

Presidio Trust Board of Directors  
Mr. David Grubb, Chairman  
Mr. Craig Middleton, Executive Director and Acting Historic Preservation Officer  
Mr. John Pelka, Environmental Compliance Manager  
Presidio Trust  
P.O. Box 28052  
San Francisco, CA 94129

May 31, 2009

**Comments by the Marina Community Association (“MCA”)**  
**Concerning the Presidio Trust’s (“Trust”)**  
**Supplement to Draft Supplemental Environmental Impact Statement (“SDSEIS”)**  
**and**  
**Revised Draft Main Post Update “RDMPU”**,  
**both dated February 2009**

Dear Directors and Messrs. Grubb, Middleton and Pelka:

The Marina Community Association (“MCA”) is submitting three separate documents containing comments on the above documents. The MCA previously submitted our first document as comments in April 2009 concerning the Revised Draft Finding of Effect as part of the Section 106 consultation process. We include those comments by reference in this document and request that they be made part of the official file of public comments.

In addition the MCA will submit two additional documents. This second document will focus on the integrity of the public review process and compliance with the appropriate laws. Separately, we will submit a third document which will focus on environmental impacts.

The MCA is a member organization of the San Francisco Board of Supervisors’ Presidio Neighborhood Representative Work Group (“PNRWG”) and incorporates the PNRWG’s comments by reference with these comments. The MCA is also a member of the Neighborhood Association of Presidio Planning (“NAPP”), and incorporates NAPP’s comments by reference in this document.

**SUMMARY OF COMMENTS**

1. It is the opinion of the MCA that the SDSEIS and RDMPU do not bring more specificity to the Presidio Trust Management Plan (“PTMP”), but rather they reverse and destroy many elements of the plan.

2. It is the opinion of the MCA that the Trust has abused the public process required by the National Environmental Policy Act (“NEPA”) in order to attempt to justify a deal to which it was already committed.
3. It is the opinion of the MCA that two Directors of the Trust may have an apparent conflict of interest in relation to this matter.
4. It is the opinion of the MCA that the preferred alternative described in the above documents will violate several sections of the Presidio Trust Act (“PTA”)
5. It is the opinion of the MCA that the Trust has not addressed the cumulative effects of the proposed actions in sufficient specific detail.

### **PURPOSE AND NEED**

The Trust identifies the purpose and need in the SDSEIS by stating (at page S-1) that it is updating the planning concept “in order to take into account several proposals, including CAMP...” The SDSEIS further states that the RDMPU is intended to bring “more specificity” to the PTMP.

As will be shown below, the RDMPU does not bring more specificity – it radically changes the PTMP and contradicts it. The following analysis will show that the purpose and need for the preferred alternative in the SDSEIS were devised (after a number of false starts and attempts to circumvent the legal process) as a way of attempting to accommodate a deal that the Trust had already agreed to.

### **APPLICABLE LAW**

The actions proposed by the Trust are governed by the following acts and laws.

1. National Environmental Policy Act (“NEPA”).
2. National Historic Preservation Act (“NHPA”).
3. Presidio Trust Act (“PTA”)
4. Code of Federal Regulations, Title 5, Section 2635 (“5 CFR 2635”)
5. By-laws of the Presidio Trust.

### **THE PROCESS FOLLOWED BY THE TRUST**

It is the opinion of the MCA that the process by which we have reached this comment stage has been biased and flawed, and that any decision that results from the process will be equally flawed.

The following chronology of the process will show that the Trust decided to proceed with

the Contemporary Art Museum at the Presidio (“CAMP”), even though that decision was contrary to the Presidio Trust Management Plan (“PTMP”). The chronology will also show that the Trust’s solution to that dilemma was to attempt to change the PTMP, rather than comply with it. It will also show that the Trust was reluctant to let its legal obligations get in the way of a deal it had already decided to make. It will further show that overwhelming criticism from the public and other responsible agencies has belatedly pushed the Trust into a half-hearted attempt to comply with NEPA and NHPA.

