

Case No. 13-16554

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRESIDIO HISTORICAL ASSOCIATION
and SIERRA CLUB,

Plaintiffs-Appellants,

v.

PRESIDIO TRUST,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 3:12-cv-00522-LB
(Hon. Laura M. Beeler, Magistrate Judge)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Presidio Historical Association and Sierra Club state that they are not-for-profit organizations and have no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad.

A handwritten signature in blue ink that reads "Debbie Sivas". The signature is written in a cursive style with a large initial "D".

Deborah A. Sivas

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PRELIMINARY STATEMENT

This case concerns the future of the historic Presidio of San Francisco, a National Historic Landmark District tracing its roots back to the time of the American Revolution. As summarized in the National Historic Landmark designation on June 13, 1962:

The Presidio has served as a military reservation from its establishment in 1776 as Spain's northern-most outpost of colonial power in the New World. It was one of the longest-garrisoned posts in the country and the oldest installation in the American West. It played a key role in Spain's exploration and settlement of the borderlands, Mexico's subsequent control of the region from Texas to Alta California, and the United States' involvement not only in frontier expansion, but also in all major conflicts since the Mexican-American War of 1846-48.

ER761. When the U.S. military finally departed the base in the mid-1990's, Congress created the Presidio Trust ("Trust"), a government corporation with special limited powers, to manage and maintain the integrity of the Presidio's historic and natural resources. In its own promotional material, the Trust acknowledges the cultural significance of its legislative charge: "The Presidio offers a window into the changes in American society over a span of almost 150 years. . . . The Presidio is home to one of the nation's finest collections of fortifications, landscapes, buildings, structures and artifacts related to military

history. It also embraces the oldest national cemetery on the West Coast, the final resting place of many Medal of Honor awardees.”¹

Yet in 2010, the Trust adopted a new management plan that authorized the construction of a large commercial hotel in the center of the “Main Post” – the geographic and historic heart of the Presidio. If built, that project will add tens of thousands of square feet of new commercial development on what is currently open space between the Main Parade and the Old Parade Ground. As such, it violates the Presidio Trust Act’s express directive limiting new construction to the replacement of existing structures of similar size in already-developed areas and the Trust’s mandate to protect the historic park from development and uses that affect its historic character. 16 U.S.C. § 460 app.

In approving expansive new commercial development, the Trust also violated its stewardship obligations under the National Historic Preservation Act. Section 110 of that statute directs federal agencies to reuse historic buildings “to the maximum extent feasible” and to ensure that their activities “minimize harm” to the historical character and integrity of National Historic Landmarks “to the maximum extent possible.” 16 U.S.C. § 470h-2. There are any number of historic buildings on the Main Post (and elsewhere throughout the Presidio) that could

¹ Presidio Trust, A History of the Presidio, at <http://www.presidio.gov/about/Pages/history.aspx>.

serve to accommodate overnight lodging. Indeed, historic Pershing Hall was recently renovated and converted to the 22-room “Inn at the Presidio.”² The Trust’s failure to pursue these available options – or even to meaningfully evaluate them – contradicts its affirmative statutory obligation.

Accordingly, this Court should reverse the district court’s summary judgment on both claims and remand for entry of judgment in Plaintiffs’ favor.

STATEMENT OF JURISDICTION

The Presidio Historical Association and the Sierra Club commenced this suit against the Presidio Trust on February 1, 2012, challenging agency action under 5 U.S.C. § 706(2). The district court had federal question jurisdiction under 28 U.S.C. § 1331. On June 3, 2013, the district court denied Plaintiffs’ motion for summary judgment, granted Defendant’s cross-motion for summary judgment, and entered final judgment on all claims. Plaintiffs timely filed a Notice of Appeal on July 31, 2013. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Does the Presidio Trust’s 2010 management plan violate Section 104(c)(3) of the Presidio Trust Act, which limits new construction on the Presidio to “the replacement of existing structures of similar size in existing areas of

² See <http://www.innatthepresidio.com/overview.php>.

development,” by authorizing approximately 70,000 square feet of new construction on existing open space in the Main Post?

2. Does the plan to construct a new commercial hotel on the Main Post, instead of repurposing existing historic buildings for overnight accommodations or locating lodging in a less historically valuable part of the park, violate Section 110 of the National Historic Preservation Act, 16 U.S.C. § 470h-2, which directs the Trust to reuse historic buildings and to “minimize harm” to the Presidio National Historic Landmark District “to the maximum extent possible”?

STATEMENT OF THE CASE

The district court heard this case on cross-motions for summary judgment. Plaintiffs argued that development authorized by the 2010 management plan violated the Presidio Trust Act’s directive that “new construction” be “limited to replacement of existing structures of similar size in existing areas of development.” The court denied this claim, deferring to the Trust’s expansive statutory interpretation that it may demolish existing structures anywhere on the Presidio, “bank” and aggregate the “credit” for such demolition, and draw on that banked credit to construct new buildings of different sizes in different place, as long as the total square footage across the entire Presidio does not increase. ER76-80. This holding reads the words “replacement” and “similar size” entirely out of the statute

and lays down a legal rule that allows the Trust to disregard clear congressional limitations on new development.³

Additionally, Plaintiffs argued that in authorizing construction of a large, new commercial hotel on the Main Post, the Trust failed to satisfy its affirmative obligation under Section 110 of the National Historic Preservation Act to minimize adverse affects on the Presidio Landmark District to the maximum extent possible. The district court also denied this claim, concluding that the Trust fulfilled its statutory obligations by completing consultation under Section 106 of the Preservation Act. ER81. Here again, the court's interpretation gives no effect to the additional statutory requirements imposed by Section 110 – and not found in Section 106 – that federal agencies must reuse historic buildings to carry out their activities and “shall, to the maximum extent possible . . . minimize harm” to National Historic Landmarks. 16 U.S.C. § 470h-2(f).

STATEMENT OF FACTS AND LAW

I. The Historic Presidio

Perched above the gateway to San Francisco Bay, the Presidio is a place of incomparable scenic beauty and historic significance. The National Park Service describes it as “a unique property that was developed over a specific span of time,

³ The district court opinion also sharply mischaracterized Plaintiffs' position in the case. Plaintiffs did not argue below, and do not argue here, that “the Trust had to keep the Presidio's buildings as they got them in 1994.” ER79.

located in a particular place and during an irreproducible series of historical events.” ER849. “From 1776 until 1994, the Presidio guarded the Golden Gate as an Army post under Spanish, then Mexican, then American Flags.” See Lisa M. Benton, The Presidio 3 (1998). Today, the 1,491-acre Presidio – nearly twice the size of New York’s Central Park – provides an oasis of open space, spectacular vistas, and relative tranquility in the midst of a highly urbanized landscape. ER568.

The Presidio is home to an “unparalleled collection of military history, cultural landscapes, recreation areas, and natural features that resulted in its designation” as a California Historic Landmark in 1933, a National Historic Landmark District in 1962, and a National Park in 1994. Benton, The Presidio at 3. Less than half of the Presidio contains development; the remaining 991 acres are open space. ER924. In the existing developed area, the Trust currently recognizes “433 individually significant historic buildings,” representing “a spectrum of architectural styles,” and “more than 180 historic objects including roadways, cannon, gates, walls, and other features.”⁴ In addition, “[l]arge areas of designed landscape are also considered historic resources, including the golf course, San Francisco National Cemetery, Crissy Airfield, and the parade grounds of Fort Scott

⁴ Presidio Trust, The Historic Presidio, at <http://www.presidio.gov/about/Pages/historic-resources-at-the-presidio.aspx>.

and the Main Post.”⁵ According to the Trust, “this makes the Presidio of San Francisco a literal museum of historic military architecture and a rich tapestry of landscape design unparalleled in the American West.”⁶

The Presidio’s historic heart and modern focal point is the “Main Post.” A visitor standing on the grass-covered Main Parade Ground in the middle of the Main Post is enmeshed in the story of the American West. To the north, across the promenades of historic Crissy Field, lies an unobstructed window to San Francisco Bay and the Marin Headlands beyond, defended for more than 200 years by soldiers garrisoned at the Presidio. Turning west, the visitor sees an imposing row of six red-brick colonial-style barracks from the 1890’s, an architectural tableau that stands as a testament to the aspirations of an emerging world power. Just beyond them lies the quiet San Francisco National Cemetery, one of the nation’s most sacred sites and the last resting place of 30,000 men and women. To the south is the historic Officer’s Club, a building whose exterior reflects the work of “armies” of public workers deployed during the Great Depression and whose interior incorporates the adobe walls built by the Spanish army to fortify its northern empire at the start of the nineteenth century. ER841, 846. And to the east, frontier outpost meets military might, where wooden Civil War-era barracks are

⁵ Id.

⁶ Id.

flanked by more massive twentieth-century quarters styled to echo the Presidio's Spanish roots. ER842, 845. Three hundred acres of forest enfold and buffer the Main Post from the commercial bustle of the city, planted by the U.S. Army at the close of the nineteenth century to create the lush, wooded character that endures today. ER843.

The Main Post is interwoven with “[v]aried architectural styles and formal landscapes [that] illustrate the complex layering of construction over time.” ER391. It is the “only place in the Presidio that contains known archeological and architectural resources from the Spanish and Mexican periods, and it retains historic resources from all other major periods of military development at the Presidio.” ER826. As the Presidio passed through the care of different sovereigns over time, each one left its own mark on the Main Post, making it “an apt setting for telling many of the Presidio's stories.” ER391.

These stories are rich and varied. In 1776, the Spanish military arrived at the Presidio and quickly recognized its strategic advantage as a military base. ER837. Spanish military officers “chose the gently sloping land in front of what is now the Officer's Club as the site for a new presidio, or garrison, for their northern frontier.” ER391. Spain used the fort's strategic location overlooking San Francisco Bay to protect California against British and Russian expansion. ER282. After Mexico declared independence from Spain in 1821, the Presidio's soldiers

took an oath of allegiance to the Mexican government “and the days of the Spanish empire in California . . . ended.” ER1421.

Mexico’s time at the Presidio was short-lived, however, as the United States turned its ambitions westward. After the Mexican-American War, the U.S. Army took possession of the Presidio in 1847, and with it, claimed California for the United States. ER379. Up until its transfer to civilian use in 1994, the American military utilized the Presidio in every major war effort, shaping its architecture and forested landscape in the process.

The second half of the nineteenth century brought about steady growth for California and the Presidio, with the Gold Rush, the Civil War, and the Spanish-American War. At the Presidio, the Union Army guarded San Francisco Bay against secessionists and constructed wood-frame structures around the Old Parade ground, two of which remain standing today. ER841. Between the Civil War and World War I, the Presidio’s focus shifted to “aesthetics and quality of life” as its population grew. ER843. The Army constructed the striking Colonial-Revival-style Montgomery Street Barracks along the Main Parade, reflecting the United States’ growing and more permanent military presence. ER845. The Presidio, initially chosen for its defensive value, went on the offensive during the Spanish-American War, serving as a launching point to deploy soldiers to the Philippines.

The Presidio’s evolution continued to parallel the history of the West

through the early- to mid-twentieth century. Rapid temporary construction characterized both World War efforts. Although the Army eventually demolished many of the temporary warehouses and barracks it had constructed during World War I, the first firehouse on an American military base remains and functions on the Main Post today. ER845-46. The peacetime between World Wars saw a renewed focus on aesthetics, with the development of the Spanish-influenced Mission-style Presidio Theatre, the chapel, and new barracks along the Old Parade. ER846. During World War II, the Presidio served as the central command center for the Army's operations in the Pacific Theater. ER838.

The second half of the twentieth century ushered in a new era of Presidio management. As the Presidio's strategic importance waned, the prior regime of frequent construction and demolition drew to a close. By the 1960's, Congress began to recognize and protect the historic, cultural, and natural importance of the Presidio – and the 200 years of American history embedded in its landscape – by legislatively constraining both demolition and new development.

II. From Military Post to National Treasure

With the decline of the Presidio's military usefulness, many saw its potential as an especially accessible portal to the history of the American West and as a haven from urban sprawl. But just as geography shaped the Presidio's military past, its location in one of America's largest and most expensive cities also made it

an attractive target for commercialization and urban redevelopment. For more than three decades, the Presidio's champions in Congress fought to preserve intact and pass down the Presidio's historic and natural legacy for generations of Americans to come. These efforts began with the Landmark designation in 1962 and culminated with passage of the Presidio Trust Act in 1996.

