Case No. 13-16554

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PRESIDIO HISTORICAL ASSOCIATION and SIERRA CLUB,

Plaintiffs-Appellants,

v.

PRESIDIO TRUST,

Defendant-Appellee.

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

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Congress spoke clearly: The San Francisco Presidio "is one of America's great natural historic sites." The Presidio Trust Act § 101(1), 16 U.S.C. § 460bb app'x ("Trust Act"). Reflecting its unique blend of historic significance and incomparable scenic beauty, the Presidio received National Historic Landmark status in 1962. With the departure of the Army in the mid-1990s, Congress created the "Presidio Trust" as a new public steward for "preservation of the cultural and historic integrity of the Presidio," id. § 101(3), charging that entity with managing the park's "significant natural, historic, scenic, cultural, and recreational resources" and protecting the park "from development and uses which would destroy the scenic beauty and historic and natural character of [its] cultural and recreational resources." Id. § 101(5).

In proposing to construct a 70,000-square-foot commercial hotel at the center of the historic Main Post, the Trust has lost sight of its core mission and come instead to view itself as something akin to an urban redevelopment agency unburdened by a historic preservation mandate. To justify its new plan, the Trust offers a strained statutory interpretation of both the Trust Act and the National Historic Preservation Act ("Preservation Act"). For each statute, the Trust asks the Court to read key operative terms entirely out of the text and to ignore Congress's

overarching objective to protect National Landmarks – and the Presidio Landmark in particular – from development activities that undermine historic integrity.

At issue here is the proper interpretation of Trust Act section 104(c)(3) and Preservation Act section 110(f). Plaintiffs advance a plain-text meaning of section 104(c)(3) consistent with congressional intent to limit new construction to the replacement of existing structures. By contrast, the Trust asks the Court to read broad new development authority into section 104(c)(3), turning a construction restriction into an open-ended license to build new structures virtually anywhere and of any size. Plaintiffs likewise offer a plain-text interpretation of section 110(f)'s affirmative mandate directing federal agencies to act "as necessary to minimize harm" to Landmarks "to the maximum extent possible." The Trust effectively ignores these powerful statutory words, which set rare National Landmarks apart from the hundreds of thousands of other historic properties listed (or eligible for listing) on the National Register. Because the Trust's approval of the Main Post Update is contrary to the unambiguous language of the two statutes, the Court should reverse the district court's judgment and set aside the approval.

ARGUMENT

I. The Trust's Interpretation of the Trust Act Is Not Entitled to Chevron Deference and Must Be Rejected.

When reviewing a challenge to a federal agency's interpretation of its authorizing statute, courts must determine "whether Congress has directly spoken

to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, 467 U.S. 837, 842-43 (1984). Here, while Congress recognized that the Trust likely would need to consider "removal and/or replacement of some structures within the Presidio," Trust Act § 101(6), it expressly circumscribed that activity by limiting any "new construction" to the "replacement" of "existing structures" with buildings "of similar size" to the structures they replace. Id. § 104(c)(3). Notwithstanding Congress's use of these plain, ordinary words, the Trust claims that section 104(c)(3) authorizes widespread new construction on any developed area of the Presidio so long as the total square footage of buildings inside the park does not exceed 1996 levels – a "banking" theory that relies on offset credits, square footage accounting, and unfettered agency discretion. The Court owes no deference to the Trust's sweeping interpretation, which contradicts the unambiguous words of the statute.

A. Section 104(c)(3) is Unambiguous and the Court Need Look No Further than the Ordinary Meaning of Its Text.

1. Plaintiffs' Plain-Text Reading of the "New Construction" Limitation Is Supported by the Ordinary Meaning of the Words Congress Chose.

Section 104(c)(3) limits "new construction" in the Presidio "to replacement of existing structures of similar size in existing areas of development." Trust Act §

104(c)(3). The key statutory terms – "replacement" and "of similar size" – are unambiguous, and their meaning can and must "be deduced through references sources such as general usage dictionaries." UMG Recordings, Inc. v. UMB Capital Partners LLC, 718 F.3d 1006, 1026 (9th Cir. 2013).

Section 104(c)(3) is susceptible to only one interpretation – new construction may only "replace" existing structures with buildings of roughly the same size in roughly the same place. The ordinary meaning of "replacement" is "to take the place of" or "to put back in a previous place." Open. Br. 37; see also SWA Painting, Inc. v. Golden Eagle Ins. Co., 268 Fed. App'x 521, 523 (9th Cir. 2008) (interpreting "replace" to mean "to put something new in the place of"). Likewise, the phrase "of similar size" means "almost the same as [the subject's] overall dimensions or magnitude." Open. Br. 37. Congress chose these simple words to convey a simple concept: Section 104(c)(3) limits the Trust to new construction that takes the place of, and is almost the same dimensions as, "existing structures."

