



Sept. 16, 2008

TO: Presidio Trust
FROM: Gary Widman, President

Presidio Historical Association General Comments on Sec. 106 Process and on Untitled, Unsigned Presidio Trust Document of 5/27/08

The subject 5/27/08 document, though untitled and unsigned, is apparently self-referenced on its cover errata page and page 1 as “Presidio Trust Main Post Undertaking NHPA Consultation Package”. Other Trust correspondence refers to a “Draft FOE and Consultation Plan” as the subject of a Sept. 16 meeting. (This document may or may not be that Draft FOE {Finding of Effects} and Plan referenced in that correspondence. Nevertheless, it will be referred to below as the “Draft FOE”.)

A. Introduction

The Presidio Historical Association, (PHA) is always pleased to respond to lawful invitations to comment on the Trust’s Sec. 106 work product, pursuant to the Programmatic Agreement for Area “B” of the Presidio (PA) and other applicable laws. It is clear that the 5/27/08 “package” is not such a document. But the PHA will nevertheless offer comments with the clear understanding that its participation and comment is NOT an acknowledgement that the subject Trust document is, or was, lawfully prepared. The PHA looks forward to that future time when it will receive a lawful Draft FOE, prepared by a professionally qualified Federal Preservation Officer (FPO), with verifiably accurate representations, as prescribed by the PA and other applicable law. It has not received such a draft FOE to date.

The PHA will also look forward to participating in modified NEPA and NHPA processes, where the Trust provides lawful Sec. 106 document drafts, allows adequate time for public comment on them, followed by adequate time for the Trust to analyze and modify its proposals in response. This should be followed by appropriate and lawful input of those Sec. 106 effects into a Draft Environmental Impact Statement where they may be considered by the public, and thereafter considered by the Trust, along with the public’s comments, prior to issuing a Final EIS or undertaking to make a decision. As an alternative, the Trust might select the prescribed “parallel” or “integrated” approaches for

combining simultaneous NHPA and NEPA processes as prescribed by Council on Environmental Quality (CEQ) guidance.

We will offer general and “big picture” comments in this memorandum, to be followed by narrower, more specific comments in a second memorandum. Our comments are based on the facts as we see and understand them. If you can show us that any of our factual statements are in error, we would appreciate your so informing us.

B. General Comments, Concerns And Suggestions

1. Legal Adequacy of the Presidio Trust’s Draft FOE

The Draft FOE is unsigned. It therefore appears that the Trust failed or declined to have its Draft FOE prepared or signed either by the Federal Preservation Officer (FPO) employed on the date of the document or by the independent historic preservation contractor it hired thereafter. It is therefore clear that this Draft FOE cannot comply with the requirements of the PA or of applicable laws or regulations. The reason for the understandable FPO requirement of the PA is that the public and commenting organizations should not have to take the time to independently verify the truth of statements made. The commenting parties are not required to accept the word or the work of anyone less than a fully qualified FPO. By investing staff time in this Draft FOE, and by inviting commenting parties to analyze this document, the Trust has encouraged the waste of time, energy, funds and goodwill by the public and by itself. A review of the document, with the flaws identified below and in a later memorandum, suggests that concerns over the document’s integrity are well justified.

Suggestion: The Trust hire a qualified FPO, ask him or her to independently review existing data, independently acquire missing data and professionally prepare a legally adequate Draft FOE, followed by appropriate comment, and appropriate revision of the Trust proposals. The Trust should modify its NEPA process to accommodate the input of such lawfully acquired, but delayed, input from the NHPA process. The PA and other laws require nothing less. They also implicitly require the NHPA and NEPA processes to be halted until those steps are taken to bring them back into compliance with the law.

2. Failure of the Trust to Give Notice of its Choice of Process for Combining NEPA and NHPA compliance.

As noted in prior comments, CEQ guidance suggests two alternative processes for simultaneous compliance with NEPA and the NHPA, (the “parallel” or “integrated” methods). The Trust has not announced which of these two processes it is using. Specificity of this choice is important so that all may know what steps to expect in the future co-ordination of these two processes. It is noted that a recent letter from the State

Historic Preservation Office expressed concern over the Trust's failure to adequately comply with both processes when used simultaneously.

Suggestion: The Trust should immediately specify which process it will use for simultaneously complying with both NEPA and NHPA, and set out steps to insure that full information developed under the NHPA will be lawfully incorporated into the NEPA process at a point when the public can meaningfully comment upon it, and when the Trust can reflect and act on those comments in its decisions.

