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3 FOR PUBLICATION  
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5 **IN THE SUPERIOR COURT**  
6 **OF THE**  
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 JULIA KOTOMAR NORITA, )  
9 by and through her Attorney-In-Fact, )  
10 CLAUDIO KOTOMAR NORITA, )  
11 Plaintiff, )  
12 v. )  
13 COMMONWEALTH OF THE )  
14 NORTHERN MARIANA ISLANDS, and )  
John Does 1 to 10, )  
Defendant. )

**CIVIL ACTION NO. 98-1310D**  
**ORDER DENYING**  
**COMMONWEALTH'S CROSS-**  
**MOTION FOR SUMMARY**  
**JUDGMENT**

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16 **I. INTRODUCTION**

17 THIS MATTER came on for a hearing on February 25, 2002, in Courtroom 205A at 10:00  
18 a.m. on Defendant- Commonwealth's Cross-Motion for Summary Judgment.<sup>1</sup> Brien Sers Nicholas,  
19 Esq. appeared for Plaintiff. Assistant Attorneys General Andrew Clayton and Karen M. Klaver  
20 appeared for the Commonwealth of the Northern Mariana Islands [hereinafter Commonwealth]. The  
21 Court, having reviewed and considered the pleadings filed, the arguments of counsel, and being fully  
22 advised, now renders its written decision.

23 **II. BACKGROUND**

24 On December 15, 1998, Plaintiff filed a complaint against the Commonwealth and John Does 1  
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26 <sup>1</sup> On June 3, 2002, the Court converted the Commonwealth's Cross-Motion to Dismiss to a Cross-Motion  
27 for Summary Judgment. *See Norita v. Commonwealth*, Civ. No. 98-1310D (N.M.I. Super. Ct. June 3, 2002) (Order  
28 Denying Plaintiff's Motion for Summary Judgment and Converting Commonwealth's Cross-Motion to Dismiss to  
Summary Judgment Motion).

1 to 10 for declaratory and injunctive relief, seeking just compensation for the taking of Plaintiff's property  
2 described as Lot No. 016 B 34, containing about 3,589 square meters, more or less, as part of Chalan  
3 Pale Arnold Road in Tanapag Village, Saipan, CNMI. In the alternative, Plaintiff seeks injunctive relief  
4 to enjoin Defendants from continuing to use and improve Plaintiff's property as a public roadway until  
5 Defendants justly compensate Plaintiff. On December 31, 1998, the Commonwealth filed its answer.

6 On February 2, 2000, Plaintiff filed her Motion for Summary Judgment asserting that there were  
7 no genuine issues of material fact in dispute regarding the parties' agreement to exchange land, and  
8 requesting that conveyance of a Quitclaim Deed be issued to her as a matter of law. On May 28, 2002,  
9 the Court denied Plaintiff's Summary Judgment Motion for failure to comply with Com. R. Civ. P. 8(a),  
10 and for failure to establish that all of the requirements for the exchange of land were completed. *See*  
11 *Norita v. Commonwealth*, Civ. No. 98-1310D (N.M.I. Super. Ct. June 3, 2002) (Order Denying  
12 Plaintiff's Motion for Summary Judgment and Converting Commonwealth's Cross-Motion to Dismiss to  
13 Summary Judgment Motion). The Court advised the parties of its intention to convert the  
14 Commonwealth's Cross-Motion to Dismiss to a Rule 56 Motion for Summary Judgment on the issue  
15 of whether a claimant can seek judicial remedy for compensation for a taking under the Land Exchange  
16 Act and/or under the N.M.I. and United States Constitutions. *Id.* The Commonwealth filed its brief on  
17 May 29, 2002, and Plaintiff filed her brief on May 31, 2002.

### 18 III. UNDISPUTED FACTS

19 On or about November 15, 1989, Julian Norita [hereinafter Norita]<sup>2</sup> received a letter from then  
20 Governor Pedro P. Tenorio [hereinafter Governor] advising him of the Commonwealth's intention to  
21 acquire his property for a right-of-way on Lot No. 016B 34. *See* Pl.'s Compl. (Dec. 15, 1998)  
22 [hereinafter Compl.] ¶ 7 and Ex. A; Answer (Dec. 31, 1998) ¶ 7. That same day, the Governor  
23 certified the acquisition of Lot No. 016 B 34 for a public purpose to the Marianas Public Lands  
24 Corporation [hereinafter MPLC] via a certification letter to Mr. William R. Concepcion, then Executive  
25 Director for MPLC. *See* Compl. ¶ 8 and Ex. C; Answer ¶ 7.

