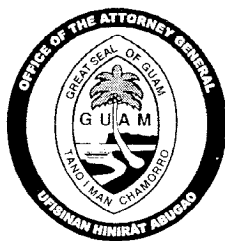


Leonardo M. Rapadas
Attorney General



Phillip J. Tydingco
*Chief Deputy Attorney
General*

OFFICE OF THE ATTORNEY GENERAL

CONFIDENTIAL ATTORNEY COMMUNICATION

December 5, 2011

Gershman, Brickner & Bratton, Inc., Receiver
David L. Manning, Special Principal Associate
8550 Arlington Boulevard, Suite 301
Fairfax, Virginia 22031

BY E-MAIL AND BY HAND

Re: Progress on Matters Addressed in GBB's July 20, 2011 Letter

Dear Mr. Manning:

This letter serves as an update on the matters raised in your letter dated July 20, 2011 addressed to Pat Mason concerning questions about your review of Public Law 31-20 ("GWSA Statute") which created the Guam Solid Waste Authority ("GWSA"). A copy of your letter is attached and was also included as part of the Receiver's August 31, 2011 Quarterly Report to Chief Judge Frances Tydingco-Gatewood in *United States v. Government of Guam*, U.S. District Court of Guam, Case No. CV 02-00022.

It is my understanding that the Receiver has been working with the Assistant Attorney General Deborah Rivera regarding the necessary steps to effectuate the Guam Solid Waste Authority's assumption of assets, liabilities, employees, real property, and equipment.¹ Therefore these matters are not further addressed.

Question No. 1 relates to the provisions in the GSWA Statute concerning recycling facilities. The determination of "necessity" of such facilities is a policy question to be decided by the GSWA. It seems to us that a plan should be in place for the proper disposal of tires. Any associated plan and the related costs would be included as part of GSWA's considerations.

With respect to Question No. 3, we are working with the Governor's Office to determine the date by which the submission of GSWA's balanced budget must be submitted to the Legislature. It appears to us that this submission is not part of the Governor's annual budget

¹ These matters are addressed in Question Nos. 2, 5, and 5 of the Receiver's July 20, 2011 letter.

process, but have sought the Governor's Counsel's confirmation of this and will supplement this response once we hear from the Governor's Counsel.

Question No. 6 deals with whether the Village mayors are exempt from paying tipping fees. As discussed in an earlier e-mail, based on our review of the relevant legislation and case law, it is our position that *mayors are exempt* from tipping fees for trash or debris "strictly from their duties in maintaining Village streets and public buildings, parks or facilities in their Villages, including the clean-up and removal of public nuisances and debris." 5 G.C.A., Ch. 40 §40113(d) (referred to hereinafter as the "Mayoral Exemption Statute").

The GSWA Statute does not expressly repeal the Mayoral Exemption Statute and under the common law rules of statutory construction, there is a presumption against an implied repeal. *See Gov't of Guam v. 162.40 Square Meters of Land*, 2011 Guam 17; *see also* 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 23.10, 479-80 (7th ed. 2009) (where a newly enacted statute is silent on a previous existing one, the indication is that the legislature did not intend to repeal the existing one; Courts are generally reluctant to find an implied repeal of statutes that serve an important public purpose, like statutes that protect public health).

Moreover, in 2001, the fiscal year 2002 budget law, P.L. 26-35, "made permanent the Mayor's tipping fee exemption when performing official duties. *See Guam 2005 Integrated Solid Waste Management Plan*, 10 G.C.A., Ch. 51 § 51103, section 3.2.1 Tipping Fee Management.

It is our position that it is unlikely that a court would find against the public policy² arguments in favor of a mayoral exemption for tipping fees and hold that the GSWA Statute impliedly repeals the Mayoral Exemption Statute. The exemption applies however, only to trash or debris "strictly from their duties in maintaining Village streets and public buildings, parks or facilities in their Villages, including the clean-up and removal of public nuisances and debris."³

Question No. 8 concerns legal services for the GSWA. Under Sections 51A110-11 of the Solid Waste Authority Statute, the GSWA is expected to hire its own attorney. In the event of litigation, GSWA's counsel would generally be appointed as a Special Attorney General for that particular matter. GSWA's Board sets the attorney's salary and benefits. Any work performed by the Office of the Attorney General would be charged to GSWA.

