

## New Guidance Offered by The City of Austin and Travis County Related to “Stay Home, Work Safe” Orders Conflict and Continue to Cause Confusion

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On March 24, 2020, the City of Austin—following the lead of other Texas cities and counties—issued its “Stay Home – Work Safe” [order](#), requiring that non-essential businesses close while providing that “[a]ll Essential Businesses[,] Essential Government Service, and Critical Infrastructure are strongly encouraged to remain open....” Critical Infrastructure is specifically defined in Exhibit B to the order “as all public and private facilities and assets ... and other functions and sectors vital to the security, governance, public health, safety, and economic continuity of the City of Austin” and includes, but is 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.” Travis County also issued a “Stay Home, Work Safe” [order](#).

Soon after issuance of the Austin order, the City then generated a [guidance memorandum](#) directed to the construction industry. This memorandum, which is not an independent order or an amendment to the order, notes that “commercial and residential construction activities are prohibited under the Order except in the very limited situations where the construction involves one of the specific types of essential and critical facilities listed in Exhibit B, Part 2.p. of the Order.” The guidance memorandum further notes—contradicting the non-exclusive language actually in the order—that the list includes **only**: public works projects, affordable housing projects, and construction of facilities that provide for the homeless, that provide social services, that are required by the City in response to the COVID-19 emergency, and “that are defined in the Order as Essential Businesses, Essential Government Functions, or Critical Infrastructure.”

While appearing restrictive, “Construction of facilities that are defined in the Order as Essential Businesses, Essential Government Functions, or Critical Infrastructure” addresses terms that are very broadly or subjectively defined, seemingly allowing construction to continue in a number of industries and sectors. But mass confusion was the result, with many construction industry participants unclear as to whether any given project could proceed.

**Yesterday**, the City issued yet another [guidance memorandum](#). Still inconsistent with the language of the actual order (which remains intact with its ambiguities, circular references, and undefined terms), this 4-page “Supplemental Guidance for the Construction Industry” memorandum provides that, as an overarching matter, “construction work by a single worker

who is the sole employee/worker on a job site may proceed.” It sets forth a number of provisions, including a description of a newly created administrative process to decide whether any given project can proceed.

A new “Construction Exemption Review Committee” has been formed to assess “whether specific construction projects and activities in the City of Austin meet the criteria to continue development under the City’s Stay Home – Work Safe Order.” The committee includes representatives from multiple City departments, and [an online form](#) is to be submitted to begin any such assessment. Apparently seeking to correct some of the ambiguities in the order due to lack of definitions, the supplemental guidance memorandum offers definitions concerning “Public works construction,” “Construction of Affordable Housing,” and “Construction work supporting Essential Businesses” and “Construction work supporting Critical Infrastructure,” which, in both instances, “includes completion of current construction work and new construction work...” Non-exempt projects must wind-down, and “the City will not cite a construction business or operator for a violation of the Order” if the project is being wound-down and requirements and recommendations in the Order and supplemental guidance memorandum are being followed. Additionally, certain employer requirements are set forth for all ongoing construction work, including signage requirements, pre-screening processes, and setting the required quantity of soap or hand-washing stations.

As with the City’s initial guidance memorandum, the City’s supplemental guidance memorandum is simply a staff-issued memorandum—not an amendment to the order or an independent order, and the language of the actual order controls (or should control). But the City’s intent continues to be expressed in restrictive and limiting terms, albeit at odds with the language of the Order.

However, overlaying all of the above is the newly issued “Guidance for the Construction Industry” [memorandum](#) issued by Travis County, also generated yesterday. In that memorandum, also not an amendment to the County’s order or an independent order, the County largely mirrors the position of the City. Namely, “[i]n general, commercial and residential construction activities are prohibited under the Order except in the very limited situations where the construction involves one of the specific types of essential and critical facilities” listed in the order. The County’s memorandum points to a finite list (also at odds with the language of the County’s order), including “Construction in support of Essential Businesses.” The County, however, takes the matter one step further, noting that: “For purposes of clarification, ‘construction in support’ refers to **necessary repairs and maintenance for the essential business to safely remain open and operational.**” In an apparent attempt to avoid any doubt, the County’s order further states “**Residential and commercial construction ARE PROHIBITED under the Order.**”

Thus, while the City may permit “completion of current construction work and new construction work,” it appears that that County may not—at least based on a memorandum.

This continues to be an evolving issue, and construction industry participants and advocates are well aware of the challenges this lack of continuity of message creates. How these conflicting and inconsistent orders and memoranda will be enforced remains to be seen.

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