

Construction During COVID-19

What New York City Condo & Co-op Boards Should Know About Commencing and Continuing Work

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Over the past month, the previously well-worn path of relatively clear regulations governing construction work in New York has turned into an overgrown forest of thorns; and has created a situation where all previous maps are now useless, making even the most basic of board decisions treacherous. The history of this changing environment provides, if not a new lay of the land, at least some background to help co-op and condo boards better understand what's at stake, and do their best to make sound decisions.

First, on March 22, 2020, all construction was initially permitted in conjunction with New York's Executive Order 202.6, which otherwise put the state on "PAUSE." Due to safety concerns for construction workers and their families, however, the directive was modified one week later, on March 30, 2020, to allow only "essential construction," i.e., work necessary to keep the state running (roads, transit facilities and utilities), work for the public good (hospitals, health-care facilities and homeless shelters), work necessary to protect the health and safety of building occupants, and continued construction on projects that would be unsafe if left undone.

Then, on April 15, 2020, New York state issued further guidance on the executive order, and the New York City Department of Buildings (DOB) expanded its definition of essential construction to further refine, or attempt to refine, the scope of the type of projects that can proceed. On April 22, 2020, the DOB issued buildings bulletin 2020-006, which superseded

bulletin 2020-004, and provided "updated guidance to owners and contractors regarding how to secure their construction and demolition sites when operations are suspended due to the ongoing COVID-19 public health emergency." Once again, this past Friday, April 24, 2020, more guidance was issued by New York state with respect to construction, again stating:

All non-essential construction must safely shut down, except emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone, but only to the point that it is safe to suspend work).

So, in this new environment, many questions have arisen. For example, if a project can be deemed "essential" under New York state law, is it also essential under New York City law? To help boards chart a course for construction projects in NYC, we provide this update to compare city and state guidance and to help boards better understand how to achieve harmony among the competing goals of protecting a building's structural issues, including the health and safety of its residents, and avoiding steep DOB fines.

Suppose, for example, a building's roof is leaking and causing mold in apartments. The board had been contemplating a renovation project but did not obtain permits from the DOB prior to April 15, 2020. Can the board now obtain a permit to commence the work? And how does a board proceed with existing projects that can continue under both New York state and New York City guidance? What and how much can be done to avoid steep fines?



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New York State Guidance

In accordance with current New York state guidance, as of April 24, 2020, essential construction is defined as:

- Construction or support for projects involving roads, bridges, transit facilities, utilities, hospitals or healthcare facilities, homeless shelters, and public and private schools.
- Construction for affordable housing, defined as construction work where either a minimum of 20% of the residential units are or will be deemed affordable and are or will be subject to a regulatory agreement and/or a declaration from a local, state or federal government agency or where the project is being undertaken by or on behalf of a public housing authority.
- Construction necessary to protect the health and safety of a structure's occupants.
- Construction necessary to continue a project if allowing the project to remain undone would be unsafe, provided that the construction is shut down once safe to do so.
- Energy industry projects in accordance with activities necessary to respond to the COVID-19 state emergency or to provide basic human services, e.g., food, shelter, safety. (For a complete list, see question no. 14 at https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_033120.pdf.)
- Construction for projects currently underway for an essential business.
- Construction being completed by a single worker who is also the sole employee on the job site.

New York City Guidance

In accordance with current DOB guidance, essential construction means the above, as well as:

- Construction for existing (currently underway) projects for essential businesses that are not transit facilities, utilities, hospitals or healthcare facilities, homeless shelters, or public or private schools, as long as a construction permit was obtained prior to April 15, 2020.
- Construction work by local government agencies as determined by New York City.

And, in accordance with DOB buildings bulletin 2020-006, "permits already in effect, including but not limited to DOB, DOT, and FDNY permits, shall remain in effect until the end of the term for which they were issued." If a permit was set to expire, the expiration date has been extended in accordance with New York City Mayor Bill de Blasio's Executive Order 107.

In sum, there are several types of work that NYC is allowing to continue that are pertinent to co-ops and condos. For example, the DOB also allows work necessary to maintain safe elevator services, such as continuing in-progress modernization work and repairing out-of-service elevators. For facade restoration, work necessary to correct conditions labeled as "unsafe," including installation of a sidewalk shed to protect the public, is allowed. Facade inspections are also permitted, as is use of necessary equipment to perform the inspections, like suspended scaffolds and industrial rope access. If there is any interruption of essential services such as heat and water to the building, an essential construction request can be submitted for a permit for plumbing, heating or electrical work. Any work that can be performed by a single worker is also allowed.

The Decision-Making Process

It appears that while the state has allowed construction projects necessary for the health and safety of occupants broadly, NYC guidance technically requires all work to cease unless the essential or emergency work fits categories laid out in recent guidance and buildings bulletins. Therefore, it is not clear just what can and cannot be done.

Where permits were previously obtained and the work is "essential" and "emergency," i.e., necessary for the health and safety of people or property: Even if your board previously obtained a work permit from the DOB prior to the coronavirus pandemic, under current rules your building is now required to obtain authorization to continue your essential project. Once you obtain approval, you must display the authorization certificate or be subject to steep fines. Permits for essential work are being issued in one day's time under normal circumstances. If approved for an essential construction request, the job will be listed on the [Essential Active Construction Sites](#) map.

