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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

PRESIDIO HISTORICAL ASSOCIATION, et al., Plaintiffs, v. PRESIDIO TRUST, Defendant.	3:12-CV-00522-LB **FEDERAL DEFENDANT'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT** Next Scheduled Hearing Date: May 15, 2013 Time: 9:30 a.m. Location: Courtroom C, 15th Floor

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ACHP	Advisory Council on Historic Preservation
AR	Administrative Record
CEQ	Council on Environmental Quality
EIS	Environmental Impact Statement
GGNRA	Golden Gate National Recreation Area
GMPA	General Management Plan Amendment
HSR	Historic Structure Report
MOA	Memorandum of Agreement
NEPA	National Environmental Policy Act
NHLD	National Historic Landmark District
NHPA	National Historic Preservation Act
NPS	National Park Service
PA	Programmatic Agreement
PTMP	Presidio Trust Management Plan
SEIS	Supplemental Environmental Impact Statement
SHPO	State Historic Preservation Officer
THPO	Tribal Historic Preservation Officer

I. INTRODUCTION

After the United States Army furled the Presidio's flag for the last time, the Presidio became America's most expensive national park. Seeking relief from the burden of funding the Presidio, the Senate proposed selling it to the private sector, and estimated budget savings of 555 million dollars over two years.[1] But legislative innovation gave the park another chance. The Presidio Trust, led by a board of expert land managers and conservationists, was created to preserve the natural, historic, and recreational resources of the Presidio while developing a land and property management plan that would achieve, at a minimum, financial self-sufficiency for the Presidio in fifteen years. If the Trust could not meet its financial goal, the Presidio would be sold. Fifteen years after the Trust's first meeting, the Presidio still belongs to the American people, and an abandoned military post has become a welcoming national park site.

The Main Post Update will continue to make the park welcoming to the public by reestablishing the Main Post as the heart of the park and focal point for visitors. Plaintiffs disagree with the Trust's decision to include a lodge for this purpose, and have "worked hard to mischaracterize this lodge" as an upscale luxury hotel. AR 3330. Through this Court, the Plaintiffs seek to substitute their judgment for the Trust's. However, the Main Post Update violates no law. From beginning to end, the Trust has diligently complied with both the letter and spirit of the Trust Act, National Environmental Policy Act (NEPA), and National Historic Preservation Act (NHPA). The Update balances the Trust's diverse mission and adheres to the Trust's authority for new construction, which the Trust formally interpreted over a decade ago and has consistently applied ever since, without challenge. Congress provided the Trust with a construction authority that is deliberately flexible, and Plaintiffs' attempt to diminish and narrow it must fail. The Trust fulfilled the procedural requirements of the NHPA by carefully considering the projects' effects on historic values. Through comprehensive consultations with historic preservation officials and the public, the Trust voluntarily modified the lodge proposal and other Main Post projects to avoid and minimize adverse effects on the historic landmark district. Finally, the Trust satisfied NEPA by preparing draft, supplemental, and final environmental impact statements which analyzed the reasonable alternatives for revitalizing the Main Post, examined their impacts, and facilitated public comment throughout. This Court should reject Plaintiffs' efforts to find fault with the Main Post Update, and uphold the decision of the Trust.

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[1] S. Rep. No. 104-82, at 320 (1995) (Statement of Sen. Barbara Boxer).

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II. ARGUMENT

A. The Trust complied with its authority to build new construction in the Presidio.

Plaintiffs do not dispute that the Supreme Court's two-part test set out in *Chevron, U.S.A. v. Natural Resources Defense Council* is the lens through which this Court must view section 104(c)(3) of the Trust Act. 467 U.S. 837 (1984). The Supreme Court reiterated in *Chevron* the longstanding principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844 (collecting cases). Under the *Chevron* deference analysis, a court reviewing an agency's interpretation of a statute it is assigned to administer first looks to "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress has spoken such that the meaning of the statute is clear, the court gives effect to the "unambiguously expressed intent of Congress." *Id.* 842-43. However, "if the language of the statute is open or ambiguous," the reviewing court "must uphold the [agency's] interpretation as long as it is reasonable." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 89 (2007); *see Chevron*, 467 U.S. at 843. "The court need not conclude that the agency construction was the one…the court would have reached if the question initially had arisen in a judicial proceeding." *Id.*at n.11.

Plaintiffs argue that section 104(c)(3) has only one clear interpretation—theirs. However, Plaintiffs have already submitted two different interpretations of section 104(c)(3) in this case. Their opening brief argued that "new construction is generally prohibited except where it substitutes for a building of similar size in the *same place*." Pls.' Br. 15 (emphasis added).[2] Their reply brief takes a new position, acknowledging "the statute allows Defendant some flexibility to locate the new structure," so long as it is in "substantially *the same developed area*." Pls.' Br. 10, 16 (emphasis added). The fact that Plaintiffs have advanced two distinct interpretations of section 104(c)(3) undermines their argument that this provision of the Trust Act is clear on its face and has only one meaning, in their favor.

At *Chevron* step one, the relevant question is whether Congress clearly and unambiguously defined the Trust's authority for new construction in section 104(c)(3) of the Trust Act.[3] Section 104(c) of the Trust Act

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[2] Citations to Plaintiffs' opening summary judgment brief will be abbreviated, "Pls.' Br." Citations to their reply brief will be abbreviated, "Pls.' Reply." Pin cites to Plaintiffs' briefs follow the bottom page numbering, not the Court's ECF stamp.

[3] Plaintiffs improperly frame the *Chevron* step one question as "whether Trust Act section 104(c) allows the kind of 'banking' Defendant relied on to approve the 2010 Plan." Pls.' Reply 13. That question is step two of *Chevron*: whether the agency's interpretation is a permissible construction of the statute.

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delegated to the Trust authority to create a program for "comprehensive management" of the Presidio, which "shall be designed to…increase revenues to the Federal Government to the maximum extent possible." Trust Act § 104(c). A statutorily-required component of this program was: "(3) new construction limited to replacement of existing structures of similar size in existing areas of development." *Id.*

1. Section 104(c)(3) clearly empowers the Trust to develop a plan that includes new construction, "of similar size" to the structures replaced, "in existing areas of development."

The Trust Act places only two limitations on new construction in the Presidio. First, new construction must replace "existing structures of similar size"—the Trust cannot plan new construction unless it has provided for demolition of structures "of similar size." Second, the new construction must be in one of the "existing areas of development" within the Presidio. The Trust cannot site new construction in undeveloped natural areas, like the Historic Forest or native plant habitats. *See* AR 27532 (Presidio Trust Management Plan (PTMP) map showing existing areas of development and proposed open space). The plain meaning of section 104(c)(3), the purpose of the Trust Act, and the legislative history all confirm this meaning.

a) The plain language of the Trust Act does not mandate "one-down/one-up" construction, and instead authorizes new construction in "existing areas of development."