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27 <sup>2</sup> Julian Norita is Plaintiff's deceased husband. On August 11, 1994, Julian conveyed his property to  
28 Plaintiff. *See* Pl.'s Compl. (Dec. 15, 1998) ¶ 12.

1 On November 20, 1989, Norita signed the Acknowledgment and Authorized letter agreeing to  
2 the acquisition, and informing the Commonwealth of his preference for a land exchange. *See* Compl. ¶  
3 7 and Ex. B; Answer ¶ 7. As a result of these transactions, Norita and MPLC entered into negotiations  
4 for a land exchange and started the appraisal process as required by law. *See* Pl.'s Mot. for Summ. J.  
5 (Feb. 2, 2002) [hereinafter Pl.'s MSJ]; Decl. of Claudio K. Norita [hereinafter Decl. of Claudio] ¶ 6;  
6 *see also* Def.'s Opp'n to Pl.'s MSJ and Cross Mot. to Dismiss and Cross-Mot. to Continue  
7 Proceeding (Feb. 22, 2000) [hereinafter Def.'s Opp'n]; Decl. of Ramon S. Salas [hereinafter Decl. of  
8 Salas] ¶ 7. MPLC appraised Norita's property at \$550.00 per square meter. *See* Decl. of Claudio ¶ 7;  
9 Decl. of Salas ¶ 7; Def.'s Opp'n, Ex. A- 1 (Feb. 22, 2000) [hereinafter Ex. A-1]. MPLC also  
10 identified two possible land exchange sites in Marpi and San Juan, Saipan. MPLC appraised the Marpi  
11 site at \$70.00 per square meter, and the San Juan site at \$15.00 per square meter. *See* Decl. of  
12 Claudio ¶ 7; Decl. of Salas ¶ 7; Pl.'s MSJ, Ex. D (Feb. 2, 2000). On August 16, 1995, the MPLC  
13 Board rejected the appraised value of Norita's property, and ordered the Marpi and San Juan  
14 properties to be re-appraised. *See* Decl. of Salas ¶¶ 5, 7; Ex. A-1 at 5. After the Board's rejection, the  
15 parties continued to negotiate, but the negotiations were never concluded. *See* Decl. of Claudio; Decl.  
16 of Salas. On December 15, 1998, Plaintiff filed the case at bar in the Superior Court seeking relief for  
17 the taking of Plaintiff's property.

#### 18 IV. QUESTION PRESENTED

19 Whether to grant the Commonwealth's Cross-Motion for Summary Judgment on the issue of  
20 whether there is a direct cause of action for just compensation for a taking under the Land Exchange  
21 Act and/or under the N.M.I. and the United States Constitutions.

#### 22 V. ANALYSIS

##### 23 A. Summary Judgment Standard

24 The standard for summary judgment is set forth in Rule 56 of the Commonwealth Rules of Civil  
25 Procedure. Rule 56(a) provides: “[a] party seeking to recover upon a claim . . . may . . . move with or  
26 without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.”  
27 Com. R. Civ. P. 56(a). Rule 56(c) continues:

28 The judgment sought shall be rendered forthwith if the pleadings, depositions,

1 answers to interrogatories, and admissions on file, together with the affidavits,  
2 if any, show that there is no genuine issue as to any material fact and that the  
3 moving party is entitled to a judgment as a matter of law.

4 Com. R. Civ. P. 56(c). Once a movant for summary judgment has shown that no genuine issue of  
5 material fact exists, the burden shifts to the opponent to show that such an issue does exist. *Riley v.*  
6 *Pub. Sch. Sys.*, 4 N.M.I. 85, 89 (1994). The opponent, by affidavit or otherwise, must set forth  
7 specific facts showing a genuine issue for trial. *Id.* A fact in contention is considered material only if its  
8 determination may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
9 242, 248, 106 S. Ct. 2505, 2510, L. Ed. 2d 202 (1986). After the moving party meets the initial  
10 burden, it falls to the non-moving party to show that a genuine issue of a material fact is still in question.  
11 *See Castro v. Hotel Nikko, Saipan, Inc.*, 4 N.M.I. 268, 272 (1995). A determination regarding the  
12 existence of genuine issues of material fact is made viewing the evidence in a light most favorable to the  
13 nonmoving party. *See Estate of Mendiola v. Mendiola*, 2 N.M.I. 233, 240 (1991).

