

OFFICIAL RECORD

Requested By:
LOMBARDI LOPER CONANT

Douglas County - NV
Karen Ellison - Recorder

Page: 1 Of 30 Fee: 43.00
BK-0510 PG- 4468 RPTT: 0.00

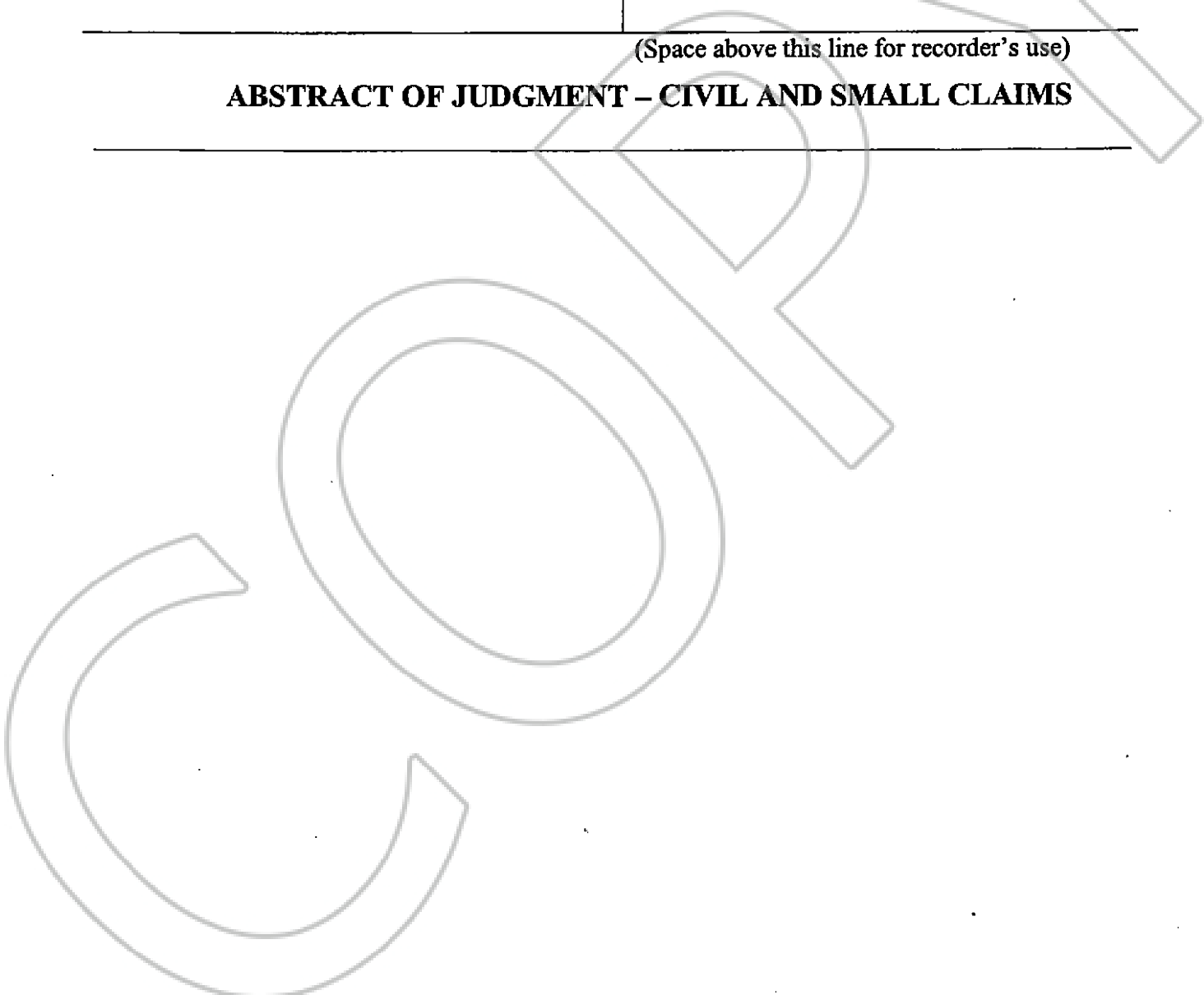


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RECORDING REQUESTED BY:
MacKay & Soms Civil Engineers, Inc.
c/o Larry Gomez
5142 Franklin Drive, Suite C
Pleasanton, CA 94588

