IN THE SUPREME COURT OF GUAM

ROSSANA SAN MIGUEL, JOSE S.N. CHARGUALAF, ANGELO M. GOMBAR, ANTHONY DUENAS LEON GUERRERO, LAWRENCE C. PORTELA, TONY A. QUINATA, and FRANKLIN M. TAITAGUE,
Plaintiffs-Appellants,

v.

DEPARTMENT OF PUBLIC WORKS, LAWRENCE P. PEREZ, in his capacity as Director of the Department of Public Works, GUAM ENVIRONMENTAL PROTECTION AGENCY, LORILEE T. CRISOTOMO, in her capacity as Administrator of the Guam Environmental Protection Agency, GEORGE LAI, ALFRED K.Y. LAM, ROBERT A. PERRON, ANDREW CHUNG PARK, FLORIDA SANCHEZ, THOMAS N. POOLE, JORGE O. NELSON, RON YOUNG, DOES I-X,
Defendants-Appellees.

Supreme Court Case No. CVA05-017
Superior Court Case No. CV0892-04

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on August 8, 2006
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice.[1]

CARBULLIDO, C.J.:

[1] This case involves a dispute over the exclusion of Guatali and Malaa as potential sites for Guam's new solid waste landfill. Plaintiffs-Appellants are taxpaying citizens ("Taxpayers") who argue that the landfill should be located at either Guatali or Malaa as the legislature had previously indicated, and not at the Dandan site that has been chosen. Defendants-Appellees are the Department of Public Works ("DPW") and the Guam Environmental Protection Agency ("GEPA") and their employees and board members who were involved in selecting the Dandan site (collectively "Agencies").

[2] The Agencies found that Parcel A of Guatali was unsuitable because it was owned by the federal government and because of slope and geological exclusionary criterion. The Agencies found that Malaa was unsuitable because of slope and incompatible land use. Plaintiff Taxpayers sought a preliminary injunction to prevent expenditure of public funds on an environmental impact study for Dandan unless Guatali and Malaa were also studied, arguing that the Agencies used impermissible exclusionary criteria, and that consideration of the Guatali site should not have been limited to Parcel A. On the Agencies' motion for summary judgment, the trial court held that legislative references referred exclusively to Parcel A of Guatali, and that Parcel A was appropriately excluded from consideration. The court summarily denied Plaintiffs' motion for reconsideration of that ruling. The lower court also denied Plaintiffs' motion for a preliminary injunction, finding that the Agencies acted within their authority in excluding Malaa based on slope.

[3] The matter comes before this court on an appeal from the trial court's denial of Plaintiff Taxpayers' motion for reconsideration and motion for preliminary injunction. We decline to exercise our discretion to review the denial of the motion for reconsideration, finding none of the

[1] After the three Justices heard oral argument in this matter, but prior to the issuance of this opinion, Justice Robert J. Torres was sworn in as Chief Justice, Justice F. Philip Carbullido assumed the role of Associate Justice, and Justice Frances Tydingo-Gatewood was sworn in as Chief Judge of the District Court of Guam.

criteria for discretionary review have been met. In addition, we find no abuse of discretion in the denial of a preliminary injunction because DPW and GEPA could reasonably have interpreted the law to permit the consideration of slope as a legitimate criterion for exclusion of Malaa.

I. Background

[4] The Ordot Landfill site has been a dumping ground since the 1940s, when it was used by the Japanese during World War II. After the liberation of Guam, the site continued to be used by the United States Navy for waste disposal. The site was transferred to the Government of Guam in 1950, and has been operated as a dump by DPW. The landfill was not properly lined or capped, and in 1982, the United States Environmental Protection Agency ("US EPA") initiated a formal investigation of the Ordot Dump for possible environmental violations. The US EPA issued orders beginning in 1986 requiring Guam to address environmental problems at the dump, including leachate discharges to the nearby Lonfit River and buildup of carbon monoxide.[2] In the late eighties and early nineties, Guam was found to have violated the US EPA's orders.

[5] In 1994, the Guam Legislature found that the Ordot Landfill had "now reached beyond its capacity," and required that a proposed site for a new landfill be identified. Guam Pub. L. 22-115:1 (Apr. 25, 1994). In May 1996, the Guam Legislature passed a bill indicating that the opening of a new landfill and the closing of the Ordot Landfill had "dragged on interminably with no fixed date in sight for accomplishment," and that the legislature "[t]herefore . . . has agreed to establish sites for the new landfill" at Guatali and Malaa unless there was "any legitimate reason" that those sites could not be used. Guam Pub. L. 23-95:1, 2 (May 8, 1996).

