



## CITY OF CHICO MEMORANDUM

**TO:** Chair Scott and Planning Commissioners

**FROM:** Bruce Ambo, Principal Planner

**DATE:** July 13, 2022

**SUBJECT:** TownePlace Suites Hotel - Letter from Marsha Burch on CEQA Infill Exemption

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This memorandum forwards the attached letter dated July 1, 2022, from Marsha A. Burch on the proposed California Environmental Quality Act (CEQA) Infill Exemption for the TownePlace Suites hotel project with staff's clarification responses. The contention topics have been summarized followed by staff's clarifications below:

### Misleading Project Description and Piecemealed Review

The project description clearly states that the environmental document has been prepared for the proposed hotel and the description of the "Project Site" and "Proposed Project" on Page 2 of the Notice of Exemption (NOE) identifies the site as being graded under a previous Mitigated Negative Declaration. The Planning Commission staff report fully analyzes the land use of a proposed hotel and architectural review compatibility of the 4-story building volume as it relates to the site and surrounding area. Furthermore, the environmental document evaluated the physical change and any associated impacts or lack thereof to any environmental resources as required by CEQA. Lastly, the staff report explains that the Architectural Review and Historic Preservation Board (ARHPB) will review the detailed architectural, landscape and lighting plans if the project is approved at the ARHPB meeting the following week.

### Project Not Exempt from CEQA

If the Planning Commission approves the project, as recommended by staff, the staff report and draft resolution contains robust findings of consistency with the General Plan, use permit findings and conformance with the Municipal Code development standards. All subsequent grading, drainage, low impact development (LID), National Pollution Discharge Elimination System (NPDES) plan and permit requirements remain in place by operation of standard permitting procedures and processes.

### Significant Effects on Water Quality

As discussed above, the proposed project has been thoroughly evaluated and the site has been graded under previous approvals. No work is proposed beyond the previously graded areas of the site and a 30-foot setback from the top of bank will be maintained where no grading or

paving is to occur. The previous grading project has been completed and references to the previous US Army Corp of Engineers nationwide permit (expired) and the Central Valley Regional Water Quality Control Board (CVRWQCB) Clean Water Act Section 401 Certification in the NOE and supporting environmental documents are no longer applicable or relevant. All other permitting requirements for subsequent approvals (grading, drainage, LID, NPDES, building permits, etc.) remain in place and are still necessary.

Proximity to Dead Horse Slough is Unusual Circumstance

There is nothing particularly unusual about Dead Horse Slough as it is neither a designated sensitive environmental habit nor a resource area. The project design includes a 30-foot setback from the top of bank where no grading or paving is proposed to occur. All construction activities are limited to the previously graded pad area and Condition No. 12 is recommended to reinforce that the approval does not include any work in the slough area.

Attachment:

7.1.22 Letter from Marsha A. Burch on CEQA Infill Exemption

# MARSHA A. BURCH

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July 1, 2022

*Via Electronic Mail*

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**Re: Towne Place Suites Hotel Proposed at Bruce Road,  
Hwy 32 and Sierra Sunrise Terrace  
Infill Exemption – CEQA Guidelines section 15332**

Dear Planning Commissioners and Mr. Ambo:

This office represents California Park Homeowners Association and Sierra Sunrise Village Property Owners Association (“Associations”) with respect to the above-referenced hotel project (“Project”) and the City of Chico’s intent to find the Project exempt from CEQA<sup>1</sup> review pursuant to CEQA Guidelines section 15332. Members of the Associations and others have submitted comments regarding the Project, and these comments are meant to supplement, not replace, previous comments by Associations’ members, the comments of other members of the public, or of other experts or agencies.

After reviewing the “Notice of Exemption”<sup>2</sup> for the Project, we have concluded that the analysis in the document falls short of compliance with the CEQA. As an initial matter, the Project review has been improperly piecemealed, and further piecemealing is proposed. Additionally, the Project description used by the City in its analysis is unstable and misleading, and does not meet CEQA’s standards for a finite, stable Project Description. Finally, the

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<sup>1</sup> California Environmental Quality Act: Public Resources Code § 21000 et seq. and the CEQA Guidelines, California Code of Regulations, title 14, 15000 et seq.