WHEN RECORDED MAIL TO:
Lombardi, Loper & Conant, LLP
c/o Liza Siu Mendoza
Lake Merritt Plaza
1999 Harrison Street, Suite 2600
Oakland, CA 94612-3541

(Space above this line for recorder's use)

ABSTRACT OF JUDGMENT - CIVIL AND SMALL CLAIMS



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, address, State Bar number, and telephone number):

Recording requested by and return to:

Matthew S. Conant, SBN 94920
Liza Siu Mendoza, SBN 242493
Lombardi, Loper & Conant, LLP
1999 Harrison Street, Suite 2600
Oakland, CA 94612
510-433-2600

BK- 0510
PG- 4469
0764139 Page: 2 Of 30 05/24/2010

ATTORNEY FOR JUDGMENT CREDITOR ASSIGNEE OF RECORD

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO
STREET ADDRESS: 720 NINTH STREET
MAILING ADDRESS:
CITY AND ZIP CODE: SACRAMENTO, CALIFORNIA 95814
BRANCH NAME:

FOR RECORDER'S USE ONLY

PLAINTIFF: MACKAY & SOMPS CIVIL ENGINEERS, INC.

CASE NUMBER:

DEFENDANT: DUNMORE HOMES, Inc., et al. (Panhandle)

34-2007-00883577-CU-C

ABSTRACT OF JUDGMENT—CIVIL AND SMALL CLAIMS Amended

FOR COURT USE ONLY

1. The judgment creditor assignee of record applies for an abstract of judgment and represents the following:

a. Judgment debtor's

Name and last known address

Dunmore Land Company LLC
c/o Gary W. Gorski
1207 Front Street
Sacramento, CA 95814

b. Driver's license no. [last 4 digits] and state:

Unknown

c. Social security no. [last 4 digits]:

Unknown

d. Summons or notice of entry of sister-state judgment was personally served or mailed to (name and address): no sister-state judgment

2. Information on additional judgment debtors is shown on page 2.

4. Information on additional judgment creditors is shown on page 2.

3. Judgment creditor (name and address):

MacKay & Soms Civil Engineers, Inc.
c/o Liza Siu Mendoza (address above)

5. Original abstract recorded in this county:

a. Date:

b. Instrument No.:

Date: May 17, 2010

Liza Siu Mendoza

(TYPE OR PRINT NAME)


(SIGNATURE OF APPLICANT OR ATTORNEY)

6. Total amount of judgment as entered or last renewed:
\$ 950,573

10. An execution lien attachment lien is endorsed on the judgment as follows:

7. All judgment creditors and debtors are listed on this abstract.

a. Amount: \$

b. In favor of (name and address):

8. a. Judgment entered on (date): 1/21/10

b. Renewal entered on (date):

9. This judgment is an installment judgment.

11. A stay of enforcement has

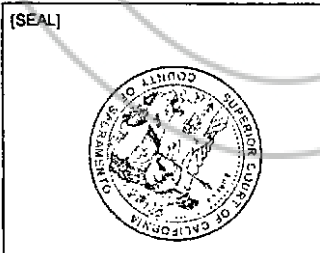
a. not been ordered by the court.

b. been ordered by the court effective until (date):

12. a. I certify that this is a true and correct abstract of the judgment entered in this action.

b. A certified copy of the judgment is attached.

