

Guidance Offered by The City of Austin Related to “Stay Home – Work Safe” Order Causes Confusion

by R. Carson Fisk

March 25, 2020

11:30 a.m. -- Related to the COVID-19 pandemic, the City of Austin issued a 15-page “Stay Home – Work Safe” order, effective at 11:59 p.m. on March 24, 2020 through April 13, 2020 ([available here](#)). Non-essential businesses are to close, however “[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.” Based on this language, one could certainly interpret construction as being exempt from the order to cease operations, though there are recommendations for employees and requirements for employers to follow in the order.

However, the City—only a few hours later—issued a guidance memorandum directed to the construction industry ([available here](#)). This memorandum, which is not an amendment to the order and was issued by unidentified City personnel, 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 that that 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

At first glance, this list appears very restrictive. However, the fifth bullet point provides that construction may continue where it involves “Construction of facilities that are defined in the Order as Essential Businesses, Essential Government Functions, or Critical Infrastructure.” Such terms are very broadly defined.

Section 6.f of the order defines “Essential Businesses” as those covered by 25 different and very broad categories, including but not limited to healthcare facilities, businesses needed for transportation, certain retail stores, hardware and supply stores, residential facilities and shelters, hotels and motels, and educational institutions, among a number of other types of businesses.

Exhibit B to the order defines “Critical Infrastructure” 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.” A non-exclusive list of 17 categories of “Critical Infrastructure” is provided, and includes banking and financial institutions, transit and transportation facilities, utilities, certain manufacturing, and governmental facilities, among other categories. Also listed as “Critical Infrastructure” are “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....” ([available here](#)). That memorandum states that:

The attached list identifies workers who conduct a range of operations and services that are essential to continued critical infrastructure viability, including ... maintaining and repairing critical infrastructure, ... working construction, and performing management functions, among others. The industries they support represent, but are not necessarily limited to, medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works.

The CISA memorandum lists the following 13 sectors and identified essential critical infrastructure workers:

- Healthcare and Public Health
- Law Enforcement, Public Safety, and First Responders
- Food and Agriculture
- Energy
- Water and Wastewater
- Transportation and Logistics
- Public Works
- Other Community-Based Government Operations and Essential Functions
- Critical Manufacturing
- Hazardous Materials
- Financial Services
- Chemical
- Defense Industrial Base

With the order permitting “Construction” and the guidance memorandum allowing construction to continue where it involves the broadly defined “Essential Businesses” or “Critical Infrastructure,” it would appear that the order does not prohibit quite as many construction activities as other language in the guidance memorandum suggests (i.e., “commercial and residential construction activities are prohibited under the Order except in the very limited situations”).

Ultimately, the guidance memorandum is simply a memorandum—not an amendment to the order or an independent order, and the language of the actual order controls. Further, Travis County has issued an order similar to the City’s order, but has not offered any similar interpretation. That being

said, through the issuance of the guidance memorandum, the City of Austin has caused confusion and created ambiguity where there (perhaps) was none previously.

This is an evolving issue, and construction industry participants and advocates are well aware of the challenges this lack of continuity of message creates. What, if anything, the City intends to do about it remains to be seen.

For more information, please contact Carson Fisk at 512.900.3032 or via [email](#).