

**Department of Land Management
Permit for Use of Matapang Beach Park**

**Investigative Audit
1984 through 1994**

**OPA Report No. 02-07
November 2002**



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EXECUTIVE SUMMARY

OPA Report No. 02-07 November 2002

**Department of Land Management
Investigative Audit on Permit for Use of Matapang Beach Park
1984 through 1994**

The Office of the Public Auditor (OPA) received a tip alleging that the Holiday Inn Resort owed the Department of Parks and Recreation (DPR) rent for its use of Chief Matapang Beach Park (Matapang Park) in Tumon. The informant alleged that the rent was due under an agreement that gives Six D Enterprises (Six D) 50 years' use of Matapang Park in exchange for the development and 20 years' maintenance of the park. Based on this tip the OPA initiated an investigation.

The evidence gathered supports the allegation that the Holiday Inn Resort has not paid rent for its use of Matapang Park because no lease was ever established between the parties. We also found that that under 21 GCA §61531 the Department of Land Management (DLM) should have required 289 parking stalls for the hotel. The hotel has 110 parking stalls on its own land and 106 on Matapang Park, a shortfall of 73 stalls. The hotel also failed to provide adequate bus parking.

DLM did not ensure compliance by the developer of five conditions set forth by the Territorial Planning Commission (TPC) and did not adequately review the developer's application. On November 8, 1984, the application for conditional use and zone variance for the Suehiro Hotel - now the Holiday Inn Resort and previously the Parc Hotel - was approved for height, parking, and setback variances by the TPC, provided that the developer met the following conditions:

1. A lease, conforming to the Attorney General's opinion, must be entered into before any construction of development takes place;
2. The lease is to be with DPR, but approval must be had from all other concerned agencies;
3. If a lease is not made, the developer must resubmit plans dealing with the expansion of the then existing Suehiro Hotel and the variances sought;
4. The Commissioner of Tamuning is to be a party to any and all negotiations and agreements relative to the project; and
5. The amended plans are not to be altered without TPC approval.

Furthermore, the Department of Public Works (DPW) miscalculated the building permit/plan review fee for the expansion of the Suehiro Hotel, resulting in an underpayment of \$62,700 to the government. Neither DLM nor DPW have an occupancy permit on file for the Parc Hotel.

A 1988 quitclaim deed conveyed 124.95 square meters of government-owned Tumon land to the President of Six D Enterprises for \$3,124, a sum that appears to

be grossly out of line with then prevailing fair market values for comparable property. With such land then selling for as much as \$175 per square meter, the property reasonably could have commanded a price of up to \$21,866.

Based on information developed subsequent to our investigation, it appears that Six D is in default of the conditions under which it was granted use of Matapang Park. The Governor stated in his radio address on October 29, 2002, that the Guam International Airport Authority (GIAA) had paid for maintenance services for the public restrooms at Matapang Beach and Ypao Beach parks over the past year and has agreed to pay for such maintenance for another year. The permit granted to Six D requires the developer to "maintain the park and beach at a level of maintenance which is pleasing and attractive and safe to all persons who may use the facilities."

Our recommendations detailed in this report include:

1. DLM re-examine and reconstruct the application process of the Six D project to ensure that the application process complies with appropriate statutory and administrative provisions affecting the development.
2. DPR review all its park maintenance agreements. Matapang Park must be regularly monitored to ensure Six D is maintaining the property or if not action to terminate the permit granted to Six D should be considered.
3. The GIAA terminate its FY 2003 Matapang Park maintenance contract. Furthermore, GIAA should seek to recover sums it spent for maintenance Six D was responsible to perform.
4. The Attorney General should evaluate the following:
 - a. Whether a lease should be executed permitting Six D to continue its use of Matapang Park;
 - b. Whether the Government of Guam should seek rent from 1985 through 2002 or if the permit granted to Six D should be terminated;
 - c. Whether DPW can recover from Inland Builders, the contractor for the Six D development, the \$62,700 portion of the building permit fee that was not charged at the inception of the project;
 - d. Whether the Government of Guam has recourse against any individual or legal entity for the conveyance of the 124.95 square meters of government-owned Tumon land to the President of Six D Enterprises;
 - e. Review the record relative to the granting of the permit to Six D to determine if legal or administrative action is warranted against any government employees and principals involved in this development.

The Management of DLM and DPR generally concurred with our findings and recommendations. The management of DPW did not submit a response to our report.



Doris Flores Brooks, CPA
Public Auditor



**Department of Land Management
Permit for Use of Matapang Beach Park**

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Introduction

The Office of the Public Auditor (OPA) received a tip alleging that the Holiday Inn Resort owed the Department of Parks and Recreation (DPR) additional rent for its use of Chief Matapang Beach Park (Matapang Park) in Tumon. The person making the complaint alleged that the rent was due for a lease, but as will be made clear in this report, the use of Matapang Beach is based on a permit, not a lease. Based on this tip, the OPA initiated an investigation.

Jurisdiction to Audit

The Public Auditor is required to annually audit “all transactions and accounts of all departments, offices, corporations, authorities, and agencies in all of the branches of the government of Guam.”¹ The Public Auditor has the authority to conduct surprise/unannounced audits “of any government of Guam agency at the Public Auditor’s discretion, and all agencies shall surrender such records as are determined necessary for the conduct of the surprise/unannounced audits.”²

Background Information

The Territorial Planning Commission (TPC) of the Department of Land Management, (DLM) was created in August 1951 by Public Law 1-33. The name TPC was changed to the *Territorial Land Use Commission* (TLUC) by Public Law 20-147 in 1990. With the passage in 1997 of Public Law 24-89, which discontinued the use of the term “Territorial” in government titles, the agency has been known as the *Guam Land Use Commission* (GLUC). The GLUC is an administrative body empowered to grant subdivision approvals, zone changes, conditional uses and variances from land use laws and regulations as well as Seashore Reserve and Wetland Permits.

