

1 MAYER BROWN LLP
2 BRYAN DALY (SBN 117901)
3 bdaly@mayerbrown.com
4 JOHN NADOLENCO (SBN 181128)
5 jnadolenco@mayerbrown.com
6 350 South Grand Avenue, 25th Floor
7 Los Angeles, CA 90071-1503
8 Telephone: (213) 229-9500
9 Facsimile: (213) 625-0248

6 NEIL DYMOTT FRANK MCFALL & TREXLER APLC
7 Michael I. Neil
8 mneil@neildymott.com
9 1020 2nd Avenue, Suite 2500
10 San Diego, CA 92101-4959
11 Telephone: (619) 238-1712
12 Facsimile: (619) 238-1562

08 CV 0926 H WMc

10 Attorneys for Plaintiff
11 BLACKWATER LODGE AND TRAINING CENTER, INC., dba
12 BLACKWATER WORLDWIDE

13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**

13 BLACKWATER LODGE AND
14 TRAINING CENTER, INC., a
15 Delaware corporation dba
16 BLACKWATER WORLDWIDE,

16 Plaintiff,

17 v.

18 KELLY BROUGHTON, in his
19 capacity as Director of the
20 Development Services Department of
21 the City of San Diego; THE
22 DEVELOPMENT SERVICES
23 DEPARTMENT OF THE CITY OF
24 SAN DIEGO, an agency of the City of
25 San Diego; AFSANEH AHMADI, in
26 her capacity as the Chief Building
27 Official for the City of San Diego; THE
28 CITY OF SAN DIEGO, a municipal
entity; and DOES T-20, inclusive,

Defendants.

Case No. _____

COMPLAINT FOR:

- (1) INJUNCTIVE RELIEF;
- (2) DECLARATORY JUDGMENT;
- (3) VIOLATION OF 42 U.S.C. § 1983 (PROCEDURAL DUE PROCESS);
- (4) VIOLATION OF 42 U.S.C. § 1983 (EQUAL PROTECTION);
- (5) DORMANT COMMERCE CLAUSE;
- (6) VIOLATION OF CAL. CONST., ART. I § 7(A) (PROCEDURAL DUE PROCESS)
- (7) VIOLATION OF CAL. CONST., ART. I § 7(A) (EQUAL PROTECTION)

DEMAND FOR JURY TRIAL

COMPLAINT

1 Plaintiff Blackwater Lodge and Training Center, Inc. dba Blackwater
2 Worldwide (“Blackwater”) alleges upon knowledge as to itself and its own actions,
3 and upon information and belief as to all other matters, against Defendants Kelly
4 Broughton in his capacity as Director of the Development Services Department of
5 the City of San Diego, the Development Services Department of the City of San
6 Diego (the “Department”), Afsaneh Ahmadi in her capacity as the Chief Building
7 Official for the City of San Diego (the “Building Official”), and the City of San
8 Diego (the “City”) as follows:

9 **NATURE OF THE ACTION**

10 1. This is an action to, *inter alia*, enforce the provisions of the San Diego
11 Municipal Code (“SDMC”) and to remedy the City of San Diego’s violation of
12 Blackwater’s federal and state constitutional rights to procedural due process and
13 equal protection, as well as those under the Commerce Clause of the U.S.
14 Constitution. Blackwater has a multi-million dollar contract from the United States
15 Navy to train sailors. To perform its duties under the contract, Blackwater secured
16 the rights to use a remote facility in Otay Mesa, on the outskirts of the City of San
17 Diego. See Exhibit A for visual depiction of area. Blackwater then applied to the
18 City for the building permits needed under the SDMC to remodel the facility by
19 adding internal walls, air conditioning units and an insulated target range. Initially,
20 the City complied with its responsibilities under the SDMC, granting Blackwater all
21 needed building permits. The City subsequently conducted the inspections
22 prescribed by the SMDC, inspecting and approving the facility’s electrical and
23 fire/life safety infrastructure. Finally, on April 30, the City’s Building Official
24 issued final approvals for the facility, including granting approval for its Certificate
25 of Occupancy. As Defendant Broughton reportedly admitted in a recent news
26 story, Blackwater “complied with our municipal code and the California Building
27
28

1 Code” and, consequently, the City issued to Blackwater the proper permits and
2 approvals.

3 2. After the City issued these permits and approvals, but before the City
4 performed its ministerial duty of issuing the Certificate of Occupancy, certain self-
5 proclaimed activists began complaining loudly about the location of “mercenaries”
6 in San Diego. They incorrectly alleged Blackwater was locating in the City not to
7 fulfill its Navy contract, but to conduct covert border operations in close proximity
8 to Mexico. And they openly stated that they wanted to kick Blackwater out of town
9 because it provides support to the United States in the war in Iraq and because it is a
10 North Carolina-based defense contractor.

11 3. Unfortunately, these activities had their intended effect, leading the
12 City to refuse to issue the Certificate of Occupancy notwithstanding its obligation
13 to do so. No doubt this occurred because this year is an election year. Indeed,
14 Election Day is June 3, and the Mayor and City Attorney are both standing for re-
15 election and are locked in tough struggles. In an apparent effort to curry favor with
16 the activists and after his election opponent raised the Blackwater permits as an
17 election issue, the City Attorney on May 16, 2008 issued a legal memorandum
18 incorrectly concluding, among other things, that the Blackwater project should be
19 subject to further discretionary review.¹ Given the California Attorney General’s
20 recent report regarding “The Sunroad Building Project,” it appears that the City
21 Attorney has a pattern of issuing flawed reports to serve political purposes.