Section 104(c)(3) of the Trust Act is a distinct authorization for the Trust to replace demolished buildings with new construction in the Presidio's existing areas of development. The Trust Act's requirements in this regard are not identical to those of the older Golden Gate National Recreation Area (GGNRA) Act. Although Plaintiffs purport to analyze the plain meaning of section 104(c)(3) of the Trust Act, their discussion reverts to the construction prohibition of the GGNRA Act. Plaintiffs urge the Court to read section 104(c)(3) of the Trust Act identically to the new construction provision of the GGNRA Act because "there is no canon of interpretation that forbids interpreting different words…to mean roughly the same thing." Pls.' Reply 16. It is well established, however, that "in interpreting statutory text, we ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning." *Abbott v. Abbott*, 130 S. Ct. 1983, 2003 (2010); *see Russello v. United States*, 464 U.S. 16, 23 (1983) (declining to conclude "that the differing language in the two subsections has the same meaning in each."). In other words, "legislative language will be interpreted on the assumption that the legislature was aware of existing statutes,…so that if a change occurs in legislative language a change was intended in legislative result." 2A Norman J. Singer & J.D. Singer, *Sutherland Statutes and Statutory Construction* § 45:12 (7th ed. 2007).

Congress simply did not apply a "one-down/one-up" requirement to new construction in the Presidio under the Trust Act. Though the two statutes share several common words, the language is not "nearly identical." Pls.' Br. 12. There are meaningful linguistic differences that Plaintiffs do not attempt to explain. For instance, Congress did not use the term "reconstruct" in the Trust Act, while that term appears in both the GGNRA Act and the legislative notes to the 1978 amendments.[4] The GGNRA Act clearly established that "new construction and development…is *prohibited*" with the sole exception that buildings may be "*reconstructed*." 16 U.S.C. § 460bb-2(i) (emphasis added). But "reconstruct" appears nowhere in the Trust Act. Although Congress limited the Army to "one-down/one-up" reconstruction in the GGNRA Act, Congress declined to confine the Presidio Trust's authority to "reconstruction."

Further, in section 104(c)(3) of the Trust Act, Congress included the words "in existing areas of development." The prepositional phrase "in existing areas of development" appears nowhere in the GGNRA Act, and Plaintiffs do not address why Congress added this phrase to the Trust Act. *See Abbott*, 130 S. Ct. at 2003 ("use of different words is purposeful and evinces an intention to convey a different meaning"). Plaintiffs argue that the phrase must describe the last antecedent, "existing structures." Pls.' Reply 16. But the interpretive canon of the last antecedent "is not an absolute and can assuredly be overcome by other indicia of meaning…." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). In this case, Plaintiffs' theory that the statute should read "existing structures…in existing areas of development" renders the unique phrase Congress added to section 104(c)(3) redundant and meaningless. Existing structures, by definition, stand "in existing areas of development." "When one plausible interpretation creates surplusage and another plausible interpretation does not, the latter generally controls." *United States v. Farmer*, 627 F.3d 416, 423 (9th Cir. 2010). To avoid redundancy and give effect to the phrase, it should be read to authorize "new construction…in existing areas of development."[5] *See Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991) ("we should avoid an

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[4] The notes accompanying the 1978 amendments to the GGNRA Act appear in the code itself, at the end of 16 U.S.C. § 460bb-2. Congress's reiteration of "reconstruct" was critical to Judge Schwarzer's reasoning that the GGNRA's prohibition should be interpreted strictly: "The [1978] amendment prohibits new construction on Army lands, but authorizes *reconstruction* or demolition…." AR 35426 (emphasis added).

[5] The phrase can also be given effect as a qualifier to the word "replacement," so that the statute reads "new construction limited to *replacement*…in existing areas of development." This interpretation of the statute is not meaningfully different from "new construction…in existing areas of development" and also confirms that the new construction (or replacement construction) need not be located in the same place.

interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress.") (quoting *Beisler v. Comm'r*, 814 F.2d 1304, 1307 (9th Cir. 1987)).

Plaintiffs' only explanation for the Trust Act's unique qualifying phrase, "in existing areas of development," is that it "indicates that construction need not be located in the exact same spot as the old building(s), but that it must be in approximately the same location." Pls.' Reply 16. Plaintiffs do not explain their logical leap from "in existing areas of development" to "in approximately the same location." Section 104(c)(3) does not say new construction must be "in *the same* existing area of development"; rather, the statute refers to the plural "existing *areas* of development." Yet throughout their brief, Plaintiffs read the words "the same" into the statute. Pls.' Reply 10 ("substantially the same developed area"); 16 ("approximately the same location"); 13 ("the same existing development area"); 14 ("the same existing development"). That additional language is Plaintiffs', not Congress's. And the several interpretations Plaintiffs propose—e.g., "approximately the same location," or "substantially the same developed area"—are inconsistent and unclear.[6] The Trust Act did not establish dividing lines between one "developed area" and another.

Plaintiffs also improperly discount the fact that Congress included plural nouns in section 104(c)(3) of the Trust Act, but drafted the GGNRA's reconstruction provision using singular nouns. 16 U.S.C. § 460bb-2(i) (allowing only demolition of "a structure" and reconstruction of "an improvement"). The plain meaning of section 104(c)(3) of the Trust Act, with its mixture of singular and plural forms, allows replacement of several "structures" collectively so long as they are of "similar size" to the new construction. Plaintiffs summarily dismiss the significance of the mixing of singular and plural in the Trust Act as a "semantic distinction," because "words importing the singular include and apply to several…things," and "words importing the plural include the singular." Pls.' Reply 15. Apparently Plaintiffs believe that that the singular nouns used in the GGNRA Act are key to establishing a mandatory "one-down/one-up" requirement, while the plural nouns used in section 104(c)(3) are meaningless. The Court should reject this selective application of 1 U.S.C. § 1. In

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[6] The "General Management Plan Amendment" (GMPA), the National Park Service's plan governing the Presidio at the time of the Trust Act, explained that the "more heavily developed areas are the Main Post, Fort Winfield Scott, the Letterman complex, the Public Health Service hospital site, and the east housing area. Other planning areas include a mix of built and natural features, like Crissy Field, or are almost entirely open space, like the Presidio Forest and Lobos Creek valley." AR 34540. In fact, the GMPA included buildings 605 and 606—which provide offset square footage for the Main Post Update—in the Main Post planning area. AR 34586.

any event, 1 U.S.C. § 1 is a general rule that does not apply where "the context indicates otherwise." *Id.* Here, the words Congress chose for section 104(c)(3) should not be ignored. The Trust Act authorizes replacement of "existing *structures* of similar *size*" to the new construction, which is a notable change from the GGNRA Act's strict provision limiting the Army to one-for-one reconstruction. 16 U.S.C. § 460bb-2(i).

b) The purpose and design of the Trust Act confirm that it allows new construction, of similar size to the structures replaced, in existing areas of development.

The GGNRA Act and Trust Act do share certain goals, including "sound principles of land use planning" and protecting "the scenic beauty and historic and natural character of the area." Trust Act § 101(5); 16 U.S.C. § 460bb. But these goals do not suggest Congress intended to restrict the Trust only to reconstruction of buildings in the same location. Plaintiffs overlook major differences in the statutory design and purpose of the GGNRA Act and Trust Act, which reflect that Congress intended the Trust to have flexibility to build construction, of similar size to demolished buildings, throughout existing developed areas of the Presidio. These fundamental differences make it inappropriate to consider the two statutes *in pari materia*, as Plaintiffs urge.

