IN THE SUPREME COURT OF GUAM

AGANA BEACH CONDOMINIUM HOMEOWNERS' ASSOCIATION and GERALD PEREZ,
Petitioners-Appellants,

v.

MONTE MAFNAS, Director, Department of Land Management, Government of Guam,
Respondent-Appellee.

Supreme Court Case No. CVA11-016
Superior Court Case No. SP0112-11

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted February 17, 2012
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Petitioners-Appellants Agana Beach Condominium Homeowners' Association and Gerald Perez (collectively referred to as the "Homeowners") appeal the trial court's Judgment and Decision and Order denying their petition for writ of mandamus seeking (1) a peremptory writ of mandate commanding the Director of the Department of Land Management ("Director") to rescind his approval of the split-zone change for Lot 2121-1-R6 ("Property") and (2) an alternative writ of mandate commanding the Director to either rescind the approval of the split-zone change for the Property and to rescind all permits, clearances or authorities relating to the Property, or to show cause why the Director has not done so. The Director opposes the appeal, arguing that the trial court did not have subject matter jurisdiction, the Homeowners lacked standing, the requirements for mandamus were not met, and indispensable parties were not joined.[1]

[2] For the following reasons, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] This dispute arises from the actions of the Director in approving a split-zone change application submitted by Marciano V. Pangilinan for the Property pursuant to Public Law 25-131, which provides a property owner of split-zoned property the right to select any one of the two zones and have it apply to the entire lot.

[1] The Director advised this court that Monte Mafnas is now the Acting Director of the Department of Land Management, whereas Carlos R. Untalan held the position at the initial time of appeal. Appellee's Br. at 2 (Jan. 20, 2012); *see also* Guam Rules of Appellate Procedure ("GRAP") Rule 23(c)(2) (when a public office holder is replaced by another person, the new officeholder is automatically substituted for the former).

[4] Pangilinan as Lessee and Paul D. Palting as Lessor executed a lease on November 24, 1969, for property described as Lot 2121-1 for a term of years beginning on January 1, 1970 and ending December 31, 2030. Pursuant to a modification of the Lease Agreement dated November 10, 2003, Florence Hair, Priscilla Sherfy (also named as Priscilla Price), Jeanine Wimett, and Margarita Inocentes, (hereinafter "successor Lessors"), and Pangilinan, as Lessee, agreed to decrease the size of the leased premises, modify the description of the property, and reduce the rents set forth in the lease. The modified description of the leased premises was Lot 2121-1-R6.

[5] In 2008, Pangilinan applied to the Director to change the Property from split-zone to entirely commercial zone pursuant to Public Law 25-131.[2] Upon receiving a written request by a property owner to correct a split zoning situation, the Director was required to approve the request, process all necessary documents to reflect the approval, and update all official maps to indicate the zone the property owner chose. 21 GCA § 61214 (2005).[3] This split-zone law effected zone changes without affording notice or a hearing to surrounding property owners, as would otherwise be required for obtaining a conditional use, zone change, or zone variance.[4]

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[2] Public Law 25-131 has since been codified at 21 GCA § 61214, the basis for the Homeowners' claimed statutory relief.

[3] At the time of Pangilinan's split-zone change application, 21 GCA § 61214 provided:

> Whenever a lot has two (2) separate zoning designations within its boundaries, the property owner shall have the right to select one of the two (2) zones and to have it apply to the entire lot. Upon receiving a written request by a property owner to correct a split-zoning situation, the Director of the Department of Land Management shall approve the request, shall process all necessary documents to reflect the approval, and shall update all official maps of the Island to indicate the zone which the property owner has chosen.

21 GCA § 61214 (2005) (repealed and reenacted by Guam Pub. L. 31-098:2 (Sept. 30, 2011) (changing the wording but leaving it substantially similar in effect)).

[4] Subsequently, the law has been changed to require that all "uses permitted on the affected lot by the zone chosen by the property owner making a split-zone election shall be conditional and subject to approval in the manner required to obtain a zone variance as provided in § 61303 . . . " 21 GCA § 61214(c) (repealed and reenacted by Guam Pub. L. 31-098:2 (Sept. 30, 2011)). Further, a permit or variance is now required to extend a permitted use from one portion of the split-zone to the other if such use is not permitted on the other side. In turn, 21 GCA § 61303 provides a schedule of fees for providing notification to surrounding property owners regarding, among other

The successor Lessors named in the modified lease claim they did not authorize or consent to Pangilinan's request for a split-zone change and oppose any request by Pangilinan to change the zone designation.

[6] The Director approved Pangilinan's split-zone application in March 2008. Thereafter, Pangilinan subleased the property to Busker Alley, Inc. ("Busker Alley" or "sublessee"). Busker Alley obtained a building permit and began constructing a restaurant, including an open-air bar, in that location. The Homeowners assert they only became aware of the split-zone change approval in March 2010 when the sublessee began constructing the restaurant on the undeveloped portion of the property, which had been zoned as R-2.

[7] Following the Homeowners' unsuccessful attempts to convince the Director to rescind the zone change, the Homeowners filed a petition for writ of mandate in the trial court. The Homeowners' petition for writ of mandate sought the trial court's jurisdiction to command the Director to rescind his approval to change the property entirely to C commercial zoning or, in the alternative, to stay the effect of the approval of the split-zone change application. The Director filed an answer in opposition, and the Homeowners subsequently filed a reply brief.

[8] After hearing oral argument, the trial court ruled that it lacked subject matter jurisdiction because Pangilinan as lessee had the right to request a split-zone property change and the Director had no obligation to provide notice to others of the change, and thus there was no statutory basis for mandamus. In addition, the court, *sua sponte*, found that the petition was not properly verified. The court also found that the case was moot because, even if the agency rescinded the zone change decision, the business was permitted to operate on both zones of the

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things, split-zone changes, where notifying the surrounding owners "shall apply," suggesting such notification is mandatory. 21 GCA § 61303(d) (added by Guam Pub. L. 29-002:7 (May 18, 2007)).

split-zone property so long as one part was commercial. Finally, it found that the Homeowners lacked standing because owners of the adjoining property could not demonstrate that they had a beneficial interest in the outcome, particularly where the business could have operated on the split-zone unit as well. Despite not substantively addressing it in the decision and order, the trial court essentially denied the Homeowners' alternative request to stay the effect of the approval of the lessee's request for the zone change. This appeal follows.

[9] Subsequent to the filing of the notice of appeal, Busker Alley moved to intervene. The Director filed a response indicating that it did not oppose the intervention. The court granted the motion.[5]

II. JURISDICTION

[10] This court has jurisdiction over appeals from final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through P.L. 113-12 (approved June 3, 2013)). This court has jurisdiction to hear this appeal pursuant to 7 GCA § 3107(b) (2005), which provides the Supreme Court with appellate jurisdiction over civil cases. The appealed decision and order denying the Homeowners' petition for a writ of mandate is final because it adjudicates all the claims and all rights and liabilities of all parties, in accordance with 7 GCA § 3108(a) (2005).

III. STANDARD OF REVIEW

[11] A trial court's dismissal of a claim for lack of subject matter jurisdiction is reviewed *de novo*. *Amerault v. Intelcom Support Servs., Inc.*, 2004 Guam 23 ¶ 9. The standard of review for a denial of a writ of mandamus is abuse of discretion. *See In re Dep't of Agric. v. Civil Serv. Comm'n (Rojas)*, 2009 Guam 19 ¶ 8 (citation omitted). The trial court's conclusions of law, such as whether the legal requirements for mandamus are met and issues of statutory

[5] Busker Alley has not entered an appearance in the appeal.

interpretation, are reviewed *de novo*. *Id.; Mendiola v. Bell*, 2009 Guam 15 ¶ 11. As an issue of law, a trial court's decision as to whether a party has standing is reviewed *de novo*. *Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶ 22 (citing *Benavente v. Taitano*, 2006 Guam 15 ¶ 10). Issues of petition verification and mootness, raised *sua sponte* by the trial court, involve statutory interpretation and are therefore reviewed *de novo*. *See, e.g., Castino v. G.C. Corp.*, 2010 Guam 3 ¶¶ 11, 14 (citation omitted) (adjudicating validity of petition verification in accordance with 6 GCA § 4308 and employing *de novo* standard of review for questions of statutory interpretation).

