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October 15, 2015

Molly C. Dwyer, Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh and Mission Streets
San Francisco, CA 94103-1526

Re: *Presidio Historical Association v. Presidio Trust*, No. 13-16554
Scheduled for oral argument October 20, 2015, before Judges Thomas,
Reinhardt, McKeown

Dear Ms. Dwyer:

This letter responds to Appellants' letter of October 12, 2015, filed under Federal Rule of Appellate Procedure 28(j), arguing that the recodification of section 110(f) of the National Historic Preservation Act amended that provision in a manner that confirmed it imposes substantive as well as procedural duties.

That argument is wrong. The recodification clarifies or confirms nothing; rather it made technical editorial changes, changing the word "which" to "that" and altering a run-on sentence by dividing it into two sentences (eliminating the conjunction "and"). But if the recodification did clarify anything, it would be that section 110(f) is purely procedural because the change makes section 110(f) *more like* section 106, which is indisputably procedural and has the same break into two sentences that section 110(f) now has. *Compare* 54 U.S.C. 306107 *with* 54 U.S.C. 306108. The recodification also merges section 106 into the various provisions of section 110, which has been generally and repeatedly held by courts to be procedural. This further indicates that *all* of the provisions in this newly codified subchapter—to the extent they impose any obligations—are procedural in nature.

In any event, Appellants' argument—that because section 110(f) requires agencies both to undertake planning *and* afford the Advisory Council on Historic Preservation the opportunity to comment, the first obligation is substantive and only the second is procedural—is unsound. As noted above, section 106 is identically structured, imposing both planning and comment obligations, and it is indisputably purely procedural in nature. In addition, Congress explained that section 110(f) complements section 106 by “setting a *higher standard for agency planning* in relation to landmarks *before* the agency brings the matter to the Council,” H.R. Rep. No. 96-1457 (emphasis added), thus recognizing the two procedural steps—planning and comment—inherent in the requirements of *both* section 106 and 100(f).

In sum, the recodification does not support Appellants' arguments; if anything, it supports the government's argument that section 110(f) imposes on federal agencies only procedural obligations. *See* Response Brief for the United States at 37-48.

Sincerely,

s/Katherine J. Barton
KATHERINE J. BARTON

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2015, 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

KATHERINE J. BARTON