

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: June 10, 2008

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: 7685 Siempre Viva Road, Blackwater (Paramilitary) Navy Ship Training 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 facility operated at 7685 Siempre Viva Road, in Otay Mesa, by an entity commonly known as Blackwater. In response to this request, 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. The City Attorney issued a memo on May 16, 2008 addressing the legal issues as they were known at the time. On May 19, 2008, the City's Development Services Director issued a letter to Blackwater conveying the need for additional discretionary review and compliance with the California Environmental Quality Act [CEQA]. It has now come to the attention of the City Attorney that Blackwater intends to conduct Navy Ship Simulator training at the Otay Mesa facility and has submitted an application on or about May 28, 2008 for this project. This memo addresses this change of use and the totality of the project in light of the current intentions of Blackwater to operate paramilitary training activities in Otay Mesa.

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, as stated in the application, was to construct 44

feet of new partitions in existing office space. This was not an application for a change of use nor an application seeking authorization for a vocational school. *See* San Diego Municipal Code [SDMC] Sections 127.0107 and 127.0108.

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, as stated on the application, included the installation of two new AC units and six exhaust fans. This was not an application for a change of use nor an application seeking authorization for a vocational school. *See* SDMC Sections 127.0107 and 127.0108.

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, but the approval sought was not for a change of use from warehouse to training facility, it was only for an indoor firing range. 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. This was not an application for a change of use nor an application seeking authorization for a vocational school. *See* SDMC Sections 127.0107 and 127.0108.

Sometime in early 2008, an entity operating under the name of Blackwater Lodge & Training Center, Inc. [Blackwater], applied for a business license with the City of San Diego to conduct security training for the United States Navy. Blackwater had contracted with the United States Navy to conduct a course called "Ship Reactionary Force Basic" [SRF-B]. Blackwater applied for a business license to conduct this security training at 7685 Siempre Viva Road, in Otay Mesa. This was not an application for a change of use nor an application seeking authorization for a vocational school. *See* SDMC Sections 127.0107 and 127.0108.

On or about May 28, 2008, Raven Development applied to the City for a Building Permit to add a simulator/ride inside of the warehouse at 7685 Siempre Viva Road. This application is still being processed.

Blackwater's Vice President made a statement reported by the San Diego Union Tribune further clarifying their operations in Otay Mesa:

On Thursday, workers were reinforcing a maze of wooden walls appended to the cargo containers at the request of city inspectors, who are still reviewing Blackwater's application to use the simulated ship area under an amusement-park ride permit, Bonfiglio said.¹

¹From Associated Press article entitled, "Blackwater Opens San Diego Training Center," which printed in the San Diego Union on June 6, 2008 ("6/6/08 Union Article"). This article may be accessed at the following web link: <http://www.siononsandiego.com/news/metro/20080606-0159-blackwaterfight.html>

QUESTIONS PRESENTED

1. May the City approve an application to operate a simulator/ride inside the warehouse at 7685 Siempre Viva Road with only ministerial review and the issuance of a building permit?

SHORT ANSWERS

1. No. The City may not approve an application to operate a simulator/ride inside the warehouse at 7685 Siempre Viva Road with only ministerial review and the issuance of a building permit, given the totality of the circumstances which clarify that the true extent of the project is not just a simulator ride but a paramilitary training facility. Discretionary review and approval at a higher level is warranted (e.g., Hearing Officer, Planning Commission and/or City Council). As a matter of local land use law, the City has an absolute right to evaluate, under the totality of the circumstances, any change of use of the Otay Mesa facility from an industrial warehouse to a military, or para-military, training center.

ANALYSIS

Blackwater has failed to conform its conduct to the requirements of the San Diego Municipal Code. By processing and issuing a building permit with ministerial review and approval at this stage, the City would fail to adhere to its legal duty to comply with CEQA. *See* SDMC Section 111.0102 where it is clear “[t]he intent of these procedures and regulations is to facilitate fair and effective decision-making and to encourage public participation.” In addition, it is contrary to Kelly Broughton’s letter of May 19, 2008 informing Blackwater that no additional approvals will be forthcoming until additional discretionary review and CEQA compliance have been achieved. Although the Court granted Blackwater a Temporary Restraining Order on or about June 4, 2008, said Order does not expressly require the City to approve a building permit for the ship simulator.