22 ¹ Like most municipalities, San Diego’s zoning code denotes three general categories of
23 uses. Although different cities call them by different names, the first such category could
24 be described as “prohibited under all circumstances.” In many cities, examples include, a
25 topless bar serving alcohol or a dump/landfill. The next category could be called,
26 “discretionary,” as those uses must go through the city’s discretionary review process. An
27 example would be locating a bar within 1000 feet of a residential neighborhood. The final
28 category could be usually called “ministerial review,” meaning that if a city inspector
checks the site for certain clearly defined features set forth in the code (for example, fire
doors and lighting, and proper number of parking spaces), the city has no discretion is
permitting the facility. As detailed below, vocational institutions, instructing in any
subject, fall under this third category in San Diego.

1 4. A few days later, the Mayor, relying on the City Attorney's incorrect
2 legal analysis, announced to the press that he was issuing a "Stop Work" order on
3 the Blackwater facility—despite his administration approving and defending the
4 permits just two weeks earlier. The Mayor also took this position after being
5 pressured by political groups and after his opponent criticized him on the
6 Blackwater issue.

7 5. Subsequently, on May 19, 2008, the City took formal action, with the
8 City's Director of Development Services, Defendant Broughton, announcing in a
9 letter to Blackwater that Development Services would not send to Blackwater its
10 Certificate of Occupancy. Again, the City took this action even though the City
11 earlier had determined that all requirements for the facility had been met, and even
12 though the City's Building Official had earlier approved issuance of the Certificate
13 of Occupancy. The Director's letter also ordered Blackwater to refrain from using
14 the facility upon penalty of fines or other city action. The City provided no notice
15 or hearing before effectively shutting down the facility. Defendant Broughton's
16 May 19, 2008 letter also relied on the City Attorney's flawed opinion and, indeed,
17 attached a copy of it.

18 6. The City took its action notwithstanding the fact that other vocational
19 institutions, such as the Southwestern College police academy, operate in close
20 proximity to the Otay Mesa facility and throughout the City. Blackwater is
21 informed and believes that Southwestern—and likely other vocational institutions,
22 including privately-run institutions—were not required to go through the further
23 discretionary process being imposed on Blackwater. Instead, on information and
24 belief, other vocational institutions were issued permits and Certificates of
25 Occupancy as a matter of right and after only ministerial review, just as Blackwater
26 was, before politics came into play. Similarly, on information and belief, other
27 facilities within the City featuring target ranges were not required to follow the
28 City's proposed discretionary process being imposed on Blackwater.

1 located in this District and a substantial part of the events or omissions giving rise
2 to Plaintiffs' claims occurred in this District.

3 THE PARTIES

4 13. Plaintiff Blackwater Lodge and Training Center, Inc. dba Blackwater
5 Worldwide is a Delaware corporation and has its principal place of business in
6 North Carolina.

7 14. Defendant Kelly Broughton is a citizen of the State of California and is
8 sued in his capacity as Director of the Department of Development Services of the
9 City of San Diego.

10 15. Defendant Department of Development Services is an agency of the
11 City of San Diego.

12 16. Defendant Afsaneh Ahmadi is a citizen of the State of California and
13 is sued in her capacity as the Chief Building Official for the City of San Diego.

14 17. Defendant City of San Diego is a municipal entity in the State of
15 California.

16 18. Plaintiff is ignorant of the true names and capacities of defendants
17 sued as DOES 1-20, inclusive, and therefore sues these defendant by such fictitious
18 names. Plaintiff will amend this Complaint to allege their true names and
19 capacities when ascertained. Plaintiff is informed and believes and based thereon
20 alleges that each of the defendants designated as a DOE is responsible in some
21 manner for the wrongful acts and omissions referred to herein and thereby
22 proximately caused injuries and damages to Plaintiffs as herein alleged.

23 FACTUAL BACKGROUND

24 Blackwater's Contract with the United States Navy

25 19. Blackwater Worldwide professionals are U.S. military and law-
26 enforcement veterans dedicated to training military law-enforcement personnel at
27 home and protecting U.S. dignitaries abroad. One of Blackwater's primary
28 functions is to protect the lives of U.S. diplomats in Iraq. Though it is not the

1 biggest government contractor, it is among the most high-profile. Lately, certain
2 individuals and interest groups have stigmatized Blackwater for its support of the
3 United States' efforts in Iraq, and in particular for Iraqi casualties suffered during
4 firefights that have occurred during Blackwater's protection of civilians in Iraq.
5 Attacking Blackwater has become a cause célèbre for certain individuals wishing to
6 express their displeasure with the war in Iraq or how the administration has handled
7 it.

8 20. A lesser known function of Blackwater is providing training for the
9 men and women of the United States Navy. In 2000, terrorists attacked the U.S.S.
10 Cole by sailing up to it in a slow-moving craft laced with explosives, killing 17
11 Navy sailors and injuring 39 others. After concluding that its sailors could have
12 defended themselves from the assailants had they been better trained in basic
13 firearm usage and tactics, the Navy contracted with Blackwater to train its sailors
14 on the safe, effective use of small personal weaponry and other apprehension
15 techniques.

16 21. Blackwater located the facility that is the subject of this suit in San
17 Diego because the Navy contract required close proximity to Naval Base San
18 Diego, the largest naval base on the West Coast, and also within San Diego's city
19 limits.