[6] In December 1996, DPW contracted with Guam Resource Recovery Partners to begin working on the landfill, but the Legislature had not appropriated funds to the contract, and in 1997 the Legislature explicitly blocked funding for the contract. Guam Pub. L. 24-57:6 (June 30, 1997). In March 1997, the Legislature passed Public Law 24-06, with the stated intent of "establish[ing] policy and legal authority for the privatization of a Municipal Solid Waste Landfill Facility . . . at

[2] The Ordot Landfill has also had problems with rats, flies, mosquitoes, odors, and major fires. Record on Appeal, tab 35 (Mem. in Supp. of Mot. to Enter Consent Decree at 2).

a site to be determined by the government of Guam." Guam Pub. L. 24-06:1 (Mar. 20, 1997). The law provided that the landfill "shall be located at either Guatali or Malaa, or both, as prescribed in Public Law 22-115 and described in the Environmental Impact Statement of November 1995." *Id.* § 4(e).

[7] In February 1998, the Legislature passed a bill requiring GEPA to prepare and adopt an Integrated Solid Waste Management Plan ("Waste Management Plan") within 300 days, including "an identification of potential sites for future sanitary landfills." Bill 495, 24th Legislature, §§ 4, 10 (1998). The same law required DPW to implement the plan. *Id.* § 2. While the law was pocket vetoed, it was subsequently "repealed and reenacted" by Public Law 24-272, though the effectiveness of the reenactment is in dispute.

[8] GEPA prepared a Waste Management Plan identifying Guatali as the site of the new landfill. The Legislature approved and amended the Waste Management Plan in 2000. Guam Pub. L. 25-175:2 (Dec. 14, 2000). The Legislature permitted GEPA to modify the plan "in accordance with the provisions of the Administrative Adjudication Law and Public Law Number 24-272, but *only* in a manner consistent with this Act." *Id.*

[9] In August 2002, the United States filed a complaint in federal district court alleging that the Government of Guam was in violation of the Clean Water Act through the continued use of the Ordot Dump. The parties eventually reached an agreement, and in October and November, 2003 signed a Consent Decree, which was entered on the docket by the District Court on February 12, 2004. The Consent Decree required, *inter alia*, that DPW submit a list of at least three potential landfill sites to the US EPA and GEPA within thirty (30) days of the filing of the decree.

[10] DPW and GEPA prepared a Preliminary Landfill Site Suitability Report ("Suitability Report") in March 2004. The Suitability Report states that there were more than twenty potential landfill locations examined, including both Guatali and Malaa, which are listed as "Previously Identified Landfill Sites." In the first level of screening, DPW and GEPA used site screening assumptions, location restrictions, and exclusionary criteria specified in the Guam Solid Waste Disposal Rules and Regulations to narrow the list of potential landfill sites to twelve. Guatali was

eliminated based on "slope and geological exclusionary criterion" and not included with the twelve sites. Appellants' Excerpts of Record ("ER"), p. 38 (Prelim. Landfill Site Suitability Report). Further screening eliminated another six sites, including Malaa, leaving six potential sites on the Preliminary Area List. Malaa was eliminated based on "slope exclusionary criterion" and "existing land use incompatibility." *Id.* at 37-38. The remaining six sites were evaluated and scored based on nine screening criteria. Dandan, Sabanan Batea, and Lonfit scored the highest and were identified as the three potential landfill sites required by the Consent Decree.

[11] On August 19, 2004, Plaintiff Taxpayers filed a complaint in the Superior Court of Guam seeking declaratory judgment, injunctive relief, damages, and attorneys' fees. Plaintiffs Rosanna San Miguel and others describe themselves as "United States citizens, Guam taxpayers and residents of Guam." ER, p. 2 (Compl. ¶ 2). On October 18, 2004, Defendant Agencies filed a motion to dismiss, for summary judgment, or to abstain or stay proceedings. On January 18, 2005, Taxpayers moved for summary judgment or, in the alternative, for a preliminary injunction to prevent the government from spending public funds on environmental impact statements for the three potential landfill sites identified in the Suitability Report.

[12] On January 31, 2005, based on the findings contained in the Suitability Report, the Agencies informed the US EPA that *Dandan* would be the site of the new landfill. Appellants' Opening Brief, Ex. 4 (Feb. 22, 2006). The US EPA approved the *Dandan* site.

[13] On July 6, 2005, the lower court entered partial summary judgment in favor of the Agencies with respect to the Guatali site, but denied summary judgment with respect to Malaa. The court held that the references to Guatali in Public Laws 23-95, 24-06, and 25-175 were only to Parcel A of Guatali, and not Parcel B. Because Parcel A is owned by the federal government, the court found that "the Government of Guam need not consider *Guatali* as a landfill site." ER, p. 112 (Decision & Order). With respect to Malaa, the trial court concluded that "there are material facts in dispute regarding why *Malaa* was not considered as a proposed landfill site." ER, p. 111. Taxpayers moved for reconsideration of the court's decision, which the court denied.

[14] The trial court also heard arguments on the Taxpayers' request for a preliminary injunction to prevent the expenditure of public money to conduct environmental impact statements until Malaa is included as a potential site. The trial court issued an order on September 19, 2005, ruling against the Taxpayers on the grounds that "there is sufficient evidence to show that *Malaa* was appropriately considered and rejected as a proposed landfill site." ER, p. 121 (Decision & Order re Prelim. Inj.). Taxpayers now appeal the trial court's denial of their motion for reconsideration and for a preliminary injunction.

