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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC.,)	Case No. 08CV0926-H(WMC)
)	
Plaintiff,)	San Diego, California
)	
vs.)	Tuesday,
)	June 17, 2008
BROUGHTON, et al.,)	9:00 a.m.
)	
Defendants.)	
)	

TRANSCRIPT OF ORDER TO SHOW CAUSE HEARING
BEFORE THE HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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1 SAN DIEGO, CALIFORNIA TUESDAY, JUNE 17, 2008 9:00 AM

2 --oOo--

3 (Call to order of the Court.)

4 THE CLERK: Three on calendar, 08CV926, Blackwater
5 Lodge and Training Center, Inc. versus Broughton, order to
6 show cause hearing regarding issuance of preliminary
7 injunction.

8 THE COURT: State your appearances for the record.

9 MR. NEIL: Thank you, your Honor. Michael I. Neil
10 of the Neil, Dymott law firm representing Blackwater.

11 MR. NADOLENCO: Good morning, your Honor. John
12 Nadolenco of the Mayer, Brown firm on behalf of Plaintiff
13 Blackwater.

14 THE COURT: Thank you.

15 MR. CHINE: Good morning, your Honor. Jeff Chine
16 for Luce, Forward, Hamilton & Scripps on behalf of
17 Blackwater.

18 THE COURT: Thank you.

19 MR. AGUIRRE: Good morning, your Honor. Michael
20 Aguirre on behalf of the City of San Diego. Good morning.

21 THE COURT: Good morning.

22 MS. BROCK: Good morning. Carmen Brock, Deputy
23 City Attorney for the City of San Diego.

24 MS. SEVERSON: Good morning. Maria Severson,
25 Chief Deputy City Attorney for the City of San Diego.

1 MR. WALTERS: Good morning. Robert Walters,
2 Deputy City Attorney for the City of San Diego.

3 THE COURT: Thank you.

4 MR. SCHAEFER: Good morning. George Schaefer,
5 Deputy City Attorney for the City of San Diego.

6 THE COURT: Good morning. This is a hearing on
7 the order to show cause why the preliminary injunction
8 should not issue. Plaintiffs may proceed.

9 MR. NEIL: Thank you, your Honor.

10 Since the last time we were here, your Honor, the
11 only change that has occurred in the landscape is that the
12 City auditor has come forth with a report which we attached
13 as an exhibit completely outlining the ministerial permit
14 process that Blackwater complied with and said that all
15 requirements were met and that all permits were properly
16 issued.

17 So basically, the ground work is the same as the
18 last time we were here except we have been up and
19 functioning for the last two weeks, and the training of the
20 United States Navy sailors has been ongoing.

21 However, there has been one change, and that is in
22 the City's response to this preliminary injunction, order to
23 show cause hearing in which for the first time -- although
24 it was verbally discussed, I believe, by Mr. McGrath last
25 time, but for the first time a theory of totality of

1 circumstances in a ministerial permit process has now been
2 made an issue.

3 This is new. Other theories that have been
4 advanced since the initial letter from Ms. Broughton denying
5 us the right to occupy the facility have been abandoned.
6 She never mentioned totality of circumstances. Ms. Amate
7 (phonetic), who in her declaration which is attached to the
8 original papers that were filed with this court never
9 mentioned totality of circumstance.

10 This is a theory that I will submit has been
11 thought up by the City Attorney's Office in a desperate
12 attempt to justify their actions. No citation to a
13 Municipal Code section, to a state law or to any authority
14 anywhere has been cited.

15 The San Diego Municipal Code Section 15170202 para
16 (a) says if the permits and the building are in compliance,
17 you do not have to comply with any Otay Mesa Development
18 District review process. Nobody anywhere has said we did
19 not meet the permit process totally and completely.

20 Where there's a reference somehow in what I would
21 say is a somewhat disjointed discourse on this totality of
22 circumstances argument by the City Attorney to the Otay Mesa
23 Development District review process, your Honor, nowhere do
24 they cite any section that says we did not meet that permit
25 process and that we have not met all of the permit processes

1 that are necessary to issue an occupancy permit.

2 And when requirements are met, the Municipal Code
3 129.0114 says the occupancy permit shall issue. The auditor
4 said we have met all of the permit requirements.

5 The only other new -- I'm going to make my
6 comments brief, your Honor, and I would like to reserve time
7 to come back because I'm not sure where the City Attorney
8 may go in their discussion today. There were two other new
9 tangential new issues brought up. One had to do with a
10 requirement that Blackwater had to comply with the Business
11 and Professions Code and seek a state permit because we're
12 training security guards and private investigators.

13 Well, I think we've made it clear by declarations
14 and otherwise that we're not doing that. We're training
15 United States Navy sailors, and the Business and Professions
16 Code section simply does not apply to what we are doing
17 there.

18 And the second reference, clearly a statistical
19 error and maybe just a mathematical error or a typo. But
20 since it appeared at least two times in the pleadings, I
21 have to make mention of it. It's cited that our simulator,
22 the mockup as I call it, which is simply some blocks that
23 represent a ship when it has some doors cut in it -- and Mr.
24 DeGuzman (phonetic), who is seated here, has seen it -- does
25 not occupy 80-percent of the floor.

1 Mr. DeGuzman and I climbed all over that. And I'm
2 sure he'd be the first one to say that it occupies a very
3 small space there because when he and I stood up, we were
4 looking out over this huge warehouse that exists where
5 nothing is, and it only occupies approximately 2-percent.
6 And if there's any issue on that, I'm sure Mr. DeGuzman, who
7 is a very fine investigator for the City Attorney's Office,
8 can verify that.

9 Having said that, your Honor, I would submit that
10 from a constitutional grounds and from a factual grounds,
11 there has been nothing to alter your ruling the last time,
12 and we would ask the Court to issue a preliminary
13 injunction. And unless the Court had any questions for me
14 right now, I would like, with the permission of the Court,
15 to defer any further comments until after the City Attorney
16 makes their comments.

17 THE COURT: I do have a couple of questions. One
18 is on the issue of irreparable injury. The Court has cited
19 law that if you have a constitutional case in these cases,
20 the Court does not necessarily require traditional
21 irreparable injury. But -- and that the Defendants make a
22 good point that traditionally land use issues are deferred
23 to the local governments or state governments for land use
24 planning.

25 But there's also law that once you comply on the

1 City's own rules and regulations -- once you comply with the
2 permit process that they set up and you've been granted the
3 signed-off certificate of occupancy in the City's own
4 documents under their own procedures where they noted that
5 these are ministerial, then you can't change the rules of
6 the game later on.

7 MR. NEIL: Yes.

8 THE COURT: But -- so nevertheless -- so there is
9 a property interest. But I've said before, the Federal
10 Courts are not the -- every time a permit is denied, people
11 cannot run to the Federal Courts and seek relief.

12 You can, under 1983 jurisdiction, which provides
13 for foregrounds and constitutional grounds if you show a
14 constitutional deprivation -- sometimes those cases where
15 there's a lesser standard of irreparable injury are
16 classified in the civil rights litigation or to protect
17 people from -- there's obviously people that frankly don't
18 like your client. And I think that there's probably some of
19 those individuals here today.

20 And so one of the reasons for the federal
21 jurisdiction is to protect rights to make an even playing
22 field, no matter whether your client is liked or not liked.
23 So -- but nevertheless, the City makes a point about lack of
24 irreparable injury. And generally, you don't do an
25 injunction to prevent breach of a contract.

1 So could you address the grounds on which you
2 claim that you have sufficient irreparable injury for the
3 issuance of a preliminary injunction.

4 MR. NEIL: Your Honor, first of all, the cases and
5 the law that the City Attorney has addressed in this case --
6 and by the way, we have not seen an affidavit or a
7 declaration from anybody anywhere that -- within the City
8 that discusses this theory of the City Attorney on the
9 issues that we talked about, this totality of circumstances.

10 But coming back to the constitutional issues, the
11 cases that they discussed almost exclusively deal with
12 discretionary permits such as permits for subdivisions.
13 You're going to build Otay Mesa, for example. To build all
14 those buildings out there and to go through that process,
15 that was a discretionary process.

16 So it's a totally different process than a
17 ministerial process. In the ministerial process, we
18 obtained that property right once we met all the permit
19 requirements. Now, having that property right, obviously,
20 to deny that denies it due process. But the irreparable
21 harm comes from we have this obligation that we've made to
22 train Navy sailors on how to defend themselves and their
23 ships, and it would cause irreparable harm to our reputation
24 if we were not allowed to Honor that contract and finish the
25 training and commitment that we have made to the United

1 States Navy.

2 Further, there is a -- obviously a financial
3 interest that is involved here, and it would disrupt this
4 entire training process that has been set in place in
5 conjunction with the Navy to train the sailors both on the
6 East Coast and on the West Coast. And this is at the
7 request of the Navy to do this. And if we are not allowed
8 to complete this, it would cause irreparable harm, and I
9 believe that under -- under 1983, irreparable harm to
10 reputation is a solid grounds to rule on and to find
11 jurisdiction, your Honor.

12 And I'm not sure if that adequately answers your
13 question.

14 THE COURT: Then can -- just factually, there was
15 some attachments I think by the City investigator about the
16 program. Are you training 24 people at a time? Is it for
17 24 people?

18 MR. NEIL: It's a three-week cycle, your Honor.
19 And we train 24 sailors per cycle. Then there's a week off
20 to get ready for the next one. The sailors go home. The
21 new sailors come in. Then another three-week cycle. It's
22 very intensive training for these sailors. It's very much
23 of a hands-on type of training. The trainers they have out
24 there are experts in what they do.

25 And you don't want to give somebody a course --

1 having no offense to any sailors who may be in the audience,
2 but as a Marine, when you're training sailors how to
3 shoot --

4 THE COURT: Aren't the Marines also within the
5 Department of the Navy?

6 MR. NEIL: Well, that's always been a subject of
7 discussion, and certainly the Navy throws it in our face all
8 the time. But in any event, at least we're trained to
9 shoot, and that's what we're trying to do with the Navy down
10 there. It takes some time to do this properly and intensely
11 and safely. And that's what Blackwater is doing down there.

12 THE COURT: But it's totally indoor?

13 MR. NEIL: Pardon me?

14 THE COURT: It's totally indoor?

15 MR. NEIL: It's totally indoors. Your Honor, if
16 you were driving in a car --

17 THE COURT: See, I think that some of the people
18 here, the name of your client, and then they digress because
19 they're thinking in the public that this is the outdoor
20 Potrero situation. We're talking about 24 sailors at a
21 time, training them in an indoor facility.

22 Coronado is a beautiful town right across the bay
23 from the City of San Diego, and the military and the
24 civilians have co-existed wonderfully. And frankly, the
25 Navy SEALs train over in Coronado more intensely than your

1 24 sailors on a three-week course here, and there haven't
2 been any significant problems. It's a win/win for both the
3 City and the military.

4 Here you're talking about a vocational training
5 course. This is zoned vocational. I think that the level
6 of concern is really addressed to a different project which
7 is not going forward.

8 MR. NEIL: Your Honor, if I may --

9 THE COURT: At least on hold for now.

10 MR. NEIL: I agree. And as I told your Honor the
11 last time, I wasn't going to get into the political aspects,
12 but it's clear that this should not be a referendum on the
13 war in Iraq, a referendum on who to vote for in the
14 presidential elections. This is simply about whether or not
15 the permitting process was met, which it was. And was it a
16 ministerial process? Yes, it was. Everybody says it was.
17 Should the occupancy permit be issued? Yes. The law says
18 that.

19 If this was XYZ Corporation doing the same thing,
20 we wouldn't be here. We're only here because of the
21 political aspect that was raised. And I'll leave it at
22 that, but I totally agree with your Honor on that.

23 THE COURT: Thank you.

24 MR. NEIL: Thank you.

25 THE COURT: Mr. Aguirre.

1 MR. AGUIRRE: Thank you very much, your Honor.

2 THE COURT: Welcome back.

3 MR. AGUIRRE: Thank you very very much, your
4 Honor. Thank you for letting me be here. I know I have an
5 uphill climb, but I also know that this Court is a fair
6 court, and we've had uphill climbs before and --

7 THE COURT: And you've prevailed in some and lost
8 in some. And so I am -- I am willing to listen, and I don't
9 necessarily -- well, my tentative is still -- in reviewing
10 the papers, my tentative is that I think that the tentative
11 still remains against you.

12 So I'll let you proceed, and then at the end -- at
13 some point I'd like you to address the fact -- I know on
14 temporary restraining orders, they come on short notice,
15 often at the worst possible time for the Court. But they
16 often come on short notice. But I did note that the City
17 auditor's report was issued the day after the Court's
18 ruling. And I can't believe that that audit report was done
19 in one day.

20 So it's a little -- I'm trying to get all the
21 relevant information. And so I would have preferred to have
22 the results of the auditor's report prior to the order, and
23 I do think it tends -- the bottom line tends to confirm some
24 of the issues that the Plaintiffs were arguing. And some of
25 the earlier positions have just not panned out to be

1 factual.

2 So that preliminary said, you may address the
3 Court.

4 MR. AGUIRRE: Thank you very very much, your
5 Honor.

6 Your Honor, I think you started off in your
7 questioning to Plaintiff's counsel at the right point when
8 you said irreparable injury, which I believe, if we examine
9 it closely, takes us into the prudential reasoning behind
10 case and controversy and the Article 3 issues and whether we
11 are here having a premature adjudication of an unripe issue.
12 And I think that that has manifest itself in your Honor's
13 question in terms of irreparable injury, for there has been
14 no final action on the part of the City.

