 or executed pursuant hereto, then the same shall be
28 considered a nullity or void, ab initio.

29 Emphasis added. This language evinces a clear intent that the
30 ground lease be considered separate from the Memorandum of
31 Agreement.^{3/}

32 ^{3/} This language also sharply distinguishes this case from
33 those Plaintiff cites in his Reply Memorandum (at 6) for the
34 proposition that "where different writings relating to the same
35 subject are executed at the same time between the same parties,
36 they are to be treated as one in the same instrument."
37 Plaintiff's authorities all deal with agreements that explicitly
38 incorporate each other's terms by reference. *Clayton v. Howard*
Johnson Franchise Systems, Inc., 954 F.2d 645 (11th Cir. 1992),
(restaurant lease and motel franchise license each explicitly
(continued...))

1 The terms of 2 CMC § 4952(b) require strict application of
2 this provision.^{4/} Moreover, even if the Legislature had not
3 provided this guidance, the severability clause would still govern
4 under applicable common law. In order to look past this clear
5 indication of the parties' intent, the Court would have to find
6 that the Memorandum of Agreement was not an "integrated document"
7 as defined by *Restatement (Second) of Contracts*, § 209. On the
8 contrary, by its terms, the Memorandum here is fully integrated.
9 In view of this authority, the Court finds that the Memorandum of
10 Agreement and the ground lease constitute separate "transactions."

11 On the other hand, the terms of the Memorandum of Agreement
12 make clear that it and the blank warranty deed are to be
13 considered a single transaction. Paragraph 7 of the Memorandum
14 describes in detail the conditions under which Mafnas would be
15 obligated to execute and redeliver the warranty deed to a grantee
16 of Fennell's choosing. In fact, the warranty deed constituted the
17 method by which the parties contemplated transferring the
18 "incidents and benefits of ownership" described in the Memorandum.

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20 ^{3/}(...continued)
21 allowed for termination if the other party breached the other
22 agreement); *Carvel Corp. v. Diversified Management Group, Inc.*,
23 930 F.2d 228 (2nd Cir. 1991) (promissory notes executed for the
24 express purpose of making payments on distributorship agreement);
25 *Harty v. Hoerner*, 463 P.2d 313 (Colo. 1969) (promissory note
explicitly referred to and made payments on subordination
contract); *Hayashi v. Chong*, 634 P.2d 105 (Haw. Ct. App. 1981)
(contract explicitly looked to another to fill in essential terms,
employing "see attached rider" language).

26 ^{4/} Public Law 8-32, which contains this statute and other
27 provisions related to Article XII enforcement, was enacted after
28 the hearing and briefing on this motions. The parties have had no
opportunity to question its constitutionality, nor have they
requested one. In this circumstance, the Court will not sua
sponte analyze the constitutionality of this statute.

1 In sum, the parties' 1980 agreements constituted two
2 "transactions" for the purposes of Article XII: 1) the ground
3 lease; and 2) the Memorandum of Agreement and the warranty deed.
4

5 C. ARTICLE XII ANALYSIS OF THE 1980 TRANSACTIONS

6 1. Memorandum of Agreement and Warranty Deed. It is
7 undisputed that the Memorandum of Agreement was never enforced by
8 the parties, and the blank deed executed along with it was never
9 filled in. Nevertheless, Plaintiff asserts that "delivery of the
10 executed deed, left blank as to the grantee, passes equitable
11 title to the person receiving it." *Kindred v. Crosby*, 100 N.W.2d
12 20, 22 (Iowa 1959); *West v. Witscher*, 428 S.W.2d 538, 544 (Mo.
13 1968). He also contends that Fennell "not only got equitable
14 ownership of the property but the right to compel the grantor to
15 convey legal title on demand" because Fennell paid the
16 consideration and assumed possession of the land. See *In re*
17 *Henderson's Estate*, 17 P.2d 786, 788 (Cal. App. Ct. 1932).

18 Special Judge King opined in *Ferreira* that:

19 any agreement whereby a non-NMD could extend the non-NMD's
20 rights beyond fifty-five years, or pursuant to which an NMD
21 would be stripped of the NMD's interest in the land, upon the
22 occurrence of conditions subsequent which are outside the
23 control of the NMD, or without independent assent by the NMD,
24 would render the transaction violative of Article XII.