A. Designation as a National Historic Landmark

The first step in this preservation effort was the Presidio's designation as a National Historic Landmark District. In recognition of its exceptional ability to illustrate the heritage of the United States, the National Park Service nominated the Presidio for Landmark status, and the Secretary of the Interior designated it as a National Historic Landmark District in 1962. At the time, the Presidio was recognized primarily for its "significant role in extending Spanish settlement into Northern California." ER1415. In its 1993 Landmark status update, the Park Service further inventoried historic buildings and the landscape and acknowledged the Presidio's expanded historic role beyond the early colonial occupation:

Overall, the Presidio possesses a visual unity that relates well to its historical importance and continuity through successive periods of development. This sense of unity commences from the marked contrast between the densely constructed blocks of the City against the rolling forested hills of the reservation . . . The definable areas of the Presidio's historic landscape and the range and diversity of resources within it are not limited to developments associated with the early Spanish-Mexican occupation

ER962, 1163.

As a National Historic Landmark, the Presidio joins other nationally celebrated Landmark sites like Niagara Falls, Monticello, Mount Rushmore National Memorial, Boston Common, and the Washington Monument. All Landmarks are subject to special protections under the National Historic Preservation Act and represent distinctive “properties of exceptional value to the nation as a whole rather than to a particular State or locality.” 36 C.F.R. § 65.2(a). Of the more than 80,000 entries in the National Register of Historic Places, only 2,400 are also National Historic Landmarks.⁷

B. Recognition as a National Park

A decade later, Congress conferred additional protection on the Presidio by including it within the boundaries of the new Golden Gate National Recreation Area that runs from Point Reyes south through the Marin Headlands and along the shoreline of San Francisco to Fort Funston (and today, covers some watershed lands around Crystal Springs reservoir). Passage of the Golden Gate National Recreation Area (“GGNRA”) Act of 1972 conferred management jurisdiction for most of these lands on the National Park Service⁸ and set in motion the future transfer of the Presidio from the Army to the Interior Department for establishment

⁷ National Historic Landmarks Program, National Park Service, at <http://www.nps.gov/nhl/qa.htm#1>.

⁸ The GGNRA contemplated that the Army, the Navy, and the Coast Guard, as well as certain state and local entities, would all continue for some period of time to use and occupy certain lands within the recreation area. 16 U.S.C. § 460bb-2.

of an urban national park. Pub. L. No. 92-589, 86 Stat. 1299 (1972), § 3 (codified at 16 U.S.C. § 460bb et seq.).

Congress created the GGNRA to “preserve for public use and enjoyment certain areas of Marin and San Francisco Counties, California, possessing outstanding natural, historic, scenic and recreational values, and in order to provide for the maintenance of needed recreational open space necessary to urban environment and planning.” 16 U.S.C. § 460bb (“section 1” of the GGNRA Act); see also Hearings on H.R. 9498 to Establish a National Recreation Area in San Francisco and Marin Counties Before the Subcomm. on Nat’l Parks & Rec., 92d Cong. 253 (Statement of sponsor Rep. Phillip Burton explaining that legislation was necessary to protect the area “from the encroachment of the urban metropolis beside it” and that without this protection, “the majestic area where sea and bay and land meet in a glorious symphony of nature will be doomed”). Accordingly, the statute directed the Interior Department to manage GGNRA lands to “preserve the recreation area, as far as possible, in its natural setting, and protect it from development and uses which would destroy the scenic beauty and natural character of the area.” Id.

To accomplish these objectives, the GGNRA Act placed restrictions on the Army’s construction authority in the Presidio. 16 U.S.C. § 460bb-2(i). Congress strengthened and expanded these restrictions in 1978, prohibiting new construction

by any non-Interior Department federal agency with residual jurisdiction over land within the boundaries of the GGNRA, including the Presidio. An exception from this prohibition allowed existing improvements to be reconstructed or demolished and “replaced with an improvement of similar size,” after consultation with the Secretary of the Interior and a public hearing. National Parks and Recreation Act of 1978, Pub. L. No. 95-625 § 317, 92 Stat. 3467, 3485 (codified at 16 U.S.C. § 460bb-2(i)).

C. Creation of the Presidio Trust

Following the Army’s 1989 announcement that it would decommission the Presidio, the Interior Department set about planning for the base’s transition to a national park. In 1994, the National Park Service released an ambitious management plan to “creat[e] a global center dedicated to addressing the world’s most critical environmental, social, and cultural challenges.” ER1241. A cornerstone of that plan was the proposed rehabilitation of 348 historic buildings and the leasing of those restored buildings exclusively to “national and international organizations devoted to improving human and natural environments.” Id. The Park Service determined that it lacked the expertise to undertake this task on its own and, based on similar models used for building-intensive parks, proposed that Congress authorize a public benefit corporation to manage the rehabilitation and leasing of the Presidio’s buildings. ER1362.

Taking its cue from the Park Service, Congress began considering legislation to create a public benefit corporation within the Interior Department that would “manage, maintain, improve, and repair” the Presidio’s historic buildings. H.R. 3433, 103d Cong., 139 Cong. Rec. No. 152 H8794 (daily ed., Nov 3, 1993); accord S. 1639, 103d Cong., 139 Cong. Rec. No. 155 S15334 (daily ed., Nov. 8, 1993). In committee, the House named this proposed public benefit corporation the “Presidio Trust,” reflecting its public focus. Markup of H.R. 3433, in the Subcommittee on National Parks, Forests and Public Lands, House Committee on Natural Resources, 103d Cong. (June 27, 1994) (opening statement of Rep. Bruce F. Vento).

As Congress debated the Presidio Trust Act, however, some members voiced concerns about the cost of rehabilitating almost every historic building on the Presidio and leasing them to a narrow set of nonprofit tenants, as the Park Service proposed in the 1994 Management Plan. See H.R. 4078, 103d Cong., 140 Cong. Rec. No. 30 H1539, § 201(4)-(5) (daily ed., Mar. 17, 1994). This concern led fiscal hawks in the House to introduce a competing bill that would establish a public benefit corporation outside the Interior Department to “manage, maintain, and repair” Presidio land and buildings. Id. §§ 202, 205(a)(1). The new corporation would nonetheless be required, in all of its actions, to “fully recognize the values of the Presidio which have contributed to its designation as a national historic landmark.” Id. § 205(a)(1). This alternative legislation proposed that the

new entity prepare plans “for the rehabilitation (including adaptive reuse), preservation, restoration, improvement, alteration, or repair of any property” within its jurisdiction, but did not provide any affirmative authority for new construction or commercial development. *Id.* § 205(a)(4).

Ultimately, Congress enacted compromise legislation that conveyed authority for management of the Presidio on the newly-created, independent Presidio Trust, but also ensured that the Presidio itself would remain a national park within the GGNRA boundaries and would be subject to the preservation values and development restrictions already embedded in the GGNRA Act. Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, 110 Stat. 4097 (codified in 16 U.S.C. § 460bb app) (“Trust Act”). The final committee conference report on the bill explained that “[t]his location within a unit of the National Park Service is expected to have a strong influence on the future management of [the Presidio].” H.R. Rep. No. 104-836, at 204 (1996) (emphasis added).

III. Laws that Govern the Presidio’s Management Today

A. The Presidio Trust Act

With the enactment of the Trust Act, Congress proclaimed the Presidio “one of America’s great natural and historic sites.” Trust Act § 101(1). To guide implementation of the statute, Congress made several other key findings. It

reaffirmed that “the Presidio, in its entirety, is a part of the Golden Gate National Recreation Area, in accordance with [the GGNRA Act]” and, mirroring the language of the GGRNA Act itself, declared that “the Presidio’s significant natural, historic, scenic, cultural, and recreational resources must be managed in a manner . . . which protects the Presidio from development and uses which would destroy the scenic beauty and historic and natural character of the area and cultural and natural resources.” Id. § 101(4)-(5) (paralleling language of 16 U.S.C. § 460bb). It explained that “preservation of the cultural and historic integrity of the Presidio for public use recognizes its significant role in the history of the United States.” Id. § 101(3). And it acknowledged that “removal and/or replacement of some structures within the Presidio” would be a management option. Id. § 101(6).

To address the financial concerns of some members of Congress, the Trust Act included one final finding: “the Presidio will be managed through an innovative public/private partnership that minimizes cost to the United States Treasury and makes efficient use of private sector resources.” Trust Act § 101(7). Using a “carrot and stick” approach to incentivize responsible financial management, the statute provided the Trust with various financial tools (e.g., id. §§ 104(b) (waiver of general government procurement requirements), 104(d) (authority to guarantee loans), 104(e) (ability to solicit and accept donations),

104(d) (ability to invest), 104(n) (authority to lease), and 105(a)(2) (eligibility for congressional appropriations)), as well as consequences for failing to achieve financial self-sufficiency within 15 years. Id. §§ 104(o) and 105(b) (reversion provisions). The Trust was well on its way to achieving the congressional goal of self-sufficiency in 2004, before it began the planning process that led to the management plan and proposed commercial hotel at issue in this case and well before congressional appropriations were slated to end. ER761 (“The Trust’s operating costs have been fully covered by earned revenue since 2004”). It has since achieved full self-sufficiency. ER163

To accomplish these congressional objectives, the Act directed that the Trust “shall manage the leasing, maintenance, rehabilitation, repair and improvement of property within the Presidio under its administrative jurisdiction using the authorities provided in this section, which shall be exercised in accordance with the purposes set forth in section 1 of the [GGNRA Act].” Trust Act § 104(a) (emphasis added). Those “authorities” include the power “to negotiate and enter into such agreements, leases, contracts and other arrangements . . . as are necessary and appropriate to carry out its authorized activities,” id. § 104(b), guided by “a comprehensive program for management of those lands and facilities” transferred to the Trust. Id. § 104(c). In making lease management decisions for Presidio buildings, the Trust “shall give priority to . . . [t]enants that enhance the financial

viability of the Presidio and tenants that facilitate the cost-effective preservation of historic buildings through their reuse of such buildings.” Id. § 104(n). To fund its historic protection mission, the Trust retains all revenues and proceeds from such leases, which are then “available, without further appropriation, to the Trust for the administration, preservation, restoration, operation and maintenance, improvement, repair and related expenses incurred with respect to Presidio properties under its administrative jurisdiction.” Id. § 104(g).

The statutory provision at the center of this case is Section 104(c) of the Trust Act. Consistent with the Landmark District status of the Presidio, Section 104(c) carried forward the construction and development restrictions of the GGNRA Act and required that they be incorporated into the Trust’s comprehensive management program. Accordingly, the Trust may demolish existing structures that, in its opinion, “cannot be cost effectively rehabilitated,” and may evaluate “for possible demolition or replacement” certain buildings identified in a 1985 Historic Landmark building survey. Trust Act § 104(c)(1)-(2). Any “new construction,” however, is “limited to replacement of existing structures in existing areas of development.” Id. §104(c)(3).

B. The National Historic Preservation Act

The Trust’s management of the Presidio is also constrained by the National Historic Landmark protections provided in the National Historic Preservation Act

(“Preservation Act”) of 1966, 16 U.S.C. § 470 et seq. Faced with “ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments,” Congress enacted the Preservation Act to “insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation.” 16 U.S.C. § 470(b)(5). Declaring that the “historical and cultural foundations of the Nation should be preserved as a living part of our community life,” id. § 470(b)(2), Congress directed federal agencies to be especially solicitous of the historic values on public property: “It shall be the policy of the Federal Government . . . [to] administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations.” Id. § 470-1(3).

The Preservation Act imposes a series of increasingly more stringent obligations on federal agencies. At the most basic level, the statute promotes the listing of “districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture,” including both private and public property, on the National Register of Historic Places. 16 U.S.C. § 470a(a)(1)(A). Congress directed the Interior Secretary to develop criteria and procedures for nominating and designating properties for listing on the National Register, id. § 470a(a)(2), and in response, the National Park Service has promulgated extensive implementing regulations. See 36 C.F.R. Parts 60 and 63.

Prior to approval of any “undertaking” – defined as any “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency,” 16 U.S.C. § 470(w)(7) – federal agencies must “take into account the effect of the undertaking” on any district, site, building, structure, or object listed or eligible for listing on the National Register. Id. § 470f. This provision of the Preservation Act is commonly known as “Section 106,” after the applicable statutory section in the original bill.

The statute also created the Advisory Council on Historic Preservation to, among other things, “recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation.” Id. § 470j(a)(1). In carrying out their Section 106 obligations, federal agencies must afford the Advisory Council “a reasonable opportunity to comment with regard to [any federal] undertaking” that may affect listed or eligible National Register property. Id. § 470f. The Advisory Council has promulgated detailed regulations to govern this Section 106 consultation process. See 36 C.F.R. Part 800.