15 What there has been is a good-faith discovery that
16 the activities that were described in the application,
17 initial application that said that there was no change in a
18 warehouse that was being used to store warehouse products
19 and not being used to do military training -- and that when
20 that discovery was made -- and Mr. McGrath did argue
21 totality of circumstances to your Honor. When the upper-
22 level decision-makers within the City were tipped off that
23 what we were talking about is war training activity with no
24 security whatsoever, which will have an impact on the City
25 in terms of having to provide increased security for the

1 area because of the nature of the activity, your Honor --

2 THE COURT: Twenty-four students. That's why I
3 said you're telling me that Coronado has a problem?

4 MR. AGUIRRE: No. I'm telling you that Coronado
5 is done under military security. This is not military
6 security. This is a business park. This is an area where
7 other businesses moved into that area expecting that they
8 would have to live and others would have to live under the
9 same Otay permit processes that they had to live under and
10 certainly were never told that their next-door neighbor
11 would possibly be a mercenary trainer of military
12 individuals who -- your Honor, this is the --

13 THE COURT: That's an explosive term. I don't
14 think --

15 MR. AGUIRRE: But it's the truth.

16 THE COURT: No.

17 MR. AGUIRRE: They are mercenaries. That is not
18 true, your Honor. They are mercenaries.

19 THE COURT: No. I think that is -- no.

20 MR. AGUIRRE: Your Honor, they are mercenaries.
21 Blackwater is a mercenary. They are hired out as private
22 contractors. They are mercenaries. And your Honor, you
23 have to defer to the City initially to make a judgment.

24 THE COURT: The private -- the private contractors
25 give security for State Department workers.

1 MR. AGUIRRE: Well, but they --

2 THE COURT: The private contractors give security
3 for ambassadors.

4 MR. AGUIRRE: Well, that's true, but they are
5 still -- in this instance, your Honor, they are --

6 THE COURT: They're a -- they're a private
7 contractor.

8 MR. AGUIRRE: They are -- they are -- your Honor,
9 let's not mix words, then. What I'm telling you in terms of
10 what we have to deal with is they are a mercenary trainer of
11 mercenaries. And in addition, they do training of military
12 personnel in a nonsecure area that is never contemplated by
13 the Otay Mesa plan.

14 And when it was discovered --

15 THE COURT: Can I ask you, in the -- just in the
16 original letter, was anything about the Otay Mesa brought
17 up?

18 MR. AGUIRRE: Well, your Honor, that was the whole
19 point of taking it up to the next reviews. The letter --

20 THE COURT: These were your land use planner
21 people.

22 MR. AGUIRRE: Your Honor, this was the legal
23 opinion that was issued by our office. And the reason it
24 was kicked up to the level that it was, because of course
25 you can't have military trainers moving into an area that is

1 zoned for something completely different. Look at what it
2 means for the City. It means increased security that we
3 have to be concerned about. It means --

4 THE COURT: What about -- what about your -- so
5 you say you didn't know. However, there's a business tax
6 application filed on February 6th, 2008, more than two
7 months before the City raised concern about Plaintiff's use
8 of the Otay Mesa facility. It was filed in the name of
9 Blackwater, audit report at seven. The application listed
10 Blackwater's business address as 7685 Siempre Viva, the
11 location of the facility at issue. And it's stated,
12 "Blackwater will conduct security training for the United
13 States Navy."

14 MR. AGUIRRE: Right. But that wasn't filed with
15 the -- that's the whole point, your Honor. That's the whole
16 point.

17 THE COURT: You got constructive notice.

18 MR. AGUIRRE: It doesn't make any difference. It
19 doesn't make any difference because there is no suggestion
20 that Development Services knew that information. There's
21 nothing in the information that suggests that the people
22 that made the initial decision that it was ministerial knew
23 that information. And what is the theory, that somehow we
24 knew the information and we just covered it up, and then out
25 of nowhere --

1 THE COURT: No. It's filed with you. It's a
2 public -- it's a public filing.

3 MR. AGUIRRE: But it goes to the good faith. We
4 did not -- the people that were making the Development
5 Services decisions had no knowledge of that permit
6 application. There's nothing in the record to suggest
7 otherwise. What they --

8 THE COURT: That's contrary to your audit report.

9 MR. AGUIRRE: No.

10 THE COURT: What the audit report answered, did
11 they mislead? Answer, no.

12 MR. AGUIRRE: Different issue. I'm not -- we
13 don't have to show they misled. That still remains an open
14 issue because only the City Council can make those findings.
15 But it's not a question -- that's why we're premature.
16 Because we haven't gone through the process. It's very --
17 what we're suggesting here is this. When Development
18 Services discovered that military training was going to be
19 taking place at the site, that is at the point where they
20 reached in and said, this has to, under our rules, go to a
21 higher level of review.

22 And your Honor, what you have to do --

23 THE COURT: And can you cite me your rule?

24 MR. AGUIRRE: Yes, your Honor. It's the whole
25 review process.

1 THE COURT: Not the whole review -- cite me the
2 rule, the Code.

3 MR. AGUIRRE: Yes. Okay. I will. It's Municipal
4 Code Section 15170202(b)(3).

5 THE COURT: And it says?

6 MR. AGUIRRE: And what it says -- just give me one
7 moment, your Honor. What it says -- and I will read it to
8 you here in just one moment, if I may.

9 THE COURT: Or if you want to move on and have
10 the --

11 MR. AGUIRRE: No, no. I have it right here. What
12 it says is -- what it basically says is this. Under Section
13 15170201 of the permits and procedures of the Otay Mesa
14 Development District, under Subsection 2, it says:

15 "The City manager shall not issue
16 any building permit for the erection,
17 construction, conversion, establishment,
18 alteration or enlargement of any
19 building or structure in any portion of
20 the Otay Mesa Development District until
21 an Otay Mesa Development permit has been
22 granted."

23 Now, when you discover that they're going to be
24 doing military training at a site that was never zoned for
25 military training and the City steps forward and says, we

1 now, having discovered that, must submit this to a higher
2 level of review, as we do with everybody else in the City
3 where the City Council, the elected officials who are
4 charged with the constitutional responsibility of making
5 these decisions -- those elected officials have an absolute
6 right to make that judgment. Your Honor has no authority
7 under Article 3 to step in and to short-circuit that
8 process.

9 Your Honor, under the case that your Honor is
10 relying upon, the Parks case, that case is directly on
11 point. And what the Parks case says, if -- your Honor, if I
12 might recall the facts just quickly. In that case there
13 were geothermal sources of power that the City, the
14 governmental agency attempted to condition the abandonment
15 of by the applicant in exchange for approving what the
16 applicant needed for a vacation.

17 It went through the entire process, and at the
18 very end of that process a decision was made. It was not
19 made in the beginning of the process. It was not made in
20 the middle of the process. And your Honor, in the Ninth
21 Circuit, the controlling case is Harrington. And the
22 Harrington case -- what the Harrington case says is that --
23 what the Harrington case says right on point -- and it talks
24 about the ripeness issue -- is it says that in land use
25 challenges, the doctrine of ripeness is intended to avoid

1 premature adjudication or review of administrative action.
2 It rests upon the idea that courts should not decide the
3 impact of regulation until the full extent of the regulation
4 has been finally fixed and the harm caused by it is
5 measurable.

6 The Supreme Court's most recent discussion of the
7 doctrine of ripeness as applied to land use cases is set
8 forth in the McDonald case and in the Williams case. And
9 what it basically says is that you have to allow the City to
10 complete its process.

11 THE COURT: That's why I said in general I agree
12 that land use planning decisions are traditionally left to
13 the local governments.

14 MR. AGUIRRE: Different issue. Different issue,
15 your Honor. That's a different issue.

16 THE COURT: But --

17 MR. AGUIRRE: If I might, your Honor. That's a
18 different issue.

19 THE COURT: But --

20 MR. AGUIRRE: I'm not talking about deferral. I
21 mean I'm talking about discretion. I'm talking about
22 timing. The City has not completed -- there's never --
23 there's not a single case that has ever been reported that
24 allows a court to enter into this level -- this early stage
25 of review. The City has not even begun its review of the

1 application, now that we have the pertinent facts.

2 THE COURT: Now that you have them -- you had them
3 in February. Inland Empire Health Plan vs. Superior Court,
4 108 Cal.App.4th 588. A city has -- a city has a mandatory
5 duty to issue a certificate of occupancy, once it has found
6 that a construction project has complied with all
7 requirements.

8 MR. AGUIRRE: And we haven't found that.

9 THE COURT: Wait a minute.

10 MR. AGUIRRE: And we haven't found that.

11 THE COURT: You say you have not found it.

12 MR. AGUIRRE: The City has not found that.

13 THE COURT: The City auditor did, the Mayor did,
14 the building inspectors did.

15 MR. AGUIRRE: But the legislative branch makes
16 that decision under our charter, one. And in Inland, that
17 process had been totally completed. In Inland, in Thompson,
18 in Parks, ever case your Honor has been cited to, every case
19 your Honor has relied upon, the entire process had been
20 completed.

21 Your Honor, just -- when you say we knew, that is
22 a question of fact that has not yet been determined.

23 THE COURT: Well, that's -- remember on
24 preliminary injunctive -- it's not final. It's do they have
25 a strong likelihood of success on the merits. I say in

1 review of this information, you've got the Mayor saying it's
2 ministerial. Your documents say it's ministerial. They
3 applied for a permit in their own name. It was clearly
4 known.

5 MR. AGUIRRE: But your Honor, that's --

6 THE COURT: The building inspector signed off. In
7 fact, the irony of ironies, Mr. Aguirre, of all individuals,
8 signed off on the certificate of occupancy.

9 MR. AGUIRRE: Different issue, your Honor. That
10 has to do with inspection. That does not have to do with
11 the initial review. When it was discovered -- and again, I
12 emphasize, when it was discovered that military training was
13 to take place, which is not contemplated --

14 THE COURT: It's zoned vocational training.

15 MR. AGUIRRE: But that's not vocational training.
16 Military training, your Honor, is not vocational training.
17 That is a question of fact that you have to at least allow
18 the City legislative branch, the overarching authority for
19 the City to make a judgment on.

20 Your Honor, someone -- it's very easily -- I can
21 easily construe the facts, and then judgement has to be made
22 about this. They artfully come in and they use somebody
23 else's name. Now, that other individual, that company
24 departs. They're no longer even involved. They don't come
25 and correct the information.

1 THE COURT: Wait a minute. That's your audit.
2 Your audit finding is totally against you. The complete
3 admission that --

4 MR. AGUIRRE: Your Honor, that is --

5 THE COURT: It's a complete admission by the City
6 that there was no misrepresentation of -- your requirements
7 don't even have --

8 MR. AGUIRRE: Your Honor, no, that's not true.

9 THE COURT: You're interrupting. Wait a minute.
10 Then I'll let you do it so that we're having a wonderful
11 back and forth --

12 MR. AGUIRRE: Good.

13 THE COURT: -- debate and discussion as we should.
14 But your audit report took a look, and the initial main
15 argument was we didn't know what was going on, and they
16 found, yes, you did know what was going on.

17 MR. AGUIRRE: No, I don't believe you can read it
18 that way.

19 THE COURT: That's just a disagreement in -- I
20 review the totality of information and conclude that on
21 balance, there is no requirement that you apply in your own
22 name. They did have the permit. It is on file.

23 So I just think that that -- on the issue of do
24 they have a strong likelihood, yes, on that issue they have
25 a strong likelihood of success on the merits.

1 MR. AGUIRRE: But your Honor, we haven't -- wait a
2 minute. The City Council has a right -- the City Council is
3 the one for the City that makes the findings that sets up
4 the issue of review in land use matters. That all has to be
5 brought to the attention of the City Council.

6 The fact that an auditor did something or somebody
7 else did something, that is not -- under our land use
8 authority and our land code, they're not the ones who make
9 the findings. It's the City Council that makes the
10 findings. All that will be brought to the City Council.

11 The Council will have a full and fair opportunity
12 to present their case. The City will then make a judgment
13 by the legislative branch, the authority that's granted that
14 authority under our Code. Then they can either -- your
15 Honor, you cited the Inland case and the Thompson case. If
16 we're wrong, they walk across the street to Superior Court
17 and get a writ of mandate.

18 THE COURT: They don't have to. They may.

19 MR. AGUIRRE: Well, they don't have to. They
20 don't have to.

21 THE COURT: They may.

22 MR. AGUIRRE: But that is certainly an option to
23 them, my point being --

24 THE COURT: Sure.

25 MR. AGUIRRE: But that's after the fact. You

1 don't jump in ahead of the time. The City did not know --
2 your Honor, you have to think about the other theory. The
3 City just sat back, knew it was Blackwater, that Blackwater
4 was going to put military training in there, and they just
5 sat back and then one day they said, you know, we've changed
6 our minds and now we're going to do something different.

7 And all that information about them concealing or
8 not disclosing who they were -- why didn't they -- when
9 Southwestern dropped out, why didn't they come in and
10 correct the application at that point?

11 THE COURT: I think your audit really -- there
12 again, your audit does not help you out at all.

13 MR. AGUIRRE: Your Honor, it says it's
14 inconclusive as to two of the permits. That's what it says.
15 Your Honor, the proper procedure under Harrington, the
16 proper procedure under Williamson, the proper reasoning --
17 the prudential reasoning of case and controversy under
18 Article 3 absolute mandates that you allow the City to
19 complete the process.

20 They can always come back with their 1983 as they
21 did in the Parks case. But the Parks case -- think about
22 the Parks case. The Court didn't jump into the Parks case
23 right at the first instance in which they tried to get the
24 geothermal power. It allowed the whole process to work its
25 way through. You still retain authority, but the reason

1 that they -- the argument for the ripeness in this case,
2 your Honor, is that the facts are not fully developed. It's
3 a contingency.

4 Maybe it'll get approved. Maybe it won't get
5 approved. But it might get approved. And the point is is
6 that there is no harm done to them. They have not released
7 their lease. There's no declaration from the United States
8 Navy. There's no declaration that says that they can't do
9 it somewhere else. They've done it somewhere else for five
10 years.

11 So even on the irreparable injury, there's not --
12 that's why I say, your Honor -- your Honor focused on
13 something -- I could tell that your Honor was troubled by
14 the irreparable injury. And what I'm saying is, if you look
15 at the irreparable injury, really what's at the core of
16 that, the center of that is the fact that it's too early
17 because we haven't made a judgment call yet.

18 And the reason I argued to your Honor, everybody
19 will come over here and do the same thing because this
20 happens all the time.