25 Slip op. at 34. The Memorandum of Agreement and accompanying
26 warranty deed clearly fall within this category. The Memorandum
27 requires Mr. Mafnas to deed his reversionary interest in the
28 property to Mr. Fennell if Article XII is adjudged to be
"unconstitutional or otherwise invalid." *Memorandum* at ¶ 3. This

1 is clearly a condition subsequent outside Mr. Mafnas' control.^{5/}
2 If Article XII remains in force, the Memorandum requires Mr.
3 Mafnas to redeliver the blank deed to a person of Mr. Fennell's
4 choosing, without additional consideration. This provision is
5 equally offensive in giving Mr. Fennell complete control over the
6 fee interest.

7 Thus, this Court finds that the Memorandum of Agreement and
8 the blank warranty deed violated Article XII and were thus void ab
9 initio. However, since the blank deed was never filled in in
10 favor of a definite grantor, these documents were rendered
11 irrelevant to the subsequent chain of title by Mr. Mafnas' use of
12 a new warranty deed to convey the property to Ms. Villagomez in
13 1984.

14 2. Ground Lease. Plaintiff contends that several provisions
15 of the ground lease violated Article XII:

- 16 a. A covenant to purchase any improvements to the land at
17 the end of the lease term (§ 42), secured by a lien to
18 lessee on Mr. Mafnas' reversionary interest, subject to
19 foreclosure fifteen days after notice (§ 43);
- 20 b. An agreement that Mr. Mafnas would not mortgage his
21 reversionary interest in the property to anyone other
22 than lessee without the lessee's consent (§ 44);
- 23 c. An agreement that Mr. Mafnas would execute a mortgage or
24 loan agreement subordinating his fee interest to an
25 institutional lender so that lessee could obtain
26 construction financing (§§ 48-48.3).

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28 ^{5/} Indeed, Special Judge King specifically mentioned this
type of provision as violating Article XII. *Ferreira, supra*, slip
op. at 35.

1 The Court will analyze these provisions in turn.

2 **a. Purchase of Improvements.** In *Ferreira v. Borja, supra*,
3 slip op. at 12, the Commonwealth Supreme Court cited a covenant to
4 purchase improvements as evidence of that a non-NMD had acquired
5 an impermissible long-term interest.^{6/} The provision at issue
6 here goes beyond a mere covenant to purchase improvements, but
7 grants the lessee a lien on the reversionary interest, subject to
8 foreclosure on fifteen days' notice. Furthermore, this
9 foreclosure threat is not limited to lessor's failure to purchase
10 improvements; it exists "to secure the performance of [...] each
11 and every other obligation of Lessor to Lessee under this Lease"
12 (§ 43). Thus, the remedy for failure to purchase improvements is
13 perhaps more offensive to Article XII than the covenant to
14 purchase itself.

15 Defendant argues that this lien places the lessee in the
16 position of a mortgagee, "and such an interest is clearly
17 permissible under Article XII." *Defendant's Response and Cross-*
18 *Motion* at 22. It is true that Article XII, § 2 excepts mortgage
19 foreclosures "if the mortgagee is a full-service bank, Federal
20 Agency or Governmental entity of the Commonwealth." But this
21 exception does not extend to private mortgagees. *The Analysis of*
22 *the Constitution of the Commonwealth of the Northern Marianas*
23 *Islands*, 168-169 (Dec. 6, 1976), explains why:

24 Those who give mortgages normally do not do so for the
25 purpose of acquiring property. They are interested in

26 ^{6/} It is true that Special Judge King's dissent found a
27 "purchase of improvements" provision unobjectionable. *Id.* at 36.
28 However, this Court does not read the Ninth Circuit's disapproval
of the *Ferreira* majority and approval of the dissent to extend to
every portion of their respective opinions. *Ferreira, supra*, 1993
WL 312268 at *2.

1 receiving payment of the principal amount loaned plus the
2 interest on the principal. Those who give mortgages insist
3 on a right to acquire interest in real property only to
4 protect their investment in case of a default. Their
intention, therefore, is not to retain the property acquired
through foreclosure, but to sell it in order to recover their
investment.

