NO. 13-16554

IN THE 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 (3:12-cv-11522-LB)

RESPONSE BRIEF FOR THE UNITED STATES

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Plaintiffs Presidio Historical Association and Sierra Club alleged jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 701 *et seq.* The district court entered final judgment on June 3, 2013. Excerpts of Record (ER) 46. Plaintiffs filed a timely notice of appeal on July 31, 2013. ER1. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The Presidio of San Francisco is a former Army base that in 1994 became a national park site for the enjoyment of the American people. It is administered by a unique, congressionally created federal corporation, the Presidio Trust, which Congress tasked both with managing the Presidio's significant historic and natural resources and making the Presidio financially self-sustaining.

The Presidio Trust took over administration of the Presidio in 1998 and quickly began rehabilitating buildings and restoring landscapes, including the Main Post – the part of the Presidio at issue in this case. But despite great progress, nearly ten years later, the Main Post had not become the "focal point for visitor orientation" as had long been intended; instead on most days the Main Post felt "empty and uninviting." The Trust thus undertook to update its governing management plan with the goal of enlivening the Main Post as the "heart of the park."

The resulting Main Post Update, approved in 2011, increases the space devoted to public use, including plans for a 110-room national park lodge to encourage and facilitate visitation at the Main Post. The lodge comprises a number of small buildings

designed to reflect the footprint of historic, Civil War-era Graham Street barracks, demolished by the Army in 1945 and replaced with a 1968 concrete-block communications center and a strip of grass. The approved lodge incorporates all recommendations of the Advisory Council on Historic Preservation, the National Park Service, and the California State Historic Preservation Officer (SHPO) to reduce its size and impact and is unanimously viewed by those agencies as avoiding or minimizing harm to the historic attributes of the Presidio. In addition, the new construction for the lodge, as well as for other projects approved in the Update, is offset by the demolition of a greater amount of square footage in other, non-historic buildings in the vicinity of the Main Post. The questions on appeal are:

1. Whether, in approving the Main Post Update, the Presidio Trust complied with section 104(c)(3) of the Presidio Trust Act, 16 U.S.C. § 460bb appendix, which limits new construction in the Presidio to "replacement of existing structures of similar size in existing areas of development."

2. Whether, in approving the Main Post Update, the Presidio Trust complied with section 110(f) of the National Historic Preservation Act, 16 U.S.C. § 470h-2(f), which provides that, prior to approving an undertaking that may directly and adversely affect a national historic landmark, a federal agency "shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark."

STATEMENT OF THE CASE

A. Factual Background

1. Overview of the Presidio: 1776 to 1994

The Presidio encompasses nearly 1,500 acres of land adjacent to the Golden Gate Bridge. It was established by Spain in 1776 as a military garrison. ER185. The United States took control of the Presidio in 1846, near the start of the Mexican-American War. As a U.S. Army post, the Presidio played a role in every subsequent major U.S. military engagement, but after 1945 it assumed a more administrative military function. Supplemental Excerpts of Record (SER) 175.

The recognition of the Presidio as encompassing values beyond its original military purpose – for its history, natural resources, scenic views, and recreational uses – began in 1962, with its designation as a national historic landmark district. In 1972, Congress created the Golden Gate National Recreation Area (GGNRA) as part of the National Park System and included the Presidio within its boundaries. *See* GGNRA Act, 16 U.S.C. § 460bb *et seq.*. The Act granted the Park Service immediate use and occupancy of certain coastal areas of the Presidio and provided for the remainder to be transferred to the Park Service if and when the Army declared the Presidio excess to its needs. *Id.* §§ 460bb-2(d), (e), (f). In 1978, Congress provided interim protection for the portion of the Presidio under the Army's jurisdiction by prohibiting new construction except where, after consultation with the Secretary of the Interior, the Army replaced a demolished structure with an improvement of similar size.

Id. § 466bb-2(i). In 1989, the Army announced that the Presidio would be closed and began plans to vacate by 1995. ER1252.

2. Transfer of the Presidio to the Park Service

In 1993, the Park Service, in anticipation of assuming jurisdiction over the rest of the Presidio, issued a management plan in the form of an Amendment to the GGNRA General Management Plan. This 1993 Park Service Plan documented the resources and complexities of the Presidio, which had become a small town unto itself. The Presidio consisted of some 700 acres of developed land and 780 acres of open space. It encompassed 6.3 million square feet of building space including 870 buildings, over half of them historic. ER1260, 1264. Approximately 4,700 people resided there in houses and apartments, and some 5,500 people worked there. *Id.*; ER1283.

To support this community, the Presidio contained facilities including a water treatment plant, several landfills, churches, a child care center, post office, museum, meeting facilities, department store, supermarket, fire department, and police services. Recreational facilities included tennis courts, gymnasiums, a bowling center, theater, swimming pool, golf course, and playgrounds and athletic fields. ER1260, 1283. Its open space protected important natural and recreational resources, including a 100-year-old forest planted by the Army, and native riparian and wetland areas and other significant biotic zones, including habitat for ten rare plant communities. ER1259.

The Presidio landmark district also contained a variety of other Army-specific facilities. These included the empty and seismically unsafe Letterman Army Medical Hospital and research facility; the unoperational Crissy airfield bordering San Francisco Bay; two forts – Fort Point under the Golden Gate Bridge (then and now managed by the Park Service) and Fort Scott; the San Francisco National Cemetery; and the abandoned Public Health Service Hospital. ER1257-58, 1263.

The 1993 Plan identified numerous challenges facing future Presidio management. The plan proposed removal of 48 historic and 228 non-historic buildings, with additional demolition to be considered. ER1283. The remaining historic buildings required rehabilitation to make them earthquake safe, eliminate hazardous asbestos and lead, address fire safety, and accommodate disabled visitors. ER1264. To ensure preservation through active use, buildings would need to be modified to accommodate new uses, *id.*, and new construction would be required where existing structures did not meet program and management needs. ER1283. Most of the utility systems – water treatment, sewage, electricity, and storm drainage – were beyond their useful life. ER1267. The seismically unsafe highway through the Presidio to the Golden Gate Bridge, called Doyle Drive, needed to be reconstructed, under the management of the California Department of Transportation (Caltrans), and hazardous wastes disposed by the Army needed to be cleaned up. ER1268.

Managing the Presidio posed a daunting and expensive challenge. The Park Service estimated the annual costs of maintaining the Presidio to be $40 million, with

needed capital improvements estimated to run between $490 million and $741 million. SER325. Management of the area required expertise that the Park Service lacked. Thus, the Park Service proposed the creation of a federally chartered institution that would work in partnership with it to manage the Presidio. ER1366.

3. The Presidio Trust and Presidio Trust Act

In 1994, the Presidio was decommissioned and its management was transferred to Interior. SER161. Congress considered legislation along the lines proposed by the Park Service, but when concerns about the potential long-term financial liability led some to propose auctioning off the Presidio, Congress took a different approach, embodied in the Presidio Trust Act. *See* Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, 16 U.S.C. § 460bb appendix. Under the Trust Act, the Park Service retained jurisdiction for about 20 percent of the Presidio located along the coast, known as Area A. Administrative jurisdiction for the remaining 80 percent, known as Area B, was to be transferred to the Presidio Trust, a unique federal corporation created by the statute. A critical feature of the statute was that it authorized federal funding for the Presidio in declining amounts over 15 years, after which, if the Trust did not succeed in making it financially self-supporting, the Presidio would be transferred to the General Services Administration for sale. Trust Act, § 104(o).

Most of the Trust Act, accordingly, deals with the structure, management, and financial and business powers of the Presidio Trust. The Act gives the Trust wide

latitude for managing the Presidio in order to achieve financial self-sufficiency, including authority to guarantee loans to tenants who finance capital improvements, to manage building leases, borrow money from the Treasury, accept donations, and demolish any buildings the Trust deems to be beyond cost-effective rehabilitation. *Id.* § 104(c)-(e).

The Act provides little guidance in the management of the Presidio's historic, natural, and other resources, giving the Trust broad discretion. The Act does not make the Trust subject to the GGNRA Act; nor did it adopt the 1993 Park Service Plan. Instead, it generally 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" and "in accordance with the *general objectives* of the [1993 Park Service] General Management Plan." Trust Act, § 104(a) (emphasis added). Otherwise, the statute directs the Trust to develop its own "comprehensive program for management" of the Presidio lands and facilities under its administration. That program is required to "be designed to reduce expenditures * * * and increase revenues to the Federal Government to the maximum extent possible." *Id.* § 104(c). The Act provided little guidance as to the nature of that plan, other than authorizing the demolition of structures under certain circumstances, *see id.* §§ 104(c)(1) & (2), and – as relevant to this litigation – providing for "new construction limited to replacement of existing structures of similar size in existing areas of development," *id.* § 104(c)(3). Otherwise, the Act merely called for

"examination of a full range of reasonable options for carrying out routine administrative and facility management programs." *Id.* § 104(c)(4).

4. Presidio Trust Initial Actions

The Presidio Trust assumed administrative jurisdiction over Area B in July 1998. The Trust proceeded simultaneously to carry out urgent projects at the Presidio and to develop the "comprehensive program" required by the Trust Act. In 2002, after a nearly two-year environmental review and planning process, the Trust issued the Presidio Trust Management Plan (the 2002 Trust Plan) and accompanying Environmental Impact Statement (EIS). The Plan divided the Presidio into seven planning districts and set forth a vision for each, recognizing that additional planning proposals could be necessary in the future. SER234. Like the 1993 Park Service Plan, the 2002 Trust Plan recognized that significant new construction would be necessary, and explained the Trust's interpretation of the Trust Act's new construction provisions, as follows:

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

SER178-179.[1] Thus, the 2002 Plan contemplated new construction only where it replaced other square footage removed in the Presidio and was located in existing areas of development. *See* below pp. 22-34.