The Subdivision and Development Review Committee (SDRC), established by Executive Order 74-23, was composed of various representatives of government agencies to address the need for an effective intergovernmental mechanism to review and analyze various development activities for TPC approval. Executive Order 96-26 changed the name of the SDRC to the *Application Review Committee* (ARC). The GLUC considers comments and recommendations from the ARC in deciding on matters brought before the Commission.

¹ 1 GCA §1908

² 1 GCA §1919

After obtaining GLUC approval and prior to construction, the applicant must obtain a building permit from the Department of Public Works (DPW). After construction, a field inspection is conducted by Land Management staff to certify compliance with any GLUC stipulated conditions. If the DPW certifies that the project has been completed in accordance with the plan and the GLUC conditions and construction standards have been met, an occupancy permit is then issued.

On June 15, 1984, an application was submitted by Six D Enterprises (Six D) to the TPC for conditional use and zone variance for the Suehiro Hotel - which is now the Holiday Inn Resort and operated for a time as the Parc Hotel - in Tumon. The Suehiro was situated on Lot 5124-2-NEW. The lot contains 4,086 square meters, including approximately 125 square meters of a portion of a bull cart trail that was conveyed to the landowner as the result of the passage of Public Law 17-81. The application states that the owners of Suehiro will develop the adjacent Matapang Park for the hotel guests' use of the park facilities including the parking areas through a joint use agreement with the Government of Guam.

On September 27, 1984, the Attorney General said in a memorandum to the Director of DPR regarding the proposed Joint Use Agreement between Six D and the Government of Guam that:

- Matapang Park is a *natural preserve* and cannot be improved upon.³
- Approval of the DPW is required.⁴
- If park is removed from the Territorial Park System, legislative approval is necessary.⁵
- No authority exists for such a joint use agreement of government property. Land Use Permits and commercial leases are the only instruments that permit government land to be used for non-government purposes.⁶

On October 25, 1984, the TPC disapproved Six D's application because of the AG's opinion regarding Matapang Park being a Natural Preserve. However, according to documents at DPW, Matapang Park has always been classified a Territorial Park, which can be developed.

On November 8, 1984, the TPC approved Six D's re-presentation of its application for conditional use and zone variance. Six D proposed to construct additional rooms to the existing Suehiro Hotel. The reconstructed hotel was to have an additional 216 rooms, be ten stories high, and have height, parking, and setback variances on all sides. Six D proposed to meet the parking and setback requirements by expanding vertically as well as horizontally; and its open space requirements would be met with an agreement from DPW permitting it to "adopt"

³ 21 GCA §77110

⁴ 21 GCA §77113

⁵ 21 GCA §77108

⁶ 21 GCA §68101 and 21 GCA §60114

Matapang Park. It was proposed that two floors within the hotel and outside the immediate hotel structure would be converted to parking spaces.

The application was approved by the TPC with five conditions. The five conditions stipulated in the Notice of Action were:

- 1) The lease agreement, to be drawn according to the AG's opinion, must be entered into before any construction or development takes place;
- 2) If lease agreement is entered into with Parks and Recreation, approval from all other concerned agencies must be secured;
- 3) If agreement is not entered into, applicant must resubmit plans dealing specifically with the expansion of the hotel and the variance required;
- 4) The Commissioner⁷ of Tamuning to be a party to any and all negotiations and agreements relative to this project; and
- 5) The amended plans are not to be altered without the approval of the TPC.

On September 28, 1985, the Director of DPW granted a voluntary improvement permit⁸ to Six D for the development and maintenance of Matapang Park. A voluntary improvement permit is granted to individuals or groups to improve, without expense to the government, any part of the Guam Territorial Park System.

On September 11, 1990, Mark C. Charfauros initiated suit⁹ in the Superior Court against the Government of Guam and Six D concerning the construction of the expansion of the Suehiro Hotel. The Plaintiff claimed:

- 1) No variance or conditional use was ever granted to Six D in relation to the intended development of the construction site;
- 2) Employees and agencies were directed by their superiors to grant their approval for the benefit of Six D;
- 3) Zoning and historic preservation laws were violated;
- 4) Wrongful and unlawful approval of the building permit application by the Department of Land Management; and
- 5) Breach of the five conditions of the TPC.

On September 17, 1991, Charfauros and the defendants, the Government of Guam and Six D, entered into a settlement agreement. Charfauros was paid \$10,500 and the defendants were discharged from claims and liabilities arising from the case.

On September 1, 1993, Building Permit 408 was issued by DPW to the contractors for Six D to construct a 10-story hotel on Lot 5124-2-NEW.

⁷ The title Commissioner was changed to Mayor by P.L. 20-331.

⁸ Former Government Code § 26015 enacted by P.L. 12-209 January 23, 1975.

⁹ Superior Court CV 659-90

On February 7, 1996, Bill 499 was introduced to the Legislature by now Senator Mark Charfauros, the same citizen who brought suit against GovGuam and Six D. This bill attempted to declassify Matapang Park as part of the Guam Territorial Park System and place it under the jurisdiction of the Department of Land Management for the sole purpose of leasing it to Six D at fair market value. It was intended that the proceeds of the lease would benefit the Chamorro Land Trust Commission to pay for the cost of infrastructure development and surveys of Chamorro homelands. The bill states that the original hotel expansion project was changed and that the Legislature is dismayed that changes in the scope of the project were permitted without resolving setback and density issues.

Bill 499 was never enacted into law.

Objectives

The objectives of our investigation were to gather and analyze evidence to form a conclusion as to whether or not the evidence supports the allegation that the Holiday Inn Resort and its predecessors had not paid rent for its use of the Chief Matapang Beach Park and whether Six D Enterprises met the five conditions of the TPC set for the approval of the variance granted.

