

Non-Essential Construction Eliminated in More Restrictive Bay Area Shelter-in-Place Orders

On March 31, six Bay Area counties—Alameda, Contra Costa, Marin, San Francisco, San Mateo, and Santa Clara—jointly issued new shelter-in-place restrictions that expand, clarify, and extend certain shelter-in-place restrictions until May 3, 2020. Previous county orders issued on March 16 allowed almost all Bay Area housing construction to continue, as well as certain other construction projects. Similarly, Governor Gavin Newsom's March 19 safer-at-home order permits housing and other construction projects to continue statewide.

This update describes how the new Bay Area county orders more strictly limit construction in the Bay Area, particularly housing construction, and how all people and businesses in the six Bay Area counties must comply with new superseding orders concerning housing construction and residential real property transactions.

Bay Area Orders' Effect on Housing and Other Construction

The March 31 Bay Area orders more severely restrict construction activities. Construction permitted to continue includes essential infrastructure, healthcare projects *directly related* to addressing the COVID-19 pandemic, housing and mixed-use projects that *include at least 10%* income-restricted affordable housing, projects required to maintain safety, sanitation, and habitability of residences and commercial buildings, and construction necessary to secure an existing construction site that must shut down. To date, Governor Newsom has not sought to have his more permissive order supersede local orders; accordingly, the more restrictive provisions of the Bay Area orders will continue to apply. Questions remain as to how specific provisions of these orders will be interpreted, and each county's FAQs or health department should be consulted for further guidance.

Specifically, construction permitted under the county orders is limited to:

- Projects immediately necessary to the maintenance, operation, or repair of Essential Infrastructure
- Projects associated with Healthcare Operations, including creating or expanding Healthcare Operations, provided that such construction is directly related to the COVID-19 response
- Affordable housing that is or will be income-restricted, including multi-unit or mixed-use developments containing at least 10% income-restricted units
- Public works projects if specifically designated as an Essential Governmental Function by the lead government agency
- Shelters and temporary housing, but not including hotels or motels
- Projects immediately necessary to provide critical non-commercial services to individuals experiencing homelessness, elderly persons, persons who are economically disadvantaged, and persons with special needs
- Construction necessary to ensure that existing construction sites that must be shut down under this order are left in a safe and secure manner, but only to the extent necessary to do so and
- Construction or repair necessary to ensure that residences and buildings containing Essential Businesses are safe, sanitary, or habitable to the extent such construction or repair cannot reasonably be delayed

Necessary Ancillary Services Permitted

The California Building Industry Association has taken the position, which we endorse, that the intent of the orders supports the conclusion that ancillary services that provide construction with the support or supplies necessary to operate are exempt to the extent that they support or supply the permitted construction activities only. The orders clarify that this exemption for ancillary services shall not be used as a basis for engaging in sales and/or services to the general public from retail storefronts.

Service Providers for Residential Transactions Exempted

Service providers that enable residential transactions (such as rentals, leases, and home sales), including, but not limited to, real estate agents, escrow agents, notaries, and title companies are considered Essential Businesses and may continue to operate, provided that all appointments and site tours only occur virtually or, if a virtual viewing is not feasible, by appointment with no more than 3 people (2 visitors from a single household and one other person) per showing at units where no people are residing.

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