

LEGAL UPDATE

CITY OF AUSTIN ORDERS SHUTDOWN OF MANY OF CITY'S CONSTRUCTION PROJECTS

By [Allensworth & Porter](#)

March 26, 2020

*Note: This article was written on Thursday, March 26, 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.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.*

On the morning of Tuesday, March 24, Austin Mayor Steve Adler issued a [Stay Home - Work Safe Order](#), effective at 11:59 p.m. that night, directing all City of Austin residents to stay home—except as needed to maintain continuity of operations of some essential businesses and critical infrastructure sectors. Williamson and Travis Counties issued similar orders with the same effective date.

The City's Work Safe Order followed several county and industry guidelines issued the prior week: Travis County and the City of Austin both handed down "Community Gathering Orders" that prohibited more than ten people from gathering in a separate enclosed space. Williamson County issued a similar order on March 18, 2020. In a subsequent order, Williamson County exempted "[r]esidential, transportation and commercial construction[.]" On March 10, 2020, OSHA released guidance on workplace exposure to COVID-19, including requirements for recording and reporting workplace exposures. The Associated General Contractors of America quickly voiced opposition to the guidance, and OSHA issued revised reporting guidance on March 13, 2020.

In its Work Safe Order, the City of Austin exempted several categories of so-called "Critical Infrastructure," including but not limited to:

...**Construction**, including public works construction, and construction of affordable housing or housing for individuals experiencing homelessness, social services construction, and other construction that supports essential uses, including essential businesses, government functions, or critical infrastructure, or otherwise as required in response to this public health emergency. (Emphasis added.)

At midday on March 24, it appeared based on the City's Order that many commercial construction projects would be allowed to continue, subject to applicable community gathering orders, OSHA guidelines, and other COVID-19-related orders—as was the case in other Texas cities, including Dallas, Fort Worth, Houston, and San Antonio.

That changed hours later, when the City of Austin issued follow-up "Guidance" to the construction industry, announcing its intention to generally shut down commercial construction within the City—arguably contrary to broader exemptions in its Order. Mayor Adler was quoted as saying, "Under the Order signed this morning, there will be no commercial construction, except in the very limited exception where it's constructing essential and critical assets."

CITY OF AUSTIN ORDERS SHUTDOWN OF MANY OF CITY'S CONSTRUCTION PROJECTS

The City's messaging was inconsistent with its written "Guidance" and did little to clarify its March 24, 2020 Stay Home - Work Safe Order. Further complicating matters, Travis County's stay-at-home order was similar but not identical to the City's Guidance, creating potentially conflicting rules for the multitude of projects within both jurisdictions. In the event of a conflict, the Travis County Order will probably prevail over the City of Austin's Order and Guidance—but the inconsistencies and preliminary enforcement efforts have already created unnecessary confusion within a construction community that depends on certainty and consistency.

In its "Guidance", the City of Austin says that it intended to exempt construction projects "where the construction involves one of the specific types of essential and critical facilities listed in Exhibit B, Part 2.p of the Order." In the same section of the "Guidance", the City's limited list of permissible projects includes "construction of facilities that are defined in the Order as Essential Businesses, Essential Government Functions, or Critical Infrastructure".

This firm's interpretation of the City's initial Order is that any project is exempt from the City's Order where the construction supports one of the specific types of Critical Infrastructure Sectors defined by the U.S. Department of Homeland Security's Cyber and Infrastructure Security Agency ("CISA") (and incorporated by the City's Order at Exhibit B, Part 2.q). CISA, under its Commercial Facilities Sector directive, includes hotels, motels, conference centers, office and apartment buildings, condominiums, mixed-use facilities, retail centers, and shopping malls, among other things.

The City disagrees, however, and seems poised to shut down commercial construction generally.

Little will be gained by closing construction sites where safety is embedded in the culture, and where existing orders and procedures have already compelled proper sanitizing and social distancing. The community gathering orders issued by the State of Texas, and by some cities and counties, are understandable and important steps in protecting the health and safety of workers and the community at large. But the City's aggressive departure from other jurisdictions in shutting down construction generally will do nothing to arrest the spread of disease. Construction labor is uncommonly itinerant, chasing the work wherever it exists. If anything, the City's lonely approach will encourage the spread of people across the state, frustrating its stated goal of "restrict[ing the] movement of persons necessary to reduce the substantial risk of harm to the public[.]" To the extent the City wants to constrain the spread of the COVID pandemic, it can do so by keeping construction work in Austin, where it can enforce stricter safety measures on construction sites than other jurisdictions. A completely predictable exodus of construction labor would needlessly harm laborers and the public alike. As of the date of this publication, Governor Abbott has declined to enter an order or other measure to standardize the exemption of construction projects across the entire state.

