SCCQ-19-0000156

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

DW AINA LEA DEVELOPMENT, LLC,

Plaintiff-Appellant,

v.

STATE OF HAWAI'I LAND USE COMMISSION; STATE OF HAWAI'I; DOES, GOVERNMENTAL UNITS, 1-10; STATE OF HAWAI'I

Defendants-Appellees.

D.C. NO. 1:17-CV-00113-SOM-RLP

ORDER CERTIFYING QUESTION TO THE SUPREME COURT OF HAWAI'I [WHAT IS THE APPLICABLE STATUTE OF LIMITATIONS FOR A CLAIM AGAINST THE STATE OF HAWAI'I ALLEGING AN UNLAWFUL TAKING OF "[P]RIVATE] PROPERTY . . . FOR PUBLIC USE WITHOUT JUST COMPENSATION," HAW. CONST. ART.I, § 20?]

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
The Honorable Richard C. Tallman
The Honorable Jay S. Bybee
The Honorable N. Randy Smith

DEFENDANTS-APPELLEES' RESPONSE TO BRIEF OF AMICUS CURIAE OWNERS' COUNSEL OF AMERICA

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DEFENDANTS-APPELLEES' RESPONSE TO BRIEF OF AMICUS CURIAE OWNERS' COUNSEL OF AMERICA

I. INTRODUCTION

Amicus Owners' Counsel of America (OCA) asserts that the answer to the question certified by the Ninth Circuit Court of Appeals[1] is that the statute of limitations applicable to inverse condemnation claims is the twenty-year period required to establish a claim for adverse possession. This is an argument that has not previously been raised or briefed by any party at any stage in this lawsuit, and this Court should decline to adopt a theory based solely on amicus arguments. In any event, OCA is wrong. Inverse condemnation and adverse possession claims are simply not analogous.[2] They require completely different analyses, have different purposes, and the policies underlying the lengthy twenty-year period necessary to establish adverse possession simply do not exist in takings cases. This Court should reject OCA's arguments.

II. ARGUMENT

A. This Court Should Decline to Adopt a Position Not Taken by Any Party

As an initial matter, no party to this case – neither the State[3] nor DW Aina Le'a – has taken the position at any point during this case, before any court, that the applicable statute of limitations to a taking claim brought pursuant to article I, section 20 of the Hawai'i Constitution

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[1] "What is the applicable statute of limitations for a claim against the State of Hawai'i alleging an unlawful taking of '[p]rivate property . . . for public use without just compensation,' Haw. Const. art. I, § 20?" Order Certifying Question to the Supreme Court of Hawai'i, Dkt. 1:1.

[2] Lest there be any doubt, regardless of the identity of the adverse possessor, when a party obtains title through adverse possession, this is *not* a "taking." In the adverse possession context, "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation." *State, ex rel. A.A.A. Investments v. City of Columbus*, 478 N.E.2d 773, 775 (Ohio 1985) (quoting *Texaco v. Short*, 454 U.S. 516, 530 (1982)).

[3] Defendant-Appellees State of Hawai'i Land Use Commission and the State of Hawai'i are collectively referred to as "the State."

is the Hawai‘i statute of limitations for adverse possession. This is important because "[a]mici cannot insert new arguments, not made by a party, into a case." *Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458, 467 (1st Cir. 2009) (citing *Pharm. Research & Mfrs. of Am. v. Concannon,* 249 F.3d 66, 74 n. 5 (1st Cir. 2001)); *In re Alappat*, 33 F.3d 1526, 1536 (Fed. Cir. 1994) (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56 n. 2 (1981) ("[A]micus may not rely on new arguments not presented below.")); *Christian v. United States*, 337 F.3d 1338, 1345 (Fed. Cir. 2003), *decision modified and remanded*, 60 Fed. Cl. 550 (2004) ("Since none of the parties has made or adopted either [of amici's] argument[s], we decline to consider them.").

At minimum, this Court should be very wary of adopting a position that neither party has advocated for, because amici do not have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *McDermott v. Ige*, 135 Hawai‘i 275, 284, 349 P.3d 382, 391 (2015), *abrogated on other grounds by Tax Foundation of Hawai‘i v. State*, 144 Hawai‘i 175, 439 P.3d 127 (2019) (discussing the importance of proper standing and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In any event, as explained below, OCA's arguments are without merit.

