



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
KA 'OIHANA O KA LOIO KUHINA  
THIRTY-SECOND LEGISLATURE, 2024**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2078, RELATING TO AFFORDABLE HOUSING.

**BEFORE THE:**

SENATE COMMITTEE ON HOUSING

**DATE:** Thursday, February 8, 2024      **TIME:** 1:15 p.m.

**LOCATION:** State Capitol, Room 225 and Videoconference

**TESTIFIER(S):** Anne E. Lopez, Attorney General, or  
Roy H. Kwon, Deputy Attorney General

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Chair Chang and Members of the Committee:

The Department of the Attorney General provides the following comments with suggested amendments.

The purpose of this bill is to prohibit property owners from bringing private causes of action for trespasses that occur when the horizontal arm of a construction tower crane (known as a "jib"), or other such machinery, "temporarily" intrudes into the airspace above a neighboring landowner's premises. The bill only prohibits such private causes of action if the intrusion happens "during construction, repair, or maintenance of affordable housing."

In light of this purpose, we respectfully advise that the bill should be amended to: (1) only allow for operation of the law when the intrusion occurs above a clearly designated height, and (2) provide a definition for "temporarily."

The takings clause of U.S. Const. Amend. V, made applicable to the states through U.S. Const. Amend. XIV, § 1, prohibits the government from taking private property for public use without providing just compensation.

Cedar Point Nursery v. Hassid, 594 U.S. ----, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021), struck down a California regulation that granted labor organizations a limited "right to take access" onto an agricultural employer's property in order to solicit support for unionization. The court ruled this regulation was a *per se* physical taking because it appropriated the property owner's right to exclude third parties from their land.

In United States v. Causby, 328 U.S. 256 (1946), military planes flying in the airspace as low as 83 feet above the farm of Thomas Lee Causby, was held to be a taking requiring just compensation. Pursuant to this ruling, courts have found trespasses for intrusions that occurred in the airspace between the ground and up to tree height. These cases are instructive.

To comply with these decisions and ensure that the regulation in this bill does not constitute a taking, first, we suggest that the proposed law only operate when the intrusion occurs at an elevated height. This can be accomplished by including a condition that states that the law “does not apply to intrusions that occur below \_\_\_\_\_ feet/meters” and that in such cases, normal procedures apply.

Second, because projects can take days, weeks, months or years, we recommend that the term “temporarily” be defined and that such definition include some type of upper limit such as “‘*Temporarily*’ means a period no longer than \_\_\_\_\_.” Providing clear guidelines can reduce the number of challenges brought and can also prevent the courts from having to define the term on their own or from defining the term in a way that frustrates the purpose of the law.

Thank you for the opportunity to submit our comments and suggested amendments on this bill.

**LATE**



**HAWAII STATE SENATE  
COMMITTEE ON HOUSING  
Conference Room 225 & Videoconference  
State Capitol  
1:15 PM**

February 8, 2024

Subject: HB 2078 - RELATING TO AFFORDABLE HOUSING

Chair Chang, Vice-Chair Hashimoto, and members of the Committee:

My name is Max Lindsey, Government Relations Committee Chair of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii. Our members build the communities we all call home.

SB 2078 proposes to permit a contractor, developer, or owner of affordable housing to employ a construction crane or other machinery that temporarily intrudes into a neighboring landowner's airspace, under certain conditions.

BIA Hawaii is in **support** of SB 2078, as these types of exemptions are required as we build more affordable housing in existing, built-up communities and neighborhoods. Construction of any kind will have temporary inconveniences to surrounding neighborhoods, and as such, adjacent property owners need to exercise a certain level of cooperation if we are to build our way out of our affordable housing crisis.

We appreciate the opportunity to provide our comments on this matter.