Unfortunately, as of this writing, the only source of clarity and guidance the industry has is the City's original Order and follow-up "Guidance" document. We had hoped that Mayor Adler and Travis County Judge Sarah Eckhardt would provide some certainty during a March 26 press conference, but neither meaningfully addressed the construction-industry issues.

CITY OF AUSTIN ORDERS SHUTDOWN OF MANY OF CITY'S CONSTRUCTION PROJECTS

We have been advised that the City of Austin, its inspectors, and the Fire Marshall have begun to enforce the Order, applying a very narrow interpretation to shut down (and/or refuse to inspect) projects that the City subjectively deems as non-Essential. Therefore (and barring any changes), as of 11:59 p.m. on Friday, March 27, 2020, our view is as follows:

1. ***If you are constructing a project that the City considers an Essential Business, the City appears poised to let these projects continue*** per the "Guidance" issued by the City on March 24, 2020. The defined Essential Businesses are listed in the Order, which contains the following, in part:
 1. Healthcare: hospitals, clinics, dentists, pharmacies, other healthcare service providers;
 2. Grocery stores, convenience stores, liquor stores;
 3. Big box retailers: presumably Home Depot, Lowes, Walmart, etc.;
 4. Social services, charitable operations, news media, gas stations, automobile dealerships;
 5. Financial institutions: banks, credit unions, title companies, pawn shops, insurance companies;
 6. Hotels and motels;
 7. Hardware stores;
 8. Laundry services;
 9. Restaurants; and
 10. Transportation.

2. ***If you are constructing a project that the City interprets as Critical Infrastructure, it appears the project will also be allowed to continue*** per the "Guidance" issued by the City on March 24, 2020. Critical Infrastructure is listed in Exhibit B to the Order and includes:
 - a. Banking and financial institutions;
 - b. Transit, transit facilities, transportation services;
 - c. Power, water, telecommunications, natural gas, and public utilities;
 - d. Technology manufacturing companies;
 - e. Public health and medical services;
 - f. Fire and law enforcement;
 - g. Public works;
 - h. Airport facilities;
 - i. Sanitation services; and
 - j. Other City government buildings or facilities.

3. ***If you are involved in the construction of federal or state facilities***, the Order acknowledges that it does NOT apply—and the Texas Attorney General's office has issued an opinion expressing its agreement.

CITY OF AUSTIN ORDERS SHUTDOWN OF MANY OF CITY'S CONSTRUCTION PROJECTS

4. If you are constructing affordable housing, or facilities for individuals experiencing homelessness or that provide social services, the Order does not apply.
5. *If you are constructing a project that does NOT fall into one of the categories in the Order or the following "Guidance", the City appears to believe it has ordered your project to be shut down and may take action to ensure that this occurs.*

Austin/Travis County appears to be the only jurisdiction in Texas in which local government has attempted to order that a significant number of construction projects must cease.

CONCLUSION

If you are in the City of Austin and are not constructing what the City deems to be an Essential Business or Critical Infrastructure, the City appears poised to refuse to provide inspections, to evacuate individuals from jobsites, and/or to shut a project down entirely. Under the terms of the City's Order, a violation is a misdemeanor, with a potential fine of up to \$1,000, and/or up to 180 days in jail. The City's prior "Guidance" suggests that *warnings* will be issued until March 27—but only if a project participant can show that it has been working to wind down the project in the three-day period starting March 24, when the Order first took effect.

Our [prior analysis](#) of the Work Safe Order and [our interpretation of the "Guidance" that followed it](#) has not changed, nor has the City's Order—for now. However, since the City is already underway with this process, the best practice for project participants will be to consult their contract(s) for the project in question, comply with all notice requirements, and notify others of the impending possible action—thereby establishing and managing expectations as much as possible under the circumstances. Also, should you be refused services or otherwise confronted by the City of Austin, be prepared to (1) explain how your project fits within the definition of Essential Business or Critical Infrastructure, and (2) escalate the issue to City management to confirm that enforcement on your project was intended, appropriate, and not done in error.

ABOUT

AUTHORS: [Joe Basham](#), [Matthew Ryan](#), [Travis Brown](#), [Amy Emerson](#), [Will Allensworth](#), [Whitney Knight](#), and [Tyler O'Halloran](#), 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.com.