21 THE COURT: Well, that's why I say we're not going
22 to just come in and do permit reviews.

23 MR. AGUIRRE: But what I'm saying is, it happens
24 all the time. People get something that will go through the
25 process, and it will get up to the point of occupancy. And

1 then there will be a discovery that there's a missing piece,
2 that somebody missed something, that they didn't do
3 something.

4 Now, this process -- your Honor, what I would
5 suggest is this. I'm not suggesting that they dismiss their
6 case. I'm not suggesting that you dismiss the case. What
7 I'm suggesting is this. Stay the case, let them -- they can
8 continue to operate. Let them continue to operate there,
9 and allow us to go through the process of review as we would
10 any other applicant.

11 THE COURT: That's the same as what we're doing
12 here.

13 MR. AGUIRRE: No. Because what I'm saying is, let
14 the City complete the process that it is entitled to under
15 our separation of powers and with the City being the initial
16 decider of how to properly execute and assert its police
17 power. Let its processes go forward. Let there be a full
18 and complete hearing. Let there be a development of the
19 underlying facts. Let there be a final determination by the
20 City. Your Honor retains jurisdiction. Let them operate
21 during that period of time.

22 THE COURT: You know, preliminary -- injunctive
23 relief is equitable in nature and is subject to modification
24 at any time.

25 MR. AGUIRRE: Well, that's why I'm --

1 THE COURT: So that's why your argument is saying
2 stop. We can actually go forward, and if things change,
3 come back in and say things change. I just don't see that
4 there's going to be great harm to the City of San Diego in
5 letting 24 sailors get training on --

6 MR. AGUIRRE: What if there's an incident down
7 there?

8 THE COURT: Then you've got a great claim against
9 the United States Government.

10 MR. AGUIRRE: Well, we don't want an incident down
11 there. Your Honor, you're putting military training in an
12 unsecured area. That doesn't happen in our society.

13 THE COURT: In an inside area with trainers
14 that --

15 MR. AGUIRRE: It's 100 yards away from the
16 international border with no security whatsoever and with a
17 gigantic bull's eye on this controversial company that is --
18 right now is obviously generating an enormous amount of
19 interest in this case.

20 Your Honor, if there is an incident where someone
21 is injured -- one of the things they do is they spray people
22 with mace.

23 THE COURT: I've been sprayed. I've been sprayed
24 in training.

25 MR. AGUIRRE: Well, your Honor --

1 MR. NEIL: Not by us.

2 MR. AGUIRRE: Your Honor, hopefully not --

3 THE COURT: I was sprayed. In fact, I think we
4 had to go -- this is -- we went to the City, of all places,
5 or the sheriff's facility and got security training if you
6 needed to -- if you wanted to carry mace. And so we all got
7 sprayed.

8 MR. AGUIRRE: How was it?

9 THE COURT: And it was fine.

10 MR. AGUIRRE: You got sprayed with mace and it was
11 fine?

12 THE COURT: Well, I mean, they tell you this is
13 what's going to happen. It's a little -- it stings, but
14 that -- if you're saying -- there used to be that O.C.
15 pepper spray was very common for people to carry and that if
16 you wanted to go, you got a permit and you could go get
17 training on O.C. pepper spray, and you had a recognized
18 course. I don't think that went through land use planning.

19 MR. AGUIRRE: No, but your Honor --

20 THE COURT: And it was on City facilities at the
21 sheriff's, and we went and I got my --

22 MR. AGUIRRE: Your Honor, I will guarantee you --

23 THE COURT: -- little certificate.

24 MR. AGUIRRE: But your Honor, I guarantee you -- I
25 guarantee you, though, that there will be enhanced cost to

1 the City for putting this facility into this location.
2 There will be increases in the security costs to the City
3 because of additional patrols that will have to take place
4 in that area. There will be a lowering of land values for
5 the people that are already in there, and the City may very
6 well face possible claims by them for allowing this to go
7 forward. Your Honor --

8 THE COURT: But it's zoned vocational.

9 MR. AGUIRRE: No, but it's not -- but this isn't
10 vocation, your Honor. This is a threshold decision.

11 THE COURT: It's a training.

12 MR. AGUIRRE: No. It's military training in an
13 unsecured area. That is -- if you were owner of a piece of
14 property -- just think about it. If you were next door and
15 you were having a normal commercial piece of property and
16 you were operating a commercial business where you have
17 entities coming and delivering and taking off, leaving
18 and -- egressing and ingressing and you found out that your
19 next-door neighbor is Blackwater doing military training
20 right next door 100 yards away from the international
21 border, I would and I think any prudent business person
22 would be deeply concerned.

23 THE COURT: Have you been to National City? Have
24 you seen the 39th Street pier?

25 MR. AGUIRRE: Yes. But your Honor, that's a

1 military --

2 THE COURT: They co-exist. Have you been to
3 Miramar?

4 MR. AGUIRRE: But that's military. They're under
5 military security. Those are secure areas. This is not.
6 Your Honor, the City of San Diego --

7 THE COURT: Are you telling me that the military
8 has no private contractors that do private training anywhere
9 within the City of San Diego? I don't believe -- I don't
10 think so.

11 MR. AGUIRRE: Your Honor, I don't know -- I don't
12 know -- well, I don't know one way or the other, but I would
13 know this, that if they do, that we'd want to review that
14 for the safety of everybody else involved. You're moving
15 military training that takes place on bases, which are in
16 secure areas with the Navy SEALS that your Honor talked
17 about in Coronado -- the City of San Diego has co-existed
18 with the Navy for as far back as memory can take us.
19 There's no question about that. And there are people in our
20 office and in the City Attorney's Office and located
21 throughout the City who are proud members of the military
22 who have served in Iraq.

23 The City of San Diego is not opposed to the
24 military, and I haven't seen any declaration from the
25 military supporting what is going on here. So to assume

1 that the military one way or the other is taking a position,
2 I think what the military wants are their people trained.
3 And I think that whether you fly them back to North Carolina
4 where they have a facility --

5 THE COURT: So you'd prefer that they fly them
6 back to North Carolina from San Diego?

7 MR. AGUIRRE: What I'm saying is, there's no
8 irreparable injury if that's all they have to do. That's
9 not irreparable injury. There is no irreparable injury.

10 THE COURT: And so it's fine for North Carolina.
11 It's not fine by the City of San Diego?

12 MR. AGUIRRE: North Carolina -- whatever -- I
13 don't know the facts and circumstances in North Carolina,
14 but I do know these facts. Otay Mesa planning -- your
15 Honor, the Otay Mesa Planning District did not envision
16 military training taking place within that district. This
17 is a substantial variance from that.

18 THE COURT: And let me look back at your letter --

19 MR. AGUIRRE: Okay.

20 THE COURT: -- of May 19th. Where does it say
21 that?

22 MR. AGUIRRE: The letter goes -- the letter
23 incorporates the attorney -- the City Attorney's opinion,
24 and the City Attorney's opinion lays out exactly what I'm
25 talking about in terms of the additional review. That's the

1 whole point of --

2 THE COURT: Does it say anything about we don't
3 like the military training aspect?

4 MR. AGUIRRE: It's not that we don't like it. It
5 says -- that's the point that triggers it. It's the --
6 what's in the business permit and the research on the
7 business permit. And we have an additional memorandum on
8 June the 10th where we go into much greater length on this.
9 But it's the whole idea -- I mean, if you just think about
10 it, your Honor, you're taking military training and putting
11 it into a completely unsecure area, and you're not involving
12 any of the other land owners in that decision or even giving
13 them an opportunity to speak. We have things like that come
14 before the City Council.

15 THE COURT: This is Otay Mesa?

16 MR. AGUIRRE: Yes, this is Otay Mesa.

17 THE COURT: Did you object when the National Guard
18 was put on the border at Otay Mesa?

19 MR. AGUIRRE: Your Honor, that's military. This
20 is not -- this is a --

21 THE COURT: It's on the City land. It wasn't
22 military. It was put on the border --

23 MR. AGUIRRE: Your Honor, that was a --

24 THE COURT: -- which is not just on the federal
25 part of the border.

1 MR. AGUIRRE: Your Honor -- your Honor, this is
2 not about military on the border for the safety and security
3 of the City of San Diego, the State of California or the
4 nation.

5 THE COURT: But did you object to that and say
6 that they needed land use planning before the National
7 Guard --

8 MR. AGUIRRE: No, your Honor, because the military
9 doesn't have to --

10 THE COURT: -- could be deployed on the border on
11 state -- on city land?

12 MR. AGUIRRE: The military doesn't have -- the
13 military isn't governed by our land code. This private
14 corporation is governed by our land code. The community
15 college that operates, they're a state agency. They're not
16 governed by our land code. But this is, and we have
17 responsibilities.

18 All we're saying is just let there be a hearing.
19 We're not saying that they can't do it. That's my whole
20 point about the ripeness issue.

21 THE COURT: So what -- you're saying let there be
22 a hearing, let the process work. And that rings music to my
23 ears.

24 MR. AGUIRRE: That's all I'm saying. Right.

25 THE COURT: However, it's also changing the rules

1 of the game at the goal line.

2 MR. AGUIRRE: No, I don't think it is, your Honor.
3 Your Honor, I don't think it is because what we say -- we
4 outline and we say, any project which deviates from the
5 regulation of the ordinance is going to have to require a
6 permit. And the permit process is laid out in our statute.
7 It has Level 1, Level 2, Level 3, Level 4.

8 THE COURT: And you deem this to be Level 1.

9 MR. AGUIRRE: Level 4.

10 THE COURT: Now you're switching to Level 3
11 that --

12 MR. AGUIRRE: Well, because we're not --

13 THE COURT: -- bumps them back in.

14 MR. AGUIRRE: But wait a second. Good faith. We
15 in good faith discovered not that it's no change. Look at
16 what they said when they said no change. They said in
17 their -- this is what they said in their application.

18 Remember, the warehouse we're talking about -- so counsel
19 can see. The warehouse that we're talking about --

20 THE COURT: You need -- why don't you have one of
21 your -- either -- yeah, just make --

22 MR. AGUIRRE: I can hold it like th is.

23 THE COURT: Or we have a walk-around mic.

24 MR. AGUIRRE: Okay. The warehouse that we're
25 talking about, your Honor, was for storage of commercial

1 properties. They put in an application, and they asked
2 propose use, same, no change. That is not true.

3 THE COURT: Then they changed it.

4 MR. AGUIRRE: No. They changed it, but they
5 didn't change it to military training. They didn't describe
6 it like they did in the business permit. And when we
7 discovered it, because of a tip, that's when the City said,
8 okay, we now understand additional facts, so now it has to
9 go through additional review.

10 Your Honor, there's nothing that says we did that
11 in bad faith. And if we did --

12 THE COURT: The standard is not bad faith, good
13 faith.

14 MR. AGUIRRE: Yes, it is. Oh, yes. No. The
15 standard -- because we're exercising our discretion. We're
16 exercising our discretion. Your Honor, that is exactly what
17 the case law says, that when -- when you exercise your
18 discretion -- when you exercise your discretion, the City
19 exercises its discretion, as long as it exercises it in good
20 faith, then you have to defer to us until we're done.

21 THE COURT: Do you think that there's some
22 censorship of this entity?

23 MR. AGUIRRE: Some censorship?

24 THE COURT: Yeah. That you don't like the
25 activities of this entity.

1 MR. AGUIRRE: Your Honor --

2 THE COURT: If it was in the name of Green
3 Peace --

4 MR. AGUIRRE: -- if there's one thing that I hope
5 that I've proven as City Attorney is the identity of the
6 individuals don't make any difference. If they have a right
7 to do this, I will be up here arguing on their behalf after
8 they complete the process to justify if there's lawyers on
9 the other side who try to stop it.

10 THE COURT: What about -- now -- so this -- let me
11 digress just a bit. What about the City audit and the
12 release date? Could you address that?

13 MR. AGUIRRE: Your Honor, if it were up to me, you
14 would have had the audit beforehand. I don't know why the
15 timing of that had nothing to do with the release of it.
16 I'm not saying that it was diabolic or anything. But I
17 still think that the -- your Honor, if what I'm saying is
18 correct, that the only authority that has the ability to
19 make findings in reference to land use matters is the
20 Council as part of that -- when they exercise their judicial
21 function of reviewing the issue, then it's really irrelevant
22 and is not an admission that is binding on the City that the
23 auditor did or didn't say something.

24 What we're saying to your Honor is -- and let me
25 just -- and I'll sit down because I really appreciate the

1 courtesy your Honor has given me, and I really appreciate
2 the fact that we got a chance to put this out here.

3 All I'm saying to your Honor is this, is a
4 compromise. Let them continue on doing what they're doing.

5 THE COURT: In the facility.

6 MR. AGUIRRE: In the facility. Let them continue
7 on doing what they're doing. Let us as the City hold the
8 proper review, have them go through the process. Let us
9 make the findings that are appropriate to the circumstances.
10 They have a full and fair opportunity to go before the City
11 Council and make their case.

12 Your Honor retains jurisdiction, and then allow
13 the case to come back here if there's a problem. And there
14 may not be. See, that's the point of what I'm saying, is
15 your Honor, if they get five votes of the City Council,
16 there's not an issue. And that's all we're saying.

17 And then everyone's interests are protected. They
18 get to continue to operate, we get to have our hearing
19 before the Council, your Honor retains jurisdiction so that
20 if you think that we've acted in bad faith or in some way
21 done something that's inappropriate, you can strike it down.
22 And then my arguments about ripeness are gone, and your
23 full -- it's a fully developed situation so that we don't
24 have a case and controversy issue.

25 THE COURT: So you agree it's not an abstention

1 issue?

2 MR. AGUIRRE: Well, I mean, I'd like to do the
3 abstention.

4 THE COURT: Earlier it was argued that we were
5 going to hear abstention, but I didn't hear abstention in
6 the papers.

7 MR. AGUIRRE: Well, your Honor, let me just say
8 this. I don't think I'm going to talk you into abstention,
9 so I think I'm going to put that on the side.