IV. ANALYSIS

[12] The Homeowners proffer four issues on appeal: (1) that the trial court erred when it held they lacked standing; (2) that the trial court erred in denying their petition based on lack of subject matter jurisdiction; (3) that the trial court erred in raising, *sua sponte*, the lack of proper verification by a beneficially interested party, which the trial court claimed deprived it of subject matter jurisdiction; and (4) that the trial court erred when it held the petition was moot. *See* Appellants' Br. at 6-7 (Dec. 21, 2011). We will discuss these issues in turn. The fifth issue involves failure to join indispensable parties, and is raised for the first time on appeal concerning the joinder of the lessee. *See* Appellee's Br. at 7 (Jan. 20, 2012).

A. Standing

[13] A verified petition must be filed by a beneficially interested party for a writ of mandate to issue. *See* 7 GCA § 31203 (2005); *Responsible Choices*, 2007 Guam 20 ¶ 27 ("A 'beneficially interested' party generally must have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (internal quotation marks omitted)).

[14] The Homeowners argue the trial court erred when it held that they lacked standing. Appellants' Br. at 8. The trial court found that because 21 GCA § 61214 did not provide rights to adjoining property owners, the Homeowners have no legally-cognizable beneficial interest. *See* Appellants' Br. at 8; Record on Appeal ("RA"), tab 39 at 6 (Dec. & Order, Sept. 21, 2011). To the contrary, the Homeowners argue that even though the split-zone law in Guam "does not provide for notice of public hearings for zone changes, it does not logically follow that adjoining landowners are not beneficially interested or lack due process rights." Appellants' Br. at 8. The Homeowners cite *Citizens Ass'n for Sensible Development of Bishop Area v. County of Inyo*, 217 Cal. Rptr. 893 (Ct. App. 1985), for the proposition that property owners and taxpayers who have a geographic nexus to the challenged site have standing. *See* Appellants' Br. at 8. To the extent that the California Court of Appeal reversed the lower court's denial of a challenge to a re-zoned development, *Citizens Ass'n* serves as persuasive guidance. *See id.* at 8-9.

[15] In *Citizens Ass'n*, the County of Inyo applied, *inter alia*, to rezone property to gain approval for a shopping center. *See Citizens Ass'n*, 217 Cal. Rptr. at 896. The California Court of Appeal reversed the trial court's holding that the plaintiffs lacked standing to petition for writs of mandate. *See id.* at 897-98. The appellate court decided that a property owner who establishes a geographical nexus with the challenged site has standing to petition for a writ of mandate against a municipal entity. *See id.* Rather than going into detail about what qualifies as a geographical nexus, the court proceeded to provide an example, asserting that "the geographical nexus can be attenuated, for instance beyond the city limits, because '[e]ffects of environmental abuse are not contained by political lines.'" *Id.* at 897 (citation omitted). Likewise, the Homeowners assert a geographical nexus with the challenged site because it is

adjacent to the Homeowners' residential buildings and their amenities. *See* RA, tab 3 at 4 (Pet. Writ Mand., June 14, 2011).

[16] The Homeowners further argue that allegations of harm are sufficient to find standing because strict standing rules are less applicable where "broad and long-term effects are involved." Appellants' Br. at 9 (citing *Bozung v. Local Agency Form.*, 118 Cal. Rptr. 249, 254-55 (1975)). The Homeowners rely on *Bozung* because the California Supreme Court recognized a complaining taxpayer resident living 1,800 feet from the challenged property as beneficially interested due to allegations of environmental harm. *See id.*

[17] As plaintiff, Bozung challenged an annexation alleging harmful environmental factors, which constituted a "substantial interest in the challenged proceedings." *See Bozung*, 118 Cal. Rptr. at 255 (noting strict rules of standing are not appropriate considering potential long-term effects). Additionally, the Homeowners maintain that even non-resident, non-taxpayers may have standing to challenge zoning decisions affecting their property. Appellants' Br. at 10 (citing *Scott v. City of Indian Wells*, 99 Cal. Rptr. 745 (1972)). According to the Homeowners, *Scott* stands for the proposition that local land use controls might trigger the Due Process Clause, which requires the opportunity to be heard before depriving an individual of a property interest. *See id.* (citing *Scott*, 99 Cal. Rptr. at 749).

[18] In *Scott*, the plaintiffs alleged that the City of Indian Wells violated municipal code sections, which required the city to give notice of a hearing, with respect to the conditional use permit application affecting all landowners within 300 feet of the challenged property. *See Scott*, 99 Cal. Rptr. at 747. The California Supreme Court ultimately held that "adjoining landowners who are not city residents may enforce these duties by appropriate legal proceedings and have standing to challenge zoning decisions of the city which affect their property." *Id.* at 750.

Essentially, this case is an example of a court recognizing that adjoining neighbor landowners should also have their beneficial interest in the municipal code represented, despite being non-residents of the municipality.

[19] Relying on this authority, the Homeowners argue that if non-residents of a city have standing to challenge zoning that affects their property, city residents owning adjacent property, like the Homeowners, should also have standing. Hence, the Homeowners assert that they had a beneficial and present right to challenge the Director's alleged violation of Guam's split-zone law. *See* Appellants' Br. at 10.[6]

[20] Following *Citizens Ass'n*, we hold that the Homeowners have a beneficial interest in the lawsuit because, as adjoining landowners, they can establish a geographical nexus with the challenged site.[7] We do not have to address the Homeowners' alternative theories for finding standing because we have found standing by virtue of the Homeowners' geographical nexus. Accordingly, the trial court erred when it denied the Homeowners' petition for lack of standing.

B. Subject Matter Jurisdiction

[21] The Homeowners also argue that the trial court erred in denying their petition for want of subject matter jurisdiction. Appellants' Br. at 14-15. They argue that the court improperly concluded that Pangilinan as lessee had a legal right to change the zone and therefore that

[6] As a point of clarification, the alleged violation is that the then-Department of Land Management ("DLM") Director approved the zone change request, despite the fact that it was made by someone other than the "property owner"—an issue of statutory interpretation of 21 GCA § 61214.

[7] The dissent argues that the cases to which we cited all concern environmental regulations, which are not at issue here. While the above-cited cases involve environmental issues, we are persuaded by the broader principles underlying the standing discussion that property owners who establish a "geographical nexus" with the affected property are parties beneficially interested in the proper enforcement of an environmental regulation or in this case a zoning statute and have standing to apply for a writ of mandate to enforce the zoning statute. We believe those principles should apply in the unique circumstance of the split-zone change law where no statutory notice or opportunity to be heard was provided. The subsequent amendment to the split-zone change law to provide notice to surrounding property owners shows that the legislature is similarly concerned. *See* 21 GCA §§ 61214(c), 61303(d) (amending the prior laws to provide for notice and hearing for affected nearby landowners).

mandamus would not lie to revoke a legal action taken. *Id.* at 14. Absent such a right, the Director could not have acted lawfully in granting the zone change, and the trial court had jurisdiction to issue a writ of mandate to revoke such action. *Id.* at 14-15. Further, they argue that there is no evidence that the Director acted within the scope of the Administrative Adjudication Law ("AAL"), and that, having acted outside of such authority, the Director lacked the authority to issue the zone change, and therefore the trial court had jurisdiction to issue a writ of mandate. *Id.* at 15. In order to determine the validity of the Homeowners' arguments, we first discuss the writ of mandate and the AAL, and then proceed to the analysis.

1. Action Compelled by a Writ of Mandate

[22] Courts generally have subject matter jurisdiction over mandamus petitions seeking review of administrative decisions. *See, e.g.*, *Voices of the Wetlands v. State Water Res. Control Bd.*, 257 P.3d 81, 91-92 (Cal. 2011); *Lipari v. Dep't of Motor Vehicles*, 20 Cal. Rptr. 2d 246, 249-50 (Ct. App. 1993). In *Gutierrez v. Guam Election Commission*, we recognized that, traditionally, petitioners for a writ of mandamus "must demonstrate, among other things, that the respondent failed in a clear ministerial duty to perform an act specifically required by law." 2011 Guam 3 ¶ 11. Immediately following this proposition, we acknowledged that "[h]owever, mandamus has also been appropriately used to annul or restrain administrative action already taken which is in violation of law." *Id.* (citation omitted). This suggests that the refusal or delay in performing a ministerial duty is a mandamus objective distinct from the objective of annulling administrative actions. Ultimately, we decided that "Guam's courts retain the general ability to review actions taken by agencies and to 'annul or restrain administrative action already taken which is in violation of the law' when such is appropriate." *Id.* ¶ 19 (quoting *Bodinson Mfg. Co.*

v. Cal. Emp't Comm'n, 109 P.2d 935, 941 (Cal. 1941)). Therefore, we have the ability to review actions taken by the Director under the AAL.