In May 2002, after extensive public review and following the required legal procedures, the Trust announced the Presidio Trust Management Plan (“PTMP”). Among the commitments made in the PTMP were:

- “The Presidio’s National Historic Landmark status will be preserved: any changes within the landmark district will comply with the NHPA and be compatible with existing structures.”
- “New construction would only be undertaken in already developed areas to replace square footage that has been removed.”
- “Planning district guidelines ensure that new construction will not jeopardize the integrity and status of the National Historic Landmark District (“NHLD”).”
- “The 100,000 square-foot Commissary is the preferred location for a large museum. The hangars at the west end of Crissy Field are another possible museum location.”
- “In recognition of the Presidio’s historic significance, PTMP makes an unequivocal commitment to protection of the NHLD status.”

In April 2007 the Trust began:

“discussing possible terms with Don Fisher in connection with CAMP. Trustee Burke summarized the key terms, including proposed location, size, financial terms and funding, parking requirements, management and lease term.” (*see Trust Board Minutes 7/26/07*)

In July 2007 the Trust Board:

“directed Mr. Burke to proceed with a draft term sheet for the proposed museum and Mr. Middleton to issue an RFP to compete (sic) the use of space around the Main Parade Ground for cultural purposes.” (*see Trust Board Minutes 7/26/07*). Thus the Trust had started to negotiate the proposed Museum with Mr. Fisher in a location which was contrary to the 2002 PTMP.

In August 8, 2007 the Trust issued a Request for Proposal (“RFP”) for “Premier Cultural Institutions at the Presidio Main Post”. The RFP stated that:

- “New construction would be located immediately south of the Main Parade Ground.”
- “The Trust will entertain proposals for a building up to 100,000 square feet.”
- “This new building should be a contemporary intervention, intentionally differentiated from the historic landscape, site features, and buildings in style and appearance.”

The Trust also requested public scoping comments for an EIS for a museum on the Main Post. Thus the Trust issued an RFP concerning the location of the museum and the design of the building, both factors being in contradiction to the 2002 PTMP. The use of the phrase “contemporary intervention” makes it quite clear that this was an RFP that was designed to make sure that CAMP was the only winning proposal.

On September 19, 2007 the Trust approved “Adoption of Main Parade Plan and Environmental Assessment and Approval of Finding of No Significant Impact”. Although the Board minutes do not specify the location of CAMP, it is clear from the August 8 RFP that the Board was approving a museum immediately south of the Main Parade Ground (*see Trust Board Minutes 9/19/07*).

The September 19, 2007 minutes also indicated that:

“Don and Doris Fisher have indicated their intention to donate \$10M to the development of the Main Parade area.”

Thus the Trust adopted environmental and historic preservation findings that were contrary to the 2002 PTMP – only 42 days after requesting scoping comments from the public and four weeks prior to the close of public comment period. This is a clear example of the Trust going through the motions of following the law but not letting legal barriers get in the way of the pre-determined course of action.

On October 10, 2007 the Trust was told that:

“proposals involving new construction for cultural institutions in the Main Post area are due on November 9, 2007. The Board agreed that no conversations with any development team should be held until proposals had been received and the deadline for receipt had passed.”

Thus the trust was unwilling to talk to other developers, even though they had been talking to Mr. Fisher for six months (*see Trust Board Minutes 10/10/07*).

On October 15, 2007 the scoping period closed for public comments on the EIS for a museum on the Main Post. The Trust received 86 comments, including one with 125

signatures. Several urged the Trust to expand the museum EIS to include other planned actions concerning the Main Post.

On October 23, 2007 the Trust decided to expand the scope of the EIS to be an SEIS Main Post Update to the 2002 PTMP (*see Trust Announcement*). This decision was taken a month after the Trust had already voted to approve the museum on the Main Post – which suggests that the Trust was just going through the motions of the legal process, but had already reached a decision.

On November 9, 2007 Mr. Fisher sent a five-page letter of intent for building 101 (*see Fisher letter to Middleton, dated July 21, 2008*). Building 101 is adjacent to the site on the Main Parade Ground where Mr. Fisher wished to locate CAMP. This is further evidence that Mr. Fisher was confident that he had a “deal” for CAMP at the top of the Main Parade Ground.