II. Jurisdiction

[15] This court exercises its jurisdiction over the appeal from the trial court's denial of a motion for preliminary injunction pursuant to 7 GCA § 25102(f), which provides that "[a]n appeal . . . may be taken . . . [f]rom an order . . . refusing to grant . . . an injunction," and 7 GCA § 3108(b), which provides that "[o]rders other than final judgments shall be available to immediate appellate review as provided by law." *See Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth*, 2004 Guam 15 ¶ 14.

[16] Taxpayers also appeal from the trial court's denial of their motion for reconsideration of an interlocutory order granting partial summary judgment to the Agencies with respect to Guatali. An interlocutory appeal is discretionary by this court and should only be exercised under "exceptional circumstances." *Merchant v. Nanyo Realty, Inc.*, 1997 Guam 16 ¶ 6. Both sides assert that jurisdiction is appropriate under 7 GCA § 3108(b), which provides this court with discretionary review of an interlocutory order where this court "determines that resolution of the questions of law on which the order is based will:

> (1) Materially advance the termination of the litigation or clarify further proceedings therein;
> (2) Protect a party from substantial and irreparable injury; or
> (3) Clarify issues of general importance in the administration of justice."

7 GCA § 3108(b). Subsections (1) and (3) permit interlocutory review in order to address concerns of judicial efficiency in specific circumstances. *People v. Angoco*, 2006 Guam 18 ¶ 19. Subsection (2) contemplates allowing an appeal to resolve questions of law so as to protect a party from substantial and irreparable injury. *Id.*

[17] Taxpayers do not specify how any of these factors have been met. The Agencies argue that the first prong has been met, asserting that interlocutory review would materially advance the termination of litigation and clarify further proceedings in this action because one of the issues raised by the motion for reconsideration may be determinative of the motion for preliminary injunction. Specifically, they assert that both motions are affected by the issue of the successive impact of Public Laws 24-06 and 25-175 on the landfill site designation provision of Public Law 23-95. Appellees' Br., p. 4 (Mar. 24, 2006). That issue, however, is tangential to the preliminary injunction motion, and fails to constitute an "exceptional circumstance" warranting interlocutory review. We find that none of the grounds set forth in 7 GCA § 3108 exist in this case. We therefore decline to review the trial court's order denying the Plaintiff Taxpayers' motion for reconsideration, and the underlying determination that Guatali was properly excluded as a potential landfill site.

III. Standard of Review

[18] This court reviews the grant or denial of a preliminary injunction for an abuse of discretion. *See Lands Council v. McNair*, 494 F.3d 771, 775 (9th Cir. 2007); *HongKong & Shanghai Banking Corp. v. Kallingal*, 2005 Guam 13 ¶ 17 ("'[A] lower court's grant of a preliminary injunction is generally reviewed for an abuse of discretion.'") (quoting *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 15 n.3). A court abuses its discretion by basing its decision on an erroneous legal standard or clearly erroneous factual findings, or if, in applying the appropriate legal standards, the court misapprehended the law with respect to the underlying issues in the litigation. *Clear Channel Outdoor, Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003); *see also Carlson*, 2002 Guam 15 ¶ 15 ("'[W]e review any determination underlying the grant [of an injunction] by the standard that applies to that determination.'") (quoting *Dare v. California*, 191 F.3d 1167, 1170 (9th Cir. 1999)). A trial court's finding that a party failed to demonstrate a likelihood of success on the merits raises primarily legal issues that should be reviewed *de novo*. *See Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 980 (9th Cir. 1993); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990); *see also Assoc. Gen. Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1180

(9th Cir. 1998) (reviewing the lower court's "determination that the preliminary injunction should be denied because [Appellant] had no likelihood of success on the merits *de novo*.").

IV. Discussion

[19] Because we have declined to exercise jurisdiction over the reconsideration ruling related to the exclusion of Guatali, the only remaining issue for this appeal is whether the trial court abused its discretion in denying the Taxpayers' motion for a preliminary injunction related to Malaa. In order for a preliminary injunction to be granted, the movant must show: "(1) irreparable injury and (2) likelihood of success on the merits." *HongKong & Shanghai Banking Corp.*, 2005 Guam 13 ¶ 18 (citing *Carlson*, 2002 Guam 15 ¶ 8). More specifically, the movant must demonstrate either: "a combination of probable success on the merits and the possibility of irreparable harm; or . . . that serious questions are raised and the balance of hardships tips in its favor." *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

A. Findings Regarding Irreparable Injury

[20] Taxpayers argue that the lower court committed reversible error by failing to make findings regarding irreparable injury. The lower court instead based its decision entirely on the second requirement – the likelihood of success on the merits. When a trial court determines that a plaintiff's failure to show a likelihood of success on the merits is significant enough to prevent the injunction from issuing, "additional findings [a]re not necessary." *Leary v. Daeschner*, 228 F.3d 729, 739 n.3 (6th Cir. 2000); *see also Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003) ("[A] district court is not required to make specific findings concerning each of the four factors used [in federal courts] in determining a motion for preliminary injunction if fewer factors are dispositive of the issue."); *New Comm. Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) ("The sine qua non of this four-part inquiry [for issuing a preliminary injunction] is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.").