First, Congress established the Trust specifically as the land manager of the Presidio, while the Army was merely a temporary custodian of future park lands in the GGNRA. The GGNRA Act sought to prevent the Army from expanding military buildings on lands that would soon become a recreation area managed by the National Park Service (NPS). For that reason, the GGNRA Act prohibited all construction activity except "reconstruction" of demolished structures.[7] Moreover, the GGNRA Act imposed mandatory requirements for the Army to consult with the Secretary of Interior, and the Secretary to hold a public hearing, before every individual reconstruction activity. 16 U.S.C. § 460bb-2(i). By contrast, Section 104(c)(3) of the Trust Act delegates the Trust itself primary authority to develop a plan for the Presidio's lands, to incorporate new construction in that plan, and to manage both maintenance and "improvement" of property under its jurisdiction. Trust Act § 104(a); 104(c). Whereas the GGNRA Act sought to strictly limit the Army's authority

[7] Plaintiffs incorrectly describe the applicability of the GGNRA provision prohibiting new construction. Pls.' Reply 11 n.5. The GGNRA prohibition only applied to "lands under the administrative jurisdiction of a department *other than* the Secretary [of Interior]," and thus it did not apply to the principal land manager of the Recreation Area, the Secretary of Interior (acting through NPS). 16 U.S.C. §460bb-2(i) (emphasis added). Given that Congress did not restrict NPS's ability to plan new construction, there is no indication Congress intended the Trust, the "successor in interest" to NPS, to be as limited as the Army in planning new construction for the Presidio. *See* Trust Act § 104(c).

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to modify the Presidio, as Plaintiff recognizes, the Trust Act "conveyed upon Defendant broad authority to manage the Presidio property." Pls.' Reply 10.

Second, the fundamental purpose of the Trust Act was to create a financially independent park. If the Trust could not achieve that goal, there would be no park in fifteen years. Defs.' Br. 19-21. Federal appropriations to the Trust would incrementally decrease to zero, and if the Presidio was not self-sufficient by that time, its lands would be "disposed of," "deleted from the boundary of the [GGNRA]," and forever lost as a public treasure. Trust Act §§ 105(b); 104(o). Economic concerns were paramount to Congress's statutory design. Trust Act §§ 101(7) ("public/private partnership that minimizes cost to the United States"); 104(c) ("increase revenues…to the maximum extent possible"); 104(g) ("all proceeds…shall be available, without further appropriation, to the Trust"); *see* H.R. Rep. No. 104-234 at 13 (1995) ("The greatest concern of the Committee has been the cost of the Presidio. The Committee cannot support funding levels for the Presidio as proposed in the NPS plan."). Congress expressed no similar economic concerns in the GGNRA Act, and in fact provided ample funding for the GGNRA—over 120 million dollars for establishment, on top of annual management appropriations to the National Park Service. 16 U.S.C. § 460bb-5. The Trust Act, unlike the GGNRA Act, issued a challenging mandate with grave consequences should the Trust fail to raise sufficient revenues from "leasing,…rehabilitation,…and *improvement* of property within the Presidio." Trust Act § 104(a) (emphasis added). To strictly constrain the Trust's construction authority to "one-down/one-up" would have tied the Trust's hands in meeting this challenging mandate, at the risk of the sale of lands in the Presidio. Instead, Congress opted to allow the Trust discretion and flexibility to locate new construction "in existing areas of development," but not in the Presidio's undeveloped areas of natural open space.

Third, a "one-down/one-up" interpretation that allows only same-place reconstruction creates an absurd result. Congress could not have intended the Trust to establish a revenue-generating mix of leasable residential and office space merely by demolishing and reconstructing the Presidio's existing layout, building-for-building. The Presidio was a decommissioned military base, with a wide variety of buildings of different sizes, situated to serve military purposes of the Army as those purposes changed over time. These buildings ranged from eighty square feet (Building 1061) or smaller to over 440,000 square feet (the Letterman Hospital). AR 2757; 32643. Congress did not intend the Trust to simply replicate the sizes and arrangement of these structures through ministerial reconstruction, but wanted the Trust to have the expertise necessary to

intelligently plan new construction in any of the Trust's already developed areas. Notably, Congress gave the President specific criteria for selecting six Trust board members

> who shall possess extensive knowledge and experience in one or more of the fields of city planning, finance, real estate development, and resource conservation. The President shall make the appointments…and shall ensure that the fields of city planning, finance, real estate development, and resource conservation are adequately represented.

Trust Act § 103(c)(1)(B). Two of the four criteria for Trust Board members involve expertise in urban planning and development, revealing that Congress did not intend to strictly cabin the Trust's authority to "one-down/one-up" reconstruction. Rather, Congress provided authority for new construction in existing developed areas, to be exercised by a board of directors with extensive expertise in "city planning," "real estate development," and "resource conservation" alike. *Id.*

c) The legislative history reflects Congress intended Section 104(c)(3) to be a flexible authority for new construction.

Both legislators and congressional witnesses envisioned a Trust that would have discretion over its authority to build similarly-sized new construction in the Presidio's existing areas of development. Congress wanted this construction authority to be a flexible one. Senator Bumpers specifically spoke of his reluctance to add limitations to the Trust's authority for new construction because he wanted it to "have some discretion." *To Provide for the Administration of Certain Presidio Properties at Minimal Cost to the Federal Taxpayer: Hearing on S. 594 Before the Senate Subcomm. on Parks, Historic Pres., and Rec. of the Senate Comm. on Energy and Natural Res.*, 104th Cong 54 (1995) [hereinafter *June 1995 Hearing*]. Senator Murkowski, Chairman of the Senate Energy and Natural Resources Committee, expressed a broader desire "to ensure that the Trust has adequate flexibility if we are going to make commitments for it to perform and phase out a significant portion of the Federal funding…." *To Provide for the Administration of Certain Presidio Properties at Minimal Cost to the Federal Taxpayer: Hearing on S. 594 & H.R. 1296 Before the Senate Comm. on Energy and Natural Res.*, 104th Cong. 2 (1995) [hereinafter *December 1995 Hearing*]. He later reiterated his intent "to ensure that the Trust has that flexibility, and we do not preclude them from it by quantifiers around this legislation." *Id.* 42-43. Moreover, at least one opponent of the legislation brought to Congress's attention that the Trust's construction authority, as drafted, suggested the Trust could "bank"

square footage of demolished structures for use in new construction.[8] *June 1995 Hearing*, 104th Cong. 62 (1995) (statement of Eduardo Cohen, Member, Preserve the Presidio). Plaintiffs improperly dismiss much of this legislative history, and suggest that the Court should consider only statements of the Trust Act's sponsors. Pls.' Reply 19. However, "[t]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history." *U.S. v. O'Brien*, 391 U.S. 267, 384 (1968). The goal is to illuminate the plain meaning of the language through the intent of the Congress, and section 104(c)(3) was intended to confer a flexible new construction authority on the Trust.