Between 1998 and 2006, the Trust undertook several critical projects. The Trust demolished the 10-story, modern high-rise Letterman Hospital and the adjacent research institute, replacing them with a series of low-rise buildings in a more compatible campus-like setting, which were leased to Lucasfilm as the Letterman Digital Arts Center. SER404-453. In a project that won the California Governor's Historic Preservation Award, the Trust converted the abandoned 1930s Public Health Service Hospital into the Presidio's first "green" residential community, demolishing two non-historic wings added in the 1950s that compromised the original building's structure. The project was made financially feasible by using some of the demolished square footage to construct a three-story addition to the rear of the hospital and a free-standing apartment building. SER125-138.[2] On the Main Post, the Trust

[1] *See also* SER199 ("To build new structures, the Trust must remove existing square footage as an offset so that building square footage in the park will not exceed today's 5.96 million square feet."); SER167 ("[P]ublic uses * * * may require limited new construction to replace building space removed elsewhere."); SER178 ("[A] freestanding building or connecting annex may be needed to enhance the function of adjacent historic buildings or landscapes or to make their rehabilitation and reuse economically viable."); SER220 ("In all cases, new construction would be located within already developed areas* * * .).

[2] *See* photos in *Milestones*: *Presidio Trust 2012 Year-End Report*, at 17. This report provides a concise and visual summary of major Presidio Trust initiatives since 1998.

cont'd.

rehabilitated and built "infill" additions to two of the Montgomery Street barracks as needed to lease them to the Walt Disney Family Museum and the International Center to End Violence (now the Futures Without Violence center). SER139-152, 108-119. The Trust also began an effort to restore the Main Parade Ground, an open green space which the Army had paved over as a parking lot. ER58.

5. The Main Post Update, 2006-2011

a. Background on the Main Post

In late 2006, the Presidio Trust began to place a particular focus on the Main Post. The Main Post area has always been the center of the Presidio's military operations. The original Spanish garrison, *El Presidio*, was strategically located there. ER377. When the United States took over the Presidio, soldiers at the Main Post helped suppress secessionists during the Civil War, living in eight wooden barracks constructed along Graham Street and the original "Old Parade" ground. ER379-380. As the Main Post's military purposes changed, so did its infrastructure. In the years leading up to World War I, a series of large cavalry barracks was built along Montgomery Street and a newer "Main Parade" parallel to the Old Parade. After 1945, the Army converted many buildings that had served military functions to office use, and paved over much of the green space at the Presidio to provide parking lots, including the Main Parade and the site of the old Spanish outpost *El Presidio*. ER385.

Available at http://www.presidio.gov/about/Administrative%20Documents/EXD-700-FY2012AnnuRpt.pdf.

The 2002 Trust Plan envisioned that the Main Post would resume its historic role as the heart of the Presidio by becoming a gateway to the park: "a focal point for visitor orientation, as well as a community center where people live, work, and enjoy themselves." SER169. The Plan contemplated that the Main Post would provide office space, cultural and educational uses, residential housing, and overnight lodging. SER239. But despite the improvements the Trust had made, the Main Post, and the Presidio generally, had not achieved the public visitation and appreciation of the Presidio's assets envisioned in the 2002 Plan.

b. Compliance with the National Historic Preservation Act

In pursuit of its goal to "enliven" the Main Post, the Trust in late 2006 issued a "request for expressions of interest" soliciting proposals for lodging from potential development partners. ER893-908. The Trust identified three potential locations for lodging in existing historic buildings on the Main Post: two smaller options – the Riley Street homes and Pershing Hall – and larger options at three of the Montgomery Street barracks. It also identified a location for new construction along the Main Parade ground where Civil War-era Graham Street barracks had been located. That space was occupied by the modern, concrete-block Building 34, which was incompatible with the Main Post's architecture, and a grassy strip. ER903-904.

The Trust then began environmental review under the National Environmental Policy Act (NEPA) and consultation under the NHPA. Because Plaintiffs have

dropped their NEPA claims, we focus on the NHPA process. Two provisions of the NHPA are relevant here: section 106 and section 110(f). Section 106 requires federal agencies, "prior to the approval of an * * * undertaking," to "take into account the effect of the undertaking on any [site] that is included in or eligible for inclusion in the National Register" and to afford the Advisory Council on Historic Preservation, an independent federal agency, an opportunity to comment. 16 U.S.C. § 470f (emphasis added). Advisory Council regulations provide that, if an agency's "undertaking" will adversely affect historic properties, the agency must consult with the Advisory Council and the State Historic Preservation Officer (SHPO) to consider ways to resolve those effects. 36 C.F.R. §§ 800.3-800.6, 800.14. The consulting parties may enter into an agreement documenting the resolution of adverse effects and compliance with section 106. *Id.* §§ 800.6, 800.14. Alternatively, the consultation may be terminated if any party determines further consultation will not be productive. *Id.* § 800.7.

NHPA section 110(f) sets a higher standard for agency planning for undertakings affecting historic landmarks. It provides that "[p]rior 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 afford the Advisory Council opportunity to comment. 16 U.S.C. § 470h-2(f). Advisory Council regulations provide that the Council will use the

section 106 regulatory process for considering adverse effects – set forth in 36 C.F.R. §§ 800.5 and 800.6 – to give the "special consideration" to landmarks that section 110(f) requires. 36 C.F.R. § 800.10(a). The regulations also require the action agency to "request" the Advisory Council and "invite" Interior to participate in that process. *Id.* §§ 800.10(b) & (c). The Council may request Interior to prepare a report recommending measures to avoid, minimize, or mitigate harm to the landmark under NHPA Section 213 and provide written comments on any resulting agreement to the agency and Interior. *Id.* §§ 800.10(c) & (d).

The Trust's NEPA and NHPA compliance process is outlined in detail in the district court order and in the record. ER58-66, 297-298, 447-449, 664-670. It involved at least four stages of review and revision with months of public comment on each of the multiple versions of the Main Post Update, dozens of public meetings, workshops, and extensive consultation over four years with the Advisory Council, Park Service, SHPO, and a dozen other consulting parties.

The Trust began in fall 2006 with public scoping on the lodge proposal, at which time it also initiated NHPA consultation. ER890; AR22889. In summer 2007, however, benefactors offered to build a public museum on the Main Post to house their contemporary art collection, and the Trust determined instead to prepare a more comprehensive update to its 2002 Plan that would include the lodge, the art museum or another cultural institution, and other reasonably foreseeable projects at the Main Post. The Trust then restarted the NEPA and NHPA processes. ER60.

In June 2008, the Trust released a Draft Supplemental Environmental Impact Statement (SEIS) for the Main Post Update, which tiered from the 2002 Plan's EIS. The Draft SEIS analyzed five alternatives containing lodging, a contemporary art museum, a visitor orientation center, a newly constructed history center (proposed by Plaintiff Presidio Historical Association), and other projects, in a variety of combinations and locations. SER92-95. The proposed action, Alternative 2, included a lodge to replace the concrete-block Building 34, on the site between the Main Parade and Old Parade grounds where several of the Graham Street Civil War-era barracks had been located. This original proposal was for a 125-room, three-story lodge, spread across a series of pavilions requiring 95,000 square feet of new construction. ER61; *see also* Addendum at A-4 (Exhibit 6) (ER74) (depicting lodge proposals throughout the NEPA/NHPA process). For NHPA purposes, the Trust determined that Alternative 2 would adversely affect the Presidio, given that it would demolish eight historic buildings and include 265,000 square feet of new construction. ER 62, AR14850.

In February 2009, the Trust issued a Supplement to the Draft SEIS analyzing its "preferred alternative," which combined elements from the various previously analyzed alternatives. ER62. The preferred alternative, among other things reduced new construction for the lodge from 95,000 square feet to 85,000 (including a cafe), divided it into three or four structures linked by hallways, and reduced the maximum height to 45 feet to be compatible with the adjacent historic barracks (Buildings 86

and 87).[3] ER63; *see* Addendum at A-4 (Exhibit 6) (ER74) (lodge design comparisons, existing historic barracks depicted only in last two illustrations). In the NHPA consultation process, the Park Service – at the Advisory Council's request – prepared a section 213 report making a number of recommendations to reduce adverse effects, and the consulting parties began the "resolution" phase of the consultation. ER62-63, 826-860. In July 2009, the art museum donors withdrew their proposal, which had generated intense opposition, and the Trust revised the alternatives to exclude it from further consideration. ER63.

Over the next year, through the NHPA consultation process, the Trust worked with the consulting parties to consider additional ways to avoid, minimize, and mitigate adverse effects to historic resources. ER64, 674. In November 2009, the Trust circulated the first draft of a Programmatic Agreement to conclude the consultation. ER64. After further comments, consultations, and Q&A sessions, the Trust added additional stipulations to the draft agreement. *Id.*, ER674. In March 2010, the Trust provided a draft of the Main Post Update and a second draft of the Programmatic Agreement. In August 2010, after another round of comments, the Trust provided additional redrafts of both documents. ER64, ER449. After further meetings and comments, the consulting agencies provided a coordinated response to the consolidated comments. On October 26, 2010, the Advisory Council sent the

[3] These remaining two Civil War barracks were enlarged from one to two stories by the Army. ER385.