[21] Plaintiff Taxpayers argue that the required showing of likelihood of success on the merits varies with the showing of irreparable harm, and that it was therefore insufficient for the lower court

to make findings on likelihood of success alone. Appellants' Opening Brief, p. 23 (citing *San Diego Comm. Against Registration & the Draft v. Governing Bd. of Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1473 (9th Cir. 1986), *abrogated on other grounds, Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 827-28 (9th Cir. 1991)). As the Ninth Circuit has stated, "'the required showing of harm varies inversely with the required showing of meritoriousness.'" *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (quoting *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987)). If the balance of hardships tips sharply towards the plaintiff, the plaintiff need not demonstrate a "*probability* of success" on the merits, but only that there is a "*fair chance* of success" or that "serious questions" are raised. *Id.* (emphasis added); *accord Lands Council*, 494 F.3d at 775.

[22] Thus, if there was less than a "fair chance of success" on the merits, then no showing of irreparable harm would justify the issuance of an injunction, and the lower court did not abuse its discretion in not making a finding on the record regarding irreparable injury. *Id.*[3] On the other hand, if there is at least a fair chance of success on the merits, then we must remand to the trial court to determine the balance of hardships. *Id.*

B. Likelihood of Success on the Merits

[23] Taxpayers argue that the Agencies' designation of Dandan as the site for Guam's new landfill was contrary to law, and seek to prevent the government from spending money on a new landfill at the proposed Dandan site without further considering the Malaa site. While an agency's interpretation of a statute is a question of law reviewed *de novo*, review is limited to "'whether the agency's conclusion is based on a permissible construction of the statute.'" *Ada v. Guam Tel. Auth.*, 1999 Guam 10 ¶ 10 (quoting *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S.

[3] In the interest of judicial economy and in order to conduct a complete review of the issues on appeal, we urge trial courts to make a full assessment on the record of both factors in considering whether to grant or deny a motion for a preliminary injunction, regardless of whether there was any likelihood of success on the merits. *See Abney v. Amgen, Inc.*, 443 F.3d 540, 547 (6th Cir. 2006) ("[E]ven though a finding of no likelihood of success 'is usually fatal[,]' a district court should ordinarily analyze all of the factors.") (citation omitted and second alteration in original); *Leary*, 228 F.3d at 739 n.3 ("We nonetheless note that it is generally useful for the district court to analyze all four of the preliminary injunction factors, especially since our analysis of one of the factors may differ somewhat from the district court's.").

837, 843 (1984)). If a statute is silent or ambiguous, courts "should defer to the agency's reasonable interpretation of the statute." *Carlson*, 2002 Guam 15 ¶ 17. "Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving engineering and scientific matters." *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989). If, however, an agency's construction of a statute is "contrary to clear congressional intent or frustrate[s] the policy that Congress sought to implement," then the court "must reject those constructions." *Ada*, 1999 Guam 10 ¶ 10. Thus, Taxpayers could prevail on the merits only if the Agencies' interpretation of the controlling laws were unreasonable, contravened clear legislative intent, or frustrated the policy that the legislature sought to implement. *See Carlson*, 2002 Guam 15 ¶ 17; *Ada*, 1999 Guam 10 ¶ 10.

[24] Specifically, Taxpayers dispute the Agencies' interpretation of: (1) Public Law 23-95, which named Guatali and Malaa as the primary and secondary sites for the landfill; (2) Public Law 24-06, which stated that the landfill "shall be located at either Guatali or Malaa, or both"; and (3) Public Law 24-272, which purportedly authorized the Agencies to adopt an interim and final Solid Waste Management Plan, including an identification of potential sites for the landfill.

1. Whether the Agencies' Interpretation of Public Law 23-95 Was Reasonable

[25] Public Law 23-95 established Guatali and Malaa as the primary and secondary sites for the new landfill, but explicitly allowed that those sites could be rejected "for any legitimate reason":

> The primary site for the new landfill shall be that area in central Guam, known as Guatali, located near the old GORCO Oil site. The government of Guam and its agencies shall immediately commence the planning and development of this new landfill site so that it can begin to be utilized at the earliest possible date. If *for any legitimate reason*, it is found that Guatali can not be used, the secondary site shall be that area known as Malaa. The same conditions shall apply to Malaa as stated for Guatali if Guatali can not be used.