2. The Scope of the Administrative Adjudication Law ("AAL")

[23] The Homeowners assert that the trial court erred when it concluded it lacked subject matter jurisdiction because "the decision was made pursuant to . . . the procedures DLM adopted pursuant to the Administrative Adjudication Law." Appellants' Br. at 15 (quoting RA, tab 39 at 4 (Dec. & Order)) (internal quotation omitted). The Homeowners argue that the record does not reflect evidence supporting this conclusion. *Id.* Indeed, the Homeowners note that the Director himself conceded that "his approval of lessee's request . . . was not made pursuant to the AAL." *Id.*

[24] The AAL includes provisions by which a party may seek judicial review. *See* 5 GCA § 9241 (2005). Yet the Homeowners did not attempt to brief or analyze exactly how the Director failed to comply with the AAL. Presumably, the Homeowners assert that the Director failed to follow AAL procedures because there had been no notice or hearing of the split-zone change. The Homeowners do not address, however, whether they are entitled to a hearing under the AAL.

[25] The AAL procedures apply to "any proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after an agency hearing." 5 GCA § 9200 (2005). This court held that "[a]lthough our AAL sets out the procedures for a hearing if licenses are revoked, it does not necessarily follow that there is a *right* to a hearing." *Rapadas v. Benito*, 2011 Guam 28 ¶ 24. In *Rapadas*, the court reviewed the relevant provisions of the Guam Code Annotated governing registration of amusement devices, namely the Business Privilege Tax Law found at Article 1 of Chapter 26 of Title 11. *See id.* ¶

27. Upon finding no reference to any right to a formal hearing in that code provision, this court reasoned the petitioner in *Rapadas* was "not entitled to a hearing under the AAL." *Id.* ¶ 30. The next inquiry is to determine whether mandamus will lie as a result. As stated above, in order to be entitled to a writ of mandamus, the Homeowners must lack a plain, speedy, and adequate remedy at law, and be a beneficially interested party. 7 GCA § 31203; *People v. Superior Court (Laxamana)*, 2001 Guam 26 ¶ 8.

3. Purpose of Mandamus

[26] Arguing the trial court erred in finding there was no subject matter jurisdiction, the Homeowners underscore the general purpose of mandamus, which is to enforce "a plain, nondiscretionary legal duty to act." Appellants' Br. at 13 (citation and internal quotation marks omitted) (quoting *Duenas v. Guam Election Comm'n*, 2008 Guam 1 ¶ 31). Relying on *Gutierrez v. Guam Election Commission*, the Homeowners further assert that mandamus is effective to "'annul' or restrain administrative action taken in violation of the law." *Id.* (citation omitted) (quoting *Gutierrez*, 2011 Guam 3 ¶ 11).

[27] Furthermore, the Homeowners emphasize the functional purpose of a mandamus action, characterizing it as "a remedial writ which necessarily includes annulling or restraining an administrative action already taken in violation of the law." Appellants' Br. at 15 (citations omitted). It appears the Homeowners are arguing that the purpose of a writ of mandamus includes annulling administrative actions that violate the law and, therefore, that approval of Pangilinan's split-zone application violated the law.

[28] In response, the Director argues that the trial court lacked subject matter jurisdiction because it lacked the necessary statutory basis for jurisdiction. *See* Appellee's Br. at 4. The Director essentially argues that because the DLM Director is not under any statutory duty to

reverse a zone change, he is thus not "under a duty to perform an act which the law specifically enjoins as required by Guam's writ statutes." *Id.* (quoting 7 GCA § 31202 (2005)) (internal quotation marks omitted). That is, reversal of the zone change would require delving into statutory interpretation to determine who has a right to request a zone change, making such a determination is not appropriate in a mandamus case, and in the absence of this determination, a reversal is not required.

[29] Moreover, the Director alleges that the purpose of mandamus is "to compel an officer or tribunal to perform a ministerial duty that the law specially enjoins." Appellee's Br. at 10 (citing 7 GCA § 31202). The requirements of mandamus, as the Director argues, include two prongs: (1) the petitioner lacks a plain, speedy, and adequate remedy at law; and (2) the petitioner is a beneficially interested party. *Id.* at 11 (citing 7 GCA § 31203; *Laxamana*, 2001 Guam 26 ¶ 8).

[30] As for the first prong, the Director is correct in the assertion that the trial court has considerable discretion to determine what constitutes an adequate remedy at law. *See id.*; *Sutco Constr. Co. v. Modesto High Sch. Dist.*, 256 Cal. Rptr. 671, 675 (Ct. App. 1989); *Johnston v. Dep't of Personnel Admin.*, 236 Cal. Rptr. 853, 858 (Ct. App. 1987)). The Director argues that the Homeowners fail to meet this first prong because they are still free to pursue civil actions at law in the future. *See* Appellee's Br. at 11.

a. Whether Petitioner Lacked a Plain, Speedy, and Adequate Remedy at Law

[31] As in *Rapadas*, here, at the time in question, 21 GCA § 61214 did not provide for either notice or hearing prior to any administrative decision approving a split-zone change. *See* 21 GCA § 61214 (2005). Therefore, the Homeowners were not entitled to a hearing under the AAL.

[32] Without a hearing requirement under the AAL, the Homeowners were deprived of an adequate remedy at law. Without the right to contest the Director's decision through judicial review, there is no other remedy at law available. Here, the remedy sought was to "annul or restrain administrative action already taken which is in violation of the law." *Gutierrez*, 2011 Guam 3 ¶ 11. That is, since the property owners did not approve or consent to the split-zone change, the Homeowners argue the DLM had a duty to deny the zone change application. The remedy sought was to follow the law, adhere to the statutory prerequisite, and deny the split-zone change. This type of action to annul an administrative action and maintain certain land use restrictions are not compensable in damages, and there is no other apparent adequate remedy at law to force compliance. Thus, mandamus is an appropriate remedy to seek redress of an alleged illegal action affecting the Homeowners' rights.

b. Whether Petitioner Was a Beneficially Interested Party

[33] Without citing to authority or legislative history, the Director asserts that 21 GCA § 61214, under which the Homeowners sought relief, was not intended to benefit adjacent landowners, but instead "to reduce the number of split-zoned lots." Appellee's Br. at 11. From this, the Director concludes the Homeowners fail to meet the second prong because they are not beneficially interested pursuant to 21 GCA § 61214. *Id.* However, as we have discussed extensively above, the Homeowners are beneficially interested due to their geographical nexus as adjoining landowners.

4. Trial Court's Error

[34] Ultimately, following *Gutierrez*, we agree with the Homeowners' contention that the trial court generally would have subject matter jurisdiction over a mandamus action seeking to annul agency approval of a zone-change request if that action was made in violation of the law. We

recognize that the trial court purported to find that Pangilinan could be deemed the owner of the property within the meaning of 21 GCA § 61214, that as a result the Director's action was legal, and that mandamus cannot be used to revoke a legal action taken. RA, tab 39 at 3-4 (Dec. & Order).

[35] Nevertheless, in resolving the jurisdictional question, the trial court improperly conflated the merits of the case with the jurisdictional issue. Guam's mandamus statute is derived from California Code of Civil Procedure section 1085. 7 GCA § 31202. In interpreting its statute, California courts, in the context of a demurrer, have held that the petitioner must allege facts which, if true, support mandamus relief. *Cal. State Emps.' Ass'n v. State of California*, 108 Cal. Rptr. 60, 65 n.7 (Ct. App. 1973); *Galbiso v. Orosi Pub. Util. Dist.*, 107 Cal. Rptr. 3d 36, 52 (Ct. App. 2010). While this is not, strictly speaking, jurisdictional, it does indicate that the courts do not conflate the merits and the jurisdictional question. Rather, if the petitioner alleges facts or argument that, if true, would fit within the requirements of mandamus, then the court has jurisdiction to consider the merits. If the court does not believe the facts or law ultimately support the petitioner's argument, then it will deny the petition, but it will not dismiss for lack of jurisdiction.

[36] In order for the court to have jurisdiction, the petitioner need not actually establish that the respondent acted unlawfully, since that is the issue that must be resolved on the merits. That approach would always conflate jurisdiction and the merits in a mandamus case. Rather, the petitioner must allege that an act—specifically enjoined by the law—was undertaken in order to give rise to jurisdiction to hear the case. *See Cal. State Emps.' Ass'n*, 108 Cal. Rptr. at 65 n.7 (in the context of a demurrer); *Galbiso*, 107 Cal. Rptr. 3d at 52 (same). By contrast, whether the law

actually enjoined such an act and whether a writ of mandamus is proper is a decision on the merits.

