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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware corporation dba BLACKWATER WORLDWIDE,

Plaintiff,

v.

KELLY BROUGHTON, in his capacity as Director of the Development Services Department of the City of San Diego; AFSANEH AHMADI, in her capacity as Chief Building Official of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive,

Defendants.

Case No. 08 CV 0926 H (Wmc)

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

Date: May 30, 2008
Time: 1:30 p.m.
Place: Courtroom of the Honorable Marilyn L. Huff

Defendants' Opposition to Blackwater's *Ex Parte* Application for a Temporary Restraining Order is more noteworthy for what it does not say than what it does. Defendants (collectively, the "City") no longer claim that Blackwater Lodge and Training Center, Inc. dba Blackwater Worldwide ("Blackwater") was required to follow a discretionary process, or that vocational schools or target ranges are not proper in Otay Mesa. Instead, the City's opposition raises several incorrect arguments and inaccurate innuendoes that Blackwater is compelled to address. And significantly, the City fails to address dispositive issues raised by Blackwater, thereby conceding them and making the requested relief appropriate. See *Day v. D.C. Dep't of Consumer & Regulatory Affairs*, 191 F. Supp. 2d 154, 159 (D.D.C. 2002) ("If a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded.")

First, contrary to the City's public position, the City's opposition does not argue that discretionary approval is necessary to operate the proposed training facility (referred to as a vocational school under the San Diego Municipal Code or "SDMC"). Rather, the City claims that Blackwater failed to apply for a *ministerial permit* to change the use of the existing structure from a warehouse to a training facility. (Opp. at 6.) This argument suffers from two fatal flaws. First, the General Application dated February 8, 2008, attached as Exhibit C-1 to the Ahmadi Declaration and submitted by the City in support of its Opposition, identifies the "Proposed Use" as "Training Facility." It also identifies the project as adding an "indoor firing range," consistent with the law enforcement training nature of the facility. Moreover, the Hazardous Material Questionnaire included as Exhibit C-7 identifies the "business activities" of the facility as "Training Facility for Law Enforcement." Clearly, the City was well aware of the nature of the proposed use—and that only ministerial permits were needed.

Ahmadi Dec., Exs. A-7, B-5, and C-9 (categorizing the permits at issue as "ministerial").

Furthermore, as vocational schools are permitted as a matter of right under applicable zoning (see Blackwater's *Ex Parte* Application, pp. 10-12), the City may not deny Blackwater a Certificate of Occupancy on these grounds. Blackwater did not need the City's permission to use the Otay Mesa Facility in a way that was an allowable use as a matter of right under the zoning restrictions. SDMC § 1517.0301 allows "all uses permitted in the IH-2-1 zone" listed in § 131.0622. According to § 131.0622, a vocational/trade school is use permitted as of right, without any approval required. Indeed, the City effectively reversed its legal position between the time the City Attorney Office issued its legal opinion and the time it drafted its Opposition. The City now claims only that an additional *ministerial permit* submittal prevents occupancy. In doing so, the City concedes that Blackwater is entitled, as a matter of law, to the certificate of occupancy, and now simply seeks to delay occupancy.

Second, the City claims that Blackwater should have proceeded in *state* court via mandamus. But this matter is squarely before this Court, which has subject matter jurisdiction thereof under both diversity of citizenship and federal question grounds (that is, Blackwater's constitutional claims and claims under 42 U.S.C. § 1983). Defendants have not offered any explanation for why this Court does not have jurisdiction, because of course, this Court does.

Furthermore, federal courts sitting in diversity typically are required to apply state law, and routinely enjoin local governmental officials who are not complying with state law. *See, e.g., Wal-Mart Stores, Inc. v. County of Clark*, 125 F. Supp. 2d 420, 427 (D. Nev. 1999) (granting preliminary injunction against Clark County, Nevada, finding that issuance of building permit was "a purely ministerial act"). Federal courts likewise routinely enjoin local government officials under federal

law. *See, e.g., Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1060 (9th Cir. 2007) (reversing denial of request to enjoin the city, city council members and the mayor to reinstate certain policies at a homeless shelter); *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1007-09 (N.D. Cal. 1965) (enjoining mayor, the city manager and the police chief from interfering with, or refusing to provide police protection for, a Vietnam Day parade). When a plaintiff's federal rights have been violated (or when diversity of citizenship properly brings a matter into the federal court system), there is no need for plaintiff to proceed in state court.