P.L. 23-95:2 (emphasis added). Taxpayers contend that Malaa may only be excluded pursuant to criteria "based in federal or local law, []or . . . required for consideration by the Solid Waste Plan adopted via Public Law 25-175." Appellants' Opening Brief, pp. 17, 19. The Agencies, however, contend that the Legislature provided them broad discretionary authority through the use of the

phrase "any legitimate reason." P.L. 23-95:2. The statute itself is silent regarding the Legislature's intended meaning of the phrase.

[26] According to its plain meaning, "legitimate" means "[c]omplying with the law; lawful . . . [g]enuine; valid." Black's Law Dictionary 912 (7th ed. 1999); *cf. DynCorp, Inc. v. NLRB*, 233 Fed. Appx. 419, 428 (6th Cir. 2007) (defining a "legitimate reason" to question an employee about a union matter to include reasons "related to a legitimate policy of the employer"); *Hardcastle v. Horn*, 368 F.3d 246, 258 (3d Cir. 2004) (defining "legitimate reason" for a peremptory challenge under *Batson* as a reason that does not deny equal protection). Given the plain meaning of "any legitimate reason," it would not be unreasonable or "contrary to clear [legislative] intent" for the Agencies to interpret those words of Public Law 23-95 to include genuine or valid policy reasons. *See Carlson*, 2002 Guam 15 ¶ 17; *Ada*, 1999 Guam 10 ¶ 10. Consequently, if the reasons provided by the Agencies for site exclusion are genuine and lawful – not pretextual or unlawful – we will not overturn the Agencies' interpretation.

[27] The Agencies excluded Malaa based on "slope exclusionary criterion" because the slope exceeded 20% and based on existing land use incompatibility. ER, pp. 35, 37-38 (Prelim. Landfill Site Suitability Report).

[28] Taxpayers' expert witness, Dr. Peter Melnyk, testified that the 20% slope criterion has no basis in federal law, and should not be the basis for the exclusion of a prospective site. Transcript ("Tr."), vol. III, pp. 46, 48 (Mots. Hr'g, Apr. 22, 2005). He further testified that "in some ways . . . you can engineer [a 20% slope] to be a benefit." *Id.* at 49. According to Dr. Melnyk, some landfill designers had intentionally sought out very steep areas to use as landfills in the past:

> I know that in the selection criteria, the – or the site selection criteria, they list a 20% slope exclusion. I don't agree[.] . . . [L]andfill design has changed over the years. When I started out in this business back in the eighties, we used to look for very – we used to call them canyon fills[.] . . . That is you try to find a very steep area and you try and fill the – fill that canyon from the bottom working your way up.

Id. at 46. For example, landfills have previously been built with slopes greater than 20% in Los Angeles and Hawaii. *Id.* at 48.

[29] Dr. Melnyk conceded, however, that slope could be a detrimental characteristic, depending on the specific landfill site:

> Q: Is having a slop[e] on a proposed landfill site a detrimental characteristic?
>
> A: It can -- again, it's site specific, it can be, basically. But on the other hand you can use a severe -- you can use a severe slope as I saw in California or in Oahu to both anchor the landfill and to obtain compression of the refuse over time.

Tr., vol. IV, p. 33 (Mots. Hr'g, Aug. 2, 2005). He also conceded that 20% slope could increase at least some of the costs associated with a landfill:

> Q. Would the cost to engineer [a landfill] in a slope with a slope factor exceeding 20 percent be greatly enhanced, greatly increased?
>
> A. Well, it's -- there -- you know, there are so many factors involved in estimating the cost of the landfill, it's hard to . . . pinpoint. Yes, this will increase the -- If you have a slope of 20 percent, you obviously are going to do more earth moving.

Id. at 34.

[30] Dr. Melnyk further testified that a 20% slope might make a landfill more difficult to access:

> [T]he site selection criteria, they list a 20% slope exclusion. I don't agree – One of the reasons they say is - - well, it's difficult to engineer, difficult to access, yes, I'll grant you that, it's difficult to climb a 20% slope, and it's also difficult to anchor a liner which is a require - - which is a requirement of both federal and Guam law for a landfill. Well, the last assumption is wrong; for instance, in Guatali, we were going to put a liner in a slope that's at 55%, so - - and we have no trouble anchoring the liner under that condition.

Tr., vol. III, p. 46 (Mots. Hr'g, Apr. 22, 2005).

[31] Taxpayers also called as an expert witness Mr. Juan C. Tenorio, who authored the Draft Environmental Impact Study. Tenorio testified that, although slope is not necessarily detrimental, he considered slope as a factor in assessing the landfill sites: "Q. So, is slope a bad thing when you're building a landfill? A. No, no, not to my knowledge again. I'm sorry, I'm not necessarily an expert in this . . . . It was – it was one of the consideration[s], but it was just one . . . ." Tr., vol. IV, p. 66 (Mots. Hr'g Aug. 2, 2005); *see also* ER, p. 55 (Draft Environmental Impact Study, tbl. 8) (listing slope as a criterion).

