

CLIENT UPDATE

TRAVIS COUNTY AND CITY OF AUSTIN ISSUE CONTRADICTIONARY GUIDANCE FOR THE CONSTRUCTION INDUSTRY

By [Amy Emerson](#), [Travis Brown](#), and [Joe Basham](#), Partners at [Allensworth & Porter](#)
March 30, 2020

Today, the City of Austin provided a [second round of guidance](#) for the construction industry, purportedly clarifying its March 24, 2020 Stay Home-Work Safe Order. The City's Supplemental Guidance Document addresses:

1. Types of permitted construction work;
2. Administrative processes and project wind-down;
3. New work safe requirements; and
4. Recommended employment practices.

The City of Austin also announced the formation of the **Construction Exemption Review Committee** that will determine exemption status for various projects. The new guidance largely tracks our earlier interpretations of the City's Order.

Travis County provided its first [guidance for the construction industry](#) on its March 24, 2020 Order today. The County's guidance contradicts and undercuts the City of Austin's supplemental guidance about permitted construction in several important ways. Also, it appears that Travis County's guidance includes internally inconsistent references to "allowed" and "not-allowed" construction activities.

PERMITTED CONSTRUCTION TYPES

The City's newest guidance confirms that the following types of project are exempt and can continue (or begin). In some instances, the County's guidance *on identical Order language* concludes just the opposite—that certain projects are *not* exempt. Guidance items from both the City and County are discussed below.

PUBLIC WORKS CONSTRUCTION:

- **CITY:** Exemption includes private projects that expand public infrastructure.

The City clarified that the term "public works" includes projects involving infrastructure that will be used by the public (dedicated to the City) when completed. This specifically includes (but should not be limited to) stormwater drainage systems, subdivision streets, utility lines, and sidewalks.

A privately-developed project *will be exempt if part of the project* involves construction of infrastructure that (i) will be dedicated to the City; (ii) will expand public infrastructure capacity beyond what is necessary to serve the project itself; and (iii) is evidenced by an agreement with the City.

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The City's public works exemption should allow construction to continue on a number of different types of private projects—e.g., office buildings, multi-family, retail space—that involve cost reimbursement deals with the City for improvements or extensions of sidewalks, streets, utilities, etc. so long as that infrastructure will benefit not only the project but also the public at large.

- **COUNTY: Scope of exemption not defined.**

The County's guidance similarly clarifies that (1) "public works" construction projects are exempt, and (2) that a construction project will be exempt if *part* of the project involves public works. But unlike the City's supplemental guidance, the County makes no attempt to define "public works" or the scope of the public works exemption. The City and County Orders use identical language in exempting public works construction. Accordingly, prior to today we believed the City and County would interpret their orders identically. But as discussed below, the County's guidance directly contradicts guidance from the City on other exemptions. For that reason, we cannot be certain that the County will define public works in the same manner as the City.

AFFORDABLE HOUSING:

- **CITY: Multi-family construction that includes an affordable housing component is exempt.**

The City's supplemental guidance says an entire construction project is exempt if part of the project includes affordable housing, which is defined as on-site, income-restricted dwellings for rent or sale. Payment in lieu of on-site affordable units does **not** count as "affordable housing" under the City's definition.

- **COUNTY: Multi-family construction that includes an affordable housing component *should be exempt* despite the County's listing of "Apartments, Townhouses, Duplex" as "not allowed."**

The County's guidance provides an exemption for affordable housing. Multifamily projects with an affordable housing component should be exempt under the County Order. Despite this, the County's Order lists "Apartments, Townhouses, and Duplex, Single-Family" as "not allowed." We believe that this categorization only applies to projects without any affordable housing. The County has not defined affordable housing.

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“CRITICAL INFRASTRUCTURE”

- **CITY AND COUNTY: Continued and new construction of Critical Infrastructure exempt.**

The City and County Orders identified a list of “Critical Infrastructure.” Per today’s guidance, both ongoing *and* new construction for specified infrastructure are exempt from the Orders. This is clearer under the City’s Order because only it specifies that construction of Critical Infrastructure “includes completion of current construction work and new construction work.” The County’s order has no additional guidance.

“ESSENTIAL BUSINESSES”

- **CITY: Continued and new construction of Essential Businesses exempt.**

The City’s Order identified a list of “Essential Businesses” that were exempt from the Order. The City’s supplemental guidance clarifies that ongoing and new construction of an Essential Businesses is exempt. This means the City intends to allow parties to **continue or begin** construction of a number of project types including veterinary clinics, grocery stores, hospitals, and hotels, if listed as an Essential Business.

- **COUNTY: Construction of Essential Businesses prohibited except for necessary repairs and maintenance.**

The City and County Orders both permit “construction that supports essential businesses.” However, the County now says only “construction in support” of Essential Businesses is allowed. Construction in support is defined as “necessary repairs and maintenance for the essential business to safely remain open and operational.” Under the County’s guidance, all current and new projects for Essential Businesses are no longer permitted, unless it is only for “repairs and maintenance,” or if the project involves an “educational facility.” For unknown reasons, an educational facility is both an Essential Business and ongoing and new projects are allowed, unlike grocery stores (an Essential Business but a new or ongoing project is not allowed). The County’s Order is both internally inconsistent, and inconsistent with the City of Austin.