The Trust claims that an ordinary, plain-text reading of the statute would yield "an absurd result," rendering the Presidio "impossible to manage" and financially unsustainable. Resp. Br. at 28-29. It contends that "Congress could not have" meant what it said, which would require the Trust to "replicate the size and arrangement of [existing] structures throughout the Presidio." Id. at 29. But

neither Plaintiffs' arguments nor the ordinary meaning of the words Congress chose dictate this parade of horribles. The Trust need not replace every demolished building, when it chooses to rebuild, with a carbon copy on the exact same spot. Trust Act § 104(c)(3) (permitting replacement construction "of similar size") (emphasis added). Likewise, nothing in section 104(c)(3), or Plaintiffs' reading of it, limits the Trust to replacing buildings with a one-for-one match; the statute allows replacement of "existing structures," meaning the Trust could remove several buildings and replace them with one new building of a similar size and dimension, and vice versa. Id. (emphasis added).

The Trust's contention that a plain-text reading would hamper its ability to complete minor "infill additions" or "annex" projects is equally meritless. Resp. Br. at 23-24. Minor infill and annexes to existing structures are not "new construction" in the ordinary sense; they are, rather, rehabilitation or improvement projects for existing structures, as expressly authorized by section 104(a). Black's Law Dictionary 312 (6th ed. 1990) (defining "construction" as the "creation of something new, as distinguished from the repair or improvement of something already existing.") Thus, enclosing a small courtyard behind the imposing Montgomery Street Barracks to make the existing space workable for a new tenant does not implicate the "new construction" limitations of section 104(c)(3). See Resp. Br. 23-24.

2. The Trust's Strained Interpretation of Section 104(c)(3) Is Unavailing.

While Plaintiffs' reading follows logically from Congress's use of simple, ordinary English words in section 104(c)(3), the Trust's proffered interpretation requires the Court to engage in a series of linguistic gymnastics, unsupported by anything in the Trust Act or its legislative history. To reach the result urged by the Trust, the Court must conclude, first, that the word "replacement" does not have its ordinary meaning, "to put back in a previous place," but instead is a "term of art" that means just the opposite – to put in any place. Second, the Court must conclude that by using the ordinary words "new construction limited to replacement of existing structures of similar size in existing areas of development," Congress actually intended to create an elaborate banking scheme, whereby the Trust could construct new buildings in the general "vicinity" of demolished structures by using an "offset" approach based on total "square footage," subject only to a park-wide development "cap." None of these concepts appear anywhere in the statute. Congress does not carelessly bury layers of hidden meaning beneath its statutory terms when crafting legislation, but rather "carefully select[s] and intentionally adopt[s] the language" it uses. In re Cardelucci, 285 F.3d 1231, 1234 (9th Cir. 2002) (quotation marks omitted).

The lynchpin of the Trust's argument – that the statutory terms "new construction," "existing structures," and "replacement" are "collective" terms of art

which should be read in the "collective" sense (Resp. Br. 23-24) – defies both common sense and legal support. The Trust contends that (i) the term "existing structures" in section 104(c)(3) does not refer to particular buildings that existed when the Trust inherited the Presidio in 1996, but instead to the collective square footage of all buildings in the park, and (ii) any structure can be "replaced" anywhere else in the park as long as some development already exists there and the collective square footage of all new buildings does not exceed the total "cap" that existed when the Trust Act was enacted.[1] Instead of grounding this expansive interpretation in the statute's plain language (or even in legislative history of congressional intent), the Trust turns to the General Management Plan Amendment for the Golden Gate National Recreation Area ("GGNRA"), released in July 1994 by the National Park Service in anticipation of assuming management authority for the Presidio. Resp. Br. at 24-25. But that document neither confirms the Trust's

[1] Notably, because the concept of a park-wide "cap" appears nowhere in the statute, there is no metric by which to measure it. The Trust suggests that the "cap" could be as high as 6.3 million square feet – the total building square footage that the Trust says existed in the Presidio when the Park Service drafted its management plan in 1993/1994. Resp. Br. 4, 24. In its own 2002 management plan, however, the Trust committed to reducing the total square footage of Presidio development to 5.6 million feet, ER 388, 924, 927, suggesting that the Trust can "bank" the difference, approximately 700,000 square feet (~16 acres), and later exercise its discretion to spend those banked credits as it chooses.

reading of the statute nor provides credible evidence of legislative intent to override the ordinary terms that Congress actually used.[2]

The Trust points, in particular, to ER pages 1283-84 (discussing the Letterman complex), 1319 (Fort Scott), 1322 (Letterman complex again), and 1345 (Presidio Golf Course) in the Park Service's management plan. Resp. Br. at 24, 27-28. As a threshold matter, the Trust's repeated reference to and reliance on construction projects at the "Letterman" hospital/complex/district (see Resp. Br. at 5, 9, 27, 28, 29, 32) is a red herring. Long before enacting the Trust Act, Congress understood that Letterman was seismically unsound and exempted it entirely from the "new construction' restriction first imposed by the GGNRA Act. See 16 U.S.C. § 460bb-2(i). Thus, the Park Service's discussion of construction plans at the dilapidated Letterman complex is neither remarkable nor relevant to the legal question before the Court.