² The legislative intent of the Mayoral Exemption Statute (P.L. 26-35 § 23) states the purpose of the law (a) is in order to "best protect Village residents' health and public safety" there are reasons to not charge the Mayors. Noted is that "one (1) of their many duties is to help ensure that their Village areas, including roads are kept free of debris and trash". Also noted is that "DPW is also charged with maintaining our roadways, but DPW often relies on the Mayors to perform this work". The statutory right to dump for free set forth P.L. 26-35 § 23 (b) as to § 40113 (d) is as to "...trash or debris shall come strictly from their duties in maintaining Village streets and public buildings, parks or facilities in their Villages, including the clean up and removal of public nuisances and debris".

³ 5 G.C.A., Ch. 40 §40113(d).

Question No.10 asks whether the GSWA is bound by Guam procurement law. The response is yes, the GSWA is a Government agency which must follow Guam procurement laws and regulations. The purchase of supplies, equipment, services and construction is governed by 5 GCA Ch 5 Section 5120. GSWA also has authority to directly conduct procurements for professional services through the Request for Proposal process. See 5 GCA Ch Section 5121 and 2 GAR Div 4 Section 3114.

We agree with you that there seems to be a conflict whether the civil service laws and personnel rules and regulations will apply to GSWA employees or separate rules and regulations promulgated by the GSWA are to control (Question No. 9). We will research this further, as well as Question No. 7 (the effect of the PUC's approval of a new fee structure on the provisions of P.L. 25-93, and supplement this response in thirty (30) days.

Sincerely,



Kat Fokas
Assistant Attorney General

Enclosure: July 20, 2011 letter from Receiver

cc: Pat Mason, Deputy Attorney General
Deborah Rivera, Assistant Attorney General
Laura J. Mooney, Assistant Attorney General



SOLID WASTE
MANAGEMENT
CONSULTANTS

RECEIVER

July 20, 2011

Mr. Patrick Mason
Deputy Attorney General
Office of the Attorney General
287 West O'Brien Drive
Hagåtña, Guam 96910

Dear Mr. Mason:

We have completed our initial review of Public Law 31-20 which creates the Guam Solid Waste Authority (GSWA). Attached is a section by section summary of the legislation that we have compiled for the purpose of identifying (1) activities for which we, as Receiver, may be responsible and (2) for identifying areas where legal guidance from your office is needed.

We are requesting that you review the summary and suggest any changes you think needed to accurately describe the new law and any steps that the Receiver should take to implement the law. We are also specifically requesting that you advise us on the following issues and questions:

1. Section 51A104 of the GSWA Act states that the GSWA should "address the necessity for a facility" for tire shredding for recycling or use as rubberized asphalt; recycling glass, and scrap metal. Given the market value of the commodities included, Guam's location relative to the markets for these commodities and the fact that the market value of these commodities will not provide the resources to achieve the apparent objectives, how should these legislative directives be implemented? Specifically, should this be construed to direct that the cost of achieving these objectives be added to the rates of the GSWA's customers?
2. Section 51A112 of the GSWA Act requires that, within 90 days of the effective date of the legislation (October 15, 2011 by our calculations), that GSWA shall assume, in writing assets, liabilities and employees of the Department of Public Works, Solid Waste Management Division. Please draft the appropriate instruments to accomplish the assumption of assets, liabilities and employees required by this section of the Act.
3. Section 51A116 of the GSWA Act requires that the GSWA submit a balanced budget to the Guam Legislature each year and that the budget must be approved by law for the next fiscal year. Is this a budget process that is a part of the Governor's annual budget process or a separate budget process for GSWA? If it is the latter, what is the time-frame for its annual submission to the Guam Legislature?
4. Section 51A203 of the GSWA Act requires that real property interests be filed with the Department of Land Management within one-year of the effective date of the Act. Much of the work necessary to accomplish such filings has or will be done in

Government of Guam
Department of Public Works, Solid Waste Management Division
542 North Marine Corps Drive, Tamuning, Guam 96913
Phone: (671) 646-4379, Ext. 201 or 212
www.GuamSolidWasteReceiver.org
www.gbbinc.com