5 This logic clearly applies to banks, government agencies and other
6 institutional lenders. It does not apply to a non-NMD investor
7 whose intention in drafting a lease is to acquire as much of an
8 interest in land as, and for as long as, he is permitted by law.
9 Accordingly, this Court will hew to the letter of Article XII, §
10 2 in holding that Paragraphs 42 and 43 of the ground lease
11 conferred on Defendant Fennell an unconstitutional long-term
12 interest in the subject property.^{7/}

13 **b. Subordination of Fee.** Mr. Mafnas also complains of the
14 lease provisions prohibiting Mr. Mafnas from encumbering his fee
15 interest without consent and, conversely, requiring him to
16 mortgage his fee interest to secure construction loans to the
17 lessee. As there are no Commonwealth or *Restatement* authorities
18 on point, recourse to the common law is required. 7 CMC § 3401.

19 One of the rights attaching to ownership of the land is the
20 power to mortgage the land. *Rush v. Anestos*, 661 P.2d 1229, 1233
21 (Idaho 1983). At common law, while a tenant was free to mortgage
22 his leasehold interest, he could not create a lien upon the fee

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24 ^{7/} One could argue that the recently-enacted 2 CMC § 4918,
25 which authorizes a court to order reimbursement of parties
26 "adversely affected" by a judgment voiding a conveyance, including
27 payment for improvements secured by a lien on the subject
28 property, implicitly ratifies by analogy the lease provision here.
However, there is a profound difference between a court-ordered
recission -- disrupting the expectations and activities of the
parties in mid-course -- and the long-awaited expiration of a
lease. Moreover, this Court cannot rewrite the express terms of
Art. XII, § 2 because of a legislative provision which applies by
analogy only.

1 interest. *Williams v. Vanderbilt*, 34 N.E. 476 (Ill. 1893). In
2 modern real estate practice, ground leases may contain provisions
3 whereby the lessor agrees that his fee interest in the land -- and
4 any mortgages on that fee interest -- will be junior to any
5 leasehold mortgages executed by the lessee. See, e.g., *Lahaina-*
6 *Maui Corp. v. Tau Tet Hew*, 362 F.2d 419, 423 (9th Cir. 1966);
7 *Republic Nat. Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d
8 349, 352 (Minn. 1979). However, the terms the lessee's expected
9 financing must be strictly defined in a subordination agreement
10 for such a clause to be enforceable, specifying the number of
11 loans contemplated, the rate of interest, and the intended manner
12 of repayment. *Lahaina-Maui, supra; Lorraine, supra*. As stated by
13 the *Lorraine* court,

14 [t]he reason for specificity, at least in part, is to protect
15 the lessor's [interest in the property]. Otherwise, he must
16 rely on the good faith and ability of the [lessee] to keep
17 down the maximum amount of the loan, rate of interest, and
18 other terms, so that the lessor will have a reasonable chance
19 to bid in the event of a foreclosure sale.

20 279 N.W.2d at 352-353.

21 Here, the subordination clause of ¶ 48 reads:

22 Lessor shall promptly after notice of request from Lessee,
23 execute and deliver a mortgage, deed of trust, or other
24 security instrument (herein called mortgage) sufficient to
25 subordinate, to the lien of a first encumbrance represented
26 by the mortgage, Lessor's fee title [...] and the leasehold
27 thereby created, and shall execute and deliver such
28 construction loan agreements and other instruments as the
lender or title company shall require to enable Lessee to
obtain construction financing and take out financing to
construct permanent improvements on the premises.

29 This provision operates in tandem with the mortgage prohibition
30 clause of ¶ 44 to deprive Mr. Mafnas of control over the
31 encumbrance of his fee interest and grant the lessees almost total
32 discretion to mortgage both the leasehold and the fee. Mr.

1 Fennell and his partners are empowered to obtain as many loans as
2 they can under whatever terms they can, and finally to default on
3 the loans, causing foreclosure resulting in the loss of Mr.
4 Mafnas' fee. Clearly, this is a scenario whereby "an NMD would be
5 stripped of the NMD's interest in land, upon the occurrence of
6 conditions subsequent which are outside the control of the NMD,"
7 *Ferreira, supra*, slip op. at 34. The Court therefore finds that
8 Paragraphs 44, 48, 48.1, 48.2 and 48.3 of the May 22, 1980 ground
9 lease also violate Article XII.^{8/}