Local police power is an elastic power.² An expansive range of interests can support a city’s exercise of its police power.³ Courts, for example have also held that regulations affecting economic interests in real property also are an appropriate exercise of the police power.⁴ Protection of a city’s “character,” “stability,” and “soul” has served to justify invocation of its police power. For example, in *Ewing v. City of Carmel-by-the-Sea*, homeowners challenged the constitutionality of a zoning ordinance prohibiting transient commercial use of residential property for less than 30 consecutive days. 234 Cal. App. 3d 1579 (1991). Ruling for the city, the court held that the ordinance was a proper exercise of the city’s land use authority under its

police power “to enhance and maintain the residential character of the city.” *Id.* at 1590.⁵

Likewise, the City of San Diego has a keen interest in preserving its prime industrial land and has designated Otay Mesa as an important industrial zone in its General Plan worthy of greater protection than a typical commercial zone. 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).

In exercising the police power, the City of San Diego must act within all applicable statutory provisions so there will be no “conflict with general laws.” The City’s actions also must meet constitutional principles of due process: they must be reasonable, nondiscriminatory, and not arbitrary or capricious.⁶ By conducting a discretionary level of review or in complying with CEQA, the City is not acting unreasonably, in a discriminatory manner, nor in an arbitrary or capricious manner.

The City of San Diego Has a Duty to Comply with CEQA

In California, construction or building permits are presumed to be ministerial permits but may be discretionary for purposes of compliance with the California Environmental Quality Act [Public Resources Code Section 21000 et seq]. *See* CEQA Guidelines Section 15268(b)(1). In practice, no “presumption” exists unless the public entity retains no discretion whatsoever in approving an application for a permit. Such an utter lack of discretion exists only where the approving agency retains no discretion to exercise substantive judgment regarding the carrying out of any phase of the proposed project.⁷ Standards are not “fixed” where they embody the earlier exercise of an agency’s discretion that can be changed or ignored at the agency’s discretion.⁸ Therefore, issuance of a construction or building permit would be considered “discretionary” when it requires application of judgment. The court in *Friends of Westwood* explained that the issuance of a building permit may be discretionary even where issuance is mandatory, as long as the approving agency retains discretion to require “substantial changes” in building design.⁹ Such discretion may exist where the approving agency can impose “reasonable conditions” based on “professional judgment.”¹⁰

Discretion may also exist where the standards guiding decisionmakers are “relatively general,” rather than fixed and precise, and where the question of compliance involves “relatively personal decisions addressed to the sound judgment and enlightened choice of the administrator.”¹¹ Even

the power merely “to delay a project” in order to explore alternatives may be enough to render an approving agency’s decision at least partly discretionary.⁰²

Furthermore, a project does not bypass the requirements of CEQA by piecemealing the project into separate and distinct ministerial approvals. For purposes of CEQA, the whole of the action is considered. The CEQA Guidelines define “project” to mean “the whole of an action” that may result in either a direct or reasonably foreseeable indirect physical change in the environment. CEQA Guidelines, Section 15378(a). In California, “project” is given a broad interpretation in order to maximize protection of the environment.⁰³ The City cannot piecemeal or segment a project by splitting it into two or more segments. The City must fully analyze each “project” in a single environmental review document. This ensures that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences.”⁰⁴

In consideration of the project as a whole (the totality of the paramilitary training operation), there is the potential for environmental impacts and there is a need for a discretionary level of review (as opposed to over-the-counter approval). The totality of the project consists of a firing range, a ship simulator, the use of firearms at the site, and other paramilitary training operations which may have the potential for impacts to the environment, such as impacts to noise, security issues given the close proximity to the International Border and the Tijuana International Airport, the potential for explosion or release of hazardous materials into the air, impacts to traffic which may require mitigation, discharges into the storm drain system, and other environmental considerations.

As explained herein, sufficient discretion or judgment has been and can be exercised under the San Diego Municipal Code by the Building Official and the Director of Development Services in determining the scope of the permits and other approvals necessary for Blackwater’s project to proceed. See SDMC Section 121.0101. Thus, CEQA has been triggered and should apply to the whole of Blackwater’s project, including but not limited to its use, occupancy and structural modifications at 7685 Siempre Viva Road. The exercise of discretion or use of judgment in determining what reviews, approvals or conditions will attach to Blackwater’s project is provided for and allowed in San Diego Municipal Code Sections 112.0103, 131.0620(e), 129.0111(d), 131.0110(a), 131.0110(c), 129.0104(a)(10) and 1517.0301(c)(2), 128.0201, 128.0202(c), 128.0207 and 111.0205.