The Trust's remaining two management plan citations tell us nothing about park-wide square footage caps, banking and offset theories, or the "collective" nature of any proposal; they merely show that the Park Service was contemplating "replacement construction" in the developed Fort Scott and Golf Course areas. ER 1319, 1345. There is no indication from the words on the page that the Park

[2] The Trust also cites its own 2002 management plan as evidence of congressional intent, Resp. Br. at 24, but that plan was released years after Congress enacted section 104(c)(3) and thus has no bearing on legislative intent.

Service was using "replacement" as a "term of art" and certainly nothing to suggest that the agency intended a Presidio-wide banking and development offset approach.

In any event, a few oblique references to "replacement construction" in an agency plan cannot transform the ordinary term "replacement" into a "term of art." Terms of art generally either have: (1) "an accepted common law meaning," United States v. Van Trease, 279 Fed. App'x 457, 459 (9th Cir. 2008); or (2) an unmistakably different meaning within a specific statutory context. Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 243 (1976) (statutory term was "not a term of art" because it did not unmistakably carry "with it a meaning precisely suited for this situation"). For example, the word "hacking" ordinarily refers to cutting or chopping something, as with an axe. In a statute concerned with computer crimes, however, "hacking" might well be a term of art, unmistakably referring to the act of illegally accessing digitally stored information. The word "replacement" in the Trust Act fits neither of these criteria. "Replacement" has no accepted common law meaning, and the word does not unmistakably mean something different in the construction context than it does in any other context. Thus, "replacement" in the Trust Act means what it normally means – "to put something new in the place of" or "to put back in a

previous place" – and cannot reasonably be construed as a "term of art" meaning "to put something new in any place."

The only other justification the Trust offers for overriding section 104(c)(3)'s plain language is the slightly different wording of the "new construction" limitation found in the GGNRA Act, 16 U.S.C. § 460bb *et seq.* Resp. Br. at 25-26. But as the Opening Brief explains, the language of the two statues is functionally identical. Open. Br. at 43-46. The GGNRA Act generally prohibits "new construction . . . on lands under the administrative jurisdiction of a department other than that of the Secretary [of the Interior,]" but includes an exception for "reconstructed or demolished" buildings: "Any such structure which is demolished may be replaced with an improvement of similar size." 16 U.S.C. § 460bb-2(i). The Trust Act expressly incorporates the GGNRA Act's broader preservation purposes, Trust Act § 104(a), and carries forward the concept of limiting new construction to replacement of existing structures of similar size.

That the grammatical construct of the operative sentences in the two statutes differs slightly is of no significance. The GGNRA Act uses the grammatical construction "any such structure . . . may be replaced," while the Trust Act uses the grammatical construction "limited to replacement of existing structures," consistent with the overall structure of section 104(c)(3). These are two ways to express the same concept – construction of a new structure is allowed only where it

takes the place of a demolished existing structure. Had Congress intended to give the Trust unbounded redevelopment authority, it could and would have made that fact clear, for instance by distinguishing the language of the GGNRA Act and defining the "new construction" limitation in terms of a total square footage cap managed through the banking of demolition offset credits. Instead, Congress used language that essentially mirrors the "replacement construction" limitations already in place under the GGNRA Act, with no hint of the complicated banking concept advanced here.

The Trust's final, equally unpersuasive argument hinges on the words "in existing areas of development," which are present in the Trust Act but not in the earlier GGNRA Act. The addition of this simple clause makes perfect sense, however. When Congress amended the GGRNA Act in 1978 to strengthen long-term protections, the Park Service managed the mostly undeveloped areas of the GGNRA, while the Army still had management control over the comparatively well-developed Presidio. See Open. Br. at 12 (citing 16 U.S.C. § 460bb-2). The GGNRA Act's "new construction" prohibition applied not to the Park Service, which generally is not in the construction or development business, but to non-Interior agencies, principally the Army, that might continue building new structures even as Congress anticipated turning the GGNRA over to the Park Service for long-term preservation. See 16 U.S.C. § 460bb-2(i). Under the then-

existing regime, the GGRNA Act prohibited any construction by the Army except for replacement structures – to effectively "stop the bleeding" and protect the status quo until the preservation-oriented Park Service took control. Given those circumstances, there was no reason for Congress to provide more statutory specificity.