On January 24, 2008 the Trust agreed to proceed with CAMP, even though the NEPA and NHPA compliance processes were still underway (*see Trust Board Minutes 1/24/08*). The Board discussed:

“making a public statement about moving ahead with the CAMP concept, without making any decision about the site or the design of the project...”

It is interesting to note that the minutes did not say that no decision about site and design had been made – but merely that a public statement to that effect should be made.

This is a prime example that illustrates the deviousness with which the Trust has dealt with the public in this matter. An RFP had been issued in August 2007 defining the site and design of CAMP. Mr. Fisher had submitted a letter of intent in November 2007 for building 101, which is adjacent to the CAMP site identified in the RFP. It is clear that the Trust understood full well the proposed site and design of CAMP, but wished the public not to conclude that CAMP was a “fait accompli”. This shows further evidence of the lack of seriousness with which the Trust viewed its NEPA and NHPA obligations, and its disregard for the public participation in the decision process.

On April 4, 2008 the Trust was warned by the National Park Service that proceeding with the proposed plans for the Main Post would probably endanger the NHLD (*see O’Neill letter to Middleton 4/4/08*).

On June 9, 2008 the DSEIS for Main Post was published, even though the Trust had already decided six months earlier to proceed with the CAMP proposal, and the National Park Service had warned about the danger to the NHLD status. Public comment was due on July 31, 2008. This is a further example of the cynical way in which the Trust asked the public to “jump through the hoops” of the NEPA and NHPA process in order to give a public appearance of a legitimate process, even though the decision to proceed with CAMP had already been taken.

On July 14, 2008 the Trust held a public Board meeting to receive comments on the DSEIS for the Main Post. There were 107 speakers recorded of which 76% opposed the Trust's plan (*analysis of comments performed by MCA*).

On July 21, 2008, Mr. Fisher complained to Mr. Middleton that he had already spent over \$4 million in preparation for starting construction on his museum by November 1, 2008 (*see Fisher letter to Middleton, dated July 21, 2008*). He complained of several delays and his frustration with the process. Among his comments were:

“As you know when I negotiated the non-binding LOI with Bob Burke I said the only reason I would do a deal with the Trust was to avoid the City's bureaucracy and get started by November 1”

“We were always under the understanding that all leases on the proposed location would expire by October 31 allowing us to start construction if everything went according to schedule on November 1.”

This was just one week after a Trust public Board meeting at which Mr. Fisher was present, and at which there were about 500 attendees with another 200 waiting outside. As mentioned above the public comment at that meeting was strongly opposed to CAMP. The period for public comment had a week more to run.

This letter is a clear indication that the Trust had given Mr. Fisher a strong enough understanding that he had a “deal” that he had been willing to spend \$4 million and was prepared to start construction in October 2008 at the “proposed location”.

At the same time the public was led to believe that it was participating in legal reviews taking place under NEPA and NHPA, and that the public still had an opportunity to influence the outcome. This letter by Mr. Fisher is compelling evidence of the bias with which this process has been conducted, and standing alone is sufficient to question whether the process can ever reach a legitimate conclusion.

On September 2, 2008 the public comment period for DSEIS was extended to October 20, 2008, and later extended again.

On November 12, 2008 the Trust announced cancellation of the planned November 13 public Board meeting because it was working on strategies “that would avoid, minimize, or mitigate effects from the proposed projects on the NHLD.” The Trust had already decided in January 2008 to proceed with CAMP, and had ignored comments from the public and the National Park Service for 11 months. The signatory parties to the NHPA Section 106 process apparently were finally successful in convincing the Trust that the laws were meant to be followed.

On December 9, 2008 another public Trust Board meeting was held. At that meeting Chairman Grubb stated:

“But two laws in particular are most important to our planning process – the National Environmental Policy Act, or NEPA, and Section 106 of the National Historic Preservation Act. These laws outline different processes that we conduct simultaneously in parallel. The final decision by the Board of Directors is informed by both these processes and is not taken until both are concluded.”