20 22. The services Blackwater has been providing to the Navy over the past
21 five years include a vocational training program for sailors. Blackwater's training
22 programs for sailors will teach a variety of skills, including marksmanship,
23 assembly and disassembly of firearms, basic arrest and apprehension techniques,
24 and proper safety for the latest state-of-the-art personal weaponry. This type of
25 training is expected to improve our sailors' ability to protect our country, our Navy
26 ships and themselves.

27 23. Pursuant to this contractual relationship with the Navy, Blackwater is
28 required to begin training its next class on June 2, 2008.

1 24. If Blackwater is unable to meet the June 2, 2008 deadline for
2 commencing its training facility, it risks being unable to satisfy its contractual
3 undertaking and being unable to train the nation's sailors as contemplated.
4 Additionally, if Blackwater is unable to meet this deadline, its reputation will be
5 severely damaged and its contractual relationship with the United States Navy
6 jeopardized. This damage to its reputation could well result in the loss of other
7 contracts and likely would damage Blackwater in an amount that is difficult, if not
8 impossible, to quantify.

9 **Blackwater Identifies the Training Site and Obtains All Necessary Permits**

10 25. To provide the services required by the Navy, a site must have space
11 for vocational/classroom instruction and a target range. As a leading site for the
12 training, Blackwater identified and leased a warehouse located at 7685 Siempre
13 Viva Road in the Otay Mesa Development District in the City of San Diego (the
14 "Otay Mesa facility"). Blackwater was not required to obtain an Otay Mesa
15 Development Permit for the Otay Mesa facility because it is a vocational school,
16 which is exempt from such permits under SDMC §§ 1517.0202(a)(2), 1517.0301,
17 131.0622 and Table 131-06B to 131.0622.

18 26. Initially, Blackwater hoped to work with Southwest Law Enforcement
19 Training Enterprises, an independent and respected San Diego based law-
20 enforcement training partnership, in creating and running the Otay Mesa facility.
21 Blackwater and Southwest Law Enforcement conducted arms-length negotiations
22 over a contract related to the Otay Mesa training facility.

23 27. In September 2007, Southwest Law Enforcement applied for a
24 Building Permit to construct 44 feet of new partitions in the Otay Mesa facility.
25 SDMC § 129.0212 provides in pertinent part: "A decision on an application for a
26 Building Permit *shall* be made by the Building Official in accordance with Process
27 One. The Building Permit shall be approved if the Building Official finds that the
28 work described in the permit application, plans, specifications, and other data

1 comply with the requirements of the Building Regulations, other applicable laws
2 and ordinances, and any applicable development permit.” (Emphasis added.) See
3 also SDMC § 112.0501, Diagram 112-05A (depicting “Process One” to include
4 only staff level (“ministerial”) review).

5 28. The Building Permit for construction of the partitions was granted and
6 Blackwater began developing the Otay Mesa facility.

7 29. By late spring, Blackwater and Southwest Law Enforcement were not
8 able to come to mutually agreeable contract terms; thus, their relationship ended
9 with regard to the facility. Nonetheless, Blackwater continued to create the training
10 facility and prepare for the training classes. There is no requirement that
11 Blackwater change the name of the entity to which the permit was issued because
12 the rights provided by the permit relate to the facility.

13 30. Blackwater’s affiliate, Raven Development Group, which specializes
14 in the creation of training facilities, assisted Blackwater with its construction of and
15 preparations for the Otay Mesa facility. For example, in February 2008, Raven
16 filed two applications for Building Permits for the Otay Mesa facility. These
17 permits were for (1) installing two new air conditioning units and six exhaust fans,
18 and (2) adding an indoor target range. These permits were granted, and
19 Blackwater, assisted by Raven, began installing the additional air conditioning units
20 and exhaust fans and constructing the indoor target range.

21 31. At the site, an indoor target range will be used for training related to
22 marksmanship and the use of firearms. Under the SDMC, Blackwater was required
23 to obtain a building permit for the target range, but was not required to obtain any
24 other approvals. Indeed, SDMC § 53.10(d) explicitly exempts target ranges from
25 all San Diego firearm restrictions, including council approval. In fact, after a
26 reasonable investigation, Blackwater has been unable to identify any instance in
27 which the City Council has been asked to approve a gun permit for a target range at
28

1 a training facility or vocational or trade school, or when a target range was required
2 to comply with the discretionary process now being imposed on Blackwater.

3 32. The same disparate treatment applies to vocational facilities instructing
4 in similar subjects. For example, Southwestern College operates a Peace Officers
5 Standards and Training (P.O.S.T)-certified police academy at 8100 Gigantic Street,
6 *less than a quarter mile from Blackwater's Otay Mesa facility*. On information and
7 belief, Southwestern College was not required to obtain from the City Council any
8 special approval to operate as a vocational institution. On further information and
9 belief—and despite initial claims to the contrary—other vocational institutions,
10 including privately-run institutions, exist in the Otay Mesa area and were not
11 required to obtain the approvals that Blackwater was told it must obtain, or follow
12 the process being imposed on Blackwater.

13 33. After informing the Navy that Blackwater would be able to satisfy the
14 Navy's West Coast training needs, Blackwater prepared for the training classes that
15 will be offered at the Otay Mesa facility by, *inter alia*, sending offer letters to
16 potential instructors and by arranging with vendors to purchase supplies and
17 training materials. Blackwater also leased the facility at a cost of \$35,000 per
18 month, and spent hundreds of thousands of dollars renovating the facility.