But as it contemplated handing over the reins to the Trust instead of the Park Service, Congress provided more nuanced direction to clarify that any replacement construction is limited to those parts of the Presidio where "development" already exists. Because the Presidio contains over 800 individual buildings spread across 1,500 acres, ER 1260, 1264, the additional language prevents replacement construction in otherwise undeveloped areas of the Presidio where an isolated shed or gunnery or other outbuilding currently exists. That is, Congress's inclusion of the clause "in existing areas of development" ensures that the Trust clusters any reconstruction activities in already-developed areas rather than scattering them across the park.

3. The Trust's Alternative Interpretation Is No More Meritorious.

Having made the full-throated argument for an open-ended interpretation of section 104(c)(3), the Trust steps back, assuring the Court that it need not go quite so far to affirm the district court. But the limiting principle that the Trust offers is no more consistent with the statute, and is really no limiting principle at all. Both

interpretations would permit hundreds of thousands, if not millions, of square feet of new construction in virtually any shape and size in or near any developed area of the Presidio.

The Trust's alternative interpretation would restrict new construction to the same "existing area of development" rather than to any area of development. The Main Post Update still meets this standard, according to the Trust, because it proposes to demolish twelve existing structures (93,939 square feet) on the Main Post and three additional structures (54,071 square feet) "just outside," but "within the vicinity of," the Main Post, collectively offsetting 146,500 square feet of new construction on the Main Post. Resp. Br. at 34-35. Plus, the plan "includes 30,000 square feet of 'incidental new construction' not allocated to any particular project but providing for future flexibility" – whatever that means. Id. at 35, fn.5.

This supposedly more modest version of the "banking theory" does not solve the problems inherent in the Trust's creative statutory interpretation. First, it suffers from the same ambiguity and lack of statutory fidelity as the Trust's stronger banking theory. Section 104(c)(3) does not authorize the Trust to erect new buildings in the "vicinity" of existing structures any more than it authorizes replacement construction further away. By injecting the amorphous word "vicinity" into the statute interpretation, the Trust can easily manipulate the calculations, as it did here, to obtain any result. The Trust concedes as much,

explaining that "administrative planning boundaries" are not fixed by statute and can be altered at will. Resp. Br. at 35.

Moreover, nothing in the Trust's "banking lite" theory prevents it from massing square footage into a single structure or placing buildings of any size in any configuration within existing development boundaries (or their vicinity), as defined by the Trust. The Trust could still demolish one million square feet of existing structures on or near the Main Post and use that credit to erect a ten-story high rise at the Main Parade. The only logical statutory construction that prevents such outcomes is the simple one Congress wrote, where "replacement" means in roughly the same place and "of similar size" means of roughly the same dimensions.

The befuddling calculations used to support the district court decision illustrate the problem inherent in any banking theory untethered to any statutory authority or constraint. To justify construction of the hotel, the Trust cites a short square footage discussion in the Main Post Update and then explains that it borrowed roughly 55,000 square feet from demolished buildings outside the Main Post. Resp. Br. at 34 (citing ER 389-90). This scheme assumes that the Trust keeps a square footage ledger over time and space, adding demolition credits and subtracting new construction debits as it goes about managing the Presidio. But there is no effective way for the public to scrutinize the Trust's opaque math or for

the courts to review it. Had Congress intended such an ornate accounting scheme, it surely would have provided some way to monitor and assess it. That Congress chose not to do so is powerful evidence that the Trust has strayed too far from its congressional directive.

B. The Trust's Interpretation Is Unreasonable In Light of the Statute's Overarching Purpose of Protecting the Presidio's Cultural and Historic Integrity.

Even if the Court finds that section 104(c)(3) is ambiguous in some way, the Trust's interpretation deserves no deference. The question is whether that interpretation is a reasonable and therefore "permissible construction of the statute." Chevron, 467 U.S. at 843. Agency interpretations that contradict the statute's overarching purpose are unreasonable and not entitled to Chevron deference. Nat. Res. Def. Council, Inc. v. Nat'l Marine Fisheries Serv. ("NRDC"), 421 F.3d 872, 879-81 (9th Cir. 2005).

The Trust Act's primary purpose is to protect and preserve the Presidio's "incomparable scenic splendor" and unique "cultural and historic integrity." See Trust Act, § 101(1), (3). Congress directed the Trust to manage "the Presidio's significant natural, historic, scenic, cultural, and recreational resources" in a manner that "protects the Presidio from development and uses that would destroy the scenic beauty and natural and historic character of the area and cultural and recreational resources." Trust Act § 101(5). To that end, section 104(a) mandates

that the Trust manage the Presidio consistent with the GGNRA Act, which seeks to preserve "the recreation area, as far as possible, in its natural setting, and protect it from development and uses which would destroy the scenic beauty and natural character of the area," 16 U.S.C. § 460bb, as well as with the general objectives of the 1994 Park Service Management Plan, which is "devoted to preservation of the extraordinary cultural, natural, and scenic resources that make [the Presidio] one of the most beautiful locations on earth." ER 1269.