Trust the executed Programmatic Agreement, signed by the Advisory Council, the Park Service, the SHPO, and the Trust. ER64, ER313-356. The Agreement confirmed the Main Post Update, as revised, successfully avoided, minimized, or mitigated any adverse effects, and that the Trust complied with NHPA requirements. ER314.

The Trust issued the Final SEIS for the Main Post Update in November 2010. ER65, 416-579. The revised preferred alternative further reduced overall building square footage on the Main Post and increased the proportion of square footage devoted to public use. It reduced new construction on the Main Post from the 265,000 square feet originally proposed to 146,500 square feet, all offset by the removal of other, predominantly non-historic buildings in the vicinity of the Main Post. It reduced the historic buildings to be demolished from eight to one 50-square-foot dilapidated shed, altered traffic patterns, and removed traffic lights. ER432, 568-570.

As to the lodge, its square footage, size, scale, and massing was further reduced, reflecting recommendations made by Plaintiff Presidio Historical Association. SER121. It now consisted of 70,000 square feet versus the original 95,000 square feet and a maximum height of 30 feet versus 45 feet. And it would be dispersed into 10 to 12 smaller structures laid out to reflect the footprint of the Graham Street Civil War barracks. ER407, 460, 569, 729; *see also* Addendum at A-3 (Exhibit 5) (ER73) (comparing original Graham Street Barracks with new lodge) & Exhibit 6 (ER74) (lodge design comparisons).

In February 2011, after hearing additional views at a public meeting, the Presidio Board adopted the Main Post Update (Alternative 2 of the Final SEIS) as an amendment to the 2002 Trust Plan. ER277. After considering another round of comments, the Trust issued its Record of Decision approving the Main Post Update. ER280.

B. District Court Proceedings

On February 23, 2012, Plaintiffs filed suit in the district court against the Presidio Trust. The complaint alleged that the Trust violated section 104(c)(3) of the Trust Act, section 110(f) of the NHPA, and NEPA requirements regarding the statement of purpose, range of alternatives, and mitigation measures considered. ER258-276.

In February 2013, the district court, addressing cross-motions for summary judgment, held in favor of the Trust. ER47-87. The court rejected Plaintiffs' contention that section 104(c)(3) of the Trust Act imposes a "one-down, one-up" limitation on new construction such that the Trust can construct only a new building that is both the same size and in the same location as a particular demolished building. Op. 30 (ER76). The court disagreed that the Trust Act imposed the same new construction limitation on the Trust that the GGNRA Act had imposed on the Army. The court found that the language of the Trust Act, unlike the GGNRA Act, does not focus on individual structures by rather multiple ones, providing flexibility consistent with the Trust Act's purpose of enabling the Trust to implement a multi-purpose park

program while maximizing revenues to the federal government. Op. 31 (ER77). The district court also concluded that the requirement that new construction be "in existing areas of development" does not mandate that replacement construction be in the same planning district as the offsetting demolished structures. The court did not, however, address whether the Trust may "bank" footage demolished throughout the Presidio, concluding instead that even without such "banking," section 104(c)(3) is satisfied here because the demolished buildings replaced by the Main Post's new construction are within or next to the Main Post itself. Op. 32-33 (ER78-79). The district court further concluded that, assuming section 104(c)(3) is ambiguous, the court would accord *Chevron* deference to the Trust's interpretation. Op. 34 (ER80).

Turning to NHPA section 110(f), the district court declined to address the parties' dispute over whether the provision is only procedural in nature or imposes a reviewable substantive requirement. Rather, the district court held that any such substantive requirement to minimize adverse effects was satisfied because "it is hard to see what else the Trust could have done besides not build the hotel at all." *Id.* The court found that the revisions the Trust had made to the lodge addressed all of the Park Service's concerns, and rejected Plaintiffs' contention that any section 110(f) "minimization" requirement was violated by the very existence of a newly constructed lodge at the Main Post. Op. 36 (ER82).

Finally, the district court held that the Trust fully complied with NEPA. Op. 36-39 (ER82-85). Plaintiffs do not seek reversal of this ruling, but it is worth noting

that the district court held that the Trust considered a reasonable range of alternatives both in terms of the amount and type of lodging at the Main Post, and that NEPA, like NHPA section 110(f), did not require the Trust to consider lodging outside of the Main Post because "the point of the Main Post Update is to increase visitor use of the Main Post and make it a 'lively pedestrian district.'" Op. 37 (ER37).

SUMMARY OF THE ARGUMENT

Congress charged the Presidio Trust with preserving the Presidio as a great national park in an urban setting, both by protecting its varied resources and making it financially self-sufficient through time. In its 16 years of managing the Presidio, the Trust has succeeded at both: it has restored and preserved critical Presidio resources, complying with environmental and historic preservation laws while finding the flexibility necessary to achieve the financial goals essential to maintaining the Presidio's existence. The Main Post Update – which seeks now to enliven the Main Post as an entry point for visitors to understand and appreciate the Presidio's many values – is no exception, and the Trust's approval of it should be affirmed.

1. The Presidio Trust's approval of the Main Post Update, including the lodge, complied with the new construction limitation in section 104(c)(3) of the Trust Act. Plaintiffs' interpretation of the statute as limiting new construction to a one-for-one replacement of a particular building of roughly the same size in roughly the same location is inconsistent with the language, purpose, and context of the statute and is ultimately unworkable. Rather, Congress clearly intended the new construction

limitation to apply on a collective basis, requiring new construction to be offset by the demolition of existing structures of an equivalent square footage and to occur only in existing areas of development. Assuming the statute is ambiguous on this point, the Trust's interpretation should be accorded deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), because Congress delegated authority to the Trust to interpret the statute in either regulations or its "comprehensive program for management" of the Presidio, and the Trust's interpretation set forth in the 2002 Trust Plan is reasonable. And while the Trust interprets the provision as allowing new construction in one developed area of the Presidio to replace existing structures in other developed areas, it is not necessary to reach that question to uphold the validity of the Main Post Update, because the new construction approved in the Main Post Update is offset by the demolition of structures within the same developed area of which the Main Post is a part.

2. The Trust's approval of the lodge as part of the Main Post Update also complies with the requirements of section 110(f) of the NHPA. Whether the statutory requirement to undertake " planning and actions as may be necessary to minimize harm" imposes only a procedural obligation that must be satisfied before project approval, as interpreted by the United States, or a substantive obligation regarding the design of the approved project, as interpreted by Plaintiffs, the Trust satisfied that requirement. The Trust indisputably complied with the Advisory Council's regulations for undertaking the section 106/110(f) process. And that process ended in a

Programmatic Agreement signed by the Advisory Council, the Park Service, the SHPO and the Trust, which imposes a binding commitment on the Trust to proceed in accordance with the measures therein. The agreement states the Trust, in compliance with section 110(f), modified the Main Post Update, including the lodge, to avoid, minimize, or mitigate adverse effects. This Court should defer to the combined professional judgment of those expert consulting agencies. In any event, the Trust's determination that it not only minimized but eliminated adverse effects is reasonable and fully supported by the record, which identifies no remaining adverse effects that the lodge itself will have on the Main Post or the Presidio as a whole.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, applying the same standards that the district court applied. *See Bagdadi v. Nazar*, 84 F.3d 1194 (9th Cir. 1996). Plaintiffs' claims are reviewed under the deferential standard of review in the Administrative Procedure Act (APA). *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012). APA review is narrow and does not permit a court to substitute its own judgment for that of the expert agency. *See The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). A court may set aside the Presidio Trust's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

ARGUMENT

I. The Presidio Trust complied with section 104(c)(3) of the Presidio Trust Act.

The Presidio Trust's approval of the Main Post Update, including the lodge, complied with the Trust Act's requirement that "new construction [be] limited to replacement of existing structures of similar size in existing areas of development." Section 104(c)(3). As demonstrated below, the Trust reasonably interprets the Act to allow it to undertake new construction that replaces the square footage in demolished buildings in either the same area or other existing areas of development in the Presidio. This Court, however, like the district court, need not reach the question whether new construction may replace buildings in *other* developed areas because the new construction authorized in the Main Post Update replaces other structures within the same developed area.

As set forth below, the Trust's interpretation of the Act should be upheld under *Chevron* step one, because Congress's intent on this question is clear. Even assuming the statute is ambiguous, this Court should defer to the Trust's permissible interpretation of the Act under *Chevron* step two.

A. Congress clearly intended to allow new construction in the Presidio if it replaces existing structures of equivalent square footage and is in an existing area of development.

In construing a statute implemented by an administrative agency, courts first consider whether "the intent of Congress is clear." *Chevron*, 467 U.S. at 842-843.

Congressional intent is determined first by examining the statute's plain language; if the text is ambiguous, the court may examine the statute's purpose, context, and legislative history. *See Cmty. Bank v. G.V.M. Trust*, 366 F.3d 982, 986 (9th Cir. 2004). If congressional intent is not clear, the question for the court is whether the agency's interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. As set forth below, the language, purpose, and context of section 104(c)(3) demonstrate Congress's clear intent to give the Trust broad discretion in undertaking new construction as long as it does not increase the amount of development in the Presidio, and occurs in already developed areas.