B. Inverse Condemnation Claims are Subject to Limitations Periods

OCA suggests that there is no statute of limitations at all for takings claims brought pursuant to article I, section 20 of the Hawai‘i Constitution. Amicus Brief at 9. This proposition finds no support either in Hawai‘i law or in decisions from other jurisdictions.

Indeed, "[i]n multiple states across the country, whether specifically defined or grouped with general code provisions, '[s]tatutes of limitation generally apply to inverse condemnation claims even though they involve an issue of constitutional magnitude.'" *City of Tupelo v.*

O'Callaghan, 208 So.3d 556, 567 (Miss. 2017) (quoting *Wadsworth v. Dep't of Transp.*, 915 P.2d 1, 3 (Idaho 1996)); *see also* 27 Am. Jur. 2d Eminent Domain § 731. And while the State acknowledges that courts in other states have adopted a variety of different approaches to statutes of limitations for takings claims, OCA has not cited any case where a court addressing the issue has held that no statute of limitations at all applies.

Moreover, OCA's attempt to draw a parallel between eminent domain proceedings and inverse condemnation actions to suggest that no statute of limitations applies, Amicus Brief at 9, n.21, is inapt and makes little sense. Of course, there is no statute of limitations for eminent domain proceedings because there is no event that "accrues" in the same way a cause of action accrues. In other words, in the eminent domain context, there is no event that would start the statute of limitations clock running; instead, whenever it becomes necessary for a government entity to condemn property for a public purpose, it simply initiates a condemnation proceeding.

OCA attempts to get around this logical hurdle by asserting that "[t]he government chooses if and most importantly *when* it institutes a condemnation lawsuit . . . ." *Id.* (emphasis in original). That is true, but in eminent domain proceedings, the government may not "take" the property until *after* it has filed a complaint to initiate eminent domain proceedings, the court has issued an order permitting the government to take possession, and the government has paid to the court the estimated just compensation sum. *See* HRS §§ 101-28, -29, -30. Thus, in eminent domain proceedings, there is no "period" to which a statute of limitations could apply. If, conversely, the government acts in such a way as to "take" private property *without* initiating an eminent domain proceeding, then "the burden shifts to the individual to bring an action to compel condemnation, known as 'inverse condemnation.'" *Klumpp v. Borough of Avalon*, 997 A.2d 967, 976 (N.J. 2010). It is only in those circumstances that the statute of limitations

becomes applicable, *i.e.*, the individual must bring the inverse condemnation action within the applicable limitations period.

In any event, in addition to the procedural differences between eminent domain and inverse condemnation cases, the substance of the cases is also very different:

> While both [eminent domain and inverse condemnation] claims rest on the same constitutional guarantee against governmental taking of property without just compensation, and both ultimately result in the same remedy -- just compensation -- a claim of regulatory taking involves a preliminary (albeit significant and complex) question whether a taking has occurred at all. It is that determination of liability, based on the multifactored *Penn Central* test we have discussed, that is entirely different in kind from any question undertaken in a traditional direct condemnation action.

Smyth v. Conservation Commission of Falmouth, 119 N.E.3d 1188 (Mass. App. 2019) (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 712-13 (1999)).

Thus, the lack of a "statute of limitations" for eminent domain proceedings is not a basis for holding that there is no statute of limitations for inverse condemnation claims.