[37] We believe that a party need only allege facts that give rise to mandamus jurisdiction. Thus, whether or not Pangilinan had the right to request a zone change is not relevant to the jurisdictional question, but rather goes to the merits. We offer no opinion on the correctness of the decision itself, other than to note that it should not have been made in conducting the jurisdictional analysis. Further, because jurisdictional issues are a threshold matter, to be addressed prior to a review on the merits, the court should have refrained from making such a finding in the first instance when it found no jurisdiction existed. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("Dismissal short of reaching the merits means that the court will not proceed at all to an adjudication of the cause." (citation and internal quotation marks omitted)).

[38] Thus, under *de novo* review, the trial court erred when it ruled that it did not have subject matter jurisdiction for this petition for writ of mandamus pursuant to 7 GCA § 31202.

C. Validity of Petition Verification

[39] The Homeowners' third argument is that the trial court erred in finding that verification of the petition was improper and then erred again in making the improper verification a basis for denying the petition for lack of subject matter jurisdiction. Appellants' Br. at 16-17. They also argue, somewhat indirectly, that the court should not have raised the issue *sua sponte*. *Id.* at 17 (citing to federal cases where the courts reversed *sua sponte* grants of summary judgment).

1. Verification Under 6 GCA § 4308

[40] The Homeowners argue the trial court erred when it raised the issue that the petition for writ of mandamus was improperly verified because it was not accompanied by a sworn

verification. *See id.* at 16 (citing RA, tab 39 at 4 (Dec. & Order)). The trial court concluded that in the absence of a verification under penalty of perjury, the court lacked subject matter jurisdiction over the petition for the purposes of 7 GCA § 31203. RA, tab 39 at 5 (Dec. & Order). The trial court's Decision and Order cited to 6 GCA § 4308,[8] which provides suggested guidelines for unsworn declarations made under penalty of perjury. *Id.* (citing 6 GCA § 4308). It also recognized another form of verification, i.e., a "jurat acknowledgment," which it distinguished from "a mere notarial acknowledgement." *Id.* The Homeowners allege that such reliance by the trial court is erroneous because there exists no language in 7 GCA § 31203 indicating that a verification *must* comply with 6 GCA § 4308. Appellants' Br. at 16. That is, if a statute does not specifically define verification, the court should allow a "fair and reasonable interpretation." *Id.* (citing *Castino*, 2010 Guam 3 ¶ 38 (concluding that "verification" in the context of Guam's mechanic's lien statute was ambiguous)).

[8] Section 4308, entitled "Unsworn Declarations under Penalty of Perjury," provides:

> Whenever, under any law of Guam or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established or proved by the unsworn declaration, certificate, verification or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed outside of Guam: "I declare (or certify, verify or state) under penalty of perjury under the laws of Guam that the foregoing is true and correct. Executed on (date).
>
> (Signature)."
>
> (2) If executed within Guam, or within a state having a rule of law or procedure similar in effect to this Section: "I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)."

6 GCA § 4308 (2005).

[41] We have held that verification *may* conform to the manner set forth in 6 GCA § 4308, but we have not held that it *must* conform to section 4308. *See Long-Term Credit Bank of Japan v. Superior Court (Nomoto)*, 2003 Guam 10 ¶ 42 n.16. In *Long-Term Credit Bank of Japan*, this court analyzed the statutory scheme of 7 GCA § 6107, governing recusal of judges, and briefly noted the verification issue therein. *Id.* ¶¶ 30-43. At the time, the statutory language of 7 GCA § 6107 provided that "[e]very such statement and every answer shall be verified in the manner prescribed for the verification of pleadings." *Id.* ¶ 30 (citing 7 GCA § 6107 (1993)). Although 7 GCA § 6107 does not cross-reference 6 GCA § 4308, the court made note that following 6 GCA § 4308 was one proper way by which the recusal request complied with 7 GCA § 6107. *See id.* ¶ 42 n.16. Similarly, here it is true that there is no specific language in 7 GCA § 31203 requiring the "verified petition" to comply with 6 GCA § 4308.[9] Nevertheless, *Long-Term Credit Bank* suggests complying with 6 GCA § 4308 suffices for verification purposes.

[42] Otherwise, "verification" may be defined as:

> [A] "formal declaration made in the presence of an authorized officer, such as a notary public, or (in some jurisdictions) under oath but in the presence of such an officer, whereby one swears to the truth of the statements in the documents," as well as "an oath or affirmation that an authorized officer administers to an affiant or deponent," and is also described as an acknowledgment or any act of notarizing.

Castino, 2010 Guam 3 ¶ 37 n.4 (quoting Black's Law Dictionary 1593 (8th ed. 2004)). The Homeowners did not comport to either the formal declaration definition of verification or the alternative verification standards set forth in 6 GCA § 4308. Therefore, the trial court did not err when it decided the writ was improperly verified. This improper verification, however, was not grounds for the trial court to dismiss the case for lack of subject matter jurisdiction.

[9] Title 7 GCA § 31203, entitled "When and Upon What Writ to Issue," provides: "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It must be issued on the verified petition of the party beneficially interested." 7 GCA § 31203.

2. Improper Verification as a Basis for Lack of Subject Matter Jurisdiction

[43] The Homeowners maintain their reliance on *Castino*, urging this court to follow its own precedent: a defect in a statement of a cause of action (i.e., improper verification) does not defeat the trial court's subject matter jurisdiction. *See* Appellants' Br. at 16-17 (citing *Castino*, 2010 Guam 3 ¶¶ 18-19). According to the Homeowners, "[f]ederal courts have reversed the *sua sponte* grant of summary judgment in analogous circumstances." *Id.* at 17 (citing *Baker v. Metro. Life Ins. Co.*, 364 F.3d 624, 632 (5th Cir. 2004); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 522-23 (2d Cir. 1996)).

[44] Although the trial court dismissed the petitions for lack of subject matter jurisdiction, the failure to verify a petition properly is not a jurisdictional defect. *See Green v. James*, 296 P. 743, 745 (Okla. 1931) (citing authority for finding noncompliance with petition verification statute is not a jurisdictional issue). The determining factor in whether a court may consider an issue *sua sponte* is not necessarily whether such issue is jurisdictional in nature. For example, federal appellate courts are permitted, though not required, to raise a number of non-jurisdictional issues *sua sponte*. *See, e.g.*, *Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975) (acknowledging that while not normally reaching issues not raised below, "the jurisdictional and equity issues necessarily implicit in this case seemed sufficiently important to raise them *sua sponte*," and then addressing both jurisdictional and equitable issues); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 471 n.4 (1st Cir. 1990) (considering *sua sponte* whether any constitutional right of plaintiff had been violated, despite never being raised below or before appellate court, because such an issue was essential to plaintiff's 42 U.S.C. § 1983 claim); *Brown v. Fauver*, 819 F.2d 395, 398 (3d Cir. 1987) (finding exhaustion of remedies in habeas corpus action, while not jurisdictional, could be considered by the court *sua sponte*); *United States v. Mitchell*, 518 F.3d 740, 750 (10th

Cir. 2008) (holding appellate court may raise *sua sponte* the untimeliness of a criminal appeal, which is non-jurisdictional, but "should not be invoked when judicial resources and administration are not implicated and the delay has not been inordinate").

[45] Likewise, trial courts may raise certain non-jurisdictional issues *sua sponte*. *See, e.g.*, *Day v. McDonough*, 547 U.S. 198, 210 (2006) (holding "if a judge does detect a clear computation error, no Rule, statute, or constitutional provision commands the judge to suppress that knowledge" in a habeas case); *United States v. Leijano-Cruz*, 473 F.3d 571, 574 (5th Cir. 2006) (upholding district court's decision to *sua sponte* raise untimeliness of defendant's motion for extension to appeal where defendant had not filed a timely notice of appeal or motion for extension and where timeliness rules in criminal cases are claims processing rules and non-jurisdictional); *Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d Cir. 1980) (district court may *sua sponte* raise non-jurisdictional statute of limitations defense). It is notable that, while a number of the above-cited cases deal with the particular issues concerning habeas and criminal law, courts have considerable leeway to raise non-jurisdictional issues *sua sponte*. This is particularly true where such issues are similar to, but distinct from, jurisdiction, such as statute of limitations, claims processing time limits, or, as here, proper verification of a petition.

