

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: May 16, 2008

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: 7685 Siempre Viva Road, Blackwater Law Enforcement/Security Operations in Otay Mesa

INTRODUCTION

On or about May 5, 2008, Mayor Sanders requested an investigation concerning the issuance of permits by the City for the use and construction of a training facility operated at 7685 Siempre Viva Road, in Otay Mesa, by an entity commonly known as Blackwater. On May 1, 2008, the Honorable Congressman Bob Filner requested a similar investigation. In response to these requests, the City Attorney's office conducted a legal analysis of the process used to issue the permits and the mechanisms available to Blackwater for compliance with the law.

BACKGROUND

On or about September 5, 2007, an entity operating under the project name "Southwest Law Enforcement Training Enterprise," filed a general application with the City of San Diego's Development Services Department [DSD] to conduct "Tenant Improvements" at 7685 Siempre Viva Road located within the Otay Mesa Development District. The existing use identified on the application was warehouse with offices. The proposed use identified on the application was identified as "same (no change)." The purpose of the application was to construct 44 feet of new partitions in existing office space. Accompanying the application was a signed Hazardous Materials Questionnaire where the applicant disclosed that there were no uses of explosives or blasting agents or other health hazards associated with the activity.

On or about February 7, 2008, another general application was submitted to the City of San Diego's DSD to conduct electrical work at the 7685 Siempre Viva Road site for a project entitled

“South West Police.” The scope of the work included the installation of two new AC units and six exhaust fans.

On or about February 7, 2008, a separate General Application was also submitted to DSD for structural work for this same site. The project description on the application was to “[a]dd [an] indoor firing range.” The identified proposed use on the application was for a training facility. The existing use was identified on the application as warehouse use and the project title was now “Southwest Law Enforcement.” The Lessee or Tenant was identified on this application as “Raven Development Group” with an address in North Carolina. However, the September 5, 2007 application had identified the Lessee or Tenant as “Southwest Law Enforcement Training Enterprises” with an address in San Diego. The Hazardous Materials Questionnaire dated February 7, 2008 for the construction of the firing range did not identify any uses of explosives or blasting agents or other health hazards associated with this operation.

QUESTIONS PRESENTED

1. May the project applicant operate a law enforcement/security training facility within an Industrial Subdistrict of the Otay Mesa Development District with only ministerial processing and approvals?
2. What processes and approvals must be followed in order for the project applicant to operate a law enforcement/security training facility within an Industrial Subdistrict of the Otay Mesa Development District?

SHORT ANSWERS

1. No. The project applicant may not operate a law enforcement/security training facility within an Industrial Subdistrict of the Otay Mesa Development District with only ministerial processing and approvals.
2. The project applicant may operate such a facility within an Industrial Subdistrict of the Otay Mesa Development District after the City has complied with the requirements of the California Environmental Quality Act [CEQA] and after the City of San Diego’s Planning Commission through a Process Four Hearing has authorized such use, pursuant to Section 1517.0301(c)(2) of the San Diego Municipal Code [SDMC]. However, if the project applicant intends to use firearms as part of the training conducted at this same training facility, the project applicant should also obtain permission from the City Council pursuant to SDMC Section 53.10(e) and (f). Furthermore, to be consistent with the purpose and intent of SDMC Section 112.0103, the highest decisionmaking body should hear all discretionary actions together; therefore, both the underlying approval of the use of the site for a law enforcement/security training facility should be made by the City Council in conjunction with the decision to allow the use of firearms on-site.

ANALYSIS

The legal authority of the City of San Diego to regulate the use of land for training facilities and firearm use falls squarely within the City's police powers. Exercising this authority, the City of San Diego strictly limits how and when firearms may be used within the City. Specifically, Section 53.10(a) states, "It is the purpose and intent of the Council of the City of San Diego that the firing of firearms and other explosives within the city limits be strictly regulated for the protection of all persons and property located in the City." With the exception of shooting galleries or target ranges (note: this exception does not include vocational or trade schools) and government authorized use, no firing of firearms is allowed without City Council approval by resolution. *See* SDMC Section 53.10(d) and (e). Approval by City Council is a discretionary act and will trigger the need to comply with CEQA. In addition, as explained in more detail below, the underlying zone and use restrictions may also limit where shooting ranges may be allowed.

7685 Siempre Viva Road is located in the IH-2-1 zone of the Otay Mesa Industrial Subdistrict within the Otay Mesa Development District. As stated in SDMC Section 131.0604(a), the purpose of the IH (Industrial—Heavy) zone

is to provide space for land-intensive industrial activities emphasizing base-sector manufacturing. The IH zones are intended to promote efficient industrial land use with minimal development standards, while providing proper safeguards for adjoining properties and the community in general. It is the intent of these zones to limit the presence of nonindustrial uses in order to preserve land that is appropriate for large-scale industrial users.