Plaintiffs argue that the Trust was to accomplish the twin goals of "protect[ing] the Presidio while achieving financial self-sufficiency" solely by "leasing *existing space* in the park." Pls.' Br. 18 (emphasis in original). There are certainly many statements in the legislative history discussing the leasing of existing Presidio buildings, because Congress intended rental proceeds to be one major source of revenue to the Trust. But Plaintiffs' implication that the Trust was *only* intended to lease existing space, rather than leasing existing space and planning appropriate new buildings to be leased, is inconsistent with the structures and purposes of the Trust Act. Congress empowered the Trust to plan "new construction," to manage the "leasing, maintenance,…and improvement" of Presidio properties, and to retain its proceeds for discretionary "improvements" as well. Trust Act §§ 104(c)(3); 104(a); 104(g). Two mandatory qualifications of Trust Board members include experience in "city planning" and "real estate development." Trust Act § 103(c). Reading the Trust's authority for new construction as "one-down/one-up" does not harmonize the meaning of the statute, it vitiates the statute's design to create a "Trust," with expertise in land use planning, whose duty is to simultaneously protect the Presidio's incomparable resources while making it financially sustainable.

Plaintiffs' many citations to the legislative history of the Trust Act omit legislative history concerning the Trust's authority for new construction. Instead, Plaintiffs selectively quote passages concerning a separate authority of the Trust—the leasing of existing buildings. Further, Plaintiffs repeatedly misconstrue Senator Campbell's statement regarding private "condos and dining clubs." Pls.' Reply 19. There is no indication in the legislative history that Senator Campbell, or any member of Congress, would have rejected a lodge in the

[8] Mr. Cohen's statement is not "silence in the legislative history." Pls.' Reply 20. Rather, he voiced his opinion, on the record before Congress, that section 104(c)(3) as written allowed square footage to be "banked and moved around," giving the Trust a flexible authority for new construction in existing, developed areas. *June 1995 Hearing*, 104th Cong. 62 (1995). The language passed unmodified.

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Presidio designed as "an affordable, visitor-friendly, family-friendly establishment with public uses on the ground floor that serves not only guests who are staying in the Lodge, but also the general public." AR 1487.

Defendant has identified numerous other passages from the legislative history directly related to the Trust's authority to undertake new construction. The Trust's authority for new construction was meant to be broad. *June 1995 Hearing*, 104th Cong 54 (Senator Bumpers commenting "I just am reluctant to put some of these things in the legislation, because I want you to have some discretion."); *December 1995 Hearing*, 104th Cong. 25 (NPS General Manager of the Presidio Robert Chandler stating, "I think the Trust we would envision would have discretion in terms of what it would wish to do within any areas of administrative jurisdiction."). Replacement square footage was originally envisioned as a tool for the Trust. *June 1995 Hearing*, 104th Cong. 40 ("replacement square footage should be allowed to enhance the value of certain properties") (Statement of Curtis Feeny, Stanford Management Co.). And new construction was authorized in any of the Presidio's existing areas of development, not just the same one. *June 1995 Hearing*, 104th Cong. 53 (James Harvey of Transamerica Corp. explaining new construction "could be in any of the so-called built up areas."). Congress was aware that section 104(c)(3) as drafted would grant the Trust substantial flexibility to demolish built space and replace it with new construction in any existing area of development.

2. At a minimum, section 104(c)(3) is ambiguous, and the Trust's interpretation deserves *Chevron* deference.

In the alternative, if the plain language, purpose, statutory design, and legislative history of the Trust Act do not clearly resolve the meaning of section 104(c)(3) in Defendant's favor, the statute is at least ambiguous, and subject to more than one reasonable reading. *See* Defs.' Br. 26. As previously noted, Plaintiffs have already argued for at least two different interpretations of section 104(c)(3) in their briefing to this Court. As Plaintiffs recognize, "agencies have wide latitude to interpret ambiguous statutes." Pls.' Reply 21. If the Court determines that the meaning of section 104(c)(3) is ambiguous, "the court does not simply impose its own construction on the statute." *Chevron*, 467 U.S. at 843. Rather, at the second step of the *Chevron* analysis, the Court defers to the agency's interpretation of the statutory provision so long as it is "based on a permissible construction of the statute." *See id*. Therefore, the Court must give the Trust's interpretation "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id* at 844; *see Mayo Found. for Med. Educ. and Research v. United States*, 131 S. Ct. 704, 711 (2011).

Defendant's opening brief explains the Trust's promulgation of the original PTMP back in 2002. Defs.' Br. 26-27. The Trust's formal interpretation of section 104(c)(3) in that comprehensive plan is reasonable. It provides:

> New construction may take the form of a building addition, an annex adjacent to an existing building, infill buildings set within an existing building cluster, or stand-alone structures in developed areas to *replace square footage removed in that location or elsewhere*…. New construction will be *limited to existing areas of development*, as stipulated in the Presidio Trust Act….

PTMP, AR 27542-43 (emphasis added). Using square footage as the yardstick for ensuring new construction is "of similar size" is certainly reasonable, as Plaintiffs do not appear to contest. Because the Trust Act allows replacement of "existing structures" collectively, the Trust appropriately does not restrict its authority to one-for-one reconstruction. Finally, the Trust quite reasonably interpreted the Trust Act to allow new construction in "existing areas of development."

Moreover, if the legislative history does not clearly show the Trust's new construction authority is broad, at a minimum it shows Congress deliberately left gaps for the Trust to fill in the language of section 104(c)(3). After Senator Bumpers explained that he would not object to allowing replacement construction in any of the Trust's built-up areas, the Senator stated: "I am just reluctant to put some of these things in the legislation, because I want you to have some discretion." *To Provide for the Administration of Certain Presidio Properties at Minimal Cost to the Federal Taxpayer: Hearing on S. 594 Before the Senate Subcomm. on Parks, Historic Pres., and Recreation of the Senate Comm. on Energy and Natural Res.*, 104th Cong. 40 (1995) (statement of Senator Bumpers). Senator Bumpers's statement demonstrates Congress wanted section 104(c)(3) to afford the Trust latitude in its development planning and development decisions, so that the Trust could use its expertise in city planning, real estate development, and resource conservation to determine what new construction would be necessary to achieve the financial self-sufficiency mandate of the Trust Act. Senator Murkowski, too, explained that he

> would not want to see…a situation where in a year we have another meeting…but the trustees come back and state that there just was not enough flexibility provided in the initial legislation so that they could do what they had to do. And I guess if I had a bottom line today, it is that.

December 1995 Hearing, 104th Cong. 42 (comment by Sen. Murkowski). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. The legislative history indicates that

Congress drafted section 104(c)(3) so that the Trust could fill the gaps. The Court should accept the Trust's reasonable interpretation of the statute, as Congress intended.