10 THE COURT: It's not even in the papers.

11 MR. AGUIRRE: Well, I know. It was in our
12 previous papers. But I -- your Honor, I've spent an
13 enormous amount of time, and I could tell your Honor and I
14 were reading a lot of the case cases and things. I could
15 tell by your questions because we were running on parallel
16 tracks. But I think that what this case really comes down
17 to fundamentally is that it is -- it is possible to state a
18 1983 due process claim. I don't think most attorneys know
19 that in land use matters, but it is possible to state that.
20 So I think the Parks case addresses that.

21 I also think, though, that we're right on the
22 timing issue, and that what I'm suggesting is a good
23 compromise because it won't -- there won't be irreparable
24 injury because they can continue to operate, and your Honor
25 will allow us to proceed ahead and hold the hearings and

1 everything else that we want to hold in order to make a
2 final judgment. And then everyone's issues have been
3 vindicated, and then the process will have allowed to have
4 been -- to work as it should, and then your Honor can --
5 obviously retains jurisdiction to review everything at the
6 end.

7 And I just recall, your Honor, in another matter
8 that we went through the whole process before and, you know,
9 how it came out. And I just suggest the same thing here.
10 And I will promise your Honor as an officer of the court
11 that they will receive every due process and every fairness
12 possible, and we will have a complete record which we will
13 present to the Court at the end. Thank you very much for
14 your courtesy.

15 THE COURT: Let me just ask, I don't think that
16 this is -- this is not a conditional use permit. So that's
17 a little bit of a difference. They're not -- they're not
18 seeking a -- they don't have to seek a conditional use
19 permit.

20 MR. AGUIRRE: Well, see, that's our point is we're
21 saying that they do because what we're saying is this. This
22 is the argument on that. We're saying that factually they
23 can't call it a shooting range or they can't call it a
24 vocational. You have to look at exactly what it is they're
25 doing, which they have now admitted, which is a military

1 training.

2 And the whole idea here is from a land use
3 perspective. I know it may -- I mean, it does in a sense
4 sound absurd. You've got -- we're surrounded by military
5 bases, and so I'm making an argument, well, you know, if
6 you've already got all these military bases around here,
7 what's the big deal about putting a military training
8 facility in there that's privately owned. And I can see the
9 logic of that.

10 THE COURT: And this is why I would like -- maybe
11 your investigator can go back and take a look to see whether
12 the military trains at any other place, any other kind of
13 courses. Because I have a feeling that they do.

14 MR. AGUIRRE: We will do that. We will do that,
15 your Honor, and we'll report back to your Honor. But your
16 Honor, I don't believe that that would make any difference
17 for this reason. The people that are in this planned
18 area -- the City has a planned area, and we want to see
19 economic activity in that area. We want jobs created. We
20 want people to feel comfortable moving in there with their
21 various commercial activities.

22 And part of the deal is is that when we strike out
23 an area and say this is going to be used for these purposes
24 and then we bring in somebody that's doing military
25 training, we're changing the rules on all the other land

1 holders. And that's the only issue that I'd have your Honor
2 consider is that if that is the case and if there is a
3 proper showing of that after a full hearing in front of the
4 Council and your Honor reviews that, you may change your
5 mind. But at least allow us to develop it.

6 And again, if they continue -- if they are allowed
7 to continue to operate, then there's no irreparable injury.
8 And since all we're doing is saying, let's allow the proper
9 land use code procedures to be utilized by the City to reach
10 that final judgment so your Honor then can make the final
11 decision, and then the ripeness issue goes away.

12 THE COURT: Now, before you get -- because the
13 devil is in the details on these injunction cases.

14 MR. AGUIRRE: Yes, your Honor.

15 THE COURT: You've already complied and given a
16 certificate of occupancy.

17 MR. AGUIRRE: Correct.

18 THE COURT: They've taken over the facility.

19 MR. AGUIRRE: Correct.

20 THE COURT: So you're just saying in part that
21 there's no need for a preliminary injunction, but then you
22 say --

23 MR. AGUIRRE: What we're saying is this.

24 THE COURT: Then you can switch from process one
25 to process three?

1 MR. AGUIRRE: What I'm saying -- process four.

2 What I'm saying to your Honor is --

3 THE COURT: Four?

4 MR. AGUIRRE: Four. That's --

5 THE COURT: Okay. What's the difference between
6 process three and process four?

7 MR. AGUIRRE: Process four essentially involves
8 the City Council. In other words, automatically will
9 involve the City Council's reviewing of this. Process three
10 can be appealed from planning to City Council.

11 And what I'm saying to your Honor is this.
12 They're up and operating. So they're not -- there's no
13 irreparable injury. We then go through the process of
14 having the City Council review it and do the things that
15 I've discussed. Your Honor retains jurisdiction.

16 THE COURT: Yeah.

17 MR. AGUIRRE: Just following the normal process.
18 In other words, there will be a normal hearing before the
19 City Council. Everybody will come down. The community will
20 fully vet it.

21 THE COURT: For what? For what purpose other than
22 rile people up?

23 MR. AGUIRRE: Well, your Honor -- you know, but in
24 our democracy -- actually, I think by getting everybody out
25 and getting it fully vetted and the City Attorney saying

1 that this is a proper process, we fully vet it, and then the
2 Council makes its findings, and then it comes here for your
3 Honor's review.

4 In other words, you see -- because think about it,
5 your Honor. Here's the threshold question. And this is
6 where you have to either, you know, believe me or not
7 believe me. The City did not know that what we were talking
8 about was a war training activity at this location. But
9 it's --

10 THE COURT: Take a look at your -- the City did
11 know. You've got a permit application that's on -- don't
12 you think the City reviews its own things?

13 MR. AGUIRRE: No, your Honor. Think about this,
14 your Honor. There's thousands and thousands and thousands
15 of filings with the City every day.

16 THE COURT: Sure. But the City is on constructive
17 notice. It really falls on deaf ears to say that you didn't
18 know when you do know.

19 MR. AGUIRRE: But for purposes -- your Honor, but
20 here's what the standard is. Did the Development Services
21 in good faith and the City Attorney and the City officials
22 in good faith discovery -- the decision-makers who were
23 making the land use decisions, did they discover in fact
24 what Blackwater was going to do here and then make a good-
25 faith determination that there had to be a higher-level

1 review.

2 And if you -- if you disagree with that, your
3 Honor, I would just say there's nothing in the record that
4 would support that we did anything in bad faith. But what
5 is in the record is that as soon as it was tipped to the
6 City, the Mayor expressed concerns, the review was
7 instantaneously done. There was a legal opinion issued.
8 And what was said was, this is something that has to go to
9 the upper decision-makers.

10 And think about the logic of every -- every
11 decision-making body. Your Honor, your law clerk might
12 receive some kind of information and be able to handle that
13 and then discover, oh, my gosh, we didn't realize that there
14 was this other piece of information. We better take it up
15 to her Honor and tell her Honor right away. And then maybe
16 your Honor might say, oh, my gosh, this is something -- I
17 better go tell the presiding.

18 So the idea is, just because you discover it late,
19 just because you had an incomplete picture of it or somebody
20 else might have been told, a guard downstairs might have
21 been told or some other official might have been told, some
22 other part of the federal bureaucracy, when it comes to your
23 Honor, that's the whole idea of management and informed
24 decision-making. So we then take it upstairs and we say,
25 oh, wait a minute. Whoa, whoa, whoa. This is something

1 that needs to be resolved at the higher levels because these
2 people are elected by the public to make these kinds of
3 decisions.

4 And then if you look at it under the ripeness
5 issue, the whole idea of timing and case and controversy and
6 premature adjudication, you look at it and say, okay, we
7 really don't have a fully developed record here. If the
8 City is willing to say, okay, we take care of the
9 irreparable injury argument by letting them operate, and all
10 we're saying is let us complete the process, and your Honor
11 retains jurisdiction, it just seems to me that that is the
12 most sensible outcome.

13 And then -- because then -- because what happens
14 if they go get five votes and there's not a problem? And
15 the fact that there's some big public hearing about it, who
16 cares. That's what the difference is between here and Iraq,
17 because that's the way we deal with things here, your Honor.
18 In the City Council, we fully vet everything. And the --

19 THE COURT: I've been to City Council meetings.

20 MR. AGUIRRE: Okay. You know. You know. But
21 that's a good thing.

22 THE COURT: But then doesn't the City have better
23 things to do with its time and effort than to take something
24 that was a process one for 24 people for training in an
25 indoor facility where other firing ranges have gone through

1 the same ministerial -- doesn't the City have better things
2 to do with its time than to --

3 MR. AGUIRRE: Your Honor --

4 THE COURT: -- than to make this in an election
5 year a cause celeb for people to then think, oh, we're
6 talking about the Potrero facility.

7 MR. AGUIRRE: Your Honor, we're not talking about
8 the Potrero facility. And I understand your Honor has made
9 a good point of that. Your Honor, this truly is about the
10 process and making sure that everyone lives with the same
11 process. And it's not about anything having to do with
12 elections. It has nothing to do with politics. It has
13 everything to do with the process.

14 And I will tell your Honor again -- and I hope I
15 have some level of credibility. If they get approved by the
16 City Council, the burden will then shift over to our side.
17 We will be up here defending their position. And your
18 Honor, I will tell you, there have been --

19 THE COURT: You want to walk on that side and say,
20 I'm going to defend you.

21 MR. AGUIRRE: No. I will defend. If they get
22 approved by the City Council, the City Attorney's job is to
23 defend their position. I will be here defending their
24 position. And my job is to make sure that I protect the
25 City's authority and responsibilities to its citizens.

1 And I believe, your Honor, that a full and fair
2 hearing with them being allowed to operate in the meantime
3 is a good compromise that allows no irreparable injury, and
4 it subjects them only to a hearing which your Honor will
5 ultimately retain jurisdiction over.

6 Thank you very much, your Honor.

7 THE COURT: Thank you.

8 MR. NEIL: Your Honor, I would like to make --

9 THE COURT: I do think you should -- I do think
10 you should address each of his issues.

11 MR. NEIL: All right. The land use issue, I'm
12 going to defer to an expert in this field, Mr. Jeffrey Chine
13 to comment on that, your Honor.

14 I do want to raise one thing at this time, and
15 then I'll defer to Mr. Chine, and then I'll close. This
16 security issue, of course, has never been raised anywhere.
17 There are no declarations from anybody. We have a police
18 chief who will sign a declaration. Somebody will sign a
19 declaration saying it's going to cost the City for security
20 or whatever.

21 Blackwater can provide their own security inside.
22 That's not a problem there. No land owner, no neighbor,
23 nobody in the area has signed a declaration saying they're
24 concerned about Blackwater being there or the lowering of
25 land values. We only heard this just in oral argument.

1 The argument made by counsel that the staff simply
2 didn't know what the use was going to be for, why don't we
3 have a declaration from somebody that said they didn't know.
4 Ms. Broughton writes the letter to Blackwater telling them
5 we're going to have a firing range, we're going to be doing
6 training and your Honor has seen these -- the exhibits
7 before, the hazardous material questionnaire which was dated
8 2/7/08. It says, "Briefly describe proposed project. Build
9 firing range."

10 Well -- and it's Blackwater doing all of this, and
11 they're inspected by officials who come out and see the
12 people working there in Blackwater shirts, et cetera. It's
13 much ado about nothing, your Honor.

14 And I want to make one final comment here before I
15 turn it over to Mr. Chine. On this Harrington case, I don't
16 claim to be the greatest inhabitant of the library, but I
17 had this case sent to me last night, and I read this case,
18 and this --

19 THE COURT: Mr. Aguirre and I do the library work.

20 MR. NEIL: Okay.

21 THE COURT: With my law clerks.

22 MR. NEIL: Your Honor, in all deference to our
23 City Attorney, I've read the Harrington case. The
24 Harrington case has nothing to do with our facts at hand.
25 This case was sent over to me last night. This has to do

1 with an application and a rejection of the Harrington
2 subdivision application and the subsequent down-zoning of
3 the area in which the Harringtons own land.

4 And there's discussion in that case. There is
5 just mere discussion -- it's not the holding of the case --
6 that our City Attorney did discuss. But the interesting
7 thing in this case is that in this case, this Ninth Circuit
8 case, we conclude that the Harringtons' claims are ripe. It
9 concludes exactly the opposite, that the claims are ripe.
10 He discusses where you have to be.

11 And we are in the final stages. Ms. Broughton
12 rejected our application, and we -- there's no further
13 action of the City that we could look forward to. Mr.
14 Aguirre says there's been no final action by the City. And
15 yes, there was. The permits were issued, inspected and
16 signed off on and said occupancy permit. You remember that
17 document, your Honor.

18 And under the City Code and Thompson vs. The City
19 of Elsinore, the City is compelled to issue the certificate
20 of occupancy, and no further process is available. And with
21 that, your Honor, I would ask --

22 THE COURT: What -- go ahead.

23 MR. NEIL: I was just going to defer the land use
24 issue that was discussed in some detail by our City Attorney
25 to Mr. Chine and ask him if he'd be kind enough to step up.

1 I assume the Court may have some questions on the land use
2 aspect.

3 THE COURT: He may.

4 MR. NEIL: Thank you.

5 THE COURT: One of the issues in reviewing the
6 Defendants' papers, they reference the Otay Mesa permit
7 process or for the Otay Mesa area. And Mr. Aguirre is
8 saying, well, really it's zoned vocational, but you're doing
9 a different type of training.

10 So can you address those two issues in the course
11 of responding to all the other issues that were addressed in
12 the planning. And then I would like to know from somebody,
13 does the military train at other places within -- within the
14 City or County? I'm quite sure that that occurs.

15 MR. NEIL: Your Honor, I could answer that
16 question very briefly. I represent Stu Segall Productions,
17 and I just completed a lawsuit. Stu Segall Productions is
18 up on -- right off of 163, not too far from where the
19 sheriff's office is. And they have a wonderful breakfast
20 diner up there, by the way.

21 And Marines train up there all the time. They go
22 through a mockup village and everything else, and there
23 is -- I mean, regular Marine units come in there, and they
24 are -- they work with the Stu Segall Productions, and
25 they're putting them through this training process, showing

1 them a mockup Iraqi village, et cetera. I mean, that's
2 right in the heart of our city, your Honor. That's one
3 example.