Scope and Methodology

The scope of our investigation was limited to the permitting process from 1984 through 1994, which resulted in the construction of the Parc Hotel on Lot 5124-2-NEW.

We reviewed the April 1986 Manual of Procedures, Government of Guam Permits, containing the building permit, conditional use, and zone variance procedures and evaluated compliance of the permitting process of the hotel to these procedures. We researched the legal requirements for obtaining a hotel construction permit to derive an understanding of the role of the Territorial Planning Commission in the 1980s.

We reviewed the documents of the Parc Hotel filed at the Department of Land Management and DPR and analyzed these documents to ensure terms of the DPR agreement and conditional use approval of the TPC were complied with and whether DPR should be receiving additional income for the lease of the Matapang Park.

We obtained a map of the Parc Hotel and Matapang Park areas from the Department of Land Management to determine whether there is ample space for parking on the property. In addition, we performed a site inspection to obtain visual evidence of land use and parking.

Our audit was conducted in accordance with *Generally Accepted Government Auditing Standards*. Accordingly, we included tests of records and other auditing procedures that we consider necessary under the circumstances.

Overall Conclusion

The evidence gathered supports the allegation that the Holiday Inn Resort and its predecessors have not paid rent for its use of the Chief Matapang Beach Park because no lease was ever established between the parties. Additionally, the Department of Land Management did not ensure compliance with the five conditions set forth by the Territorial Planning Commission in 1984 and did not adequately review Six D's application. Furthermore, the Department of Public Works miscalculated the building permit/plan review fee for the expansion of the Suehiro Hotel, resulting in an underpayment of \$62,700. Based on information developed subsequent to our investigation [See heading Subsequent Events hereinafter], it appears that Six D is default of the conditions under which it was granted use of Matapang Park.

Prior Audit Findings

We are not aware of any prior audits of the Department of Land Management by the OPA. We reviewed the general purpose financial statements of the Government of Guam and the Single Audit Reports for the last three years and determined there are no audit findings related to the subject of this audit.

Specific Findings and Conclusions

Finding 1: Building Permit Fees

Building permit fees charged by DPW are set forth in Table 3A of the latest edition of the Uniform Building Code (UBC).¹⁰ The UBC is updated every three years. In 1991, for valuation of \$1,000,001.00 and up, the building permit fee is \$3,539.50 for the first \$1,000,000.00 plus \$2.00 for each additional \$1,000.00 or fraction thereof. Additionally, a plan review fee of 65 percent of the building permit fee is charged.

We found that the permit fee for Building Permit 408 issued on September 1, 1993, to Inland Builders for new construction of the third through tenth floors of the hotel on Lot 5124-2-NEW owned by Six D, with an estimated cost of \$39,000,000, was calculated at \$68,540.18. But at an estimated cost of

¹⁰ 21 GCA §66408

\$39,000,000, the permit/plan review fee should have been \$131,240.18. The result was an underpayment of \$62,700.00.

The \$68,540.18 fee was based on a valuation of \$20,000,000, which we found crossed out on the permit and plan-review application and \$39,000,000 was written above it. It appears that the building official neglected to recalculate the permit fees based on the \$39,000,000 valuation.

The following table illustrates what we found on Building Permit 408 and our recalculation of the fees conforming to Table 3A of the 1991 UBC:

	As indicated on building permit and calculation of \$20,000,000 valuation	Recalculation by OPA consistent with Table 3A of UBC
ESTIMATED CONSTRUCTION COST	\$20,000,000.00	\$39,000,000.00
BUILDING PERMIT FEE	\$41,539.50	\$79,539.50
PLAN CHECKING FEE (65% of building permit fee)	\$27,000.68	\$51,700.68
TOTAL	\$ 68,540.18	\$ 131,240.18

We have made numerous attempts to elicit a response from the DPW regarding the building permit calculations. However, as of report date, no response has been received.

Finding 2: Application to TPC

Procedures

Land Management is responsible for reviewing the application to the TPC. The zone variance process outlined in the *Manual of Procedures, Government of Guam Permits, April 1986* states that the application process for a zone variance requires supporting documents, including a letter of justification demonstrating to the Commission that:

- 1) The provision of this Title would not result in practical difficulties or unnecessary hardships inconsistent with the intent of the law;
- 2) A special condition exists that is peculiar to the land or building in question that does not apply generally to other property in the same zone; and
- 3) The granting of such variance will not be contrary to the objectives of the master plan, and will not be detrimental to the public welfare or injurious to the properties or improvements in the neighborhood in which the property is located.

These provisions are consistent with 21 GCA §61617, *Variance Requirements*.

The procedures for development within an “H” Zone require the applicant to submit:

- 1) Information showing the location of utilities, drainage facilities, the direction of flow of all water courses within the area, and topography with contour intervals;
- 2) Approval of any proposed use or structure not included in the tentative plan before any building permit is issued. **See related Finding 3, Condition 5;**
- 3) A performance bond or undertaking;
- 4) A maximum time period approved by the Commission within which all of the improvements authorized shall be completed;
- 5) Certification by DPW that the project has been completed in accordance with the tentative plan. **See related Finding 3, Occupancy Permit.**

We did not find evidence of a letter of justification, legible maps, TPC approval for any proposed use or structure not included in the tentative plan, nor a performance bond attached to the Six D application submitted to the Territorial Planning Commission on June 15, 1984. DPW stated that the maps and plans for this project were destroyed in a typhoon and cannot be located. We did not find evidence of a maximum time period for completion of the project indicated in the TPC minutes or any other document within the Parc Hotel file at DLM.

Parking

The parking requirements for a hotel are set forth at 21 GCA §61531. Some subsections follow:

- (b) For hotels, at least one automobile parking space for each four guest rooms;
- (d) For places of assembly, such as restaurants or nightclubs without fixed seating facilities, one parking space for each one hundred (100) square feet of customer area in such use;
- (f) For retail and wholesale sales and services, exclusive of warehouse activity, at least one space for each one hundred (100) square feet or portion thereof of usable commercial floor area;
- (g) For professional and business offices, public administration offices, one parking space for each four hundred (400) square feet or portion thereof of floor area;
- (j) Three spaces for every four (4) employees.
- (k) Total parking requirements will be a total of all applicable elements in paragraphs (a) through (k).

