



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY- FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

H.B. NO. 357, RELATING TO STATUTE OF LIMITATIONS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, February 9, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325, Via Videoconference

TESTIFIER(S): Clare E. Connors, Attorney General, or
David D. Day, Deputy Attorney General

Chair Nakashima and Members of the Committee:

The Department of the Attorney General (Department) supports the purpose of this bill and offers the following comments.

The purpose of this bill is to amend chapter 657, Hawaii Revised Statutes (HRS), to include a new section that would expressly provide that all actions against the State for a regulatory taking, including those brought under section 20 of article I of the Constitution of the State of Hawaii, shall be subject to a two-year statute of limitations.

Section 20 of article I of the Constitution of the State of Hawaii provides: "Private property shall not be taken or damaged for public use without just compensation." Although traditionally associated with eminent domain, where the government literally takes ownership of property, courts have expanded the claim by recognizing the doctrine of "inverse condemnation," which allows suits for compensation alleging that a government action has taken private property by virtue of physical occupation of the property or by a regulation that severely diminishes the value of the property.

Monetary claims against the State—whether based upon contract, statute, rule, a tort theory, or breach of fiduciary duty—are subject to a two-year statute of limitations. See, e.g., sections 661-5, 662-4, and 673-10, HRS. However, the Hawaii Supreme Court ruled in DW Aina Le'a Development, LLC v. State of Hawai'i Land Use Comm'n, SCCQ-19-0000156, 2020 WL 7394265 (Haw. Dec. 17, 2020), that the statute of

limitations for a regulatory-taking claim is six years pursuant to the “catch all” statute of limitations of section 657-1(4), HRS. This bill would establish that regulatory-taking claims are subject to the same two-year statute of limitations as other monetary claims against the State.

Frequently, it is not immediately obvious to the government that a regulation may have serious adverse effects upon private property owners. Hawaii has unique legal structures for land-use and permitting, including conservation district permitting, coastal zone management, shoreline setbacks, historic preservation laws, the Water Code, and a robust trust doctrine, all of which are intended to protect the ‘aina and its resources and natural beauty. Because regulations within these legal structures could potentially limit the development of property, the State could be subject to a variety of regulatory-taking claims.

This bill also would help executive departments, as well as the Legislature, address the COVID-19 pandemic. Laws and regulations that limit business activity or that limit the rights of landlords for the benefit of public health could potentially be subject to suit. Because Hawaii case law on regulatory-taking claims is very limited, the likelihood of the State being found liable for a regulatory-taking claim is difficult to predict, given the myriad different factual situations. This in turn makes the State’s potential financial exposure very high.

When a regulatory-taking claim is asserted, the State and its agencies can take timely action to mitigate damages and prevent further undue interference with private property rights. Without a two-year limit on those claims, the State’s potential damages increase substantially. A two-year statute of limitations allows the State to timely consider a claim and determine the best course of action to take without allowing potential damages to continue and increase. And, because regulatory-taking claims usually allege substantial interference with real property and development rights, and routinely seek many millions of dollars, the statute of limitations should be limited to two years to prevent the State from unnecessarily accruing increased financial liability.

While the Department fully supports the purpose of this bill, the Department believes that this bill could be strengthened by amending the phrases “regulatory

takings” and “a regulatory taking” on page 1, lines 2-3 and 11, and on page 2, lines 4-5, with the phrases “inverse condemnation” or “an inverse condemnation,” respectively—these amendments would make clear that all species of inverse condemnation (i.e., physical and regulatory) are subject to a two-year statute of limitations, not just regulatory takings. The same reasons justifying a two-year statute of limitations apply to physical inverse-condemnation claims, as the State can be subject to high financial exposure for physical takings but can take remedial measures to limit liability, if notified timely.

We respectfully request that the Committee pass this bill with the amendments referenced herein.