

August 26, 2009

Mr. Collins D. Lam, P.E.  
Chair, Mayor's Waikiki Natatorium Task Force  
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## **BY EMAIL**

Re: Historic Waikiki Natatorium - Legal and Regulatory Issues for  
Consideration

Dear Chairman Lam:

On behalf of the National Trust for Historic Preservation we appreciate the opportunity to provide an overview of the state and federal legal framework that applies to the proposed demolition of the Waikiki War Memorial Natatorium. We recognize the difficult work the Waikiki Natatorium Task Force for has been asked to perform on this issue. However, it is essential to understand the laws that exist to protect this unique historic resource in order to make an informed recommendation to the Mayor.

Most alternatives currently being considered by the Task Force would require substantial additional regulatory review. This letter outlines several applicable federal laws and regulations that caution against permanently altering the existing conditions of the shoreline. Most pertinently, the Army Corps of Engineers must evaluate alternatives to any proposal that would harm the Natatorium, a resource listed in the National Register of Historic Places, prior to issuing the permits that would be required for demolition.

Additionally, we remain extremely concerned that the City's continued neglect of the Natatorium poses a serious risk to the marine environment and public safety. The threat of its collapse poses a serious and immediate danger. We urge the Task Force to recommend the immediate stabilization of the pool and bleachers as the most responsible alternative to protect the public interest.

## **Interests of the National Trust**

The National Trust for Historic Preservation was chartered by Congress in 1949 as a private nonprofit organization for the purpose of furthering the historic

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preservation policies of the United States and facilitating public participation in the preservation of our nation's heritage. 16 U.S.C. § 468. With the support of our 230,000 members nationwide, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The Trust has nine regional and field offices around the country, including a Western Office in San Francisco which is specifically responsive to preservation issues in Hawai'i. The National Trust included the Waikiki War Memorial Natatorium on its annual list of America's 11-Most Endangered Places in 1995. We have worked in partnership with the Friends of the Natatorium and the Historic Hawai'i Foundation to advocate for the protection of this important resource.

### **Application of Federal Law to Natatorium Demolition Plans**

The Task Force must consider the applicability of several environmental and historic preservation laws in its decision-making process. Since the Natatorium borders the Pacific Ocean, any action to demolish the structure would affect the navigable waters of the United States. The impact to navigable waters requires the oversight of the Army Corps of Engineers pursuant to the Rivers and Harbors Act. 33 U.S.C § 1. Several other recent projects in Honolulu bordering the Pacific Ocean have similarly required Army Corps review.<sup>1</sup>

The proposal to demolish the Natatorium would likely require two independent permits from the Army Corps. First section 10 of the Rivers and Harbors Act mandates a permit when it is necessary to excavate from or deposit material in navigable waters. 33 U.S.C. § 403; 33 C.F.R. § 320.2(b). Second, a permit under section 404 of the Clean Water Act would be required because the project would result in the discharge of pollutants into navigable waters. 33 U.S.C. § 1251. The term "pollutant" is broadly defined to include dredged soil . . . rock, sand, [and] cellar dirt." 33 U.S.C. 1362(6).

#### **a. Factors to Consider in Army Corps Permit Issuance**

The Army Corps employs a "public interest" balancing test in order to determine whether to issue a permit for a project affecting navigable waters pursuant to authorizing laws such as section 10 of the Rivers and Harbors Act and section 404 of

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<sup>1</sup> In Smallwood v. U.S. Army Corps of Engineers, the U.S. District Court held that a proposal to construct a marina was subject to Army Corps jurisdiction because the proposed "marina, [the marina's] water-related construction, and marina-related activities" would be connected to the Pacific Ocean off the coast of Honolulu. 2009 U.S. Dist. LEXIS 5508 at 5, 30. Similarly in 2008, the Army Corps exercised its authority over a proposed establishment of a stable sandy beach by the Sheraton Waikiki Hotel. 73 Fed. Reg. 67, 847-48 (Nov. 17, 2008).

the Clean Water Act. 33 U.S.C. §§ 403, 1344. In accordance with federal regulations, the Army Corps' central question for determining the merits of such a project would be based on an evaluation of the probable impacts, including cumulative impacts, of the project on the public interest. 33 C.F.R. § 320.4(a)(1). Specifically, the Army Corps would determine the cumulative impact of the project by balancing the benefits over the foreseeable detriments of the project. *Id.*

The impact of the proposal to historic properties is a critical consideration that factors into the Army Corps decision-making process. Army Corps regulations state:

Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers, historic properties and National Landmarks . . . Action on permit applications should, insofar as possible, be consistent with, and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.

33 C.F.R. 320.4(e). Since the demolition of the Natatorium would have a significant adverse effect on a property listed in the National Register, the Task Force cannot assume that the Army Corps would approve a permit to enable its destruction. Furthermore, the Army Corps would have the responsibility to comply with several federal laws prior to taking such action.

#### **a. National Historic Preservation Act**

Because the Natatorium is listed on the National Register of Historic Places, the Army Corps would consider the project's impact on the historic pool and façade of the Natatorium, pursuant to Section 106 of the National Historic Preservation Act ("NHPA"). 16 U.S.C. § 470; 36 C.F.R. Part 800; 33 C.F.R. § 320.3(g). In particular, section 106 of the NHPA provides that the Army Corps, or any federal agency with jurisdiction over any undertaking, must "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." See 16 U.S.C. § 470f. The Army Corps would be required to "afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking." *Id.*

#### **b. National Environmental Policy Act**

The Army Corps would also be required to consider the project's merits under the National Environmental Policy Act ("NEPA"). The purpose of NEPA is to "promote efforts which will prevent or eliminate damage to the environment . . ." 42 U.S.C. § 4321. Specifically, NEPA requires that federal agencies, including the Army Corps, consider the environmental consequences of all proposed "major Federal actions

significantly affecting the quality of the human environment . . . .” *Id.* § 42 U.S.C. 4332(2)(C).