<sup>2</sup> A Notice of Exemption is a brief notice filed at the County Clerk’s office, which states the Lead Agency has approved or will carry out a project that is exempt from the requirements of CEQA. (CEQA Guidelines § 15062.) The document identified by the City as “Notice of Exemption” is the City’s CEQA analysis.

City cannot make all the findings necessary to support the use of the Infill Exemption. The evidence does not support a finding that the Project is consistent with the General Plan or that the Project will not have a significant effect on water quality, and the “unusual circumstances” exception applies and precludes use of the exemption.

**A. The Project Description is unstable and misleading and the Project review has been improperly piecemealed.**

The Mitigated Negative Declaration for the previous grading of the Project site (“MND”) included *only* a description of the grading and leveling of a spoil pile to “facilitate the future sale of the site.” In the environmental analysis for the hotel Project the City and its consultants include the grading as part of the “project” under review. (See July 12, 2021, Memorandum from Dave Krolick; and “Notice of Exemption” p. 15, relying upon Nationwide Permit 18 and Clean Water Act, Section 401 Certification from the Central Valley Regional Water Quality Control Board, both issued *solely* for the grading activity.)

A CEQA document must accurately describe the proposed project. (Guidelines §15071(a).) “An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document].” (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) The Project Description for the hotel Project at times includes the grading work done under a previous approval by the City, and at other times it does not. This is not a small matter and is confusing to the public and the decision makers. The confusion is compounded by the fact that the City is deferring analysis of the design of the Project.<sup>3</sup> The City acknowledges that detailed architectural and landscaping plans have been provided by the developer, but the City has determined to break the review into pieces. Such an approach violates CEQA.

“CEQA requires public agencies to undertake an environmental review of proposed projects that require their discretionary approval.” (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222.) “The scope of the environmental review conducted for the initial study must include the entire project.” (*Ibid.*) “Project” is defined broadly in the CEQA Guidelines as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .” (Guidelines §15378(a).)

Deferring review of the final design of the Project to the future precludes analysis of the whole of the project. Notably, the City makes conclusions regarding the hotel Project’s scenic and aesthetic impacts, and yet it has

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<sup>3</sup> This deferral of review of the design appears in a second document labeled “Notice of Exemption” that appears on the City’s website as “Project Description”.

determined to leave the architectural review “on hold” pending approval of construction of the hotel.

The City has broken the overarching project into three small pieces, and has thereby avoided the appropriate level of environmental review for the whole of the Project. There “is no dispute that CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project.” (*Berkeley Keep Jets Over the Bay Com. V. Board of Port Commissioners* (2001) 91 Cal.App.4<sup>th</sup> 1344, 1358.)

The piecemeal environmental review has resulted in confusion regarding the description of the “project” being reviewed at this time. The City may not move forward in its review of the hotel Project *separate* from the architectural and landscape plans. Further, the record must be clarified to prevent the public and the decision makers from continuing to believe that the water quality permits issued for the previous grading project are somehow applicable to the hotel Project. They are not.

**B. The Project is not exempt from CEQA.**

If an agency determines that a project falls within a categorical exemption, the findings necessary to support that exemption must be made. In this case, the City intends to approve the Project and file a Notice of Exemption relying upon the Infill Exemption. (Guidelines § 15332.) The Infill Exemption requires the approving agency to apply the following 4 criteria:

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.

At this time, the City cannot make finding (a) because the City has deferred review of the architectural and landscaping plans for the Project, and so there is no basis for concluding that the Project is consistent with General Plan policies regarding Community Design. The City also cannot make finding (d) because there is no information (and no analysis) of the impacts to water quality that will most assuredly result from the development and paving of several acres adjacent to a sensitive water body.

If the four requisite findings can be made (and in this case they cannot), then the agency must determine whether any of the “exceptions” to the CEQA exemption apply. Exceptions to the exemptions add back in a measure of consideration to the process. (CEQA Guidelines, § 15300.2(b), (c)–(f).)

A categorical exemption cannot be used for an activity that has a reasonable possibility of resulting in a significant impact on the environment due to “unusual circumstances.” (Guidelines § 15300.2(c).)