Clerk, by  Deputy



This abstract issued on (date):
MAY 18 2010



COPY

EXHIBIT A

ORIGINAL

BK- 0510
PG- 4471
0764139 Page: 4 Of 30 05/24/2010

FILED/ENDORSED
JAN 21 2010
By: *A. WOODWARD*
District Clerk

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Facsimile: (925) 416-1833

10 Attorneys for Plaintiff
11 MACKAY & SOMPS CIVIL ENGINEERS, INC.

12 **SUPERIOR COURT OF CALIFORNIA**
13 **COUNTY OF SACRAMENTO, UNLIMITED JURISDICTION**

14
15 MACKAY & SOMPS CIVIL
ENGINEERS, INC.,

16 Plaintiff,

17 v.

18 DUNMORE HOMES, INC., a California
19 Corporation aka DUNMORE HOMES;
DUNMORE LAND COMPANY LLC,
20 a Delaware Limited Liability Company;
DHI DEVELOPMENT, a California
21 Corporation; COMERICA BANK, a Texas
Corporation; JMP SECURITIES, LLC, a
22 Delaware Limited Liability Company;
JMP REALTY TRUST, INC., a California
23 Corporation, and DOES 1-200, Inclusive,

24 Defendants.

Case No. 34-2007-00883577-CU-CO-GDS
(PANHANDLE PROJECT)
**NOTICE OF ENTRY OF JUDGMENT
AFTER BENCH TRIAL**

Action Filed: December 18, 2007
Trial: October 30, 2009

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LOMBARDI, LOPER & CONANT, LLP
Lake Merritt Plaza
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Oakland, CA 94612-3541

00275-37263 LSM 575764.1

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JAN 21 2010
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TO DEFENDANT AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on January 11, 2010, the above-entitled court entered Judgment, a copy of which is attached hereto as Exhibit A and incorporated herein by reference

DATED: January 15, 2010

LOMBARDI, LOPER & CONANT, LLP

By:

Liza Siu Mendoza
LIZA SIU MENDOZA

LOMBARDI, LOPER & CONANT, LLP
Laka Merrill Plaza
1888 Harrison Street, Suite 2600
Oakland, CA 94612-3541

FILED / ENDORSED
JAN 11 2010
By M. Milbourne, Deputy Clerk

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10 Attorneys for Plaintiff
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12 SUPERIOR COURT OF CALIFORNIA
13 COUNTY OF SACRAMENTO, UNLIMITED JURISDICTION

14
15 MACKAY & SOMPS CIVIL
ENGINEERS, INC.,

16 Plaintiff,

17 v.

18 DUNMORE HOMES, INC., a California
19 Corporation aka DUNMORE HOMES;
DUNMORE LAND COMPANY LLC,
20 a Delaware Limited Liability Company;
DHI DEVELOPMENT, a California
21 Corporation; COMERICA BANK, a Texas
22 Corporation; JMP SECURITIES, LLC, a
Delaware Limited Liability Company;
23 JMP REALTY TRUST, INC., a California
Corporation, and DOES 1-200, Inclusive,

24 Defendants.

Case No. 34-2007-00883577-CU-CO-GDS
(PANHANDLE PROJECT)

~~PROPOSED~~ ORDER AND JUDGMENT
AFTER BENCH TRIAL

Action Filed: December 18, 2007
Trial: October 30, 2009

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LOMBARDI, LOPER & CONANT, LLP
Lake Merritt Plaza
1999 Harrison Street, Suite 2600
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Trial in above matter was held on October 30, 2009 in Department 45 of the Sacramento Superior Court, the Honorable Alan G. Perkins presiding. Plaintiff was represented by Matthew S. Conant and Liza Siu Mendoza of Lombardi, Loper & Conant, LLP. Defendant Dunmore Land Company LLC was represented by Gary W. Gorski of the Law Offices of Gary W. Gorski.

The court issued a Notice of Intended Decision on December 2, 2009. Ten days have elapsed without any party opposing the Notice of Intended Decision. Pursuant to California Rule of Court 3.1590(c), the Notice of Intended Decision is now the Statement of Decision.

