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Governor Issues Statewide Shelter in Place Order; At Least Some Construction Is Now Exempted From Shelter in Place Requirements

Yesterday evening, Governor Newsom ordered all of California to shelter in place in an effort to slow the spread of COVID-19. It appears that construction work for now will be allowed to proceed, at least on public works and housing construction projects.

On March 19, 2020, the Governor issued Executive Order No. N-33-2 (the “Executive Order”), which requires “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors, as outlined at <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>.” The Executive Order also authorizes the Governor, “in consultation with the Director of the Governor’s Office of Emergency Services” to designate “additional sectors as critical.”

As originally drafted, the Executive Order did not designate construction as a “critical infrastructure sector”, although it did designate the Commercial Facilities Sector as critical. The Commercial Facilities Sector includes casinos, conference and convention centers, theme and amusement parks, retail centers and shopping malls, arenas and stadiums, and professional sports leagues. In other words, the Executive Order authorizes Disneyland to reopen, but did not allow construction to continue no matter how vital the construction work might be. (<https://www.cisa.gov/commercial-facilities-sector>).

For that matter, although the Executive Order authorizes people who work in commercial sector facilities to go to their jobs, it does not allow anyone to leave their homes to patronize these

facilities. Nor does the Executive Order expressly authorize people to leave their homes to go to the doctor, buy food, or exercise; however, the Governor's remarks, and the state COVID-19 website both indicate that individuals may leave their residences for such purposes. Unlike the typical city and county Shelter in Place order, the Executive Order does not authorize individuals to leave their home to perform work necessary for Minimum Basic Operations of businesses, such as processing of payroll.

Late last night, after lobbying by industry organizations, the Governor's office added "construction" as a critical infrastructure sector. Although the Governor's office and some industry trade associations have reported this change, the only evidence that the change has occurred is some new language on the State's COVID-19 website, which now states that Californians are ordered to stay at "home or at their place of residence, except as needed to maintain continuity of operation of the federal critical infrastructure sectors, critical government services, schools, childcare, and construction, including housing construction." (<https://covid19.ca.gov/stay-home-except-for-essential-needs>) It is unclear if the Governor actually consulted with the Director of the Governor's Office of Emergency Services or what was actually done in order to designate construction as a critical infrastructure sector.

The typical Shelter in Place order issued up to now had not permitted commercial construction to continue. On its face, the Governor's designation of construction as a critical infrastructure does not exclude commercial construction. Accordingly, there is now a conflict between the county and city Shelter in Place orders, which do not allow commercial construction, and Governor Newsom's executive order, which apparently does.

The county and city Shelter in Place orders are still in effect, although it is unclear whether they have been preempted or repealed by the Executive Order. At least with regard to order issued by charter counties or cities (San Francisco, Los Angeles, and Fresno), there is reason to believe that stricter provisions of local Shelter in Place orders might not be preempted by the Executive Order. Charter cities and counties enjoy considerable latitude in governing their affairs under the home rule doctrine.

A prudent approach would be to assume that both the Executive Order and local Shelter in Place orders both are in effect and that the stricter provisions will apply.

This is a rapidly changing situation and we will update you when more information becomes available.

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