Finally, the Trust's interpretation of section 104(c)(3) is entitled to deference not only because it is a reasonable interpretation on its face and is consistent with the structure and purposes of the Trust Act, but also because the Trust has consistently applied that interpretation since the development of the PTMP. The Trust's plan also "reflect[s] the Agency's own longstanding interpretation, which should be accorded particular deference." *Barnhart v. Walton*, 535 U.S. 212, 213 (2002). The Trust's past construction projects like the Letterman Digital Arts Center, the Public Health Service Hospital redevelopment, the Walt Disney Family Museum, and the International Center to End Violence all used demolished square footage to offset construction of new buildings, often in different locations or outside the footprint of the existing structure. *See* Defs.' Br. 28. The Main Post Update similarly relies on "[a]ggregate or 'banked' square footage from demolished structures at the Main Post as well as elsewhere in the Presidio" to offset the limited new construction for the Presidio theater and chapel additions, the new archaeology lab entrance, and the Lodge. AR 35485. As Defendant has previously explained, the Trust has maintained an accounting of the total demolition and new construction within the Presidio since the original PTMP, to ensure there will be sufficient square footage to offset planned new construction. AR 2755-66. Demolitions from the Main Post Update and the nearby Doyle Drive project alone provide sufficient square footage to offset the planned new construction. Defs.' Br. 30 (explaining that Doyle Drive demolition is sufficient to offset 52,500 square-foot increase in the Main Post); *see* AR 996 (showing Buildings 605 and 606 approximately 500 feet north of the Main Parade, and Building 1158 further east along Doyle Drive). Plaintiffs have wavered in applying their "one-down/one-up" interpretation over the years—they settled the *Sierra Club v. Marsh* case to allow aggregation and relocation of square footage, and they proposed a new History Center on the Main Post that relied on banked square footage, as well. *See* Pls.' Reply 11 n.6; 17 n.8 (not denying Defendant's characterization). But the Trust has long adhered to its original interpretation of section 104(c)(3). That reasonable interpretation deserves *Chevron* deference.

B. <u>The Trust satisfied section 110(f) of the NHPA.</u>

The NHPA is a purely procedural statute, requiring agencies to "stop, look, and listen" before proceeding with an undertaking that will affect listed historic resources. *Te-Moak Tribe of W. Shoshone v. U.S. Dep't of Interior*, 608 F.3d 592, 610 (9th Cir. 2010); *Apache Survival Coal. v. United States*, 21 F.3d 895, 906

(9th Cir. 1994) ("[NHPA and NEPA] are stop, look, and listen provisions") (internal quotation marks and citation omitted); *City of Oxford v. FAA*, 428 F.3d 1346, 1356 (11th Cir. 2005) ("Like NEPA, the NHPA imposes purely procedural requirements."); *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 263 (3d Cir. 2001) ("[T]he NHPA is a procedural rather than a substantive statute...."). In passing section 110 of the NHPA in 1980, Congress did not intend to overhaul the procedural design of the statute by adding substantive mandates prohibiting certain agency actions if historic landmarks may be affected. The plain language of section 110(f) does not impose a substantive mandate. The legislative history explains that section 110 was "not intended to change the preservation responsibilities of Federal agencies as required by any other laws." H.R. Rep. No. 96-1457, at 36 (1980). And section 110(f), specifically, "does not supersede section 106, but complements it…." *Id.*

1. Most courts have applied section 110 procedurally, like the rest of the NHPA.

No court has ever held a provision of section 110 to be substantive. However, many courts have rejected attempts to construe provisions of section 110 substantively, or inconsistently with NHPA's procedural heart, section 106. *Nat'l Trust for Historic Pres. v. Blanck*, 938 F. Supp. 908, 922 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999) (holding section 110(a) merely procedural); *see Lee v. Thornburgh*, 877 F.2d 1053, 1057 (D.C. Cir. 1989) (sections 110(b) and 110(d) must be read in conjunction with section 106). In its opening brief, Defendant cited numerous cases explaining that section 110(f) "does not mandate specific substantive results, and merely sets forth procedural requirements." *Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin.*, 407 F. Supp. 2d 323, 338 (D. Mass. 2005), *aff'd* 463 F.3d 50, 63 (1st Cir. 2006); *Blanck*, 938 F. Supp. at 922. The substantial majority of courts to consider section 110 generally, and section 110(f) specifically, have found both procedural. *See* Defs.' Br. 32-33 n.20.[9]

Plaintiffs and amicus curiae attempt to distinguish the many cases rejecting their substantive interpretation of 110(f) by arguing that the analysis in the *Blanck* case was limited to section 110(a). Pls.' Reply 26; Amicus Br. 10. But "the *Blanck* court did not use such limiting language." *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp. 2d 161, 173 (D.D.C. 2008) (citing *Blanck*). Rather, *Blanck* examined

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[9] *Lesser v. City of Cape May* does not support Plaintiffs' substantive view of section 110(f). The *Lesser* court noted, the "Third Circuit…has determined that the NHPA only imposes relatively limited procedural obligations," and concluded "section 110(f) is subject to a similar interpretation." 110 F. Supp. 2d 303, 324 (D. N.J. 2000) (citing *Blanck*). Notably, the *Lesser* court also deemed the agency's programmatic agreement from the section 106 process as "ample evidence" the requirements of section 110(f) had been satisfied. *Id.*

section 110 in its entirety. It quoted the statutory text of subsections (a), (d), and (f), and it quoted and analyzed the legislative history for each of these provisions. *See Blanck*, 938 F. Supp. at 916-17 (quoting section 110(f) in full); 921-22. Ultimately, "the *Blanck* court concluded that '*Section 110 does not affirmatively mandate* the preservation of historic buildings or other resources' and only requires an agency 'to comply to the fullest extent possible with, and in the spirit of, the Section 106 consultation process and its own Historic Preservation Plan.'" *Oglala Sioux*, 537 F. Supp. 2d at 173. (quoting *Blanck*, 938 F. Supp. at 925) (emphasis in original). As the *Oglala Sioux* court expressly concluded, and the many other courts quoting *Blanck* have concluded implicitly, the analysis in *Blanck* was an evaluation of the entirety of section 110, and was not limited to part (a).

Continuing to lean on cursory dicta from the *Coliseum Square* case, Plaintiffs argue section 110(f) should be read as a substantive obligation to "minimize harm" to historic landmarks. But the Fifth Circuit in *Coliseum Square* did not explain its reasoning, did not examine legislative history, and did not even cite to another judicial interpretation of section 110. The multiple pages of discussion in *Blanck* provide a far more thorough legal analysis of NHPA section 110 than the few sentences of dicta in *Coliseum Square*. *Compare Blanck*, 938 F. Supp. at 916-17, 920-22, 925 *with Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 242, 243 (5th Cir. 2006).

Additionally, the legislative history for section 110(f) is clear that Congress intended the Advisory Council on Historic Preservation (ACHP) to develop "implementing procedures for this section, to provide clear guidelines to the agencies" for how to apply section 110(f) along with the section 106 process.[10] H.R. Rep. 96-1457 at 38. The ACHP has formally promulgated those regulations. 36 C.F.R. § 800.10(a)-(d). As described by the First Circuit,

> [t]he implementing regulation for section 110(f), 36 C.F.R. § 800.10, calls for the same procedures as section 106 (*i.e.*, the procedures specified in 36 C.F.R. §§ 800.6 and 800.7 requiring consultation with the ACHP), but further requires that the agency 'invite the Secretary [of the Interior] to participate in the consultation where there may be an adverse

[10] Although amicus argues section 110(f) is "codified" by the *Secretary of Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs*, the guidelines are not legally binding and "have no regulatory effect." 63 Fed. Reg. 20496-01 (1998). With respect to section 110(f) specifically, Congress directed ACHP to give agencies "clear guidelines" on implementing section 110(f) during the 106 process. *See Neighborhood Ass'n of the Back Bay v. Fed. Transit Admin.*, 463 F.3d 50, 63 (1st Cir. 2006) (applying *Chevron* deference to ACHP regulations of section 110(f)).