The Trust claims that its "banking theory" is a reasonable and permissible interpretation because Congress intended to convey the flexibility necessary for the Presidio to become financially self-sufficient. Resp. Br. 26-27, 33. The Trust's argument is unpersuasive for two reasons.

First, the banking theory assumes that the Trust could not become self-sufficient within the confines of section 104(c)(3)'s plain language. Yet there is nothing in the Main Post Update or Administrative Record to suggest that banking generally, or the construction of a hotel complex in the heart of the Main Post specifically, is necessary to achieve financial self-sufficiency. The Trust was well on its way to self-sufficiency long before the Main Post Update was issued, and achieved that status soon thereafter, without having constructed a commercial hotel. ER761, 163.

Second, the banking theory is at odds with the Trust's primary preservation mandate. The concept of banking converts Congress's express construction limitation into an open-ended development authorization. Without an effective limiting principle, the Trust's banking argument would permit construction of new structures that undermines the Presidio's historic, cultural, and aesthetic integrity – just the opposite of what Congress intended. Indeed, a 110-room hotel between the Main Parade and the Old Parade grounds, built with banked "credit" from the adjacent Doyle Drive renovation, will do precisely that.

The Trust's financial argument here is akin to the agency's failed argument in NRDC, where the National Marine Fisheries Service ("NMFS") had a statutory mandate under the Magnuson Act to rebuild overfished fisheries in as short a time as possible. 421 F.3d at 875. NMFS extended the rebuilding period for several decades, justifying its action based on statutory language that recognizes the economic interests of local fishing communities. While acknowledging Congress's desire to protect these interests, the Court nevertheless held that NMFS's interpretation was unreasonable under Chevron because it was at odds with the statute's overarching conservation purpose. Id. at 880-882.

Similarly here, while the Trust Act set a goal of self-sufficiency and provided the Trust a number of financial and management tools to achieve that statute, the statute cannot reasonably be interpreted to give priority to financial

objectives. The primary purpose of the statute is to protect and preserve the historic and natural character of the Presidio. The directive to "increase revenues to the Federal Government to the maximum extent possible," Trust Act § 104(c), does not override that primary purpose. The statute's various provisions, read together, require that the Trust generate revenue while still preserving the scenic beauty and historic character of the Presidio Landmark. An interpretation that would allow virtually any new construction in virtually any configuration the Trust chooses, so long as a park-wide square footage cap is not exceeded, is inconsistent with the primary purpose and plain language of the statue and must, therefore, be rejected.[3]

II. The Trust's Planned New Hotel Construction Does Not Minimize Harm to the Presidio to the Maximum Extent Possible, in Violation of Section 110(f) of the National Historic Preservation Act.

The Trust argues that it complied with Preservation Act section 110(f) by consulting the Advisory Council over construction of a new hotel complex in the center of the Main Post, and then scaling down the structure's total mass, tinkering with its configuration, and adding a faux historic exterior in response to the Council's concerns. But negotiating minor modifications to proposed new construction in the middle of a National Historic Landmark District does not satisfy section 110(f), which requires that the agency proposing an "undertaking"

[3] Importantly, the Trust never justified the project on financial self-sufficiency grounds.

minimize harm to the maximum extent possible. This heightened obligation to actually avoid harm whenever possible is separate from and in addition to the Trust's obligation to consult with the Advisory Council under both sections 106 and 110(f).

Here, it is the Main Post's unique blend and layered arrangement of historic structures from different military eras that undergirds the Presidio's historic integrity and its Landmark District status. In these circumstances, the Trust does not satisfy its heightened section 110(f) obligation by plunking a contemporary new building in the middle of the district without giving meaningful consideration to available alternatives – for example, overnight accommodations in renovated historic structures on the Main Post – that could entirely avoid new buildings while still achieving the agency's objectives. The Trust's failure to do so violated section 110(f).

A. The Trust Has Two Separate and Distinct Duties Under Section 110(f) – to Consult with the Advisory Council and to Minimize Harm to the Landmark to the Maximum Extent Possible.

Section 110(f) imposes two mandatory duties on any federal agency whose planning or actions may adversely affect a Landmark. First, agencies "shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark . . . ." 16 U.S.C. § 470h-2(f). Second, they "shall afford the Advisory Council on Historic Preservation a

reasonable opportunity to comment on the undertaking." Id. The second requirement is nearly identical to the section 106 consultation requirement and is not at issue here.

