



Oct. 28, 2021

Mr. Nathan Fletcher, Chair  
Board of Supervisors  
County of San Diego  
1600 Pacific Highway  
San Diego, CA 92101

Re: Comments on Revised Program Environmental Impact Report for the McClellan-Palomar Airport Master Plan Update

Dear Chair Fletcher:

The City of Carlsbad (City) submits the following comments on the revised Program Environmental Impact Report (PEIR) for the McClellan-Palomar Airport (Airport) Master Plan Update (Proposed Project). The City is submitting its comments directly to you because neither the PEIR nor the County's website for the Proposed Project identifies a County of San Diego (County) staff member to whom comments should be submitted.

The City's comments are limited to the portions of the PEIR which were revised by the County in response to the judgment entered against the County in a lawsuit entitled *Citizens for a Friendly Airport v. County of San Diego*, San Diego Superior Court Case No. 37-2018-00057624-CU-TT-CTL. As you know, the County elected not to appeal the judgment and instead rescinded its certification of the original PEIR and vacated its approval of the Proposed Project.

Although the Mutual Cooperation and Settlement Agreement between the City and the County has been terminated, the City continues to believe that the parties' respective interests are best served by their mutual cooperation on airport-related matters. Therefore, the City submits the following comments to inform the County of the ways in which the PEIR fails to comply with the California Environmental Quality Act (CEQA) despite the recent revisions and to allow the County an opportunity to correct these deficiencies.

- 1. The PEIR fails to comply with CEQA because it does not identify an amendment to CUP-172 as one of the approvals required to implement the Proposed Project.**

In the lawsuit against the County concerning the Proposed Project, the Superior Court found that the County agreed to obtain a Conditional Use Permit from the City as a condition of the

**City Manager**

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City's annexation of the airport site. The City approved the County's application for Conditional Use Permit No. 172 (CUP-172) concerning the Airport on September 24, 1980. As a result, the court specifically ruled that implementation of the Proposed Project "required an amendment to CUP-172." (*Citizens for a Friendly Airport v. County of San Diego*, San Diego Superior Court Case No. 37-2018-00057624-CU-TT-CTL, Minute Order filed January 26, 2021, p. 2.)

CEQA Guidelines § 15124(d)(1), subdivision (B) requires an EIR to contain a list of permits and other approvals required to implement the project. Although the PEIR indicates that the County will seek an amendment to CUP-172 under certain circumstances and subject to certain conditions, the PEIR fails to identify an amendment to CUP-172 as one of the approvals required to implement the Proposed Project. Neither Section 1.5, Intended Uses of the EIR, nor Table 1-3, Matrix of Project Approvals, makes any reference to the required amendment of CUP-172. The PEIR's failure to comply with CEQA Guidelines section 15124(d)(1), subdivision (B) violates CEQA.

Please revise the PEIR, including Section 1.5, Intended Uses of the EIR, and Table 1-3, Matrix of Project Approvals, to identify CUP-172 as one of the approvals required to implement the Proposed Project.

**2. The PEIR fails to comply with CEQA because it does not identify the City of Carlsbad as a responsible agency for the Proposed Project.**

A "responsible agency" is a public agency other than the lead agency which has discretionary approval power over a proposed project. (CEQA Guidelines § 15381.) CEQA Guidelines section 15124(d)(1), subdivision (A) requires an EIR to contain a statement briefly describing the intended uses of the EIR, including a list of the agencies that are expected to use the EIR in their decision making.

The City has discretionary approval power over the Proposed Project because it is the public agency responsible for approving any amendment to CUP-172. However, neither Section 1.5, Intended Uses of the EIR, nor Table 1-3, Matrix of Project Approvals, of the PEIR identifies the City as an agency with discretionary approval power over the Proposed Project. The PEIR's failure to comply with CEQA Guidelines section 15124(d)(1), subdivision (A) violates CEQA.

Please revise the PEIR, including Section 1.5, Intended Uses of the EIR, and Table 1-3, Matrix of Project Approvals, to identify the City as a responsible agency that may use the EIR in its decision-making concerning CUP-172.

**3. The County violated CEQA by failing to consult with and to request comments from the City as a responsible agency.**

CEQA Guidelines section 15086, subdivision (a)(1) requires a lead agency to consult with and request comments on a draft EIR from responsible agencies. The City is a responsible agency

because, as the agency responsible for approving any amendment to CUP-172, it has discretionary approval power over the Proposed Project. Since giving notice that the revised PEIR was available, the County has neither consulted with nor requested comments from the City as a responsible agency. The County's failure to comply with CEQA Guidelines section 15086, subdivision (a)(1) violates CEQA.