C. The Twenty-Year Statute of Limitations for Adverse Possession Does Not Apply to Inverse Condemnation Claims

i. Adverse possession claims are not analogous to inverse condemnation claims

Fundamental differences between adverse possession claims and inverse condemnation claims make the application of the same statute of limitations inappropriate. In Hawai‘i, "[i]n order to establish title to real property by adverse possession, a claimant 'must bear the burden of proving by clear and positive proof each element of actual, open, notorious, hostile, continuous [,] and exclusive possession for the [twenty-year] statutory period.'" *Wailuku Agribusiness Co. v. Ah Sam*, 114 Hawai‘i 24, 33, 155 P.3d 1125, 1134 (2007) (quoting *Petran v. Allencastre*, 91 Hawai‘i 545, 556–57, 985 P.2d 1112, 1123–24 (App. 1999)); *see also Booth v. Beckley*, 11 Haw. 518, 523 (1898) ("When a person enters land under color of title or under a mistake as to

description and holds adversely continuously, openly and notoriously for the statutory period, a title by limitation may be acquired by him."). The statute of limitations for adverse possession in Hawai‘i is twenty years. HRS § 657-31; HRS § 669-1(b).

The nature of adverse possession claims and the elements necessary to establish adverse possession make the statutory period for such claims inapposite here, as courts in other jurisdictions have noted. For example, when rejecting the adverse possession statutory period for inverse condemnation claims, the Supreme Court of Michigan stated that in Michigan (like in Hawai‘i), "adverse possession must be actual, visible, open, notorious, exclusive, continuous, under cover of claim of right and uninterrupted for the statutory period." *Hart v. City of Detroit*, 331 N.W.2d 438, 497 (Mich. 1982). "In contrast, a party who initiates an inverse condemnation action usually concedes that the condemnor has taken the property indirectly by its actions preceding formal institution of condemnation proceedings. It would be unusual for the condemnor's acts to be of such a degree as to satisfy the strict test for adverse possession." *Id.* Moreover, as the Court further explained, "the plaintiff in an inverse condemnation suit does not ordinarily seek repossession of his property, but rather, just compensation for the value of the property taken." *Id.* That is very different to an adverse possession case, where the action is one for recovery of property, and "where, if title to the property is secured by the adverse possessor, the original owner is not entitled to payment." *Id.*

Moreover, the twenty-year statutory period in HRS §669-1(b) that is required before title can pass via adverse possession does not even apply to claims against the State because in Hawai‘i, "adverse possession does not apply against the sovereign." *Application of Kamakana*, 58 Haw. 632, 641, 574 P.2d 1346, 1351 (1978); see also *State v. Zimring*, 52 Haw. 477, 478, 479 P.2d 205, 206 (1970) ("[T]here cannot be adverse possession against the sovereign.");

Application of Kelley, 50 Haw. 567, 580, 445 P.2d 538, 547 (1968) ("There is no adverse possession against the sovereign, in this case the Government, unless expressly provided for by statute."); *Public Access Shoreline Hawai'i by Rothstein v. Hawai'i County Planning Com'n by Fujimoto*, 79 Hawai'i 425, 450 n.42, 903 P.2d 1246, 1271 n.42 (1995) ("The sovereign power to enforce the usufruct of lands may not be lost through inaction, because 'there cannot be adverse possession against the sovereign.'") (quoting *Zimring*, 52 Haw. at 478, 479 P.2d at 206).

These differences (in addition to the many other reasons discussed in this brief) are why this Court should decline to adopt the reasoning in the cases cited by OCA wherein the courts applied the statutes of limitations for adverse possession claims.[4] In *White Pine Lumber Co. v. Reno*, 801 P.2d 1370 (Nev. 1990), for example, the Supreme Court of Nevada applied the adverse possession statutory period to an inverse condemnation claim because "[w]e feel that had the 'taker' in this case been a private party, the applicable limitations period would have been the one for acquiring title by adverse possession." *Id.* at 780. With all due respect to the Nevada Supreme Court, however, the fact that the "taker" in an inverse condemnation claim is *not* a private party but is the government "taking" property for public use is what distinguishes such claims from adverse possession cases.