What Mr. Grubb failed to tell the public is that the Board had already decided to proceed with CAMP – almost a year earlier – and before the NEPA or NHPA processes had even started. At the same public meeting Trust Executive Director Middleton described changed plans for the Main Post:

“We believe that reducing the scale of visible new construction is important.”

The careful choice of the adjective “visible” by Mr. Middleton is interesting because the resulting changes did not reduce new construction, but merely buried some of it below ground level. Mr. Middleton also stated that:

“--new architecture – needs to be compatible with the historic context in which it is sited.”

There were 51 public comments recorded at this meeting of which 86% opposed the Trust’s plan (*analysis of comments performed by MCA*).

On January 14, 2009 the Trust Board discussed a new preferred alternative for the Main Post SEIS, and on February 11, 2009 the Trust Board approved a new preferred alternative for the Main Post SEIS (*see Trust Board minutes 1/14/09 and 2/11/09*).

On February 27, 2009 Supplement to Draft Supplemental Environmental Impact Statement (“SDSEIS”), Draft Finding of Effect for the Main Post Update (“DFOE”), and Revised Draft Main Post Update “RDMPU”) were all issued.

On April 7, 2009 the Presidio Trust held another public Board meeting at which there were 103 public comments recorded, of which 83% opposed the Trust’s plan (*analysis of comments performed by MCA*). At this meeting Mr. Middleton stated:

“We’ve received over 2,000 comments on the Main Post. Public input has been varied.”

That is a misleading statement. The MCA has analyzed all written comments and all oral comments that are in the Trust’s files. Our analysis shows that there is not as much variation as Mr. Middleton would have us believe. Over 80% of the 791 comments in the files were opposed to the Trust’s plans for the Main Post.

The preceding chronology clearly shows that the Trust started to negotiate a deal with Mr. Fisher in April 2007 and continued to negotiate details throughout 2007. The Trust decided in January 2008 to proceed with CAMP, but decided to keep that fact from the

public. For all of 2008 and to date in 2009 the Trust has engaged in a public process that has been deliberately deceptive and has consisted of post facto attempts to justify that decision by engaging the public in incomplete, half-hearted and misleading attempts to comply with NEPA and NHPA.

### **POTENTIAL CONFLICTS OF INTEREST**

In the conduct of business the Trustees are subject to the by-laws of the Trust and the “Supplemental Standards of Conduct for Directors of the Presidio Trust”, dated November 18, 2003. This last document also requires the Trustees to adhere to 5 CFR Section 2635. These documents address the subject of appearance of conflicts of interest.

The current proposals raise questions as to whether Mr. Grubb and/or Mr. Wilson should recuse themselves from deliberation in this process. These questions concern relationships that Messrs. Grubb and Wilson might have with their former employers.

Mr. Grubb served as Chairman of Swinerton when appointed to the Trust Board in 2003. The Swinerton website discloses that Swinerton built the GAP Stores Headquarters in San Francisco and GAP offices in San Bruno. It also lists projects that include the deYoung Museum and the SF Museum of Modern Art.

Swinerton Inc. could be a bidder on the CAMP project if it were approved by the Trust Board. That could give Mr. Grubb, as former Chairman of Swinerton, an appearance of a conflict of interest particularly as CAMP is proposed by Mr. Fisher, founder and ex-Chairman of GAP.

Under 5 CFR 2635 the MCA requests that the Trust disclose whether or not Mr. Grubb or his family have any remaining financial interest in Swinerton Inc. If such a financial interest exists, then Mr. Grubb should recuse himself from any discussion or vote by the Trust Board on the current proposals, or Swinerton should commit not bid on construction of CAMP, the lodge or theater expansion,

Mr. Wilson founded Webcor Builders Inc. which lists as clients Lucas Digital Arts in the Presidio. Webcor is in a position to compete for any construction project that might be allowed under the proposed RDMPU. That could give Mr. Wilson, as founder of Webcor, an appearance of a conflict of interest.