19 34. In short, Blackwater complied the SDMC permit and approval
20 requirements, as recently admitted by Defendant Broughton:

21 Earlier this month, the Mayor Jerry Sanders launched an
22 inquiry into how Blackwater obtained its permits. One
23 issue under review is why the development services
24 department classified the company's navy training center
25 as a trade school. David Potter is a former planner with
26 the city. He says no city rules exist that would exclude the
27 project from operating as a trade school.

28 Potter: The zone clearly allows that but doesn't define
what it is....so I would say this qualifies as vocational
training.

And that's why development services director Broughton
says even if Blackwater had been listed on the permit
applications, his staff wouldn't have done anything

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

differently.

Broughton: I don't see that I would have had any other choice but to approve it because it complied with our municipal code and the California Building Code.²

Blackwater Should Not Be Required To Undergo The City's Proposed Discretionary Process

35. The Otay Mesa Development District requires a development permit or an exemption from the permit requirement. Blackwater is exempt from the permit requirement because its facility—a trade/vocational school—is in compliance with this Ordinance. SDMC §1517.0202(a)(2).

36. Vocational/trade schools, such as Blackwater's training facility, are permitted uses as of right in the Otay Mesa Development, pursuant to two distinct provisions of the Municipal Code. SDMC § 1517.0301(a)(1) specifically authorizes “[a]ll uses permitted in the IH-2-1 zone.” It further exempts facilities permitted in the IH-2-1 zone from obtaining any special permits, including an Otay Mesa Development Permit. Vocational schools are permitted in the IH-2-1 zone, under SDMC § 131.0622, Table 131-06B. Thus, because Blackwater’s facility, a vocational school, would be permitted in the IH-2-1 zone as a matter of right, it is similarly permissible, as a matter of right, in Otay Mesa.

37. A vocational school also is permissible in Otay Mesa under SDMC § 1517.0301(a)(8)(A). That section allows a trade school to operate that instructs in subjects *related* to a use *permitted* in the Industrial Subdistrict. The Industrial Subdistrict allows for a wide variety of uses, including: (1) scientific research and development activities; (2) manufacturing plants requiring advance technology and skills; (3) facilities engaged in the production of experimental products; (4) general industrial uses (defined as “Establishments engaged in the . . . manufacturing . . .

² KPBS, *San Diego City Hall Probes Permit for Blackwater Facility*, by Amita Sharma, May 20, 2008, available at <http://www.kpbs.org/news/local?id=11738>.

1 testing [or] servicing . . . of a wide range of products”); (4) storage warehouses; and
2 (5) facilities involved in the wholesale distribution of various goods (including
3 machinery, equipment, and supplies), pursuant to SDMC §§ 1517.0301(a)(2)(A),
4 (2)(B), (2)(D), (3), (6)(A), (6)(B), *et seq.* Thus, if the subjects taught at
5 Blackwater’s vocational facility relate to *any* of these permissible uses, it is also
6 permissible.

7 38. Blackwater’s facility will instruct in a variety of subjects, all of which
8 are related to permitted uses in the Otay Mesa Industrial Subdistrict. For example,
9 Blackwater’s facility will instruct on proper safety techniques for using the latest
10 state-of-the-art personal weaponry. Because facilities engaged in researching and
11 developing this weaponry are permitted in the subdistrict, a vocational school
12 instructing end users on how to properly employ these devices would also be
13 permissible. Blackwater’s facility will also instruct students on how to assemble
14 and disassemble firearms. Because facilities engaged in the manufacturing of
15 firearms and firearm components are permitted in the subdistrict, a vocational
16 school instructing individuals on how to assemble these items would also be
17 permissible. Although it is by no means required that such weapons actually be
18 manufactured in the subdistrict for weapons training to be permitted, it is certainly
19 notable that a facility constructing Navy training drones employing live rocket
20 motors is located next door to the Otay Mesa Facility.

21 39. Blackwater does not require approval by the City Council to train
22 sailors on the proper use of firearms at the facility. SDMC § 53.10(d) clearly
23 permits the discharge of firearms, without discretionary council approval or CEQA
24 review, if the firearms are discharged at a facility instructing on the proper use of
25 firearms and allowing individuals to engage in target practice. Such facilities are
26 called target ranges. By exempting from special approval processes the places
27 where San Diegans (and in this case, the men and women serving in the U.S. Navy)
28 may practice gun safety and gun accuracy, the Municipal Code is consistent with

1 the public policy of the State of California, which similarly exempts target ranges
2 from even the strictest of gun laws.³

3 40. In sum, the Blackwater facility is clearly a vocational school.
4 Vocational schools are permitted in Otay Mesa—as a matter of right with no need
5 for discretionary or CEQA review—under two separate provisions of the Municipal
6 Code.

