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To the benefit of the City of San Diego, Exempt from fees per Gov't Code § 6103.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No. 08 CV 0926 H (WMC) DEFENDANTS OPPOSITION TO PLAINTIFF BLACKWATER'S *EX PARTE* REQUEST FOR A TEMPORARY RESTRAINING ORDER Date: June 2, 2008 Time: 10:30 a.m. Courtroom: 13 Judge: Hon. Marilyn L. Huff

I.

INTRODUCTION

On or about September 5, 2007, an entity operating under the project name "Southwest Law Enforcement Training Enterprise" filed a general application with the City of San Diego's Development Services Department ("DSD") to conduct "Tenant Improvements" at 7685 Siempre Viva Road located within the Otay Mesa Development District (the "building" or "site"). Exhibit "A" to the Declaration of Afsatteh Ahreadi, filed contemporaneously herewith. The existing use

identified on the application was warehouse with offices. The proposed use identified on the application was identified as "same (no change)." The purpose of the application was to construct 44 feet of new partitions in existing office space. Accompanying the application was a signed Hazardous Materials Questionnaire where the applicant disclosed that there were no uses of explosives or blasting agents or other health hazards associated with the activity. The application identified the Lessee or Tenant as "Southwest Law Enforcement Training Enterprises" with an address in San Diego.

On or about February 7, 2008, another general application was submitted to the City of San Diego's DSD to conduct electrical work at the building for a project entitled "South West Police." Exhibit "B" to the Declaration of Afsatteh Ahreadi, filed contemporaneously herewith. The scope of the work included the installation of two new air conditioning units and six exhaust fans.

On or about February 7, 2008, a separate General Application was also submitted to DSD for structural work for this same site. Exhibit "C" to the Declaration of Afsatteh Ahreadi, filed contemporaneously herewith. The project description on the application was to "[a]dd [an] indoor firing range" that covered 5,000 square feet of the more then 60,000 square foot structure. The Hazardous Materials Questionnaire dated February 7, 2008 for the construction of the firing range did not identify any uses of explosives or blasting agents or other health hazards associated with this operation. The Lessee or Tenant was identified on this application as "Raven Development Group" with an address in North Carolina. The existing use of the building, as identified on the permit application, was for warehouse use.

Finally, on May 28, 2008, ***five days after*** the instant lawsuit was filed, a building permit application was filed with DSD to allow the addition of a "simulator/ride" within the property in question. Declaration of Afsatteh Ahreadi, ¶ 5, filed contemporaneously herewith.

Accordingly, at this time, the permits filed with the City of San Diego for the building in question only encompass approximately 5,000 square feet of the over 60,000 square foot structure. No permit application has been filed to allow any change in use of the building from anything other then a warehouse. However, Plaintiff Blackwater now requests that the City issue

Plaintiff Blackwater a certificate of occupancy so that it can occupy and utilize the entire facility. As will be shown below, for numerous reasons, Plaintiff Blackwater's request for a temporary restraining order ("TRO") should be denied.

II.

LEGAL ARGUMENT

A. Land Use Regulation Within San Diego City Limits Rests with The City of San Diego

The legal basis for all land use regulation is the police power of the city to protect the public health, safety and welfare of its residents. *Berman v. Parker* 348 U.S. 26, 32-33 (1954). A land use regulation lies within the police power if it is reasonably related to the public welfare. *Associated Home Builders, Inc. v. City of Livermore* 18 Cal.3d 582 600-601 (1976). This police power is set forth in the California Constitution, which confers on cities the power to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." Cal. Const. Art. XI, § 7.

The police power is an elastic power. It allows cities to tailor regulations to suit the interests and needs of a "modern, enlightened and progressive community" even as those interests and needs change. *Rancho La Costa v. County of San Diego* 111 Cal.App.3d 54, 60 (1980). Regulations are sustained under current complex conditions that but a short time ago might have been condemned as arbitrary and unreasonable. *Euclid v. Ambler Realty Co.* 272 U.S. 365, 387 (1926).

Before a federal court may step in under a due process or equal protection claim, the local authority must be permitted to take final action on the matter so that the court can judge whether the local authority's position was arbitrary. *See Strickland v. Alderman* 74 F.3d 260 (11th Cir. 1996); *Landmark Land Co. of Oklahoma v. Buchanan* 874 F.2d 717 (10th Cir. 1989). Moreover, permit applicants cannot assert procedural due process claims under section 1983 based on denial of a building permit where the state law provides unsuccessful applicants with a sufficient state remedy, for example, mandamus, to cure random and unauthorized building permit denials. *See New Burnham Prairie Homes, Inc. v. Village of Burnham* 910 F.2d 1474 (7th Cir. 1990). Indeed,

in the Ninth Circuit, courts often have held that land-use planning questions "touch a sensitive area of social policy" into which the federal courts should not lightly intrude. *See Bank of America v. Summerland County Water Dist.,* 767 F.2d 544, 546 (9th Cir.1985); *Kollsman v. City of Los Angeles,* 737 F.2d 830, 833 (9th Cir.1984), *cert. denied,* 105 S.Ct. 1179 (1985); *C-Y Development Co. v. City of Redlands,* 703 F.2d 375, 377 (9th Cir.1983); *Santa Fe Land Improvement Co. v. City of Chula Vista,* 596 F.2d 838, 840 (9th Cir.1979); *Sederquist v. City of Tiburon,* 590 F.2d 278, 281 (9th Cir.1978); *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092, 1094-1095 (9th Cir.1976).