4 MR. CHINE: Thank you, your Honor.

5 Another example is on Ruffin Road. There's an
6 indoor shooting range on Ruffin Road. And up until about a
7 month ago for five consecutive years, that facility also had
8 trained military personnel. We've submitted a declaration
9 to your Honor that after reviewing all of the City's files,
10 there are no discretionary permits that were issued in
11 connection with that firing range and training activity
12 there on Ruffin Road. So there is a track record. There is
13 a history at the City of San Diego of these types of
14 facilities.

15 Your Honor, in response to the City's arguments
16 and in response to their briefing, there seems to be a
17 fundamental disconnect about the issue, the discourse that
18 we're having here. From the very beginning, Blackwater's
19 position has been that the permits that it sought under the
20 City's Code are ministerial in nature. And we provided
21 ample citations to the Municipal Code, the City's own
22 statements, the City's own admissions.

23 Everyone seemed to be in agreement that what we
24 were talking about here were ministerial permits. And it's
25 very important that we keep in mind this distinction between

1 what is a ministerial permit and what is a discretionary
2 permit. Because there's a world of difference between the
3 two.

4 The City Attorney has just made an argument
5 seeking a compromise of sorts and asking the Court if the
6 Court would just allow this process to proceed along a
7 discretionary track. Well, that's the heart of why we're
8 here, your Honor. That's why Blackwater was compelled to
9 file this lawsuit. Because after the fact, after
10 applications were submitted, after construction took place,
11 after inspections were completed, at that point the City or
12 elements within the City decided that it wanted to change
13 the rules. It wanted to change this to somehow transform
14 this ministerial process into a discretionary process. And
15 that's something that a City cannot do.

16 This notion that there's a totality of
17 circumstances, this is a new concept in land use law that
18 until the hearing a couple of weeks ago, I had not
19 encountered. And the idea is, through some form of alchemy,
20 you can have ministerial permits, and someone at the City
21 after the fact can decide that, well, you know what? I
22 think this should be a discretionary process and not just a
23 Phase 2 or Phase 3 discretionary process, process two or
24 process three. We just heard it's now a process four.

25 So now these ministerial permits -- and your

1 Honor, we're talking about air-conditioning permits. We're
2 talking about tenant improvements. We're talking about
3 installing the jury box. That's what we're talking about
4 here today.

5 But now what you're being asked -- what the Court
6 is being asked is to transform that into a process four.
7 Process four in the City of San Diego is a mandatory City
8 Council hearing. So fundamentally now we've taken an over-
9 the-counter building permit process and we've given it to
10 the City Council. That's the essence now of a political
11 decision.

12 Also, in a discretionary process, unlike a
13 ministerial process, as its name suggests, the City Council
14 gets to exercise its discretion. It gets to add conditions.
15 California law says if it's discretionary, the City Council
16 can just deny it outright.

17 None of those are possible under a ministerial
18 permit process. By its nature, a ministerial permit process
19 is a black and white process. It's very objective. It's an
20 engineering process of sorts.

21 If you meet the four or five enumerated objective
22 criteria, the City must issue the permit. It can't say no.
23 There's no discretion involved. The fact that it's
24 Blackwater, that's why we're here today. That's why the
25 City Attorney is urging that let's just kick this down the

1 road. He's asking the Court not to make a hard decision.
2 Let's punt this on down the road to the City Council.
3 Because after all, that's what they're elected to do.

4 Well, the City Council is elected to abide by the
5 laws of the City of San Diego. And the laws of the City of
6 San Diego say that this is a process one application. It's
7 a process one. If you've met the objective criteria, the
8 City must issue the permit.

9 And ironically, everyone at the City seems to
10 agree with this. It's only the City Attorney's Office that
11 seems to disagree. The Mayor in numerous statements has
12 said this is process one. We should have issued the
13 permits. The audit just said that. Kelly Broughton, the
14 head of Development Services, that was his original
15 position, and subsequently it changed.

16 The inspectors have said that Blackwater has
17 complied with all applicable requirements. Both the
18 Municipal Code and case law state that in a ministerial
19 context, once the permit is issued, once the work is
20 complete, once the inspections are done, the City building
21 official is compelled as a matter of law to issue the
22 certificate of occupancy.

23 THE COURT: Can I also find an estoppel on the
24 City based on the track record I have here?

25 MR. CHINE: Your Honor, estoppel against a

1 government agency, there's a higher level associated with
2 it. I believe we've met that higher standard here based on
3 the numerous admissions from the City that we've contained
4 in our papers.

5 Quite frankly, based upon the admissions that were
6 made by the City Attorney's representative during the TRO
7 hearing in which he stated Blackwater has complied with all
8 of the City rules, has complied with all of the City
9 regulations. But we -- and I'm not sure who we is. But
10 we've decided that we now want to look at the, quote,
11 totality of the circumstances.

12 In the City of San Diego, your Honor, over 40,000
13 ministerial permits are issued every year. This is the
14 business of the City Building Department. This is what they
15 do. Imagine for a moment if the City's theory were correct,
16 if after the fact, after you've issued the permits, after
17 the homeowners have done their work and put on the roof of
18 their house or constructed their pool and it's been
19 inspected, if after that somebody over in the City
20 Attorney's Office could decide that, you know, based on the
21 totality of the circumstances, I think we may want to go
22 ahead and kick this thing up to the City Council. Imagine
23 the mayhem. Imagine the chaos. There would be no certainty
24 whatsoever in the process.

25 And I think that's the essence of why Blackwater

1 was forced to file this lawsuit. Blackwater obtained a
2 vested property right at the time that it got its permit,
3 that it conducted its work in good-faith reliance upon those
4 permits. And not the City is saying, we want to subject you
5 to more process.

6 The fact that they're asking to be subjected to
7 more process in and of itself is a deprivation of that
8 vested property right. Now Blackwater is subject to
9 potentially a City Council hearing, flat outright denial of
10 its permit, the addition of conditions and exactions through
11 the discretionary permit process.

12 Your Honor, that just can't be. This theory of
13 totality of the circumstances has been invented out of whole
14 cloth. If this was the way land use was conducted in the
15 State of California, I would submit nothing would ever get
16 done. You certainly couldn't get any financing. It would
17 throw the entire system into chaos.

18 Why is the City asking for a special rule here?
19 Why is the City asking for a special interpretation?
20 Because it's Blackwater.

21 And unless the Court has any further questions --

22 THE COURT: What do you say -- there's a threshold
23 issue. He says you do maybe need a conditional use permit
24 in Otay Mesa because you're doing sailor training, not
25 vocational training.

1 MR. CHINE: I would say that's selective citation
2 or lack of citation to the Code. And the way the City's
3 Code works in this particular district is that --

4 THE COURT: You're talking about the Otay Mesa
5 District?

6 MR. CHINE: Yes, your Honor. You do have to apply
7 for a discretionary permit under a myriad of circumstances.
8 For example, when this project was originally built, because
9 of the magnitude of the project, it had to go through a
10 discretionary permit review process. That was probably a
11 process three.

12 But now that the building is built and now that
13 we're talking about simply the implementation, if you will,
14 of this --

15 THE COURT: Tenant improvements?

16 MR. CHINE: Tenant improvements. Exactly, your
17 Honor. Tenant improvements within this project. At that
18 point, the discretion is all gone and you simply look to --
19 you simply look to the Code, your Honor. And as the Court
20 went into great detail in your ruling on the temporary
21 restraining order, the Code under these circumstances
22 authorizes vocational schools. The City in other
23 circumstances with similar zoning, as we've asserted in our
24 brief, has viewed this type of activity as being within the
25 purview of this particular zone.

1 This is vocational training. These Navy sailors
2 are being trained in their vocation. It's a shooting range.
3 It is a mockup. This is a vocation of Navy sailors, and
4 it's completely consistent with the zone. It's completely
5 consistent with other activity in the area. As it was
6 mentioned, there's a police academy down in this part of the
7 world. This is fundamentally consistent.

8 Maybe more importantly, your Honor, the City came
9 to this conclusion -- as our briefs all indicate, this was
10 fully vetted within the City. The City's director of
11 Development Services came out publicly -- it was in the
12 media, it was in the press, I believe it's in our papers --
13 and said, I have no choice but to issue this permit because
14 it's fully consistent with the zone. So that decision was
15 made.

16 Blackwater went through the appropriate process.
17 It's now only after the fact that we're trying to reinvent
18 history perhaps and say that the City decision-makers need
19 to make this decision. That's already happened. Prior to
20 issuing the permit, that decision was made. It's
21 substantiated in the record, and it was the correct
22 decision.

23 THE COURT: So your request for preliminary
24 injunction is for what specifically? Do you have an
25 attachment or does the City have one? Now that you have the

1 certificate of occupancy, what would you want the Court to
2 say? What about Mr. Aguirre's suggestion that now nothing
3 is needed further, you're there?

4 MR. CHINE: Your Honor, I apologize for reading
5 from our brief, but in the conclusion at page 17 of our
6 papers, Blackwater respectfully requests that the Court
7 enter a preliminary injunction, that it enjoins the City and
8 its agents from interfering with Blackwater's right to
9 occupy the Otay Mesa facility and use that property
10 consistent with the permits and certificates of occupancy
11 that the City already granted.

12 The City -- excuse me. The Court should also
13 continue its order that the City and its agents promptly and
14 properly process any currently pending ministerial permits.
15 That would be the mockup.

16 And your Honor, I think this is critical because
17 what the City Attorney is suggesting here is that there will
18 be further City process. We're asking the Court to
19 acknowledge and to order that there is no further process --
20 of course pending the trial on the merits, there is no
21 further process that should occur here.

22 As I've stated, all of the appropriate processes have
23 been completed, and as a matter of law, the CFO must issue.
24 So we would ask the Court to enjoin the City from conducting
25 those further processes with the intention of revoking or

1 with the possibility of revoking the certificate of
2 occupancy pending the hearing on the merits.

3 THE COURT: Can you address the irreparable injury
4 in the context of land use planning when there is a 1983
5 claim for denial of a property right.

6 MR. CHINE: I may need to defer some of that, but
7 let me give the Court my impression of that. Because
8 Blackwater followed all the appropriate processes, because
9 it obtained a permit, it relied in good faith on that
10 permit, it expended substantial sums, the City issued or
11 signed off on the inspection and notified, in effect, that
12 the certificate of occupancy was in the mail.

13 At that point, Blackwater obtained vested rights.
14 Those are constitutionally protected property rights. These
15 are vested rights now that the City is infringing upon
16 through its further processing and through its now
17 transformation of a ministerial permit into a discretionary
18 permit. That in and of itself, your Honor, is a deprivation
19 of a property right which the Court can recognize and which
20 the Court can enjoin.

21 MR. NEIL: Your Honor, I'd like to -- if I may,
22 Mr. Nadolenco is more of an expert in this 1983 area than I
23 am, and I would ask him to further respond to your question.

24 THE COURT: You may.

25 MR. NADOLENCO: Thank you, your Honor. And I will

1 be brief because I do think my co-counsel did a very good
2 job of explaining this.

3 But when you are dealing with a vested property
4 right as we have submitted and we believe demonstrated,
5 there is no more irreparable injury that could be thought of
6 than a constitutional violation that infringes on that
7 right. How much more irreparable do you get than a
8 constitutional violation?

9 The City says this is about money. It's not about
10 money. It's about protecting the constitutional rights of
11 Blackwater. We have a vested right in having -- using and
12 occupying the facility. That cannot be taken away through
13 due process under the guise of more process. You cannot
14 treat Blackwater differently than you have treated other
15 vocational schools in the area. You cannot treat Blackwater
16 differently than you have treated in-state companies or
17 other target ranges. You just can't do it without violating
18 constitutional. So first and foremost, it's not about
19 money. It's about constitutional rights and their
20 protection.

21 In addition to that, we have gone beyond that in
22 the papers and in the declarations we've submitted and
23 established irreparable harm the old-fashioned way. We have
24 a situation where Blackwater has a contract to train U.S.
25 Navy sailors. And it is fulfilling those contractual

1 obligations.

2 And it will suffer grave reputational injury which
3 the case law made clear. Reputational injury that is
4 difficult to calculate or quantify in and of itself can be
5 irreparable harm. That has been established if we were to
6 have this -- the City come in and take away these rights
7 that have been earned. Blackwater would not be able to
8 fulfill it's contractual obligations. It could risk the
9 entire contract with the United States Navy. And we've put
10 that in the Bonfiglio (phonetic) declaration.

11 And there is no telling what the ramifications of
12 that reputational harm could be for the future. Would it
13 stand a chance at winning future contracts from the Navy or
14 other branches of the Armed Forces. Those -- that's exactly
15 the type of harm that the irreparable injury standard is
16 meant to protect against.

17 So we would submit that when you have a situation
18 where constitutional rights are at stake, reputational
19 damage could be this significant, we have met the threshold
20 of showing irreparable harm.

21 THE COURT: Could you address the security issue.
22 Mr. Aguirre says there's going to be additional security
23 needed down in this business -- in this -- how would you
24 classify it -- in this park area.

25 MR. NADOLENCO: As my co-counsel pointed out,

1 there's precious little actual evidence of that before the
2 Court. I appreciate the argument of the City's Attorney,
3 but there's no evidence that it's actually going to be any
4 more expensive to secure.

5 And in addition, it is -- as far as I understand
6 it, Blackwater provides its own security down there and is
7 taking steps to ensure that the facility is safe, is
8 operated in a safe manner.

9 In addition to that, to the extent what the City
10 is arguing is that they have to provide additional security
11 to guard against protesters or things like that, that -- I'm
12 not aware of anything in the case law that says that that is
13 something that should be -- that should influence the Court
14 in an irreparable harm determination.

15 The fact that there is a company there that is
16 Blackwater that, in part because of this suit that it was
17 forced to bring, has a relatively high profile in the
18 community, that shouldn't work against them because their
19 constitutional rights are being infringed upon, and
20 therefore the City has to come in and provide some
21 unspecified security.

22 THE COURT: Are most of the employees of
23 Blackwater former military or does that --

24 MR. NEIL: I'm sorry, your Honor. What was --

25 THE COURT: Are most of the employees that would

1 be doing this security from our military?