7 **San Diego City Officials Inspect Blackwater's Facilities and Give**
8 **Blackwater the Right to Occupy the Facility**

9 41. During and after the development process, inspectors from the City
10 visited the Otay Mesa facility to inspect the work done pursuant to the three
11 building Permits. Each inspector met with representatives of Blackwater, who
12 specifically identified themselves as Blackwater employees. On March 21, 2008,
13 the City's electrical inspector visited the facility. Meeting with him was
14 Blackwater West Vice President Brian Bonfiglio, who identified himself as a
15 Blackwater employee and provided the inspector with a Blackwater business card.
16 Mr. Bonfiglio also was wearing a Blackwater shirt. The City's electrical inspector
17 approved Blackwater's electrical permits. On March 25, 2008, the San Diego Fire
18 Inspector visited the facility and met with Mr. Bonfiglio, who again identified
19 himself as working for Blackwater, provided the inspector with a Blackwater
20 business card and again was wearing a Blackwater shirt. The Fire inspector
21 approved Blackwater's fire and safety permits. Similarly, Blackwater

22 ³ See, e.g., Cal. Pen. Code § 12026.2(a)(9) (exempting people traveling to target ranges
23 from California's concealed weapon ban); Cal. Pen. Code § 12027(f) (exempting
24 members of target ranges, whether public or private, from other concealed weapons
25 restrictions); Cal. Pen. Code § 12031(b)(5) (exempting individuals at target ranges from
26 being charged with felony for carrying a loaded weapon); Cal. Pen. Code § 12070(b)(9)
27 (exempting target ranges that loan guns to individuals from California gun-transfer laws);
28 Cal. Pen. Code § 12073(b)(7) (exempting target ranges from certain recordkeeping
requirements); Cal. Pen. Code § 12280(k)(1)(C)(i) (exempting target ranges from
California assault weapons ban); Cal. Pen. Code § 12285(c)(3) (exempting individuals at
target ranges from certain assault weapon registration requirements); and Cal. Civ. Code
§ 3482.1 (exempting compliant shooting ranges from nuisance liability).

1 representatives had met with City planners and other officials, and identified
2 themselves as Blackwater employees. No effort was made to conceal Blackwater's
3 management or control over the Otay Mesa facility. Every City staff member must
4 have known they were dealing with Blackwater employees.

5 42. Blackwater completed the projects for which it obtained permits:
6 constructing 44 feet of partitions, installing air conditioning units and exhaust fans,
7 and installing an indoor target range. On April 29, Blackwater staff and its
8 contractors met with Afsaneh Ahmadi, Chief Building Official for the City of San
9 Diego, at her request. She scrutinized Blackwater's plans, and requested one more
10 walk-through of the facility. The very next day, the City's Structural Engineer
11 conducted a final inspection and, finding that Blackwater was in compliance with
12 all relevant provisions of the SDMC, approved issuance of a Certificate of
13 Occupancy, pursuant to SDMC §§ 129.0113(a) & 129.0114. The Building Official
14 evidenced this approval of the Certificate of Occupancy by stamping the plans for
15 the Otay Mesa facility. He was overheard saying, "everything looked good. I can't
16 *not* sign these plans."

17 43. All that is left is the ministerial act of sending Blackwater its
18 Certificate of Occupancy. SDMC § 129.0114 ("Issuance of a Certificate of
19 Occupancy." "The Building Official shall inspect the structure and if the Building
20 Official finds no violations of the Land Development Code or other regulations that
21 are enforced by the City's designated Code Enforcement Official, the Building
22 Official *shall* issue a certificate of occupancy") (emphasis added); see also SDMC §
23 131.0622. Blackwater is informed and believes that it is the City's custom and
24 practice to mail the actual paper Certificate of Occupancy several weeks after the
25 approval. No further permits or approvals are necessary from the City of San Diego
26 before Blackwater commences its training program at the Otay Mesa facility.
27
28

Election Year Politics Trigger an Investigation of the Otay Mesa Facility

1
2 44. San Diego's Mayor and City Attorney will stand for re-election on
3 June 3, 2008. The Otay Mesa facility that Blackwater intends to open on June 2,
4 2008 has become an issue in both the Mayor's and the City Attorney's campaigns
5 for re-election.

6 45. Several self-proclaimed activists have tried to make Blackwater's Otay
7 Mesa facility an election issue. According to The Courage Campaign, "Now it's up
8 to the Mayor and the San Diego City Council to stand up against these mercenaries
9 setting up shop on in California." The Mayor's election opponent, Steve Francis,
10 also sought to make Blackwater a campaign issue by claiming the "Blackwater
11 permit issue raises more questions than it answers," including "[w]hy was this
12 matter not handled in an open and transparent way with public hearings and public
13 comment period?" Indeed, a headline read, "Blackwater Explodes into San Diego
14 Mayoral Race."

15 46. On April 26, 2008, San Diego Councilman Scott Peters, at a rally
16 organized by political activists, began questioning the propriety of the City
17 approving Blackwater's facility. Peters is running for City Attorney against Mike
18 Aguirre. The press covered the issue through late April and early May.

19 47. On May 5, 2008, the Mayor of San Diego requested that the City's
20 Chief Operating Officer, Jay Goldstone, "conduct an investigation into the permits
21 granted so far and permits yet to be granted" for Blackwater's Otay Mesa facility.

22 48. Despite not being requested by the Mayor to conduct an investigation,
23 the City Attorney then, on May 16, 2008, issued a Memorandum recommending the
24 issuance of a "Stop Work Order," or, in the alternative, the revocation of the
25 Certificate of Occupancy for the Otay Mesa facility. This Memorandum contains
26 incorrect factual assumptions and reaches faulty legal conclusions and specifically
27 states the City Attorney is "open to considering additional information or facts as
28 they become known." The Memorandum was issued in a transparent attempt for

1 the City Attorney to garner political support from activists who have been opposing
2 Blackwater's efforts. A copy of the City Attorney's May 16, 2008 Memorandum is
3 attached as Exhibit B.

