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Special Report: Law firms on construction, real estate legal insights

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For law firms in Hawaii during the coronavirus pandemic, it's more or less business as usual – most firms are continuing to assist clients although attorneys are working remotely.

Terry O'Toole, director of Starn O'Toole Marcus & Fisher, told Pacific Business News that on the construction side, it's hard to shut a project down – especially the big projects underway in Kakaako.

"From an economic standpoint, the ripple effect is huge ... on the other hand, the real estate market is dead in the water with the lack of financing," O'Toole said.

He did note an upside to COVID-19, which is that "we're all going to learn how to communicate more effectively without being face-to-face."

PBN checked in with other local law firms specializing in real estate and construction law to see how their firm is adjusting to the stay-at-home orders and what their clients need to know in regards to COVID-19.

Kimi Ide-Foster

Attorney, Chun Kerr



TINA YUEN PBN

Crane and construction activity in the Kakaako to downtown area

What key issues do property owners and landlords need to consider as they plan to confront the pandemic? The most obvious answer is whether tenants, in the face of increasingly strict governmental directives, will be able to meet their rental obligations, and what rights and remedies landlords have if they cannot. On the flip side, landlords' ability to make mortgage loan payments may be affected due to interruptions in the normal cash flow from tenants.

Landlords should be prepared for reduced cash flow and tenants seeking reduced or abated rent or even seeking to get out of the lease entirely. Even if your tenants have not yet raised it, I would advise landlords to proactively seek legal counsel and reach out to their tenants on this issue. There is no clear answer on how these claims will play out in the courts, nor will there be any forthcoming anytime soon as the pandemic has greatly slowed down all judicial actions.

How is your firm communicating with your clients while social distancing?

Chun Kerr LLP already had robust remote capabilities prior to the COVID-19 pandemic, so accessing our files and e-mail system is never a problem. Many of us have or will soon have access to our office phone lines in our homes, and of course there is Zoom, FaceTime, and other similar virtual meeting spaces. For us, it's more or less business as usual. We know that the pandemic is creating new challenges and a significant amount of uncertainty, so we work hard to ensure our clients enjoy the same level of communication and accessibility as they would any other time.

What percentage of your staff/attorneys are working remotely?

100% – All attorneys and staff are working remotely, although we still require some contact with the office, such as to retrieve deliveries on a daily basis. When access to the office is necessary, we have implemented strict social distancing protocols to limit the possibility of any community transmission. We have also engaged cleaners to thoroughly clean and disinfect our offices to eliminate any potential contamination during this period.

Is your firm providing advisories to clients to address evolving legal considerations involving coronavirus?

Stay responsive, be flexible, and keep on top of the news. Understand that standard operating procedures will need to change and evolve. There are no stock answers

as the situation continues to develop and many issues that crop up will be, to some extent, novel and untested.

Gregory Kugle

Director, Damon Key Leong Kupchak Hastert

What key issues do property owners and landlords need to consider as they plan to confront the pandemic?

Commercial landlords are being asked for rent deferrals or reductions by tenants whose businesses have either been shuttered as nonessential by the government proclamations, or those who have seen their customer base dwindle as travel and social distancing restrictions kick in. Landlords and tenants are reviewing their leases and other contracts for force majeure clauses and other terms that may govern when performance by either party is no longer possible or feasible. Another area of concern for those businesses that can remain open is how to create and maintain a work environment that is safe for employees and customers. Many landlords and property owners are also reviewing their insurance coverages for business interruption coverage, or coverage for claims by employees or customers who contract COVID-19 while at their property.

How is your firm communicating with your clients while social distancing? Damon Key has prohibited all in-office meetings with clients, except for the execution of certain legal documents which must be notarized or witnessed. We continue to conduct normal business operations through telephone and Zoom conferencing and e-mail.

Vicki Y. Nakahara

Partner, Carlsmith Ball

What key issues do property owners and landlords need to consider as they plan to confront the pandemic?

In the commercial context, landlords may not receive rent for a number of months from certain tenants. Or, landlords may receive notices from tenants of their inability to pay rent, for a variety of reasons, all of which are related to the COVID-19 situation. Worse yet, some businesses may close down for good. The force majeure

clause in contracts and leases will become a focus of how such situations can be addressed. Landlords will need to consider whether to take action against the tenants or to wait it out until the economy improves.

What percentage of your staff/attorneys are working remotely?

As of now, about 80% of our attorneys and about two-thirds of our staff are working primarily remotely. Some of our staff are on a rotation where they alternate coming in with other staff members. However, there are some staff members, such as our IT staff, that are essential to our business and need to be in the office during most of the work day.

Michelle Loudermilk

Partner, Cades Schutte

How is your firm communicating with your clients while social distancing?

As a professional service provider, Cades Schutte continues to operate as permitted by law, and our attorneys and staff are working remotely to the extent possible.

Our secured systems are designed to protect the confidentiality of client information, and essential functions that cannot be performed offsite continue to be handled onsite by a limited number of people. The Cades Schutte main reception desk is staffed, and calls can be directed to any of our offices on Oahu, Maui, Kauai, and Hawaii. In addition, our individual attorneys are readily available directly by phone or email, and their contact information is on our website at cades.com. If remote communication is not feasible for a client, we will arrange an in-person meeting using recommended social distancing protocols, and our conference rooms are cleaned after each meeting.

What percentage of your staff/attorneys are working remotely?

All of our attorneys are equipped to work remotely, and presently about 60% of our attorneys and staff are working remotely at any given time. There are certain valuable employees in our information technology, finance, and administration departments whose work cannot be performed from home. We also have attorneys and staff who work with original documents, some of which may be very old and

delicate, incoming and outgoing postal service and courier mail, and confidential, sealed, or privileged documents that are best kept in our offices. Each attorney's and staff member's circumstance is likely to change with the nature of a particular case or matter at hand, and those who must come to the office are required to practice social distancing.

Ryan Engle

Partner, Bays Lung Rose & Holma

Are there any new or upcoming laws regarding the real estate/construction industries?

Businesses are really struggling with the application of state and county orders designating construction as an essential business but requiring social distancing. Contractors need to keep working, while at the same time protect the health and welfare of their employees. Organizations like the Building Industry Association and General Contractors Association have been providing guidance and developing policies that are important resources. Industry associations will play a big part in establishing the standard of care moving forward.

Leighton Yuen, Partner and Jennifer Chin, Associate

Goodsill, Anderson Quinn & Stifel

What key issues do property owners and landlords need to consider as they plan to confront the pandemic?

COVID-19 affects all segments of the Hawaii economy, particularly hotels and resorts, non-essential retail, and entertainment, including dine-in restaurants and nightclubs. Property owners and landlords need to understand the mounting pressures that their tenants face, particularly those who may not have a large amount of accumulated capital. Besides lost revenues, tenant pressures can include employee retention and payroll, new employment regulations, lost inventory, and bank loans. Landlords face many of the same pressures themselves, especially if they depend on percentage rent revenues. Ideally, landlords and tenants will communicate openly and reasonably regarding the effects that the coronavirus pandemic has on their respective businesses, and it is important that

neither landlords nor tenants rush to make quick or unreasonable decisions that will have long-term effects.

On the development side of things, nothing seems predictable at this point, from supply chains, to the availability of planners, engineers, environmental experts and other key consultants, and the effect that this pandemic will have on lending and financial markets. Developers might best spend their time on strategic planning and formulating options for how to do business during and following COVID-19.

Negotiations can proceed, but all parties need to consider the effect that COVID-19 might have on any projects or transactions.

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