> effect' and requires that the ACHP 'report the outcome of the section 106 process...to the Secretary [of the Interior]….'

Neighborhood Ass'n of the Back Bay v. Fed. Transit Admin., 463 F.3d 50, 63 (1st Cir. 2006). Surely Section 110(f)'s instruction for agencies to "undertake such planning and actions as may be necessary to minimize harm to [National Historic Landmarks]" intended agencies to consider ways of avoiding, mitigating, or minimizing harm to landmarks. But Congress intended that obligation to be a procedural one. Agencies' section 110(f) obligations are fulfilled through the framework of the section 106 process of "develop[ing] and evaluat[ing] alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects…." *See* 36 C.F.R. § 800.6(a) (describing section 106 consultation process). Section 110(f) imposes the additional procedural requirements specified by the ACHP: requesting ACHP participation, § 800.10(b); inviting the Secretary of Interior's involvement in the consultation, with a discretionary section 213 report, § 800.10(c); and reporting the outcome of the consultation to the Secretary, § 800.10(d). *See* 36 C.F.R. § 800.10.[11]

2. The plain language of section 110(f) does not impose a substantive mandate.

Plaintiffs' reading of section 110(f) as a substantive obligation that agencies "'minimize harm' to National Landmarks to the 'maximum extent possible'" requires manipulation and selective omission of Congress's language. Pls.' Reply 25. First, Plaintiffs paraphrase 110(f) by shuffling the order of its clauses. Their rewrite makes the phrase "to the maximum extent possible" modify the phrase "minimize harm." But that is not what the statute says.[12] As written, the statute instructs agencies "shall, to the maximum extent possible, undertake…planning and actions." The legislative history confirms this reading: "[a]gencies are directed to *undertake, to the maximum extent possible,* such planning and actions as may be necessary to minimize harm to such a landmark…." H.R. Rep. No. 96-1457 at 36 (1980) (emphasis added). The statute thus does not mandate that agencies "minimize harm to the maximum extent possible"; it requires agencies "undertake planning and actions" to the maximum extent possible. Pls.' Reply 28 (quotations omitted).

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[11] Amicus notes that 36 C.F.R. § 800.10(a) instructs agencies to "give special consideration to protecting National Historic Landmarks *as specified in this section*," suggesting ACHP views 110(f) as requiring more than the procedures outlined in ACHP's regulations. Amicus Br. 7-8. "This section" clearly refers to ACHP's own regulation, section 800.10—not section 110(f) of the NHPA.

[12] Section 110(f) provides: "Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark…."

Second, Plaintiffs read the phrase "as may be necessary" out of section 110(f) completely. Section 110(f) instructs agencies "shall…undertake *such* planning and actions *as may be necessary* to minimize harm." Although Congress often uses the word "shall" to create a mandatory obligation, when words like "as appropriate" or "as may be necessary" accompany that instruction, Congress confers discretion on the agency. *Consumer Fed. of Am. v. U.S. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1503 (D.C. Cir. 1996) ("as appropriate" directly following "shall" gives agency discretion on when or how to act); *Trustees of Masonic Hall v. Leavitt*, 2006 WL 1686405, *9 (N.D.N.Y. June 7, 2006) ("'[A]s may be necessary' strongly suggests that Congress intended to commit such matters to the Secretary's discretion."); *Bergquist v. U.S. Nat'l Weather Serv.*, 849 F. Supp. 1221, 1228 (N.D. Ill. 1994) (statute requiring agency to take "such meteorological observations as may be necessary to establish and record the climatic conditions" vested discretion in agency). Notably, section 110(a) of the NHPA also uses the word "shall," modified by the discretionary phrase "as may be necessary"—"Each agency shall undertake…any preservation, as may be necessary to carry out this section." 16 U.S.C. § 470h-2(a)(1). As Plaintiffs and amicus acknowledge, this similar language in section 110(a) has already been held merely procedural, like the NHPA itself. *See, e.g.*, *Blanck*, 938 F. Supp. at 922 (holding section 110(a) non-substantive).

The fact that substantive statutes addressing education for children with disabilities, workplace safety, or endangered species happen to include the phrase "to the maximum extent" does not illuminate the meaning of section 110(f) in the context of the NHPA.[13] Pls.' Reply 24-25. "[I]n ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted); *Forest Guardians v. Dombeck*, 131 F.3d 1309, 1312 (9th Cir. 1997). Rather than comparing section 110(f) to unrelated substantive statutes, the Court should look elsewhere in the NHPA. The phrase "to the maximum

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[13] Amicus curiae reiterates Plaintiffs' argument that section 110(f) of the NHPA should be interpreted like section 4(f) of the Department of Transportation Act. Amicus Br. 8 (quoting 49 U.S.C. § 303(c)). Courts have repeatedly explained that section 4(f) is a substantive mandate, while the NHPA is procedural. Defs.' Br. 34 n.21; *see, e.g.*, *Neighborhood Ass'n of the Back Bay*, 463 F.3d at 64); *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999) ("[S]ection 4(f), unlike the other statutes at issue in this case, imposes a substantive mandate."); *Prairie Band Pottawatomie Nation v. Fed. Highway Admin.*, 751 F. Supp. 2d 1174, 1182 (D. Kan. 2010) ("Unlike NEPA and the NHPA, Section 4(f)…imposes substantive limits on the discretion of the Secretary of Transportation to approve a federally-funded transportation project…"); *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1193 (D. Or. 2010) ("Whereas the NHPA and NEPA impose only procedural requirements on federal projects, § 4(f) imposes a substantive mandate.").

extent feasible" appears in section 110(a)—"Prior to acquiring, constructing, or leasing buildings…each Federal agency *shall* use, *to the maximum extent feasible*, historic properties available to the agency." 16 U.S.C. § 470h-2(a)(1). This language is similar to section 110(f), which also uses the construction "agency shall…to the maximum extent." But multiple courts, including those in the Ninth Circuit, have already held section 110(a) "cannot be read to create new substantive preservationist obligations separate and apart from the overwhelmingly procedural thrust of the NHPA…." *Blanck*, 938 F. Supp. at 922; *see Wilderness Watch v. Iwamoto*, 853 F. Supp. 2d 1063, 1071 (W.D. Wash. 2012) (quoting *Blanck*). Because another NHPA provision using the phrase "to the maximum extent feasible" has already been held purely procedural, this Court should not interpret the similar phrase in section 110(f) substantively.

3. The Trust fulfilled the additional procedural requirements of section 110(f) and incorporated measures to minimize the adverse impacts of the lodge in the Programmatic Agreement.