Plaintiffs' claim stems from the Trust's failure to satisfy section 110(f)'s first obligation – to minimize harm to the Presidio if at all possible. As the Park Service's Section 110 Standards and Guidelines explain, and the Trust does not dispute, "the larger message [is] that federal agencies have affirmative responsibilities under section 110 that go beyond the responsibility for compliance with section 106. In addition, these standards and guidelines make clear that they are in addition to, not instead of, other guidance and requirements, such as section 106." 63 Fed. Reg. 20,496 (Apr. 24, 1998) ("Section 110 Standards").

The difference between section 110(f)'s two distinct requirements is critical here. The consultation requirement of sections 106 and 110(f) focuses on the effects of a proposed undertaking to the relevant historic structure and on ways to mitigate those effects. For example, in completing its recent renovation of the historic Officer's Club at the top of the Main Post, the Trust needed to rehabilitate the building in a way that met its goals of providing event/educational space while still maintaining the structure's historic features and unique contribution to the

Landmark district.[4] The Trust's consultation with the Advisory Council and other agencies for that project presumably focused on how to protect and highlight the original Adobe walls, how to preserve the structure's Mission Revival architecture, and how to modernize and reconfigure indoor space to reflect its historic character.

The construction of a brand new, faux historic commercial building in the heart of a Landmark District, where none exists today, is an entirely different matter. The question raised by the Trust's new hotel proposal is not whether rooflines can be lowered to enhance the viewshed or whether a different façade would better mimic historic architecture. Rather, the critical question is whether it is "possible" to achieve the Trust's announced objective of accommodating overnight visitors in another way – e.g., by placing lodging in existing historic structures around the Main Post or somewhere else besides the focal point of the Landmark district. The Trust's consultation with the Advisory Council and Park Service regarding particular building features for the proposed new construction and the resulting Programmatic Agreement do not satisfy the Trust's affirmative section 110(f) obligation to explore feasible alternatives.

The Trust's reading of the Preservation Act collapses section 110(f)'s two requirements and section 106 into a single duty, comprised solely of consultation. That interpretation renders the robust language of section 110(f) virtually

[4] See http://www.presidio.gov/explore/Documents/Officers%20Club%20Overview% 20Fact%20Sheet.pdf.

meaningless, and does not reflect Congress's intent to impose a "higher standard of care" for National Historic Landmarks controlled by federal agencies.[5] H.R. Rep. No. 96-1457.

B. The Trust Failed to Minimize Harm to the Presidio Landmark Because It Did Not Evaluate, Let Alone Choose, Feasible Alternatives to New Construction.

1. The Trust's Planned New Construction Will Harm the Presidio's Historic Integrity.

The Presidio's rich history is most evident in the Main Post's array of "architectural styles and formal landscapes [that] illustrate the complex layering of construction over time." ER391. This architectural archive of successive sovereigns provides windows into different eras of the Presidio's history, dating back to 1776. Under the Preservation Act, the Trust must protect this layered arrangement of historic structures as it existed when Landmark status was granted. In the Main Post Update, the Trust proposes to rearrange the historic layout of the Landmark by inserting large-scale new construction into the middle of the Main Post, bisecting the very "heart of the park." Resp. Br. at 1.

[5] The Trust's interpretation of the Preservation Act is not entitled to deference because the Trust is not charged with implementing the generally applicable Preservation Act. It is the Park Service that has the authority to interpret section 110, which it does in consultation with the Advisory Council. 16 U.S.C. § 470a(g). The Advisory Council's interpretive authority is limited to section 106. Id. § 470s. The Council's regulations regarding section 110(f) are limited to the consultation provision that is identical to section 106's consultation requirement.

Wedged between the Main and Old Parade grounds, the 12 newly constructed buildings comprising the proposed faux historic hotel will concentrate overnight visitors, becoming the focal point of the most historic part of the Landmark. As a new destination spot, the hotel complex will degrade the integrity of the authentic historic features at the Main Post – a marked departure from the Trust's earlier plan to disperse overnight lodging in historic buildings in order to provide an authentic way for visitors to experience the Presidio's history. See ER932. The Programmatic Agreement memorialized the interagency section 106/110 consultation process, but it did not reverse the prior adverse effect finding by both the Park Service and the Trust that triggered the section 110(f) duties, and it did not address the actual harm to the Presidio.[6]

The Trust, like the district court below, relies heavily on the long-demolished Graham Street Barracks to justify its no harm conclusion. Resp. Br. at 2, 16, 51, 53. However, placing portions of the proposed new construction in the ghostly footprint of structures that were razed nearly two decades before the Presidio became a Landmark, and then slapping on a nineteenth century façade, does not eliminate the harm. See ER1415-23 (1962 arrangement of structures, not