An adverse possession case is just that – a dispute generally between two private individuals regarding possession and ownership of the property in question. A taking claim, on

[4] It also bears noting that in all the cases OCA cites in which courts adopted the adverse possession statutory period for inverse condemnation claims, the statutory period was shorter than the twenty years under Hawai'i law. *See White Pine Lumber*, 801 P.2d at 1370 (15 years) ; *Frustruck v. City of Fairfax*, 28 Cal. Rptr. 357 (1963) (5 years); *Krambeck v. Gretna*, 254 N.W.2d 691 (Neb. 1977) (10 years); *Hallco Texas, Inc. v. McMullen Cnty.*, 221 S.W.3d 50 (Tex. 2006) (10 years). Although OCA also cited an Illinois case, where the adverse possession period is twenty years, in that case, *Rosenthal v. City of Crystal Lake*, 525 N.E.2d 1176 (Ill. Ct. App. 1988), there was no inverse condemnation claim, but rather an ejectment claim and a claim for mandamus to force the City to initiate eminent domain proceedings.

the other hand, is very different. Unlike an adverse possessor, the "taker" in a takings case – which can only be the government – is not required to adversely possess the property, and it does not need to show it has engaged in "actual, open, notorious, hostile, continuous, and exclusive possession" of the property for any prescribed statutory period. Instead, it merely has to "take" or "damage" private property for public use. Haw. Const. art. I, § 20. As OCA acknowledges, the government is not prohibited from doing this; it is in fact authorized to do so. *See* Amicus Brief at 8 ("to succeed on its takings claim, Aina Lea must concede that the Commission's action was legitimate, because unconstitutional or otherwise illegal government actions cannot be the basis for compensation (property must be taken or damaged for public use)."

Moreover, as long as the "taking" is for a public purpose, the only remedy is just compensation. Injunctive relief is not available. *See Knick v. Township of Scott*, 139 S.Ct. 2162, 2176 (2019) ("As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking."). Simply put, adverse possession is not a taking, and the two situations are not analogous. *See A.A.A. Investments*, 478 N.E.2d at 775 (in adverse possession cases, "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation" (quoting *Texaco*, 454 U.S. at 530)). Given these differences, adverse possession is simply not analogous to inverse condemnation claims.

ii. The policy underlying the long statutory period for adverse possession claims does not apply to inverse condemnation claims

In addition to the claims themselves being very different, the policies and purposes that require such a long statute of limitations for adverse possession claims are simply not present in inverse condemnation actions. Unlike when government "takes" private property for public use pursuant to the takings clause, the doctrine of adverse possession requires a long statutory period

for reasons specific to that doctrine. As noted above, "[i]n order to establish title to real property by adverse possession, a claimant 'must bear the burden of proving by clear and positive proof each element of actual, open, notorious, hostile, continuous [,] and exclusive possession for the statutory period.'" *Wailuku Agribusiness Co*, 114 Hawai'i at 33, 155 P.3d at 1134.

In Hawai'i, the statutory period for adverse possession is twenty years. HRS § 657-31; HRS § 669-1(b). Thus, a property owner of record can bring a claim to recover possession of his or her property against an adverse possessor anytime within twenty years of that possession beginning. Only upon expiration of the twenty-year period does title pass to the adverse possessor (assuming all other elements of adverse possession are met). Plainly, because adverse possession allows one individual to obtain title to property over a prior owner simply by possessing and using the property for a certain period (and unlike in a "taking," without compensation), it makes sense – to protect the original owner's right to intervene and regain possession of his or her property – that the individual claiming adverse possession must prove that he or she has been in adverse possession for a long period of time.

In addition, the primary policy behind the adverse possession doctrine is that the law does not favor property owners who leave land unused and unproductive for *long periods* of time. *See, e.g.*, *Dean v. Goddard*, 56 N.W. 1060, 1062 (Minn. 1893) (noting that transfer of title via adverse possession serves the "public policy demand that our lands should not remain for long periods of time unused, unimproved, and unproductive"); *Buford v. Logue*, 832 So. 2d 594, 601 (Miss. Ct. App. 2002) ("The Mississippi legislature enacted the adverse possession statute so as to resolve the problem of inattentive landowners who ignore their property over a long period of time"); *Roy v. Woodstock Cmty. Tr., Inc.*, 94 A.3d 530, 550 (Vt. 2014) ("This is the principle underlying the doctrine of adverse possession: That a landowner so inattentive as to permit

occupation of its land for fifteen years must accept the subsequent loss of title.") (quoting *N.A.S. Holdings, Inc. v. Pafundi*, 736 A.2d 780, 788 (Vt. 1999)). And that is why the statutory period for adverse possession in the vast majority of states is at least ten years.[5]