Under those regulations, the federal agency proposing the undertaking must apply a set of criteria to determine whether the action will have an adverse effect on the historic property. “An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that

qualify the property for inclusion in the National Register in a manner that would diminish the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(a)(1). For example, adverse effects include a "[c]hange of the character of the property's use or of physical features within the property's setting that contribute to its historic significance," as well as the "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features." Id. § 800.5(a)(2)(iv)-(v). At the Council's request, the National Park Service assists in the Section 106 consultation by providing a report that "detail[s] the significance of any historic property, describing the effects of any proposed undertaking on the affected property, and recommending measures to avoid, minimize, or mitigate adverse effects," commonly known as the "Section 213 Report," after the statutory section in the original legislation. 16 U.S.C. § 470u.

Upon a finding of adverse effect on listed or eligible property, the federal agency proposing the undertaking must invite the Advisory Council, the State Historic Preservation Officer, and others "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a). This process normally concludes in a memorandum of agreement or, for more complex projects, a negotiated "programmatic agreement" that "evidences the agency's official

compliance with section 106.” Id. §§ 800.6(c) and 800.14(b) (“Compliance with the procedures established by an approved programmatic agreement satisfies the agency’s section 106 responsibilities for all individual undertakings of the program covered by the agreement.”).

While these basic Section 106 requirements apply whenever a federal undertaking may affect any listed or eligible property, whether private or public, the Preservation Act provides additional layers of protection for federally-owned or controlled historic properties. These additional protections, added to the Preservation Act in 1980 and further strengthened in 1992, are contained in “Section 110” of the statute, 16 U.S.C. § 470h-2, which was intended to clarify and codify the “minimum responsibilities expected of federal agencies in carrying out the purposes of the act.” H.R. Rep. No. 96-1457, 96th Cong., reprinted in 1980 U.S.C.C.A.N. 6378, 1980 WL 12933 (Oct. 10, 1980). Section 110(a)(1) provides that “[p]rior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency” and “shall undertake . . . any preservation as may be necessary to carry out this section.” 16 U.S.C. § 470h-2(a)(1). Additionally, Section 110(a)(2) requires each federal agency to establish a preservation program for the protection of historic properties to ensure that such properties “are managed and maintained in a way that considers

the preservation of their historic, archaeological, architectural, and cultural values in compliance with [Section 106] and gives special consideration to the preservation of such values in the case of properties designated as having National significance.” Id. § 470h-2(a)(2) (emphasis added). As the Park Service explains in its Section 110 Standards and Guidelines document, “the larger message [is] that federal agencies have affirmative responsibilities under section 110 that go beyond the responsibility for compliance with section 106. In addition, these standards and guidelines make clear that they are in addition to, not instead of, other guidance and requirements, such as section 106.” 63 Fed. Reg. 20,496 (Apr. 24, 1998) (emphasis added).

The Preservation Act reserves its most protective requirements for National Historic Landmarks.⁹ Property may be designated as a Landmark only if the Interior Secretary finds that it has “national significance,” where “[t]he quality of national significance is ascribed to districts, sites, buildings, structures and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture

⁹ All National Historic Landmarks are automatically included on the National Register and subject to the Section 106 consultation requirements. 16 U.S.C. § 470a(a)(1)(B). As Congress recognized, properties eligible for Landmark status may be privately held, in which case the Preservation Act provides a mechanism for objection to a Landmark designation. Id. § 470a(a)(6). But where, as here, the Historic Landmark is a federal property, the directives of Section 106 (consultation), Section 110(a) (federal property), and Section 110(f) (National Historic Landmarks) all apply.

and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association.” 36 C.F.R. § 65.4(a).

Once a property meets the exacting criteria for Landmark status, Section 110(f) imposes a heightened duty of protection:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

16 U.S.C. § 470h-2(f) (emphasis added). The National Park Service’s Section 110 Standards and Guidelines acknowledge that Section 110(f) “requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect [National Historic Landmarks].” 63 Fed. Reg. at 20,503. Where the proposed undertaking will have adverse effects, the action agency must, at a minimum, “consider all prudent and feasible alternatives to avoid an adverse effect” and, if it chooses not to adopt such an alternative, demonstrate why “undue cost” or other considerations outweighs the harm to the Landmark. Id.

IV. The Trust’s Plans to Commercialize the Historic Main Post

Following its creation in 1996, the Trust set about developing a management plan to preserve and restore the Presidio’s open spaces and buildings, as mandated by the Trust Act. ER940-42. In 2002, the Trust adopted its first comprehensive

management plan (“2002 Management Plan”) for the portions of the Presidio entrusted to its care and issued a Record of Decision. See ER914-942, ER943-946. The 2002 Management Plan “ma[de] clear that the appearance of the Presidio will not substantially change over time and that the park will thrive.” ER916.

The provision for overnight accommodations in the 2002 Management Plan reflected this preservation focus. “Small-scale lodging” would integrate visitors with the Presidio’s history, be dispersed throughout the Presidio, and be capped at 51,000 square feet in the Main Post. ER923. During the EIS process, commenters raised concerns about the impact of lodging on the Presidio’s “historic character” and whether lodging would “fit with the [park’s] historic and/or environmental themes.” ER921. In response, the Trust clarified that “[l]odging facilities [would] only be provided in existing buildings” and “[t]he only new construction for lodging would consist of additions or annexes necessary to enable an existing structure to function as a lodging facility.” Id. (emphasis added).

Despite these early assurances, just a few years later the Trust set about amending the 2002 Management Plan, after becoming fixated on erecting a large, new commercial hotel on the Main Post. In October 2005, the Trust’s first plans for a commercial hotel emerged, followed by a feasibility study and the release of those plans to the public through a request for proposals to build the hotel. See ER893-910. The Trust’s vision of lodging on the Main Post transformed from one

of visitors experiencing the Presidio's military history first-hand by "stay[ing] overnight in . . . historic barracks or officers' quarters," ER932, to constructing the "Presidio Lodge" – a 60,000 to 80,000 square-foot behemoth of conference rooms, restaurants, galleries, a bookstore, and numerous retail stores. See ER910 (showing hotel's proposed amenities), ER901 (describing scale of proposed construction).

Chastened by public outcry over the proposal, in June 2008 the Trust began a combined environmental review and Section 106 consultation process to amend the 2002 plan, circulating multiple drafts of documents that consistently included the construction of a new commercial hotel as the centerpiece of an updated Main Post management plan. The public and the National Park Service repeatedly raised concerns about the impacts of such large-scale development and its conformity with the Trust Act, the Preservation Act, and other laws. In its Section 213 Report, for example, the Park Service warned that new construction would "seriously threaten the integrity of the Main Post . . . to a degree that cannot be mitigated to an acceptable level, which would significantly diminish the integrity of the Presidio." ER832-33. For its part, the Trust acknowledged that the proposed new plan would have an adverse effect on the National Historic Landmark District. ER772. Yet it never seriously considered hosting overnight visitors in the available historic buildings, either at the Main Post or elsewhere on the Presidio,

despite suggestions throughout the EIS and Section 106 process that it do so. E.g., ER361.

Notwithstanding many concerns, comments, and objections, the Trust issued a final Main Post Update to the Presidio Trust Management Plan in 2010 (“2010 Development Plan”), retaining the proposed commercial hotel construction proposal largely intact. ER368-415. The Trust modified the original hotel design modestly by reducing its height, tacking on a historical veneer, and spreading its footprint over 12 new buildings. As adopted, the 2010 Development Plan will permit the construction of 70,000 square feet of new commercial hotel space adjacent to the Main Parade Ground, spanning an area previously occupied by the 31,000-square-foot “Building 34” and a large open space area next to it. Even adjusting for demolition of Building 34, the proposed hotel will, on net, add roughly 40,000 square feet of new structures to the Main Post, expanding overnight accommodations by a factor of five over lodging already available and bringing with it the kind of daily hubbub that necessarily attends such a large-scale commercial operation. ER280.

SUMMARY OF ARGUMENT

Congress has long recognized the Presidio for its exceptional contributions to the nation’s history. Consistent with the Presidio’s status as a National Historic Landmark District and a National Park, Congress carefully circumscribed how its

future should unfold in the transition from military to civilian management. To address concerns that the Park Service might not be fully equipped to restore and financially manage a historic urban park, Congress created a new entity – the Presidio Trust – to serve as the steward for the Landmark District. Importantly, however, the authorizing legislation emphasized the Trust’s duty to preserve intact the integrity of the park’s historic, cultural, and natural values. Construction of 12 new buildings to house a 110-room commercial hotel on the Main Post, in the historic heart of the Presidio, is inconsistent with this unambiguous congressional directive.

As the Presidio landlord, the Trust has broad authority under the Presidio Trust Act to rehabilitate, lease, and manage the park’s historic buildings. The statute does not, however, confer on the Trust the power to alter the historic integrity and characteristics that led to the Presidio’s designation as a Landmark District. To the contrary, the Trust Act speaks only in terms of “removal” or “demolition” of existing structures that cannot be cost-effectively rehabilitated and their “replacement” with new structures of “similar size.” Trust Act § 104(c). Beyond that, the statute prohibits any other “new construction,” a constraint entirely in keeping with the preservation of the historic district’s national significance and with the landscape integrity of the central Main Post. The Trust, and the district court’s decision below, would effectively rewrite this unambiguous

statutory prohibition against new construction as an affirmative authorization for new construction, based on a convoluted “banking” scheme that is found nowhere in the statute, its legislative history, or any implementing regulations. Under this interpretation, the Trust could demolish a series of low-lying buildings on the western edge of the Presidio, for example, and use the “credit” banked from this demolition to construct a modern commercial high-rise on or adjacent to the Main Parade Grounds. That surely is not what Congress had in mind.

Like all other federal entities, the Trust also must adhere to the stringent restrictions of the National Historic Preservation Act in managing the Presidio Landmark District. Where, as here, a proposed undertaking will adversely affect the characteristics for which a Landmark was designated and will diminish its feeling and association, the federal agency “shall, to the maximum extent possible . . . minimize harm to such landmark.” 16 U.S.C. § 470h-2(f). In this case, the Trust could do so by, for example, reconfiguring its proposed undertaking – the provision of additional overnight accommodations – in a way that restores and reuses historic buildings on the Main Post or other buildings nearby. This was precisely the approach that the Trust took in its first management plan, before it became fixated on finding a vendor to construct and operate a large commercial hotel on the Main Post. At the very least, Section 110 of the Preservation Act requires the Trust to meaningfully explore reuse options, something it did not do

here. Mere consultation with the Advisory Council under Section 106 and a slight downscaling of the original proposal does not satisfy the Trust's heightened obligation to protect the historic integrity of the Presidio Landmark District.

STANDARD OF REVIEW

Under the Administrative Procedure Act, courts must set aside an agency's actions, findings, and conclusion if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations." *Id.* § 706(2)(C). This Court reviews the district court's grant or denial of summary judgment de novo, meaning that it "views the case from the same position as the district court."

Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969, 973 (9th Cir. 2003). Here, Plaintiffs seek review of the Trust's interpretation of Section 104 of the Trust Act and its application of Section 110 of the Preservation Act to the undisputed facts in the administrative record.

The Trust's interpretation of the Trust Act is governed by the framework laid out in Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), and United States v. Mead Corp., 533 U.S. 218 (2002). On questions of statutory construction, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43. Only upon a finding

that the Trust Act is ambiguous does the Court need to determine what level of deference, if any, to accord the Trust's interpretation. See The Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1060 (9th Cir. 2003) (en banc).

Even where a statute is ambiguous, moreover, an administrative agency interpretation of a particular statutory provision qualifies for deference only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). “Otherwise, the interpretation is ‘entitled to respect’ only to the extent it has the ‘power to persuade.’” Gonzales v. Oregon, 546 U.S. 243, 256 (2006) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

Here, the Trust's interpretation of Section 104(c) of the Trust Act is not the result of a formal or informal rulemaking proceeding, but “involves only an agency's application of law in a particular . . . context” – the 2010 Development Plan – and therefore does not carry the force of law. Wilderness Soc'y, 353 F.3d at 1067. Such legal applications are analyzed solely on the basis of their power to persuade, not under any deference standard. Id.; Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv., 629 F.3d 1024 (9th Cir. 2010) (interpretation contained in management plan); High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 647-48 (9th Cir. 2004) (interpretation contained in permitting decision). The fact that

agency planning documents where the interpretation appears are subject to public comment does not change the fact that they are not formal interpretations carrying the force of law. See Wilderness Watch, 629 F.3d at 1035.