[46] Even though the petitions here should have been properly verified, the failure to do so is not grounds to dismiss the case on the merits. *See, e.g.*, *City of New York v. Brown*, 465 N.Y.S.2d 388, 390 (Civ. Ct. 1982) (finding dismissal of defective petitions failing to meet statutory requirements of verification "too harsh a penalty"). It is within the trial court's discretion to raise proper verification *sua sponte*. *See, e.g.*, *Day*, 547 U.S. at 206, 210; *Leijano-Cruz*, 473 F.3d at 574; *Leonhard*, 633 F.2d at 609 n.11. However, we also hold that the trial court erred by dismissing the case for lack of jurisdiction because of an improperly verified

petition. On remand, the Homeowners shall have the opportunity to correct this petition verification defect so as to comply with verification standards. *See, e.g.*, *Burton v. Powell*, 325 N.E.2d 789, 791-92 (Ill. App. Ct. 1975) (holding trial court had jurisdiction over matter because plaintiffs could amend verification defect so as to comply with statutory petition verification standards).

[47] Thus, we hold that even though the trial court did not err when it found the petition was not properly verified, dismissing the case was too harsh and, instead, the Homeowners shall have the opportunity to correct the defect on remand.

D. Mootness

[48] The Homeowners also argue that the trial court erred when it held moot the petition for writ of mandamus. Appellants' Br. at 17. The Homeowners primarily argue that the trial court mistakenly believed the Homeowners' writ sought to restore only the R-2 zone designation across the entire lot, rather than over the initial dual zone designated R-2 and C zoning, thus rendering the court unable to sign the alternative writ or peremptory writ. Appellants' Br. at 17-18. Instead, the Homeowners wish the property to be restored to split-zone R-2/C, not just to an R-2 designation, which they made clear during the trial court hearing. *Id.* at 18. The Homeowners believe the trial court erred in holding the petition was moot on the grounds that the complained-of bar venue is allowed to operate in both the original R-2/C split-zone designation as well as in the C only designation. *Id.* They contend that the issue before the trial court was whether the Director's approval of the Lessee's request was proper, not whether a commercial business entity could properly operate in the current zone designation. *Id.* The Homeowners also contend that the trial court erred in raising the issue of mootness *sua sponte*, relying on the same argument, above, regarding the raising of verification *sua sponte*. *Id.*

[49] In response, the Director maintains that the petition was moot because the "complained of business, a beach bar, can operate in either an R2 or a C zone," thus rendering the case lacking in "controversy." Appellee's Br. at 4. Additionally, the Director asserts that a case is considered moot when it becomes resolved by the passage of time. *Id.* at 4-5 (citing *Clementine v. Bd. of Civil Serv. Comm'rs*, 117 P.2d 369, 371 (Cal. 1941); *Callie v. Bd. of Supervisors*, 81 Cal. Rptr. 440 (Ct. App. 1969)).[10] The Director follows this legal proposition with the conclusory and indeed tautological argument that "there is no longer a case or controversy here," yet neglects to mention how, if at all, the passage of time has abated the controversy at issue. *Id.* at 5.

[50] The issue before the trial court was whether the Director properly approved of the Lessee's request, not whether the commercial business entity could properly operate in the current zone designation. That is the relief sought in the petition. RA, tab 3 at 5-6 (Pet. Writ Mand.). Although it is true that "[i]t has been the practice of the Government in the past to allow the split-zone to continue and to allow the landowner to develop the property based on uses permitted in either zoning designation," P.L. 25-131:1 (May 22, 2000), the Homeowners did not specify in their petition the reason they sought reversal of the Director's decision, *see* RA, tab 3 at 5-6 (Pet. Writ Mand.). The Director's decision had a tangible effect on the status of the property, and the Homeowners seek a writ to reverse that decision; thus, whether the Director erred in issuing the order is not itself moot. Whether other consequences may flow from the decision is a different question that is not before the court.

[51] Therefore, under *de novo* review, we hold that the trial court erred in concluding that the case was moot.

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[10] We note that *Callie*, cited by the Director, does not stand for the proposition that time alone may render a case moot, but rather that the repeal of a challenged law will render the case moot, at least in a case where the older version of the law no longer applies to the action at question. *Callie*, 81 Cal. Rptr. at 443-44.

E. Failure to Join Necessary Parties

[52] Independently, the Director raises whether Pangilinan and Busker Alley should have been named as parties in the petition. *See* Appellee's Br. at 7. Busker Alley intervened in the case, but only after the judgment was rendered and the appeal filed.

1. It Is Not Too Late Procedurally to Join Real Parties in Interest

[53] Procedurally, the Director argues it is now too late to amend the pleadings to include these real parties in interest. Appellee's Br. at 8. Citing several California cases, the Director argues that "[a]ttempts to amend pleadings to add parties after the deadline for appeal of an agency decision has passed are generally denied with prejudice." *Id.* The Director then states that the trial court never heard from the parties whose rights were involved, that the case had the wrong posture, and that the case would unlikely be decided until the construction is finished. *Id.* at 9.

[54] While the trial court's decision and order did not discuss the issue of joinder of necessary parties, this court has recognized that "timing does not bar consideration of the issue [of necessary parties]." *Perez v. Gutierrez*, 2001 Guam 9 ¶ 29. This issue can even be raised *sua sponte* and at any time, including on appeal. *Id.*; *Sananap v. Cyfred*, 2011 Guam 21 ¶ 24. The *Perez* court also acknowledged that "co-tenants and assignees holding interests of record in real property" are "within the class of persons to be joined if feasible under the provisions of the Guam Rule of Civil Procedure 19(a)(2)-(i)." *Perez*, 2001 Guam 9 ¶ 27. Even though we are not bringing up the necessary parties issue *sua sponte*—it was brought up by the Director's opposition—*Perez* intimates that the joinder of necessary parties may be raised on appellate review. *See id.* ¶ 29. While the Director only argues that Busker Alley and Pangilinan are

indispensable, we also wish to raise, *sua sponte*, whether the successor Lessors--Palting's heirs--are also necessary to the resolution of the case.

2. The Successor Lessors Are Necessary Parties for the Purposes of the Proceedings on Remand

[55] The Homeowners reply to the Director's indispensable parties argument by citing facts from the record showing Busker Alley--the sublessee--did not intend to intervene or join in the action. *See* Reply Br. at 5 (Jan. 31, 2012). However, the record indicates that Busker Alley intervened in the case in the trial court, albeit after the filing of the present appeal. RA, tab 57 (Order Granting Mot. Intervene, Dec. 13, 2011). Pangilinan has not intervened, though he does have an attorney who has been in contact with the attorney for the Homeowners. Tr., Hr'g on Pet. Writ Mand. at 9 (Aug. 24, 2011). According to the Homeowners' attorney, Pangilinan's attorney was asked if he wished to intervene and stated "we'll see." *Id.* Since the sublessee Busker Alley is now a party to the litigation, it will advance and protect the same position as the lessee Pangilinan, i.e., that the zone change was proper and thus the subsequent sublease of the property was proper.

[56] However, even assuming Pangilinan has waived any right to participate or be construed as a necessary party, this does not address the successor Lessors. Determination of an indispensable or necessary party in Guam is governed by Guam Rules of Civil Procedure ("GRCP") Rule 19, which is virtually identical to Federal Rules of Civil Procedure ("FRCP") Rule 19. *See Benavente*, 2006 Guam 15 ¶ 48 (noting similarity of these rules and consequently seeking guidance from federal court interpretations of the federal rule). *Compare* Guam R. Civ. P. 19, *with* Fed. R. Civ. P. 19.

[57] Whether a party is indispensable is the third part of the inquiry that takes place under Rule 19. First, a court must determine whether a party is necessary under GRCP 19(a).

Benavente, 2006 Guam 15 ¶ 58. If so, then it must determine whether joinder is feasible. *Id.* ¶ 77. If joinder is feasible, the court shall order the necessary party to be joined. *Id.* If joinder is not feasible, then the court determines whether the party is indispensable. *Id.* ¶ 82; *see also United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999). As previously noted, this is an issue which this court may raise *sua sponte*. *Perez*, 2001 Guam 9 ¶ 29; *Sananap*, 2011 Guam 21 ¶ 24. Thus, even assuming the Director raising the issue as to Busker Alley and Pangilinan does not bring the issue as to the successor Lessors before us, we may consider it on our own initiative.

a. Necessary Parties

[58] Under GRCP 19(a), a party shall be joined to an action if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or
>
> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
>
> (i) as a practical matter impair or impede the person's ability to protect that interest or
>
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

GRCP 19(a). As we noted in *Benavente*, a party need meet only one of these criteria to be considered a necessary party. *Benavente*, 2006 Guam 15 ¶ 58.