**It is Within the City’s Discretion to Determine if Additional Review and
Approval of the Proposed Blackwater Project is Warranted**

⁰² *Friends of Westwood, supra*, 171 Cal. App. 3d at pp. 272-273 (citing *San Diego Trust and Savings Bank, v. Friends of Gill* (4th Dist. 1981) 121 Cal. App. 3d 203, 210-214; 174 Cal. Rptr. 784. See also *Miller v. City of Hermosa Beach* (2d Dist. 1993) 13 Cal. App. 4th 1118; 17 Cal. Rptr. 2d 408. See also *Day v. City of Glendale* (2d Dist. 1975) 51 Cal. App. 3d 817, 824; 124 Cal. Rptr. 569; Guide to CEQA California Environmental Quality Act, 2006 [11th] Edition, (2007).

⁰³ *McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space District* (6th Dist. 1988) 202 Cal. App. 3d 1136, 1143, 249 Cal. Rptr. 439.

⁰⁴ *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2d Dist. 1991) 233 Cal. App. 3d 577, 592; 284 Cal. Rptr. 498; ; Guide to CEQA California Environmental Quality Act, 2006 [11th] Edition, (2007).

In the City of San Diego, the approval and issuance of a construction permit will not trigger the need for public hearing if approved under Process One review, but only where no other discretionary approvals are determined necessary. *See* SDMC Sections 111.0205 and 112.0502. In some instances, as elaborated below, the decision to allow a use or issue a construction permit may also result in the exercise of discretion or judgment which would trigger the application of CEQA. It is within the City's municipal authority to require additional discretionary approvals before a project can proceed. Such a determination was made by Kelly Broughton, Director of Development Services on May 19, 2008. *See* SDMC Sections 112.0103, 131.0620(e), 129.0111(d), 131.0110(a), 131.0110(c), 129.0104(a)(10) and 1517.0301(c)(2), 128.0201, 128.0202(c), 128.0207 and 111.0205. Mr. Broughton, in his letter of May 19, 2008, has exercised his discretion under SDMC Section 111.0205, 131.0110(a) and 1517.0301(c)(2) to submit the project to further discretionary review, including CEQA review. As expressly stated in SDMC Section 121.0308, the issuance of a construction permit does not grant a person a right to violate other laws:

(a) The issuance or granting of any *development permit* or *construction permit* or any plan, specifications, computations, or inspection approval does not constitute a permit for, or an approval of, any violation of any of the provisions of the Land Development Code, including the Building, Electrical, Plumbing, or Mechanical Regulations or any other ordinance of the City. *Development permits, construction permits, or inspections* presuming to give authority to violate or cancel the provisions of the Land Development Code, Building, Electrical, Plumbing, or Mechanical Regulations or other ordinances of the City are not valid.

(b) The issuance of a *development permit* or *construction permit* based on plans, specifications, and other data does not prevent the City Manager from subsequently requiring the correction of errors in the plans, specifications, and other data or the Building Official from stopping building operations that are in violation of the Land Development Code or any other applicable law.

The Building Official, reporting to the Director of Development Services, operates under delegated and assigned duties specified and clarified in the City of San Diego's Land Development Code and other Municipal Code provisions. Specifically, the Building Official oversees the issuance of building and construction permits for the City and falls under the direction of the Director of Development Services.

Pursuant to the San Diego Municipal Code, the City's Building Official is charged with making interpretations of the applicable provisions of the Land Development Code. These interpretations are to be in conformance with the purpose and intent of the Land Development Code. *See* SDMC Section 129.0104(a)(4). The Building Official is also charged with approving and issuing construction permits (e.g., building permits, grading permits, etc.) that comply with the applicable Land Development Code provisions. *See* SDMC Section 129.0104(a)(3). Construction or building permits are, under most but not all circumstances, considered

ministerial permits, as previously explained herein. The Building Official is also charged with the duty to request and receive the assistance and cooperation of other City officials in carrying out these duties. *See* SDMC Section 129.0104(a)(10). This can and does include seeking the assistance of the Director of Development Services and the City Attorney's Office. The Building Official performs her duties within the constructs of the Municipal Code, including the provision requiring discretionary permit approval before ministerial permit issuance.

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).

SDMC Section 129.0105(b). A development permit is a discretionary permit requiring a public hearing and notice and opportunity to be heard. *See* SDMC Section 113.0103. 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."