10 c. Effect of Violations on Enforceability of Lease. As
11 noted above, the newly-enacted 2 CMC § 4952(b) requires strict
12 enforcement of any severability clauses in agreements found to
13 violate Article XII. Here, ground lease contains a severability
14 clause (§ 45) which specifically addresses the contingency that
15 some provisions of the lease might be found unconstitutional:

16 In the event that any provision of this Lease or the lien
17 granted by Lessor to Lessee herein, or any other agreement by
18 and between Lessor and Lessee relating to the Premises would,
19 if recognized and enforced, invalidate this Lease by reason
of any such valid provision contained in said Constitution or
Covenant, or other law of similar import, then such provision
shall be either limited or deleted from the Lease

20 Following the Legislature's mandate of 2 CMC §4952(b), the Court
21 finds this provision strictly enforceable; and the remaining
22 unobjectionable provisions of the ground lease are therefore
23 upheld. The unconstitutionality of the provisions discussed above
24 thus has no effect upon the property rights of the parties as they
25 have passed to the current fee owner and lessee.

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27 ^{8/} This Court's holding is limited to the lease provisions at
28 issue here, which are quite indefinite and broad in the powers
they give the lessee. This finding does not constitute a ruling
that "fee subordination" provisions per se violate Article XII.

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D. THE 1984 WARRANTY DEED

2 At the hearing on these motions and in the first round of
3 post-hearing briefs, much attention was devoted to the December
4 27, 1984 conveyance by warranty deed from Mr. Mafnas to Ms.
5 Villagomez. The parties agreed that the consideration for this
6 conveyance was provided by Mr. Fennell; however, they have
7 submitted no evidence of other agreements, oral or written,
8 between Mr. Fennell and Ms. Villagomez as to control of the fee
9 interest in the property beyond the terms of the ground lease,
10 which Ms. Villagomez assumed from Mr. Mafnas.

11 The legal issue originally briefed by the parties was whether
12 this conveyance created a resulting trust in favor of Mr. Fennell.
13 Since the hearing, however, the Ninth Circuit Court of Appeals^{9/}
14 and the Commonwealth Legislature^{10/} have given the Court
15 unequivocal guidance that no resulting trust arises under these
16 circumstances. The parties' supplemental briefs agree with this
17 view. See *Plaintiff's Supplemental Brief* at 4; *Defendant's*
18 *Supplemental Brief* at 9. Furthermore, the Commonwealth Supreme
19 Court has held that agency principles are inappropriate for the
20 analysis of this type of transaction. *Ferreira v. Borja, supra*,
21 slip op. at 9. Thus, this Court holds that the 1984 conveyance to
22 Ms. Villagomez did not violate Article XII.

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^{9/} In *Ferreira v. Mafnas, supra*, 1 F.3d at 962, the Ninth
Circuit rejected the CNMI Supreme Court's application of the
resulting trust doctrine to Article XII cases.

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^{10/} Title 2 CMC § 4922 provides:
Where a transfer of an interest in real property is made to
one person and the purchase price is paid by another who is
not qualified under the Constitution or laws of the Northern
Mariana Islands to acquire that interest, a resulting trust
does not arise in favor of the person by whom the purchase
price is paid.

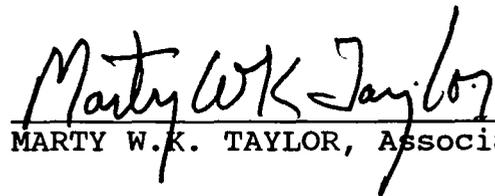
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IV. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS in part and DENIES in part each party's motion for partial summary judgment. While the 1980 Memorandum of Agreement and blank deed violated Article XII, the transaction they contemplated was never executed and thus had no impact upon subsequent grantees. While the 1980 ground lease contained certain provisions violating Article XII, the remaining provisions are enforceable and assignable to subsequent lessees. Finally, as the 1984 conveyance did not violate Article XII, it gave Ms. Villagomez fee title which passed to subsequent grantees.

In sum, the allegations pleaded in Plaintiff's Second Cause of Action do not create any cloud on the current fee title to the property, held by Ms. Little, or on the leasehold interest, held by Mr. Yokeno. Plaintiff's Second Cause of Action is therefore DISMISSED.

So ORDERED this 7th day of December, 1993.


MARTY W.K. TAYLOR, Associate Judge