The “unusual circumstances” exception precludes the use of any categorical exemption when there is a “reasonable possibility” that the project “will have a significant effect on the environment due to unusual circumstances.” (Guidelines § 15300.2(c).) In reviewing a lead agency’s determination as to whether the exemption applies and if the effects will be significant, the Supreme Court has applied a two-prong test wherein an agency must answer: (1) are there unusual circumstances? And if so, (2) would these unusual circumstances create a potential for significant impact? The second prong of the test is subject to the “fair argument” standard. If an agency determines there is an “unusual circumstance,” then the “fair argument” standard requires an EIR when it can be fairly argued based on substantial evidence that “due to” the unusual circumstances of the project, it *may* have a significant effect on the environment. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1114).

In the present case, an “unusual circumstance” exists that requires additional environmental review of the Project. The Project site is located on the edge of Dead Horse Slough, a water body identified by the City in its Code as worthy of specific regulation (Chico Municipal Code §19.60.030(B)(6)), and it is regulated by the U.S. Army Corps of Engineers and the Central Valley Regional Water Quality Control Board. There are no permits in place, no analysis of stormwater runoff has been done, and the City’s own documentation shows that mitigation is required to prevent contamination of Dead Horse Slough. Thus, there is a fair argument that the Project may have a significant impact on the environment.

**1. There is no basis to conclude that the Project is consistent with General Plan**

The “Notice of Exemption” notes that the Project is consistent with the General Plan Land Use Diagram and the zoning (Community Commercial). This letter will not go into the details of the inconsistency of the Project with the General Plan but refers the Commissioners to the letter submitted by John Jeffery Carter. This letter focuses on the fact that the findings necessary to support the use of the CEQA Exemption cannot be made for the Project, and one deficiency is that the City cannot conclude that the Project is “consistent with the applicable general plan designation and all applicable general plan policies as well as the

applicable zoning designation and regulations.” (Guidelines § 15332(a).) Noting that the hotel use is allowed under the current zoning designation with a use permit is not sufficient. The Community Design Chapter of the General Plan governs community design through policies meant to be used with the City of Chico Design Guidelines Manual. In the section “Infill Design Capability” the General Plan states that the Community Design Element establishes policies and actions to guide the design of infill development to be compatible with its neighborhood. (General Plan, p. 5-2.)

The “Notice of Exemption” prepared by the City does not even mention the Community Design Element. The City cannot make a conclusion that the Project is consistent with the Community Design Element or the City of Chico Design Guidelines Manual because the City has deferred review of the architectural design and the landscaping plan for the Project. The finding is unsupported.

**2. The Project will result in significant effects to water quality.**

In making Infill Exemption finding (d), the City relies upon water quality permits issued by the U.S. Army Corps of Engineers (“USACE”) and the Central Valley Regional Water Quality Control Board (“RWQCB”) to support the conclusion that the Project will not have biological impacts or impacts to water quality. Neither of these two permits cover the hotel Project.

The August 28, 2018, letter from USACE to Dan Gonzales provides that the “Grading project involves the discharge of fill material into 0.03 acres of waters of the U.S. (WOUS) for the grading and leveling of a large spoil pile subject to Section 404 of the Clean Water Act.” The letter authorized the work under Nationwide Permit 18, pending certification under Section 401 of the Clean Water Act. The verification *expired* on March 18, 2022.

On August 29, 2018, the Central Valley RWQCB sent a letter to Mr. Gonzales for the “Bruce Road and Highway 32 Grading Plan Project.” The Section 401 certification and order was issued, stating that “[t]he proposed project involves grading and leveling the site in anticipate of selling the site for future development.” The “Project Description” in the certification describes the grading and leveling that will occur during the dry season. The permit also requires the applicant to notify the RWQCB when the work is completed. Presumably Mr. Gonzales provided the required notice when he completed his work. The permit does not allow for modifications to the project (such as the construction of a hotel) without an amendment to the permit. Additionally, the Order is not transferrable to a new owner without following the procedures of the RWQCB.