THE COURT HEREBY ENTERS JUDGMENT in favor of plaintiff MacKay & Somps Civil Engineers, Inc. and against Dunmore Land Company LLC pursuant to the Statement of Decision attached as Exhibit A. The court hereby orders plaintiff MacKay & Somps Civil Engineers, Inc. to recover from defendant Dunmore Land Company LLC damages in the amount of \$790,242 plus \$158,048 in prejudgment interest at the rate of ten percent per annum from December 18, 2007, the date on which the complaint was filed, for a total judgment of \$948,290, together with cost of suit incurred.

IT IS SO ORDERED.

DATED: Jan. 11, 2010

JUDGE OF THE SUPERIOR COURT
ALAN G. PERKINS

LOMBARDI, LOPER & CONANT, LLP
Lake Merritt Plaza
1989 Harman Street, Suite 2600
Oakland, CA 94612-3541

FILED / ENDORSED

DEC 2 2009

By M. Milbourne, Deputy Clerk

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO, UNLIMITED JURISDICTION**

**MACKAY & SOMPS CIVIL
ENGINEERS, INC.,**

Plaintiff,

v.

**DUNMORE HOMES, INC., a California
Corporation aka DUNMORE HOMES;
DUNMORE LAND COMPANY LLC,
a Delaware Limited Liability Company;
DHI DEVELOPMENT, a California
Corporation; COMERICA BANK, a Texas
Corporation; JMP SECURITIES, LLC, a
Delaware Limited Liability Company;
JMP REALTY TRUST, INC., a California
Corporation, and DOES 1-200, Inclusive,**

Defendants.

**Case No. 34-2007-00883577-CU-CO-GDS
(PANHANDLE PROJECT)**

NOTICE OF INTENDED DECISION

Trial Date: October 30, 2009

Action Filed: December 18, 2007

Trial in the above matter was held on October 30, 2009 in Department 45 of the Sacramento Superior Court, the Honorable Alan G. Perkins presiding. Plaintiff was represented by Matthew S. Conant and Liza Siu Mendoza of Lombardi, Loper & Conant, LLP. Defendant Dunmore Land Company LLC was represented by Gary W. Gorski of the Law Offices of Gary W. Gorski.

The plaintiff asserted entitlement to recover under theories of quantum meruit and unjust enrichment. The court heard the presentations of each party and reviewed the trial exhibits and

1 materials submitted by each party. Based upon the testimony presented at trial and a review of the
2 documentary evidence submitted, and with consideration given to the arguments of the parties and
3 the applicable law, the court rules as follows:

4 1. The court overrules defendant's¹ objection on jurisdictional grounds. Defendant does
5 not dispute plaintiff provided professional services in the Panhandle project without being fully
6 compensated. Defendant's main contention is that it is not the party responsible for paying
7 plaintiff's services. Defendant contends Dunmore Homes, Inc. is the proper party responsible for
8 paying plaintiff. Dunmore Homes, Inc. is in bankruptcy proceedings in the United States
9 Bankruptcy Court for the Eastern District of California, case number 08-20569-B-11. Defendant
10 contends the proper court to address plaintiff's allegations is the bankruptcy court. This court
11 disagrees. The Panhandle project is not included as an asset in Dunmore Homes, Inc.'s Disclosure
12 Statement in Support of Debtor's Plan of Liquidation. (Exhibits P and Q) Furthermore, plaintiff's
13 creditors' claim does not include a claim for services provided in the Panhandle project. (Exhibit R)
14 Moreover, as the court further discusses below, the evidence shows Dunmore Land was responsible
15 for paying plaintiff's services in the Panhandle project.

16 2. The following evidence was submitted at trial:

17 a. Ken Giberson, civil engineer with plaintiff, testified plaintiff began its services for the
18 Panhandle project in May 2003. Plaintiff worked and was paid for its services until
19 plaintiff stopped receiving payments in January 2007. Mr. Giberson testified that
20 based on assurances and promises he was given from defendant, plaintiff continued
21 to provide services until September 2007.