Defendants' reference to mandamus also misses the point as to the procedural status of this action: mandamus is the ultimate remedy in a state superior court action under Code of Civil Procedure § 1085, but here, the relief requested is a provisional or temporary remedy, that is, a temporary restraining order. Nothing prevents a federal district court with subject matter jurisdiction from granting the same relief as could be pursued in a state mandamus action.[1] 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); Federal Rule of Civil Procedure 65.

Third, the City claims Blackwater lacks standing to assert claims under 42 U.S.C. § 1983—but conceding that it has standing to assert its injunctive and declaratory relief claims under state law. However, since the City's conduct in refusing to send the Certificate of Occupancy as required by the SDMC is causing a direct, concrete and irreparable injury to Blackwater, it has standing to assert its claims. Article III requires three elements for standing: (1) a threatened or actual distinct and palpable injury to the plaintiff; (2) a fairly traceable causal nexus between the alleged injury and the defendant's challenged conduct; and (3) a

[1] Indeed, the relief Blackwater requested in its first cause of action was akin to mandamus.

substantial likelihood that the requested relief will redress or prevent the injury. *McMichael v. County of Napa*, 709 F.2d 1268, 1270 (9th Cir. 1983). All three elements are clearly fulfilled here. Indeed, the City's letter (by Defendant Broughton) announcing it would not send the Certificate of Occupancy *is addressed to Blackwater*. Bonfiglio Dec. Ex. I. The City knew exactly whose interests were at stake and whose constitutional rights it was infringing.

Fourth, the City suggests that Blackwater cannot rely on the permits because they were applied for by other entities. This has been a red herring since the beginning. All of the entities that applied had a legal right to apply for the permits. *See* SDMC §112.0102(a)(3) (allowing permit application by anyone with "interest or entitlement to the use of the property"). Indeed, it is customary for contractors to apply for permits and Certificates of Occupancy on behalf of their clients. Declaration of Joseph Bohac filed concurrently herewith. Once approved, the permits and Certificates of Occupancy relate to the facility, not an individual or entity. Indeed, the City's paperwork shows as much. Ahmadi Dec., Ex. C-1 ("project title" is "Southwest Law Enforcement") and Ex. C-3 (permitted "issued to Raven Development"). Were this not the case, every homeowner that wished to remodel his or her house, would be forced to wait in line at Development Services to apply for the permit in his or her name. And when that homeowner moved, the new owner would need to renew the permits. The City's argument is, at best, disingenuous.

Fifth, the City claims that Blackwater did not obtain a permit for its ship simulator. This Court should disregard this after-the-fact justification that was *not* a reason relied upon by the City in its refusal to send Blackwater its Certificate of Occupancy. Bonfiglio Dec. Ex. I (May 19, 2008 letter from Defendant Broughton). Nonetheless, Blackwater has long been discussing the issue of the ship simulator with the City. The simulator is in a section of the facility that

Blackwater plans as a future use. A "future use area" never affects the permits for the rest of a facility. It is akin to identifying on plans for a house that the homeowner plans to add a swimming pool later. The City cannot avoid issuing a Certificate of Occupancy today because of questions it may have as to a potential future use. Thus, even if an additional permit is required for the simulator, that should not affect Blackwater's ability to occupy and use the rest of the facility for vocational instruction (including the target range).

Lastly, the City claims that Blackwater has not established irreparable harm. But the City offered no rebuttal to Blackwater's evidence on this subject. The City does not deny that it has treated other vocational schools and target ranges differently than it treated Blackwater; thus, Blackwater has established at least a *prima facie* case for violation of the equal-protection and dormant-commerce clauses. The record also clearly shows that the City is using manufactured, after-the-fact justifications to try to deny Blackwater's vested rights, without providing Blackwater with due process. The City does not claim otherwise. These constitutional violations are enough to show irreparable harm. *See* Blackwater's Ex Parte Application at 21:5-19. Moreover, Blackwater's harm is not "strictly monetary." Opp. at 8:4. Its reputation likely will be severely damaged and, despite the City's unsupported contention to the contrary, courts routinely grant injunction relief because reputational harm often is difficult, if not impossible, to quantify. *See, e.g., United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002) (damage to reputation can constitute irreparable injury, especially if damages would be uncertain or inadequate).[2]

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[2] The City also incorrectly argues that San Diego City College is providing SRF-B training. Opp. at 8:11-18. It is not; Blackwater is. San Diego Community College is providing SRF-A training, which does not include live firearms training.

In sum, none of the City's assertions have merit and Blackwater is entitled to its requested relief.

DATED: May 29, 2008

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