

Date: March 30, 2020

Re: Guidance on Determining which Businesses are “Essential” for Purposes of the Governor’s Executive Orders on Workforce Reduction

On March 18, 2020, the Governor issued Executive Order (“EO”) 202.6,<sup>1</sup> directing that all businesses and non-profit entities reduce their in-person workforce 50%. The EO exempted “essential business” and entities providing “essential services or functions,” including “construction.” Subsequent EOs increased the in-person workforce reduction requirement to 75% (EO 202.7)<sup>2</sup> and 100% (EO 202.8),<sup>3</sup> without making any changes to EO 202.6’s original list of “essential businesses.” EO 202.6 also conferred upon the New York State Department of Economic Development d/b/a Empire State Development (“ESD”) the ability to determine whether a business is essential “should it determine that it is in the best interest of the state to have the workforce continue in full capacity in order to properly respond to this disaster.”

On March 27, 2020, the ESD issued updated “Guidance for Determining Whether a Business Enterprise is Subject to Workforce Reduction under Recent Executive Orders (the “March 27 Guidance”).<sup>4</sup> The March 27 Guidance is attached, and stated, with respect to “Construction”:

- All non-essential construction must 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 until it is safe to shut the site).

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<sup>1</sup> Available at: <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.6.pdf>

<sup>2</sup> Available at: <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.7.pdf>

<sup>3</sup> Available at: [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.8.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf)

<sup>4</sup> Available at: <https://esd.ny.gov/guidance-executive-order-2026>

- Essential construction may continue and includes roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters. At every site, if essential or emergency non-essential construction, this includes maintaining social distance, including for purposes of elevators/meals/entry and exit. Sites that cannot maintain distance and safety best practices must close and enforcement will be provided by the state in coordination with the city/local governments. This will include fines of up to \$10,000 per violation.
- For purposes of this section, construction work does not include a single worker, who is the sole employee/worker on a job site.

Under “Essential Manufacturing,” the March 27 Guidance lists “food-producing agriculture/farms.” Finally, under “Essential services necessary to maintain the safety, sanitation and essential operations of residences or other businesses,” **the** March 27 Guidance lists “general maintenance whether employed by the entity directly or a vendor.”

The foregoing ESD guidance raises several questions: is all non-emergency construction considered “non-essential;” is the listing of “essential construction” exclusive; and what is the legal basis for asserting that a \$10,000 fine would be opposed under state enforcement?

Moreover, Westchester County municipalities have raised two specific issues concerning the March 27 Guidance: (1) the limitation on construction; and (2) how the March 27 Guidance applies to the March 24 Interim Guidance for Horticulture issued by the New York State Agriculture and Markets Commissioner (the “AG Guidance.”) The AG Guidance lists the following as “essential” on the grounds that “horticulture is a key component of agriculture and New York State farms”:

1. Production movement maintenance and sale of vegetable plants, nursery stock, trees, plants and flowers at greenhouse and nursey operation;
2. Tree and shrub trimming and removal for disease, safety and public health purposes;
3. The placement and ground maintenance of sod, landscaping, plants, flowers, ornamentals and trees on residential and commercial grounds;
4. Transportation necessary to meet and of the above functions;

5. Agribusinesses, including the sale and application of pesticides, herbicides, fertilizers and minerals that support any of the above functions.

On March 30, 2020, the Governor issued EO 202.13 (*available at <https://on.ny.gov/3dDreaI>*), which states in relevant part that the ESD “is authorized to determine what construction projects are essential. “

#### “Essential” or “Emergency” Construction

In light of the latest Executive Order (202.13) municipalities can seek a determination from ESD if they believe that a particular project warrants designation as essential. ESD has provided this website for requests to be designated as essential businesses. <https://esd.ny.gov/guidance-executive-order-2026>. Note that municipalities can also make the determination that construction must go forward because of an “emergency.”

#### “Landscaping”

The AG Guidance conflicts with that issued by ESD. In particular, the AG statement permitting “[t]he placement and ground maintenance of sod, landscaping, plants, flowers, ornamentals and trees on residential and commercial grounds” is much broader than the ESD Guidance. In light of Executive Order 202.13 leaving the determination of what is an essential business in the hands of ESD, we would conclude that general landscaping as provided for in the AG Guidance is not essential. We recommend that municipalities seek clarification from ESD. Municipalities can request clarification through the ESD website listed above.

Please note that this is not a formal legal opinion, and is offered as guidance based upon the Westchester County Law Department’s research. We urge municipalities to consult with their own attorneys and law enforcement officials regarding the matters discussed herein.