1. The statutory language does not limit the Trust to a "one-down, one-up" approach to new construction.

Plaintiffs contend (Br. 38) that the Trust Act imposes a building-by-building approach to demolition and replacement, such that a new structure can only replace an existing structure of "nearly the same spatial dimensions or magnitude" in roughly the same location. That interpretation is contrary to the statutory language. First, "new construction" is a collective term that refers not to construction of a single building – one that could replace another, particular demolished building – but rather to construction generally. In fact, the Trust has undertaken many "new construction" projects – without controversy, and that did not adversely affect the Presidio's historic qualities – that demonstrate this error. These include, for example, an infill addition of 16,900 square feet to one of the Montgomery Street barracks for the Disney Museum,

and infill construction of 3,600 square feet to another Montgomery Street barracks for the Futures Without Violence center. ER389. Treating such infill or annexes as buildings required to be of similar size and in the same location to other, demolished buildings would render the provision nonsensical.

Second, the Act limits new construction to "replacement" of "existing structures" of "similar size." "Existing structures" is also a collective term, further indicating that "new construction" need not replace a particular building, but demolished buildings in general. And the combined use of the collective terms "new construction" and "existing buildings" nullifies Plaintiffs' contention (Br. 36-38) that "replacement" and "of similar size" refer to replacement of a particular building based on that building's particular size. Rather, under the Trust Act, new construction may "replace" several existing structures, so long as the new construction, collectively, is "of similar size" to the structures demolished.

Plaintiffs' interpretation also ignores how the term "replacement" was used in the 1993 Park Service Plan that formed the basis for Congress's consideration of the Trust Act. The 1993 Plan repeatedly recognized that "replacement construction" could occur so as to allow new construction totaling no more than the square footage that was scheduled to be demolished. ER1284, 1319, 1322; *see infra* pp. 27-28. The 2002 Trust Plan uses the term in the same manner. Thus, in the context of the Presidio, "replacement" construction is a term of art, which Congress understood not to apply in a collective sense, not on a one-for-one basis. *Air Wisconsin Airlines Corp. v.*

Hoeper, 134 S. Ct. 852, 861-62 (2014) (when Congress employs a term of art, it is presumed to adopt the ideas attached to it).

Finally, Plaintiffs ignore that new construction may replace existing structures "in existing areas of development." If the statute is interpreted to limit new construction to replacement of a particular building in its particular location, the more general phrase "existing areas of development" is impermissibly rendered nonsensical and unnecessary. *Jacobson v. Rose,* 592 F.2d 515, 520 (9th Cir. 1978) ("Generally, we will not read a statute to render language superfluous."). By requiring new construction to be in "existing areas of development," the statute clearly anticipates that the new construction need *not* be in the same place as a specific demolished structure which, of course, would already be in an "existing area[] of development."

The failure of Plaintiffs' interpretation is even starker when examined against the new construction restraint in the GGNRA Act, 16 U.S.C. § 460bb-2(i), on which they primarily rely (Br. 43-44). Plaintiffs are wrong (Br. 44) that the "similarity" of the language of the two statutes means they should be interpreted similarly. Rather, the GGNRA Act demonstrates that Congress knew how to limit new construction to a one-for-one replacement and chose *not* to do so in the Trust Act. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 n.12 (9th Cir. 2000) (omission in later legislation of limiting language present in earlier statute presumed intentional).

To begin with, the GGNRA Act provided that "new construction" was "prohibited," while the Trust Act provides that "removal and/or replacement of

some structures within the Presidio must be considered as a management option." *Compare* 16 U.S.C. § 460bb-2(i) *with* Trust Act, § 101(6). This reflects the very different purposes of the two provisions: the GGNRA Act's purpose of preserving the Presidio's historic resources until it came under the administration of a preservation entity versus the Trust Act's mandate to consider replacing structures as part of achieving the Act's dual purposes of protect the Presidio's resources and attaining financial self-sufficiency.

The GGNRA Act had an exception to the prohibition on new construction providing that any "structure which is demolished may be replaced with an improvement of similar size." 16 U.S.C. § 460bb-2(i). As the district court recognized, this provision – unlike the Trust Act – used the singular rather than the plural form to describe the new construction that could occur – "an improvement" – as well as what it could replace – "any * * * structure" that was demolished. The GGNRA Act thus may reasonably have been construed to impose a one-down, one-up limitation, but Congress, plainly aware of this language in enacting the Trust Act, intentionally modified it to allow the Presidio Trust to have much broader discretion.

2. The purpose, structure, and context of section 104(c)(3) further demonstrate that it provides broad discretion over undertaking new construction.

This reading of the Trust Act's language is supported by the Act's purpose, structure, and context. A critical purpose of the Trust Act was to create a financially independent park; otherwise the Presidio would be sold. Thus, section 104(c), which

contains the "new construction" language, requires the development of a comprehensive management program for the Presidio that "shall be designed to reduce expenditures by the National Park Service and increase revenues to the Federal Government to the maximum extent possible" – demonstrating Congress intended to provide the Trust flexibility rather than to impose narrow constrictions on it. The statute's surrounding provisions confirm this intent. The Trust is empowered to demolish any buildings that cannot be cost-effectively rehabilitated and to evaluate for demolition any other buildings except for the approximately 100 highest category historic buildings in the Presidio. *See* Trust Act, §§ 104(c)(1) & (2).

In addition, even the 1993 Park Service Plan that formed the basis for Congress's deliberations underlying the Trust Act plainly did *not* envision that the Presidio would follow a one-down, one-up policy, with each new structure replacing a building of roughly the same size and in the same location. Rather, with the end of the Army's jurisdiction – and thus the end of the GGNRA Act's new construction limitations imposed on the Army – the 1993 Plan envisioned that there would be an overall cap on new construction, which would never exceed the existing total, and that the number and size of buildings could vary. ER1283-1284.

For example, the 1993 Plan provided that, if the 10-story, non-historic "Letterman hospital is demolished, replacement new construction could occur and would be limited to the building's existing area of approximately 450,000 square feet." ER1284; *see also* ER1322 ("Up to 503,000 gross square feet of replacement

construction could occur within the [Letterman] complex as a substitute for buildings identified for demolition, including the medical center."). And it limited the height of new construction to 60 feet, considerably less than the 10-story Letterman hospital, envisioning replacement of the single high-rise with multiple, smaller buildings. ER1283, 1322. The Plan also provided for replacement of "the undersized Army clubhouse and maintenance buildings" in the Presidio Golf Club with "construction of approximately 10,000 square feet," envisioning the new buildings to be larger than those replaced. ER1345. In the Fort Scott area, the Plan provided that [a]pproximately 10,000 square feet of assembly space may be constructed, if needed," and declared that "[a]pproximately 40,000 square feet of replacement construction will be required at a site north of the parade ground for Golden Gate Bridge District maintenance functions" – in neither case identifying particular buildings that would be replaced. ER 1319. It is implausible that Congress in the Trust Act, which was designed to provide much broader flexibility in the Presidio's management than the Park Service had envisioned, imposed stricter limitations on new construction than projected in the Park Service's Plan.

3. Plaintiffs' interpretation yields an absurd result.

As the discussion above demonstrates, a one-down, one-up interpretation of the Trust Act's new construction provision would impermissibly create an absurd result. *See United States v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 2012). Buildings throughout the Presidio range in size from 80 square feet to over 440,000 square feet.

SER79. Congress could not have expected the Trust to simply replicate the size and arrangement of these structures throughout the Presidio, particularly since priority structures for removal are non-historic, modern buildings. Similarly, as noted above, the need for new construction can range from small additions to existing buildings, such as the Futures Without Violence center, to a series of stand-alone structures, such as those in the Letterman district. Indeed, the lodge replaces, in part, the modern 32,000 square-foot Building 34 with separate structures of no more than 7,000 square feet each, based on recommendations from the NHPA consulting parties. A one-for-one match could actually interfere with achieving historic preservation goals and render the Presidio impossible to manage. And if the Presidio cannot be successfully managed in a financially self-sustaining manner, it may not be preserved at all.

Finally, Plaintiffs' contention (Br. 47) that the Trust's interpretation would allow it free rein to replace numerous small buildings with a high rise is unfounded and wrong. The Trust must comply with NEPA, the NHPA, and the purposes of the GGNRA Act and objectives of the 1993 Park Service Plan incorporated in the 2002 Trust Plan. Every project the Trust has undertaken has required new construction to be of a scale, massing, height, and design compatible with the surrounding historic environment, and the Trust has won awards for its efforts in this regard. *See supra* p. 9 & n.2. Without the Trust's flexible interpretation of the Trust Act, it could not have achieved many of its results. Congress did not intend to the contrary.

B. Assuming section 104(c)(3) is ambiguous, this Court should defer to the Trust's reasonable interpretation.

If Congress's intent in section 104(c)(3) is not clear, this Court should defer to the Trust's reasonable interpretation set forth in its initial governing document, the 2002 Plan, and the Main Post Update. For *Chevron* deference to apply, an agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1874 (2013). The conferral of such interpretative authority applies to *all* the matters the agency is charged with administering, including the scope of the agency's own statutory authority – even where statutory language is intended to curtail the scope of agency discretion. *City of Arlington,* 133 S. Ct. at 1872.

