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Restarting safely: Construction under California's shifting shelter-in-place orders

By Tracy Ickes and Alison Torbitt

Since March 22, 2020, the California State Public Health Officer has taken the position that construction is an “essential business” under Governor Gavin Newsom’s shelter-in-place order, but several local governments have issued more restrictive orders affecting construction.

For some municipalities, like the City of San Diego, construction has essentially continued without limitation.

For other localities around the Bay Area, including Alameda, Contra Costa, Marin, San Mateo, San Francisco, and Santa Clara Counties and the City of Berkeley, there are more restrictive orders that generally limit construction unless it is necessary for, among other things, (1) infrastructure, (2) health care directly related to COVID-19, (3) providing non-commercial services to high-risk groups such as the homeless and elderly, or (4) ensuring that residential structures are safe and habitable. These Bay Area orders also allow construction of affordable housing or developments containing at least 10% income-restricted units.

These conflicting orders and exceptions have led to confusion. In an April 7, 2020, Implementation Statement, the City of Oakland interpreted this requirement broadly and stated that the City would allow residential construction “compliant with the City’s affordable housing requirements,” including, but not limited to, projects that pay the Affordable Housing Impact Fee in lieu of constructing affordable housing. A week later, on April 14, 2020, the Alameda County Health Officer objected to this broad interpretation as “inconsistent with both the spirit and the letter of the Order, which prioritizes construction of affordable-housing units over other construction.” The City of Berkeley similarly opined that actual units must be available; contributions to an affordable housing fund will not suffice.

In contrast to these strict interpretations, or maybe in response, other localities are moving to loosen earlier restrictions. As of April 22, 2020, Napa County is allowing all construction if physical distancing protocols are observed. Likewise, San Obispo County is also now allowing all construction to recommence, provided physical distancing and sanitation are observed.

Just as restrictions on what construction is allowed vary across the state, the steps required to reinstate construction activities are likely to vary county-by-county, and even city-by-city. For example, the City of Los Angeles Department of Building Services issued detailed safety guidance for construction sites, which may provide a template for other cities. Among other things, Los Angeles' guidance requires a designated COVID-19 supervisor on site, posting the Public Notice of Social Distancing Protocol, and ensuring six-foot separation on site. Observing this separation may require managing "choke points" where workers are forced to stand together, staggering trades to reduce density, and taking special precautions when materials are delivered.

In addition to this Los Angeles guidance, construction companies can also look across the country to Boston, which is considering options such as extended work hours to allow multiple shifts so that there would be increased physical separation between workers, affidavits of compliance with physical distancing requirements, and loss of building permits if physical distancing is not observed.

Tip lines may also be anticipated as construction recommences. Napa County is requiring confidential telephone numbers for complaints of non-compliance with social distancing requirements at construction sites. Contractors should expect it to be used. In fact, San Francisco residents filed 730 complaints of alleged non-essential construction activities in just ten days.

Repercussions for violations may vary. Violations of the Bay Area shelter-in-place orders may be penalized as misdemeanors. Los Angeles issued stop work orders at sites not observing social distancing. Complaints may even be filed with California's Contractors State License Board, which could result in a fine or license revocation. It is important to ensure compliance, health and safety of workers and neighbors, and to avoid bad press or other repercussions in light of COVID-19.

Anyone looking to resume construction in California should carefully review the local shelter-in-place orders in effect, as well as state law, to ensure that they are in compliance with ALL laws. Things to consider include:

- How has an order been applied? The same language may be treated quite differently, as illustrated by Oakland, Berkeley, and Alameda's different interpretations of allowable construction of affordable housing.
- If construction is allowed, what are the social distancing protocols and/or guidance particular to construction in the local jurisdiction and elsewhere?
- What new practices and procedures has the local building department implemented, including for permit review and site inspection?

Given the rapidly changing and widely divergent orders across the state, it is also important to monitor for updates to these and other issues, and to seek knowledgeable counsel.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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