



**COMMENTS OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

S.B. NO. 2676, RELATING TO THE ALOHA TOWER DEVELOPMENT CORPORATION.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Thursday, February 18, 2010 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN COMMENTS ONLY. For more information, call Gregg Kinkley, Deputy Attorney General, at 586-1180.

Chair Kim and Members of the Committee:

The Department of the Attorney General supports this bill.

In October of 2004, Aloha Tower Development Corporation ("ATDC") entered into a Development Agreement with Kenneth H. Hughes, Inc., a Texas developer, that among other things contemplated the construction of a mixed-use (condo/retail) building on Piers 5 and 6 in the Aloha Tower development area. After two years of unsuccessful attempts to get the proposed development off the ground, a more modest plan was proposed by Hughes in 2006, under the provisions of the 2004 Development Agreement. This plan also failed, as the parties could not agree on essential terms of the deal. Hughes demanded arbitration under the 2004 Development Agreement.

In the arbitration proceedings, Hughes demanded damages on various theories and amounts, up to approximately \$23 million. After 21 days of hearings held from May 2008 through April 2009, the arbitrator awarded Hughes damages for "lost investment time" in the amount of \$741,544.59, costs incurred of \$162,047.90 (together, \$903,592.49 in "reliance" damages), pre-award interest of \$271,755.44, and post-award interest at the rate of 10 percent per annum. In addition, in the Final Arbitration

Award on June 2, 2009, the Arbitrator awarded Hughes attorneys' fees in the amount of \$361,804.07, plus costs of the arbitration proceedings in the amount of \$62,899.73. The total award thus came to just over \$1,600,000, with interest on that amount at 10 percent per annum until the sum is paid.

Hughes demanded payment of the entire award immediately, and filed a petition in U.S. District Court to confirm the arbitration award. ATDC opposed confirmation and moved to vacate the award, particularly because of rulings made by the arbitrator in awarding pre- and post-award interest, which was an issue never presented to the arbitrator.

Judge David Ezra issued an order confirming the arbitration award in full and dismissing ATDC's motions to vacate or modify the award. Because of the potential impact of a ruling regarding sovereign immunity, ATDC filed an appeal with the U.S. Ninth Circuit Court of Appeals. In the meantime, Hughes obtained a garnishment order from the U.S. District Court, effectively impounding approximately \$2,000,000 in state funds on deposit at First Hawaiian Bank because the garnishment laws provide for withholding 120 percent of the amount due at the time of garnishment.

At the mandate of the U.S. District Court, settlement efforts were conducted with the assistance of a Magistrate Judge. In discussions and meetings over several days, an agreement was reached to resolve the entire dispute for the total sum of \$1,550,000, in total and complete payment of all amounts due or claimed by Hughes, including any interest or attorneys' fees. The stipulated judgment provides for ATDC to use its best efforts to promptly seek an appropriation to pay the settlement sum, and further provides for vacating of the court's order confirming the arbitration award (and thus

vacating the ruling that sovereign immunity was waived) and for dismissal of the Ninth Circuit appeal. The court also retained jurisdiction to oversee the settlement, and left the garnishment order in place pending payment of the settlement amount.

Under the circumstances, the stipulated judgment with Hughes represents a significant savings, and avoids future harmful decisions against the State if the arbitrator's rulings (confirmed by the court) remained as legal precedent. Interest on the arbitration award would by now have increased the arbitration award of \$1,600,000 by nearly \$107,000. Further, the adverse ruling as to sovereign immunity has been vacated and an appeal on that issue is no longer needed.

ATDC filed a motion to quash the garnishment summons and stay enforcement of the judgment, arguing that the state legislative appropriations process should be allowed to proceed. Judge Ezra denied the motion to quash and barred enforcement of the judgment unless payment of the Stipulated Judgment is not made by May 7, 2010.

Given the timing placed upon payment by the Court, we strongly urge approval of S.B. No. 2676 in order to fund the settlement of this dispute before May 7, 2010.