2 MR. NEIL: Yes, your Honor. And well trained and
3 experienced. I think that in reality, your Honor, most of
4 the neighbors in the area, if asked, would welcome having
5 Blackwater there just simply from the fact that having
6 Blackwater there, these individuals who are well trained in
7 and of itself lends security to the area.

8 I just -- his is a specious argument, your Honor.
9 There is no support at all for the City Attorney's
10 representation that increased security is going to be needed
11 down there. Rather -- I would submit the opposite.

12 THE COURT: All right. Now, typically we do
13 opening, then reply, then -- but I think that Mr. Aguirre is
14 itching to have a couple of words.

15 MR. AGUIRRE: Well, thank you very much, your
16 Honor. Thank you very very much. And I'll make it brief.
17 And I appreciate that.

18 Your Honor, think about -- you know, this is
19 what's great about our system of justice is because when you
20 really argue it out and you get a chance to think it
21 through, think about what they're saying. They're saying
22 that if there is a hearing before the City Council, the City
23 Council might put some conditions on how they operate their
24 business there.

25 For example, they might condition the permit on an

1 assurance that there will be security. Right now there's no
2 such obligation. Or they might condition it on some
3 other -- for some other logical and rational -- logical or
4 rational way.

5 If this were coming for the first blush and the
6 decision had been made, if they would have come in and said,
7 we're Blackwater and this is what we're going to be doing
8 and the City said, okay, well, we're going to take you
9 through the Level 4 that I mentioned, so that means that
10 there's application plans submitted, there's a staff review,
11 then the Planning Commission has a hearing, and they come
12 forward and they present it, and all the neighbors get to
13 come in and be there -- they might put some conditions on
14 it. If either side doesn't like what the outcome is, then
15 there's an appeal filed through the City Council, and then
16 the City Council holds an appeal and may make some judgment
17 calls.

18 They get to completely circumvent that entire
19 process and operate without any conditions, even though
20 threshold what they're doing there is not contemplated by
21 the existing plan that was adopted after a great deal of
22 thought and care by the City of San Diego. They get to
23 circumvent that.

24 Then I say, well, let's compromise. You won't
25 have any irreparable injury if you continue to operate

1 there. We'll let the Court order remain. You get to
2 operate there, but let's have a hearing, and then after the
3 hearing is done, your Honor can come in and decide, has this
4 been done correctly or has it not been done correctly.

5 And they said, no, let's not do that either. What
6 they want is unfettered, unreviewed carte blanche to operate
7 any way they want to there, and they want your Honor to say
8 that they don't even have to go through the process, even
9 though the City is proposing a very rational, careful
10 review.

11 And I would say this, your Honor. I would never
12 sell your Honor a pig in a poke. I will say that what I'm
13 suggesting to your Honor -- if you just look at the
14 rational, careful prudence. And again, remember, the
15 prudential considerations under Article 3, case and
16 controversy, I think what we're doing is we're building on
17 that here and just saying to your Honor, retain
18 jurisdiction, allow the process to go forward, ultimately
19 review it for reasonableness, and everyone's interests are
20 protected, and that way we don't have these problems.

21 And your Honor, this is the little boxes that come
22 in the decision process that describe the various reviews.
23 I'm not just making it up. This is the way it is. And
24 normally what happens -- and it happens all the time --
25 someone will come in and they'll get a permit and they'll

1 start down that road, and then a realization will take
2 place, oh, my gosh, we better review this in a different
3 way, and it'll go up the ladder. It happens every day, and
4 occupancy permits are not issued.

5 In this case we're not saying don't issue the
6 occupancy permit. We're just saying allow our process to go
7 forward so we can make a fully informed judgment. Thank
8 you.

9 THE COURT: Thank you.

10 MR. NEIL: Your Honor, just -- may I conclude just
11 by making a short statement?

12 THE COURT: You may.

13 MR. NEIL: I wanted to correct one thing.

14 THE COURT: You may.

15 MR. NEIL: All of our instructors are former
16 military with the exception of two, and those two are
17 retired San Diego Police Department police officers. And
18 your Honor -- and in conclusion, I would just like to say I
19 appreciate the time that you've given us here today. This
20 is still America. Blackwater deserves the same
21 constitutional treatment as anybody else. We believe we've
22 met our ministerial test. We should be able to operate just
23 like anybody -- any other company that met this ministerial
24 process and not be treated like somebody else nor thrown to
25 the wolves of a political process as Mr. Aguirre has

1 suggested. And we would ask the Court to issue the
2 preliminary injunction. Thank you.

3 THE COURT: He doesn't think City Council people
4 are wolves. Not all of them. No. All right. Thank you.

5 This matter has been very well briefed by both
6 sides. It's an interesting case. Whatever the Court does
7 is always subject to appellate review at an appropriate
8 time.

9 The Court has evaluated and given considerable
10 thought and research to the issues involved. The Court
11 concludes that the Plaintiffs have met the standards for the
12 issuance of the temporary restraining order. The temporary
13 restraining order that the Court will issue will be a
14 relatively narrow one, fairly consistent with the Court's
15 temporary restraining order previously issued.

16 The Court notes that at least on the record before
17 the Court, the conclusion that the Court makes that these
18 are ministerial permits is supported in large part by the
19 records of the City. The City grants a series of
20 ministerial permit applications. The Plaintiff first
21 entered into a joint venture with Southwest Law Enforcement
22 Training Enterprises on September 5, 2007. Noble
23 Construction Consultants, a contractor for Plaintiff, filed
24 a general application with the City's Development Services
25 Department for a building permit. That's in the audit

1 report of the City at page six.

2 The application identified Southwest as the lessee
3 or tenant of the property, stating that the existing use was
4 warehouse with offices and that the proposed use was same,
5 no change. The City has the right to then take a look at
6 that and say, well, it does seem like it's no longer going
7 to be used as a warehouse. It's going to be used for
8 training. But the City did grant that permit application.

9 Then next -- that's not the end of the story or
10 the record before the Court. On October 1, 2007,
11 Plaintiff's contractor, Noble Construction Consultants,
12 filed another building permit application. That application
13 was technical in nature. It was for installation of the air
14 conditioning and exhaust. But significantly, that proposed
15 use for the facility at the audit report at six identified
16 the training -- identified the facility as training. No
17 longer warehouse, training. That's way back in October of
18 2007.

19 Then February 7, 2008, another general application
20 was filed with the City's Development Services Department
21 for a building permit to conduct electrical work at the Otay
22 Mesa facility, and the application identified the owner of
23 the property and referred to the project title as Southwest
24 Police. That's not quite what we have here, but the City
25 Audit Department indicated that the permit application does

1 not necessarily have to develop -- disclose the end user.

2 The application sought a permit for work,
3 including the installation of two new air conditioning units
4 and six exhaust fans, basically tenant improvements. And
5 the City classified the project type as ministerial, and the
6 permit was granted.

7 On February 8th, 2008, another general application
8 for a building permit was filed, this time by Raven
9 Development Group, an entity that the application identified
10 as the lessee or tenant of the Otay Mesa facility. Raven
11 Development Group is a corporate affiliate of Plaintiff and
12 specializes in the development of training facilities.

13 This application clearly indicated that there was
14 going to be an indoor firing range. And significantly
15 again, the existing use was warehouse, and the proposed use
16 was training facility. So there's no -- there was no hiding
17 the ball that this was going to be transformed from a
18 warehouse to a training facility.

19 The City's documents again, after taking a look at
20 this, knowing that there's a firing range going to be added,
21 indicated that the type of permit is ministerial. That's
22 the City's own classification, knowing that it's training,
23 knowing that it's an indoor firing range. And the City
24 granted the permit.

25 Once the permit was granted, Plaintiff began

1 installing the additional air-conditioning units, exhaust
2 fans and constructing the firing ranges -- the firing range.

3 On March 21, 2008, the City's electrical inspector
4 approved the Otay Mesa facility's electrical infrastructure.
5 On March 25, 2008, a City fire inspector approved the fire
6 and safety permits. That's significant because in the
7 earlier filings there was an indication, well, if you have a
8 firing range, does that endanger the area because you're
9 going to be shooting guns there, is that implicating any
10 fire or safety areas.

11 And certainly in San Diego City, County, this
12 whole region, that's a significant issue. But on each
13 occasion, the Plaintiff's vice president met with the
14 inspector, identified himself as working for Plaintiff,
15 Blackwater, and provided his Blackwater business card.

16 On April 29th, 2008, the City's chief building
17 official, Defendant Amate, reviewed the Plaintiff's plans
18 for the Otay Mesa facility and found no unresolved issues.

19 On April 30, 2008, the City's structural engineer
20 conducted a final inspection of the Otay Mesa facility. The
21 structural engineer signed Plaintiff's permits and plans,
22 and the evidence showed that the City on April 30, 2008
23 approved the certificate of occupancy.

24 On the certificate of occupancy line on the City's
25 inspection record, there's the signature from that date by

1 Aguirre, but obviously a different Aguirre, also working
2 within the City of San Diego, and no relation. Prior
3 counsel had cleared that up.

4 The Plaintiff stated that the City's Development
5 Services Department would mail the paper certificate of
6 occupancy within the next few weeks.

7 Also, the -- on May 19, 2008, after they said that
8 they're going to issue the certificate of occupancy, the
9 director of the City's Development Services Department
10 informed Plaintiff that the City would not issue a
11 certificate of occupancy to Plaintiff for the Otay Mesa
12 facility. That's a final decision. That's a decision. It
13 just said we're not going to issue it. We've approved it,
14 but now we're not going to issue it.

15 The letter stated that Plaintiff may continue to
16 use the facility as a warehouse, but not as a shooting range
17 or vocational trade school until a certificate of occupancy
18 had been issued. That then prompted the temporary
19 restraining order enjoining Defendants from refusing to
20 issue the certificate of occupancy.

21 At the May 30, 2008 hearing regarding Plaintiff's
22 application for a temporary restraining order, the
23 Defendants contended that a new and/or additional
24 discretionary review process was proper because Plaintiff
25 had allegedly concealed its identity from the City and

1 allegedly misrepresented the true nature of the intended use
2 of the Otay Mesa facility.

3 Then the City auditor's report then came to light
4 on May 5, 2008, prior to the time that the City declared a
5 refusal to issue a certificate of occupancy. The Mayor of
6 the City of San Diego ordered an investigation of
7 Plaintiff's permit applications and desire to use the Otay
8 Mesa facility for Navy training.

9 As part -- and so the City audit, which --
10 auditors, which is a recognized entity of the City of San
11 Diego, then was charged by the Mayor of San Diego to do a
12 full and complete investigation. Plaintiff agreed to
13 provide access to the Otay Mesa facility, to the City
14 auditor and his staff as well as to answer all questions and
15 provide all documents requested by the City auditor.

16 On June 5, 2008, the day after the Court granted
17 Plaintiff's application for a temporary restraining order,
18 the City auditor issued the -- its results, the document
19 entitled "Audit of Permits Issued for the Blackwater
20 Facility," the audit report.

21 The stated objectives of the audit were to answer
22 the following questions:

23 One, did Blackwater misrepresent its identity or
24 intended use of the facility located at 7685 Siempre Viva
25 Road, Otay Mesa Development District?

1 Two, did Development Services staff properly issue
2 permits in compliance with codes and regulations for the
3 Blackwater facility?

4 And three, is the designation of the vocational
5 trade school appropriate for the Otay Mesa site?

6 Now, this is significant because this is the City
7 auditor charged by the Mayor with this responsibility doing
8 an independent audit. It could go one way, it could go the
9 other way. But after reviewing all of the relevant
10 information, including the building permit and business tax
11 certificate applications that were filed for the Blackwater
12 facility, the City auditor determined that Blackwater did
13 not misrepresent its identity.

14 Remember that the alleged misrepresentation in the
15 letter denying the certificate of occupancy was one of the
16 stated reasons at that time for transforming the ministerial
17 process into a discretionary review process.

18 So the City auditor answered that the --
19 Blackwater did not misrepresent its identity. That's audit
20 report at five. And then this is a quote:

21 "In the City of San Diego, building
22 permit applications do not require the
23 name of the business owner. The
24 Municipal Code Section 112.0102 permits
25 either an owner, an agent of the owner

1 or a party with a legal interest to be
2 named on the permit application."

3 If the City doesn't like that or certainly if the
4 City Attorney's Office now in retrospect doesn't like that,
5 then prospectively for other entities or other permit
6 processes, certainly the City Council is permitted to change
7 the law prospectively for other people and can do that
8 through the regular process of -- maybe that requires a vote
9 of the City of San Diego residents probably.

10 But in this democratic process, if the Code needs
11 to be changed, obviously the Code can be changed. So
12 there's a process in order to do that prospectively, but we
13 don't change the rules retrospectively.

14 So in accordance with these provisions of the San
15 Diego Municipal Code, the City audit concluded that
16 Blackwater did not complete, sign or file any of the
17 building permit applications. But the significant part was,
18 nor was it required to do so. The City audit noted that two
19 of the permit applications for the Otay Mesa facility
20 indicated that the proposed use was for training.

21 And then significantly, the -- well, perhaps --
22 perhaps the City Attorney didn't realize that Plaintiff's
23 business tax certificate application way back in February
24 identified its primary business activity at the facility
25 would be security training for the U.S. Navy. Nevertheless,

1 the City is on constructive notice of its business tax
2 certificate. It's a public document. And it clearly
3 indicated way back in February, well before the sign-off on
4 the certificate of occupancy by the building inspectors that
5 the primary business activity at the facility would be
6 security training for the U.S. Navy.

7 The audit report concluded that this constituted
8 direct evidence that Blackwater represented to the City its
9 intent to operate a training facility at the address.
10 Accordingly, the audit concluded that Plaintiff did not
11 misrepresent its identity or the intended use of the Otay
12 Mesa facility.