4 49. On May 19, 2008, counsel for Blackwater wrote to the Mayor of San
5 Diego—and copied the City Attorney—describing the numerous errors and flaws in
6 the City Attorney's analysis. For example, counsel for Blackwater explained how
7 the City Attorney's claim that "because Blackwater will train members of the U.S.
8 Navy on the proper use of firearms at the facility, the [SDMC] requires a special
9 approval by the city council" was incorrect. SDMC § 53.10 "generally prohibits
10 the use of firearms and allows the city council to issue permits for the same under
11 'conditions as it deems proper.' However, SDMC section 53.10(d) clearly permits
12 the discharge of firearms, without discretionary council approval or CEQA review,
13 if the firearms are discharged at a facility instructing on the proper use of firearms
14 and allowing individuals to engage in target practice. Such facilities are called
15 'target ranges.'"

16 50. Additionally, counsel for Blackwater explained that the City
17 Attorney's contention "that a law enforcement or security training operation does
18 not 'clearly qualify' as a permitted use in Otay Mesa" is incorrect. Vocational
19 schools, such as Blackwater's Otay Mesa facilities "are permitted in Otay Mesa, as
20 a matter of right" under SDMC §§ 1517.0301(a)(1), 131.0622, and
21 1517.0301(a)(8). A copy of the May 19, 22008 letter from counsel for Blackwater
22 to the Mayor of the City of San Diego is attached as Exhibit C.

23 **The City of San Diego Nullifies Blackwater's Building Permits and Revokes its**

24 **Approval for the Certificate of Occupancy**

25 51. On the same day, May 19, 2008—not even an hour after Blackwater
26 sent its letter (and certainly before City officials had time to digest Blackwater's
27 factual and legal analysis), and *before* the audit report requested by the Mayor had
28 been issued—Defendant Broughton, in his capacity as Director of the City of San

1 Diego's Development Services Department, wrote to Mr. Brian Bonfiglio, Vice
2 President of Blackwater, to inform him that the City of San Diego "will not issue a
3 certificate of occupancy" for the Otay Mesa facility. The letter directed Blackwater
4 not to use the "portions of the building identified for use as a shooting range and
5 vocational/trade school...until a certificate of occupancy has been issued for this
6 change of use."

7 52. Mr. Broughton further asserted that "no certificate of occupancy will
8 be issued until the appropriate discretionary processes associated with the use of
9 firearms in city limits and determination of use for the vocational/trade school by
10 the Planning Commission has been completed. Since [the] Planning Commission
11 and City[] Council's actions will be considered discretionary, these actions are
12 subject to review under the California Environmental Quality Act (CEQA)."

13 53. Mr. Broughton's letter asserted that Blackwater may continue to use
14 the Otay Mesa facility as a warehouse. A copy of Mr. Broughton's May 19, 2008
15 letter to Mr. Bonfiglio is attached as Exhibit D.

16 54. As detailed above, target ranges are not subject to discretionary
17 council approvals. As detailed above, vocational facilities are not subject to
18 discretionary planning commission review (or the concomitant CEQA analysis).

19 55. Fearing Blackwater's May 19, 2008 letter may have crossed with Mr.
20 Broughton's May 19, 2008 and not been reviewed, Blackwater sent another letter to
21 Defendant Broughton on May 20, 2008. A copy of the May 20, 2008 letter is
22 attached as Exhibit E. Despite Blackwater's request, the City still refuses to send
23 Blackwater its Certificate of Occupancy.

24 ///

25 ///

FIRST CLAIM FOR RELIEF
Injunctive Relief Mandate Against All Defendants

1
2 56. Blackwater realleges and incorporates by reference paragraphs 1
3 through 55 hereof as if set forth herein in full.

4 57. As Defendant Broughton has admitted, Blackwater has complied with
5 the Municipal Code and the California Building Code. As a result, all permits were
6 properly issued and Blackwater was correctly given the right to occupy the site, and
7 Blackwater has vested rights in the Otay Mesa Facility. Defendants have a clear
8 and present ministerial duty to send to Blackwater its Certificate of Occupancy for
9 the Otay Mesa training facility, which has already been approved by the Building
10 Official.

11 58. Blackwater has a clear and present right to occupy the Otay Mesa
12 facility and therefore a right to the performance of Defendants' ministerial duty of
13 sending the Certificate of Occupancy. See SDMC § 129.0114.

14 59. Blackwater does not have a plain, speedy, and adequate remedy in the
15 ordinary course of law because Blackwater must have the training facility
16 operational by June 2, 2008.

17 60. To remedy Defendants' improper acts and avoid irreparable harm,
18 Blackwater seeks injunctive relief ordering Defendants to send to Blackwater its
19 Certificate of Occupancy. Alternatively, Blackwater seeks an order staying the
20 effectiveness of the Defendant Broughton's May 19, 2008 letter to Brian Bonfiglio
21 and allowing Blackwater to immediately occupy the Otay Mesa Facility.
22 Moreover, Blackwater seeks an order enjoining Defendants from (1) enforcing the
23 May 19, 2008 letter from Kelly Broughton purportedly refusing to issue its
24 Certificate of Occupancy for the Otay Mesa Facility and/or refusing to allow
25 Blackwater to immediately occupy the Otay Mesa Facility, and (2) refusing to
26 perform the ministerial task of sending Blackwater a Certificate of Occupancy for
27 the Otay Mesa Facility.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

SECOND CLAIM FOR RELIEF
Declaratory Judgment against All Defendants

61. Blackwater realleges and incorporates by reference paragraphs 1 through 60 hereof as if set forth herein in full.

62. An actual controversy has arisen and now exists between Blackwater and Defendants relating to their respective rights and duties in that Blackwater contends that Defendants' withholding of Blackwater's Certificate of Occupancy is invalid and unenforceable. Instead, the City is legally required to perform the ministerial act of sending Blackwater the Certificate of Occupancy. See SDMC § 129.0114. Defendants dispute these contentions and contend that their withholding of Blackwater's Certificate of Occupancy is valid.