The Trust's process under the NHPA fulfilled every procedural requirement the statute imposes, in both section 106 and section 110. The Trust requested the ACHP to participate in the section 106 consultation and notified the Secretary of Interior that the undertaking may affect a National Historic Landmark District. AR 1057; 36 C.F.R. § 800.10(b). The ACHP and Secretary of Interior (through NPS) both participated extensively in the consultation, and the NPS prepared a Section 213 Report to determine what additional measures to avoid or reduce adverse impacts to historic resources could be taken. *See id.* § 800.10(c). And, to conclude the NHPA consultation, a Programmatic Agreement (PA) establishing mandatory stipulations to avoid or minimize harm to historic resources was executed among the ACHP, California State Historic Preservation Officer, NPS, the Trust, and numerous other consulting parties (including amicus curiae, National Trust for Historic Preservation). *See* 36 C.F.R. § 800.6(b)(2) ("If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement."); 36 C.F.R. § 800.14(b) (authorizing PA). One of the recitals in the PA provides:

> WHEREAS, the Trust, through the consultation process and in compliance with the NHPA, including Sections 106 and 110(f), has modified the Undertaking to avoid, minimize, or mitigate the adverse effects identified in the *Finding of Effect for the Main Post Update*, and described this modified Undertaking in a *Final Main Post Update* (August 2010)

AR 206. The Trust in no way conceded that its actions were limited to the section 106 process. Pls.' Reply 29. The Trust made clear that it had complied with its 110(f) obligations, as well.

Defendant has explained that section 110(f) is strictly procedural. But even if section 110(f) imposed some affirmative obligation beyond the procedures in ACHP's 110(f) regulations, the Trust's modifications to

the Main Post Update would meet any responsibility to "undertake such planning and actions as may be necessary to minimize harm" to the Landmark District. The Trust made major changes to the undertaking to avoid and minimize adverse effects to historic resources, including adopting the majority of the suggestions in NPS's Section 213 Report. AR 35594-95 (explaining Section 213 Report recommendations adopted). Total new construction in the Update was reduced from 253,000 square feet initially proposed to 146,500 square feet in the final version. AR 7629; AR 4505. The six historic structures originally slated for demolition were reduced to only one in the final plan—a 50-square-foot shed too dilapidated to incorporate in the design of the new archaeology lab. AR 35545; AR 35594. The Trust agreed no traffic lights would be installed on the Main Post, and closures of historic roads would be reduced in order to protect the historic circulation pattern of the Main Post. AR 35595. The Contemporary Art Museum was withdrawn, removing a controversial element that would adversely affect the landmark district, and no demolition or new construction was planned in its proposed location. *Id.*

Additionally, the Trust undertook extensive "planning and actions" to avoid and minimize the potential harms of the Lodge proposal in particular. "The lodge has been revised to reduce the scale, massing, and height of the new construction and to incorporate the adjacent historic buildings into the program." AR 35595. Total new construction for the Lodge was reduced to 70,000 square feet, "broken into separate, smaller buildings to resemble the historic pattern of development on the site, and arranged in a manner that would not create a hard building plane on the east edge of the Main Parade." *Id.* Historic Structure Reports would be prepared in the event historic buildings 86 and 87 were reused as part of the Lodge design. The PA imposes additional mandatory avoidance and harm minimization measures, including adherence to the conceptual design plans, a height limit for the Lodge, and a minimum setback from historic structures. AR 210-11; AR 35541 ("Height restrictions for the new lodge construction would keep it lower than neighboring historic buildings…and setbacks…would further reduce its effects."). Considering adoption of all of the measures to minimize the harm of the Lodge, the Trust concluded in the Final SEIS that "the new [Lodge] construction would not adversely affect either the adjacent historic structures or the Main Post." AR 925.[14] The Record of Decision further explained, "development of the mitigated preferred alternative fulfilled the Trust's obligation

[14] *See also* the ACHP, California State Historic Preservation Officer, NPS, and Trust joint response to comments: "Where projects include new construction (Lodge, Theatre, Chapel), design review processes and documentation exercises (HSR's) have been established to further minimize – or potentially avoid – identified adverse effects." AR 1265.

under Section 110(f) of the NHPA 'to the maximum extent possible to undertake such planning and actions as may be necessary to minimize harm to the landmark.'" AR 8.[15]

Plaintiffs may believe that the new Lodge "creates a fun house mirror image superimposed on the significant resources." Pls.' Br. 29. But the ACHP, California State Historic Preservation Officer, and NPS all executed the PA, agreeing that the Lodge could move forward with the numerous measures to avoid, minimize, and mitigate harm to the Presidio's historic resources.[16] The ACHP reaffirmed by letter that its signature on the PA "indicated [ACHP's] concurrence in the actions taken by the Trust to meet its Section 110(f) obligations." AR 1057-58. And NPS, in its final comments on the Main Post Update SEIS, stated:

> We are pleased to see that the Trust has made significant revisions…. These changes have resulted in a mitigated Preferred Alternative that is more in keeping with the historic character of the Main Post, the historic core of the Presidio, and that also emphasizes the preservation and protection of the Presidio's National Historic Landmark District (NHLD) status, by combining a focus on the rehabilitation and preservation of historic buildings and landscapes while providing for new programmatic opportunities for future park visitors.

AR 37785. NPS went on, "[t]he revised documents also generally responded to and incorporated the recommendations found in the 213 Report, which has also helped to avoid or minimize many of the adverse effects of the proposed undertaking on the Presidio NHLD." *Id.* Although section 110(f) did not impose substantive obligations on the Trust, the Trust nevertheless undertook planning and actions necessary to minimize harm to the historic landmark district.

C. The Trust fulfilled its NEPA obligations.

1. The Trust examined a reasonable range of lodging locations in light of its purpose to update the planning concept for the Main Post.

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[15] Plaintiffs seem to argue these measures are insufficient, because the only way for the Trust to sufficiently minimize harm would be "siting the lodge off the Main Post" altogether. Pls.' Br. 29. But the entire Presidio, and not just the Main Post, is a National Historic Landmark District. By Plaintiffs' logic, section 110(f) is a substantive requirement that prohibits the Trust from building a lodge anywhere in the Presidio. This cannot be what Congress intended for section 110(f).

[16] Nothing in the NHPA requires these entities to sign anything at the conclusion of the section 106 process. Indeed, if they cannot reach agreement on measures to incorporate in an MOA or PA, any of the parties may terminate the consultation without reaching agreement. 36 C.F.R. § 800.7(a). In that case, the agency may proceed with any action it chooses, so long as the head of the agency "take[s] into account the Council's comments in reaching a final decision on the undertaking." 36 C.F.R. § 800.7(c)(4).

As described in Defendant's opening brief, the Main Post Update was never intended to be a comprehensive reworking of the entire PTMP. It was a site-specific NEPA document, tiered to the PTMP EIS, for the purpose of examining proposed actions in the Main Post planning district. The Trust's purpose and need for the 2010 EIS was to "update the planning concept for the Main Post district" by making it the "focal point for visitor orientation" and reestablishing the Main Post as the "heart of the Presidio." AR 795. Plaintiffs do not contest that this statement of purpose is reasonable. To achieve this purpose, the Trust considered an appropriate range of alternative lodging locations throughout the Main Post district—reuse of Pershing Hall (Building 42), Buildings 40 and 41, the Upper Funston Officer's Quarters (Buildings 11 through 16), and new construction in place of Building 34. *See* AR 809; 816; 823; 828 (maps reflecting lodging locations in blue).