[32] Although the importance of slope is in dispute, there is no indication that the Agencies' use of the slope criterion was pretextual or unlawful.

[33] Moreover, the use of the criterion was not contrary to clear Legislative intent. The Agencies developed a list of five exclusionary criteria "to serve as the first level screening effort to narrow the universe of potential land areas." ER, p. 35 (Prelim. Landfill Site Suitability Report, p. 4 (2004)). Among the five exclusionary criteria were "[s]lopes in excess of 20%," which the report characterized as "Severe Topography," and was deemed "too unstable for safe, cost effective landfill construction and phasing, especially when considering liner side slope design requirements." *Id.* In passing Public Law 23-95, the Legislature indicated that its intent was to expedite the establishment of a site for the new landfill. P.L. 23-95 (describing as "interminabl[e]" the delay in establishing a site). The Agencies' use of 20% slope and other "first level screening" criteria serves the Legislature's stated purpose of expediting site selection, even if the slope requirement does not take into account site-specific considerations related to the impact of the slope.

[34] As such, we cannot say that the Agencies' use of slope criterion was unreasonable in light of Public Law 23-95, contrary to clear legislative intent, or that it frustrated the policy that the Legislature sought to implement. *See Carlson*, 2002 Guam 15 ¶ 17; *Ada*, 1999 Guam 10 ¶ 10.[4]

2. Whether Agencies' Interpretation of Public Law 24-06 Was Reasonable

[35] Taxpayers argue that the Agencies' exclusion of Malaa was inconsistent with Public Law 24-06, the Solid Waste Landfill Authorization Act of 1997. Public Law 24-06 provided that the landfill "shall be located at either Guatali or Malaa, or both, as prescribed in Public Law 22-115 and described in the Environmental Impact Statement of November 1995." P.L. 24-06:4(e). In turn, Public Law 22-115 required that a proposed landfill site be identified by the Governor, but did not itself identify a site.[5] The Environmental Impact Statement of November 1995, meanwhile, examined Guatali and Malaa as potential sites of a new landfill, concluding that Guatali was the preferred site.

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[4] Having found that the Taxpayers exclusion of Malaa was not unreasonable based on the slope criterion, we need not address the Agencies' alternative basis for excluding Malaa – the incompatible land use criterion.

[5] Public Law 22-115 required, *inter alia*, that "the Governor shall identify a proposed site for the location of the new solid waste landfill and . . . submit to the Legislature an annual report . . . each of the next three (3) years . . . includ[ing] the status of the progress of activation of the new landfill site." P.L. 22-115:4.

[36] The Legislative Intent section of Public Law 24-06 stated that "[t]he purpose of this Act is to establish policy and legal authority for the privatization of a [landfill] by means of a long-term contract for the development, construction and operation [of a landfill facility] at a *site to be determined by the government of Guam.*" P.L. 24-06:1 (emphasis added). The law also provided that DPW "is the appropriate government agency for the development of a new landfill," *id.*, and that both GEPA and DPW "shall monitor the performance of the contractor," *id.* § 4(u).

[37] Nothing in Public Law 24-06 contradicts the statement in Public Law 23-95 that the Agencies could exclude Malaa for "legitimate reasons," and the Legislature never repealed Public Law 23-95. The Agencies' interpretation of Public Law 24-06 as not prohibiting them from excluding Malaa based on a valid practical consideration, slope, was not unreasonable or contrary to clear legislative intent. *See Carlson*, 2002 Guam 15 ¶ 17; *Ada*, 1999 Guam 10 ¶ 10.

3. Whether the Agencies' Interpretation of P.L. 24-272 Was Reasonable

[38] Taxpayers dispute whether GEPA was authorized to select alternative sites for a solid waste landfill. GEPA was authorized by Bill 495 of the 24th Legislature (which is sometimes referred to as Guam Public Law 24-139)[6] and by Guam Public Law 24-272 to adopt an interim Waste Management Plan and a final Waste Management Plan, which would include "an identification of potential sites for future sanitary landfills." Guam Pub. L. 24-272:10 (Oct. 2, 1998) (codified at 10 GCA § 51119(a)(6)). The law also required GEPA to revise the Waste Management Plan every five years. P.L. 24-272:4 (codified at 10 GCA § 51103(a)(2)). When the Legislature adopted GEPA's first final Waste Management Plan, it provided that GEPA could modify the plan "in accordance with the provisions of the Administrative Adjudication Law and Public Law Number 24-272, but *only* in a manner consistent with this Act." P.L. 25-175:2. Thus, the Legislature granted GEPA authority to identify potential sites for landfills, to exclude Guatali and Malaa for "any legitimate reason," and to revise the Waste Management Plan that included the site selection. Assuming these Public Laws were valid, then GEPA's actions in selecting potential landfill sites were within the

[6] The Legislature incorrectly assumed that Bill 495 was lawfully enacted and referred to it as Public Law 24-139.

authority granted to it by the Legislature. *Cf. Carlson*, 2002 Guam 15 ¶ 17 (requiring deference to a reasonable agency interpretation of the law where the statute is silent or ambiguous).

