

November 14, 2011

San Rafael Planning Commission
c/o Kraig Tambornini
City of San Rafael
1400 Fifth Avenue
P.O. Box #151560
San Rafael, Calif. 94915-1560



Protecting Marin Since 1934

Re: **Final Environmental Impact Report (FEIR) for the San Rafael Airport
Recreational Facility**

Dear Commissioners,

On November 15, the San Rafael Planning Commission will consider recommending certification of the FEIR as adequate. The Commission will consider the merits of the project at a later date. Because issues of concern straddle the two processes, it is essential that an adequate FEIR provide a solid basis for evaluating the merits of the project. The FEIR continues to claim that there are no significant impacts of the project that cannot be mitigated to less than significant levels, and that Alternative 1 is infeasible. These conclusions may satisfy the standard for *legal* adequacy of an FEIR, but they leave important unresolved issues that must be considered at the subsequent "merits" hearing.

1. The FEIR does not explain the *intent* of the Declaration of Restrictions to limit development on the site or provide the history of the Declaration.

MCL, in commenting on the DEIR, requested that the FEIR provide more detail to elucidate the context in which the Declaration of Restrictions was agreed to and the history of negotiations between the City, County, and landowner, which could reveal the Declaration's *intent*. Staff has asserted that the covenant did not constitute a form of transfer of development density. The history suggests otherwise. In a *de facto* exchange of density, more intense development was permitted toward the Highway 101 corridor (e.g., Embassy suites, Autodesk). In "exchange," development on the airport site would be limited in uses, per the Declaration of Restrictions.

Quoting a letter to the City from the Sierra Club Marin Group (February 4, 2006), which remains relevant today:

"...the long history of this parcel clearly shows a continuum of efforts to limit development of the site. The reference to 'private and public recreational use' clearly contemplated recreational uses consistent with this history and did not create a basis of support for any and all recreational uses. Using that faulty basis, a racetrack facility or professional foot-

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ball stadium could be considered a ‘recreational use’, which would clearly contradict the intent of the covenant. . . We believe the covenant’s limitation to ‘recreational use’ should be interpreted as contemplating recreational structures of de minimus size. An 85,700 square foot building is not de minimus.”

Master Response PD-2 does not provide any new explanation, but simply restates the language in the Declaration of Restrictions, as found in the DEIR.

The DEIR states on Page 16-6 that “the existing Declaration of Restrictions allows for private and public recreational *uses* but not a recreational *facility*” (emphasis added). The FEIR, in Master Response PD-2 skirts the issue by stating that the Declaration of Restrictions was silent on the topic of “structures” and therefore does not preclude them. As noted above, under this logic any kind of recreational facility or structure—an arena, stadium, etc.—would theoretically be possible.

The CEQA document does not tell the whole story. A major question remains for discussion of merits: “Is the proposed 85,700 square foot building, with its anticipated daily and nightly patronage and activities, consistent with the intent of the Declaration?”

2. The FEIR finding that the Project will not have a significant impact on California Clapper Rails rests on assumptions that cannot be verified.

The DEIR describes the high level of disturbance associated with *all sides* of the branches of Gallinas Creek in the vicinity of the project site (*emphasis added*). Master Response BIO-2 simply restates the DEIR’s conclusion that California clapper rails in the vicinity of the project site have been able to adapt to the presence of humans and their activities: “Thus, the biological consultant, Monk & Assoc, has confirmed their conclusion that *one must assume* that the clapper rails have become accustomed to heavy human disturbances in the area.” This statement in itself is speculative. The Master Response goes on to list sources of disturbance: noise and motion associated with aircraft; noise and lighting on McInnis fields; lighting from nearby residential development; and presence of hikers on trail adjacent to the creek. The DEIR concludes that with adequate mitigation (buffers, etc.) the project will not have a significant impact on the clapper rail. The FEIR echoes this conclusion.

There are two problems with the conclusion. First, the description of disturbance is incomplete. It fails to note that existing disturbances are quantitatively and qualitatively different on the south side of the North Fork Gallinas Creek from those on the north side. Clapper rails have been observed frequently in the marshes along the south side, possibly seeking refuge from activity on the north side. On the south side of the creek, aircraft activity is sporadic and relatively remote from the creek habitat; human presence near the creek is infrequent; there are no lights; motion and noise are infrequent; mowing is seasonal; traffic is limited to airport users; and nighttime activity is essentially nonexistent. In effect, the project would bring to the south side disturbance levels that are now limited to the north side.

The second problem, i.e., lack of certainty, is related. Without lengthy observation, *one can only assume* that clapper rails would become habituated to a compounding of disturbance

levels. A number of variables influence wildlife habituation to disturbance. Therefore, one can only *speculate* as to whether the *cumulative effect* of disturbance on both sides of the creek, along with short-lived but intense construction noises such as in pile driving, may reach a threshold of tolerance at which the local population of clapper rail cannot habituate to the disturbances. Even with seasonal restrictions on construction and buffers as specified in mitigation measures, it is impossible to state conclusively that there is no possibility of significant impact on the California clapper rail population.

Since it is unlikely that the consultant will shift EIR findings in this regard from less-than-significant (with mitigation) to significant, the subsequent discussion of project merits must bear in mind that the FEIR cannot be conclusive. The population of California clapper rail is the most sensitive resource in the vicinity that could be “significantly” impacted by the project!

