

October 12, 2015

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Molly C. Dwyer Clerk of Court U.S. Court of Appeals for the Ninth Circuit 95 Seventh Street San Francisco, California 94103

Presidio Historical Ass'n v. Presidio Trust Case No. 13-16554

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j), Plaintiffs-Appellants Presidio Historical Association and Sierra Club call the Court's attention to the following supplemental authority.

In briefing this appeal, Plaintiffs-Appellants explained that section 110(f) of the National Historic Preservation Act (formerly 16 U.S.C. § 470h-2(f)) imposes two distinct obligations on federal agencies in approving a federal undertaking that may adversely affect a National Historic Landmark. See Opening Brief at 48-49; Reply Brief at 18-19. In preparing for oral argument, Plaintiffs-Appellants learned that, subsequent to briefing of this appeal, Congress amended the Preservation Act to consolidate various statutes relating to the National Park Service. See Act of Dec. 19, 2014, Pub. L. 113-287 § 2(a), 128 Stat. 3094, 3094. These amendments shed light on Congress's intended construction of section 110(f). See id. § 2(b), 128 Stat. at 3094 ("In the codification of laws by this Act, the intent is to conform to the understood policy, intent, and purpose of Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections "); see also FHA v. Darlington, Inc., 358 U.S. 84, 90 (1958) (subsequent legislation is not conclusive of legislative intent, but a "later law is entitled to weight when it comes to the problem of construction").

Notably, Congress created a new stand-alone section for section 110(f) and severed its two clauses into separate sentences. The new section now reads:

Prior to the approval of any Federal undertaking that 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 the landmark. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

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54 U.S.C. § 306107 (2014). This amendment confirms that Congress intended to impose an affirmative duty on federal agencies to minimize harm to landmarks, in addition to and separate from agencies' procedural obligation to confer with the Advisory Council.

Sincerely yours,

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