The IH-1-1 zone allows primarily manufacturing uses and the IH-2-1 zone allows manufacturing uses with some office use. *See* SDMC Section 131.0604(b). Neither a shooting range nor a law enforcement/security training operation clearly qualify or fall within any of the permitted uses of the IH-1-1 or IH-2-1 zones. Table 131.06B of Section 131.0622, however, does permit vocational/trade schools in the IH-2-1 zone and SDMC Section 1517.0301(a)(1) cross-references Table 131.06B as applicable within the Otay Mesa Industrial Subdistrict. However, as of the date of this memo, no available information indicates clearly that the law enforcement/security training facility, as proposed by the applicant, would qualify as a vocational or trade school. In addition, SDMC Section 1517.0301(a)(8)(A) further restricts trade schools within the Otay Mesa Industrial Subdistrict to those "trade schools instructing in subjects related to a use permitted within the Industrial Subdistrict." However, SDMC Section 1517.0301(c)(1) and (2) states other uses not otherwise identified are permitted under the following circumstances:

(1) Accessory uses for any of the foregoing permitted uses including signs. As specified in Land Development Code Chapter 14, Article 2, Division 12 (Sign Regulations), for sign regulatory purposes this Otay Mesa Development District shall be deemed to be an industrial zone.¹

¹ The training facility does not fall into the category of "accessory use" as defined in Section 113.0103.

(2) Any other uses which the Planning Commission finds, in accordance with Process Four, to be similar in character to the uses enumerated in the Otay Mesa Development District Ordinance and which are clearly within the intent and purpose of the Otay Mesa Development District. The adopted resolution embodying any such finding shall be filed in the office of the City Clerk.

Given the type of operation proposed, Planning Commission approval pursuant to Section 1517.0301(c)(2) is appropriate here.² Planning Commission review is a discretionary act and will trigger the requirements of CEQA.³

Since the use of firearms at the site will trigger City Council approval, it would be appropriate under these circumstances for the City Council to determine the whole of the action; namely, whether to authorize the use of 7685 Siempre Viva Road as a law enforcement/security training facility where firearms will be used. This would be consistent with SDMC Section 112.0103.⁴

With respect to the CEQA analysis, at a minimum, potential environmental impacts should be analyzed, including noise impacts, potential for discharges into the storm drain, accidental explosion or release of hazardous substances (e.g., lead discharge), fire hazards and impacts on fire protection services, other safety concerns due to the firing of guns and potential adverse effects due to traffic, such as traffic congestion. To the extent these impacts are determined to be significant, then they should be mitigated and the mitigation documented in a Mitigated Negative Declaration. Mitigation may include, but is not limited to, the following:

- The facility be constructed with impenetrable walls, adequate ventilation and lighting systems for a shooting range, and acoustical treatment for sound attenuation suitable for a firing range;

² SDMC Section 131.0110(a) gives some discretion to the City Manager to determine the appropriate use category; however, this discretion does not authorize arbitrary determinations. In fact, SDMC Section 131.0110(c) allows for an amendment to the Use Regulations Table where a use category or subcategory cannot be determined. Any amendment will require City Council approval. Planning Commission review under Section 1517.0301(c)(2) provides another means for determining appropriate use, in order to avoid the problem of having to fit a square peg into a round hole.

³ Even if this operation were only characterized as a shooting range and not a training facility, a shooting range is not a use authorized within this zone and would also trigger the need for Planning Commission review, regardless of the applicability of SDMC Section 53.10. *See also* SDMC Sections 131.0620(a), 131.0630(a) and 1517.0301(a).

⁴ SDMC Section 112.0103 states: "When an applicant applies for more than one permit, map, or other approval for a single development, the applications shall be consolidated for processing and shall be reviewed by a single decision maker. The decision maker shall act on the consolidated application at the highest level of authority for that development as set forth in Section 111.1015. The findings required for approval of each permit shall be considered individually, consistent with Section 126.0105."

- The facility be operated in a manner that minimizes the possibility of a release of hazardous waste and/or hazardous waste constituents (e.g., fine powders of range lead); The facility collect, manage, and dispose of all unreacted gun powders and residues properly as hazardous waste;
- The facility label each container of hazardous waste generated on-site; and,
- The facility complete a Hazardous Waste Manifest for all hazardous wastes generated on-site, and use a registered hazardous waste transporter to transport hazardous wastes off-site to an authorized facility.

CONCLUSION

Because construction permits and other approvals were issued before discretionary approval of the underlying use had been obtained, a stop work order should be issued. The applicant should be required to submit a new application for discretionary approval in order to use the site as a law enforcement/security training facility where firearms will be used.⁵ In addition, no Certificate of Occupancy under SDMC Section 129.0114 should be issued until all discretionary approvals have been obtained, including compliance with CEQA. If a Certificate of Occupancy has already been issued in error, then proceedings to suspend or revoke the Certificate should be initiated pursuant to SDMC Section 129.0118. This Office is open to considering additional information or facts as they become known; at such time, additional legal analysis may be appropriate.

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⁵ SDMC Section 129.0108 states, "After all required approvals, including any required *development permits*, have been obtained and all required fees have been paid, the Building Official may issue a *construction permit*. Construction shall not begin until the required permits have been issued." Section 129.0105(a) further states, "If a proposed *development* requires one or more *development permits*, the required *development permits* must be issued before an application is submitted for a *construction permit* except as provided in Section 129.0105(c)."