We believe this project would constitute a “major federal action significantly affecting the quality of the human environment,” and, therefore, that the Army Corps would be required to prepare an Environmental Impact Statement in consultation with the Environmental Protection Agency. An EIS was similarly required in the Sheraton Waikiki project. See 73 Fed. Reg. 67, 847-48 (Nov. 17, 2008). To accomplish NEPA’s mandate, the agency must: (i) analyze a reasonable range of alternatives, 40 C.F.R. § 1502.14; (ii) provide an adequate baseline of potentially affected historic properties, *Id.* § 1502.15; (iii) take a hard look at the direct, indirect, and cumulative impacts to historic properties, *Id.* § 1508.25; and, (iv) examine measures to mitigate the potential adverse impacts to historic properties, *Id.* § 1502.14.

### **c. Clean Water Act**

The Army Corps would be required to evaluate the project based on regulations concerning the discharge of dredged or fill material into waters of the United States pursuant to section 404 of the Clean Water Act. 40 C.F.R. § 230 et seq; 13 U.S.C. § 1344, et. seq. Essentially, these regulations require the Army Corps to consult with the EPA in order to evaluate the effects and minimize the environmental impacts of discharge that dredged or fill material may have on a site. 40 C.F.R. § 230.5. In the present case, considering that the removal of the Natatorium pool and bleachers would involve considerable dredging and filling of the site, the Army Corps would have to comply with these Clean Water Act regulations. *Id.*

### **d. Endangered Species Act**

The Army Corps would also be required to evaluate the project based on the requirements of section 7 of the Endangered Species Act. 16 U.S.C. § 1531, et seq. Section 7 requires consultation with the State as well as the Department of the Interior for “any action authorized, funded, or carried out by [a federal] agency . . . [that would] jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.” *Id.* § 1536(a)(2).

In 2008, the Waikiki Sheraton Hotel proposed to establish a beach off the coast of Waikiki, and the Army Corps indicated that it would consult with the Department of the Interior regarding the project’s impacts to endangered or threatened species. 73 Fed. Reg. 67,848 (Nov. 17, 2008). Because the Natatorium is located on the same stretch of coastline as the beach proposed by the Waikiki Sheraton Hotel, it is likely that the Army Corps would be subject to similar requirements. 16 U.S.C. § 1536(a)(2).

#### **e. Magnuson-Stevens Fishery Conservation and Management Act**

Finally, the Army Corps would be required to consider the project's effects on "fishery resources" pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens"). 16 U.S.C. § 1801, et seq. The purpose of the Magnuson-Stevens Act is to "conserve and manage the fishery resources found off the coasts of the United States." *Id.* § 1801(b)(1). Specifically, the Act requires that "Each Federal agency shall consult with the Secretary [of Commerce] with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any essential fish habitat identified under this Act." *Id.* § 1855(b)(2); see *Id.* 1802(39).

In the present case, the Natatorium is located on the same stretch of Waikiki coastline as the project carried out by the Waikiki Sheraton Hotel in 2008. 73 Fed. Reg. 67,847-48 (Nov. 17, 2008). Thus, because the Army Corps determined with the Waikiki Sheraton Hotel's proposed beach triggered examination of the plan pursuant to the Magnuson-Stevens Act, the Army Corps would likely require consideration of the effects of the proposed demolition of the Natatorium pool on "fishery resources" as well, pursuant to Magnuson-Stevens. *Id.*; 16 U.S.C. § 1801, et seq.

#### **Conclusion**

There are very significant legal constraints on any proposal to for the City to demolish the Natatorium. Significant costs and time would be associated with any demolition proposal in order to properly evaluate the impact to historic properties and the marine environment and to comply with all applicable federal laws. The City's best option is to proceed with the already approved rehabilitation of the historic structure by, at the very minimum, stabilizing the bleachers and pool. This option would not require opening the pool as a swimming area for public use.

Finally, we recommend that to accomplish a full rehabilitation in the most cost-efficient manner the City should petition the Hawaii Department of Health to amend the state public saltwater swimming pool regulations so that the rules are consistent with sound science and similar safety regulations in other jurisdictions. The current requirement that saltwater pools in Hawaii contain a mechanical pump system is excessively restrictive, potentially dangerous, and would add significant costs to rehabilitation efforts. See Haw. Dept. of Health Admin. Rules, § 11-10-3(c)-(d).

We appreciate your consideration of our concerns, and we look forward to working with you as the process moves forward in selecting the most appropriate solution for the Natatorium.

Respectfully Submitted,

A handwritten signature in black ink that reads "Brian R. Turner". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Brian R. Turner  
Regional Attorney

Cc: Mayor's Waikiki Natatorium Task Force  
Governor Linda Lingle  
Senator Daniel Inouye  
Senator Daniel Kahikina Akaka  
U.S. Representative Neil Abercrombie  
U.S. Representative Mazie Hirono  
Reid Nelson, Advisory Council on Historic Preservation  
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Donna Ching, Friends of the Natatorium