In this instant case, the proper remedy for Plaintiff Blackwater to seek to compel the City of San Diego ("City") to issue the certificate of occupancy is to seek a California Code of Civil Procedure § 1085 writ of mandamus. Plaintiff has not so sought a writ of mandamus, but rather filed this instant lawsuit. In as much as Plaintiff Blackwater has failed to do pursue a writ of mandamus, Plaintiff Blackwater has failed to exhaust its state remedies. Accordingly, this instant lawsuit is not properly before this Court.

B. Blackwater is Not Likely to Succeed on the Merits of Its Claim

Plaintiff Blackwater's disingenuously claims that it is likely to succeed on the merits of this case. Plaintiff Blackwater's claim is disingenuous because Blackwater was not the applicant for any of the permits with the City of San Diego. Therefore, Plaintiff Blackwater cannot allege any violation of its Constitutional rights pursuant to 42 U.S.C. § 1983. Rather, it appears that Plaintiff Blackwater is seeking to assert an alleged Constitutional violation of a third party. However, in general, the federal courts have disallowed one party to assert the Constitutional violation of another. The United States Supreme Court, in *Broadrick v. Oklahoma* 413 U.S. 601 (1973), held that:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [citations omitted] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. [citation omitted]

Id. at 610. The United States Supreme Court, also held that "[i]n the past, the Court has recognized some limited exceptions to these principles, but only because of the most 'weighty countervailing policies.' [citation omitted]" *Broadrick* at 611.

In this instant matter, Plaintiff Blackwater was not the applicant listed on any of the permit applications with the City. Plaintiff Blackwater was not listed as the owner of the property in question. Nor was Plaintiff Blackwater even listed as the lessee or tenant of the property. Yet, Blackwater now claims in its complaint that the City has violated its Constitutional rights to due process and equal protection of the laws. That being the case, Plaintiff Blackwater is asserting the Constitutional rights of some other entity. However, Plaintiff Blackwater has not argued any "weighty countervailing policies" that would allow it to escape the general rule that Constitutional violations are generally personal in nature, and thus, may not be asserted vicariously. Accordingly, Plaintiff Blackwater lacks standing to assert the Section 1983 claim for relief pled in its complaint.

C. No Entity, including Blackwater, Applied for Any Permits Relating to Modifiying the Interior of the Structure and Using the Warehouse as a Vocational School

Plaintiff Blackwater is not entitled to any certificate of occupancy for the entire building at this point as the City has yet to receive any permit application from any entity to allow a change in use in occupancy (from warehouse to vocational school) and allow the building of certain tenant improvements, including a ship bulk head.[1] In fact, the only permits applied for by any entity were for an indoor firing range totaling approximately 5,000 square feet, the installation of 44 feet of new partitions in existing office space and a general permit to conduct electrical work. Notably, no entity, including Plaintiff Blackwater has ever applied for a permit to change the use of the structure from warehouse to vocational school to allowing training.

These facts were confirmed in a conversation by Afsatteh Ahreadi, the DSD's Chief Building Official, on or about April 29, 2008, at the site with at least one representative of Blackwater, two representatives from the contractor, and potentially Blackwater's attorney.

[1] Plaintiff Blackwater apparently concedes this fact as on May 28, 2008, five days after it filed its complaint, it submitted a permit application to construct a simulator in the premises.

Declaration of Afsatteh Ahreadi, ¶ 6, filed contemporaneously herewith. In that conversation, Ms. Ahreadi indicated to these people that the projected needed a change of occupancy permit to allowing training to take place on the premises as the building's current use allowed only for warehouse use. Declaration of Afsatteh Ahreadi, ¶ 7, filed contemporaneously herewith. Ms. Ahreadi stated this fact to these persons as the plans for the project listed "training" as one of the uses for the facilities. Declaration of Afsatteh Ahreadi, ¶ 8, filed contemporaneously herewith. The use of "training" at the facility is considered a change of use. However, no one has submitted a permit application with the City to request this change in use. Declaration of Afsatteh Ahreadi, ¶ 9, filed contemporaneously herewith. Accordingly, no certificate of occupancy could be issued allowing for anyone to use the whole building for training as no permit application requesting a change of use has ever been filed. Declaration of Afsatteh Ahreadi, ¶ 10, filed contemporaneously herewith.