14 **B. No Judicial Remedy Under the Land Exchange Act**

15 The legislature enacted the Public Purpose Land Exchange Authorization Act of 1987  
16 [hereinafter Land Exchange Act] pursuant to Article XI, §5(b) of the N.M.I. Constitution, which  
17 provides, in relevant part, that MPLC may transfer public lands in exchange for private land to  
18 accomplish a public purpose as authorized by law.<sup>3</sup> *See* N.M.I. Const. art. XI, § 5(b); *see also* PL  
19 5-33; *Manalisay v. Marianas Pub. Land Corp.*, 1997 MP 6, 5 N.M.I. 59; *Castro v. Div. Pub.*  
20 *Lands*, 1997 MP 29, 5 N.M.I. 131. The express purpose of the Land Exchange Act is to facilitate the  
21 accomplishment of certain public purposes by authorizing MPLC to enter into agreements by which the  
22 government obtains a freehold interest in private land in exchange for passing a freehold interest in

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26 <sup>3</sup> MPLC was dissolved pursuant to Executive Order 94-3. *See* Executive Order 94-3. The Governor, with the  
27 passage of PL 10-57, established the Board of Public Lands, administered by the Division of Public Lands, to oversee  
28 land exchanges. The passage of PL 12-71 established the Marianas Public Land Authority, which became the final  
approval authority for land exchanges. *See* PL 10-57; *see also* PL 12-71.

1 public land to private owners. *See* 2 CMC § 4142; see also 2 CMC § 4142 for public purposes.<sup>4</sup> The  
2 MPLC established rules and regulations to govern land exchanges. *See Rules and Regulations Issued*  
3 *Pursuant to the Public Purpose Land Exchange Authorization Act of 1987*, 10 Com. Reg.  
4 5418-28 (1988) [hereinafter Regulations].

5 The CNMI Supreme Court has addressed the issue of whether a claimant can seek judicial  
6 remedy under the Land Exchange Act. In *Castro v. Div. Pub. Lands*, the CNMI Supreme Court held  
7 that there is no judicial cause of action arising directly under the Land Exchange Act. The *Castro*  
8 Court, in its opinion, stated:

9 [T]here is nothing in the [Land Exchange Act] which creates a cause  
10 of action upon which the Court can grant relief. The [Land Exchange Act]  
11 only authorizes persons who believe that they are entitled to compensation  
12 to file claims for compensation with MPLC. The statute contemplates that  
13 MPLC will resolve those claims through its own administrative processes.  
14 If a claimant . . . is aggrieved by MPLC’s decision, relief can be had under  
15 the Administrative Procedures Act through an appeal to the Superior Court.

16 *See Castro*, 1997 MP 29 ¶ 13, 5 N.M.I. at 134; *see also Taman v. Marianas Pub. Land Corp.*,  
17 1998 MP 13 ¶ 8, 5 N.M.I. 181, 182 (“Therefore, an aggrieved claimant, the heirs, must first file a  
18 claim with MPLC because the Act itself does not authorize a judicial cause of action.”); *Pua v.*  
19 *Marianas Pub. Land Corp.*, 1998 MP 4 ¶ 8, 5 N.M.I. 157, 158. Clearly, a claimant seeking  
20 enforcement of an agreement to exchange land under the Land Exchange Act must first exhaust  
21 administrative remedies before seeking judicial recourse.

22 Here, the Commonwealth argues that there is no direct cause of action under the Land  
23 Exchange Act. Plaintiff, however, contends that the Regulations adopted under the Land Exchange Act  
24 created a cause of action to pursue land exchange judicially. *See* Pl.’s Reply to Def.’s Opp’n to Pl.’s  
25 Mot. for Summ. J. and Opp’n to Def’s Mot. to Dismiss and Cross-Mot. to Continue Proceeding (Jan.  
26 28, 2002) at 7. In view of the Supreme Court precedent on the issue presented, the Court agrees with  
27 the Commonwealth that there is no direct cause of action arising under the Land Exchange Act.