22 b. From May 2003 to approximately May 2004, plaintiff received payment for its
23 services from Dunmore Homes LLC. Starting approximately August 2004 until
24 January 2007, plaintiff received payment for its services from defendant Dunmore
25 Land Company LLC. There were no payments after January 2007. The last invoice
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27 ¹ Whenever the court uses the word "defendant," it is referring to defendant Dunmore Land Company
28 LLC. Defendant Dunmore Land Company LLC was the only defendant present at trial. The other
defendants were dismissed prior to trial.

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defendant paid was October 2006. Defendant did not pay plaintiff's invoices from November 2006 to September 2007. (Exhibit J)

c. Mr. Giberson testified and the evidence shows MacKay invoiced "Dunmore Homes," a generic term referring to the various Dunmore corporations. Mr. Giberson testified MacKay was never told to invoice a particular Dunmore entity and MacKay's invoices were accepted and paid in the past with checks from various Dunmore corporations, including Dunmore Land Company LLC.

d. Mr. Giberson met four times with Sidney B. Dunmore, President of Dunmore Land, between June 2007 to January 2008 to discuss MacKay's outstanding invoices. According to Mr. Giberson, Mr. Dunmore assured him MacKay would be paid for its services from the Dunmore Land account. MacKay was specifically instructed to submit the Panhandle, Stone Boswell and Granite Bay² outstanding billings to Dunmore Land, and to submit overdue billings on other projects to the bankruptcy proceedings mentioned above. Although Mr. Dunmore confirms he met with Mr. Giberson to discuss MacKay's past invoices, he denies promising to pay MacKay's invoices.

e. Kenneth Allred, former Vice President of Land for Dunmore Homes LLC, testified he was responsible for approving MacKay's invoices for payment. Mr. Allred testified he approved some, if not all, of MacKay's outstanding invoices in the Panhandle project. He authenticated the outstanding invoices in Exhibit X as invoices he received from MacKay and testified he approved those invoices for payment with a checkmark and his initials. He also testified he was the person who decided which Dunmore account—Dunmore Homes or Dunmore Land—would pay for MacKay's invoices. Mr. Allred did not dispute Dunmore Land paid for some, if not most, of MacKay's invoices.

f. Steve Roberts, former Director of Land Development for Dunmore Homes and Dunmore Land, testified the Panhandle project is a Dunmore Land project and

² Stone Boswell and Granite Bay are two other projects MacKay worked on for Dunmore Land.

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therefore MacKay's invoices were slated to be paid by Dunmore Land. Mr. Roberts testified his job included reviewing invoices for approval. Mr. Roberts reviewed the invoices in Exhibit X and authenticated them as invoices Dunmore received from MacKay. Mr. Roberts further testified he stamp-approved and initialed these invoices for payment. Mr. Roberts testified he met with MacKay's representatives to reconcile and approve all of MacKay's outstanding invoices in the Panhandle project. (Exhibit S)

g. Mr. Giberson, Mr. Allred and Mr. Roberts testified there were weekly meetings between MacKay and managerial employees of Dunmore Land to discuss the Panhandle project. MacKay's job was to obtain entitlements, public approvals, etc. and ready the project for construction. Both Mr. Allred and Mr. Roberts described the Dunmore business model, in which Dunmore Land would obtain ownership interest and/or options to purchase land, and prepare the land for construction. Once the entitlement process was completed and the land was publicly approved for construction, Dunmore Land would transfer its land rights to Dunmore Homes for the actual construction homes. Mr. Allred and Mr. Roberts testified the Panhandle project was in the pre-construction phase and was therefore managed by Dunmore Land.

