SIX BAY AREA COUNTIES AMEND SHELTER IN PLACE ORDERS TO RESTRICT TYPES OF CONSTRUCTION THAT MAY BE PERFORMED

On March 31, 2020, six San Francisco Bay Area counties and the City of Berkeley jointly announced that they had amended their shelter in place orders, extending the lockdown period until midnight on May 3, 2020, and tightening restrictions with regard to the types of work activities that may be performed.

The six counties issuing the announcement are Santa Clara, San Mateo, San Francisco, Alameda, Contra Costa, and Marin. Other counties may also decide to issue amended orders.

Based on the text of the order issued by Santa Clara, construction may continue to be performed, “but only of the types listed.” The types of construction that may be performed are limited to the following:

A. Projects associated with Healthcare Operations, including creating or expanding Healthcare Operations, provided that such construction is directly related to the COVID-19 response;

B. Affordable housing that is or will be income-restricted, including multi-unit or mixed-use developments containing at least 10% income-restricted units;

C. Public works projects if specifically designated as an Essential Governmental Function by the lead governmental agency;

D. Shelters and temporary housing, but not including hotels or motels;

E. 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;

F. 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
G. 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.

Significantly, the earlier orders had stated contractors could perform exempted construction activities “provided that they carry out those services or that work in compliance with Social Distancing Requirements as defined this Section, to the extent possible.” This language indicated that contractors could continue to work even when strict compliance with Social Distancing Requirements was not possible. The removal of the “to the extent possible” clause signals that the counties likely will prohibit even exempted construction work if it cannot be carried out in compliance with Social Distancing Requirements.

The orders assert that they are not preempted by the statewide Executive Order, stating:

Consistent with California Health and Safety Code section 131080 and the Health Officer Practice Guide for Communicable Disease Control in California, except where the State Health Officer may issue an order expressly directed at this Order and based on a finding that a provision of this Order constitutes a menace to public health, any more restrictive measures in this Order continue to apply and control in this County.

If you have any doubts as to whether construction work may continue, we strongly recommend that you communicate not only with other project participants, such as the owner, but also with the local county authorities who are responsible for interpreting and enforcing the shelter in place orders.

We hope that you and your families stay safe and well in this unprecedented time. Please email or call us if we can help you in any way. We are working remotely and can continue to assist you. We are also monitoring changes in the law and will provide you with updates as matters develop. We look forward to seeing you – in person – once the COVID-19 emergency passes!