This fact was confirmed in a May 19, 2008 letter from Kelly Broughton, Director of Development Services, to Brian Bonfiglio, Vice President of Blackwater Worldwide, in which Mr. Broughton reiterated "[a]s the majority of the structure is still identified for warehouse uses, no other uses are permitted until a submission for a request of change in occupancy has been made and approved by the Development Services Department." Exhibit "D" to Plaintiff Blackwater's Complaint.

In as much as Plaintiff Blackwater has failed to obtain all permits necessary to convert the use of the structure from warehouse use to vocational school/training use, this Court should deny Plaintiff Blackwater's request for a temporary restraining order.

D. Blackwater will Suffer No Irreparable Harm if the Temporary Restraining Order is Not Issued

The purpose in issuing a temporary restraining order is to preserve the *status quo* pending a fuller hearing. *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). The standard for issuing a temporary restraining order is the same as that for issuing a preliminary injunction. *Brown Jordan International, Inc. v. Mind's Eye Interiors, Inc.,* 236 F.Supp.2d 1152, 1154 (D.Hawai'i 2002). In the Ninth Circuit, a party seeking a preliminary injunction must show either

(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor. *Roe v. Anderson,* 134 F.3d 1400, 1401-02 (9th Cir.1998). These formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Id.* at 1402.

Under either formulation of the test, the party seeking the injunction must demonstrate that it will be exposed to some significant risk of irreparable injury. *Caribbean Marine Servs. Co. v. Baldrige,* 844 F.2d 668 (9th Cir.1988). A plaintiff must do more than merely allege imminent harm sufficient to establish standing, he or she must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief. *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1201 (9th Cir.1980). Speculative injury does not constitute irreparable harm. *See Caribbean Marine Servs. Co. v. Baldrige,* 844 F.2d 668, 674 (9th Cir.1988); *Goldie's Bookstore, Inc. v. Superior Court,* 739 F.2d 466, 472 (9th Cir.1984).

When a civil rights violation is alleged, the Ninth Circuit has stated that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore v. Superior Ct.,* 739 F.2d 466, 472 (9th Cir.1984). However, the mere fact that a constitutional violation is alleged ***does not*** create an automatic presumption of irreparable harm. In fact, in the *Goldie's Bookstore* case, that court found that the plaintiff in that case was not entitled to such a presumption as the court found that the plaintiff had not demonstrated a sufficient likelihood of success on the merits of its constitutional claims to warrant the grant of a preliminary injunction as "the constitutional claim was too tenuous." *Id.* Moreover, in the Eleventh Circuit, that court has refused to presume irreparable injury from allegations of equal protection violations when it found the primary damage that plaintiff asserted to be "chiefly, if not completely, economic." *Northeastern Fla. Chapter of Ass'n of Gen. Contractors v. Jacksonville, Fla.* 896 F.2d 1283, 1285-1286 (11th Cir.1990)

Here Blackwater is attempting to use the request for a temporary restraining order to change the status quo. Currently, the building in question has not been issued an occupancy

permit. Therefore, the building cannot be used for any other purposes but its existing approved purpose – a warehouse.

If this court denies Plaintiff Blackwater's request for a temporary restraining order, the alleged "harm" Plaintiff Blackwater will suffer is strictly monetary. Specifically, based on the allegations in the complaint, Plaintiff Blackwater has a contract to provide training classes to the U.S. Navy, and if it cannot fulfill that commitment, Blackwater, presumably will not be paid by the U.S. Navy for those classes. In fact, Plaintiff Blackwater agrees that its damages would only be monetary as it claims in its motion that the damage it may suffer without the issuance of the TRO is "harm to its reputation" which may lead to loss of other contracts. (Motion 21:20-27) Plaintiff Blackwater claims no other potential irreparable harm.

Moreover, if this Court denies Plaintiff Blackwater's request for a temporary restraining order, the U.S. Navy is not left without any potential training options. This is because the course Blackwater proposes to teach at the facility in question is not unique. This course, Security Reaction Forces – Basic (SRF-B), is taught by other entities all over the world for the U.S. Navy. Indeed, in San Diego, this exact same course is taught by San Diego City College. Actually, on or about May 10, 2008, the U.S. Navy extended San Diego City College's contract to teach the Security Reaction Forces – Basic (SRF-B) course. Exhibit "A" to the Declaration of Walter C. Chung, filed contemporaneously herewith.

Accordingly, Plaintiff Blackwater will not suffer any irreparable harm if this Court denies its request to issue a temporary restraining order compelling the City to issue Plaintiff Blackwater an occupancy certificate for the building. Therefore, this Court should deny said request.

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III.

CONCLUSION

Finally, as shown above, Blackwater is not likely to succeed on the merits of the case. Blackwater was not the applicant for any permit with the City. Accordingly, Blackwater lacks standing to assert an alleged Constitutional violation against the City, and thus, irreparable harm should not be presumed from the mere fact that they have pled a Section 1983 claim for relief.

Dated: May 29, 2008

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By /s/ Walter C. Chung
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