Under 5 CFR 2635 the MCA requests that the Trust disclose whether or not Mr. Wilson or his family have any remaining financial interest in Webcor Inc. If such a financial interest exists, then Mr. Wilson should recuse himself from any discussion or vote by the Trust Board on the current proposals, or Webcor should commit not to bid on construction of CAMP, the lodge or theater expansion,

## THE PRESIDIO TRUST ACT (“PTA”)

The actions proposed by the Trust also violate several sections of the PTA. Those sections involve:

- historical integrity
- NHLD status
- limitations on new construction

### Historical Integrity and NHLD

The PTA Section 101 (3) states that the role of the Trust is:

“preservation of the cultural and historic integrity of the Presidio for public use recognizes its significant role in the history of the United States.”

PTA Section 101 (5) states that:

“... resources must be managed in a manner ... which protects the Presidio from development and uses which would destroy the scenic beauty and historic and natural character of the area ....”

The National Park Service issued report under Section 213 of the NHPA on April 6, 2009. That report stated:

“The proposed undertaking will have a significant adverse effect on the Presidio of San Francisco NHLD because key character defining features and contributing resources will be adversely and irreversibly effected (sic).”

Thus the proposed plans not only contradict the PTMP’s

“unequivocal commitment to protection of the NHLD status”.

They also violate sections 101 (3) and (5) of the PTA.

### Limitations on New Construction

Section 104 (c) (3) of the PTA requires that:

“new construction (be) limited to replacement of existing structures of similar size in existing areas of development.”

The proposed plans do not comply with that section of the PTA. Page 47 of the RDMPU shows proposed new construction of 253,000 square feet, and proposed demolition of 117,032 square feet. Thus, rather than limiting new construction to replacement of

buildings of a similar size, the plans call for a more than a two-fold increase in new construction.

If one were to discount new construction and demolition already approved since the PTMP and the demolition due to Doyle Drive, the remaining figures give the incremental effect of the proposed plans. That shows new construction of 228,000 square feet and demolition of 82,510 square feet. That shows a new construction ratio of about 2.75 to one, instead of the one-to-one required by the PTA.

The 228,000 square feet or 253,000 square feet of new construction shown on page 47 of the RDMPU are underestimates because of the three additional sources of new construction described below.

Firstly, there will be at least an additional 170,000 sq. ft. for the three proposed underground parking structures (35,000 sq. ft. for the relocated CAMP garage (100 spaces); 30,000 sq. ft. for the Lodge garage (65 spaces) and 105,000 sq. ft. for the North Bluff garage (300 spaces). The 105,000 sq. ft. for the 300 space garage is estimated as three times the size of the 35,000 sq. ft. for the 100 space CAMP-annex garage.

Secondly, there will be at least 20,000 sq. ft. of new construction resulting from CAMP's three sunken courtyards, its partially glassed-in walkways beneath the overhanging roof, its café plaza, and its underground hallways. The RDMPU does not provide specific dimensions for this construction; however, a conservative estimate of these additions is 20,000 sq. ft., based on the concept drawing at page 47 of the RDMPU.

Thirdly, the total should also include the building without walls proposed to be constructed on the Main Parade in front of the Lodge. While dimensions for this structure are not provided in the RDMPU, Trust drawings suggest it will be approximately 5,000 sq. ft.

Thus, the grand total of the new construction on the Main Post would be approximately 448,000 sq. ft. In contrast, the Preferred Alternative proposes to demolish 82,510 sq. ft. of usable existing buildings, for a ratio of over 5:1.

Whether the new construction plans are calculated at two-for-one, two and three quarters-for-one or at five-for-one, they clearly violate the one-for-one requirements of Section 104 (c) (3) of the PTA.