h. The parties executed a contract effective March 28, 2006. The contract expressly provides, "Consultant [MacKay] shall not perform any services prior to full execution of this Master Agreement, and until directed by Owner [Dunmore Homes and certain other designated legal entities that will issue Letters of Authorization] to begin work pursuant to Letters of Authorization." (Exhibit G, ¶ 1) Although the parties drafted a Letter of Authorization, no Letter of Authorization was executed by either party. (Exhibit H)

i. The March 28, 2006 contract was set to expire in one year unless it was renewed by both parties in writing. The parties did not renew this contract. (Exhibit G) Mr. Allred testified it was common practice to enter into verbal agreements with service

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providers. Mr. Allred testified there was a mutual understanding that MacKay would be paid for all of its services regardless of the existence and/or expiration of the contract.

j. Mr. Allred further testified MacKay's work was satisfactory and there was no dispute as to the quality of MacKay's services. Mr. Allred also testified that at no time did Dunmore Land request MacKay to stop working on the Panhandle project.

k. Based on these facts the court determines that the services claimed were not covered by any contractual obligation that was in force between the parties when the services at issue were rendered.

3. Plaintiff seeks compensation for its outstanding bills in the amount of \$955,294 (\$790,242 in principal plus \$165,052 in prejudgment interest) under the legal theories of quantum meruit and unjust enrichment.

4. Defendant contends it is not responsible for MacKay's outstanding bills because the contract was entered between MacKay and Dunmore Homes, not between MacKay and Dunmore Land. Defendant further contends MacKay is not entitled to quantum meruit and unjust enrichment because there cannot be an implied contract for services when an express contract exists. Defendant cites the following cases in support of its position: *Willman v. Gustafson* (1944) 63 Cal.App.2d 830, 831-832; *Wal-Noon Corporation v. Hill* (1975) 45 Cal.App.3d 605, 613; *Wilkerson v. Wells Fargo Bank, N. A.* (1989) 212 Cal.App.3d 1217, 1227 (overruled on other grounds).

5. The court finds the March 28, 2006 contract was entered between MacKay, Dunmore Homes, and "certain other designated legal entities that will issue Letters of Authorization." (Exhibit G) The court further finds Dunmore Land was a legal entity that had authority to issue Letters of Authorization. The court is aware no Letters of Authorization were actually executed but is persuaded by the evidence showing Dunmore Land drafted, and therefore had authority to execute, a Letter of Authorization. The court is further persuaded by Mr. Allred's testimony that the March 28, 2006 contract intended to bind Dunmore Land.

6. The contract specifically provided MacKay was not to perform services until a Letter of Authorization is executed. As already discussed, the parties did not execute a Letter of

1 Authorization for the Panhandle project. Yet MacKay performed services regardless of the contract
2 and Dunmore Land paid for most of these services. Moreover Dunmore Land received the benefit of
3 those services.

4 7. The court is not persuaded by defendant's argument that Dunmore Homes was
5 responsible for MacKay's invoices because these invoices were addressed to Dunmore Homes.
6 Given the evidence presented, the court finds the fact that MacKay's invoices were addressed to
7 Dunmore Homes does not preclude Dunmore Land from being responsible for payment of these
8 invoices.

9 8. Furthermore, Mr. Allred and Mr. Roberts, both former employees of Dunmore
10 Homes who had authority to approve invoices on behalf of Dunmore Land, testified they approved
11 all of MacKay's outstanding invoices for payment by Dunmore Land.

12 9. The court further finds MacKay's services benefited Dunmore Land because
13 MacKay readied the land for construction and increased the value of the land by doing so. Mr.
14 Giberson testified Dunmore Land owns and/or holds options to purchase the land that comprises the
15 Panhandle project. The court notes defendant has not provided any evidence to the contrary.
16 Furthermore, the court is persuaded from evidence showing Dunmore Land was the entity
17 responsible for the entitlement and public approval process of development, and evidence showing
18 Dunmore Land met with MacKay weekly to discuss work performed in the Panhandle project. The
19 court finds MacKay's services added value to the land and that Dunmore Land benefited from
20 MacKay's services.