Because the Trust is not charged with implementing the generally applicable Preservation Act, its interpretation of that statute is likewise entitled to no deference. The Court reviews the application of the Preservation Act to the facts in the record under the arbitrary and capricious standard. Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior, 608 F.3d 592, 598 (9th Cir. 2010).

ARGUMENT

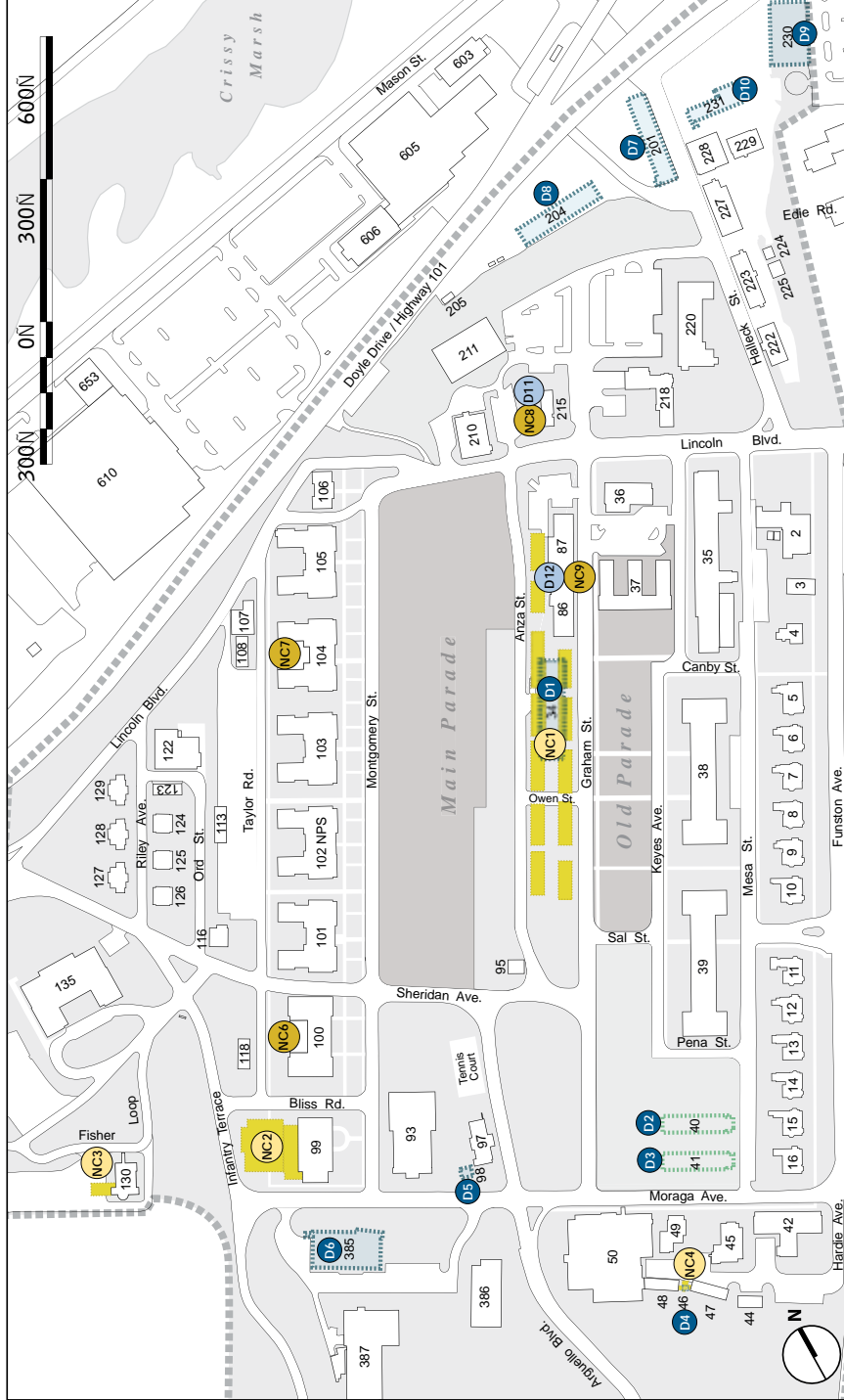
I. The Trust’s Planned New Construction on the Historic Main Post Violates Section 104(c)(3) of the Trust Act.

The Trust Act established the Trust as the caretaker for “one of America’s great natural historic sites.” Trust Act § 101(1). In creating this entity, Congress carefully balanced competing concerns regarding sound financial management against the core value of preserving the Presidio’s historic integrity in perpetuity by tightly circumscribing the Trust’s development authority. It charged the Trust with restoring and leasing the Presidio’s existing properties and plowing the proceeds of those leasing activities back into the “administration, preservation, restoration, operation, maintenance, improvement, [and] repair” of the Presidio. Id. § 104(g); see also id. § 104(n). It did not, however, empower the Trust to act like a commercial developer or an urban redevelopment agency.

To the contrary, the Trust Act expressly prohibits new construction except in very limited circumstances. The Trust may demolish buildings it cannot cost-effectively rehabilitate and build in their place structures of similar size. Trust Act § 104(c)(3). Beyond this narrow exception, the Trust has no statutory authority to undertake or permit new construction on the Presidio. That fact is hardly surprising, given the clear congressional directive that “as part of the Golden Gate National Recreation Area, the Presidio’s significant historic, natural, scenic, cultural, and recreational resources must be managed in a manner which . . . protects the Presidio from development and uses that would destroy the scenic beauty and natural and historic character of the area and cultural and recreational resources.” Trust Act § 101(5).

Despite these unambiguous statutory constraints, the Trust’s 2010 Development Plan proposes 146,500 square feet of new construction on the Main Post, roughly half of which will be devoted to the development of a new, 12-building commercial hotel directly adjacent to and filling the space between the Main Parade and the Old Parade at the center of the Main Post. To compensate for this development, the Trust proposes to demolish a much smaller, 31,824-square-foot building in the vicinity of the proposed hotel, as well as 62,115 square feet of other structures scattered around the Main Post. And to balance the ledgers in its creative “banking” scheme, the Trust proposes to draw another 54,071 square feet

UPDATING THE PTMP



Planned New Construction
 Planned Demolition
 Main Post District
 Building Treatment Subject to further consultation

FIGURE 6: MAIN POST NEW CONSTRUCTION AND DEMOLITION

Planned Demolitions (D)		Buildings to be Demolished for Doyle Drive	
D1	Building 34 31,824 SF	D7	Building 201 (Half) 6,164 SF
D2	Building 40* 8,216 SF	D8	Building 204 12,193 SF
D3	Building 41* 8,298 SF	D9	Building 230 10,060 SF
D4	Building 46 50 SF	D10	Building 231 3,842 SF
D5	Building 98 449 SF	Total	32,259 SF
D6	Building 385 10,580 SF	Buildings Demolished Since PTMP	
Total	59,417 SF	D11	Building 215 1,848 SF
* Demolition, removal, or relocation subject to further consultation.		D12	Building 85 415 SF
		Total	2,263 SF
		Total	94,000 SF

TABLE 2: MAIN POST BUILDING DEMOLITION (IN SQUARE FEET [SF])

Planned New Construction (NC)		New Construction Since PTMP	
NC1	Lodge/Cafe 70,000 SF	NC4	Int'l Center to End Violence 3,000 SF
NC2	Presidio Theatre 18,000 SF	NC7	Disney Family History Center 2,000 SF
NC3	Presidio Chapel 4,000 SF	NC8	Transit Center 1,000 SF
NC5	Archaeology Lab 500 SF	NC9	Buildings 86/87 Infill 24,000 SF
	Incidental New Construction 30,000 SF	Total	146,500 SF
Total	122,500 SF	Total	146,500 SF

TABLE 3: MAIN POST NEW CONSTRUCTION (IN SQUARE FEET [SF])

of “credit” from proposed demolition elsewhere on the Presidio, outside the Main Post. ER293 (explaining that new construction can “aggregate or ‘bank[]’ square footage from demolished structures . . . elsewhere in the Presidio”). There is no legal authority in the Trust Act that permits such an imaginative accounting process to override the replacement-only limitation on new construction.

Accordingly, the 2010 Development Plan is inconsistent with the statute’s plain language and the Trust Act’s overarching preservation purpose.

A. Section 104(c)(3) Unambiguously Limits New Construction to the “Replacement” of Demolished Structures with Buildings of Roughly the Same Size in Roughly the Same Place.

The Trust Act claim is one of statutory interpretation, requiring the Court to employ “traditional tools of statutory construction” to ascertain whether Congress “had an intention on the precise question at issue.” Chevron, 467 U.S. at 843, n.9. If Congress “has directly spoken to the precise question at issue,” then the statute’s expressed “intention is the law” and courts “must give effect to [it].” Id. at 842-43.

“The starting point for . . . interpretation of a statute is always its language.” U.S. v. Gallegos, 613 F.3d 1211, 1214 (9th Cir. 2010). “The statutory language is interpreted by reference ‘to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” United States v. Youssef, 547 F.3d 1090, 1093 (9th Cir.2008) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). “Where the plain meaning of a provision is

unambiguous that meaning is controlling, except in the ‘rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters.’” Coronado-Durazo v. I.N.S., 123 F.3d 1322, 1324 (9th Cir. 1997) (quoting U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989)). Thus, ‘if the plain language of a statute renders its meaning clear, [the Court] will not investigate further unless its application leads to unreasonable or impracticable results.’” United States v. Fei Ye, 436 F.3d 1117, 1120 (9th Cir. 2006).

Here, there is only one plausible interpretation of Section 104(c)(3) of the Trust Act: New construction is limited to replacement of existing buildings of roughly the same size in roughly the same place. This statutory section states that “new construction” shall be “limited to replacement of existing structures of similar size in existing areas of development.” Trust Act, § 104(c)(3) (emphasis added). “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” Gross v. FBL Financial Services, Inc., 557 U.S. 167, 175-76 (2009) (quoting Engine Mfrs. Assn. v. South Coast Air Quality Management Control Dist., 541 U.S. 246, 252 (2004)); see also Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) (“When terms used in a statute are undefined, we give them their ordinary meaning”). And when, as here, key “terms are not defined within a statute, they are accorded their plain and ordinary meaning,

which can be deduced through reference sources such as general usage dictionaries.” UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1026 (9th Cir. 2013); see also Schindler Elevator Corp. v. United States, 131 S. Ct. 1885, 1891 (2011) (citing to several dictionaries to determine word’s “ordinary meaning”); U.S. v. Gallegos, 613 F.3d at 1214.

The operative term in Section 104(c)(3) is “replacement” – a word that means the act of replacing. The plain and ordinary meaning of “replace” is to “take the place of,” “provide a substitute for,” or “put back in a previous place or position.” The Oxford Concise English Dictionary 1214 (10th ed. 1999); see also Webster’s New World Dictionary 1138 (3d College ed. 1988) (first definition of “replace” as “to place again; put back into a former or the proper place or position”); Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/replace> (“to restore to a former place or position,” “to take the place of,” or “to put something new in the place of”). This Court agrees: Interpreting the undefined term “replacement” in an insurance agreement, the Court looked to the Merriam-Webster Dictionary for the definition of “replace” and concluded that its plain meaning is “to put something new in the place of.” SWA Painting, Inc. v. Golden Eagle Ins. Co., 268 Fed. App. 521, 523 (9th Cir. 2008). Accordingly, the only plausible reading of Section 104(c)(3) is that new construction is limited by the Trust Act to buildings that take the place of, or are put in the place of, existing

structures.

This plain meaning is reinforced by the prepositional phrase “of similar size” that modifies “existing structures.” Trust Act § 104(c)(3). The term “similar” means “nearly but not exactly the same or alike,” Webster’s New World Dictionary 1250, or “almost the same as . . . something else.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/similar>. And the term “size” means “a thing’s overall dimensions or magnitude,” The Oxford Concise English Dictionary 1432, or “that quality of a thing which determines how much space it occupies.” Webster’s New World Dictionary 1256. Thus, under the plain language of the statute, the Trust may only construct new buildings to take the place of existing buildings of almost or nearly the same spatial dimensions or magnitude. Put differently, any new construction is limited to new structures of roughly the same size, in roughly the same place, as existing structures that are demolished.