Plaintiffs insist that the Trust was required to consider lodge sites in areas other than the Main Post planning district. They assert the Trust should have considered "alternative lodging locations just outside, but adjacent to, the Main Post." Pls.' Reply 30. Plaintiffs continue to disregard that the stated purpose of the Update was to "update the planning concept *for the Main Post district.*" AR 795 (emphasis added). "[C]ourts must defer to the agency's proffered statement of purpose in assessing whether the NEPA document sufficiently considered all reasonable alternatives." *High Sierra Hikers Ass'n v. U.S. Dep't of Interior*, 848 F. Supp. 2d 1036, 1052 (N.D. Cal. 2012); *see Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994) ("The range of alternatives…need not extend beyond those reasonably related to the purposes of the project."); *see also Pac. Coast Fed. of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1099 (9th Cir. 2012) (applying "'rule of reason' standard that requires an agency to set forth only those alternatives necessary to permit a reasoned choice"). The Trust explained why an alternative outside the Main Post district was not considered: "[a]lternative sites for the lodge outside the Main Post, including Stilwell Hall at Crissy Field, were analyzed in the final PTMP EIS and not again for the Main Post Update as they would not meet the purpose and need of adding vitality to the Main Post district." AR 35573. Adding a lodge to Crissy Field might serve the purpose of making Crissy Field the "focal point for visitor orientation" or "lively pedestrian district" of the Presidio, but it would not achieve these things for the Main Post planning district. Plaintiffs appear to believe that a lodge on a site "just outside, but adjacent to" the Main Post would cause visitors to wander from that area onto the Main Post, thus achieving the Trust's goals. Such speculation in achieving the Trust's purpose for the Main Post Update was not a "reasonable" alternative, and the Trust properly declined

to consider it. *Laguna Greenbelt*, 42 F.3d at 525 (holding alternatives proposed by plaintiff were "not reasonable or obvious").[17]

Moreover, the Trust's use of a broad, programmatic EIS (for the original PTMP), followed by a site-specific supplemental EIS (for the Main Post Update), was an appropriate "tiering" of NEPA documents.[18] The CEQ regulations encourage agencies to "tier their environmental impact statements to eliminate repetitive discussions…and to focus on the actual issues ripe for decision at each level of environmental review." 40 C.F.R. § 1502.20. Tiering should be used when an agency moves "[f]rom a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of *lesser scope* or to a *site-specific statement* or analysis." 40 C.F.R.§ 1508.28 (emphasis added). The programmatic PTMP EIS had already analyzed alternative sites for lodging in the Presidio as whole, and the PTMP selected three areas planned to eventually include lodging: the Main Post, Fort Scott, and Crissy Field. *See, e.g.*, AR 27581. The Supplemental EIS for the Main Post Update was a subsequent, site-specific EIS that focused on the Main Post specifically:

> The final SEIS tiers from the final PTMP EIS and analyzes several actions involving new freestanding buildings or building additions that required "more specific planning" and environmental review as foreseen in the PTMP.

AR 800. The supplemental EIS aimed to "add greater detail to the planning…than was possible in 2002." AR 795. The Trust properly used tiering to first consider which areas of the Presidio were appropriate for certain uses (including lodging), and then analyze site-specific locations for the uses chosen for the Main Post.[19]

2. The Trust was not required to reissue the Main Post Update EIS for a fourth round of public comment.

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[17] Plaintiffs' citation to *'Ilio'ulaokalani Coalition v. Rumsfeld* is inapposite. In that case, the Army's purpose was "not, *by its own terms*, tied to a specific parcel of land." 464 F.3d 1083, 1098 (9th Cir. 2006) (emphasis in original). Here, the Trust's purpose is focused on a particular parcel of land: the Main Post district.

[18] "Tiering refers to the coverage of general matters in broader environmental impact statements…with subsequent narrower statements or environmental analyses (such as…site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. 1508.28.

[19] Plaintiffs' citation to *Sierra Forest Legacy v. Rey* is not relevant. In that case, the Forest Service "did not consider a new range of alternatives" in its SEIS—it simply compared the proposed action to seven alternatives from the programmatic EIS. 577 F.3d 1015, 1020 (9th Cir. 2009). The Trust, by contrast, considered a range of lodging sites throughout the Presidio in the 2002 EIS, *and* considered a new, site-specific range of lodging sites within the Main Post district in the 2010 SEIS.

Plaintiffs admit that their complaint did not include a claim against Defendants for failure to recirculate the Final SEIS. Although Plaintiffs had all of the facts necessary to plead this claim when the complaint was filed, they waited over a year to raise it for the first time on summary judgment, six weeks before Defendant's brief was due. Plaintiffs' delay in raising this claim prejudices Defendant, and should be denied. *See Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798-99 (9th Cir. 1991) (affirming denial of request to amend made four and a half months before trial).

Even considered on the merits, the claim fails. Interested parties, including Plaintiffs, have already had three opportunities to submit formal, written comments during the NEPA process—on the Draft SEIS, the Supplement to the Draft SEIS, and the Final SEIS. Plaintiffs now seek a fourth round of circulation and public comment. They complain that withdrawal of the Contemporary Art Museum proposal was a "dramatic overhaul" of the project, and imply there was no opportunity for public comment on a version of the update that did not have the museum. This ignores that the Trust accepted comments on the Final SEIS, and considered the comments prior to making a decision. Moreover, courts have adopted CEQ's guidance that if the agency wishes to make changes "within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed." 46 Fed. Reg. 18026-01, 18035; *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 854 (9th Cir. 2013); *Russell Cnty. Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011). The selected alternative in the final Main Post Update was both qualitatively and literally within the spectrum of alternatives considered. The Draft SEIS had already analyzed several alternatives for the Main Post Update that did not include an art museum on the Main Post, and the public had opportunity to comment on these alternatives. AR 17001-02 (table of Draft SEIS alternatives); AR 35548-50.

Plaintiffs also make no effort to address CEQ's example of the type of changes in a final EIS that are "within the spectrum of alternatives already considered," and do not require recirculation. The changes to the Lodge in the Final SEIS are just like the example given by CEQ—a variation using "a different configuration of buildings." Defs.' Br. 41. Additionally, Plaintiffs neglect to address the fact that they themselves requested the design changes the Trust made to the Lodge: "Lodging should be placed in smaller more sympathetically designed structures…consistent with the structures that were there historically." Defs.' Br. 42; AR 21051.

IV. CONCLUSION

For the reasons described above, the Court should grant Defendant's cross-motion for summary judgment, and deny Plaintiffs' summary judgment motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2013, I electronically filed the foregoing

FEDERAL DEFENDANT'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

with the Clerk of the Court via the CM/ECF system, which will send notification of such to the attorneys on record to receive e-mail notice of electronic filings in the above-captioned case.

/s/ Joseph T. Mathews

JOSEPH T. MATHEWS