3. Alternative 1 (No Project) is inappropriately dismissed in the FEIR.

According to CEQA Guidelines Section 15126.6(d), the range of potential alternatives to the proposed project shall include those that (1) could feasibly accomplish most of the *basic* objectives of the project and (2) could avoid or substantially lessen one or more of the significant effects (§15126.6(c)). On the first point, the EIR dismisses Alternative 1 (No Project) as infeasible because it “would not meet *key* objectives of the project to ensure economic viability,” and because it “fails to meet *crucial* project objectives.”

Objectives provide an important benchmark in selecting and comparing alternatives and evaluating their *feasibility*. The more the objectives depart from *basic* and become *specific*, the less likely any alternative can be considered feasible. As listed in the DEIR, *General Objectives* begin:

“Create an economically self-sustaining, non-taxpayer financed, multi-sport recreational facility that provides all Marin County families with the opportunity to recreate year round on safe, all-weather fields and courts.”

The next *General* objective states:

“The facility shall include an indoor facility with ceiling heights and field sizes that meet national recreational standards for soccer and other field/court sports.”

Immediately, objectives jump to a new level, rendering any alternative that does not include a building as infeasible, even though Alternative 1, which lacks a building, could satisfy the first general objective and even partially address San Rafael Policies PR-13 and PR-14. With few exceptions, all of the Specific Objectives that follow the General Objectives in the FEIR are based on the assumption of a building and the consequent need to utilize it in such a way as to protect the investment. For example, “ensure that space is full on a daily basis” and “ensure that space remains marketable to new users over time” are not basic objectives; nor are “Project income must be sufficient to pay the mortgage and provide a reasonable rate of return on the 25% project down payment,” or “Include credit worthy sports operators with proven track records of success” basic objectives, although the applicant may consider these as “key” or “crucial” to

his investment. These FEIR conclusions may satisfy CEQA standards of adequacy, but they should not limit consideration of any alternative in the next phase of review.

On the second point, Alternative 1 is dismissed because “it would not substantially lessen one or more of the significant effects of the project.” The argument supporting this conclusion is that since the Project has no significant effects that cannot be mitigated to less than significant levels, Alternative 1 will “not substantially lessen one or more of the significant effects” (because there are none!). This contorted logic ignores the dramatic reduction in overall “impact” on the environment that eliminating the building, and thereby numbers of users and activities, would have. It also ignores its own conclusions in many categories that impacts would be *less than* or *similar*. Finally, in dismissing Alternative 1, the FEIR ignores its own evaluation that the No Project (Alternative 1) is the “Environmentally Superior Alternative.” Again, the CEQA conclusions should not serve to eliminate Alternative 1 from consideration of project merits.

4. Greenhouse gas emissions are “significant” even if this finding is not required by CEQA for the FEIR.

The discussion of climate change and greenhouse gas (GHG) emissions in the DEIR and FEIR demonstrates how legal adequacy of an EIR can ignore clearly “significant” impacts – impacts that should not be ignored in consideration of merits, however. We appreciate that the consultant performed a second analysis of greenhouse gas emissions, pursuant to new BAAQMD thresholds and revised CEQA Guidelines. This provides a quantifiable threshold for determining that *there would be a significant impact*, even though such a determination is not applicable to this FEIR because the Notice of Preparation preceded adoption of the new regulations.

Based on a *qualitative* threshold for GHG, the DEIR describes a number of Project components intended to limit emissions, such as incorporating LEED standards for efficiency, limiting vehicle idling, limiting waste generation, incorporating bicycle and pedestrian access, etc. (See also FEIR Table 1). However, the FEIR Master Response GHG-1 (Page C&R-51) admits that “due to the geographic location of the facility and its relative isolation from transit and an efficient multimodal transportation network, there aren’t any significant additional changes that can be made (e.g., reducing Project-related traffic and VMT) to allow for a Project that meets the new thresholds established by the BAAQMD for projects after June 2, 2010.”

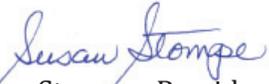
This is a very important admission! The City’s Climate Action Plan (CAP) lists many programs and means of implementing the City’s goal to reduce GHG emissions, many of which would be incorporated in the Project. One recommendation in the CAP that is not addressed in the FEIR is the following: “The best way for local governments to address emissions from transportation is to regulate how cities are developed. . .” When the merits of this proposed project are discussed, the Planning Commission must look beyond the limitations of the FEIR, which does not measure vehicle miles traveled or find GHG emissions “significant” because of the timing of regulations, and consider whether the remote location of this project from public transit is not simply one more reason that the airport site is inappropriate.

5. The City must have some guarantee against the liability of possible future failure of the project.

The governing and long standing Master Plan for this property limits further uses to ancillary airport uses as well as open space and recreation. It is conceivable that the City, after thorough review, may decide to approve the proposed project. With that possibility in mind, the City should consider the potential for financial failure of the project's business plan and clearly foreclose the possibility of allowing the site to be converted to other commercial uses not envisaged in the existing Master Plan. To insure that the site would be returned to its pre-project status, the property owner and the operator of the project complex should be required to provide bonding sufficient to remove the structures and associated facilities in their entirety. The FEIR is silent on appropriate mitigation or conditions if the proposed project should fail in future years. While CEQA does not require assessment of project viability, it is a relevant issue in this case because of the limitations placed on the land in the existing Master Plan.

In conclusion, Marin Conservation League thanks you for the opportunity to comment. We believe that the DEIR suffered from a number of serious flaws, only a few of which have been resolved in the FEIR. Unfortunately, inadequate FEIRs are frequently found to be *legally* adequate. This should not be allowed to interfere with the need for full and comprehensive consideration of the merits of the proposed project at the appropriate time.

Sincerely,



Susan Stompe, President

(signed)

Roger Roberts

cc: Susan Adams, Supervisor 1st District