

THE CITY OF AUSTIN IS REFUSING TO INSPECT PROJECTS IN VIOLATION OF ITS OWN ORDER

By [Allensworth & Porter](#)

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Despite considerable effort by this firm and the entire design and construction industry, Mayor Adler held a press conference this afternoon and has again failed to provide certainty for how the City's [Stay Home Order](#) will affect the construction industry. We hoped that the Mayor would provide some clarity for the construction industry during this press conference, but nothing specific to construction was discussed. Unfortunately, that means that we are operating under the confusion of the original [Order](#) and [Guidance](#).

We've 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, as of 11:59 p.m. on Friday, March 27, 2020, our advice 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:
 - a. Healthcare: hospitals, clinics, dentists, pharmacies, other healthcare service providers;
 - b. Grocery stores, convenience stores, liquor stores;
 - c. Big box retailers: presumably Home Depot, Lowes, Walmart, etc.;
 - d. Social services, charitable operations, news media, gas stations, automobile dealerships;
 - e. Financial institutions: banks, credit unions, title companies, pawn shops, insurance companies;
 - f. Hotels and motels;
 - g. Hardware stores;
 - h. Laundry services;
 - i. Restaurants; and
 - j. 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.

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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 has issued an opinion expressing agreement.*
4. *If you are constructing a project that does NOT fall into one of the categories in the Order or its 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 the vast majority of construction must cease.

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, and neither 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.

The situation is and will remain fluid while the City continues to operate under its ambiguous and confusing order. 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 inclusive of every category or condition in the Order. Further, we 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.

CLIENT UPDATE

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ABOUT

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Allensworth & Porter focuses exclusively on the practice of construction law. For 25 years, we've 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. Our 360-degree view of the industry and singular focus on construction law allows us to provide clients with comprehensive insight, education, and strategies to minimize risk, accomplish business objectives, and resolve disputes. For more information, visit aaplaw.com.