Please suspend any further proceedings concerning the PEIR until the County consults with and requests comments from the City as a responsible agency.

**4. The PEIR's conclusion that impacts associated with land use compatibility will be less than significant is not supported by substantial evidence.**

The PEIR determined that the Proposed Project would not be inconsistent with CUP-172 and land use compatibility impacts would be less than significant. (PEIR, p. 3-112.) This determination is based on faulty assumptions and is not supported by substantial evidence.

The County agreed to obtain a Conditional Use Permit from the City as a condition of Local Agency Formation Commission's (LAFCO) approval of the City's annexation of the airport site. The City issued CUP-172 subject to specified conditions. Condition No. 11 provides "[t]he existing designation of the airport as a General Aviation Basic Transport Airport shall not change unless an amendment to this CUP is approved by the Planning Commission."

The County admits that the Federal Aviation Administration (FAA) subsequently changed the designation of the Airport to B-II. However, the County failed to request an amendment of CUP-172 to change the existing designation from General Aviation Basic Transport to B-II.

The County further admits that "the purpose of the Proposed Project is to more safely accommodate the D-III aircraft that are already using the airport." (*Citizens for a Friendly Airport v. County of San Diego*, San Diego Superior Court Case No. 37-2018-00057624-CU-TT-CTL, Respondent and Defendant County of San Diego's Application for Reconsideration re 1/26/21 Minute Order, filed on February 24, 2021, p. 1.) In addition, the Superior Court ruled that the Proposed Project requires an amendment to CUP-172 to change the existing designation of the Airport to D-III. However, the description of the Proposed Project in the PEIR does not include a request to amend CUP-172 to change the designation of the Airport to D-III.

The Proposed Project is inconsistent with the existing designation of the Airport in CUP-172. Notwithstanding this inconsistency, the PEIR concludes that impacts associated with land use compatibility would be less than significant. (PEIR, p. 112.) This conclusion is based on the PEIR's assumptions that (i) the County's compliance with CUP-172 is voluntary, (ii) the County has a right to assert immunities with respect to an amendment to CUP-172, and (iii) the County can delay seeking an amendment to CUP-172 until sometime in the future.

The PEIR's assumptions are incorrect for the following reasons. First, the County's duty to comply with CUP-172 is mandatory, not "voluntary." Based on evidence in the administrative record, the Superior Court found that the County obtained CUP-172 in connection with the City's annexation of the Airport and its zoning of the land for airport use. In approving the annexation, LAFCO stated that the City must place an appropriate zoning designation on the land and the County must obtain a Conditional Use Permit. The evidence further showed that the County agreed with this procedure. (*Citizens for a Friendly Airport v. County of San Diego*, San Diego Superior Court Case No. 37-2018-00057624-CU-TT-CTL, Minute Order filed January 26, 2021, p. 2.)

Second, the County has waived any right to assert immunities in connection with CUP-172. The Superior Court ruled that "the evidence in the administrative record indicates that the County voluntarily and intentionally relinquished its immunities with respect to the airport." (*Citizens for a Friendly Airport v. County of San Diego*, San Diego Superior Court Case No. 37-2018-00057624-CU-TT-CTL, Minute Order filed January 26, 2021, p. 2.) The PEIR acknowledges that the County did not appeal the judgment and the judgment is final. Thus, the PEIR's repeated assertion that the County reserves its right to assert immunities in connection with the amendment of CUP-172 is contrary to the Superior Court's determination and judgment that the County waived its immunities with respect to the Airport, including CUP-172.

Third, the County's attempt to defer an amendment to CUP-172 until sometime in the future is inconsistent with CUP-172. As noted above, the existing designation of the Airport in CUP-172 is "General Aviation Basic Transport." The County acknowledges this designation is outdated and admits the FAA changed it to B-II several years ago. The County also acknowledges that the purpose of the Proposed Project is to more safely accommodate D-III aircraft which already are using the Airport. The County's attempt to defer seeking an amendment to CUP-172 is improper because an inconsistency with CUP-172 already exists and nothing in CUP-172 authorizes the County to set conditions on when it will seek an amendment to eliminate the inconsistency. The Proposed Project's intention to accommodate D-III aircraft, without immediately seeking an amendment to CUP-172, exacerbates the existing inconsistency and results in a significant impact on land use compatibility.

Please revise the PEIR to identify and discuss the significant impact on land use compatibility associated with the inconsistency between the Proposed Project and CUP-172.