Furthermore, 21 GCA §61670 imposes a petty misdemeanor charge against any person, firm, corporation or officer thereof who violates any of the provisions of

Guam's zoning laws. Such person, firm, or corporation shall be deemed guilty for each day during any portion of which any violation is committed, continued, or permitted.

Legislative Resolution 300, incorporated into the Tumon Bay Master Plan by Public Law 17-86 on January 1, 1985, states that one space of bus parking is required for every 20 automobile spaces for resort use.

The following table compares what we found in the files at DLM to OPA calculations based on 21 GCA §61531. We have utilized the information we found in the application to the TPC and information about the actual number of hotel employees. The numbers in bold represent additional rooms and restaurant space that were omitted in the DLM calculations but presented on the application to the TPC. The DLM calculations assumed 15 employees could operate a 254-room hotel. Employee parking calculations are presented to reflect both the 15 employee assumption and the 130 employees actually employed at the Holiday Inn.

				Required parking spaces		
	Existing Hotel	Proposed Extension	OPA calculations consistent with 21 GCA §61531	Found in DLM file *	OPA 15 employee calculation	OPA 130 actual employee calculation
Facility Details						
Rooms	38	216	(38 + 216) ÷ 4	54	64	64
Disco		2700 sq. ft.	2700 ÷ 100	27	27	27
Restaurant	2368 sq.ft.	3500 sq. ft.	(2368 + 3500) ÷100	24	59	59
Shops		3620 sq. ft.	3620 ÷ 100	36	36	36
Support Facilities		1500 sq. ft.	1500 ÷ 400	4	4	4
Offices		515 sq. ft.	515 ÷ 400	1	1	1
Staffing Details						
Assuming 15 employees		15 ÷ 4 = 3.75 x 3		5	11	-
Actual 130 employees		130 ÷ 4 = 32.5 x 3		-	-	98
TOTAL Required Parking				151	202	289

* Assuming 15 employees

Additionally, there are 14 bus parking stalls required based on the 289 parking space requirement.

The parking requirements we found in the Six D file at the Department of Land Management do not conform to 21 GCA §61531. DLM also miscalculated employees parking by accepting as valid the claim of only 15 employees. The assumption of 15 employees was unrealistically low and raises the question whether this number was deliberately set low so that Six D would need fewer parking stalls.

A Planner at the Department of Land Management agreed that the proposed parking calculations could be miscalculated. He further stated that important factors to consider when looking at parking requirements of a proposed hotel are the number of hotel employees and the number of slots made available for public parking for patrons of shops and restaurants. These are considered fixed parking spaces that are continuously occupied. He also stated that assuming 15 employees for a 250-room hotel was unrealistically low.

We also found insufficient parking accommodations on the Holiday Inn Resort lot. We noted 110 parking stalls and two parking spaces designated as reserved for individuals with disabilities within the Holiday Inn lot and 106 parking stalls and five parking spaces designated as reserved for individuals with disabilities at Matapang Beach for a total of 216 available parking spaces. We also observed 3 bus parking stalls on the Matapang Beach lot. There is no bus parking space on the Holiday Inn lot.

The application for use approval submitted by Six D to the TPC states that 87 automobile parking spaces are required and 64 spaces will actually be built. There is a note that states, "Sufficient parking spaces are not available on the property. Adjacent government lot to be developed by the applicant at no cost to the Government for joint use including parking."

The hotel alone does not have sufficient parking based on its actual parking stalls of 110. However, with the inclusion of the 106 Matapang Beaching slots, the number of available parking slots increases to 216 and the requirement of 202 is met. But this determination is valid only if Six D's claim of only 15 employees is accepted as valid. In making its calculations, Land Management accepted the claim of only 15 employees as valid.

Currently, the Holiday Inn employs approximately 130 people to operate its 251 rooms and six banquet rooms. There should have been 98 parking stalls for 130 employees. We calculate that under 21 GCA §61531, the TPC should have required 289 parking stalls for the hotel. The hotel has only 110 parking stalls, a shortfall of 179 parking stalls. This shortfall is reduced to 73 when you add the 106 parking stalls of Matapang Beach. The hotel also failed to meet the required number of bus parking stalls.

It appears DLM unreasonably underestimated employee parking and calculated the parking requirements based on the extension and omitted the existing

structure from its calculations even though we found that the TPC application indicates total area as the sum of the existing hotel and the proposed extension.

The purpose of zoning laws is to assure adequate provisions for the community. Visitors of the Matapang Beach are often without parking because the guests and employees of the Holiday Inn may occupy these slots because of the inadequate parking facilities at the Holiday Inn.

Finding 3: Five Conditions of TPC Approval

The Notice of Action issued by the Territorial Planning Commission (TPC) on February 7, 1985, constitutes the approval of the TPC with conditions for zone variance and conditional use for construction and extension of hotel and proposed Suehiro Hotel condition and height variance.

The five conditions stipulated in the Notice of Action were:

- 1) The lease required by the Attorney General's opinion, must be entered into before any construction or development takes place;
- 2) If a lease is entered into with DPR, approval from all other concerned agencies must be secured;
- 3) If a lease is not entered into, applicant must resubmit plans dealing specifically with the expansion of the hotel and the variance required;
- 4) The Commissioner of Tamuning¹¹ be made a party to any and all negotiations and agreements relative to this project; and
- 5) The amended plans not be altered without the approval of the TPC.

Six D complied with only one of the five conditions set forth by the TPC in the Notice of Action. A letter dated January 26, 1996, signed by the Commissioner of Tamuning, attested that the Commissioner was notified and informed of all transactions regarding the development, satisfying Condition 4.