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28 <sup>4</sup> The legislature finds that land exchanges are an effective and economical means of obtaining private land  
essential to public projects and of resolving lawful claims against the government. *See* 2 CMC § 4142.

1 C. Judicial Remedy Exists Under N.M.I. Constitution Vis-a-Vis the U.S. Constitution

2 The existence of a judicial remedy for just compensation for a taking begins with a review of the  
3 applicable constitutional provisions. Article XIII of the N.M.I. Constitution reads:

4 Section 1: *Eminent Domain Power*. The Commonwealth may  
5 exercise the power of eminent domain as provided by law to acquire  
6 private property necessary for the accomplishment of a public purpose.

7 Section 2: *Limitations*. Private property may not be taken without  
8 just compensation. Private land may be taken only if no suitable public  
9 land is available for the accomplishment of the public purpose.

10 *See* N.M.I. Const. art. XIII. Similarly, the Fifth Amendment of the United States Constitution provides  
11 that no private property shall be taken for public use without just compensation. *See* U.S. Const.  
12 amend. V. The U.S. Supreme Court held that the Fifth Amendment is made applicable to the States by  
13 the Fourteenth Amendment. *See Penn Cent Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.  
14 Ct. 2646, 57 L. Ed. 2d 631 (1978).

15 In comparing Article XIII of the N.M.I. Constitution and the Fifth Amendment of the United  
16 States Constitution, the Court notes that there is a difference in the language of the two provisions.  
17 Article XIII of the N.M.I. Constitution states that private property "may" not be taken for public use  
18 without just compensation. *See* N.M.I. Const. art. XIII. However, the Fifth Amendment of the United  
19 States Constitution provides that private property "shall" not be taken for public use without just  
20 compensation. The term "may" is a permissive word allowing someone to act in a certain way without  
21 requiring him to do so. *See Burglin v. Morton* 527 F.2d 486, 488 (9th Cir. 1975). On the other hand,  
22 the term "shall" is usually regarded as making a statutory provision mandatory. *See Firebaugh Canal*  
23 *Co. v. U.S.*, 203 F.3d 568, 574-75 (9th Cir. 2000). The general rule of construction requires that  
24 terms be interpreted in its ordinary sense unless there is clear evidence to the contrary. *See Solenoid*  
25 *Devices, Inc. v. Ledex, Inc.*, 375 F.2d 444, 445 (9th Cir. 1967). In this case, clearly, the term "may"  
26 does not mean "shall." *Id.*

27 Where there is a discrepancy between the N.M.I. Constitution and the United States  
28 Constitution, the Court looks at Section 501 of the Covenant to Establish a Commonwealth of the  
Northern Mariana Islands in Political Union with the United States of America [hereinafter Covenant]  
to determine if the Fifth Amendment of the United States Constitution trumps Article XIII of the N.M.I.

1 Constitution. The purpose of Section 501 of the Covenant is to make applicable to the Northern  
2 Marianas, as if it were a state, certain of the Constitutional provisions governing the relationship  
3 between the federal government and the states. Section 501 of the Covenant states, in part: “(a) To  
4 the extent that they are not applicable of their own force, the following provisions of the Constitution of  
5 the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana  
6 Islands were one of the several States: . . . Amendments 1 through 9 . . .” See COVENANT TO  
7 ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH  
8 THE UNITED STATES OF AMERICA, 48 U.S.C. § 1801 note, *reprinted in* Commonwealth Code at  
9 B-101 et seq. The Fifth Amendment to the U.S. Constitution prohibits the taking private property for  
10 public use without just compensation. The Court finds that Section 501 of the Covenant binds the  
11 Commonwealth to the United States Constitution’s Fifth Amendment taking provision.