If your board isn't sure whether a previously permitted project is essential, you can submit an essential construction request at the [DOB website](#)¹ for consideration. However, while the DOB is delib-



erating, work must be suspended except to secure and maintain the site. Bear in mind that the DOB has never been endowed with the ability to make decisive, clear determinations, and is rumored to now be even more bogged down with requests in the COVID-19 environment.

If you have already received certification for your essential project, a decision as to whether to continue the project requires deliberation. For example, every site requires workers to maintain appropriate social distancing, including for purposes of elevators, taking meals, entry and exit. Sites that cannot maintain appropriate social distancing, including cleaning and disinfecting protocols, must close. Enforcement is conducted by the state and local governments, and includes fines up to \$10,000 per violation. Therefore, deciding to continue a project involves potential new risks to a board, since on many job sites it is not physically possible to achieve social distancing.

And, can a board fully complete a project? The answer to that question is no. While the DOB is likely allowing work for previously obtained essential and emergency permits, the work can continue “only to the point that it is safe to suspend work.” Accordingly, it’s important for a board to closely consult with its architect to determine how much of the project needs to be completed to reach this point — and to suspend the project once this point is reached. Under these circumstances — increased soft costs and, essentially, two time lines — it may be financially unfeasible to continue the project.

Finally, assuming a board decides to continue a project, it must still take into account that more people coming in and out of the building increases the risk of exposure to the coronavirus. Construction workers will require access to the building and elevators. Can a board provide workers with running water and soap/hand sanitizer, and provide a place to take breaks and eat lunch, all while staying at least six feet apart? On many job sites, workers also share tools. Is the construction company able to provide alcohol-based wipes or other methods to clean tools before and after each use, and to properly instruct workers in these methods? Will your construction company provide signage for workers regarding COVID-19 protocols? Are safety protocols and social distancing even possible for your particular project? Even for single-person construction work, it’s still imperative to limit their interaction with residents and the

building staff, and to require a face mask at all times in common areas.

In the end, even if a project falls into the limited category of projects that may be allowed by the city and state, boards may decide that the safest route is to forego construction that’s not immediately necessary until a later time, even though it’s deemed essential and is permissible under the state’s PAUSE order and the city’s DOB rules.

New, essential projects in NYC: For essential or emergency projects that require a permit, but a permit has not been yet obtained, there’s a process available for submitting requests at the [DOB website](#).¹ The DOB also has an appeals process for challenging negative determinations, so it would seem that for new projects at least, the best course of action is to submit requests and let the DOB lead the way. Then, once an essential work permit is obtained, the board can follow the social distancing and other safety measures set forth above in hopes of avoiding a fine and of exposing residents to the coronavirus. In addition, a certificate of authorization must be printed for each permit and posted at the work site.

But what about projects where even an ordinary work permit isn’t required? According to current rules², “minor alterations or ordinary repairs” may be exempt from permit requirements, and may nevertheless still be essential in the COVID-19 environment.

For example, what should a co-op do about a leaking roof? Work permits are not required for roof repair or replacement, which is limited to the “roof membrane, roof coverings, cant strip, and any insulation above the roof deck/sheathing, provided that the New York City Energy Conservation Code does not require additional thermal insulation for the roof.” Accordingly, in the case of a leaking roof, where the membrane, roof covering and insulation are a board’s responsibility (a board needs to consult with counsel to make this determination, because it may be that, instead, a unit owner or shareholder with a penthouse is responsible), and where the leak repairs are necessary for the health and safety of the building, a board should be able to have its architect design a new temporary membrane repair project that won’t require a *work permit* but will, at least temporarily, stop the leak, even where more than one worker is required to complete the job.

However, even if an ordinary work permit is not required, the new essential permit and essential work certificate are still required, and all social distancing



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rules must be followed in order to avoid a \$10,000 fine from the DOB for violating COVID-19 rules.

New, nonessential projects: What to do? If a permit was not obtained prior to April 15, 2020, there is some relatively good news for boards thinking about upcoming nonessential projects. While a co-op or condo board cannot start a new project, such as a lobby modernization, which is not necessary for the safety and health of occupants, as of April 24, 2020, the DOB has streamlined the application process for new projects, making it easier and more expedient than ever before to obtain permits. Boards can make all the necessary filings now so that once new nonessential or emergency work is permitted, it will have all permits in place for that spectacular lobby, roof garden, new amenity, or other ongoing project that the board contemplated before March 2020.

Conclusion

We hope this article has helped your board start the process of thinking about and understanding how best to chart the current construction environment in NYC. However, boards should be aware that the DOB is actively pursuing violators. Because of expected revenue decreases for the city that will continue as the economic crisis continues, the DOB's \$10,000 fines will certainly be something the city may

zealously pursue against building owners to help feed its coffers. Therefore, boards should make sure to carefully follow all DOB COVID-19 protocols and document all projects in case violations are issued.

For more information on issues affecting your condominium or cooperative regarding this or other issues related to the COVID-19 pandemic, feel free to reach out to the [co-op and condo team at Anderson Kill](#), and to continue following our newsletter for continuing updates. ▲

ENDNOTES

¹ www.nyc.gov/dobnow

² *Rules of the City of New York, §101-14, Sections 28-105.1 and 28-105.4 of the Administrative Code of the City of New York*

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