- 5. The PEIR fails to analyze the potential significant impacts on land use compatibility associated with the inconsistency between the County's waiver of immunities and the requirements of its federal sponsor assurances.**

On January 26, 2021, the Superior Court ruled that the County waived its immunities with respect to the Airport. The County elected not to appeal the ruling and, as a result, the judgment is final and binding on the County. (PEIR, p. 3-107.)



In Section 3.1.7, Land Use & Planning, the PEIR acknowledges that the County's waiver of immunities concerning the Airport would result in the County being out of compliance with its federal sponsor assurances:

The County, however, has immunities from City of Carlsbad ordinances (e.g., building and zoning) and cannot waive those immunities without risking a violation of its federal sponsor assurances. To the extent immunities have been waived, City of Carlsbad's approval may be sought, but the County reserves the right to reassert immunities, federal preemption, or other legal theories when necessary to remain compliant with federal sponsor assurances or implement County objectives.

(PEIR, p. 3-97.) The PEIR further states that it may become necessary to assert immunities in order to limit the applicability of CUP-172, because the County's federal sponsor assurances require it to retain land use control and to seek to regain land use control where it has been relinquished. (PEIR, p. 3-107.)

There is a clear conflict between the Superior Court's ruling that the County waived its immunities with respect to the Airport and the County's reservation of a right to assert immunities in connection with its federal sponsor assurances or the implementation of County objectives. However, the PEIR fails to identify this conflict as a potential significant impact on land use compatibility. As a result, the PEIR's analysis of potential significant impacts on Land Use & Planning is inadequate and incomplete.

Please revise the PEIR to identify and discuss the potential significant impact on land use compatibility associated with the inconsistency between the County's waiver of immunities concerning the Airport and the County's federal sponsor assurances.

**6. The PEIR's description of the Proposed Project is unstable and incomplete because neither the PEIR nor the Airport Master Plan Update contains a copy of the proposed ALP.**

The PEIR describes the Proposed Project as follows:

The Airport Master Plan Update is a comprehensive projection of the Airport's near-term (0-7 years), intermediate-term (8-12 years) and long-term (13-20 years) conceptual facility development. It provides the framework to guide future Airport development based on its ability to meet existing and future aviation demand in a safe and cost-effective manner. The Master Plan Update evaluates proposed improvements and bases their constructability on their ability to meet technical, economic, and environmental considerations. The evaluation culminates in the development of an Airport Layout Plan (ALP) that is approved by the FAA making projects that are depicted on the ALP eligible for federal funding.

(PEIR, p. 1-10.) The PEIR further states that, “[a]s part of the proposed Airport Master Plan Update, the ALP would be revised to depict anticipated improvements in the 20-year planning period (2016–2036).” [PEIR, p. 3-103.]

The ALP is a fundamental component of the Proposed Project. It is identified as Appendix 1 in the McClellan-Palomar Airport Master Plan Update (October 2021). The ALP is of particular importance to the issue of land use compatibility because the PEIR repeatedly states that the County will not seek an amendment to CUP-172 to change the designation of the Airport until it makes “any change in ARC beyond the existing B-II designation in the ALP or prior to taking action to implement facility improvements for an ARC greater than B-II.” (See, e.g., PEIR, p. 3-110.)

The County acknowledges that the purpose of the Proposed Project is to more safely accommodate the D-III aircraft that already are using the Airport. It is reasonable to assume, therefore, that the current ALP will be revised to change the Airport’s designation to D-III. However, the PEIR does not indicate whether the revised ALP will do so and a copy of the revised ALP has not been made available. Although its Table of Contents identifies the ALP as Appendix 1, the version of the Master Plan Update made available to the public states that Appendix 1 is “A Draft Document in Progress.” (McClellan-Palomar Airport Master Plan Update (October 2021), Appendix 1, p. A1-6-1.)

Where the description of an important component of a project is still “in progress,” an EIR’s project description is neither complete nor stable nor accurate. The description of the Proposed Project in the PEIR is unstable, incomplete and inadequate because a copy of the revised ALP is not included in either the PEIR or the Airport Master Plan.

Please revise the PEIR to disclose whether the ALP currently “in progress” will change the designation of the Airport to D-III. Please also suspend any further proceedings concerning the Proposed Project and the PEIR until the proposed ALP is completed and included as Appendix 1 in the McClellan-Palomar Airport Master Plan.