Courts often describe an agency's statutory interpretation as qualifying for *Chevron* deference "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." *Mead,* 533 U.S. at 226-227 (2001). The "delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." *Id.* at 227. "[W]hether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue." *Barnhart v.*

Walton, 535 U.S. 212, 222 (2002). Other considerations relevant to determining whether *Chevron* deference should be applied are "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Id.*

The Trust's interpretation is due deference. Congress delegated the Trust broad authority to manage the Presidio in accordance with certain general purposes and objectives. Congress directed it to "develop a comprehensive program" for the Trust's own management of the Presidio lands and facilities under its jurisdiction, and gave the Trust regulatory authority to govern business conduct and use of its lands. Trust Act, §§ 104(c) & (j). The Trust's construction of section 104(c)(3), set forth in the 2002 Plan (*see* pp. 8-9), constitutes an exercise of that delegated authority. That plan was subjected to a significant public process including notice and comment. The Trust – assigned with the unique and complex task of simultaneously addressing the preservation and financial needs of the Presidio – has unique expertise to determine how to manage the Presidio's built environment. The Trust's interpretation has been carefully considered and consistent throughout its management of the Presidio: it was not only set forth in the Trust's 2002 Plan but was inherent in the Trust's decisions to

undertake new construction in the Letterman district, at the Public Health Service Hospital, and elsewhere.[4]

In the district court, Plaintiffs did not dispute that *Chevron* deference applied, thus waiving the issue. In any event, their new argument fails. It is immaterial that the Trust's interpretation is not in the form of a rulemaking. Congress intended the Trust's comprehensive plan, not regulations, to provide the binding, governing authority for the Trust's own actions. And the Supreme Court has frequently applied *Chevron* to uphold administrative determinations that involve the application of an agency's delegated authority to a particular set of facts in the context of informal adjudication. *See, e.g., NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995) (deference to interpretation of Comptroller of the Currency in approving application to act as agent in sale of annuities); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (deference to Pension Benefit Guarantee Corporation decision requiring restoration of company's pension benefit plans).

Moreover, unlike the cases on which Plaintiffs rely (Br. 32), the Trust's interpretation is not applied just in a particular context; rather it is set forth in the

[4] In the Letterman district, the Trust demolished two structures of 451,000 and 356,000 square feet and replaced them with four buildings ranging from 176,000 to 270,000 square feet each. SER447-449. At the Public Health Service Hospital, the Trust demolished two modern wings totaling 132,000 square feet and constructed a 35,000 square foot addition to the hospital and a separate 16,000 square foot free-standing building. SER132, 77-78.

Trust's governing plan and has been consistently followed. This is not a situation where a court need be concerned about an agency's potentially varying interpretations of a statute under which it regulates other parties; this interpretation applies to the Trust alone, in the context of a statute in which Congress gave it the broadest of discretion. This Court should not "transfer [the] interpretive[] decision" here – an "archetypal *Chevron* question[] about how best to construe an ambiguous term in light of competing policy interests—from the agenc[y] that administer[s] the statute[] to federal courts." *City of Arlington*, 133 S. Ct. at 1873.

Applying *Chevron* deference, the Trust's interpretation of section 104(c)(3) should be upheld. The Trust's interpretation is consistent with the statutory language, purpose, and context. The interpretation furthers the Trust Act's objectives to limit new construction in the Presidio while providing the flexibility necessary to enable the Trust to manage the Presidio for ongoing financial self-sufficiency and to address the full array of types of new construction that may be required in the Presidio into the future. Plaintiffs fail to provide any convincing reason why the language or purposes of the Trust Act should be construed – as their interpretation would do – to bar almost every new construction action the Trust has taken in the past or plans to take in the Main Post Update.

Even if the Court determines not to accord *Chevron* deference to the Trust's interpretation of section 104(c)(3), it is still deserving of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The views of agencies implementing a statute

"constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 139-40. The Trust's interpretation of its new construction authority qualifies for *Skidmore* deference because it has been thoroughly considered and consistently applied, and has allowed the Trust to build compatible replacement construction in various districts of the Presidio to achieve its mission of financial independence.

C. New construction planned in the Main Post Update complies with the Trust Act – even if replacement construction must be offset by removal of structures in the same developed area.

Under the Presidio Trust's interpretation of the Trust Act, the new construction in the Main Post Update is allowable because it would indisputably be offset by the removal of existing structures in the Presidio. But even if the Court accepts Plaintiffs' contention that the Trust cannot "bank" square footage removed *elsewhere* in the Presidio, but must offset new construction with square footage removed in the same "existing area[] of development," the Main Post Update satisfies that requirement as well.

Under the Update, new construction at the Main Post since the Trust assumed jurisdiction in 1998 would total 146,500 square feet. ER389-390. This new construction replaces fifteen structures in the developed area where the Main Post is located: twelve within the Trust's planning boundaries for the Main Post totaling 93,939 square feet, and three just outside those boundaries totaling 54,071 square feet,

for a total of 148,010 square feet.[5] *Id.*; see also Addendum at A-1 & A-2 (Exhibits 2 & 3) (ER70-71) (showing location of buildings). The latter three buildings are being demolished by Caltrans for the Doyle Drive reconstruction and cannot be replaced on their old footprints due to the reconstruction project. The total demolition in the vicinity of the Main Post more than offsets the planned new construction.

Accordingly, even if the Trust Act is interpreted to require new construction to replace existing building space within the *same* "existing area[] of development," the Main Post Update satisfies that requirement. The three buildings outside the Main Post planning boundary – Buildings 605, 606, and 1158 – are still within the larger "existing area of development" that includes the Main Post. The Trust Act's application is not, of course, determined by the Trust's artificial planning boundaries. The Main Post planning boundary in the 1993 Park Service Plan, in fact, included Buildings 605 and 606 within the Main Post, and Building 1158 was right on the boundary's edge. ER1309, 1323.

* * * * *

[5] This includes approximately 16,500 square feet in Buildings 40 and 41, the removal of which is subject to further consultation. ER389. If those buildings are not removed, total new construction at the Main Post might need to be reduced. The Update, however, includes 30,000 square feet of "incidental new construction" not allocated to any particular project but providing for future flexibility. The specific projects approved in the Update, including the lodge, thus are not dependent on the removal of Buildings 40 and 41.

In sum, the new construction in the Main Post Update replaces structures that cumulatively are of a similar size to the new construction. The new construction is not only in an existing area of development but in the *same* area of development as the structures replaced. Under the clear intent of Congress in section 104(c)(3), and the Trust's reasonable interpretation of that provision in the 2002 Trust Plan, the Trust's approval of the Main Post Update complies with the law.

II. The Trust satisfied the requirements of Section 110(f) of the National Historic Preservation Act.

Section 110 of the NHPA, including subsection 110(f) at issue here, has been on the books for 34 years, since 1980. In all that time, the agencies charged with implementing section 110(f) have treated it as imposing purely procedural requirements, like the rest of the NHPA. Also during that time, no court has held that any provision of section 110, including section 110(f), imposes a substantive obligation on an agency to undertake a particular course of action. Rather, those courts have held that Congress intended to preserve the purely procedural nature of the NHPA that has existed since its 1966 enactment nearly 50 years ago.

But this Court need not reach that question because, whether section 110(f) imposes only procedural or also substantive obligations, the Trust plainly satisfied its requirements. The Trust indisputably complied with the procedural regulatory requirements, and any purported substantive requirements were satisfied by the Trust's entering into a Programmatic Agreement with the Advisory Council, the Park

Service, and the SHPO – an agreement that the parties recognized avoided, minimized, or mitigated the impacts of the lodge and that confirmed that the Trust complied with section 110(f). In any event, an independent review demonstrates that the Trust's determination that it minimized the impacts of the lodge – indeed to the point where it had *no* adverse effect on the Presidio's historic resources – was not arbitrary and capricious, and its approval of the lodge should be upheld.

A. Section 110(f) imposes only procedural requirements, not a substantive mandate regarding an agency's project approval.

1. Congress intended section 110(f) to have only procedural effect.

It is well-established that "the NHPA, like NEPA, is a procedural statute requiring government agencies to 'stop, look, and listen' before proceeding with agency action." *Te-Moak Tribe of W. Shoshone*, 608 F.3d 592, 610 (9th Cir. 2010); *see also United States v. 0.95 Acres of Land*, 994 F.2d 696 (9th Cir. 1993). One of its important provisions is section 106, which requires federal agencies, "prior to the approval of an * * * undertaking," to "*take into account* the effect of the undertaking on any [site] that is included in or eligible for inclusion in the National Register" and to afford the Advisory Council an opportunity to comment. 16 U.S.C. § 470f (emphasis added). As discussed *supra*, p. 13, the Advisory Council's regulations in 36 C.F.R. part 800 implement section 106 by defining a consultation process for identifying and attempting to resolve an undertaking's adverse effects on historic properties.

In 1980, Congress amended the NHPA to provide "clear direction to federal agencies for the basic requirements that must be met under the [NHPA]." H.R. Rep. No. 96-1457, at 24 (1980). The main effect of the 1980 amendments was to add section 110, pertaining to federal agency responsibilities toward historic properties, including national historic landmarks. 16 U.S.C. § 470h-2. Section 110, for example, requires agencies to establish a historic preservation program, record information about historic properties that may be destroyed or altered, and designate a preservation officer. *See id.* §§ 470h-2(a), (b), (c). It also section 110(f), which provides that

> [p]rior 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.

Id. § 470h-2(f).