The surrounding statutory text provides the appropriate context. Section 104(c) requires that the Trust create a comprehensive management program for the Presidio, which shall consist of –

- (1) demolition of structures which, in the opinion of the Trust, cannot be cost-effective rehabilitated, and which are identified in the management plan for demolition,
- (2) evaluation for possible demolition or replacement those buildings identified as categories 2 through 5 in the Presidio of San

Francisco Historic Landmark District Historic American Buildings Survey Report, dated 1985,¹⁰

- (3) new construction limited to replacement of existing structures of similar size in existing areas of development, and
- (4) examination of a full range of reasonable options for carrying out routine administrative and facility management programs.

Trust Act § 104(c)(1)-(4). The statute thus requires that the Trust develop a management program for the buildings it inherited in 1996 and provides authority to make building-by-building demolition and replacement decisions for those existing structures that cannot be cost-effectively rehabilitated or do not contribute to the Historic Landmark District status. Where existing buildings are demolished pursuant to Section 104(c)(1) or (2), the Trust may leave the space open or construct new, similarly sized structures in their place. Nothing in the text authorizes any other new construction or development.

Section 104(c) is part of a larger statutory section outlining the “Duties and Authorities of the Trust,” and must be interpreted in that context. Food and Drug Admin. v. Brown & Williamson Tobacco Corp, 529 U.S. 120, 133 (2000) (“It is a fundamental canon of statutory construction that the words of a statute must be

¹⁰ The 1985 San Francisco Historic Landmark District Historic American Buildings Survey Report describes the 400 most historic buildings on the Presidio and assigns them a ranking of (I)-(V). Category (I) buildings have the highest rehabilitation priority and contribute directly to the National Historic Landmark District designation. Other buildings identified in the survey are historic, but do not contribute directly to the National Historic Landmark District designation.

read in their context and with a view to their place in the overall statutory scheme.”) (quoting Gustafson v. Alloyd, 513 U.S. 561, 5691 (1995)). Section 104(a) directs the Trust to “manage the leasing, maintenance, rehabilitation, repair and improvement of property within the Presidio . . . in accordance with the purposes set forth” in the GGNRA Act; Section 104(b) gives the Trust authority “to negotiate and enter into agreements, leases, contracts and other arrangements . . . as are necessary and appropriate to carry out its authorized activities. Trust Act, § 104(a)-(b). Notably, neither of these sections provides authority for new construction or development, which is governed solely by Section 104(c).

This textual structure makes perfect sense from a congressional perspective. The underlying GGNRA Act established the park in order to maintain and preserve its outstanding natural, historic, scenic, and recreational values and to protect these outstanding attributes from development and uses that could destroy them. 16 U.S.C. § 460bb. Like the Trust Act, the GGNRA Act generally prohibits new construction within the park, except that existing buildings may be “reconstructed or demolished” and any demolished structure “may be replaced with an improvement of similar size.” Id. § 460bb-2(i). In the subsequently enacted Trust Act, Congress retained and incorporated this GGNRA Act concept by (i) acknowledging that the “removal and/or replacement of some structures within the

Presidio” may be a necessary management option to obtain financial self-sufficiency with respect to buildings that cannot be rehabilitated, Trust Act § 101(6), but then (ii) expressly limiting that management authority to the demolition of certain buildings and their replacement with similarly sized structures. Id. § 104(c).

In short, viewed in its entirety, the Trust Act provides the Trust with broad authority to rehabilitate, lease, and manage existing buildings to meet both its historic preservation and financial self-sufficiency directives, but expressly constrains the new corporation’s demolition and building activities consistent with unambiguous congressional policy objectives for historic and natural preservation. While the Trust may, under certain circumstances, demolish existing structures, its power to construct new structures on the Historic Landmark is “limited” to buildings of roughly the same size and in roughly the same place as the demolished structures. Section 104(c)’s prohibition on new construction is not only clear on its face, but also precisely aligned with “the structure of the [Trust Act] as a whole, including its object and policy,” United States v. Williams, 659 F.3d 1223, 1225 (9th Cir. 2011) (internal quotation marks omitted), cert. denied 132 S. Ct. 1951 (2012), and with the text and policy objectives embodied in the GGNRA Act and expressly incorporated into the Trust Act.

B. The 2010 Development Plan Is Based on a “Banking” Theory that Is Not Authorized by the Trust Act and that Reads Key Words Entirely Out of Section 104(c)(3).

Notwithstanding the plain language of Section 104(c), the 2010 Development Plan adopted by the Trust provides for demolishing Building 34 adjacent to the Main Parade to make way for the construction of 12 new structures, with a significantly larger footprint and more than double the square footage of the demolished structure, to house a 110-room commercial hotel. To justify this expansive new construction, the Trust has developed a “banking” theory whereby it “can demolish structures and ‘bank’ or hold in reserve the square footage for an indefinite period, drawing upon it later to provide the basis for building additions or new construction throughout [the areas of the Presidio under the Trust’s jurisdiction].” ER1425. In other words, in the Trust’s view, the word “replacement” in Section 104(c)(3) does not actually mean “to put in place of” and the term “similar size” does not actually mean “almost the same dimensions or magnitude.” Instead, “replacement of existing structures of similar size” means, illogically, that the Trust can (1) demolish buildings anywhere on the Presidio, (2) aggregate the demolished square footage, and (3) construct new buildings of completely different dimensions in completely different places by drawing on banked demolition credit, as long as the total square footage of new construction does not exceed the total square footage of demolished structures across the

Presidio as a whole. And to track all of these bank deposits and withdrawals through time and space, the Trust supposedly maintains some master accounting ledger.

Had Congress wanted to create such a convoluted banking scheme, it could have – and presumably would have – done so directly. For instance, Section 104(c) might have read: “new construction not to exceed total square footage of all buildings demolished pursuant to sections (a) and (b) of this paragraph.” But Congress did not say that, or anything like it. Instead, the statute says, simply, “new construction limited to replacement of existing structures of similar size in existing areas of development.” Trust Act, § 104(c)(3).

The plain language of Section 104(c)(3), in fact, closely tracks the constraints on new construction first embodied in the GGNRA Act. That statute provides:

(i) New construction; limitation; notice and public hearing; exceptions

New construction and development within the boundaries described in section 460bb-1(a) of this title on lands under the administrative jurisdiction of a department other than that of the Secretary is prohibited, except that improvements on lands which have not been transferred to his administrative jurisdiction may be reconstructed or demolished. Any such structure which is demolished may be replaced with an improvement of similar size, following consultation with the Secretary or his designated representative, who shall conduct a public hearing at a location in the general vicinity of the area, notice of which shall be given at least one week prior to the date thereof . . .

16 U.S.C. § 460bb-2(i) (emphasis added). In 1986, the District Court for the Northern District of California interpreted this provision to prohibit exactly the type of banking and development the Trust is now proposing. ER 1405-06 (Sierra Club v. Marsh, Case No. C-86-0289 WWS, *3-4 (N.D. Cal. Feb. 14, 1986) (Order with Findings of Fact and Conclusions of Law, rejecting as contrary to plain language the Army’s argument that it could accumulate square footage credit for demolished structures and spend it on new construction elsewhere)).

“It is an elementary principle of statutory construction that similar language in similar statutes should be interpreted similarly.” United States v. Sioux, 362 F.3d 1241, 1246 (9th Cir. 2004); see also Wachovia Bank v. Schmidt, 546 U.S. 303, 316 (2006) (“statutes addressing the same subject matter generally should be read as if they were one law”); Cannon v. Univ. of Chicago, 441 U.S. 677, 696–98 (1979) (in interpreting a newly enacted statute using the same words as an existing statute, Congress is presumed to have intended the same construction to apply to the new statute as applied to the existing statute). And “[u]nder the rules of statutory construction, [the Court] presume[s] that Congress acts ‘with awareness of relevant judicial decisions.’” United States v. Alvarez-Hernandez, 478 F.3d 1060, 1065 (9th Cir. 2007) (citations omitted). Thus, “where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated

law, at least insofar as it affects the new statute.” Lorillard v. Pons, 434 U.S. 575, 581 (1978).

The incorporation of nearly identical “new construction” prohibitions in the Trust Act and the GGNRA Act is, moreover, consistent with the history of these interlocking statutes. In enacting the GGNRA Act in 1972, Congress envisioned the Presidio as an integral part of a larger national park and recreation area and sought to preserve its historic and natural features from potential construction activity by the Army that might jeopardize those features. In enacting the Trust Act two decades later, Congress created a new entity to rehabilitate and financially manage the already developed areas of the Presidio, but once again sought to tightly constrain the power of that entity to undertake new development that could jeopardize the same historic and natural features. Understandably, because the preservation-oriented Park Service was not the Presidio building manager under either statute, Congress imposed limitations on new construction that were intended to fulfill the overarching preservation mandate of both the GGNRA Act and the Trust Act, consistent with the Park Service’s general national park mandate.¹¹

¹¹ The Trust’s argument below turned largely on the fact that in the Trust Act, Congress added to the clause “new construction limited to replacement of existing structures of similar size” the words “in existing areas of development” – words which do not appear in the original GGNRA Act. But Congress could not plausibly have authorized a complicated banking scheme “in so cryptic a fashion.”

As this Court has often explained, “[t]he preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there.” Tides v. The Boeing Co., 644 F.3d 809, 814 (9th Cir. 2011) (citations omitted); Texaco Inc. v. United States, 528 F.3d 703, 709-10 (9th Cir. 2008). Here, there is “not the slightest doubt” that the word “replacement” means to return to roughly the same place and the term “similar size” means of nearly the same dimensions. MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 228 (1994). Those key words in Section 104(c)(3) do not, by an stretch of the imagination, support the Trust’s intricate “banking” theory, and this Court should not presume that Congress was “ignorant of the meaning of the language it employed.” BedRoc Limited, LLC v. United States, 541 U.S. 176, 187 (2004).

C. The Trust’s Interpretation of Section 104(c)(3) Contradicts Congressional Intention and Is Not Entitled to Deference.

Not only is the “banking” theory concocted by the Trust contrary to the plain language of the statute, but it permits development activity that runs directly counter to Congress’ primary objective – that the park be managed in a manner “which protects the Presidio from development and uses” inconsistent with its

Brown & Williamson, 529 U.S. at 160. The much simpler, common sense explanation is that Congress wanted to ensure that small existing structures located here and there across the Presidio (e.g., magazines, storage buildings, etc.), outside generalized areas of development, would not become the foundation for new construction and development.

historic and natural character. Trust Act § 101(5). In the Trust’s alternate universe, Section 104(c)(3) does not require, as the district court put it, the “jot-for-jot replacement that Plaintiffs propose.” ER77. Rather, it merely “caps the total amount of development in the Presidio’s existing ‘areas of development.’” *Id.* Such a cap does nothing, however, to ensure historic preservation.

Under the court’s interpretation, new construction would be limited only by the Trust’s ingenuity. Nothing would stop the Trust, for instance, from demolishing dozens of small structures across the park and aggregating their square footage to build a 100,000-square-foot high-rise in place of Building 40 (~8,000 square feet) or Building 41 (~8,000 square feet) or Building 385 (~10,000 square feet), all of which are slated for demolition. In fact, as endorsed by the district court, the Trust’s expansive “banking” theory has no limiting principle other than total Presidio-wide square footage, potentially allowing extensive new commercial development on the historic Main Post.

Even if the words “replacement of existing structures of similar size” were in any way ambiguous – which they are not – the Trust’s untethered interpretation of Section 104(c)(3) “goes beyond the limits of what is ambiguous and contradicts what . . . is quite clear.” *Wilderness Soc’y*, 353 F.3d at 1069 (quoting *Whitman v. Am. Trucking Assn.*, 531 U.S. 457, 481 (2001)). Here, the Trust takes what plainly was intended by Congress as a strict limitation on new construction to replacement

of existing structures that cannot be cost-effectively restored, rehabilitated, or repurposed and turns it on its head, reading Section 104(c)(3) instead as a statutory authorization for new development. Congress did not, however, convey on the Trust the power to rewrite this express statutory prohibition, whether through a management plan or otherwise. And because the Trust's illogical – indeed, counterintuitive – reading of the “new construction” limitation is neither persuasive nor the product of specialized agency expertise, it is not entitled to any judicial deference. *Id.* (citing *Mead*, 533 U.S. at 228 and *Skidmore*, 232 U.S. at 140).

II. The Trust's Planned New Construction on the Historic Main Post Does Not Minimize Harm to the Presidio to the Maximum Extent Possible, in Violation of Section 110 of the Preservation Act.