12 Under the Fifth Amendment taking provision analysis, the U.S. Supreme Court has held that the  
13 just compensation clause is designed not to limit governmental interference of property rights per se, but  
14 rather, to secure *compensation* in the event of otherwise proper interference amounting to a taking.  
15 See *First English Evangelical Lutheran Church v. Los Angeles County*, Cal., 482 U.S. 304, 315,  
16 107 S. Ct. 2378, 2385-86, 96 L. Ed. 2d 250 (1987). Generally, a "taking" occurs when the  
17 government acts to condemn private property in the exercise of its power of eminent domain. *Id.* at  
18 315, 107 S. Ct. at 2386. Thus, government action that works a taking of property rights necessarily  
19 implicates the "constitutional obligation to pay just compensation." *Id.* As such, land owners are entitled  
20 to bring an action in inverse condemnation as a result of "the self-executing character of the  
21 constitutional provision with respect to compensation." Claims for just compensation for a taking are  
22 grounded in the Constitution itself. *Id.* The U.S. Supreme Court, in explaining the self-executing nature  
23 of the constitutional provision involving actions in inverse condemnation, noted that:

24 The suits were based on the right to recover just compensation for property  
25 taken by the United States for public use in the exercise of its power of  
26 eminent domain. That right was guaranteed by the Constitution. The fact  
27 that condemnation proceedings were not instituted and that the right was  
28 asserted in suits by the owners did not change the essential nature of the  
claim. The form of the remedy did not qualify the right. It rested upon the  
Fifth Amendment. Statutory recognition was not necessary. A promise to  
pay was not necessary. Such a promise was implied because of the duty to  
pay imposed by the Amendment. The suits were thus founded upon the

1 Constitution of the United States.

2 *Id.* (citations omitted). The U.S. Supreme Court further opined that even "temporary" takings  
3 that deny a landowner all use of his property, are not different in kind from permanent takings for  
4 which the Constitution clearly requires compensation. *Id.* at 318, 107 S. Ct. at 2388. Hence, in the  
5 event of a taking, no subsequent action by the government can relieve it of the duty to provide  
6 compensation for the period during which the taking was effective. *Id.* at 321, 107 S. Ct. at 2387.

7 Applying the principles above to the case at bar, the Court finds that when the Commonwealth,  
8 through its eminent domain powers, acquires private property for a public purpose, the land owner may  
9 seek judicial remedy for just compensation. In this case, it is undisputed that the Commonwealth  
10 acquired Plaintiff's property for a public road way, and for water, sewer, and power utilities since  
11 1944. *See* Compl. ¶ 7 and Exs. A and C; Answer ¶ 7. It is also undisputed that there is now an  
12 on-going road construction project to further improve Plaintiff's property as part of a public road. *See*  
13 Compl. ¶ 14; Answer ¶ 13. As such, the Court finds that the Commonwealth took Plaintiff's property,  
14 Lot No. 016-B-34, and Plaintiff is entitled to just compensation. The parties, however, disagree on  
15 whether Plaintiff has been fully compensated for the use of her property by the Commonwealth. Plaintiff  
16 contends that she was not compensated. *See* Compl. ¶14. The Commonwealth, on the other hand,  
17 argues that Plaintiff was fully compensated for the indefinite use of her property. *See* Def.'s Opp'n at  
18 10. The Court finds that there is a dispute over compensation due to Plaintiff, and thus, finds that the  
19 Commonwealth is not entitled to Summary Judgment as a matter of law.

## 20 VI. CONCLUSION

21 For the foregoing reasons, the Court enters the following orders:

- 22 1. The Court finds that a direct cause of action does not arise directly under the Land  
23 Exchange Act, absent evidence that claimant has exhausted her Administrative remedies.
- 24 2. The Court finds that a direct cause of action does arise directly under the Fifth Amendment  
25 of the United States Constitution vis-a-vis Section 501 of the Covenant; and
- 26 3. The Commonwealth's Cross-Motion for Summary Judgment is hereby DENIED. A Bench  
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1 Trial, therefore, is set for August 2, 2002, at 10:00 a.m. on the issue of compensation.<sup>5</sup>

2 **SO ORDERED** this 18th day of June, 2002.

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/s/ \_\_\_\_\_

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VIRGINIA S. SABLAN ONERHEIM, Associate Judge

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27 <sup>5</sup> The Court, in having this matter set for trial, effectively DENIES the Commonwealth's Cross-Motion to  
28 Continue the case pending the decision on appeal of *Taisacan v. MPLC*, Civ. No. 97-0807 (N.M.I. Super. Ct. Nov. 10, 1999) (Decision and Order).