3. Failure of the Trust to Comply with Sec. 104 (c) (3) of the Trust Act (limiting new construction)

Trust legislation is quite specific in limiting new construction to replacement of existing structures of similar size. The law is not phrased in technical jargon, and is not rocket science. This law has apparently been ignored by the Trust in formulating and advocating its proposals. A federal court decision interpreting that section was called to the Trust's attention prior to its July 14 hearing. Requests for responses from the Trust since that time have gone unanswered. The Trust appears to have spent hundreds of thousands of dollars, perhaps more, preparing and advocating proposals which it knew, or should have known, would violate the law, and is apparently preparing to spend still more.

Suggestion: In order to prevent the unnecessary waste of public funds and the unnecessary waste of funds and time by commenting agencies and public organizations, the Trust should take the only reasonable step under the circumstances—withdraw all proposals that violate Sec. 104 (c) (3). That would require, at a minimum, immediate withdrawal of the proposed amendments to the PTMP, proposed amendments to the Main Post Design Guidelines, and of proposals to construct a contemporary art museum or a massive hotel in the Main Post. Anything short of such a withdrawal would appear to be a willful violation of the law, and arbitrary and capricious agency action.

4. Failure of the Trust to comply with Sec. 104 (a) of the Trust Act.

This section sets out the "Overall Requirements of the Trust". It requires that the Trust exercise its "authorities" "****in accordance with the purposes set forth ***" in the Act establishing the GGNRA and Presidio Park., and in accordance with the "management plan" approved for the Presidio. The Trust's proposals violate these provisions. The Trust was advised in an April letter from the National Park Service (NPS) (the agency with legislative authority to define park purposes) that the Trust's proposals were clearly harmful to the historic integrity of the Main Post portion of the National Historic Landmark District (NHLA). While the NPS did accept the 2002 Presidio Trust Master Plan, it has not agreed with the Plan changes and Design Guideline changes currently advocated by the Trust. It therefore clearly appears that the Trust proposals identified in paragraph 3. above, and possibly others as well, also violate Sec. 104 (a) of the Trust Act.

Suggestion: Again, in the interest of preventing the waste of hundreds of thousands of dollars by the Presidio Trust, and in the interest of protecting the Presidio Park, it appears that the only responsible course of action by the Trust is to immediately withdraw all its proposed PTMP amendments, Main Post Design Guideline amendments and all presently proposed construction in the Main Post. As in the above case, it appears that failure to do so would constitute willful violation of the law, and arbitrary and capricious agency action.

5. Failure of the Presidio Trust to Provide legally Required Documentation

The regulation at 36 CFR 800.11 provides that:

The agency official shall ensure that a determination, finding, or agreement *** under the procedures of this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis.

The Presidio Trust has not only failed to provide the described documentation, it has refused to respond to requests for more specific information about its proposals. A few examples include:

- a. Failure to provide requested dimensioned sections, story poles or other measurements for specific building on specific sites. Even though the Trust received its bid for the Art Museum in 2007, it still refuses to provide dimensioned sections for that building, or for the grading of sites underlying that building, or for the use of land outside the building for art display. Similarly, little information is available on the design and site plans for the Hotel or Heritage Center. The Multiplex Theater and remodeled chapel proposals were sprung on the participants in mid-process with little or no architectural information.
- b. Cumulative effect information is missing, thereby preventing commenting parties from fairly assessing the cumulative effects of the proposed projects and their cumulative effects considered with the Disney Museum, Esplanade or other approved or proposed structures in the Main Post.
- c. Many conclusions in the document state that there is no “adverse effect” because the proposal will comply with the Secretary’s standards. There is no information provided confirming that there will be compliance with those standards, (pursuant to 36 CFR 800.11) but there is information suggesting they will not be in compliance. For example, in every case, alternative sites off the Main Post are available, which would involve less adverse impact on the historically important Main Post. If the Secretary’s standards were complied

with, there would be no new construction on the Main Post so long as those alternatives were available. In short, more factual information is needed, along with fewer asserted, but unsupported, conclusions describing little or no adverse impact. And of course, evidence of compliance with the Secretary's standards is needed.

d. In other cases, descriptions suggest there will be "adverse impacts" but that two-dimensional description does not convey the fact that the adverse impacts will be devastating. For example, there is no mention of the NPS April letter, which advised that if the Trust's large museum and hotel projects were to proceed, it would place the entire NHLD at risk of termination. Such termination would then raise the question as to whether there were resources in the Presidio capable of maintaining its status as a National Park.

For all these reasons, it now appears that the Sec. 106 process, as implemented by the Trust to date, is fatally defective. It further appears that the only reasonable step that would bring the Trust into compliance with the law and prevent an enormous waste of public funds is withdrawal of all the current master plan, design guideline, and project proposals for the Main Post.

Detailed comments will follow in a second memorandum.