The Building Official, pursuant to SDMC Section 129.0111(d), upon inspection of the facility for which the permits were issued, shall either indicate that the inspected portion of the construction is satisfactory as completed or shall notify the permittee or an agent of the permittee that the inspected portion fails to comply with the Building, Electrical, Plumbing, or Mechanical Regulations or with other applicable regulations of the Municipal Code. The Building Official, as stated in SDMC Section 129.0111(d), may determine that the site does not comply with other applicable regulations of the Municipal Code. As clearly stated in the Municipal Code, the Building Official has the discretion to determine whether compliance with the Land Development Code has been satisfied:

The Building Official shall inspect the *structure* and if the Building Official finds no violations of the Land Development Code or other regulations that are enforced by the City's designated Code Enforcement Officials, the Building Official shall issue a Certificate of Occupancy. All work for which a Building Permit was issued must be complete and have had a final inspection before issuance of a Certificate of Occupancy, except in accordance with Section 129.0115. The Certificate of Occupancy must be signed by the Building Official.

SDMC Section 129.0114.

A City determination that additional requirements of the Land Development Code apply to a project are fully within duties specified in law, as demonstrated above. In addition, it is fully within the scope and expectation of these assigned duties that the Building Official seek out assistance from other City officials where needed before issuing certificates of occupancy or before issuing permits. This is what has happened here. On May 19, 2008, the City's Development Services Director issued a letter informing Blackwater that additional discretionary

review is necessary before the project could proceed. *See* SDMC Sections 112.0103, 131.0620(e), 129.0111(d), 131.0110(a), 131.0110(c), 129.0104(a)(10) and 1517.0301(c)(2), 128.0201, 128.0202(c), 128.0207 and 111.0205.

It is not clear that the whole of the project was or is a permissible use within the underlying zone. Given the true scope of the project (i.e., paramilitary training), the exercise of judgment is necessary to weigh and consider the facts. Thus, a discretionary level of review and decision (i.e., Hearing Officer, Planning Commission, and/or City Council), as well as compliance with CEQA are necessary. For example, the definition of a vocational school is missing from the Municipal Code, thus triggering the exercise of discretion to determine whether an operation falls squarely within such definition. In addition, the definition of a firing range or shooting range is missing from the Municipal Code and will trigger the exercise of discretion or judgment to determine whether an operation qualifies as one. Furthermore, the underlying zone allows for vocational schools but does not at all allow a firing or shooting range or a ship simulator and definitely does not provide for paramilitary security training operations of the kind and scope contemplated by Blackwater. Exercise of discretion is needed to determine if paramilitary activities can be allowed within the zone. The exercise of this discretion requires compliance with CEQA. The comprehensive scope of such an operation has yet to be fully identified and the extent of this type of operation may trigger additional permitting or additional CEQA analysis. Until Blackwater fully cooperates with the City and fully discloses the details of its operations, the City is handicapped in its ability to fully analyze the scope of the approval process that may still need to be triggered. The Municipal Code allows for the City's exercise of discretion and judgment here. *See* SDMC Sections 112.0103, 131.0620(e), 129.0111(d), 131.0110(a), 131.0110(c), 129.0104(a)(10) and 1517.0301(c)(2), 128.0201, 128.0202(c), 128.0207 and 111.0205.

The fact that Blackwater would prefer to have their approvals for use of land within the City's jurisdiction issued over-the-counter (ministerially) without a public hearing is not a decision they are entitled to make, but one the City is fully capable of making within the confines of its local Municipal Code. Such a determination was made by Kelly Broughton on May 19, 2008. Any arguments concerning whether the use is appropriate within the underlying zone can be raised by Blackwater to the decisionmaking body (e.g., Hearing Officer, Planning Commission, and/or City Council) where the appropriate due process is made available, with opportunity for Blackwater to appeal. After exhaustion of administrative remedies, Blackwater still disagrees with City findings, they have the same opportunity every applicant has to challenge the decision in state court by way of mandamus. *See* SDMC 112.0501 et seq.

CONCLUSION

The applicant should submit a new or revised application for discretionary approval and compliance with CEQA in order to use the site as a paramilitary security training facility where firearms will be used. The fact that Blackwater is currently operating a paramilitary training operation in Otay Mesa does not mean they are now exempt from compliance with the law. This Office is open to considering additional information or facts as they become known; at such time, additional legal analysis may be appropriate.

Honorable Mayor and City Council

June 10, 2008

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Michael J. Aguirre
City Attorney

MJA:SRE:pev

Attachment

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