Approval of the conditional use and variances granted to Six D was dependent upon the fulfillment of the five conditions. Since four of the five conditions have not been met, the building permit and occupancy permit were improperly issued.

Condition 1

Six D and the Government of Guam did not enter into a lease required by Condition 1. Under 21 GCA §60112, any lease of government-owned real property must be approved by duly enacted legislation. Instead DPR issued Six D a permit to develop and maintain Matapang Beach. This permit gives "Six D Enterprises and its clientele access to Matapang Beach for beach and recreation

¹¹ The title Commissioner was changed to Mayor by Public Law 20-331.

use for a period of 50 years.” In return, Six D is required to maintain the park for a period of 20 years; after 20 years, the Government of Guam must maintain the park.

The permit granted to Six D by DPR states that it is authorized under Public Law 12-209, an act relative to the transfer of functions to the then newly created DPR, passed on January 23, 1975. Section 26015 of the Government Code addressed Voluntary Improvements: “The Director may grant permits to any individuals or group to improve, without expense to the government, any part of the Guam Territorial Park System.”

The permit was approved by Governor Ricardo J. Bordallo on September 28, 1985, and is still relied upon by Six D as its authorization for the use of the Matapang Beach property.

Section 26015 of the Government Code of Guam was recodified as 21 GCA §77117 and amended by Public Law 20-188:6 on May 23, 1990 to read:

“The government of Guam may not, without approval of the Legislature by statute, directly or indirectly compensate any individual or group for the development or maintenance of a part of the Guam Territorial Park System except pursuant to a valid procurement contract. This prohibition includes monetary or in-kind credit towards the rent or sale amount in any transaction involving the government of Guam in consideration for improvements done under a permit issued this section.”

P.L. 20-188 further stated:

“No part of the Guam Territorial Park System, including parking spaces, structures or access, shall be used for the benefit of any adjacent or non-adjacent private landowner. **Any existing or future agreement to the contrary shall be null and void.** [Emphasis supplied.] All adopt a park agreements or other agreements whereby a private person, company or group improves a park shall be terminated at will by either party with sixty (60) days written notice.”

P.L. 20-188 also added Section 61624¹² to Title 21 of the Guam Code Annotated prohibiting the TLUC from allowing parks to be used for the benefit of private landowners.

On May 29, 1992, Public Law 21-105 repealed and reenacted 21 GCA §77117 to its current form:

“Voluntary improvements. The Parks and Recreation Commission may permit a person or legal entity to improve and maintain, without expense

¹² Renumbered 61624 by Compiler because the number designated in the act was already in use.

to the government of Guam, any part of the Guam Territorial Park System. Permits may be renewed annually by the Governor. No permit shall grant any exclusive use of any park property to the permittee nor shall a permit impair or limit the government of Guam from controlling access to and use of park property.”

The permit issued to Six D states “No use or deposit fee shall be charged to SIX D Enterprises for use of Matapang Beach Park, said fee having been taken into consideration in the expense to develop the property as agreed herein and for the maintenance during the term of this agreement.”

Although the permit does not specify the use of the Matapang Park to satisfy the hotel’s parking and setback requirements, it is indicated as such in the TPC minutes of meetings held on October 25 and November 8, 1984. This appears contrary to P.L. 20-188, which prohibits the use of parking spaces, access, and structures of parks that benefit adjacent landowners. However the permit was already in existence before the passage of P.L. 20-188. The effort to invalidate existing agreements may be ex post facto under § 5(j) of the Organic Act (48 USCA 1421 b (j)).

The DPR has stated to the OPA that it does not have any internal procedures to address situations where the laws passed by the Legislature could potentially affect existing permits issued by the department.¹³

We also found that the conditions of the permit were not fulfilled. The permit required Six D to provide, among other amenities, a playground, a drinking fountain, and 10 trash containers. Our site visit observation showed no drinking fountain, no playground, and only three trash containers.

It appears that the Department of Land Management bypassed the legislative approval required for the lease agreement in favor of the assignment of the development, use, and maintenance of Matapang Park through a permit. This is evidenced by a memo dated October 29, 1984, from the Chief Planner to the Director of Land Management stating, “There definitely is no need for a complicated Joint Use Agreement involving the Legislature. We are simply having a park developed and maintained for public use.”

A memorandum from the legal counsel of the Twentieth Guam Legislature, found in the files at the DPW, stated that the “permit is not an adequate substitute for a commercial lease as required by the Attorney General” and “does not satisfy the TPC’s condition so the terms of the variance have not been met.”

We were not able to obtain Tumon lease rates for the period of 1984-1985. However, we obtained a copy of a 1990 lease agreement where the Government

¹³ Additional provisions of law dealing with land use permits are found at 21 GCA §§ 68101 and 68102. These provisions authorize the Director of Land Management, with the approval of the Governor, to issue land permits for no more than two years to nonprofit organizations.

of Guam leased 1,024 square meters of government land in Tumon to an individual to operate a zoo. Based on the rent for this lease, which calculated to \$6 a square meter a year, we estimated the loss of lease revenue at \$90,888 annually or \$1,454,208 for the 16 years from 1985-2001 for the 15,148 square meters of Matapang Park used by Six D.

We question the permit's appropriateness in its stipulation that Six D will maintain the park for only 20 years while having use of the land for 50 years.¹⁴

Condition 3

Condition 3 stated that if a lease is not entered into, applicant must resubmit plans dealing specifically with the expansion of the hotel and the variance required.

We did not find any resubmitted plans and applications to the TPC regarding the Parc Hotel.

Condition 5

Condition 5 required that the plans not be altered without TPC approval. The application indicates the project's improvements will occupy 21,197 square feet, which is 48 per cent of the hotel's lot area of 43,964 square feet. Matapang Park is 162,968 square feet.