13 The next issue was whether or not Development
14 Services staff properly issued permits in compliance with
15 the codes and regulations for this facility. The audit
16 report concluded the Municipal Code, the City Attorney's
17 opinion -- after reviewing the Municipal Code, the City
18 Attorney's opinion, in interviewing Development Services
19 Department staff as well as Blackwater officials, the City
20 audit report determined that the Development Services staff
21 had the authority under the Municipal Code Section 111.0205
22 to classify Blackwater's use of the building as a vocational
23 trade school.

24 First, San Diego Municipal Code Section 111.0205
25 states that the City, without a public hearing, is

1 authorized to make a determination of the proper usage. The
2 San Diego Municipal Code Section 131.0620(e) states that for
3 any use that cannot be readily classified, the City manager
4 shall determine the appropriate use category and use
5 subcategory upon request to the applicant or property owner.

6 Based on these provisions of the Municipal Code,
7 the audit report reached two conclusions. Development
8 Services Department has the authority to classify use of the
9 facility as a vocational trade school, and vocational trade
10 school, a permitted use, may be approved or denied by staff
11 in accordance with a process one ministerial review.

12 What is significant to the Court in this respect
13 is the City's own auditors have then said and confirmed that
14 the City, without a public hearing, can make their own
15 classification that knowing that Blackwater's use was going
16 to be through the permit tax application training of
17 sailors, that they -- they, knowing on constructive notice
18 of that, nevertheless does classify the use as vocational
19 trade school. And the vocational trade school is consistent
20 with the zoning permitted in the Otay Mesa area that is the
21 subject matter of the property location.

22 The audit report noted that consistent with these
23 provisions, the Department Services Department had -- which
24 is similar, an analogous position, had classified the
25 American Shooting Center, another shooting range located in

1 the city, as a vocational trade school. So it's not only
2 consistent with its right to classify this as ministerial,
3 it's on notice of the training for Navy sailors, and its own
4 Development Services Department classifies it as a
5 vocational trade school consistent with other uses located
6 in the city which include shooting ranges.

7 The San Diego Municipal Code provides that
8 instruction at the vocational trade schools must be related
9 to a use permitted in the Otay Mesa Development District.
10 And that's the Municipal Code Section 129.0102 and 129.0107.

11 Although the Municipal Code does not state if the
12 subject taught should be directly or indirectly related to a
13 permitted use, Plaintiff's project at issue here proposes
14 security, law enforcement and/or military training.

15 And then according to Department Services
16 Department, security guard use would be classified as a
17 business support use, which is expressly permitted in the
18 Otay Mesa Development District pursuant to San Diego
19 Municipal Code 1517.0301(a)(7). And that's from the City's
20 own audit report.

21 Then the audit report goes on to state, there are
22 many examples of security guards at other properties in Otay
23 Mesa that have the same zoning designation. And
24 additionally, law enforcement and military uses are
25 classified within the Government office use category which

1 uses are permitted in the Otay Mesa Development District by
2 San Diego Municipal Code Section 1517.0301(a)(1).

3 The audit report noted that at least at that time,
4 the City Attorney's stated belief that a shooting range or a
5 law enforcement security training operation did not clearly
6 fall within any of the permitted use of the IH2-1 zone in
7 which the Plaintiff's Otay Mesa facility is noted. The
8 audit report concluded that the complexity and lack of
9 clarity for certain sections of the Municipal Code
10 contributed to these differing interpretations.

11 And that's why I say, if there's any ambiguity
12 here, prospectively the City can take a look at its
13 Municipal Code and see if any clarification for future use
14 is warranted. But with respect to their own classification,
15 knowing of these issues, the Development Services Department
16 was clearly authorized to classify this as a vocational
17 trade school, which is clearly within the permitted use of
18 the Otay Mesa Development District.

19 And then with respect to whether the use of the
20 Otay Mesa facility can be done as a shooting range, the
21 audit concluded that shooting galleries or target ranges are
22 regulated by the San Diego Police Department and do not fall
23 strictly within Development Services Department authority
24 over zoning use and building regulations.

25 But also in the Court's review of the other

1 examples which are precedential for the Court, no other
2 indoor shooting range has been changed from a ministerial
3 process into a discretionary review process. So the San
4 Diego Police Department confirmed that a police permit was
5 not required for Blackwater to operate as a firing range.

6 Now on the standards for preliminary injunction.

7 "In the Ninth Circuit, a plaintiff
8 is entitled to a preliminary injunction
9 when the plaintiff demonstrates a strong
10 likelihood of success on the merits,
11 irreparable harm if injunctive relief is
12 not granted, that the threatened injury
13 to the plaintiff outweighs whatever
14 damage the proposed injunction might
15 cause to the opposing party, and that
16 the issuance of the injunction will not
17 be adverse to the public interest."

18 Regents of the University of California vs. ABC,
19 Inc., 747 F.2d 511, Ninth Circuit 1984.

20 "Alternatively, a plaintiff may be
21 entitled to a preliminary injunction by
22 establishing the existence of serious
23 questions going to the merits and that
24 the balance of hardship tips sharply in
25 his favor."

1 Roe vs. Anderson, 134 F.3d 1400, Ninth Circuit
2 1998.

3 "These formulations represent two
4 points on a sliding scale in which the
5 required degree of irreparable harm
6 increases as the probability of success
7 decreases."

8 Roe vs. Anderson, 134 F.3d at 1402.

9 "Thus, if the balance of hardship
10 tips decidedly towards the plaintiff,
11 then the plaintiff need not show as
12 robust a likelihood of success on the
13 merits."

14 State of Alaska Yukon Flat School District vs.
15 Native Village of Yintay (phonetic), 856 F.2d 1384, Ninth
16 Circuit 1988.

17 In this case, Plaintiff has met its burden under
18 these tests for the issuance of a preliminary injunction.
19 The Court notes that and concludes, after a review of all of
20 the information, that Plaintiff has met its burden to
21 demonstrate a strong likelihood of success on the merits.

22 And then I'll address the irreparable harm for
23 deprivation of a property right on a constitutional 1983
24 type of matter, and that the threatened injury to Plaintiff
25 outweighs whatever damage a TRO might cause to Defendants.

1 And TROs are also classified to -- the same as preliminary
2 injunction.

3 But the Court also has to conclude that the
4 issuance of the injunction will not be adverse to the public
5 interest. Regents of the University of California vs. ABC,
6 Inc. 747 F.2d at 515.

7 On the likelihood of success on the merits, the
8 Court concludes that the request for injunctive relief
9 centers on Plaintiff's claim that after following all
10 applicable rules for the issuance of permits as noted in the
11 audit report and passing all required inspections, the City
12 has a duty to issue the certificate of occupancy consistent
13 with those permits and its own Municipal Code. And the
14 reference to that is San Diego Municipal Code 129.0114.

15 Over the past several weeks, Defendants have put
16 forth numerous often changing purported justifications for
17 the decision to refuse the certificate of occupancy for the
18 Otay Mesa facility. The Defendants first decried the fact
19 that Plaintiff affiliate -- that Plaintiff's affiliates and
20 contractors had applied for the permits at issue. And that
21 was cited in Defendants' opposition to Plaintiff's ex parte
22 request for a temporary restraining order at page five,
23 Document Number 15 in our filing system.

24 The City's own audit later concluded that
25 Plaintiff and its contractors complied with the applicable

1 Municipal Code and that Plaintiff did not misrepresent its
2 identity or the intended use of the Otay Mesa facility,
3 audit report at seven.

4 Next, the Defendants argue, or maybe
5 alternatively, that Plaintiff's permits were improper
6 because vocational facilities with target ranges were not
7 allowed without a discretionary review by the City Counsel
8 and SEQA review. Once again, the City's own audit
9 contradicted that assertion, which is not supported by the
10 San Diego Municipal Code.

11 Although San Diego Municipal Code Section 53.10
12 provides it is the purpose and intent of the Council of City
13 of San Diego that firing of firearms within the City limits
14 be strictly regulated, San Diego Municipal Code Section
15 53.10(d) specifically provides exceptions for shooting
16 galleries or target ranges. See audit report at 10 through
17 11.

18 Defendants' argument regarding the presence of a
19 firing range is also undermined by the City's past practice
20 with respect to other firing ranges in the City, since
21 Defendant cannot locate a single example of a firing range
22 being subjected to discretionary review.

23 And the Court can take, as I mentioned at the TRO
24 hearing, judicial notice that I know at least of one firing
25 range that is near Morena, but is almost adjacent to an area

1 where there's mobile facilities and even more semi-permanent
2 residents almost directly across the street. There's been
3 no incident there that the Court is aware of, and there was
4 no need for a discretionary review in there.

5 That goes to the Plaintiff's argument that the
6 City's precedent supports the fact that this -- the issue
7 about the firing range which was clearly disclosed on the
8 permit applications is not a ground to transform the
9 ministerial permits into a discretionary review permit.

10 The Court concludes that none of Defendants'
11 arguments change the facts that form the basis of
12 Plaintiff's complaint and request for injunctive relief.
13 Plaintiff properly filed several permit applications which
14 the City granted after conducting all required inspections
15 under the ministerial process provided by the City's own
16 laws.

17 A City structural engineer conducted a final
18 inspection of Plaintiff's facility, signed Plaintiff's
19 permits and plans and informed Plaintiff that Development
20 Services Department would mail to Plaintiff the certificate
21 of occupancy within a short period of time. The same day,
22 April 30, 2008, a City official signed the certificate of
23 occupancy portion of the inspection record.

24 Despite the San Diego Municipal Code's clear
25 provision stating that if all requirements are met, the

1 City, quote, "shall issue a certificate of occupancy," end
2 of quote, under Municipal Code Section 129.0114, the City
3 subsequently refused to actually send the Plaintiff the
4 certificate.

5 Plaintiff contents that Defendants have a
6 ministerial duty under the laws to issue a certificate, and
7 the Court concludes that Plaintiff has demonstrated a strong
8 likelihood of success on the merits of that claim based on
9 the record before the Court.

10 I do agree with the Defendants that generally land
11 use planning can be in certain instances subjected to a
12 discretionary review process, and the City has set up
13 different levels, process one, process two, process three,
14 process four. But in this case, the City classified this,
15 knowing these facts, as process one.

16 The Plaintiffs complied with all the requirements.
17 The audit confirmed that the Plaintiffs have complied with
18 all the requirements. The City officials signed the
19 certificate of occupancy portion of the inspection regard,
20 and then the City's own Municipal Code states that the City
21 shall issue the certificate of occupancy.

22 In evaluating the totality of circumstances,
23 including the Plaintiff's -- the Defendants' relatively new
24 argument about totality of the circumstances, Plaintiffs
25 appear likely to success on its argument that no conditional

1 use permit is needed to operate a vocational trade school
2 within the Otay Mesa Development, since such uses are
3 permitted as a matter of right.

4 The San Diego Municipal Code authorizes all uses
5 permitted in the IH2-1 zone under Municipal Code Section
6 1517.0301(a)(1). Vocational schools are permitted in the
7 IH2-1 zone, and therefore in the Otay Mesa Development,
8 which consists of industrial buildings and lacks residential
9 properties. That's under San Diego Municipal Code Section
10 131.0622 and Table 131-06(b).

11 The San Diego Municipal Code exempts facilities
12 permitted in the IH2-1 zone from obtaining special permits
13 and provides that permits for such facilities are subject to
14 ministerial review, not the discretionary review process
15 that requires an applicant to seek approval of the City
16 Council. That's the San Diego Municipal Code Section
17 53.10(d).

18 The fact that a vocational school involves a
19 firing range does not change that conclusion, since the San
20 Diego Municipal Code expressly exempts target ranges from
21 discretionary Council approval -- that's at the audit report
22 at 10-11 pages -- and assigns to the San Diego Police
23 Department the authority to require permits for a firing
24 range which the San Diego Police Department has stated are
25 not necessary for Plaintiff's facility. That's in the audit

1 report at page 11.

2 Consistent with these provisions of the Municipal
3 Code regarding vocational schools and/or firing ranges, all
4 required permits and approvals for Plaintiff's property were
5 considered by the City to be ministerial. As such, they
6 were granted without any indication that the project
7 required or that the City had authority to impose
8 discretionary review. Under Municipal Code Section
9 1517.0301.

10 Prior to the May 30, 2008 hearing regarding a
11 temporary restraining order, Jerry Sanders, the Mayor of the
12 City of San Diego and former police chief, stated publicly
13 that the original decision was ministerial and that the
14 Mayor believed that Plaintiff's project was properly
15 permitted. That's Document Number 13 and transcript of the
16 record at 4:9 through 10 and 5:1 through 2.

17 Defendants' complaints that Plaintiff's intended
18 use does not qualify as a vocational school also ring hollow
19 in light of the evidence indicating that Development
20 Services Staff, not Plaintiff, classified the building as a
21 vocational facility after being on notice of the intended
22 use.

23 Moreover, the evidence indicated that there are
24 other vocational facilities in the Otay Mesa area as well as
25 other firing ranges within the City, none of which have ever

1 been subjected to discretionary review by Defendants.

2 Second, even if a permit was required for a change
3 of use to a vocational trade school, the evidence indicates
4 that multiple permits were filed and granted. The general
5 application filed February 8, 2008 states the existing use
6 as a warehouse and the propose use as a training facility.
7 That's in the Amate declaration, and Amate is a Defendant
8 within the City of San Diego. She is the chief building
9 official for the City of San Diego.

10 That application also listed the project
11 description as indoor firing ranges, and the attached
12 hazardous material questionnaire identified the business
13 activities of the facilities for -- of training. The City
14 granted that application.

15 Moreover, the application filed several months
16 earlier in September of 2007 had indicated that the
17 partition revision was related to the storage of ammo. One
18 of the applications filed in February of 2008 stated the
19 project's scope as building permit to add modular training
20 unit inside of existing warehouse for Southwest Law
21 Enforcement facility.

22 Additionally, a business tax application filed on
23 February 6, 2008, more than two months before the City
24 raised concern about Plaintiff's use of the Otay Mesa
25 facility, was filed by Blackwater Lodge and Training Center,

1 Inc., audit report at seven. The application listed
2 Blackwater's business address at 7685 Siempre Viva, the
3 location of the facility at issue here, and stated
4 Blackwater will conduct security training for the United
5 States Navy.