[59] The first inquiry, whether "in the person's absence complete relief cannot be accorded among those already parties," is entirely concerned with the effect on the parties participating in the action, without regard to the absent party or possible future litigation. *Id.* ¶ 59. Here, if the Homeowners' request for relief is granted, the zone change will be reversed. If the request is denied, then the change will remain in effect. That the successor Lessors might bring a future suit as a result is not at issue, and so they are not necessary under this prong. *Id.*

[60] The second inquiry is focused on GRCP 19(a)(2), in determining whether the absentee claims an interest in the subject of the action and whether his rights will be impaired as a result of the action continuing without his presence. *Id.* ¶ 62. We note that while the successor Lessors have not formally entered the fray as a party, they have filed affidavits opposing the zone change. RA, tab 13 at 2 (Aff. Portia Seeley, July 6, 2011); RA, tab 18 at 2 (Aff. Jeanine Wimett, July 19, 2011); RA, tab 19 at 2 (Aff. Priscilla Sherfy, July 19, 2011); RA, tab 20 at 2 (Aff. Florence Hair, July 19, 2011); RA, tab 21 at 2 (Aff. Anthony H. Inocentes, July 19, 2011).

[61] This is potentially significant because many courts have held that, in order to be a necessary party under FRCP 19(a)(2)(i) or (ii), the absentee must claim the right or interest itself, and a third party may not make such a claim on their behalf. For example, in *Northrop Corp. v. McDonnell Douglas Corp.*, the Ninth Circuit examined the defendant's motion to dismiss on the grounds that the government was an indispensable party in a contract dispute. 705 F.2d 1030, 1043 (9th Cir. 1983). The court, in finding that McDonnell Douglas attempted to assert that the government had an interest in the litigation, held that the government was not an indispensable party because it was not first a necessary party. *Id.* at 1043-44. The court specifically stated that the government had "meticulously observed a neutral and disinterested posture, and regards this as a private dispute." *Id.* at 1044. Notably, the government not only failed to claim any interest, it explicitly disavowed any.

[62] Likewise, the Second Circuit held that "it is the absent party that must claim an interest." *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 49 (2d Cir. 1996) (citation and internal quotation marks omitted). In *Segal*, the defendant attempted to dismiss the case on the grounds that the Myanmar Ministry of Fisheries ("Ministry") was an indispensable party. *Id.* at 45. The defendant had worked for companies later owned by the plaintiff, companies which had been

engaged in joint ventures with the Ministry, and argued that the Ministry was indispensable because the litigation could dilute its interest in the company. *Id.* at 49. The court rejected that argument because the Ministry had not been the one to claim such an interest. *Id.* The court also cited to *Northrop* for the proposition that a nonparty to a contract is typically not a necessary party to an adjudication of the contract, even if the party is the government. *Id.* (citing *Northrop Corp.*, 705 F.2d at 1043). Finally, it noted that nothing impaired the Ministry's interest because the defendant was being sued as an individual and the joint venture agreement concerned the company. *Id.*

[63] The Second Circuit again reached the same result in *ConnTech Development Co. v. University of Connecticut Education Properties, Inc.*, 102 F.3d 677 (2d Cir. 1996). In a dispute between a private company and a state-created corporation, the defendant state corporation sought dismissal of the suit, arguing that the state of Connecticut was a necessary party for which joinder was infeasible, and that it was indispensable. *Id.* The court found that the defendant tried to assert an interest on behalf of Connecticut, but held that it is the absentee which must claim the interest. *Id.* at 683. The court also noted that the lease in dispute specifically stated that the agreement was between those parties only and did not implicate the state of Connecticut, the university, or its employees. *Id.*

[64] We did not directly address this issue in *Benavente*. In that case, the respondents moved for dismissal of the petition based on, among other things, the failure to join indispensable parties. *Benavente*, 2006 Guam 15 ¶ 8. The trial court found that nominees on the primary ballot who had not been made parties to the case would have their rights prejudiced if the petitioners received the relief sought: an invalidation of the primary election. *Benavente v. Taitano*, SP0140-06 (Dec. & Order at 12 (Oct. 5, 2006)). It appears that this issue, including the

rights lost, was raised by the respondents and not by the absentee nominees. *See id.*; *Benavente*, 2006 Guam 15 ¶ 8.

[65] This is not inconsistent with the approach taken by other federal courts, which have examined whether an absentee will have rights impaired without regard to whether they, as opposed to present parties, are raising the issue. *See, e.g.*, *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 313-17 (3d Cir. 2007) (rejecting argument that absentee party to case was necessary, but only examining nature of impairment without regard to fact that absentee was not the one claiming an impairment). Courts have generally regarded the requirements of FRCP 19 as flexible and focused on practicality rather than formalism. *See, e.g.*, *City of Marietta v. CSX Transp., Inc.*, 196 F.3d 1300, 1305 (11th Cir. 1999); *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 308 (2d Cir. 1994); *Picciotto v. Cont'l Cas. Co.*, 512 F.3d 9, 18 (1st Cir. 2008).

[66] We hold that the absentee party does not necessarily have to be the one to claim an interest. As in *Benavente*, where there is concern that the absentee party may have rights impaired by the litigation and the absentee has not disclaimed or otherwise challenged this point, a court may examine the nature of the interest and determine whether or not the party is necessary to protect that interest. *Benavente*, 2006 Guam 15 ¶ 62. In the above cases where courts held that the absentee must claim the interest, we note that the absentees took affirmative steps to indicate their disinterest and desire not to participate, and the courts always included further analysis to this effect, rather than treating the assertion by someone other than the absentee as dispositive without comment. This is sensible since the inquiry is practical, and a party that assures the court that it does not believe its rights will be impacted does not need protection, whereas a wholly absent party may be unaware of, or at least not following, the litigation and yet may still have rights that it would otherwise wish to protect. In any event, the

successor Lessors have made at least a preliminary claim, by way of their affidavits, that they oppose the zone change, indicating some affirmative interest in the litigation. RA, tab 13 at 2 (Aff. Portia Seeley); RA, tab 18 at 2 (Aff. Jeanine Wimett); RA, tab 19 at 2 (Aff. Priscilla Sherfy); RA, tab 20 at 2 (Aff. Florence Hair); RA, tab 21 at 2 (Aff. Anthony H. Inocentes).

[67] That being so, we must now determine what rights the successor Lessors have, if any, and whether as a practical matter a judgment will impede or impair those rights. *Benavente*, 2006 Guam 15 ¶ 62. We have noted that some courts have held that an absentee needs to claim a "legally protected interest," while others have held that they need to "claim an interest in the subject matter of the litigation." *Id.* ¶¶ 63-64 (citations and internal quotation marks omitted). In *Benavente*, we held that the absentee showed an interest in the subject matter of the litigation, and we declined to determine the precise nature of the asserted right. *Id.* ¶ 73. As discussed, with respect to impairment or impediment of those rights, the inquiry is practical as opposed to theoretical. *Picciotto*, 512 F.3d at 16. "[J]oinder will be insisted upon if the action might detrimentally affect a party's or the absentee's ability to protect his property or to prosecute or defend any subsequent litigation in which the absentee might become involved." 7 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure: Civil* § 1604 (3d ed. 2012). Thus, even where a judgment would not be preclusive, it may impair a party's right if it reduces the probability of winning a subsequent lawsuit or places that party in a less favorable bargaining position. *Picciotto*, 512 F.3d at 16.

[68] The successor Lessors, as owners of the property, unquestionably possess an interest in the zoning of that property and in the subject matter of the litigation concerning it. While their ownership of the property is interest enough, it is also noteworthy that if the successor Lessors oppose the zone change, they would need to undertake subsequent litigation to undo it or

otherwise undertake a new administrative proceeding. If a party other than the successor Lessors is deemed an owner within the meaning of the law and permitted to effect a zone change, then it is certainly possible this could detrimentally affect the successor Lessors ability to protect their property. Accordingly, they have an interest in the litigation, and said litigation could in their absence impair their ability to protect those interests.[11]

b. Feasibility of Joinder

[69] The next step is to determine if joinder is feasible. Federal courts have considered joinder infeasible in three situations: when venue is improper, when the absentee is not subject to personal jurisdiction, and when joinder would destroy subject matter jurisdiction. *See, e.g.*, *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005); *Tick v. Cohen*, 787 F.2d 1490, 1493 (11th Cir. 1986). In *Benavente*, we did not list the contours of the rule, other than to hold that where the time to add parties had expired, joinder was infeasible. *Benavente*, 2006 Guam 15 ¶ 77.