During site visits, we observed that the hotel occupies nearly 100 per cent of the land area of Lot 5124-2-NEW. We also found this when comparing the hotel dimensions indicated on building permit 408 issued by DPW and the map of the lot area obtained from the Department of Land Management.

The building permit issued by DPW indicates the building is to be 120 feet wide by 287 feet 6 inches (287.5) long. This calculates to 34,787.5 square feet. This conflicts with the calculations submitted to the TPC where structures are indicated as 21,197 square feet, a difference of 13,590 square feet.

Although Six D intends to use Matapang Park to meet its open space requirements as indicated in its application, it appears that the plans submitted to the TPC have been altered to produce a hotel that does not conform to the plans submitted and approved by the TPC on November 8, 1984.

Six D claimed in a letter to DPW dated January 26, 1996, requesting an occupancy permit that the five conditions have been met.

¹⁴ See heading Subsequent Events relative to the fact that notwithstanding the obligation of Six D to maintain Matapang Park for 20 years, the Guam International Airport Authority assumed this obligation for FY 2002 and FY 2003 by issuing a contract to a vendor to perform the service.

We have made numerous attempts to elicit a response from DPW as to whether documentation exists that an inspection was conducted of the hotel. However, as of report date, no response has been received.

Occupancy Permit

Title 21 of the Guam Code Annotated §66307(a) states, “If after inspection as provided in §66306, it is found that the proposed work has been completed in accordance with the requirements of the building permit and the provisions of this Chapter, together with the certification issued by the Director of the Department of Revenue and Taxation that the property and all the improvements thereon have been entered into the tax assessment rolls, the building official shall issue a certificate of occupancy. The building official shall keep a permanent record of all certificates of occupancy issued.”

Title 18 §3317 of the Guam Administrative Rules and Regulations state that “the DPW shall certify to the Commission that the project has been completed in accordance with the tentative plan.”

Title 21 GCA §61620 adds, “If the decision filed involves a variance granted by the Commission, said variance shall be the authority for the director of Land Management to endorse and to issue any building or certificate of occupancy in conformance thereto and for the approval of any application for the approval of a required license.”

We did not find an occupancy permit in the Parc Hotel file at DLM nor were we able to obtain a copy of the occupancy permit from DPW. The Chief Building Inspector stated that the document was destroyed in a typhoon along with many other documents dated before 1995.

It appears that DPW is not in compliance with Title 21 of the Guam Code Annotated §66307(a) which requires that permanent records of occupancy permits shall be kept.

The occupancy permit constitutes conformity with the building permit requirements. However, without such document on record at DPW, it cannot be confirmed that all requirements of the building permit of the Parc Hotel were met or that the building was even inspected after construction.

Additionally, issuance of the occupancy permit denotes conformity with the conditions of the TPC as §61620 states. However, we found that four of the five conditions set forth by the TPC for their approval of Six D application for height, parking, and setback variances were not met.

Finding 4: Notice to Landowners

Title 21 §61303 of the Guam Code Annotated states that in any hearing or meeting on an application for conditional use whether based on an original or amended site plan, in each of the zones, the Commission shall require the applicant to give personal written notice at least 10 days prior to the hearing to property owners within a radius of five hundred feet (500') or if personal notice is not possible, then written notice to the last known address of such owner at least 25 days prior to the hearing by certified mail, return receipt requested.

Documentary evidence indicates a public hearing was held on October 24, 1984 at the Tamuning Commissioner's office regarding Six D Enterprise's application, with three people in attendance.

A letter dated June 11, 1996, addressed to the Department of Public Health by an adjacent landowner, was found in the Six D file at the Department of Land Management. It was in reference to a proposed toilet vent that the homeowner learned would have to void into the person's yard from the Parc Hotel (now the Holiday Inn), which is built right up to their property line. The letter states, "Though our family property is adjacent to the Parc Hotel site, we were never invited to any public hearings relating to the building of the hotel."

Finding 5: Conveyance of Land

Section 2112 of Title 18, Land Management, of the Guam Administrative Rules and Regulations states that when an application is made to purchase or lease government real property, the Land Transfer Board shall establish what in its opinion is the fair value of the property. It may base its decision on any evidence that may be available as to the value of such property, but shall, in every case, request from the Department a written appraisal of the property.

A quitclaim deed for the conveyance of the bull cart trail granted to the President of Six D by PL 17-81 was executed on October 7, 1988. It conveyed the 124.95 square meters of land to Ely Del Carmen for \$3,124.

A review by the legislative legal counsel dated August 16, 1989, of the DPR/Six D permit and quitclaim deed was made at the request of Senator Gordon Mailloux. The review stated that the unusual circumstance involving the deed was that the value placed on the land to be conveyed was grossly out of line and too low by at least \$175 per square meter. It states the 124.95 square meters of land was conveyed to Mr. Del Carmen for \$3,124 or approximately \$25 per square meter.

It appears that the fair market value of the land was not assessed by the Land Transfer Board and the land may have been conveyed in violation of Title 18 of the Guam Administrative Rules and Regulations.

Subsequent Events

Subsequent to the completion of fieldwork, the OPA learned that in the Governor's radio address of October 29, 2002, "The Guam International Airport has contracted to provide janitorial, maintenance and security services at the public restrooms at Matapang and Ypao Beach Parks." The Governor also stated that the contract is actually a resumption of services that the airport had contracted and paid for over the past year.