6 Additionally, the application stated Blackwater
7 has contracted with the United States Navy to conduct a
8 course called "Ship Reactionary Force Basic." And we do
9 know from the documents filed by the Defendants that it's 24
10 sailors on a three-week course being sent in to this
11 facility or approximately that number.

12 In light of these applications, the Court is not
13 persuaded by Defendants' arguments that Plaintiff's identity
14 and/or the nature of Plaintiff's project only recently
15 became known.

16 On April 30, 2008, a City structural engineer
17 inspected the facility, signed the permits and plans and
18 informed Plaintiff that the City's Development Services
19 Department would mail to the Plaintiff a certificate of
20 occupancy within a short period of time. Also on April 30,
21 2008, a City official signed the certificate of occupancy
22 portion of the inspection record.

23 Nothing remains for the Defendants except to issue
24 the certificate of occupancy under the City's own rules and
25 regulations and code. And the Municipal Code does not

1 provide discretion for the Defendants to refuse to do so in
2 these circumstances.

3 I'm quoting from the Municipal Code:

4 "The building official shall
5 inspect the structure, and if the
6 building official finds no violation of
7 the Land Development Code or other
8 regulations that are enforced by the
9 City's designated code enforcement
10 official, the building official shall
11 issue a certificate of occupancy."
12 Municipal Code Section 129.0114.

13 Defendants repeatedly stress that the issuance of
14 building permits is a discretionary function and quote
15 Thompson vs. City of Lake Elsinore, 18 Cal.App.4th 49 at 47,
16 1993. But the present case does not involve the
17 municipality's discretionary decision to grant or deny a
18 permit application. A building official is authorized to
19 determine whether or not a particular product satisfies all
20 the conditions of its building permit as well as applicable
21 code and other requirements before issuing the certificate
22 of occupancy. That's not disputed, and that's in Thompson
23 vs. City of Lake Elsinore, 18 Cal.App.4th 49, 1993.

24 The building official must be allowed great
25 latitude, discretion in making this determination. The

1 Court agrees in that respect. However, the difference in
2 this case is that the evidence showed City officials have
3 already made that determination, have granted the permits at
4 issue consistent with its Municipal Code, and after
5 conducting the final inspection, have approved the issuance
6 of certificates of occupancy consistent with those permits.

7 Once that occurs, pursuant to the City's own
8 Municipal Code, there is little to no discretion regarding
9 whether to issue certificates under Municipal Code 129.0114.

10 California law -- turning from the Municipal Code
11 at issue, California law also supports the conclusion that
12 under these circumstances, issuing the certificate of
13 occupancy is a nondiscretionary duty that the Defendants
14 must perform.

15 The discretion to issue a building permit at all
16 is much broader than the decision which must be exercised in
17 determining whether to issue a certificate of occupancy.
18 Once the building permit has been issued, it cannot be de
19 facto revoked by the simple expedient of never issuing the
20 certificate of occupancy. And that's in the Thompson vs.
21 City of Lake Elsinore case.

22 And then also, in Inland Empire Health Plan vs.
23 Superior Court, 108 Cal.App.4th 588, 2003:

24 "A city has a mandatory duty to
25 issue a certificate of occupancy once it

1 has found that a construction project
2 has complied with all requirements. The
3 critical point which defendants have
4 failed to grasp is that the building" --
5 I'm quoting from the case law now. I'm not
6 talking about the City officials here.

7 "The critical point which
8 defendants have failed to grasp is that
9 the building official had already
10 exercised its discretion even if the
11 building official is immune for its
12 discretionary act in determining whether
13 or not the certificate should be issued,
14 i.e. that the building complies with the
15 relevant requirements. The building
16 official had in fact, by its final
17 inspection okay, already approved" --
18 "already actually approved the owner's
19 building."

20 That's in Thompson vs. City of Lake Elsinore, 18
21 Cal.App.4th at 58.

22 Accordingly, according to the Thompson case, the
23 building official retained no further discretion to withhold
24 the certificate of occupancy. Here, the Mayor of the City
25 of San Diego, the San Diego building official, the City's

1 own inspector, the San Diego -- and the San Diego Municipal
2 auditor have all stated that Plaintiff met every requirement
3 for use and occupancy of the Otay Mesa facility.

4 Defendants cannot point to any provision of the
5 Municipal Code that allows the City to conduct all required
6 inspections and approval, permits and occupancy only to
7 later decide not to issue the formal certificate of
8 occupancy.

9 And I think one of the benefits of being here in
10 Federal Court is that traditionally Federal Courts have been
11 immune to any political ramifications of the consequences of
12 its decision. Federal Courts in the civil rights
13 litigation in the '60s were strongly supportive of the
14 people supporting civil rights for all individuals at a time
15 when it was not necessarily politically popular within a
16 segment of the community, particularly in the south.

17 Similarly, the fact that people here today in the
18 audience do not like Blackwater or that others do not like
19 the fact that the United States Navy has elected to
20 subcontract some training to a private contractor does not
21 change the fact that under the City's own rules and
22 requirements, the rules of the process set out by the San
23 Diego Municipal Code, this entity, this Plaintiff complied
24 with those rules and regulations and should not be subjected
25 to then a political decision by the City Council or a

1 process four review when it was process one determined by
2 the relevant City officials, and all of the indications in
3 this review from the Court's perspective have been met for
4 the process one ministerial review.

5 So the fact that it may not be popular within a
6 certain segment of the community or even if it wasn't
7 popular at all should not weigh in the Court's determination
8 as to whether they have met the requirements for the
9 issuance of a preliminary injunction.

10 The Court concludes on balance that Plaintiff's
11 application demonstrates a strong likelihood of success on
12 its procedural due process claim brought pursuant to 42
13 United States Code Section 1983.

14 "A property interest in a benefit
15 protected by the due process clause
16 results from a legitimate claim of
17 entitlement created and defined by an
18 independent source such as state or
19 federal law."

20 Parks vs. Watson, 716 F.2d 646, Ninth Circuit
21 1983.

22 Here, Plaintiff argues that state and local laws
23 providing that Defendant shall issue the certificate of
24 occupancy creates a protectable property interest because
25 when a Government agency is given little discretion

1 regarding whether to grant a permit, the denial of that
2 permit creates a protectable right.

3 So in this case, I'm not concerned with the
4 opening of the flood gates on many other ones. It was the
5 City that set up this ministerial process. It was the City
6 San Diego Municipal Code that set up this process. If the
7 City wishes to change this and have a broader review
8 process, it's permitted to do so by changing the San Diego
9 Municipal Code, but we can't punish the Plaintiff by not
10 applying the City's own rules and procedures.

11 And under 1983 law, there is a recognized property
12 right that Plaintiff has shown in this instance a strong
13 likelihood of success on the merits of its procedural due
14 process claim.

15 Plaintiff argues that Defendants violated
16 Plaintiff's rights to procedural due process by depriving
17 Plaintiff of that right without notice and opportunity for a
18 hearing appropriate to the nature of the case. And that
19 case is cited ironically because -- Cleveland Board of
20 Education, 470 U.S. 532, 1985.

21 Here, the Defendant is the one, and the City
22 Attorney is saying, we'll give you many hearings. We'll
23 give you a lot of hearings, and we'll give you lots of due
24 process, procedural due process.

25 And there's some merit to that. There's certainly

1 nobody that would be against transparency in the whole -- in
2 land use planning in general. But this is not that case.
3 The City, through its own processes and procedures, set up a
4 ministerial review. Plaintiff has complied with that
5 ministerial review, and therefore is entitled to a
6 certificate of occupancy.

7 In that respect, Plaintiff's evidence shows that
8 Plaintiff obtained the building permits and approval for the
9 certificate of occupancy and that on April 30, 2008, the
10 certificate of occupancy was approved and that Defendants
11 have refused to -- absent the Court's TRO, refused to
12 actually issue the certificate of occupancy. And that would
13 be then a violation of Parks, 716 F.2d at 657. To quote
14 Parks, "Once the conditions are met, the city lacks
15 discretionary powers."

16 Now, as to the City Attorney's suggestion that
17 perhaps the parties could -- as to the City Attorney's
18 suggestion that the Court should defer and not issue the
19 preliminary injunction and that instead the City should
20 proceed with the discretionary review process, having
21 concluded that it was ministerial and that they complied,
22 that would be contrary to the Court's decision in this
23 respect.

24 Nevertheless, recognizing that whatever the Court
25 does, it's an issue and then obviously the Plaintiffs face

1 more of a political issue within Otay Mesa or political
2 matters with the City of San Diego and a pending permit for
3 the mockup simulator, there is nothing to prevent the two
4 parties, like any case that is before the Court, from
5 getting together and even with the assistance, if necessary,
6 of the magistrate judge, Magistrate Judge McCurine, to then
7 say, what other issues can we reasonably discuss. Can we --
8 can we -- can we in some way alleviate your concerns if the
9 police are going to have to drive by there or can we give
10 some assurances, here's our security plan. Can we do some
11 other things.

12 There's nothing to prevent the two parties who
13 have respectfully both come to the Court and made their case
14 respectfully to the Court from further working out some of
15 the unresolved issues. There is never a case that is --
16 there is rarely a case that addresses all issues. I'm
17 basing my decision based on the law, but the parties can
18 then take a look at if they can discuss these matters
19 further, working productively to then make sure that the
20 City's concerns and maybe some of the audience's concerns or
21 other concerns are met.

22 I said before, I'll say again, I think some of the
23 concerns got on a collateral track because of the prior
24 Potrero matter where obviously the residents would have a
25 concern about an open-air, open facility in an area. Here,

1 it's training of sailors on something that I think everybody
2 would agree is appropriate to have them trained to respond
3 to situations. It's in an indoor facility. There's no
4 residents around.

5 Law enforcement is next door. The Southwest
6 Academy is -- I don't know if it's right next door, but it's
7 in the neighborhood. I don't have any problem thinking that
8 within the San Diego area, with the compatible uses of the
9 military at Miramar and in Coronado with the military in
10 Coronado, with National City being adjacent to National
11 City, this area has had a long track record of cooperative
12 use with -- between the civilian and the military.

13 And I think that after the fervor settles down
14 about this, if people step back and say, we submitted it to
15 the Court, the Court took a careful look at the law in this
16 regard, the Court will issue a preliminary injunction. I
17 think on the issue of the bond, I'll increase it to 50,000.
18 I think that that -- if there is any claims, there's a
19 claims process that can always be done.

20 MR. AGUIRRE: Your Honor, we're not asking for the
21 bond to be increased.

22 THE COURT: You're not asking for the bond? All
23 right. So we'll keep -- 10,000 at the bond? All right.
24 Ten thousand at the bond.

25 And then the parties, I suggest, still should

1 talk. And so the injunction will be consistent -- fairly
2 consistent with what the Court did at the temporary
3 restraining order hearing.

4 The Court does conclude that having a protectable
5 property interest, that the Court can issue an injunction,
6 and the Court finds two bases. One, irreparable harm on the
7 regular traditional merits, but more significantly,
8 irreparable harm on the constitutional issue here.

9 The Plaintiff has already commenced doing work at
10 the facility. Any type of injunction is subject to
11 modification if circumstances warrant it. If the parties
12 are not able to resolve the matter, the case can go to a
13 hearing on the merits.

14 The Court reminds the parties that I'm not making
15 a final determination about who would win or lose here. I'm
16 just applying the standards of law, saying that Plaintiff
17 has demonstrated that it faces a significant threat of
18 immediate and irreparable injury in the absence of
19 injunctive relief, and that given the track record here and
20 the denial by the City of the certificate of occupancy when
21 the Court concludes that it should issue, that there are
22 grounds for the issuance of injunctive relief.

23 And that on the question as to whether it's now
24 moot, now that they have the certificate of occupancy, is it
25 moot, I think it's not moot in the sense that the City still

1 wants to go not to now a level process three discretionary
2 review, but now to a process four discretionary review. And
3 I think that it was a ministerial application, and it
4 appears to the Court that the next one is also a ministerial
5 application, the ship simulator.

6 So I think that the parties should really try to
7 work that out. But I recognize that the standards in that
8 respect may be a little bit different. But I think that you
9 can probably work that out.

10 So the Court concludes also that Plaintiff has met
11 its burden to establish that without injunctive relief,
12 Plaintiff faces the immediate threat of irreparable injury.
13 And the finally, on the balance of hardships, that the
14 threatened injury to Plaintiff outweighs whatever damage a
15 preliminary injunction might cause to the Defendant.

16 Accordingly -- and then finally, the Court has
17 also considered the public interest in deciding whether to
18 do that.

19 I appreciated the excellent briefing by both of
20 the parties on very short notice. This is the nature of
21 injunctive relief. And the parties have had a full and fair
22 opportunity to present the case to the Court. The Court
23 concludes that the Court will enjoin, having concluded there
24 is a ripe case or controversy, that the ripeness standard
25 has been met, that there is the standards for issuance of

1 the temporary restraining order, that Defendants are
2 enjoined from refusing to perform the ministerial task of
3 sending the Plaintiff the certificate of occupancy for the
4 property, which has now already been done, and/or refusing
5 to allow Plaintiff to occupy and use that property
6 consistent with the permits that the City has already
7 granted.

8 And the Court also orders Defendants to promptly
9 and properly process any current pending ministerial permits
10 for the Otay Mesa property. And then the Court will
11 continue the amount of security that has already been
12 posted.

13 You should check if you need to then do -- if your
14 bond expired, and if so, whether you need to do a new bond.
15 But that would be in the amount of \$10,000.

16 And the Court will issue its written order and a
17 separate order on the preliminary injunction. Thank you
18 very much.

19 ALL: Thank you, your Honor.

20 (Proceedings concluded.)

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1 I certify that the foregoing is a correct
2 transcript from the electronic sound recording of the
3 proceedings in the above-entitled matter.

4
5 s/Shonna Mowrer _____ 6/18/08
6 Transcriber Date

7 FEDERALLY CERTIFIED TRANSCRIPT AUTHENTICATED BY:

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9 s/L.L. Francisco _____
10 L.L. Francisco, President
11 Echo Reporting, Inc.

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