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ADMINISTRATIVE PROCESS AND PROJECT WIND-DOWN UNDER CITY OF AUSTIN'S SUPPLEMENTAL GUIDANCE

Austin has created a **Construction Exemption Review Committee** that is responsible for assessing whether a specific construction project is exempt from the Stay Home-Work Safe Order. You may have already received an email from the Development Service Department. A link to the Exemption Request form is here: [Exemption Request Form](#). You will need to check one or more of the following under Question No. 7:

- Public Works construction projects
- Affordable housing projects
- Construction of facilities for individuals experiencing homelessness
- Construction of facilities that provide social services
- Construction of facilities that are defined in the Order as Essential Businesses, Essential Government Functions, or Critical Infrastructure
- Construction of facilities specifically required by the City in response to the current COVID-19 emergency
- Other, please describe below

The Construction Exemption Request Form allows the responder to explain why project meets one of the exemptions. The Committee will then determine whether the Project may continue or must stop. If the Project is not exempt, and work must stop, then the Committee will provide a date for the project to safely stop, and the Committee will consider a proposed wind-down date. The City's supplemental guidance says the **Committee's decision is final**.

Non-exempt projects that have secured a City-approved wind-down process beyond the Order's deadline of March 27, 2020, must ensure compliance with:

- i. the social distancing requirements in § 6.j. of the Order (6-foot distances, 20-second hand washing, cough/sneeze protocols, high-touch surface cleaning, and no handshakes);
- ii. the recommendations for employees in Exhibit B of the Order (refrain from reporting to work based on certain health conditions); and
- iii. Section 2 of the City's Supplemental Guidance (discussed below).

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The City has further clarified that it will not issue citations for Order violations if the contractor can demonstrate that it is winding down efficiently and safely, and that it is following not only the requirements listed above but also complying with *all* of the recommendations in Exhibits A and B of the Order (Austin/Travis County Health Authority Requirements and Employer Requirements). While this no-citation wind-down process should apply broadly to any type of project, it appears from the prefacing language (“to mitigate housing uncertainty for individuals purchasing homes still under construction”) that it was of particular importance to single-family homebuilders.

NEW WORK SAFE REQUIREMENTS FOR CONSTRUCTION UNDER CITY OF AUSTIN’S SUPPLEMENTAL GUIDANCE

As of March 30, 2020, exempt construction projects with more than 10 “active workers” at any time must comply with new safe work requirements, in addition to the general social distancing and work safe requirements in the Order. Briefly, the new requirements mandate that the person in charge of the overall site (called the “Site Manager”) perform the following for all construction work:

1. Post certain notices about crew size and type, and prescreen worker health daily;
2. Ensure sufficient handwashing stations;
3. Prohibit community water coolers;
4. Ensure disinfection of shared tools, common spaces, and collective touch points; and
5. The Site Manager must also keep a daily sign-in list, with contact information for each on-site worker, and take specific actions in the event a worker is confirmed to have contracted the coronavirus.

RECOMMENDED EMPLOYMENT PRACTICES

Finally, the City’s new guidance “encourage[s]” employers not to take adverse action (1) if a worker declines to work at a construction site under certain conditions, or (2) against a quarantined worker. The City also asks employers not to contest unemployment benefits for workers temporarily furloughed because of a project closure.

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ACTION ITEMS TO CONSIDER

- Evaluate if your project is considered construction work supporting “Essential Business” as defined in Section 6.f. of the COA Order. If “Yes”, then your project is generally exempt under the City Order and exempt only for construction repairs and maintenance under the County Order.
- Evaluate if your project is considered construction work supporting “Critical Infrastructure” as defined in Paragraph 2.b. in Exhibit B of the Order. If “Yes”, then your project is exempt under both Orders.
- Evaluate if your project involves building infrastructure elements, including but not limited to the following: stormwater drainage systems, subdivision streets, utility lines, and sidewalks that will be used by the general public when completed. If “Yes”, then your project is likely exempt under both Orders.
- Evaluate if your project involves affordable housing. If “Yes”, then your project is likely exempt under both Orders.
- If you are not able to say “Yes” to the questions above, then your project is likely not exempt, and you may be able to avoid citation by the City if you can show that you are winding down the Project in accordance with its Guidance.
- Seek legal guidance on the specifics of your project, and for timing and specifics for filling out the Construction Exemption Request Form, including the “Declarations” in Question 7 and the explanation box in Question 8.

The situation is and will remain fluid while the City and County continue to operate under their ambiguous, confusing, and now contradictory orders and supplemental guidance, as well as under the actions of the newly-formed Construction Exemption Review Committee. We have created an [FAQ page](#) on our website and will continue to update it as more information comes to light.

Concerned project participants should seek legal advice that is specific to the contract(s) and circumstances at issue, as our summaries *are not legal advice*, and are not inclusive of every category or condition in the orders or supplemental guidance documents. Further, we renew our call upon all design and construction industry members to raise their voices to Governor Greg Abbott, to request that the Governor issue executive orders, proclamations, or regulations that standardize industry requirements by exempting commercial and residential construction from the City of Austin and Travis County orders, as other cities and counties in Texas have done.

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ABOUT

AUTHORS: [Amy Emerson](#), [Travis Brown](#), and [Joe Basham](#), Partners at Allensworth & Porter

Allensworth & Porter focuses exclusively on the practice of construction law. For 25 years, the firm has handled complex construction matters from preconstruction to closeout, from the first claim to the last appeal, and all manners of disputes in between for clients in virtually every sector of the commercial construction industry. For more information, visit aapl原因.com.

*Note: This article was written on Monday, March 30, 2020, based on the most up-to-date information available at the time. During this unprecedented situation, policies and circumstances evolve rapidly. For our most recent analysis of COVID-19 and the construction industry, please visit aapl原因.com/news. **This is not legal advice**; all decisions should be based on an analysis that is specific to the contracts and facts of any given project.*