[70] The land is situated on Guam and consequently gives rise to service of process. 7 GCA § 14109 (2005); *Banes v. Superior Court (Banes)*, 2012 Guam 11 ¶ 27 (holding long-arm statute gives Guam jurisdiction to the extent permitted by the Constitution); *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) ("[W]hen claims to the property itself are the source of the underlying controversy . . . , it would be unusual for the State where the property is located not to have

[11] The dissent believes that if we hold that the sub-lessee can protect the rights of the lessee, then so too could the Homeowners protect the rights of the successor Lessors. By the affidavits filed, the successor Lessors do not consent to the split-zone change. As the owners of the property who object to the split-zone change, they should be heard as to the reasons for opposing the split-zone change. The interests of the Homeowners and the successor Lessors are potentially different. The Homeowners seemingly want to protect against the nuisance of having a restaurant or bar next to their condominium residence. The successor Lessors, meanwhile, may view the current rent inadequate under the changed property zoning and may want to bargain for better terms in consideration for their consent to the zone change.

jurisdiction . . . ."). [12] Finally, the last issue is principally concerned with subject matter jurisdiction for diversity cases brought in federal court. There is no reason that the addition of the successor Lessors would otherwise harm this court's jurisdiction, so this last issue is a nonissue.

[71] Accordingly, because the successor Lessors are necessary parties and there is no reason apparent to us why joinder is not feasible, we do not need to determine whether, under GRCP 19(b), they are indispensable. Instead, upon remand, we hold that the trial court should order the successor Lessors to join the case as necessary parties. If, for reasons not addressed in this opinion, the trial court is faced with issues concerning the feasibility of joinder, it should address those in the first instance.

V. CONCLUSION

[72] For the reasons set forth above, the trial court's judgment is **REVERSED** and **REMANDED**. The trial court erred when it denied the petition for writ of mandamus for lack of standing because the Homeowners are beneficially interested as adjoining landowners to the subject property. The trial court also erred in denying the petition for lack of subject matter jurisdiction because the trial court possesses subject matter jurisdiction over the mandamus action seeking to annul the Director's approval of a split-zone change. Improper verification was not grounds to dismiss the case for lack of subject matter jurisdiction. On remand, the Homeowners shall have the opportunity to correct this defect. Furthermore, the trial court erred

[12] The dissent does not believe that the property is truly the subject of the litigation, but rather simply the zone designation and decision changing it. We believe the dissent misses the point of the controversy. The split-zone change affects the property itself. In deciding whether the Director had the authority to approve the split-zone change, the statute requires the written consent of the "property owner." 21 GCA § 61214 (2005) (requiring receipt of "a written request by a property owner to correct a split-zoning designation . . . ."). While there is no dispute regarding the identity of the title holders of the property, the dispute is centered on who is deemed an "owner" for the purposes of that statute and who may effect a change to the nature of the property. We believe this renders the property to be "the source of the underlying controversy" for jurisdictional purposes. *Shaffer*, 433 U.S. at 207.

in ruling the case was moot, because the only relief sought in the petition pertained to the Director's actions in approving the split-zone change, and this relief has not yet been afforded or obviated by the present zoning situation. Lastly, although the trial court did not analyze the issue of indispensable parties, which was broached by the Director on appeal, we remand the case to proceed after joining the successor Lessors, who we determine are necessary parties to the case.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Chief Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

TORRES, J., dissenting:

[73] I respectfully dissent from the majority opinion. For the reasons set forth below, I would affirm the trial court's finding that the Homeowners lack standing. Furthermore, because the Homeowners lack standing, they are not beneficially interested parties and, therefore, do not satisfy the elements for mandamus relief. Finally, I do not believe the record before us is sufficient to determine whether joinder of the successor Lessors is feasible in this case.

I. Standing

[74] I do not agree with the basis of the majority's determination that the Homeowners have standing to bring this appeal. In particular, I disagree that the "geographical nexus" test should be used to determine whether the Homeowners have standing in this case. From my review of the cases cited by the majority, it is clear that the test was adopted and continues to be used in California in cases involving alleged violations of the California Environmental Quality Act ("CEQA"). In all, there are only four reported California cases that have utilized the geographical nexus test, and all four involve alleged CEQA violations.[13] *See Citizens Ass'n for Sensible Dev. of Bishop Area v. Cnty. of Inyo*, 217 Cal. Rptr. 893, 897 (Ct. App. 1985) ("[I]n a

[13] The majority of this court and the Homeowners do not cite to any case—either in or outside of California—which has utilized the geographical nexus test in a non-environmental regulation context. Indeed, from my review of many of the reported cases which have mentioned the geographical nexus test, all involve alleged violations of environmental laws or regulations. *See, e.g., Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220 (10th Cir. 2012) (involving alleged violations of procedural requirements of National Environmental Policy Act ("NEPA")); *Wong v. Bush*, 542 F.3d 732 (9th Cir. 2008) (involving alleged violation of NEPA); *WildEarth Guardians v. Salazar*, 834 F. Supp. 2d 1220 (D. Colo. 2011) (involving claim under Endangered Species Act); *Nw. Envtl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957 (D. Or. 2006) (involving alleged violation of Clean Air Act). I have not come across a single non-environmental case which has utilized the geographical nexus test. This, to me, is significant. The logic behind allowing surrounding property owners standing to object to a development that may cause detrimental environmental harm is sound: more often than not, harmful environmental effects are not contained by property lines. *See Bozung v. Local Agency Formation Comm'n of Ventura Cnty.*, 529 P.2d 1017, 1023 (Cal. 1975) ("Effects of *environmental abuse* are not contained by political lines; strict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved." (emphasis added)). Where a development is not alleged to violate environmental quality standards, however, I do not see the need to grant a right of action to challenge the development to those who do not satisfy typical rules of standing.

writ of mandate against a municipal entity based on alleged violations of [the California Environment Quality Act], a property owner, taxpayer, or elector who establishes a geographical nexus with the site of the challenged project has standing."); *Burrtec Waste Indus., Inc. v. City of Colton*, 119 Cal. Rptr. 2d 410, 412 (Ct. App. 2002) (same); *Regency Outdoor Adver., Inc. v. City of W. Hollywood*, 63 Cal. Rptr. 3d 287 (Ct. App. 2007) (involving alleged violation of CEQA); *Waste Mgmt. of Alameda Cnty., Inc. v. Cnty. of Alameda*, 94 Cal. Rptr. 2d 740, 749 (Ct. App. 2000), *overruled by Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005 (Cal. 2011) (involving alleged violation of CEQA). The present case, in contrast, does not involve allegations of violations of environmental regulations; rather, it involves an allegation that the Director violated 21 GCA § 61214 when he granted a split-zone election made by a leaseholder rather than by the owner of the property.

[75] The majority's reliance on *Scott v. City of Indian Wells*, 492 P.2d 1137 (Cal. 1972), is also misplaced. In *Scott*, the city ordinance in question required that notice of hearing "shall . . . be mailed to . . . the persons to whom the property is assessed within 300 feet of the . . . property for which the variance is sought." 492 P.2d at 1139 n.3 (omissions in original) (internal quotation marks omitted). Plaintiffs were owners of property within 300 feet of the challenged site, but were nonresidents of the city because their property lied outside municipal lines. The Supreme Court of California rejected the defendant's contention that the plaintiffs had no standing due to their nonresident status, holding that the city "owes adjoining landowners who are not city residents a duty of notice *to the extent given similarly situated city residents*, a duty to hear their views, and a duty to consider the proposed development with respect to its effect on all neighboring property owners." *Id.* at 1142 (emphasis added). Unlike the city ordinance in *Scott*, here, 21 GCA § 61214, at the time Pangilinan applied to the Director to change the

Property from split-zone to entirely commercial zone, did not require that notice be given to any neighboring landowners. It is clear that had the plaintiffs in *Scott* lived outside the 300-foot radius from the challenged site, the court would not have found them to have standing because "similarly situated city residents" living outside the 300-foot radius would not have had standing under the city ordinance.