21 10. Quantum meruit and unjust enrichment are quasi-contractual remedies used to
22 compensate a party in equity for services performed for the benefit of another. (*McBride v.*
23 *Boughton* (2004) 123 Cal.App.4th 379, 388, fn. 6) Here, the court finds (1) MacKay provided
24 services in the Panhandle project without being fully compensated; (2) Dunmore Land benefited
25 from MacKay's services; (3) Dunmore Land previously paid MacKay for its services; (4) it was
26 reasonable for MacKay to expect payment for its outstanding invoices from Dunmore Land; and (5)
27 justice requires Dunmore Land to pay a reasonable value for the services MacKay provided. The
28



1 parties stipulated \$955,294 is the reasonable value for MacKay's services (\$790,242 in principal plus
2 \$165,052 in pre-judgment interest of ten percent per annum).

3 11. Having determined the parties acted as if there was no express contract, this court
4 finds the cases defendant cited in support of its position inapposite. Those cases do not deal with the
5 scenario, as here, where parties entered into an express contract but blatantly disregarded the terms
6 of the contract.

7 12. The court therefore orders judgment in favor of plaintiff and awards plaintiff
8 \$790,242 in principal as compensation for its outstanding invoices in the Panhandle project. Plaintiff
9 is also awarded prejudgment interest at the rate of ten percent per annum from December 18, 2007,
10 the date on which the complaint was filed. (See *George v. Double-D Foods, Inc. (1984)* 155
11 Cal.App.3d 36, 45-47 and *Wegner, California Practice Guide: Civil Trials and Evidence at §§*
12 *17:187-188* regarding the limitation on the court's authority to award prejudgment interest in a
13 quasi-contract action.)

14 STATEMENT OF DECISION

15 If either party timely requests a Statement of Decision, this notice of intended decision
16 will be the statement of decision unless within 10 days, either party specifies controverted issues
17 or makes proposals not covered herein. California Rules of Court Rule 3.1590(c). If a separate
18 Statement of Decision is required, counsel for Plaintiff shall prepare the proposed Statement of
19 Decision.


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If this notice of intended decision becomes the statement of decision, counsel for Plaintiff is directed to prepare an appropriate order and judgment. California Rules of Court Rule 3.1312.

IT IS SO ORDERED.

DATED: December 2, 2009


ALAN G. PERKINS
Judge of the Superior Court

PROOF OF SERVICE

MacKay & Soms Civil Engineers, Inc. v. Dunmore Homes, Inc., et al.
(Panhandle Project)

Sacramento Superior Court Case No. 34-2007-00883577-CU-CO-GDS

I, Noelle Duncan, hereby declare:

I am a citizen of the United States, over 18 years of age and not a party to the within action. I am employed in the county of Alameda; my business address is Lombardi, Loper & Conant, LLC, 1999 Harrison Street, Suite 2600, Oakland, CA 94612.

On January 19, 2010, I served the within:

NOTICE OF ENTRY OF JUDGMENT AFTER BENCH TRIAL

on all parties in this action, as addressed below, by causing a true copy thereof to be distributed as follows:

MACKAY & SOMPS CIVIL ENGINEERS, INC.
Larry Gomez
Mackay & Soms Civil Engineers, Inc.
5142 Franklin Drive, Ste. C
Pleasanton, CA 94588
Email: lgomez@msce.com

Telephone: (925) 416-1790
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Attorneys for Plaintiff
MacKay & Soms Civil Engineers, Inc.

Gary W. Gorski
2251 Douglas Boulevard, Suite 115
Roseville, CA 95661

Telephone: (916) 965-6800
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(916) 275-2813
Attorneys for Defendant
Dunmore Land, LLC

1207 Front Street
Sacramento, CA 95814
Email: usrugby@gmail.com
Email: usrugby@pacbell.net

By United States Mail: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope/package for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing documents for mailing. On the same day that the document is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Oakland, California.

By Fax Transmission: Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed above. No error was reported by the fax machine that I used.