Separate and distinct from the Trust Act, Section 110(f) of the Preservation Act imposes an affirmative duty on federal agencies to act in a manner that causes the least possible harm to the integrity of National Historic Landmarks like the Presidio. This obligation is above and beyond the Section 106 consultation process required for all federal undertakings that may affect public or private property listed or eligible for listing on the National Register. Here, the planned construction of a large, commercial hotel in the middle of the Main Post will cause entirely avoidable adverse impacts to the historic and cultural integrity of the Presidio Landmark District. The Trust's failure to minimize those impacts by

placing desired overnight lodging in existing historic buildings on the Main Post or in other buildings away from the historic heart of the Presidio violated Section 110.

A. Section 110 of the Preservation Act Imposes an Affirmative, Heightened Obligation on the Trust’s Management of the Presidio Landmark.

As with the Trust Act claim, the Court’s review of the Preservation Act Section 110(f) claim must begin with the language of the statute itself:

Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal Agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

16 U.S.C. § 470h-2(f) (emphasis added). In other words, the Trust has an affirmative legal obligation to ensure that its management of the Presidio causes the least possible harm to the Landmark’s character and integrity.

In sharp contrast, Section 106 of the Preservation Act provides only that all federal agencies must “take into account” the adverse effects of their proposed actions on any public or private property eligible for National Register listing. Section 106 is, in other words, a purely procedural “stop, look, and listen” requirement that is satisfied through consultation with the Advisory Council and other interested parties. Te-Moak Tribe of Western Shoshone of Nevada v. U.S.

Dep't of the Interior, 608 F.3d 592, 607 (9th Cir. 2010). Although the Advisory Council's Section 106 consultation regulations encourage federal agencies to evaluate modifications to their proposals that "could avoid, minimize or mitigate adverse effects on historic properties," there is no requirement that they actually do so or that they do so to the maximum extent possible. See 36 C.F.R. §§ 800.6-800.7.

While consultation with the Advisory Council is also, to be sure, a necessary step for Section 110(f) compliance, it is not a sufficient one. The Interior Department's Section 110 Standards and Guidelines underscore that federal agencies have additional responsibilities, beyond Section 106, with respect to National Historic Landmarks and that federal actions affecting Landmarks are subject to a "higher standard of care." 63 Fed. Reg. at 20,496, 20,503. This interpretive guidance faithfully reflects congressional intent embodied in the 1980 amendments to the statute, which enacted a "major change" in the law through new Section 110. H.R. Rep. No. 96-1457, at 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6378, 6379, 6401 (explaining that Section 110(f) "establishes a higher standard of care to be exercised by Federal agencies when considering undertakings that may directly and adversely affect National Historic Landmarks" and that it "does not supercede Section 106, but complements it by setting a higher standard for agency planning in relationship to landmarks before the agency brings the matter to the

[Advisory] Council”).

Adhering to the statutory language, the courts have generally agreed that federal agencies have a heightened duty with respect to National Landmarks. In Coliseum Square Ass’n Inc. v. Jackson, 465 F.3d 215, 242 (5th Circuit, 2006), for instance, the Fifth Circuit held that Section 110(f) is an exception to the general rule that the Preservation Act is a procedural statute, concluding that federal actions relating to Historic Landmarks are “subject to more stringent requirements” and that Section 110(f) creates an “affirmative duty.” See also Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082 at 1095 n.4 (N.D. Cal. 2008)

The case law comports with the plain language of Section 110(f). The word “minimize” means “to make (something bad or not wanted) as small as possible,” while the word “possible” means “able to be done” or “being within the limits of ability, capacity, or realization.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary>. Under the plain language of Section 110(f), therefore, the Trust has a heightened, affirmative duty, when carrying out its planning and actions at the Presidio, to make any harm to the Landmark’s historic character as small as the Trust is able, within the limits of its statutory ability.

To satisfy this obligation, agencies managing National Landmarks must do more than catalogue adverse effects and consult with historic preservation experts; they must do everything within their power to eliminate those effects, including

potentially abandoning or substantially altering the proposed action. Coliseum Square, 465 F.3d at 241 (explaining that Section 106 does not require abandonment of a project, but that Section 110(f) provides an “exception to that rule” for National Historic Landmarks).

B. The Trust’s Planned New Construction of a 110-Room Commercial Hotel in the Center of the Main Post Does Not Minimize Harm to the Maximum Extent Possible.

As discussed above, the Presidio was designated a National Historic Landmark District in 1962 for its unique characteristics as a historic military post of national significance, with hundreds of structures and their layered relationship to each other all contributing to the district’s historic status. To qualify for this relatively rare designation, Landmark Districts must “possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association.” 36 C.F.R. § 65.4(a). The “visual unity” of the Main Post, with its layered arrangement of historic structures, its open parade grounds, and its unique vistas of San Francisco Bay, is integral to the Presidio’s cultural significance, made all the more so by the densely build urban landscape surrounding the park.

At the center of this relatively quiet setting, adjacent to a National Cemetery, the Trust proposes to construct 12 new buildings, sprawled over the length of more than a football field between the Main Parade and Old Parade, to accommodate a contemporary 110-room hotel. The proposed construction would bring an

unprecedented level of new commercial development into the heart of the Presidio, transforming the Main Post from a tranquil showcase of history into a bustling hub of commercial and tourist activity. In its Section 213 Report for the Section 106 consultation, the Park Service explained that the scale of the proposed new construction, demolition, or building relocation, along with the change in traffic patterns, “will have a severe negative effect on the setting, feeling, and association of the Main Post” and “will critically change a fundamental character defining feature that distinguishes the historic fabric, setting, feeling and association of the Presidio [Landmark District] from the surrounding urban fabric of the city.”

ER830. Among other things, the new construction will “create a false sense of historical development” – the kind of faux design that may be suitable for an urban redevelopment zone, but not for a Historic Landmark District. ER831. Such adverse effects “severely diminish[] the historic character of the Main Post, which is the heart of the Presidio of San Francisco, and significantly diminish[] the overall integrity of the National Historic Landmark District.” ER829.

Although the Trust subsequently reduced the size of the hotel (from 80,000 to 70,000 square feet) and simultaneously expanded its footprint in the final 2010 plan, those modest alterations do not minimize to the maximum extent possible the “character and feel” effects of a large modern hotel on the Main Post. As the final EIS document acknowledged, the 2010 plan “is inconsistent with” the language of

the 2002 plan, which “proposed that lodging be accommodated in historic buildings,” and with the Trust’s prior commitment “to locate public uses mainly in existing structures.” ER487. The proposed new construction constitutes a significant adverse impact on the National Historic Landmark District, ER565, that “would alter the association, setting, and feeling of the historic resources within the [National Historic Landmark District]” and would diminish “certain ‘aspects of integrity.’” ER651.

More specifically, the proposed demolition of historic Buildings 40 and 41 would cause an unavoidable “significant” impact on the Landmark District, while “[o]ther new construction and building demolition components of the [selected] alternative would result in adverse effects on individual resources but would not,” in the Trust’s view, “rise to the level of a significant impact” under the National Environmental Policy Act (“NEPA”). ER659; see also ER772 (finding that the proposed plan “will diminish the integrity of individual resources within the Presidio related to each of the nine thematic periods within the Presidio’s period of significance, and thus the project will have an adverse effect” and concluding that it will “cumulatively have altered the appearance and character defining elements in large areas of the [Landmark District]”).

Notwithstanding these adverse effects, the Trust argued below that the Section 106 consultation process, which concluded with a so-called “programmatic

agreement,” fully and simultaneously satisfied its Section 110(f) obligation to minimize harm to the maximum extent possible because that process resulted in some mitigation designed to reduce some adverse effects. This argument is incorrect as a matter of law and unsupported by evidence in the record. Although the Advisory Council consultation component of Section 110(f) may be satisfied by a joint Section 106/110 consultation, a federal agency cannot satisfy its own separate heightened duty of care under section 110(f) merely by mitigating adverse effects to what it believes is below the “level of significance” under the National Environmental Policy Act or by garnering other agency signatures on a programmatic agreement. Whenever an action will adversely affect a National Historic Landmark, the federal agency proposing the action must, in addition, evaluate and pursue “all prudent and feasible alternatives” that minimize harm to the maximum extent possible. 63 Fed. Reg. at 20,503.

Although the Trust became fixated, even before the new planning process began in earnest, on increasing overnight accommodations at the Main Post, it has no statutory mandate or imperative to construct a large new commercial hotel – or any overnight accommodations at all. Rather, it has only two statutory mandates: (1) under the Trust Act, to preserve and protect the Presidio “from development and uses which would destroy [its] scenic and natural and historic character,” Trust Act § 101(4)-(5), and (2) under the Preservation Act, to “use, to the maximum

extent feasible, historic properties available to it” prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, including “any preservation that may be necessary to carry out this” mandate, 16 U.S.C. § 470h-2(a). To the extent that the Trust desires or prefers additional overnight lodging at the Presidio, it must pursue that goal, if at all, in a way that is consistent with its actual statutory directives; first and foremost, it must evaluate potential opportunities to house overnight guest in existing historic buildings. See also 63 Fed. Reg. at 20,500 (“In those cases where historic property is under the jurisdiction and control of” a federal agency, that agency “has an affirmative responsibility to seek and use historic properties to the maximum extent feasible in carrying out its activities.”).

The record demonstrates that the Trust did not satisfy this heightened affirmative obligation. The final EIS document did include four “alternatives” intended to comply with the Trust’s wholly separate NEPA obligations, three each of which contained a different configuration for some overnight accommodations. But the Trust never undertook a systematic evaluation of historic buildings on the Main Post or elsewhere at the Presidio that could potentially accommodate lodging. For instance, two of the NEPA alternatives included lodging in World War II barracks now identified as Buildings 41 and 42. ER453, 472. Instead of repurposing the buildings for overnight lodging, the Trust elected to demolish them

and “bank” their combined 17,000 square feet of space toward construction of the new hotel. Another NEPA alternative included lodging in the Upper Funston Avenue Officers’ Quarters, Buildings 11 to 16, and in nearby Pershing Hall. ER467. Although the EIR does not offer a total square footage number for the six Upper Funston units, their former service as Civil War-era Officers’ Quarters clearly makes them potential candidates for overnight lodging, as are the nearly identical Lower Funston units, Buildings 5 to 10. The EIR also suggested that former barracks Buildings 86 and 87 along the Main Parade could be converted from offices to lodging. ER461. Indeed, virtually all of the buildings surrounding the Main and Old Parade Grounds, including the stunning Montgomery Street barracks, Buildings 100 to 105, and the large early twentieth century Mediterranean Revival barracks now known as Buildings 38 and 39, served as military housing at some point and could potentially play a role in accommodating overnight visitors today, as the 2002 management plan envisioned. And if the Trust is really determined, for some reason, to construct a large, new hotel from the ground up, locating it just off the Main Post, as part of the Doyle Drive renovation that will connect the Main Post to Crissy Field with walking paths, would have avoided all adverse effects to the historic integrity of the Main Post.

Yet none of these options were seriously considered, let alone systematically evaluated. Instead, when the public and other agencies objected to three new

massive buildings adjacent on the Main Parade, the Trust broke the proposed hotel into 12 smaller buildings, with all of the same commercial attributes, and then pitched them as replacements for ghost barracks demolished more than half a century ago, long before the Presidio was designated as a Historic Landmark. In failing to give serious consideration to the myriad options for more lodging in existing buildings, the Trust seems to have lost sight of the fact that its statutory mandate is historic preservation, not urban redevelopment.

To properly comply with the Park Service's Section 110 standards for projects affecting National Historic Landmarks, the Trust should have evaluated "all prudent and feasible alternatives" to the proposed construction of a contemporary new hotel in the middle of the Main Post. 63 Fed. Reg. at 20,503 (Standard 4(j)). Although a federal agency may, arguably, reject otherwise feasible alternatives on the basis of "undue cost" or where doing so will "compromise the undertaking's goals and objectives," it must first evaluate these factors, weigh the competing interests, and balance its concerns against Congress' preservation intent in Section 110(f). *Id.* (Standard 4(k)). The record does not reflect that the Trust undertook any such evaluation, in part because it erroneously believed that the Section 106 consultation would fully satisfy its Section 110(f) obligations and in part because it was determined, since as early as 2005, to build a new commercial hotel in the center of the Main Post.

The only explanation for the Trust's failure to evaluate available options for reusing historic buildings as lodging seems to be the Trust's assumption that a new 110-room hotel is necessary to satisfy its articulated project objective of making the Main Post the "focal point for visitor orientation" and a "lively pedestrian district." ER424. No record analysis supports this assumption, however. The Park Service was surely correct when it noted "a new lodge at the Main Post is not the only means to welcome visitors and animate the Main Parade." ER361. The Service explained that "there are other ways to achieve this goal, such as through rehabilitation of existing buildings at the Main Post, the establishment of a Visitor Center, and programs . . ." *Id.* (expressing hope that "the Trust's first priority will be to rehabilitate existing buildings at the Main Post, rather than construct new ones"). Yet the Trust declined the Park Service's invitation to meaningfully evaluate such available options.

