

Neil Dymott

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May 20, 2008

Mr. Kelly Broughton
Development Services
CITY OF SAN DIEGO
1222 First Avenue, MS 501
San Diego, CA 92101-4155

Dear Mr. Broughton:

We are in receipt of your letter dated May 19 that indicates the city “will not issue a certificate of occupancy” for the Blackwater Otay Mesa facility. Your letter states you reached this conclusion based on the “opinion from the City Attorney’s office,” dated May 16. We have grave concerns with you proceeding based on the City Attorney’s memorandum, because the City Attorney’s memorandum was fatally flawed. For the reasons explained below (and in the attached letter), we ask you to reconsider your letter of yesterday.

Our primary concern is that you proceeded without correct information. The City Attorney’s May 16 memorandum stated that the “Office is open to considering additional information or facts as they become known; at such time, additional legal analysis may be appropriate.” In an effort to provide the city with the additional information and facts the City Attorney requested, we submitted to the Mayor (copying you and the City Attorney) a letter outlining all relevant information and the appropriate legal analysis. We transmitted this letter to you yesterday, in the late afternoon. Your letter indicating the city would not issue the certificate of occupancy arrived very shortly thereafter.

Because of the close time proximity of the letters, and because your letter did not appear to have the benefit of the additional facts and information we provided, we have reason to believe our letters crossed in transmission. In an effort to make sure you have all possible information before you make a crucial decision in error, I am again summarizing below all salient facts and the appropriate legal analysis.

- **The City’s Firearms Ban makes an exception for Target Ranges.** Normally, entities wishing to discharge firearms or explosives within city limits must apply for council approval, which is a discretionary process. However, the city law establishing this process clearly exempts target ranges. San Diego Municipal Code Section 53.10(d) reads: “Exceptions: This section does not apply to . . . target ranges.” This code provision is

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consistent with exemptions for target ranges outlined in state law, exemptions which exist undoubtedly to encourage facilities that teach the safe, effective use of firearms. Blackwater's facility will teach the safe, effective use of firearms and is therefore not subject to the city council approval process.

- **Blackwater's Otay Mesa location is a vocational facility.** A vocational facility is a school, other than a traditional university, where subjects are taught to facilitate a person's entry or continuing membership in a skilled or semi-skilled profession. Blackwater's Otay facility will teach men and women of the Navy how to properly learn the skills necessary to be successful in their vocation. The facility also has the capability of training local law-enforcement deputies and warehouse security guards on safe, effective apprehension techniques. Blackwater's Otay Mesa facility is therefore undoubtedly a vocational facility.
- **Vocational Facilities are permitted in Otay Mesa as a matter of right, after only ministerial review.** Two separate code provisions allow for vocational facilities in Otay Mesa. SDMC section 1517.0301(a)(1) specifically authorizes "All uses permitted in the IH-2-1 zone." Vocational facilities are permitted in the IH-2-1 zone under SDMC section 131.0622. Moreover, SDMC section 1517.0301(a)(8)(A) specifies that vocational facilities instructing on subjects related to permitted uses in Otay Mesa are also permitted. The Blackwater facility will instruct on a number of subjects related to permitted uses in Otay Mesa. Consequently, the facility is permissible as a matter of right.
- **A facility that is permissible as a matter of right need only undergo ministerial review and inspections. Our facility has undergone these inspections, and passed with flying colors.** The code specifies that facilities not subject to discretionary review must only meet the criteria outlined in the code. These include inspections for such things as the requisite number of fire exits and other safety-related features. Your staff repeatedly inspected the Blackwater Otay Mesa facility and repeatedly examined its plans. On April 29, we met with Chief Building Official Afsaneh Ahmadi for one final review. The next day, your department stamped all permits. Thus, Development Services has no discretion on whether to issue the Certificate of Occupancy, which is Blackwater's due, it having met all the criteria in the code. Indeed, you were quoted in the San Diego Union Tribune on May 15 saying that Blackwater's permits that your office had just issued were non-appealable, thereby recognizing that

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they were nondiscretionary. To withhold our Certificate of Occupancy at this stage is completely improper and illegal.

- Non-Discretionary Permits are not subject to CEQA review. Under state law, only projects subject to discretionary review are subject to the CEQA process. Cal. Pub. Res. Code § 21080(b)(1). Blackwater's permits are non-discretionary. Thus your May 19 letter was in error when it stated Blackwater's permits for the Otay facility should be subject to CEQA review.

We stress that withholding Blackwater's Certificate of Occupancy will cause grave harm. It could jeopardize Blackwater's longstanding contract with the Navy, to train sailors in basic anti-terrorism tactics, training which is designed to avoid a repeat of the tragic attack on the U.S.S. Cole in 2000. Withholding the Certificate of Occupancy could diminish Blackwater's business reputation and organizational goodwill. It could cause harm to national security. And it likely constitutes a constitutional violation, since the city is treating Blackwater differently from all other permit applicants and taking these steps without affording Blackwater the process it is due.

We ask you to rescind or stay your May 19 letter and to issue the Certificate of Occupancy for Blackwater's Otay facility immediately. If we do not hear from you by close of business Friday, we will be forced to consider taking other steps to enforce and protect Blackwater's rights.

Very truly yours,

Neil, Dymott, Frank,
McFall & Trexler APLC

Michael I. Neil

MIN:km

cc: Mayor Jerry Sanders
City Attorney Michael Aguirre
Members of the City Council

Attachment: Letter from Blackwater dated May 19, 2008