The 1980 amendments arose from legislation proposed by Interior to implement a new National Heritage Program. *See National Heritage Policy Act of 1979: Hearings on S. 1852 Before the Subcomm. on Parks, Recreation and Renewable Resources of the Senate Comm. on Energy and Natural Resources*, 96th Cong. 26 (1980). That legislation sought to combine protections for natural and cultural resources and, among other things, to require a section 106-type process for agency undertakings that would adversely affect certain natural as well as historic properties. *Id.* at 14-15. In addition,

it provided for heightened review of undertakings affecting natural or historic landmarks. Its language was essentially identical to section 110(f) as enacted except that it also required that the agency "shall determine that no prudent and feasible alternative to such undertaking exists." *Id.* at 15. Even with that language, Interior explained – in response to concerns raised by some Senators – that this provision afforded landmarks "another, higher degree of *consideration*" than the section 106 process, but assured Congress that "[t]here is *no mandatory protection* in either level of consideration and mediation," and "the final decision to proceed or not proceed with the proposed action rests (*as it does now*) with the federal agency responsible for the undertaking." *Id.* at 412-413 (emphasis added). Thus Interior – and Congress as informed by Interior – understood this new planning provision to increase the consideration given to actions affecting landmarks but otherwise to operate the same as section 106.

Congress enacted section 110(f) in the form Interior had proposed, except that it deleted its application to natural areas as well as the "prudent and feasible alternative" analysis. Consistent with Interior's explanation, the relevant House report explained that section 110 generally "*clarifies* and codifies the minimum responsibilities expected of Federal agencies in carrying out the purposes of [the NHPA]," and "is not intended to change the preservation responsibilities of Federal agencies as required by any other laws, executive orders, or regulations." H.R. Rep. No. 96-1457 at 36 (emphasis added). As to section 110(f) specifically, the report explained that it

"does not supersede 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 Council*." *Id.* at 38 (emphasis added). Congress thus demonstrated its understanding that section 110(f) should operate like section 106, except with a more intensive level of planning.

That understanding is supported by Congress's decision to provide no implementing regulatory authority for section 110(f), leaving the Advisory Council's section 106 regulatory authority as the only regulatory mechanism for implementing section 110(f). *Compare* 23 C.F.R. part 774 (detailed regulations implementing substantive provisions of section 4(f), discussed below). Instead, Congress provided for implementation only via non-binding guidelines. The statute directed Interior to establish guidelines for federal agency responsibilities under section 110 generally. 16 U.S.C. § 470a. And the House committee stated that it "expect[ed] the [Advisory] Council, in its implementing procedures for this section, to provide clear guidelines to the agencies, including provisions for a sequential application of this section and Section 106." H.R. Rep. 96-1457 at 38.

Against this background, the language of section 110(f) clearly imposes only procedural obligations. When drafting section 110(f), both Interior and Congress considered that section against the background of two pre-existing statutory provisions pertaining to federal agency planning: the purely procedural provisions of NHPA section 106; and the substantive provisions of section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303(c). Section 4(f) provides that the

Secretary of Transportation "may approve a transportation program or project" requiring use of publicly owned natural or historic areas "only if (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the [protected area] resulting from such use." 49 U.S.C. § 303(c).[6] Section 4(f) establishes substantive requirements, judicially reviewable requirements under the highly deferential standard of the APA. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). As described below, while section 4(f) contains a minimization requirement, its language contrasts starkly with that of section 110(f), which instead parallels the structure of section 106 – thus indicating that Congress intended section 110(f) to function similarly to the former and not the latter. *See*, *e.g., United States v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007) (*en banc*) (citing *Metro Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)) (statutes with similar language addressing similar subject matter should be interpreted consistently with each other).

First, section 4(f) expressly governs in what circumstances an agency "may approve" a project. 49 U.S.C. § 303(c). Section 110(f), in contrast, addresses only what must happen "*prior to* the approval" of an agency undertaking, without limiting the agency's approval authority. 16 U.S.C. § 470h-2(f) (emphasis added). This language is identical to the procedural provisions of section 106, which similarly describes what

[6] For example, Interior told Congress that the "prudent and feasible" language in the new bill was "derived" from section 4(f). *Hearings*, *cited supra* p. 38, at 412.

an agency must consider "*prior to* the approval" of an agency action. *Id.* § 470f (emphasis added). Thus, like section 106, and unlike section 4(f), section 110(f) pertains only to procedures prior to project approval, not approval itself.

Second, section 4(f) allows approval "only if the program or project *includes* all possible planning to minimize harm," thus specifying what the project itself ultimately must encompass. Section 110(f) only provides that the agency "*undertake* such planning and actions as may be necessary to minimize harm," thus addressing only the nature of the agency's planning, not the contours of the selected project design. Again, this is similar to section 106, which requires only that an agency "*take into account* the effect of the undertaking," addressing the agency's deliberations but not its ultimate decision.

Finally, section 4(f) requires the agency to include all possible planning "to minimize harm," without any qualification, thus establishing "minimization" as a substantive, judicially reviewable standard. Section 110(f), in contrast, provides for planning and actions "*as may be necessary* to minimize harm," invoking classic language conferring discretion on the agency to determine what planning and actions are needed to minimize harm. *See, e.g., Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (language directing EPA to take such measures "as necessary" to prevent the construction or modification of a major emitting facility confers discretion on agency to determine what measures, if any, are needed); *Commonwealth of Pennsylvania v. Nat'l Assoc. of Flood Insurers,* 520 F.2d 11, 26 (3d Cir. 1989) (language providing that agency

shall take such action "as may be necessary" to make flood insurance information publicly available requires agency to "consider whether or not action should be taken," but vests "significant discretion" in the agency to "decide if and when information should be disseminated"). Leaving such discretion to the agency is consistent with Interior's explanation to Congress that the provision contains "no mandatory protection" and leaves the "final decision to proceed or not proceed" to the agency. Accordingly, the language, purpose, and legislative history of section 110(f) all support the conclusion that it, like the rest of the NHPA, imposes only procedural obligations.

2. Agency regulations and guidelines implementing section 110(f) impose only procedural burdens.

The actions of the Advisory Council and Interior in implementing section 110(f) are consistent with the view that it is only procedural. The guidelines Interior issued delineating agency responsibilities under section 110 generally – which "have no regulatory effect" – provide that under section 110(f), an agency should give historic properties "full *consideration* when planning or considering approval of any action that might affect" historic landmarks. 63 Fed. Reg. 20496, 20,500 (1998) (emphasis added). They state that section 110(f) requires agencies to "exercise a higher standard of care when *considering* undertakings that may adversely affect national historic landmarks" and provide that an agency "should *consider* all prudent and feasible alternatives to avoid an adverse effect" on the landmark. *Id.* at 20503

(guideline j) (emphasis added). If the alternatives are too costly or compromise the undertaking's goals and objectives, the agency is to "*balance* those goals and objectives with the intent of section 110(f)." *Id.* (guideline k) (emphasis added). Hence Interior's guidelines, consistent with Interior's explanation to Congress, treat section 110(f) as mandating no substantive protections and leaving the final project decision up to the action agency.

The Advisory Council, which has primary responsibility for implementing section 110(f), amended its regulations to integrate section 110(f) compliance into the section 106 process. As discussed *supra*, p. 13, those regulations provide for the Council to use the section 106 process in consulting on how to minimize adverse effects under section 110(f) and provide additional procedures for involving Interior and the Advisory Council in that consultation. 36 C.F.R. § 800.10.

In a 1998 report to Congress, the Advisory Council explained that "[t]he review required by Section 110(f) is similar to that required under Section 106 but involves a higher standard of care," noting that "[g]enerally, Section 110(f) review is accomplished under the Council's procedures implementing Section 106." *Alternatives for Implementing Section 106 of the National Historic Preservation Act: An Assessment Submitted by the Advisory Council on Historic Preservation*, May 1998.[7] In that report, the

[7] Available at http://www.achp.gov/alternatives.html (last visited Oct. 9, 2014). The on-line publication is unpaginated but quoted text may be found by searching "110(f)."

Advisory Council considered four options for revising the section 110(f) process, one of which was to modify section 110(f) to "allow Federal agencies to approve programs or projects adversely affecting historic properties of national significance *only* if they demonstrate that (1) there is "no feasible and prudent alternative"; and (2) the program or project included "all possible planning to minimize harm" to the property. *Id.* (emphasis added). The Council, however, recommended against amending the statute to add such substantive, section 4(f)-type requirements. *Id.* Congress took no action to change section 110(f).

3. Courts to consider the question have held that section 110, including section 110(f), is procedural.

Finally, courts that have ruled on the issue have repeatedly rejected the theory that section 110 imposes substantive obligations. In *Nat'l Trust for Historic Preserv. v. Blanck*, 938 F. Supp. 908, 916 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999), the court concluded that section 110 generally "was not intended to create new substantive preservationist obligations." The court reasoned that to read section 110 to require substantive duties "would create vast new preservationist responsibilities unrelated to the consultation provisions of section 106 to which the rest of section 110 constantly refers" and would ignore the "overwhelmingly procedural thrust of the NHPA as described by every court that has ever considered the Act." 938 F. Supp. at 922. While the court was interpreting section 110(a) specifically, it also acknowledged the language of section 110(f), and its rationale rested on its view of section 110 as a

whole. *Id.* at 920. More recently, in W*ilderness Watch v. Iwamoto*, 853 F. Supp. 2d 1063, 1071 (W.D. Wash. 2012), the court examined precedent on section 110 generally and concluded that it, like the rest of the NHPA, "does not compel particular preservation-oriented outcomes"; the court thus held that section 110(a) did not impose affirmative obligations. *See also Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, 537 F. Supp. 2d 161, 173 (D.D.C. 2008) (relying on reasoning in *Blanck* to hold that a subsection of section 110(a) not considered in *Blanck* does not impose mandatory obligations on agencies). And in *Lee v. Thornburgh,* 877 F.2d 1053, 1055-1057 (D.C. Cir. 1989), while the D.C. Circuit examined whether certain requirements of section 110 applied to the matter at hand and did not reach the merits of whether section 110 imposes substantive obligations, it reasoned that "the legislative history of § 110, though scant, supports our reading of that section in conjunction with § 106" and concluded that the "the statutory text [of sections 110(b) and (d)] persuades us that * * * they are aimed solely at discouraging federal agencies from ignoring preservation values in projects they initiate, approve funds for or otherwise control."