In the 2002 management plan, the Trust estimated that it was "functionally and financially feasible" to create 180 to 250 rooms for overnight lodging by reusing historic buildings. ER932. There is no evidence, analysis or evaluation in the administrative record for the 2010 revision to explain why the Trust could not meet its new objective of enlivening the Main Post by carrying through with its original plan to reuse historic buildings for lodging. Because the Trust "entirely failed to consider an important aspect of the problem," the 2010 Development Plan

should be set aside. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29, 43 (1983).

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that the Court reverse the district court's Order Granting Defendant's Motion for Summary Judgment and direct the district court to enter judgment in Plaintiffs' favor on their Presidio Trust Act and National Historic Preservation Act claims.

Date: December 20, 2013

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
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By: 

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HISTORICAL ASSOCIATION and
SIERRA CLUB

STATEMENT OF RELATED CASES

Counsel for the Presidio Historical Association and Sierra Club are not aware of any related cases.

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 13,979 words, exclusive of tables and cover sheet.



Deborah A. Sivas

Addendum

THE PRESIDIO TRUST ACT
(as amended through December 28, 2001)

16 U.S.C. § 460bb appendix
(enacted as Title I of H.R. 4236, P.L. 104-333, 110 Stat. 4097, on November 12, 1996)
(amended by P.L. 105-83, 111 Stat. 1607, November 14, 1997)
(amended by P.L. 106-113, 113 Stat. 1501, November 29, 1999)
(amended by P.L. 106-176, 114 Stat. 23, March 10, 2000)
(amended by P.L. 107-107, 115 Stat. 1328, December 28, 2001)

SEC. 101. FINDINGS.

The Congress finds that—

- (1) the Presidio, located amidst the incomparable scenic splendor of the Golden Gate, is one of America's great natural historic sites;
- (2) the Presidio was the oldest continuously operating military post in the Nation dating from 1776, and was designated a National Historic Landmark in 1962;
- (3) preservation of the cultural and historic integrity of the Presidio for public use recognizes its significant role in the history of the United States;
- (4) the Presidio, in its entirety, is a part of the Golden Gate National Recreation Area, in accordance with Public Law 92-589;
- (5) as part of the Golden Gate National Recreation Area, the Presidio's significant natural, historic, scenic, cultural, and recreational resources must be managed in a manner which is consistent with sound principles of land use planning and management, and which protects the Presidio from development and uses which would destroy the scenic beauty and historic and natural character of the area and cultural and recreational resources;
- (6) removal and/or replacement of some structures within the Presidio must be considered as a management option in the administration of the Presidio; and
- (7) the Presidio will be managed through an innovative public/private partnership that minimizes cost to the United States Treasury and makes efficient use of private sector resources.

SEC. 102. AUTHORITY AND RESPONSIBILITY OF THE SECRETARY OF THE INTERIOR.

(a) **INTERIM AUTHORITY.**—The Secretary of the Interior (hereinafter in this title referred to as the (“Secretary”) is authorized to manage leases in existence on the date of this Act for properties under the administrative jurisdiction of the Secretary and located at the Presidio. Upon the expiration of any such lease, the Secretary may extend such lease for a period terminating not later than 6 months after the first meeting of the Presidio Trust. The Secretary may not enter into any new leases for property at the Presidio to be transferred to the

Presidio Trust under this title, however, the Secretary is authorized to enter into agreements for use and occupancy of the Presidio properties which are assignable to the Trust and are terminable with 30 days notice. Prior to the transfer of administrative jurisdiction over any property to the Presidio Trust, and notwithstanding section 1341 of title 31 of the United States Code, the proceeds from any such lease shall be retained by the Secretary and such proceeds shall be available, without further appropriation, for the preservation, restoration, operation and maintenance, improvement, repair and related expenses incurred with respect to Presidio properties. The Secretary may adjust the rental charge on any such lease for any amounts to be expended by the lessee for preservation, maintenance, restoration, improvement, repair and related expenses with respect to properties and infrastructure within the Presidio.

(b) PUBLIC INFORMATION AND INTERPRETATION.—The Secretary shall be responsible, in cooperation with the Presidio Trust, for providing public interpretive services, visitor orientation and educational programs on all lands within the Presidio.

(c) OTHER.—Those lands and facilities within the Presidio that are not transferred to the administrative jurisdiction of the Presidio Trust shall continue to be managed by the Secretary. The Secretary and the Presidio Trust shall cooperate to ensure adequate public access to all portions of the Presidio. Any infrastructure and building improvement projects that were funded prior to the enactment of this Act shall be completed by the National Park Service.

(d) PARK SERVICE EMPLOYEES.—

(1) Any career employee of the National Park Service, employed at the Presidio at the time of the transfer of lands and facilities to the Presidio Trust, shall not be separated from the Service by reason of such transfer, unless such employee is employed by the Trust, other than on detail. Notwithstanding section 3503 of title 5, United States Code, the Trust shall have sole discretion over whether to hire any such employee or request a detail of such employee.

(2) Any career employee of the National Park Service employed at the Presidio on the date of enactment of this title shall be given priority placement for any available position within the National Park System notwithstanding any priority reemployment lists, directives, rules, regulations or other orders from the Department of the Interior, the Office of Management and Budget, or other Federal agencies.

SEC. 103. ESTABLISHMENT OF THE PRESIDIO TRUST.

(a) ESTABLISHMENT.—There is established a wholly-owned government corporation to be known as the Presidio Trust (hereinafter in this title referred to as the “Trust”).

(b) TRANSFER.—

(1) Within 60 days after receipt of a request from the Trust for the transfer of any parcel within the area depicted as Area B on the map entitled “Presidio Trust Number 1”, dated December 7, 1995, the Secretary shall transfer such parcel to the administrative jurisdiction of the Trust. Within 1 year after the first meeting of the Board of Directors of the Trust, the Secretary shall transfer to the Trust administrative jurisdiction over all remaining

parcels within Area B. Such map shall be on file and available for public inspection in the offices of the Trust and in the offices of the National Park Service, Department of the Interior. The Trust and the Secretary may jointly make technical and clerical revisions in the boundary depicted on such map. The Secretary shall retain jurisdiction over those portions of the building identified as number 102 as the Secretary deems essential for use as a visitor center. The Building shall be named the "William Penn Mott Visitor Center". Any parcel of land, the jurisdiction over which is transferred pursuant to this subsection, shall remain within the boundary of the Golden Gate National Recreation Area. With the consent of the Secretary, the Trust may at any time transfer to the administrative jurisdiction of the Secretary any other properties within the Presidio which are surplus to the needs of the Trust and which serve essential purposes of the Golden Gate National Recreation Area. The Trust is encouraged to transfer to the administrative jurisdiction of the Secretary open space areas which have high public use potential and are contiguous to other lands administered by the Secretary.

(2) Within 60 days after the first meeting of the Board of Directors of the Trust, the Trust and the Secretary shall determine cooperatively which records, equipment, and other personal property are deemed to be necessary for the immediate administration of the properties to be transferred, and the Secretary shall immediately transfer such personal property to the Trust. Within 1 year after the first meeting of the Board of Directors of the Trust, the Trust and the Secretary shall determine cooperatively what, if any, additional records, equipment, and other personal property used by the Secretary in the administration of the properties to be transferred should be transferred to the Trust.

(3) The Secretary shall transfer, with the transfer of administrative jurisdiction over any property, the unobligated balance of all funds appropriated to the Secretary, all leases, concessions, licenses, permits, and other agreements affecting such property.

(4) At the request of the Trust, the Secretary shall provide funds to the Trust for preparation of the program required under section 104(c) of this title, hiring of initial staff and other activities deemed by the Trust as essential to the establishment of the Trust prior to the transfer of properties to the Trust.

(c) BOARD OF DIRECTORS.—

(1) IN GENERAL.—The powers and management of the Trust shall be vested in a Board of Directors (hereinafter referred to as the "Board") consisting of the following 7 members:

(A) The Secretary of the Interior or the Secretary's designee.

(B) 6 individuals, who are not employees of the Federal Government, appointed by the President, who shall possess extensive knowledge and experience in one or more of the fields of city planning, finance, real estate development, and resource conservation. At least one of these individuals shall be a veteran of the Armed Services. At least 3 of these individuals shall reside in the San Francisco Bay Area. The President shall make the

appointments referred to in this subparagraph within 90 days after the enactment of this Act and shall ensure that the fields of city planning, finance, real estate development, and resource conservation are adequately represented. Upon establishment of the Trust, the Chairman of the Board of Directors of the Trust shall meet with the Chairman of the Energy and Natural Resources Committee of the United States Senate and the Chairman of the Resources Committee of the United States House of Representatives.

(2) TERMS.—Members of the Board appointed under paragraph (1)(B) shall each serve for a term of 4 years, except that of the members first appointed, 3 shall serve for a term of 2 years. Any vacancy in the Board shall be filled in the same manner in which the original appointment was made, and any member appointed to fill a vacancy shall serve for the remainder of the term for which his or her predecessor was appointed. No appointed member may serve more than 8 years in consecutive terms, except that upon the expiration of his or her term, an appointed member may continue to serve until his or her successor has been appointed.

(3) QUORUM.—Four members of the Board shall constitute a quorum for the conduct of business by the Board.

(4) ORGANIZATION AND COMPENSATION.—The Board shall organize itself in such a manner as it deems most appropriate to effectively carry out the authorized activities of the Trust. Board members shall serve without pay, but may be reimbursed for actual and necessary travel and subsistence expenses incurred by them in the performance of the duties of the Trust.

(5) LIABILITY OF DIRECTORS.—Members of the Board of Directors shall not be considered Federal employees by virtue of their membership on the Board, except for purposes of the Federal Tort Claims Act and the Ethics in Government Act, and the provisions of chapter 11 of title 18, United States Code.

(6) MEETINGS.—The Board shall meet at least three times per year in San Francisco and at least two of those meetings shall be open to the public. Upon a majority vote, the Board may close any other meetings to the public. The Board shall establish procedures for providing public information and opportunities for public comment regarding policy, planning, and design issues. The Board may establish procedures for providing public information and opportunities for public comment regarding policy, planning, and design issues through the Golden Gate National Recreation Area Advisory Commission.

(7) STAFF.—Notwithstanding any other provisions of law, the Trust is authorized to appoint and fix the compensation and duties and terminate the services of an executive director and such other officers and employees as it deems necessary without regard to the provisions of title 5, United States Code, or other laws related to the appointment, compensation or termination of Federal employees.

(8) NECESSARY POWERS.—The Trust shall have all necessary and proper powers for the exercise of the authorities vested in it.

(9) TAXES.—The Trust and all properties administered by the Trust and all interest created under leases, concessions, permits and other agreements associated with the properties shall be exempt from all taxes and special assessments of every kind by the State of California, and its political subdivisions, including the City and County of San Francisco.

(10) GOVERNMENT CORPORATION.—

(A) The Trust shall be treated as a wholly-owned Government corporation subject to chapter 91 of title 31, United States Code (commonly referred to as the Government Corporation Control Act). Financial statements of the Trust shall be audited annually in accordance with section 9105 of title 31 of the United States Code.

(B) At the end of each calendar year, the Trust shall submit to the Committee on Energy and Natural Resources of the United States Senate and the Committee on Resources of the House of Representatives a comprehensive and detailed report of its operations, activities, and accomplishments for the prior fiscal year. The report also shall include a section that describes in general terms the Trust's goals for the current fiscal year.

SEC. 104. DUTIES AND AUTHORITIES OF THE TRUST.

(a) OVERALL REQUIREMENTS OF THE TRUST.—The Trust shall manage the leasing, maintenance, rehabilitation, repair and improvement of property within the Presidio under its administrative jurisdiction using the authorities provided in this section, which shall be exercised in accordance with the purposes set forth in section 1 of the Act entitled “An Act to establish the Golden Gate National Recreation Area in the State of California, and for other purposes,” approved October 27, 1972 (Public Law 92-589; 86 Stat. 1299; 16 U.S.C. 460bb), and in accordance with the general objectives of the General Management Plan (hereinafter referred to as the “management plan”) approved for the Presidio.