In short, the nature of the adverse possession doctrine and the policy behind the doctrine demand that the period be relatively long. Those same policy concerns are not present, however, when the government "takes" private property for a public purpose pursuant to the takings clause. In fact, the opposite is true. As the Supreme Court of New Jersey has stated:

> [I]n our view, the thirty-year period applicable to private takings of another's real property does not fit with the interests involved when government takes private real property. The government's ability to appropriate private property is tied to the requirement that it put the property to public use. *See N.J. Const.* art. I, ¶ 20.[6] That purpose would be undermined if a long period of uncertainty were allowed in respect of property ownership, assuming that the State has not commenced condemnation proceedings under the [Eminent Domain Act].

Klumpp v. Borough of Avalon, 997 A.2d 967, 977–78 (N.J. 2010).

In addition, as the Court in *Klumpp* went on to explain, "the limited time frame for pursuing a [just] compensation claim advances the public interest in providing fair compensation

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[5] *See, e.g.*, Alaska Stat. § 09.10.030 (Alaska, 10 years); Ariz. Rev. Stat. Ann. § 12-526 (Arizona, 10 years); D.C. Code Ann. § 12-301(1) (District of Columbia, 15 years); Del. Code Ann. Tit. 10 § 7901 (Delaware, 20 years); Ga. Code Ann. § 44-5-163 (Georgia, 20 years); 735 Ill. Comp. Stat. Ann. 5/13-101 (Illinois, 20 years); Kan. Stat. Ann. § 60-503 (Kansas, 15 years); Cts. & Jud. Proc. § 5-103 (Maryland, 20 years); Minn. Stat. Ann. § 541.02 (Minnesota, 15 years); N.H. Rev. Stat. Ann. § 508:2 (New Hampshire, 20 years); Ohio Rev. Code Ann. § 2305.04 (Ohio, 21 years); Or. Rev. Stat. § 12.050 (Oregon, 10 years); S.D. Codified Laws Ann. § 15-3-1 (South Dakota, 20 years); Vt. Stat. Ann. tit. 12, §§ 501, 502 (Vermont, 15 years); Va. Code Ann. § 8.01-236 (Virginia, 15 years); Wash. Rev. Code Ann. § 4.16.020 (Washington, 10 years). In Hawai'i, the statutory period for adverse possession was ten years until 1973, when the Legislature amended it to twenty years. *See* 1973 Haw. Sess. L. Act. 26, § 4 at 31-32; *Wailuku Agribusiness Co.*, 114 Haw. at 33 n.19, 155 P.3d at 1134 n.19.

[6] Article I, section 20 of the New Jersey Constitution provides in relevant part that "[p]rivate property shall not be taken for public use without just compensation." The only difference between that and article I, section 20 of the Hawai'i Constitution is that the Hawai'i Constitution's taking clause is slightly broader, providing that "[p]rivate property shall not be taken ***or damaged*** for public use without just compensation." (Emphasis added).

for the government's taking. The closer in time the landowner commences the action, the more precise the valuation, particularly when improvements by the government may be forthcoming and would alter the condition of the property at the time of the taking." *Id.* at 978.

In short, inverse condemnation and adverse possession are very different claims, are founded in different law, and have very different underlying purposes. OCA's assertion that "an owner must let the prescription period lapse (here, twenty years) without an assertion of her rights before she is deemed to have lost her property rights," Amicus Brief at 2-3, is true for adverse possession claims only. There are good reasons for that rule under the adverse possession doctrine. The same is not true where the government "takes" private property for public use. The analogy is inapt, and this Court should reject it.

III. CONCLUSION

For all the reasons stated above and in the State's answering brief filed on September 13, 2019, this Court should reject the arguments presented in OCA's amicus brief, and hold that the applicable statute of limitations to inverse condemnation claims is two years pursuant to HRS § 661-5, or, in the alternative, HRS § 657-7.

DATED: Honolulu, Hawai'i, October 24, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing has been served by electronic service through the Judicial Electronic Filing System (JEFS) or by US Mail where noted upon the following:

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