Consistent with this view of section 110 generally, courts likewise have held that section 110(f) imposes only procedural obligations. In *Lesser v. City of Cape May*, 110 F. Supp. 2d 303, 324 (D.N.J. 2000), the court held that the agency satisfied the requirements of section 110(f), concluding that the "NHPA only imposes relatively limited procedural obligations" and that "[s]ection 110(f) is subject to a similar interpretation." In *Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin.*, 407 F.

Supp. 2d 323, 338 (D. Mass. 2005), *aff'd*, 463 F.3d 50 (1st Cir. 2006), the court found that "[s]ection 110(f), like Section 106, does not mandate specific substantive results and merely sets forth procedural requirements." It went on to conclude that because the agency in the section 106 process had reduced impacts to the point that the project had no adverse effects on historic resources, section 110(f) did not apply. *Id.* The court of appeals, in affirming, also noted that "Section 110 of the NHPA imposes more stringent *procedural* requirements when National Historic Landmarks are involved" and that "Section 4(f) [of the Department of Transportation Act of 1966], unlike sections 106 and 110(f), imposes a substantive mandate." *Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin.,* 463 F.3d 50, 64-65 (1st Cir. 2006). In *Friends of Hamilton Grange v. Salazar*, 08-civ-5220 (DLC), 2009 WL 650262, *21 (S.D.N.Y. March 12, 2009), in the course of concluding that plaintiffs failed to state a claim under section 110(f), the court found that the provision, like section 106 "is also procedural in nature, and complements Section 106 by setting a higher standard for agency planning regarding the effects on National Historic Landmarks."

Plaintiffs identify no case holding that section 110(f) imposes a substantive obligation. The two cases on which they rely (Br. 51-52) off-handedly suggested that section 110(f) imposes a substantive obligation without examining the legislative history, case law, or statutory language and, in any event, did not reach the merits of the question. *See Coliseum Square Ass'n v. Jackson*, 465 F.3d 214, 243-244 (5th Cir. 2006) (upholding agency's determination that its undertaking would not adversely affect a

landmark so that section 110(f) did not apply); *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1095 n.4 (N.D. Cal. 2008) (mentioning section 110(f) in a footnote while discussing the plaintiff's standing to bring a claim under another, wholly unrelated NHPA provision). Thus, in the 34 years since section 110 was enacted, no court to reach the merits of the issue or examine the question has concluded that any of its provisions impose a substantive obligation. This Court should hold that section 110(f) imposes only a procedural obligation.

B. Whether section 110(f) imposes procedural or substantive obligations, the Presidio Trust satisfied its requirements.

However this Court interprets section 110(f), the Trust plainly satisfied its requirements. The district court, in fact, declined to reach the question whether section 110(f) imposes a substantive standard, finding that it could not see what else the Trust could have done to minimize impacts other than not build the lodge at all, which section 110(f) does not require. ER81.

First, the Trust indisputably complied with the Advisory Council regulations governing sections 106 and 110(f). The Trust determined that the Main Post Update was an undertaking that, as originally proposed, would adversely affect the Presidio. It thus undertook extensive consultations with the Advisory Council, the Park Service, the SHPO, and a dozen other consulting parties (including Plaintiffs) to avoid, minimize, or mitigate those effects. The Trust addressed every recommendation made by the Park Service in its Section 213 report, provided as part of section 110(f)

compliance, incorporating most of them in the Main Post Update, and – as relevant here – included all of its recommendations regarding the lodge. The Advisory Council confirmed by separate letter that the Trust complied with section 110(f) by satisfying the requirements at 36 C.F.R. § 800.10. ER701-702. This Court assesses an agency's compliance with section 106 based on its compliance with the Advisory Council's regulations under an arbitrary and capricious standard of review, s*ee Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999), and it should do the same with respect to section 110(f) compliance here.

Assuming compliance with the regulations is not sufficient to show compliance with section 110(f), the Trust's entering into a Programmatic Agreement with the Advisory Council, Park Service, and SHPO should do so. While the completion of such an agreement is not required by the regulations – since neither section 106 nor section 110(f) imposes mandatory protections or compels a particular agency decision – the agreement plainly demonstrates that the Trust satisfied the requirements of section 110(f). The agreement itself finds that "the Trust, through the consultation process and in compliance with the NHPA, including Sections 106 and 110(f), has modified the Undertaking to avoid, minimize or mitigate the adverse effects identified." ER314. The agreement represents the combined professional judgment of the expert consulting agencies of the appropriate actions to avoid, minimize, or mitigate harm. This Court should not substitute its judgment for that of the expert historic preservation agencies.

Finally, as the district court found, under any standard, the revisions made to the lodge as approved by the Trust do minimize harm to the Presidio. The objections to the Main Post Update as originally proposed were outlined by the Park Service in its section 213 report. The report recommended seven changes to avoid, minimize, or mitigate the negative effects of the proposed Update on the Presidio, only one of which pertained to the lodge. ER833-834. Specifically, the report found that the "[p]roposed scale and massing of the lodge is incompatible with the historic scale and massing of historic development between the Old and New Parade Grounds and creates a false sense of history regarding the historic spatial organization of the Main Post and the character of the eastern edge. * * * * The lodge creates a hard edge and formality where it never existed and suggests uniformity to the Main Parade that never existed." ER831. To address this concern, the report recommended that the Trust "[r]educe the footprint, scale, massing, and height of the proposed lodge; break up the mass into separate buildings, arranged in a manner that does not create a hard building plane/edge on the east side of Main Parade Ground or remove the lodge from the Main Post." ER834. The report explained that adopting this recommendation would "avoid" or "minimize" the lodge's identified impacts. *Id.*

The Trust redesigned the proposed lodge to incorporate all these recommendations.[8] It reduced the footprint by reducing new construction for the lodge from 85,000 to 70,000 square feet and incorporating two existing historic structures into the design. It reduced the scale and massing by breaking the lodge up into a series of smaller buildings, none of them over 7,000 square feet. It reduced the height of those buildings from 45 feet to a maximum of 30 feet for some buildings and 15 feet for others, to keep the new construction lower than neighboring historic buildings. It eliminated the undesirable "hard edge" that might be created by an imposing new structure on the Main Parade by making the lodge a collection of separate, smaller buildings with a layout reminiscent of the historic Graham Street barracks. And it increased the lodge's setback from a historic building of concern to avoid potential disturbance of known archaeological sites. In comments on the Final SEIS, the Park Service recognized that the Trust's revisions "generally responded to and incorporated the recommendations found in the 213 Report." The Service "hoped" that the Trust's first priority would be to rehabilitate existing buildings rather than construct new ones, but had no further recommendations for altering the lodge. ER361.

[8] The Trust incorporated most of the Park Service's other recommendations as well, including by eliminating over 100,000 square feet of new construction, reducing from six to one the number of historic structures to be removed; eliminating traffic lights, and reducing closures of historic roads.

As a result of these changes, the Trust concluded in the Final SEIS that the lodge had no adverse effect on adjacent historic structures or the Main Post. ER569. That is consistent with the Advisory Council's explanation of how to evaluate the effect of new construction. According to the Council, if the new construction does not physically destroy a part of the property, change the character of the property's use or of physical features that contribute to its historical significance, or introduce visual, atmospheric or audible elements that diminish the integrity of its significant historic features, new construction that conforms to the applicable Secretary's Standards, as the Trust believes the lodge does, may be treated as having no adverse effect. *See Section 106 Regulations Section-by-Section Questions and Answers;*[9] SER91, 89 (demonstrating lodge compliance). Accordingly, the Trust reasonably concluded that the revisions made to the lodge fulfilled any obligations that the Trust might have under section 110(f). ER285.

Plaintiffs contend that the Presidio Trust violated Section 110(f) by failing to: (1) locate overnight lodging in existing historic buildings on the Main Post or elsewhere on the Presidio (Br. 30, 56-60); (2) minimize the adverse "character and feel" effects of the lodge on the historic character of the Main Post (Br. 53-54); and

[9] Available at http://www.achp.gov/106q&a.html#800.5 (last visited Oct. 8, 2014). The Secretary of the Interior's Standards for Treatment of Historic Properties is available at http://www.nps.gov/history/local-law/arch_stnds_8_2.htm (last visited October 8, 2014).

(3) consider all reasonable and prudent alternatives to the lodge's construction (Br. 55, 58). These arguments fail.

Plaintiffs identify no record support for their concerns that the lodge has *any* adverse effects on the historic characteristics of the Presidio. They insist that the Trust did not minimize the lodge's effects on the "character and feel" and "visual unity" of the Main Post (Br. 52-53), but these concerns are not reflected in the views of any of the consulting agencies. To the contrary, building the lodge to reflect the footprint of the Graham Street barracks meets the Trust's goal of reestablishing the historic separation between the Old and Main Parades with a group of compatibly scaled buildings, a goal the Trust established in its original 2002 Plan. ER407; SER240-241, 245. The lodge also replaces the incompatible 1968 cement-block Building 34. And under the Programmatic Agreement, detailed design guidelines will be developed to further ensure visual unity of the lodge with the Main Post.