[39] Taxpayers point out, however, that this court held in *Gutierrez v. Pangelinan*, 2000 Guam 11 ¶ 8, that Bill 495 was pocket vetoed and never became law. Further, this court stated in *Pangelinan v. Gutierrez*, 2004 Guam 16 ¶ 43, that Guam Public Law 24-272 was invalid because it purported to reenact a law (Bill 495 or Public Law 24-139) that was never lawfully enacted.

[40] The Agencies now ask us to overturn the *Pangelinan v. Gutierrez* decision as improperly decided. "It is true . . . that the court has the ability to overturn precedent." *People v. Villapando*, 1999 Guam 31 ¶ 29. *Stare decisis* is a "'principle of policy,' and not . . . an 'inexorable command.'" *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (citation omitted). We do not overturn precedent lightly, however, as the doctrine of *stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). This policy does not shield court-created error from correction. *People v. Mendoza*, 4 P.3d 265, 285 (Cal. 2000). Rather, the doctrine is flexible and permits us to depart from our own precedent in an appropriate case. *Id.* In deciding whether to depart from precedent, this court may consider whether the prior decision was "'unsound in principle.'" *Allied Signal, Inc. v. Director*, 504 U.S. 768, 783 (1992) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)); *see also Oraee v. Breeding*, 621 S.E.2d 48, 53-54 (Va. 2005) ("While we adhere strongly to the doctrine of *stare decisis* . . . this is one of those rare situations in which we cannot perpetuate a clearly incorrect application of the law.").

[41] In determining that Public Law 24-272 was invalid, the *Pangelinan v. Gutierrez* court's reasoning was conclusory and cited no authority. The court stated only that: "Public Law 24-272 repealed and reenacted Public Law 2[4]-139. However, Public Law 2[4]-139 was subsequently invalidated by this court in *Gutierrez v. Pangelinan*, 2000 Guam 11. Therefore, we hold that Public Law 24-272 is without legal effect." *Pangelinan*, 2004 Guam 16 ¶ 43.

[42] The 2004 *Pangelinan* decision contradicted a prior Ninth Circuit decision, *Gutierrez v. Pangelinan*, which stated that "[t]he reenacted provisions stand on their own as duly-enacted sections of Public Law 24-272." 276 F.3d 539, 549 (9th Cir. 2002). The 2004 *Pangelinan* decision did not distinguish or otherwise acknowledge the Ninth Circuit's contradictory statement. With the exception of these two earlier decisions related to Guam Public Law 24-272, there is little or no case law addressing the specific situation we face here – where a statute purports to repeal and reenact a law that is subsequently found to be *void ab initio*.

[43] The Agencies argue that any invalid provision of the law can be severed pursuant to the law's severability provision. Public Law 24-272 provides that:

> If any provision of this Law or its application to any person or circumstance is found to be invalid or contrary to law, such invalidity shall not affect other provisions or applications of this Law which can be given effect without the invalid provisions or application, and to this end the provisions of this Law are severable.

P.L. 24-272:2. The presence of such a severability clause "'creates a presumption that [the Legislature] did not intend for the validity of a statute to depend on the survival of [invalid] provisions,'" but that presumption "'is not conclusive.'" *In re Interpretation & Application of Sections 6 & 9 of the Organic Act of Guam*, 2004 Guam 10 ¶ 54 (quoting *W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1097 (9th Cir. 2001)). Unless it is evident that the legislature would not have enacted those provisions that are within its power, independent of the invalid provisions, the invalid portions may be severed. *Id.* (citing *Champlin Refining Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932)). Our test for whether an invalid provision may be severed from a statute is: (1) whether, if the invalid provisions are removed, the remaining provisions will be fully operative as law; and (2) if so, whether the legislative intent in enacting the public law can be accomplished through the remaining provisions. *Id.*

[44] We find that the first part of the test is satisfied. If the provision purporting to repeal and reenact Public Law 24-139 is removed, the remaining provisions will be fully operative as law. *See* P.L. 24-272 ("Be it enacted by the People of Guam: . . . Title 10 of the Guam Code Annotated is hereby repealed and reenacted to read as follows: . . . .").

[45] Under the second part of the test, we begin by examining the legislative intent in enacting the law. Taxpayers contend that the Legislature's "single purpose" in passing Public Law 24-272 was to repeal and reenact sections 2 through 16 of Public Law 24-139 and not to revise the Guam Code Annotated. Appellants' Opening Supplemental Brief, pp. 7, 10 (Aug. 2, 2007). The Agencies respond that the Legislative purpose in passing Public Law 24-272 was to make substantive changes to the laws of Guam, not just to repeal and reenact an existing public law.