However, Section 4 of the permit granted to Six D states:

Six D Enterprises shall maintain Matapang Beach and its facilities for the term of twenty years commencing after completion and acceptance of the development stated in Section 2. Six D Enterprises shall perform all routine maintenance necessary to maintain the park and beach at a level of maintenance which is pleasing and attractive and safe to all persons who may use the facilities. This maintenance shall include routine maintenance on mechanical and utilities systems and all structures which are placed on or exist at the park including structural repair. The structures shall also be kept in good and aesthetically pleasing condition throughout the term of this permit. Six D Enterprises shall further, at its expense, keep Matapang Beach free of all debris and trash and shall maintain the landscaping and flora of the park in a manner [that] is aesthetically pleasing and consistent with the developed surroundings. All public driveways, parking areas and walkways shall likewise be maintained in a safe and useable condition. After the expiration of the twenty years of maintenance by Six D Enterprises, the maintenance shall be assumed by the Government of Guam at the same level of maintenance performed by Six D Enterprises. Both parties acknowledged that the maintenance of Matapang Beach in an acceptable manner is of mutual benefit to both parties. Therefore, the parties agree to meet and discuss the maintenance of Matapang Beach as it may become necessary and each party agrees to cooperate in good faith with the other in doing such work as may be necessary to maintain Matapang Beach in a condition that is acceptable to both parties. **Six D Enterprises' failure to provide the above mentioned construction and services will constitute a breach of this agreement.** [Emphasis supplied.]

The obligation of Six D to maintain the park is also evidenced by a sign posted at the park entrance stating, "Developed, Adopted, and Maintained by: Six D Enterprises."

Rather than the GIAA expending its funds to maintain Matapang Park, the government should require Six D to fulfill its obligation or else move to terminate the permit because of the breach. The GIAA should also take steps to recover from Six D any money it has paid to maintain Matapang Park.

Recommendations

We recommend the following:

1. The Department of Land Management re-examine the application process of the development of the Parc Hotel to ensure that the application process was complete and thorough. A reconstruction of the application process must include lawful documentation by the developer to show:
 - a. Public hearing notices were given to nearby landowners as required by law;
 - b. A justification letter was submitted to substantiate their request for a variance and deviation from the zoning requirements;
 - c. Parking requirements conform to law; and
 - d. Amendments to the plan were approved by the TPC.
2. The Attorney General's office evaluate:
 - a. Whether a lease for the fair value of Chief Matapang Beach Park should be retroactively executed, with Legislative approval, to comply with the conditions of the TPC for the construction of the Parc Hotel, which is already completed and whether the Government of Guam should be compensated for rental from 1985 through 2002. We recognize that the ex post facto prohibition of the Organic Act may preclude such action, but this would be a legal determination that should be made by the Attorney General;
 - b. If it is not possible to put the Park under a lease that is fair to the government and its taxpayers, the Attorney General should determine if the permit can be revoked;
 - c. Whether the Department of Public Works must notify Inland Builders that an additional building permit/plan review fee of \$62,700 is owed to the government. We recognize that there may be a statute of limitation issue here;
 - d. Whether the Land Transfer Board established the fair market value of the land conveyed to Six D by the Government of Guam and, if not, whether there is any recourse for the government or whether any administrative or legal action should be taken against any employee of the government who was knowingly complicit in setting a price that was unrealistically low; and
 - e. Review the record relative to the granting of the use permit to determine if administrative or legal action is warranted against any of the government employees and principals involved in this development.

3. The Department of Public Works should attempt to locate an occupancy permit immediately, perhaps through the contractor, for DPW files.
4. The Department of Parks and Recreation should
 - a. Perform a compliance review of all its agreements whereby private businesses agree to maintain public parks in exchange for some benefit from the Government of Guam. These agreements must be monitored regularly;
 - b. Regularly monitor Matapang Park to ensure Six D complies with its permit to ensure that the developer makes the necessary improvements to comply with the permit, i.e., place additional trash containers, a drinking fountain, and playground and that Six D maintain Matapang Park at a level that is pleasing, attractive, and safe to all persons who may use the facilities, including mechanical and utilities systems and all structures. If Six D is determined to be in noncompliance with the permit, the Holiday Inn should not be allowed to use the Park to fulfill its open space and parking requirements; and
 - c. Develop written procedures that address enactment of new legislation that would affect permits in force and other matters within their department.
5. The Guam Airport Authority should terminate its FY 2003 contract for the maintenance of Matapang Park and redirect those funds for the maintenance of other parks or for other government purposes. Furthermore, GIAA should compel Six D to reimburse it for the prior year maintenance contract that Six D was responsible for.

Management Responses

A copy of the draft report was provided to the management of the Department of Land Management, the Department of Public Works, and the Department of Parks and Recreation. DLM and DPR generally concurred with the findings and recommendations of the report addressed to their respective agencies. However, the management of DPW had not submitted a response to the draft report. The letters of response are attached as **Appendix A** of this report.

Limitations of Report

Our work was performed in accordance with *Generally Accepted Government Auditing Standards*.

This report does not provide conclusions involving legal determinations. This report contains only evidentiary conclusions based on documentation available

for our review. This report has been released to the Governor of Guam, the Speaker and Members of the Guam Legislature, the Directors of the Department of Land Management, the Department of Public Works, and the Department of Parks and Recreation, and the Attorney General of Guam. This report is a matter of public record and its distribution is not limited.

OFFICE OF THE PUBLIC AUDITOR

A handwritten signature in dark ink, appearing to read 'Dor Brooks'.

DORIS FLORES BROOKS, CPA
Public Auditor

OPA Report 02-07

Appendix A - Management Responses



Carl T.C. Gutierrez
Governor

Madeleine Z. Bordallo
Lt. Governor

Department of Parks and Recreation
Dipattamenton Plaset Yan Dibuetision
Government of Guam
P.O. Box 2950
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Parks Division: (671) 475-6255/57
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Dominic G. Muna
Director

Frank A. Acfalle
Deputy

NOV 18 2002

Received by Office of the
Public Auditor

11/20/02
11:35AM

MEMORANDUM

To: Office of the Public Auditor
ATTN: Mr. Randall V. Wiegand

From: Director, Department of Parks and Recreation

Subject: OPA Report No. 02-07 - Matapang Beach Park

Thank you for providing us a draft copy of OPA Report No. 02-07, that was transmitted to us with a cover letter dated November 12, 2002, for our review and comments.