Plaintiffs only cite two pages of the Final SEIS, neither of which is pertinent. The first, reproduced at ER565, addresses Alternative 1, which does not include the lodge. The second, reproduced at ER651, discusses the cumulative effects of *all* new construction, including in particular the Doyle Drive reconstruction undertaken by Caltrans, not construction of the lodge, which on the previous page (ER650) is described as avoiding or minimizing impacts. Plaintiffs also complain (Br. 54) about the potential demolition of historic buildings 40 and 41. That complaint is irrelevant. The removal of those buildings has nothing to do with the lodge, is contingent on

further action, and was not addressed by Plaintiffs in the district court and thus is waived. *Crawford v. Lungren*, 96 F.3d 380, 389 n. 6 (9th Cir. 1996).

Plaintiffs' complaints arise from their own idiosyncratic view of what constitutes "harm" to the Presidio, a view not reflected by the historic preservation agencies.[10] They complain (Br. 53) that the lodge will transform the Main Post "from a tranquil showcase of history into a bustling hub of commercial and tourist activity." But "tranquility" historically was not a feature of the Main Post, which instead was the central hub of the Presidio's activity – where hundreds of soldiers were housed in barracks and enjoyed social events in the officer and enlisted clubs, recreation activities at the bowling alley and an 800-seat theater, while military activity bustled on the two parade grounds to the accompaniment of marching bands and ceremonial cannon fire. SER378-381, 391-403. Even after World War II, the Main Post continued as a hub of activity for the 10,000 workers and residents who used the exchange store, gym, library, child care center, and even a Burger King, all constructed there between the mid-1950s and late-1980s. SER402-403.

[10] Their view seems particularly idiosyncratic since Plaintiff PHA estimated its proposed history museum would transform the Main Post into a "must-see" destination attracting as many as "100,000 to 200,000 annually based on average of 100 visitors per hour, six days a week." SER102, 106. PHA's proposed museum also comprised new construction of 48,000 square feet – nearly four times the size of the bowling alley it would have replaced, and PHA considered it unlikely that the museum could be accommodated in an existing historic building. SER96.

Plaintiffs' incessant warning about "commercial" and "tourist" activity is also unfounded. The vision for the Presidio is a great national park in an urban setting. Lodging for visitors has always been planned for the Main Post, which has always been viewed as the center for tourist activity. Providing lodging is a commercial activity whether located in new buildings or existing ones, and increasing visitation – including by tourists – is the very objective of the Main Post Update. The Update achieves that objective, in part, by decreasing the amount of space devoted to offices and residences and increasing the space for public use. ER388-390. Plaintiffs cite no preservation principle that bars increased visitor use.

In the absence of *any* record support for their contention that harm from the lodge is not minimized, Plaintiffs' assertion that the Trust unlawfully failed to consider all prudent and feasible alternatives has no legal content. Furthermore, section 110(f) does *not* require consideration of all prudent and reasonable alternatives; to the contrary, Congress eliminated such a requirement. *See* H.R. Rep. No. 96-1457 at 38. Regardless, the Trust *did* consider all prudent and feasible alternatives for providing lodging at the Main Post. The Trust identified multiple locations for lodging in existing buildings, but found through lack of responses to its request for interest by potential development partners that development of lodging facilities of 80-100 rooms in the identified buildings was not feasible. SER32. Section 110(f) does not require the Trust to consider alternatives for providing lodging elsewhere on the Presidio. The very undertaking proposed by the Presidio was to provide lodging at the

Main Post as long envisioned; section 110(f) provides only for minimization of harm from an undertaking, not its abandonment. The most that section 110(f) can be read to require is the minimization of harm. "Minimization" is defined by the consulting agencies as "a method or measure designed to lessen the intensity of an impact on a particular resource *(i.e.* impacts related to new construction are made smaller by reducing or reallocating the total square footage of new construction)." ER346. Under any reading of section 110(f), the Trust satisfied its requirements.

In sum, it is the Presidio Trust's responsibility to preserve the Presidio as a public resource. Here, the record shows that its actions in pursuit of this goal fully complied with all federal law.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for Appellee The Presidio Trust is unaware of any related caseCertificate of Compliance with

Federal Rule of Appellate Procedure 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,922 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Katherine J. Barton

ADDENDUM

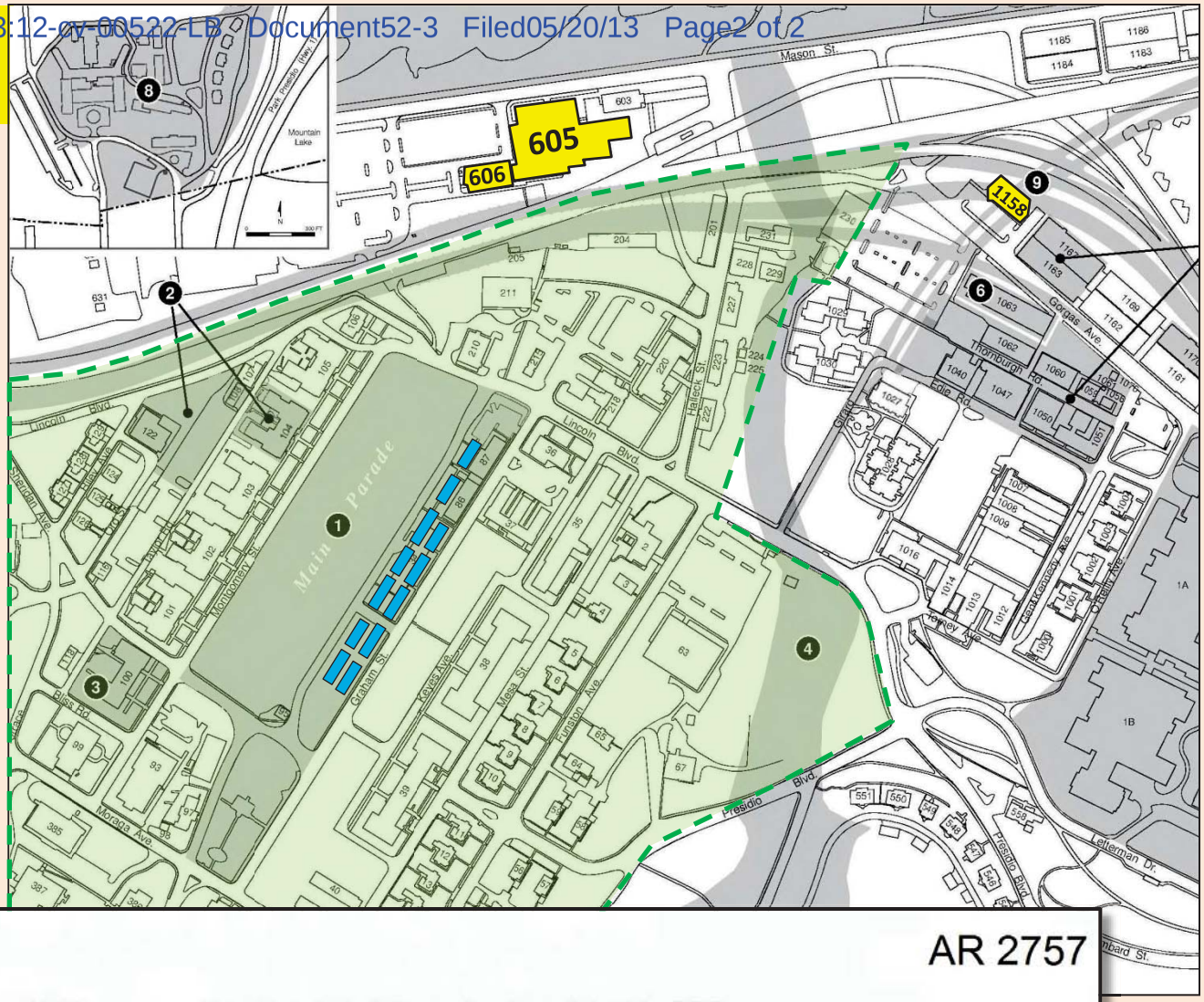
The following are selected demonstrative exhibits filed by the Presidio Trust pursuant to the district court's summary judgment hearing and reproduced in the district court's opinion at pp. 24-28 (ER70-74).

Planning Districts, Existing Areas of Development, and Proposed Open Space (AR 27532)

Additional Demolition
Outside Main Post District

Grayscale map at AR 996.

New Construction	+ 146,500
Main Post Demolition	- 93,939
Outside Demolition	- 54,071
Net Sq. Ft. Decrease	**- 1,510**



Pending demolition AR 2757

1803	1,401 No	PHSH	Non-historic building to be demolished by FCD	
230	10,060 Yes	Main Post	Doyle-related demolition	
204	12,193 Yes	Main Post	Doyle-related demolition	
201	6,164 Yes	Main Post	Doyle-related demo of 1/2 building	
1158	4,336 No	Letterman	Doyle-related demo	
605	51,271 No	Crissy Field	Doyle-related demo	Army gross ext is 42319 - sig
606	9,011 No	Crissy Field	Doyle-related demo	Army gross ext is 7416 - sign
670	430 Yes	Crissy Field	Doyle-related demo	

A-2

Ex. 3

Old Graham Street Barracks (approx. 1860-1945)

Presidio Lodge

Ex. 5

RENDERINGS OF THE PRESIDIO LODGE SITE

Ex. 6

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Katherine J. Barton