[6] The Trust references two similar tables showing the Trust's proposals to resolve adverse effects identified in the Park Service's 213 Report and the Trust's Final Finding of Effect. Resp. Br. at 52. The Trust's proposals to scale down the hotel hardly demonstrate compliance with the Preservation Act's requirement to minimize harm to the Landmark, as discussed further below.

including the Graham Street Barracks). The Trust seeks solace in the Secretary of the Interior's "Standards for the Treatment of Historic Properties" ("Secretary's Standards").[7] Resp. Br. at 52. But these standards actually illustrate the Trust's error in relying on the placement and aesthetics of the non-existent barracks to justify the proposed new construction. The standards provide that "alteration of features, spaces, and spatial relationships that characterize a property will be avoided. . . . [and] new construction will not destroy historic materials, features, and spatial relationships that characterize the property." Secretary's Standards. Only "[c]hanges to a property that have acquired historic significance in their own right will be retained and preserved." Id. Here, it is the open space relationship between the Main Parade and Old Parade grounds that contributed to the Main Post's structural arrangement and integrity at the time of the 1962 Landmark designation. And it is that arrangement which must be protected, not the long-absent barracks.

Indeed, before this lawsuit, the Trust did not justify the new hotel as a reconstruction of former barracks. Even if it had, reconstruction is appropriate

[7] Available at http://www.nps.gov/history/local-law/arch_ stnds_8_2.htm. The Advisory Council notes that, for a section 106 analysis, new construction in a historic district "could be treated as a no adverse effect situation" if, among other conditions, it conforms to the Secretary's Standards. See Advisory Council on Historic Preservation, Section 106 Regulations Section-by-Section Questions and Answers, available at http://www.achp.gov/106q&a.html #800.5 (last updated Aug. 30, 2013) (emphasis added).

only when it is "essential to the public understanding of the property." Secretary's Standards. And recreating demolished barracks in the form of a modern hotel with a 1860s façade falsifies the Main Post's historic narrative. Id. ("Each property will be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or elements from other historic properties, will not be undertaken."). The absent barracks do not provide support for the Trust's argument that a new 110-room hotel complex has no effect on the Landmark's historic character and integrity.

2. Regardless of Labels, the Trust Did Not Meaningfully Consider Prudent and Feasible Alternatives and Thus Did Not Satisfy Its Section 110(f) "Higher Standard of Care."

The Trust spends many pages arguing that section 110(f)'s requirement to "minimize harm" to Landmarks "to the maximum extent possible" is "procedural" rather than "substantive." Resp. Br. 37-48. However, "[t]he words 'substantive' and 'procedural' are mere conceptual labels and in no sense talismanic." Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525, 549 (1958) (Whitaker, J., concurring). In any event, the Trust's line-drawing exercise provides little value in answering the relevant question in this case – whether the Trust satisfied the "higher standard of care" that Congress, the National Park, and the Trust all recognize under section 110(f). E.g., 1980 U.S.C.C.A.N. 6378, 6379, 6401; 63 Fed. Reg. 20,503 (Apr. 24, 1998); Resp. Br. at 39-40, 43-44 (conceding that

section 110(f) requires "heightened review" and imposes "a higher standard of care" than section 106).[8]

To answer that question, the Court must assess whether the Trust meaningfully considered and reasonably rejected "possible" ways to minimize or avoid harm caused by proposed new construction. See Resp. Br. at 37, 43 (conceding duty to "consider"). In particular, "the agency should consider all prudent and feasible alternatives to avoid an adverse effect on the [Landmark]." 63 Fed. Reg. at 20,503 (Standard 4(j) (emphasis added)). Only "[w]here such alternatives appear to require undue cost or to compromise the undertaking's goals and objectives" should the agency then "balance those goals and objectives with the intent of section 110(f)." Id. (Standard 4(k)).

The Trust argues that it need not consider prudent and reasonable alternatives to new construction and that, in any event, it did so. Resp. Br. at 55-56. Both arguments fail. First, minimizing harm to the maximum extent must include, where "possible," avoiding the harm altogether. At the very least, the "higher standard of care" imposed by those words means that the Trust must consider and evaluate available alternatives that avoid harmful new construction

[8] As the court explained in National Trust for Historic Preservation v. Blanck, 938 F. Supp. 908, 925-26 (D.D.C. 1996), aff'd, 203 F.3d 53 (D.C. Cir. 1999), when discussing section 110(a), "it should be emphasized that merely because a statutory requirement is described as 'procedural' does not render it any less meaningful or mandatory."

and, if the Trust rejects those alternatives, justify its reasons for doing so. The Trust's refusal to acknowledge that obligation when proposing 70,000 square feet of new construction on current open space confirms that the Trust sees itself as a completely autonomous redevelopment entity rather than a historic preservation agency.

