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Hon. Leevin Taitano Camacho
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OPINION MEMORANDUM

To: Vice Speaker Telen Cruz Nelson
I Mina Trentai Singko Na Liheslaturan Guåhan

From: Attorney General Leevin T. Camacho

Date: January 30, 2020

Subject: **Legislative Authority to Determine the Manner of Filling Vacancies in Municipal Offices of Mayor and Vice-Mayor (Ref: LEG 20-0036)**

Our office does not typically opine on other legal opinions or on proposed legislation. However, we recognize that there is great public importance in addressing the situation affecting the municipality of Yona. To that end, we provide this opinion in response to your January 23, 2020 request.

QUESTION AND ANSWER

The Organic Act is silent on who has authority to create and control villages or the office of mayor. Guam law provides that vacancies in the office of mayor can be filled by a majority vote of a municipal planning council under certain circumstances. The question is whether, in the absence of any express limitations in the Organic Act, the Legislature can determine the manner of filling vacancies in municipal offices of mayor and vice-mayor? The answer is yes.

DISCUSSION

Guam law provides that, in certain situations, a vacancy in the office of mayor shall be filled by a municipal planning council, subject to the advice and consent of the Legislature. Title 5 GCA § 40110(b) provides in pertinent part:

In a municipality where there is no vice-mayor and the vacancy is less than two hundred forty (240) days before the date of the next general election for mayors and vice-mayors, the vacancy shall be filled by a majority vote of the municipal planning council of the municipality in

election for mayors and vice-mayors, the vacancy shall be filled by a majority vote of the municipal planning council of the municipality in which the vacancy occurs, subject to the advice and consent of *I Liheslaturan* (the Legislature).

5 GCA § 40110(b). The question is whether section 40110(b) violates the Governor's appointment powers under the Organic Act.

The Governor's appointment powers are set forth in sections 1422 and 1422c(a) of the Organic Act. Section 1422 provides for the Governor's power to appoint officers and employees of the executive branch and states, in relevant part, “[the Governor] shall appoint, and may remove, all officers and employees of the executive branch of the government of Guam, except as otherwise provided in this or any other Act of Congress, or under the laws of Guam” 48 U.S.C. § 1422. Section 1422c(a) provides for the Governor's power to appoint the heads of executive agencies and instrumentalities. Under this section, “[t]he Governor shall, except as otherwise provided in this chapter or the laws of Guam, appoint, by and with the advice and consent of the legislature, all heads of executive agencies and instrumentalities.” 48 U.S.C. § 1422c(a).

Courts have held that the Legislature cannot restrict the appointment of certain positions if such restrictions interfere with powers expressly granted to the Governor under the Organic Act. *See Bordallo v. Baldwin*, 624 F.2d 932, 934-35 (9th Cir. 1980) (finding that a statute restricting the Governor's power to appoint hospital trustees was inorganic because it conflicted with the Organic Act provision vesting the Governor with authority to maintain Guam's health services); *Nelson v. Ada*, 878 F.2d 277, 279 (9th Cir. 1989) finding that a statute calling for the election of school board members rather than appointment by the Governor was inorganic because it conflicted with the Organic Act provision vesting the Governor with authority to establish, maintain and operate Guam's public school system).

The Supreme Court of Guam, however, has recognized that not all laws which limit the Governor's ability to appoint members of government agencies or boards violate the Organic Act. In *Sablan v. Gutierrez*, 2002 Guam 13, the Supreme Court was asked to determine whether legislation requiring the Governor to appoint members of the Guam Election Commission (“GEC”) from lists of candidates provided by the two main political parties on Guam violated the Governor's appointment authority under the Organic Act. The Governor argued that any limitation on his power of appointment violates the Organic Act. *Id.* at ¶ 13. The court rejected that argument, holding that even assuming *arguendo* the GEC was an executive agency, in instances where the Organic Act was silent, the legislature had authority to provide for the appointment of its members. *Id.* The court went on to observe that, “[u]nlike the facts presented in *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir.1980), and *Nelson v. Ada*,

878 F.2d 277 (9th Cir.1989), *no other provision within the Organic Act limits the manner in which the legislature may restrict the power of appointment* with respect to the GEC.” *Sablan*, 2002 Guam 13 ¶ 14 (citations omitted) (emphasis added).

This suggests that the Legislature has authority to determine how public officials are selected unless there is a conflict with specific powers vested in the Governor by the Organic Act. *See Driscoll v. Sakin*, 1 A.2d 881, 882 (N.J. 1938) (observing that “it seems settled that where the Constitution of this State is silent the legislature may determine the manner in which a public official may be named, and may delegate the selection to others and that the Executive may be clothed with no discretion in the issuance of the commission.”).

The Organic Act does not vest the governor with specific powers over municipalities. This is not surprising because it is generally settled law that the power to create a corporation, either public or private, has been observed to be a legislative function:

It frequently has been broadly stated in the decisions of the courts of this country that legislative authority over municipal corporations exists, except as limited by the federal and state constitutions, or that legislative control exists as to civil and political and governmental powers, or the like, and such legislative power is often referred to as plenary, supreme, absolute, complete, or unlimited.

1 McQuillin *The Law of Municipal Corporations* § 4.03 (3d ed. 1987) (footnotes omitted). *See also People v. Village of North Barrington*, 237 N.E.2d 350, 354 Cert. den., 393 U.S. 1082 (Ill. App. 1968) (holding that “[m]unicipalities are mere creatures of the Legislature, created for convenience in the handling of day to day local problems.”); *Cochran v. Black*, 400 S.W.2d 280, 283 (Ark. 1966).

The Legislature created municipalities. *See* 1 GCA § 403. The Legislature also established the office of mayor for the municipalities and villages of Guam. *See* 5 GCA § 40101. Based on the Organic Act’s silence on the issue, it follows that the Legislature may determine the manner of filling the office of mayor and filling vacancies in the same. 1 McQuillin § 4.123 (3d ed. 1987).

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CONCLUSION

The Organic Act is silent with respect to municipalities and the offices of mayor and vice-mayor. Thus, courts are likely to find that an appointment to fill a vacancy in the office of mayor is more akin to appointments to the GEC described in *Sablan* than it is to appointments to the board of trustees of the public hospital discussed in *Bordallo* or members of the school board in *Nelson*. Therefore, it is our opinion that the Legislature can determine the manner of filling vacancies in municipal offices of mayor and vice-mayor without impermissibly encroaching upon the Governor's power of appointment in the Organic Act.



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