

Bay Area COVID-19 Shelter-In-Place Orders Exempt Activities Necessary for Housing Construction

In response to the coronavirus (COVID-19) global pandemic, seven counties in California—**Alameda, Contra Costa, Marin, San Francisco, San Mateo, Santa Clara, and Santa Cruz**—issued orders requiring residents to shelter in place and mandating closure of many businesses. The March 16, 2020 orders exempt certain "essential" business operations, which include the "construction of housing," from these restrictions. This update addresses the narrow question whether and to what extent the orders allow or prohibit activities related to the construction of housing.

The exact wording of each order differs slightly, but the substance is the same. Each contains language similar to the following:

For purposes of this Order, individuals may leave their residence to provide any services or perform any work necessary to the operations and maintenance of "Essential Infrastructure," including, but not limited to, public works construction, construction of housing (in particular affordable housing or housing for individuals experiencing homelessness), airport operations, water, sewer, gas [and] electrical . . . provided that they carry out those services or that work in compliance with Social Distancing Requirements as defined this Section, to the extent possible.

The orders are new and untested. We expect to learn more in the next few days about how the orders will be interpreted and applied. However, applying common-sense meanings in light of the intent of the orders to allow continued homebuilding appears appropriate.

Work "Necessary" to Housing Construction. The orders expressly exempt housing construction activities, as confirmed in notices being distributed by some (but not all) city and county officials. The details of exactly which associated services are exempted is less clear. The California Building Industry Association is taking the position that permit, inspection, and other services are also "necessary" to accomplish the construction of housing and therefore exempt, including plan checks, issuance of building and grading permits, inspections for permits and certificates of occupancy, utility hook-ups, and recordation of necessary documents, such as mechanics liens, tax liens, easements, financing instruments, covenants, conditions and restrictions, and title transfers.

The issue of whether title companies and recordation offices may remain open is especially complicated in light of factors other than these orders, but the position taken by the CBIA comports with the literal language of the orders. Another issue not expressly addressed is whether activities needed for occupancy of a residence, such as appraisals, home inspections, and visits by prospective homebuyers or tenants, may occur. The intent of the orders supports the conclusion that these activities are exempt as well.

Mixed Use Projects as "Construction of Housing." While the orders do not expressly address mixed-use projects, it is reasonable to interpret them to mean that mixed-use housing projects are exempt because they involve the "construction of housing." Some questions might arise if a phased mixed-use project includes phases that provide no housing and construction of those phases can feasibly be severed from the rest of the project. As of the writing of this update, however, the *San Francisco Chronicle* is reporting that San Francisco is considering all mixed-use projects to be exempt.

Other Residential Services. The orders contain additional language that exempts plumbers, electricians, and "other service providers that provide services necessary to maintaining the safety, sanitation, and essential operation of residences" While this text appears primarily directed at "maintaining" existing residences, it lends support to the general notion that work designed to provide all residents with safe, functioning homes is exempt.

Traveling for Housing Activities. Traveling done for the purposes of any of the exempt activities described above should also be considered exempt.

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