The USACE and RWQCB approvals are no longer in place, and even if they were, the “project” those approvals were issued for was grading only and

would not extend to the construction and operation of a hotel with “59,265 SF of paved parking areas” and other impervious surfaces adjacent to Dead Horse Slough. The City has not analyzed the amount of stormwater runoff that will end up in the Slough. The City acknowledges that a “contributory drainage channel of the Dead Horse Slough forms the western and southern project boundaries and serves as an overflow to the human-made California Park Lake, located at the north of the property.” The City has done no analysis of how (or if) storm flows will be prevented from entering these water bodies. In a short statement about utilities, the City notes that “Stormwater from the site will be screened by the proposed landscaping to the south and a proposed bioswale to the west before being directed to an existing concrete storm drain system along Highway 32.” It is interesting that the City can make this conclusion when it has decided *not* to review the architectural and landscaping plan at this time.

In response to the grading plan that was undertaken to prepare the Project site for sale, the USACE and the RWQCB determined that significant mitigation was required to reduce impacts to water quality. The City Code requirement of a 25-foot setback from the Slough is not going to prevent contamination by stormwater runoff from the tremendous amount of impervious surface that will be added to the site. All of this is compounded by the fact that the City is not even planning to review the landscaping plan, and “proposed bioswale” until some point after Project approval.

The Section 401 Water Quality Certification for the grading of the Project site (page 4) described Dead Horse Slough as follows:

The Project is located within the jurisdiction of the Central Valley Water Board. Receiving waters and groundwater potentially impacted by this Project are protected in accordance with the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fifth Edition, revised May 2018 (Basin Plan). The plan for the region and other plans and policies may be accessed online at: [http://www.waterboards.ca.gov/plans\\_policies/](http://www.waterboards.ca.gov/plans_policies/). The Basin Plan includes water quality standards, which consist of existing and potential beneficial uses of waters of the state, water quality objectives to protect those uses, and the state and federal antidegradation policies.

The grading work on the site required an NPDES permit because of possible impacts to the Slough, and yet the City has decided not to analyze hotel construction impacts to water quality, and has deferred analysis of the stormwater flows that will leave the hotel site once it is in operation; flows that will include landscaping runoff potentially laden with chemicals, as well as contaminated parking lot runoff.

The “evidence” relied upon by the City to conclude that there will be no significant effects to water quality includes two permits that do not apply to the



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Project. There is no evidence that the design of the Project or some mitigation measures or best management practices will avoid water quality impacts. Infill Exemption finding (d) cannot be made for water quality.

**3. The Project's proximity to Dead Horse Slough is an "unusual circumstance" and there is a fair argument that the Project may have significant impacts to water quality**

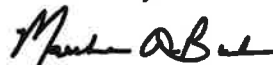
The City included Dead Horse Slough in its Creekside Development Standards for a reason: because there is environmental value in preventing impacts to this water body. The City also included discussion of the sensitive nature of the Project site and the Slough in the MND for the grading project, including mitigation measures to "protect sensitive natural resources and water quality from project impacts and ensure that the project will not jeopardize the continued existence of special-status species." (MND, p. 2.) The MND identified several special-status species, terrestrial and aquatic, that triggered the need for several mitigation measures.

The MND also required a Section 404 permit from USACE and a Section 401 Water Quality Certification from the RWQCB. The mitigation measure requiring these water quality permits were necessary for "protected wetlands" on the Project site. The 404 and 401 permits included myriad mitigation measures and best management practices to prevent runoff from entering Dead Horse Slough. As noted above, these permits are either expired or do not apply to the present Project, and there is no basis for a conclusion that the grading, construction, paving, and operation of the hotel will not result in significant impacts to water quality. In fact, the City's own documentation shows that there is a fair argument the Project may have a significant impact on water quality.

**C. Conclusion**

Because of the issues raised above, we believe that the Infill Exemption does not apply to the Project. The evidence before the City reveals a fair argument that the Project may have significant environmental impacts, and the proposal should be denied pending the preparation of an Environmental Impact Report.

Sincerely,

  
Marsha A. Burch  
Attorney

cc: California Park Homeowners Association  
Sierra Sunrise Village Property Owners Association  
Vincent C. Ewing, City Attorney ([vincent.ewing@chicoca.gov](mailto:vincent.ewing@chicoca.gov))