This one-for-one requirement of the PTA has been litigated before in

*Sierra Club v. John O. Marsh, N.D. Cal C-86-0289 WWS.*

This 1986 case involved a proposal by the U.S. Army to build a Post Office on Crissy Field. It concerned the 1972 Act which established the Golden Gate National Recreation Area ("GGNRA"), but it is directly applicable to the PTA because Section 104 (a) of the PTA requires the Trust to operate in accordance with the 1972 GGNRA Act. The Court

in this case pointed to the 1979 guidelines issued by the National Park Service concerning new construction in the GGNRA. Those guidelines stated:

“The first requirement for a new structure is that a building of ‘similar size’ must be demolished first. A number of smaller buildings can not be demolished to accumulate credit for one large building.”

“These requirements are Federal law. The National Park Service has no power to modify these restrictions.”

The Court in the above case stated:

“It is clear that this statute has been carefully considered and fully understood by responsible agencies of the government.”

This has become known as the one-up/one-down rule.

In footnote 20 on page 34 of the SDSEIS the Trust asserts that:

“‘banked’ square footage of demolished structures – may be used for new construction in existing areas of development, thereby maintaining the overall cap on developed square footage in the Presidio.”

The Trust gives no legal justification for its “banked square footage” assertion, but refers the reader to page 258 of the June 2008 DSEIS which states that:

“ .. past U.S. Army and NPS practices indicate that the Trust can demolish structures and ‘bank’ or hold in reserve the square footage for an indefinite period, drawing upon it later to provide the basis for building additions or new construction throughout Area B of the Presidio.”

That unsupported assertion is contrary to Section 104 (c) (3) of the PTA, contrary to the GGNRA Act of 1972, contrary to the National Park Service guidelines of 1979, and contrary to the Court’s ruling in *Sierra Club v. John Marsh*, which specifically denied the Army’s plan to do what the Trust now plans to do.

## **CUMULATIVE IMPACTS**

The NEPA definition of cumulative impact is contained in 40 C.F.R. Section 1508.7:

“Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person

undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

Among the adverse impacts in the current proposals are:

- New construction of up to 450,000 square feet
- Introduction of traffic lights
- Creation of pedestrian malls
- Demolition of sports facilities
- 300% increase in the number of visitors
- Severe degradation of traffic intersections in the City of San Francisco
- Financial impact on MUNI to provide service

Decisions in the Federal Appeals Courts, and particularly in the Ninth Circuit, have shown that it is necessary to review these cumulative impacts in depth and not just make conclusory assertions. In a case brought by neighbors against the US Forest Service concerning timber sales, the Ninth Circuit found the EIS inadequate because it contained only “general statements about possible effects” rather than the required analysis (*see In Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F. 3d 1372 (9<sup>th</sup>. Cir. 1998).

In another case the D.C. Circuit found for the National Resources Defense Council, holding that an EIS was inadequate because it contained only “conclusory remarks” (*see In Natural Res. Def. Council, Inc. v. Hodel*, 865 F. 2d 288 (D.C. Cir. 1988).

It is the opinion of the MCA that the SDSEIS does not adequately address the cumulative impacts of the proposed action, along with other actions already taken or planned, in sufficient detail for the cumulative effects to be reasonably determined.

This is particularly true of the traffic and consequent financial impacts on the City of San Francisco, which is already facing a major budget deficit. These traffic impacts are discussed in a separate comments document that is being submitted by the MCA.

In October 2008 the SFMTA produced a report for the PNRWG, which gave some preliminary estimates of the cost to MUNI of providing the transportation for visitors projected by the earlier version on the SEIS. The estimates were for an initial capital cost of \$18.9 million and annual operating costs of \$8.8 million. Since that time estimates of annual visitors have increased by about 18%, and so the cost estimates may increase. This burden will have to be added to the current MUNI budget deficit of approximately \$130 million.

## **CONCLUSION**

The following comments summarize the opinions of the MCA.

1. The SDSEIS and RDMPU do not bring more specificity to the PTMP, but rather they reverse and destroy many elements of the plan.
2. The Trust has abused the public process required by the NEPA in order to attempt to justify a deal to which it was already committed.
3. Two Directors of the Trust may have an apparent conflict of interest in relation to this matter.
4. The preferred alternative described will violate several sections of the PTA.
5. The Trust has not addressed the cumulative effects of the proposed actions in sufficient specific detail.