63. Pursuant to 28 U.S.C. § 2201, Blackwater desires a declaration that (1) the Defendants' purported withholding of Blackwater's Certificate of Occupancy is improper, unlawful and invalid and (2) Blackwater has the right to occupy the building.

64. Such a declaration is necessary and appropriate at this time under the circumstances in order that Blackwater and Defendants may ascertain their respective rights and duties, and for Blackwater to avoid irreparable harm.

21
22
23
24
25
26
27
28

THIRD CLAIM FOR RELIEF
Violation of Section 1983 (Procedural Due Process) against All Defendants

65. Blackwater realleges and incorporates by reference paragraphs 1 through 64 hereof as if set forth herein in full.

66. At all times relevant herein, all Defendants' conduct was subject to 42 U.S.C. § 1983.

67. Blackwater obtained all necessary Building Permits and approvals to occupy the building so it could operate its training program at the Otay Mesa facility. The Building Official indicated that Blackwater was approved for a Certificate of Occupancy by stamping Blackwater's building plans with a

1 Certificate of Occupancy stamp. Accordingly, Blackwater possesses a protected
2 property right in its building permits and the approval to occupy the building.

3 68. On May 19, 2008, Defendants, acting under color of state law and
4 pursuant to the City Attorney's flawed analysis, purported to deprive Blackwater of
5 its protected property rights by sending a letter to Brian Bonfiglio, Blackwater's
6 Vice President, stating that "[t]he City will not issue a certificate of occupancy for
7 the [Otay Mesa facility] pursuant to Section 129.0114 of the San Diego Municipal
8 Code..." This letter prohibits Blackwater from using the Otay Mesa facility for any
9 purpose other than "warehouse uses." Accordingly, Blackwater cannot operate its
10 training program or begin classes on June 2, 2008, as it must do to satisfy the
11 United States Navy's requirements.

12 69. Defendants provided Blackwater no notice and opportunity to be heard
13 before depriving Blackwater of its property rights. Moreover, any post-deprivation
14 hearing that Blackwater might be entitled to would be completely ineffective
15 because nothing would be resolved prior to June 2, 2008. Accordingly, Defendants
16 have violated Blackwater's constitutional right to procedural due process.

17 70. Because Defendants are improperly withholding Blackwater's
18 Certificate of Occupancy, Blackwater stands to suffer reputational harm and could
19 lose all or a portion of its contract with the United States Navy for the training of
20 sailors. Blackwater may also incur expenses related to the Otay Mesa facility, such
21 as rent, and utility bills, even though the company cannot use it for its training
22 program. Blackwater also may be contractually obligated to pay its instructors,
23 vendors, and landlord for services and goods that it will not be able to use because
24 of this revocation.

25 71. To remedy this constitutional violation and avoid irreparable harm,
26 Blackwater seeks to recover from Defendants, pursuant to 42 U.S.C. § 1983,
27 appropriate declaratory and injunctive relief as well as its damages, together with
28 interest, and its costs and attorneys' fees in bringing this lawsuit.

1 burdening out-of-state competitors.” *Kentucky v. Davis*, -- S.Ct. --, 2008 WL
2 2078187 (U.S., May 19, 2008) (citation and internal quotes omitted).

3 83. The dormant Commerce Clause requires any justifications for favoring
4 in-state business over out-of-state competitors to satisfy “strict scrutiny.”

5 84. Blackwater intends to use the Otay Mesa facility to operate a training
6 program for sailors. This training program would include training on
7 marksmanship using the target range that Blackwater has built inside the
8 warehouse. By withholding Blackwater’s Certificate of Occupancy, Defendants
9 have prevented Blackwater from using the Otay Mesa facility to operate its training
10 program.

11 85. However, the City permits Southwestern College to operate a P.O.S.T-
12 certified police academy in the Otay Mesa area, at 8100 Gigantic Street, less than a
13 quarter mile from Blackwater’s Otay Mesa facility. On information and belief, the
14 City did not require Southwestern College or other vocational institutions,
15 including privately-run institutions, to obtain any special approval from the City
16 Council to operate as a vocational institution, such as the process being imposed on
17 Blackwater. Moreover, on information and belief, other target ranges in the area
18 were not required to pursue the City’s proposed “discretionary process”—and were
19 not subjected to CEQA’s requirements—as is being required of Blackwater. *See*
20 Exhibit C.

21 86. Defendants have not articulated any proper basis for their disparate
22 treatment of Blackwater. The City’s withholding of Blackwater’s Certificate of
23 Occupancy for political motives is a discriminatory act absent a showing that there
24 is no other means to advance a legitimate local purpose.

25 87. Defendants have imposed on Blackwater regulatory measures in a
26 manner designed to benefit in-state economic interests by burdening out-of-state
27 competitors.

28

1 training program or begin classes on June 2, 2008, as it must do to satisfy the
2 United States Navy's requirements.