[76] Based upon my reading of former 21 GCA § 61214, I would hold that the statute does not confer standing upon the Homeowners in this case. The majority acknowledges that, unlike other zoning statutes, where the legislature clearly requires notice to be sent to surrounding property owners, the statute here did not include such a requirement. *See* Maj. Op. ¶ 5 ("This split-zone law effected zone changes without affording notice or a hearing to surrounding property owners, as would otherwise be required for obtaining a conditional use, zone change, or zone variance."); 21 GCA §§ 61303, 61617 (2005). Indeed, from the plain language of former section 61214, it appears that the legislature intended for the split-zone elections to be granted as a matter of course, without any discretion on the part of the department:

> Whenever a lot has two (2) separate zoning designations within its boundaries, the property owner *shall have the right* to select one of the two (2) zones and to have it apply to the entire lot. Upon receiving a written request by a property owner to correct a split-zoning situation, the Director of the Department of Land Management *shall* approve the request, *shall* process all necessary documents to reflect the approval, and *shall* update all official maps of the Island to indicate the zone which the property owner has chosen.

21 GCA § 61214 (2005) (emphases added). Thus, there being no discretion to grant or deny such elections, it does not make sense that the input of third-party property owners should be

considered. By holding that the Homeowners have standing to challenge the split-zone election, the majority ignores the clear legislative intent to grant these elections automatically.[14]

II. Failure to Satisfy Requirements for Issuance of Extraordinary Writ

[77] Because I do not believe the Homeowners have standing to bring this action, I would hold that they are not beneficially interested parties and, therefore, have not satisfied the elements for mandamus relief. Title 7 GCA § 31203 provides that a writ of mandamus "must be issued on the verified petition of the party beneficially interested." 7 GCA § 31203 (2005). This court has previously held:

> A beneficially interested party is a person that "has some special interest to be served or some particular right to be preserved over and above the interest held in common with the public at large." The petitioner must establish both that a substantial right needs protection and that a substantial injury was or will *in fact* be suffered. More specifically, the petitioner must show that "it has suffered an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."

People v. Superior Court (Laxamana), 2001 Guam 26 ¶ 24 (citations omitted).

[78] Title 21 GCA § 61214, when originally enacted, did not confer a right to surrounding property owners to challenge split-zone elections. Thus, I am unconvinced that the Homeowners have established a substantial right in need of protection. Moreover, the Homeowners have not established that a substantial injury was or will *in fact* be suffered, instead relying on conjecture

[14] I recognize that section 61214 has since been amended to now require notice to surrounding landowners. *See* 21 GCA § 61214(c) (repealed and reenacted by Guam Pub. L. 31-098:2 (Sept. 30, 2011)) ("All uses permitted on the affected lot by the zone chosen by the property owner making a split-zone election *shall* be conditional and subject to approval in the manner required to obtain a zone variance in [21 GCA § 61303]. No such use shall be permitted upon any part of the lot described in Subsection (a) above which is inconsistent or incompatible with the uses of property adjacent to such part, nor which would otherwise be detrimental to the public."); 21 GCA § 61303(c) (2005) ("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 ten (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 twenty-five (25) days prior to the hearing by certified mail, return receipt requested. In addition, the commission shall require the applicant to erect a sign on the subject location, no smaller than four feet (4') by eight feet (8') in height and width, displayed to make the following information available to the general public in a reasonable manner . . . ."). However, at the time of Pangilinan's split-zone election, section 61214 clearly did not require such notice.

and hypotheses as to the potential social evils of the neighboring development. The majority's decision today essentially creates a right that the legislature, in drafting former 21 GCA § 61214, did not intend to create.

[79] Assuming arguendo that the Homeowners do have standing, I disagree with the majority's decision to remand the case to the trial court for determination on the merits. Although I agree that the trial court conflated the jurisdictional question with the merits of the case, the fact that the trial court indeed reached the merits obviates the need to remand for this purpose. The trial court has already found that under the terms of Pangilinan's lease, he had "all rights of the Property owner during the term of the Lease," including "the right to request a split-zone property change." Record on Appeal ("RA"), tab 39 at 4 (Dec. & Order, Sept. 21, 2011). The trial court therefore determined that the Director's actions in granting Pangilinan's split-zone election was legal under 21 GCA § 61214 and concluded that because mandamus could not be granted to reverse a legal action, the trial court had no subject matter jurisdiction. *Id.* While that may not be the case for the reasons cited by the majority, I do not feel it necessary to reverse the trial court on this issue and remand for a determination on the merits, when it is clear that the trial court has already done just that. Judicial economy is not served by remanding to the trial court to consider an issue already decided. Moreover, the trial court's earlier decision having already established the law of the case, it is unclear why the majority insists on remanding the issue. As for whether the trial court's decision on the merits was correct, I decline to express an opinion given my belief that the Homeowners are not entitled to mandamus relief.

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III. Necessary Parties

[80] As for the majority's directive that the successor Lessors be joined as necessary parties, I do not believe the majority has done a thorough job of articulating how the disposition of the action in the absence of the successor Lessors would impair or impede their ability to protect their interests. The majority determines that the lessee, Pangilinan, need not be joined because the sub-lessee, Busker Alley, is a party and will advance and protect the same interest as Pangilinan. Following that reasoning, why is it not also the case that the Homeowners can adequately protect the interests of the successor Lessors? We know from the successor Lessors' declarations that their interests are aligned with the Homeowners, i.e., that both groups wish to overturn the split-zone election on the basis that the Director approved the election despite the applicant being a lessee rather than title owner of the property. Indeed, by relying on the Homeowners to litigate the case, any issue of the successor Lessors' joinder should be deemed waived. *See, e.g.*, *Shinaberger ex rel. Campbell v. LaPine*, 34 P.3d 1253 (Wash. Ct. App. 2001) (where school district knew about petition for antiharassment against employee prior to hearing but chose not to intervene or request joinder until after court issued order, school district waived joinder by relying on employee to litigate matter in its place).

[81] Furthermore, even if the successor Lessors are necessary parties to the action, I believe that the record before us is insufficient for this court to determine the feasibility of joining them in the case. [15] The issue of their joinder was neither raised below nor in this appeal. Thus, but for the affidavits filed by the successor Lessors, in which they expressed their objections to the split-zone election, we know little about them. From their affidavits, it appears that the successor

[15] The majority seems to acknowledge the possibility that joinder of the successor Lessors may not be feasible, and instructs the trial court to address in the first instance any issues that may arise on remand regarding feasibility of joinder. *See* Maj. Op. ¶ 71.

Lessors do not live in Guam. Thus, while we know that they own property situated in Guam, I question whether the mere fact of this ownership subjects them to the jurisdiction of this court. While I agree that this court has jurisdiction over the property because it is situated in Guam, the property is not the subject matter of the action. The majority quotes *Shaffer v. Heitner*, 433 U.S. 186 (1977), for the proposition that "when claims to the property itself are the source of the underlying controversy . . . , it would be unusual for the State where the property is located not to have jurisdiction." Maj. Op. ¶ 70 (quoting *Shaffer*, 433 U.S. at 207). I have reservations about whether claims to the property are the source of the underlying controversy between the Homeowners and the Director. Although the merits of the case call for a determination of whether Pangilinan qualifies as a "property owner" for purposes of 21 GCA § 61214, there is no dispute that he is the leaseholder of the property and that the successor Lessors are the title owners to the property. Thus, although the property is involved in the action because it is the site of the challenged development, the underlying controversy does not involve claims to the property itself. Rather, the single issue raised by the Homeowners is whether the Director complied with 21 GCA § 61214 when it granted a lessee's split-zone election. Thus, I do not believe in rem jurisdiction is a proper basis for exercising jurisdiction over the successor Lessors.

[82] Finally, even if we were to treat this as a quasi in rem action, whether quasi in rem jurisdiction exists involves an inquiry into the presence or absence of constitutionally mandated minimum contacts. *See Shaffer*, 433 U.S. at 208-12. Although the ownership of property in Guam might suggest the existence of other ties to Guam, the presence of property alone would not be sufficient to satisfy the *International Shoe Co. v. State of Washington* standard of minimum contacts and, therefore, would not support Guam's jurisdiction over the successor

Lessors. *See id.* at 209; *Banes v. Superior Court*, 2012 Guam 11 ¶ 57. *See generally Int'l Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

Original Signed By: **Robert J. Torres**

ROBERT J. TORRES
Associate Justice