#### **7. The PEIR’s Noise Analysis Fails to Comply with the Superior Court’s Order and Remains Deficient Under CEQA**

In addition to ruling that the County must conduct supplemental noise analysis to expand the scope of the noise impacts studied, the Superior Court held that the methodology of the noise analysis in the PEIR was “inadequate.” (*Citizens for a Friendly Airport v. County of San Diego*, San Diego Superior Court Case No. 37-2018-00057624-CU-TT-CTL, Minute Order filed January 26, 2021, p. 3.) Citing the decision in *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1377–1383, the Superior Court held that an agency’s sole reliance on Community Noise Equivalent Level (CNEL) is improper for CEQA purposes. As the Court of Appeal explained in the *Berkeley Jets* case, an EIR which relies only on CNEL for noise analysis fails to disclose how the project will influence nighttime overflights and

their effects on sleep disturbance in the community. (*Id.*) The Court of Appeal held that supplemental noise analysis of nighttime flights was necessary and reasoned that this could be accomplished using sound exposure level [SEL] to evaluate sleep disruption from single event sounds including aircraft fly-bys. (*Id.* at 1382.)

Although the revised PEIR includes supplemental noise analysis, it fails to correct the inadequate methodology identified by the Superior Court. The PEIR still relies solely on the CNEL methodology and fails to address any other form of noise measurement to evaluate sleep disruption from night flights. This issue was raised in the City's comments on the Draft PEIR back in March 2018 and remains unaddressed. (City of Carlsbad, Comments on the McClellan-Palomar Airport Master Plan Update and Draft Program Environmental Impact Report (March 16, 2018), p. 25.)

Please revise the PEIR to include an updated noise analysis which uses a methodology to address potential significant noise impacts associated with nighttime flights.

- 8. The PEIR must be recirculated because it contains information showing new significant environmental impacts would result from the Proposed Project and the description of the Proposed Project is incomplete.**

CEQA Guidelines section 15088.5 requires a lead agency to recirculate a draft EIR where significant new information is added to the EIR after the draft EIR has been made available for public review but before certification. "Significant new information" requiring recirculation includes, among other things, a disclosure showing a new significant environmental impact would result from the proposed project.

The PEIR must be recirculated because there is substantial evidence showing new significant impacts on land use compatibility and noise that are not analyzed in the PEIR. These new significant impacts include:

- (1) The inconsistency between CUP-172 and the designation of the Airport as B-II in the current version of the ALP;
- (2) The inconsistency between CUP-172 and the Proposed Project's intention to more safely accommodate D-III aircraft that already are using the Airport;
- (3) The inconsistency between the Superior Court's ruling that the County voluntarily and intentionally waived its immunities with respect to the Airport and the County's federal sponsor assurances; and
- (4) The potential significant impacts on noise, such as those associated with sleep disruption from night flights, that were not addressed due to the PEIR's sole use of CNEL methodology.

Recirculation also is required where a draft EIR is so fundamentally inadequate and conclusionary in nature that meaningful public review and comment were precluded. The courts have made clear that an accurate and complete project description is "indispensable to an informative, legally adequate EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192.) The description of the Proposed Project is incomplete, unstable and inaccurate because neither the PEIR nor the McClellan-Palomar Airport Master Plan Update (October 2021) includes a copy of the proposed ALP and the proposed ALP was still "in progress" when the PEIR was made available for public review.

Please recirculate (i) a revised version of the PEIR which discloses and discusses the new significant impacts on land use compatibility associated with the inconsistencies between the Proposed Project and CUP-172 and between the County's waiver of immunities concerning the Airport and its federal sponsor assurances, (ii) a revised version of the PEIR which includes an updated noise analysis that uses an additional methodology to address nighttime flights, (iii) a revised version of the PEIR which includes a complete, stable and accurate description of the Proposed Project, and (iv) a revised version of the McClellan-Palomar Airport Master Plan which includes a complete and final proposed ALP as Appendix 1.

The City looks forward to working with the County to ensure that the PEIR is adequate and complete and the Airport Master Plan Update and its various components are undertaken in a manner that does not compromise the health and well-being of Carlsbad residents, while ensuring the requirements for safety and air navigation are met at the McClellan-Palomar Airport.

Sincerely,



Scott Chadwick  
City Manager

cc: Nora Vargas, Vice Chair, Board of Supervisors  
Joel Anderson, Member, Board of Supervisors  
Tara Lawson-Remer, Member, Board of Supervisors  
Jim Desmond, Member, Board of Supervisors  
Celia Brewer, City Attorney  
Geoff Patnoe, Assistant City Manager  
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