[46] According to one treatise, when a law is repealed and reenacted, courts often assume that the legislature did not intend a repeal even if the legislature said that it did:

> In the situation in which there is a simultaneous repeal and re-enactment of a statute the courts seldom refer to [legislative] intent; and when they do refer to intent they say in effect that the fact that the legislature has re-enacted the statute which it purported to repeal indicates that it did not intend a true repeal, but intended that the original statute should continue in force without interruption.

M.L. Cross, 77 A.L.R.2d 336 § 6 (collecting cases); *see also In re Shaver*, 140 F.2d 180, 181 (7th Cir. 1944) (stating that repealed and reenacted statutes are regarded as having been continuously in force); *Haines v. Dept. of Employment*, 270 P.2d 72, 73 (Cal. Dist. Ct. App. 1954) ("[T]he reenactment neutralizes the repeal, and the provisions of the repealed act which are thus reenacted continue in force without interruption[.]").[7]

[47] Here, Public Law 24-272 does not include a section regarding legislative findings or legislative intent. Section 1 of the law simply states that "Sections 2 through 16 of Public Law No. 24-139 are hereby repealed and reenacted to read as follows . . . ." P.L. 24-272. In turn, the revised sections 2 through 16 state that they repeal and reenact sections of the Guam Code Annotated. Even though the law states that it repeals a prior public law, the legislative intent of the law was not necessarily a repeal. 77 A.L.R.2d 336 § 6. Rather, based on the text of the law, it appears that the underlying legislative intent was to make substantive changes to the Guam Code Annotated to ensure

[7] Further, a legislature's pronouncement that a law repealed an earlier law is not dispositive, but is a judicial question. *Gill v. Goldfield Consol. Mines Co.*, 176 P. 784, 786 (Nev. 1918) ("Whether a statute was repealed by a later one is a judicial, not a legislative, question."); *Merlo v. Johnston City & Big Muddy Coal & Mining Co.*, 258 Ill. 328, 334 (1913) ("Whether a given act of the Legislature repeals a former one, and, if so, to what extent, is a judicial question, and a legislative declaration that an act is or is not repealed is only a declaration of the Legislature upon a judicial question, which is not binding on the courts.").

that an appropriate legislative scheme was in place governing the disposal of solid waste on Guam.[8] The law's failure to repeal 24-139 does not interfere with the solid waste disposal scheme set up by the legislature. Although there is some ambiguity, we cannot say that "'it is evident that the legislature would not have enacted [the valid] provisions . . . independently of . . . the invalid part.'" *In re Interpretation & Application of Sections 6 & 9*, 2004 Guam 10 ¶ 54. We therefore overrule *Pangelinan*, 2004 Guam 16 ¶ 43, as being "unsound in principle," and find that the invalid portion of 24-272 can be severed. *Allied Signal*, 504 U.S. at 783; *see also Villapando*, 1999 Guam 31 ¶ 29 ("[This] court has the ability to overturn precedent."). The remaining portions of Public Law 24-272 are valid. *See In re Interpretation & Application of Sections 6 & 9*, 2004 Guam 10 ¶ 54.[9]

[48] Because Public Law 24-272 is valid, the Agencies' had the authority to prepare and adopt an interim Waste Management Plan and a final Waste Management Plan consistent with the provisions of that law. P.L. 24-272:4 (codified at 10 GCA § 51103). Plaintiffs claims have not raised "serious questions" because they have less than a "fair chance" of success on the merits, and, regardless of the balance of harms, a preliminary injunction is therefore inappropriate. *Marcos*, 862 F.2d at 1362.

V.

[49] The Agencies were explicitly authorized to identify potential sites for the landfill, and were authorized to exclude Guatali and Malaa for any legitimate reason. Their use of slope as a criterion for the exclusion of Malaa was not an abuse of discretion. We therefore **AFFIRM** the lower court's denial of a preliminary injunction.

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[8] Public Law 24-272 made several minor revisions to 24-139, presumably to improve upon the prior legislation. *See* Appellees' Supplemental Brief, pp. 8-9 (Aug. 16, 2007) (discussing differences between P.L. 24-139 and 24-272).

[9] In a somewhat analogous situation, when a court determines that a prior law was not repealed by a repeal and reenactment (because it remains continuously in force), the subsequent legislation purporting to reenact it remains valid. *See In re Shaver*, 140 F.2d at 18; *Haines*, 270 P.2d at 73. Similarly, even though Public Law 24-272 did not repeal Public Law 24-139, Public Law 24-272 should remain valid. Moreover, invalidating the entire law makes little policy sense. The express repeal and reenactment of a dubious law can provide greater certainty regarding the status of the questionable law, but only if the reenactment is considered valid regardless of the validity of the prior law.

[50] In addition, we **DECLINE** to exercise our discretionary jurisdiction over the appeal of the motion for reconsideration, and the underlying order upholding the Agencies' exclusion of Guatali.

Original Signed By: Robert J. Torres

ROBERT J. TORRES
Associate Justice

Original Signed By: F. Philip Carbullido

F. PHILIP CARBULLIDO
Chief Justice