Second, the Trust did not give serious or meaningful consideration to available historic building alternatives that might accommodate overnight visitors, on the Main Post or elsewhere. To be sure, the Trust's original 2002 management plan envisioned doing just that: "[P]art of the visitor experience at the Presidio will include the opportunity to stay overnight in an historic building, such as historic barracks or officers' quarters." ER932. That plan called for "small-scale" lodging in historic buildings dispersed throughout the Presidio, id. at 927, which would have integrated visitors into the fabric of a unique historic park. That such lodging possibilities exist is beyond dispute. See Open. Br. at 56-57; ER 932 (2002 management plan conclusion that it was "functionally and financially feasible" to create 180 to 250 rooms for overnight lodging by reusing historic buildings around the Presidio). Indeed, throughout the plan update process, the Park Service continued to press for lodging in renovated historic buildings as a viable alternative to new construction. ER 361.

Yet the Trust refused to seriously consider these possible alternatives, claiming a "lack of responses to its request for interest by potential development partners." Resp. Br. at 55-56 (citing SER 32 (single line in record stating the same)). There is no infeasibility analysis or other evidence in the record to support the Trust's conclusion. The Trust did not, for example, evaluate the economics of renovating historic buildings as new lodging, as it had done successfully with the Inn at the Presidio (http://www.innatthepresidio.com/), or balance costs against other goals, as required by the Park Service Guidelines. The Trust's reliance on the lack of developer bids is particularly unpersuasive given its recent announcement of plans to renovate one of the existing historic barracks on the Main Post for a hotel – without a developer. See Motion for Judicial Notice, Exh. A at 10 (stating that the "Trust is preparing to invest in an additional lodge on the Main Post, to open within the historic Montgomery Street Barracks, an iconic streetscape, in 2017"), B, C. And just last year, the Trust opened Funston House as an extension of the successful Inn at the Presidio. Id. at Exh. D. These actions undercut the Trust's assertion that such renovation projects are not possible or feasible alternatives to new construction. At a minimum, section 110(f) required the Trust to meaningfully evaluate them.

C. The Trust's Cited Case Law Authority Adds Virtually Nothing to the Analysis of the Unique Circumstances Here.

Given the narrow applicability of section 110(f) – it applies only to federal agency actions affecting National Landmarks – it is hardly surprising that, as the Trust notes, few courts have interpreted its language. National Landmark status, which provides the highest level of historic protection under the Preservation Act, has been granted to only three percent of the sites listed on the National Register.[9] It is reserved for such national treasures as Niagara Falls, Mount Rushmore National Monument, the Washington Monument, and, of course, the Presidio. And most other Landmarks are not targeted for new construction or development. But the fact that section 110(f) is rarely implicated does not mean it is toothless.

The Trust's cited cases generally do not involve section 110(f) at all, either because the site is federal but not a Landmark and/or because there was no federal trigger. See Blanck, 938 F. Supp. 908 (applying section 110(a), not 110(f), in connection with historic buildings at the Walter Reed Army Medical Center); Lee v. Thornburgh, 877 F.2d 1053, 1055-58 (D.C. Cir. 1989) (finding that sections 110(b) and (d) were never triggered where no federal agency approved funding for the project); Wilderness Watch v. Iwamoto, 853 F. Supp. 2d 1063 (W.D. Wash. 2012) (discussing section 110(a) but finding it did not control); Oglala Sioux Tribe

[9] National Historic Landmarks Program, National Park Service, at http://www.nps.gov/nhl/ qa.htm#1.

v. U.S. Army Corps of Eng'rs, 537 F. Supp. 2d 161, 172-173 (D.D.C. 2008) (finding no violation of section 110(a)); Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin., 463 F.3d 50, 55 (1st Cir. 2006) (analyzing section 106 but declining to apply section 110(f) because wheelchair access renovation under ADA did not harm adjacent Landmark); Friends of Hamilton Grange v. Salazar, No. 08CIV5220 (DLC), 2009 WL 650262, at *20-22 (S.D.N.Y. Mar. 12, 2009) (finding no agency action ripe for review). Because other parts of section 110 do impose a duty to "minimize harm to the maximum extent possible," these cases have no bearing or precedential value here.

The only case that actually analyzes section 110(f)'s "minimize harm" standard involved the renovation of a historic hotel; there, the court concluded that the proposal avoided adverse effects, but noted that "it is seldom possible to avoid all adverse effects from new construction." Lesser v. City of Cape May, 110 F. Supp. 2d 303, 319 (D.N.J. 2000) (citing 36 C.F.R. Part 800, at 38).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and set aside the flawed Main Post Update.

November 21, 2014 Respectfully submitted,

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