

CLIENT UPDATE

THE CITY OF AUSTIN'S "GUIDANCE" TO THE CONSTRUCTION INDUSTRY FAILS TO PROVIDE CLARITY

By [Allensworth & Porter](#)

March 24, 2020

The City of Austin issued [guidance for the construction industry](#) late Tuesday night, attempting to shut down virtually all commercial construction within the City. The Mayor is 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." We do not believe the City's guidance adds clarity to its [March 24, 2020 Stay Home - Work Safe Order](#). Further complicating matters, Travis County's stay at home order is inconsistent with the City's guidance. In the event of a conflict, the Travis County Order will likely prevail over the City of Austin's Order and guidance.

Here is our interpretation of the City of Austin's guidance. The City of Austin specifically exempted construction projects "where the construction involves one of the specific types of essential and critical facilities listed in Exhibit B, Part 2.p."

Our interpretation is that any project is exempt from the City's Order "where the construction involves" one of the specific types of Critical Infrastructure defined by CISA (and incorporated by the City's Order at Exhibit B, Part 2.q). CISA, under its Commercial Facilities Sectors directive, includes hotels, motels, conference centers, office and apartment buildings, condominiums, mixed-use facilities, retail centers and shopping malls. See below.

LATE-TUESDAY GUIDANCE

2. Construction as Critical Infrastructure. The Order provides that some types of construction activities are Critical Infrastructure. In 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 Exhibit B, Part 2.p. of the Order. This list includes only:

- 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

EARLY-TUESDAY ORDER EXH. B

EXHIBIT B Critical Infrastructure Designations and Obligations

1. "Critical Infrastructure" is defined as all public and private facilities and assets, including both physical and cyber systems, and other functions and sectors vital to the security, governance, public health, safety, and economic continuity of the City of Austin.
2. **Critical Infrastructure, includes but is not limited to the following:**
 - a. banking and financial institutions;
 - b. transit and transit facilities, transportation services, equipment and facilities;
 - c. power, water, telecommunications, natural gas, and public utilities;
 - d. critical manufacturing including components for primary metals, machinery, electrical equipment and components, health and safety products and equipment, and transportation equipment;
 - e. auto and vehicle parts manufacturing and assembly plants;
 - f. technology manufacturing companies;
 - g. information and communications, including press;
 - h. emergency services;
 - i. public health and medical services;
 - J. fire and law enforcement;
 - k. public works;
 - l. agriculture and food;
 - m. airport facilities and operations;
 - n. sanitation services;
 - o. other City government buildings or facilities, as designated by the City Manager;
 - p. **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; and
 - q. **Personnel and industries identified in the U.S. Department of Homeland Security Cyber and Infrastructure Security Agency's ("CISA") Essential Critical Infrastructure Workforce Memorandum dated March 19, 2020 to continue their operation appropriately modified to account for CDC workforce and consumer protection guidance.**

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CRITICAL INFRASTRUCTURE SECTORS

There are 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof. Presidential Policy Directive 21 (PPD-21): Critical Infrastructure Security and Resilience advances a national policy to strengthen and maintain secure, functioning, and resilient critical infrastructure. This directive supersedes [Homeland Security Presidential Directive 7](#).

Guidance on the Essential Critical Infrastructure Workforce

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Chemical Sector

The Department of Homeland Security is designated as the Sector-Specific Agency for the Chemical Sector.



Commercial Facilities Sector

The Department of Homeland Security is designated as the Sector-Specific Agency for the Commercial Facilities Sector, which includes a diverse range of sites that draw large crowds of people for shopping, business, entertainment, or lodging.



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COMMERCIAL FACILITIES SECTOR

The Commercial Facilities Sector includes a diverse range of sites that draw large crowds of people for shopping, business, entertainment, or lodging. Facilities within the sector operate on the principle of open public access, meaning that the general public can move freely without the deterrent of highly visible security barriers. The majority of these facilities are privately owned and operated, with minimal interaction with the federal government and other regulatory entities.



The Commercial Facilities Sector consists of eight subsectors:

- Entertainment and Media (e.g., motion picture studios, broadcast media).
- Gaming (e.g., casinos).
- Lodging (e.g., hotels, motels, conference centers).
- Outdoor Events (e.g., theme and amusement parks, fairs, campgrounds, parades).
- Public Assembly (e.g., arenas, stadiums, aquariums, zoos, museums, convention centers).
- Real Estate (e.g., office and apartment buildings, condominiums, mixed use facilities, self-storage).
- Retail (e.g., retail centers and districts, shopping malls).
- Sports Leagues (e.g., professional sports leagues and federations).

The City's confusing and inconsistent messaging does a disservice to the design and construction industry and its diverse stakeholders. Owners, builders, designers, subcontractors, suppliers, trades, and laborers all depend on and deserve clearer legal directives and "guidance" than what the City of Austin has provided, especially in times of uncertainty. Other cities and counties in Texas and elsewhere have succeeded in this regard, and the Austin design and construction industry deserves no less.

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 aapl.com.