Commercial Construction During COVID-19 Shelter-in-Place Orders
NAIOP Silicon Valley Real Time Virtual Series
April 1, 2020

In response to the impact COVID-19 is having on our members and member-companies, NAIOP Silicon Valley created the Real Time Virtual Series, to focus on timely issues facing commercial real estate. The information below is not intended to influence decisions and does not replace your firm’s professional legal guidance. NAIOP Silicon Valley will conduct these calls every other Wednesday, from 11:00-11:30 am, until further notice, to create a body of resources and real time information.

Top 10 Takeaways

1. The county public health officers released the revised Shelter-in-Place orders, updated March 31, 2020, that are more restrictive than the prior orders and allow very little construction to occur. The restrictions will continue to get tighter if the pandemic worsens and restrictions will loosen if the pandemic improves.

2. Consult counsel to confirm if your projects can proceed.

3. Local county orders apply despite the State of California order. These orders are self-executing; you do not apply for approval. For example, you do not need Santa Clara County’s approval before proceeding with a project in Sunnyvale.

4. Local governments will only approve permits for construction projects they believe qualify with the Orders.

5. Liability – applicable statute says any person who violates the statute is liable. For example, both the General Contractor and Owner could be cited. The fines can be as much as $1,000 per violation. Fines may be stacked. A violation can also be prosecuted as a misdemeanor, punishable by up to 90 days in jail.

6. Forensic analysis can trace back to where an infection occurred. It is critical to have a health and safety precautions in place.

7. To determine if a project should proceed, each contributor, contractor, owner, and sub-contractor, will need to determine for itself if it’s worth the risk. Review your indemnity provisions and contracts prior to making a decision. The orders are subjective and takes precedence over contracts.

8. The What, Who, When, and Why should be broken down for each project when deciding how to proceed and to protect yourself.
   - What – Does your project fit within any of the categorically committed areas in terms of what you’re building or repairing. The closer your project is to “essential” services the better.
Who is this project for or who does it protect? There are 27 essential businesses listed in the order.

When – Urgency is required for most projects to continue or begin. A project that can be delayed or is not immediately needed will not likely be allowed.

Why are you doing the project? Security, safety, health, habitability, and sanitation are priorities within the Order.

9. **Focus on safety.** Work to close down any projects as safely and securely as possible. If a project can be reasonably delayed, it will not be permitted.

10. Sign up for updates on the county websites as orders can **change frequently**.

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**What Types Projects Probably Can Proceed Under the Revised 3/30/2020 Orders?**

- Reconfiguring existing space for an essential telecommunications company (e.g., Zoom) to allow for more servers and supporting infrastructure or increasing HVAC capacity.
- Continuing construction for healthcare facilities, possibly including Biotech, provided they are related to responding to COVID-19.
- Affordable Housing and Mixed-Use development provided 10% of residential units are classified affordable housing.
- Shelters for housing disadvantaged communities.
- Fencing off-site and other security measures where construction has stopped.

**What Projects Probably Cannot Proceed Under the Revised 3/30/2020 Orders?**

- Finishing work for tenant improvement. It is likely okay to fix exposed wiring but do not proceed with a new set of paint.
- New commercial construction projects cannot be started.
- Construction activities at current construction sites unrelated to safety or security.

**RESOURCES**

Below are links to the updated 3/30/2020 Orders by county:

**Santa Clara:**

**San Mateo:**

**Alameda:**

**San Francisco:**
[https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07b-ShelterInPlace-03312020.pdf](https://www.sfdph.org/dph/alerts/files/HealthOfficerOrder-C19-07b-ShelterInPlace-03312020.pdf)
Here are the key definitions and exemptions of which you should be aware (excerpts from the updated orders):

....(c) For the purposes of this Order, individuals may leave their residence to provide any services or perform any work necessary to the operation and maintenance of “Essential Infrastructure,” including airports, utilities (including water, sewer, gas and electrical), oil refining, roads and highways, public transportation, solid waste facilities (including collection, removal, disposal, and processing facilities), cemeteries, mortuaries, crematoriums and telecommunications systems (including the provision of essential global, national and local infrastructure for internet, computer services, business infrastructure, communication and web based services).

.... (f) For the purposes of this Order, “Essential Businesses” are:

....(v) **Construction**, but only of the types listed in this subparagraph below:

1. Projects immediately necessary to the maintenance, operation or repair of **Essential Infrastructure**;
2. Projects associated with **Healthcare Operations**, including creating or expanding Healthcare Operations, provided that such construction is **directly related to the COVID-19 response**;
3. Affordable housing that is or will be **income-restricted**, including **multi-unit or mixed-use developments containing at least 10% income-restricted units**;
4. Public works projects if specifically **designated as an Essential Governmental Function** by the lead governmental agency;
5. **Shelters and temporary housing**, but not including hotels or motels;
6. 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;
7. 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
8. 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;