(b) AUTHORITIES.—The Trust may participate in the development of programs and activities at the properties transferred to the Trust, except that the Trust shall have the authority to negotiate and enter into such agreements, leases, contracts and other arrangements with any person, firm, association, organization, corporation or governmental entity, including, without limitation, entities of Federal, State and local governments as are necessary and appropriate to carry out its authorized activities. The National Park Service or any other Federal agency is authorized to enter into agreements, leases, contracts and other arrangements with the Presidio Trust which are necessary and appropriate to carry out the purposes of this title. Any such agreement may be entered into without regard to section 321 of the Act of June 30, 1932 (40 U.S.C. 303b). The Trust may use alternative means of dispute resolution authorized under subchapter IV of chapter 5 of title 5, United States Code (5 U.S.C. 571 et seq.). The Trust shall

establish procedures for lease agreements and other agreements for use and occupancy of Presidio facilities, including a requirement that in entering into such agreements the Trust shall obtain reasonable competition. The Trust may not dispose of or convey fee title to any real property transferred to it under this title. Federal laws and regulations governing procurement by Federal agencies shall not apply to the Trust, with the exception of laws and regulations related to Federal Government contracts governing working conditions and wage rates, including the provisions of sections 276a-276a-6 of title 40, United States Code (Davis-Bacon Act), and any civil rights provisions otherwise applicable thereto. The Trust, in consultation with the Administrator of Federal Procurement Policy, shall establish and promulgate procedures applicable to the Trust's procurement of goods and services including, but not limited to, the award of contracts on the basis of contractor qualifications, price, commercially reasonable buying practices, and reasonable competition. The Trust is authorized to use funds available to the Trust to purchase insurance and for reasonable reception and representation expenses, including membership dues, business cards and business related meal expenditures.

(c) MANAGEMENT PROGRAM.—The Trust shall develop a comprehensive program for management of those lands and facilities within the Presidio which are transferred to the administrative jurisdiction of the Trust. Such program shall be designed to reduce expenditures by the National Park Service and increase revenues to the Federal Government to the maximum extent possible. In carrying out this program, the Trust shall be treated as a successor in interest to the National Park Service with respect to compliance with the National Environmental Policy Act and other environmental compliance statutes. Such program shall consist of—

(1) demolition of structures which in the opinion of the Trust, cannot be cost-effectively rehabilitated, and which are identified in the management plan for demolition,

(2) evaluation for possible demolition or replacement those buildings identified as categories 2 through 5 in the Presidio of San Francisco Historic Landmark District Historic American Buildings Survey Report, dated 1985,

(3) new construction limited to replacement of existing structures of similar size in existing areas of development, and

(4) examination of a full range of reasonable options for carrying out routine administrative and facility management programs.

The Trust shall consult with the Secretary in the preparation of this program.

(d) FINANCIAL AUTHORITIES.—(1) To augment or encourage the use of non-Federal funds to finance capital improvements on Presidio properties transferred to its jurisdiction, the Trust, in addition to its other authorities, shall have the following authorities subject to the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.):

(A) The authority to guarantee any lender against loss of principal or interest on any loan: *Provided, That—*

(i) the terms of the guarantee are approved by the Secretary of the Treasury;

(ii) adequate subsidy budget authority is provided in advance in appropriations Acts; and

(iii) such guarantees are structured so as to minimize potential cost to the Federal Government. No loan guarantee under this title shall cover more than 75 percent of the unpaid balance of the loan. The Trust may collect a fee sufficient to cover its costs in connection with each loan guaranteed under this title. The authority to enter into any such loan guarantee agreement shall expire at the end of 15 years after the date of enactment of this title.

(B) The authority, subject to appropriations, to make loans to the occupants of property managed by the Trust for the preservation, restoration, maintenance, or repair of such property.

(2) The Trust shall also have the authority to issue obligations to the Secretary of the Treasury, but only if the Secretary of the Treasury agrees to purchase such obligations to the extent authorized in advance in appropriations Acts. The Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, United States Code, and the purposes for which securities may be issued under such chapter are extended to include any purchase of such notes or obligations acquired by the Secretary of the Treasury under this subsection. Obligations issued under this subparagraph shall be in such forms and denominations, bearing such maturities, and subject to such terms and conditions, including a review of the creditworthiness of the loan and establishment of a repayment schedule, as may be prescribed by the Secretary of the Treasury, and shall bear interest at a rate determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. No funds appropriated to the Trust may be used for repayment of principal or interest on, or redemption of, obligations issued under this paragraph.

(3) The aggregate amount of obligations issued under paragraph (2) of this subsection which are outstanding at any one time may not exceed \$150,000,000.

(e) **DONATIONS.**—The Trust may solicit and accept donations of funds, property, supplies, or services from individuals, foundations, corporations, and other private or public entities for the purpose of carrying out its duties. The Trust is encouraged to maintain a liaison with the Golden Gate National Park Association.

(f) **PUBLIC AGENCY.**—The Trust shall be deemed to be a public agency for purposes of entering into joint exercise of powers agreements pursuant to California government code section 6500 and related provisions of that code.

(g) PROCEEDS.—Notwithstanding section 1341 of title 31 of the United States Code, all proceeds and other revenues received by the Trust shall be retained by the Trust. Those proceeds shall be available, without further appropriation, to the Trust for the administration, preservation, restoration, operation and maintenance, improvement, repair and related expenses incurred with respect to Presidio properties under its administrative jurisdiction. The Secretary of the Treasury shall invest, at the direction of the Trust, such excess moneys that the Trust determines are not required to meet current withdrawals. Such investment shall be in public debt securities with maturities suitable to the needs of the Trust and bearing interest at rates determined by the Secretary of the Treasury taking into consideration the current average yield on outstanding marketable obligations of the United States of comparable maturity.

(h) SUITS.—The Trust may sue and be sued in its own name to the same extent as the Federal Government. Litigation arising out of the activities of the Trust shall be conducted by the Attorney General; except that the Trust may retain private attorneys to provide advice and counsel. The District Court for the Northern District of California shall have exclusive jurisdiction over any suit filed against the Trust.

(i) MEMORANDUM OF AGREEMENT.—The Trust shall enter into a Memorandum of Agreement with the Secretary, acting through the Chief of the United States Park Police, for the conduct of law enforcement activities and services within those portions of the Presidio transferred to the administrative jurisdiction of the Trust.

(j) BYLAWS, RULES, AND REGULATIONS.—The Trust may adopt, amend, repeal, and enforce bylaws, rules and regulations governing the manner in which its business may be conducted and the powers vested in it may be exercised, including rules and regulations for the use and management of the property under the Trust's jurisdiction. The Trust is authorized, in consultation with the Secretary, to adopt and to enforce those rules and regulations that are applicable to the Golden Gate National Recreation Area and that may be necessary and appropriate to carry out its duties and responsibilities under this title. The Trust shall give notice of the adoption of such rules and regulations by publication in the Federal Register.

(k) DIRECT NEGOTIATIONS.—For the purpose of compliance with applicable laws and regulations concerning properties transferred to the Trust by the Secretary, the Trust shall negotiate directly with regulatory authorities.

(l) INSURANCE.—The Trust shall require that all leaseholders and contractors procure proper insurance against any loss in connection with properties under lease or contract, or the authorized activities granted in such lease or contract, as is reasonable and customary.

(m) BUILDING CODE COMPLIANCE.—The Trust shall bring all properties under its administrative jurisdiction into compliance with Federal building codes and regulations appropriate to use and occupancy within 10 years after the enactment of this title to the extent practicable.

(n) LEASING.—In managing and leasing the properties transferred to it, the Trust shall consider the extent to which prospective tenants contribute to the implementation of the general objectives of the General Management Plan for the Presidio and to the reduction of cost

to the Federal Government. The Trust shall give priority to the following categories of tenants: Tenants that enhance the financial viability of the Presidio and tenants that facilitate the cost-effective preservation of historic buildings through their reuse of such buildings.

(o) REVERSION.—If, at the expiration of fifteen years, the Trust has not accomplished the goals and objectives of the plan required in section 105(b) of this title, then all property under the administrative jurisdiction of the Trust pursuant to section 103(b) of this title shall be transferred to the Administrator of the General Services Administration to be disposed of in accordance with the procedures outlined in the Defense Authorization Act of 1990 (104 Stat. 1809), and any real property so transferred shall be deleted from the boundary of the Golden Gate National Recreation Area. In the event of such transfer, the terms and conditions of all agreements and loans regarding such lands and facilities entered into by the Trust shall be binding on any successor in interest.

(p) EXCLUSIVE RIGHTS TO NAME AND INSIGNIA.—The Trust shall have the sole and exclusive right to use the words ‘Presidio Trust’ and any seal, emblem, or other insignia adopted by its Board of Directors. Without express written authority of the Trust, no person may use the words ‘Presidio Trust’, or any combination or variation of those words alone or with other words, as the name under which that person shall do or purport to do business, for the purpose of trade, or by way of advertisement, or in any manner that may falsely suggest any connection with the Trust.

SEC. 105. LIMITATIONS ON FUNDING.

(a) (1) From amounts made available to the Secretary for the operation of areas within the Golden Gate National Recreational Area, not more than \$25,000,000 shall be available to carry out this title in each fiscal year after the enactment of this title until the plan is submitted under subsection (b). Such sums shall remain available until expended.

(2) After the plan required in subsection (b) is submitted, and for each of the 14 fiscal years thereafter, there are authorized to be appropriated to the Trust not more than the amounts specified in such plan. Such sums shall remain available until expended. Of such sums, funds shall be available through the Trust for law enforcement activities and services to be provided by the United States Park Police at the Presidio in accordance with section 104(i) of this title.

(b) Within 1 year after the first meeting of the Board of Directors of the Trust, the Trust shall submit to Congress a plan which includes a schedule of annual decreasing federally appropriated funding that will achieve, at a minimum, self-sufficiency for the Trust within 15 complete fiscal years after such meeting of the Trust. No further funds shall be authorized for the Trust 15 years after the first meeting of the Board of Directors of the Trust.

(c) The Administrator of the General Services Administration shall provide necessary assistance, on a reimbursable basis, including detailees as necessary, to the Trust in the

formulation and submission of the annual budget request for the administration, operation, and maintenance of the Presidio.

SEC. 106. GENERAL ACCOUNTING OFFICE STUDY.

(a) Three years after the first meeting of the Board of Directors of the Trust, the General Accounting Office shall conduct an interim study of the activities of the Trust and shall report the results of the study to the Committee on Energy and Natural Resources and the Committee on Appropriations of the United States Senate, and the Committee on Resources and Committee on Appropriations of the House of Representatives. The study shall include, but shall not be limited to, details of how the Trust is meeting its obligations under this title.

(b) In consultation with the Trust, the General Accounting Office shall develop an interim schedule and plan to reduce and replace the Federal appropriations to the extent practicable for interpretive services conducted by the National Park Service, and law enforcement activities and services, fire and public safety programs conducted by the Trust.

(c) Seven years after the first meeting of the Board of Directors of the Trust, the General Accounting Office shall conduct a comprehensive study of the activities of the Trust, including the Trust's progress in meeting its obligations under this title, taking into consideration the results of the study described in subsection (a) and the implementation of plan and schedule required in subsection (b). The General Accounting Office shall report the results of the study, including any adjustments to the plan and schedule, to the Committee on Energy and Natural Resources and the Committee on Appropriations of the United States Senate, and the Committee on Resources and Committee on Appropriations of the House of Representatives.

**SEC. 107. CONDITIONAL AUTHORITY TO LEASE CERTAIN HOUSING UNITS
WITHIN THE PRESIDIO.**

(a) **AVAILABILITY OF HOUSING UNITS FOR LONG-TERM ARMY LEASE.**—Subject to subsection (c), the Trust shall make available for lease, to those persons designated by the Secretary of the Army and for such length of time as requested by the Secretary of the Army, 22 housing units located within the Presidio that are under the administrative jurisdiction of the Trust and specified in the agreement between the Trust and the Secretary of the Army in existence as of the date of the enactment of this section.

(b) **LEASE AMOUNT.**—The monthly amount charged by the Trust for the lease of a housing unit under this section shall be equivalent to the monthly rate of the basic allowance for housing that the occupant of the housing unit is entitled to receive under section 403 of title 37, United States Code.

(c) **CONDITION ON CONTINUED AVAILABILITY OF HOUSING UNITS.**—Effective after the end of the four-year period beginning on the date of the enactment of this section, the Trust shall have no obligation to make housing units available under subsection (a) unless, during that four-year period, the Secretary of the Treasury purchases new obligations of at least \$80,000,000 issued by the Trust under section 104(d)(2). In the event that this condition is not satisfied, the existing agreement referred to in subsection (a) shall be renewed on the same terms and conditions for an additional five years.