We have completed our review of this report and provide the following as our formal response pertaining to our department:

1. We will be requesting the Guam Economic Development and Commerce Authority (GEDCA) to provide us a complete listing of all previously issued Qualifying Certificate (QC) involving development/improvement/maintenance's scopes of our parks areas. We will also be requesting in informing us in writing (in lieu of a phone call) of all future issuance of QC's directly involving any park areas in our inventory in order to ensure that no corporation or individuals are left out in our monitoring.
2. We have met recently with the General Manager of the Holiday Inn Resort, Guam, regarding the maintenance upkeep of the Matapang Beach Park. Work has commenced and our department will be monitoring the work. The Ypao beach crew will be monitoring the park on a regular basis and report its findings to the Parks Administration. The Parks Administration will be contacting the Resort for any noncompliance.
3. Our Administrative Services Officer is tasked in developing written procedures to monitor new legislation that affects permits in force and



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other matters within the department.

Should you need to discuss this matter further, please feel free to contact me.

Sincerely,



DOMINIC G. MUNA

cc: ASO
All Division Heads



CARL T. C. GUTIERREZ
Governor

DEPARTMENT OF LAND MANAGEMENT
(DIPATTAMENTON TANO')

Government of Guam
P.O. Box 2950 Hagåtña, Guam 96932
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CARL J. C. AGUON
Director

MADELEINE Z. BORDALLO
Lieutenant Governor

FRANCISCO P. SAN NICOLAS
Deputy Director

November 25, 2002

MEMORANDUM

To: Office of the Public Auditor
From: Director, Department of Land Management
Subject: Comments on OPA Report No. 02-07

Buenas Yan Saluda!

Thank you for the opportunity to comment on the audit report identified as OPA Report No. 02-07. The department has thoroughly reviewed the report as well as its records. The department provides the following comments and suggestions and restricts these comments as it pertains to the Department of Land Management and the Guam Land Use Commission:

1. We agree with the general findings of the report as it is based on extensive research and review of documents and files from several agencies including this department;
2. With respect to the recommendations made on page 16 of the report, we again agree with this, as it is already established in your report that several documents pertinent to your report were not available or could not be located from certain government agencies mandated to keep on file. Thus the burden of proof as to whether the applicant, Six D Enterprises fully complied with all government requirements to secure approval of the project from the Commission as well as to comply with any and all government permitting requirements should clearly rest with them (the applicant).

At the same time, the government has a responsibility to protect and secure copies of any and all documents related to land-development approvals, as enumerated in your report. Such documents should be safe-guarded to allow for



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a reexamination of this project, as well as others that may be questioned in the future;

3. PARKING CALCULATIONS: Page 8-9 of the Report:

Comments: with respect to the procedures used in the parking calculation, we agree that a more responsible and diligent job should have been done to calculate the true parking needs as the parking requirements per land use and zoning are clearly reflected in the zoning law. The department (Planning Division) currently uses a PAI (preliminary application interview) form in assessing all applications to the commission, including parking requirements.

4. With respect to the bigger issue of whether Six D Enterprises has complied with the five conditions of its approval of 1985, it should be noted that DLM files show that the Chief Planner issued a July 07, 1994 to DPW acknowledging that there appears to have been "alleged violations of the Zoning Law", and that a Stop Work Order was in fact issued by DPW.

Comment: At this point, since the project was a commission approved, it probably would have been prudent to have the Building Official appear before the Commission and report to that body as to his findings on whether his office has determined any violations;

5. Again on the issue as to whether the Six D Enterprises has complied with the five conditions stipulated in the Notice of Action dated February 07, 1985, documents contained within the department's official files and dated January 26, 1996 from Six D Enterprises to the director at that time appear to address these issues.

Comment: Between the periods July 07, 1994 through January 26, 1996 (18 months), it appears that both the developer and the government attempted to administratively address and remedy these alleged violations. At some point in this process, DPW, Building Official in conjunction with DLM, Planning should have concluded their findings and report in making a firm determination on this whole issue, and said report should have been submitted to the Commission. Finally, the administrative review should have been completed during the period that the Stop Work Order was in effect.

In conclusion, it should be noted that if the government of Guam, and specifically those permitting agencies entrusted with the review and approval of all land development applications had a networked "permit tracking system" in the '80s, it could have done a better job of monitoring all aspects of the review, approval and compliance process relative to all building and occupancy permits, business licenses, etc.

It should also be noted that since the early '90s when most of the current planning staff at Planning Division were hired, several key administrative changes were put into place. Specifically, all Notices of Action (NOA's) are now required to be recorded, including all relevant documents of Commission approval. Additionally, E.O. 96-26 establishes strict guidelines regarding the review, processing and disposition of all applications prior to being forwarded to the Commission.

We agree that there has to be better coordination and communication between the relevant agencies tasked with the review and approval of Commission-approved projects. Furthermore, it has always been our position that the current zoning laws and development review procedures are much too out of date and must be completely revamped as called for in the proposed I Tano'-ta Land Use Plan. In our opinion, it is imperative that the "planning" and "permitting" mandates and functions of the government should be centralized under one authority, and that all land-development documents, inclusive of approved building plans, building permits, occupancy permits and any business licenses, government agreements SHOULD be officially recorded to ensure protection of these documents.

One interesting and very crucial element of Development Review Manual (I Tano'-ta) is that it would establish a separate "development permit" process procedure and empower the Zoning Official with the authority and responsibility to act on all development on Guam. It is our position that the government should seriously pursue the adoption of this Plan and hopefully avoid future cases such as the PARC Hotel.

Again, thank you for the opportunity to submit our constructive comments on the audit.

Sincerely,


f CARL J.C. AGUON

Attachment: Returned OPA Report No. 02-07