3 94. Defendants provided Blackwater no notice and opportunity to be heard
4 before depriving Blackwater of its property rights. Any post-deprivation hearing
5 that Blackwater might be entitled to would be completely ineffective because
6 nothing would be resolved prior to June 2, 2008. Accordingly, Defendant has
7 violated Blackwater's constitutional right to procedural due process.

8 95. Because Defendants are improperly withholding Blackwater's
9 Certificate of Occupancy, Blackwater stands to suffer reputational harm and could
10 lose all or a portion of its contract with the United States Navy for the training of
11 sailors. Blackwater may also incur expenses related to the Otay Mesa facility, such
12 as rent, and utility bills, even though the company cannot use it for its training
13 program. Blackwater also may be contractually obligated to pay its instructors,
14 vendors, and landlord for services and goods that it will not be able to use because
15 of this revocation.

16 96. To remedy this constitutional violation and avoid irreparably harm,
17 Blackwater seeks to recover from Defendants, pursuant to Cal. Const., art I, § 7(a),
18 appropriate declaratory and injunctive relief.

19 **SEVENTH CLAIM FOR RELIEF**

20 **Violation of Cal. Const., art I, § 7(a) (Equal Protection) against All Defendants**

21 97. Blackwater realleges and incorporates by reference paragraphs 1
22 through 96 hereof as if set forth herein in full.

23 98. At all times relevant herein, all Defendant's conduct was subject to
24 Cal. Const., art I, § 7(a).

25 99. Blackwater intends to use the Otay Mesa facility to operate a training
26 program for sailors. This training program would include training on
27 marksmanship using the target range that Blackwater has built inside the
28 warehouse. By withholding Blackwater's Certificate of Occupancy, Defendants

1 have prevented Blackwater from using the Otay Mesa facility to operate its training
2 program.

3 100. However, the City permits Southwestern College to operate a P.O.S.T-
4 certified police academy in the Otay Mesa area, at 8100 Gigantic Street, less than a
5 quarter mile from Blackwater's Otay Mesa facility. On information and belief, the
6 City did not require Southwestern College or other vocational institutions,
7 including privately-run institutions, to obtain any special approval from the City
8 Council to operate as a vocational institution, such as the process being imposed on
9 Blackwater. Moreover, on information and belief, other target ranges in the area
10 were not required to pursue the City's proposed "discretionary process"—and were
11 not subjected to CEQA's requirements—as is being required of Blackwater. *See*
12 Exhibit C.

13 101. Defendants have not articulated any rational basis for its disparate
14 treatment of Blackwater, on the one hand, and Southwestern College and other
15 target ranges or vocational institutions, on the other hand. Indeed, Defendants'
16 withholding of Blackwater's Certificate of Occupancy violates the City's own
17 Municipal Code.

18 102. Instead of being motivated by any rational basis, Defendants' actions
19 are motivated by political pressure. The existence of Blackwater's facility in Otay
20 Mesa has become an issue in the campaign for re-election of both the San Diego
21 City Attorney and the Mayor of San Diego. Thus, Defendants' actions are
22 motivated not by a legitimate state interest, but by the City Attorney's and the
23 Mayor's desire to win their re-election campaigns.

24 103. Accordingly, Defendants have violated Blackwater's constitutional
25 right to equal protection.

26 104. To remedy this constitutional violation, Blackwater seeks to recover
27 from Defendants, pursuant to Cal. Const., art I, § 7(a), appropriate declaratory and
28 injunctive relief.

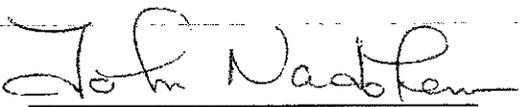
PRAYER FOR RELIEF

WHEREFORE, Blackwater prays for:

1. A preliminary and permanent injunction requiring Defendants to complete the ministerial function of sending Blackwater the Certificate of Occupancy or, alternatively, order staying the effectiveness of the City's May 19, 2008 letter to Brian Bonfiglio and allowing Blackwater to immediately occupy the Otay Mesa Facility;
2. A preliminary and permanent injunction enjoining Defendants from (1) enforcing the May 19, 2008 letter from Kelly Broughton purportedly refusing to issue its Certificate of Occupancy for the Otay Mesa Facility and/or refusing to allow Blackwater to immediately occupy the Otay Mesa Facility, and (2) refusing to perform the ministerial task of sending Blackwater a Certificate of Occupancy for the Otay Mesa Facility;
3. A judgment declaring that (1) Defendants Broughton's, the Department's and the City' purported withholding of Blackwater's Certificate of Occupancy is improper, unlawful and invalid and (2) Blackwater has the right to occupy the building;
4. A judgment awarding Blackwater all damages it incurred, together with interest;
5. A judgment awarding Blackwater its costs and attorneys' fees; and
6. Such other and further relief as this Court deems just and proper.

Dated: May 21, 2008

MAYER BROWN LLP

By: 

John Nadolenco
Attorneys for Plaintiff
BLACKWATER LODGE AND TRAINING
CENTER, INC., dba BLACKWATER
WORLDWIDE

JURY DEMAND

Plaintiff hereby demand trial by jury of all issues so triable.

Dated: May 21, 2008

MAYER BROWN LLP

By: 

John Nadolenco

Attorneys for Plaintiff
BLACKWATER LODGE AND TRAINING
CENTER, INC., dba BLACKWATER
WORLDWIDE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28