- connection with the construction of the Layon Landfill, the permitting of the existing Transfer Stations and the closure of the Ordot Dump. To facilitate compliance with this section, please draft or specify the information requirements for the documents necessary to be filed with the Department of Land Management.
5. Please advise as to the proper procedure for transferring the equipment of the Solid Waste Management Division to the Authority.
 6. Section 4 of the GSWA Act repeals and reenacts Section 51118 of Chapter 51A, Title 10 Guam Code Annotated. The reenacted provision does not include several archaic provisions related to the rates charged to solid waste customers. In addition, it does not appear to include the provisions granting exemption to tipping fees for Mayors, Good Citizens and events declared under the Governor's Force Majeure authority. Does this effectively repeal these exemptions? If it does repeal the exemptions, when is the repeal effective?
 7. Section 51A301 of the GSWA Act authorizes the Public Utilities Commission to establish, amend and approve all commercial, government and residential tipping and user fees, "which when established *shall* replace those previously created by law." How will the provisions of Public Law 25-93 be affected by the PUC's approval of a new fee structure?
 8. Section 51A110 of the GSWA Act authorizes the GSWA Board to appoint a Secretary and an Attorney. The provision also allows the Board to consolidate the two positions into one position and to "appoint one or more assistants to any such office". May the GSWA appoint one of the Assistant General Managers or other GSWA employees to the position of Secretary and continue to rely upon the Office of the Attorney General instead of hiring its own Attorney?
 9. Several sections of the GSWA Act address the employees of the Authority. These include:
 - Section 51A104(u) of the GSWA Act which grants the GSWA the power to "adopt rules and regulations governing selection, compensation, promotion, performance evaluation, disciplinary action and other terms and conditions of employment affecting certified technical and professional personnel, subject to the provisions of the Administrative Adjudication Act. Such rules and regulations shall provide for the employment and retention of persons on the basis of merit, and shall include an orderly and systematic method of recruitment and the establishment of a list of qualified applicants. Certified Technical and Professional personnel are defined as personnel employed by the Guam Solid Waste Authority who are professional engineers, attorneys, and other licensed professionals. Compensation for all other personnel shall remain consistent with compensation plans and pay scales as determined by law;"
 - Section 51A111 of the GSWA Act provides that the employees of the Authority "shall be employees of the government of Guam for the purposes of the application of all civil service laws and personnel rules and regulations that apply to government of Guam employees, inclusive of all scales, tables and schedules for compensation. With respect to compensation, this Section shall not apply to the compensation of the General Manager, Assistant General Manager: Administration, Assistant General Manager: Operations and Technical Support, Secretary, Attorney or the Chief Financial Officer;" and

Mr. Patrick Mason
July 20, 2011
Page 3

Section 51A117(a) of the GSWA Act provides that "Pursuant to the provisions of Title 4 GCA §§4105 and 4106, the Board shall establish rules and regulations regarding selection, promotion, performance evaluation, demotion, suspension and other disciplinary action for the employees of the Authority which shall be transmitted to *Ilihes laturan Guahan* [Legislature] to be ratified. All contracts for the hiring of off island employees shall conform to the provisions of Title 4 GCA §§6501 and 6501.1."

While there is some apparent contradiction in these sections concerning the GSWA Board's authority with respect to the General Manager, Assistant General Managers, Chief Financial Officer and Secretary of the Authority, Section 51A117(c) explicitly makes it clear that these employees serve at the pleasure of the Board and their compensation and terms of employment are set by the Board.

However, with respect to the other employees of the Authority, the language of Sections 51A104(u) and 51A117(a) appear to grant the Authority the power to prescribe its own rules and regulations concerning all aspects of the rules governing employee selection, compensation, evaluation, demotion, suspensions and other disciplinary actions while Section 51A111 appears to require the Authority to follow the Government of Guam laws, rules and regulations in all of these areas.

Should the GSWA address this matter by prescribing its own rules and regulations or by following the apparent mandate of Section 51A111 with respect to its employees?

10. The GSWA Act does not address the issue of procurement. Does the Authority have the power to specify its own procurement procedures or must it follow the procedures and laws that govern the procurement requirements for Government of Guam Agencies?

Thank you for your assistance.

Sincerely,



David L. Manning
Special Principal Associate,
GBB's Receiver Representative

Attachment