By Overnight Delivery: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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- By Personal Service:** I personally delivered the documents to the persons at the addresses listed above. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with the receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.
- By Messenger Service:** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service.)*
- By E-Mail or Electronic Transmission:** Based on a court order or an agreement of the parties to accept service by email or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 19 2010, at Oakland, California.



 Noelle Duncan



COPY

EXHIBIT B

1 MATTHEW S. CONANT, State Bar No. 094920
msc@llcllp.com
2 LIZA SIU MENDOZA, State Bar No. 242493
lsiumendoza@llcllp.com
3 LOMBARDI, LOPER & CONANT, LLP
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4 1999 Harrison Street, Suite 2600
Oakland, CA 94612-3541
5 Telephone: (510) 433-2600
Facsimile: (510) 433-2699

FILED & ENDORSED
JAN 11 2010
By M. Milbourne, Deputy Clerk

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lgomez@msce.com
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10 Attorneys for Plaintiff
11 MACKAY & SOMPS CIVIL ENGINEERS, INC.

12 SUPERIOR COURT OF CALIFORNIA
13 COUNTY OF SACRAMENTO, UNLIMITED JURISDICTION

14
15 MACKAY & SOMPS CIVIL
ENGINEERS, INC.,

16 Plaintiff,

17 v.

18 DUNMORE HOMES, INC., a California
19 Corporation aka DUNMORE HOMES;
DUNMORE LAND COMPANY LLC,
20 a Delaware Limited Liability Company;
DHI DEVELOPMENT, a California
21 Corporation; COMERICA BANK, a Texas
22 Corporation; JMP SECURITIES, LLC, a
Delaware Limited Liability Company;
23 JMP REALTY TRUST, INC., a California
Corporation, and DOES 1-200, Inclusive,

24 Defendants.

Case No. 34-2007-00883577-CU-CO-GDS
(PANHANDLE PROJECT)

~~PROPOSED~~ ORDER AND JUDGMENT
AFTER BENCH TRIAL

(Costs Posted - FEB 11 2010)

Action Filed: December 18, 2007
Trial: October 30, 2009

LOMBARDI, LOPER & CONANT, LLP
Lake Merritt Plaza
1999 Harrison Street, Suite 2600
Oakland, CA 94612-3541

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LOMBARDI, LOPER & CONANT, LLP
Letis Merritt Plaza
1898 Harrison Street, Suite 2600
Oakland, CA 94612-3541

Trial in above matter was held on October 30, 2009 in Department 45 of the Sacramento Superior Court, the Honorable Alan G. Perkins presiding. Plaintiff was represented by Matthew S. Conant and Liza Siu Mendoza of Lombardi, Loper & Conant, LLP. Defendant Dunmore Land Company LLC was represented by Gary W. Gorski of the Law Offices of Gary W. Gorski.


The court issued a Notice of Intended Decision on December 2, 2009. Ten days have elapsed without any party opposing the Notice of Intended Decision. Pursuant to California Rule of Court 3.1590(c), the Notice of Intended Decision is now the Statement of Decision.

THE COURT HEREBY ENTERS JUDGMENT in favor of plaintiff MacKay & Somps Civil Engineers, Inc. and against Dunmore Land Company LLC pursuant to the Statement of Decision attached as Exhibit A. The court hereby orders plaintiff MacKay & Somps Civil Engineers, Inc. to recover from defendant Dunmore Land Company LLC damages in the amount of \$790,242 plus \$158,048 in prejudgment interest at the rate of ten percent per annum from December 18, 2007, the date on which the complaint was filed, for a total judgment of \$948,290, together with cost of suit incurred.

Costs = \$2,283.⁰⁰ Total with Costs Added = \$ 950,573.⁰⁰


IT IS SO ORDERED.

DATED: Jan. 11, 2010



JUDGE OF THE SUPERIOR COURT
ALAN G. PERKINS

FEB 11 2010

A. WOODWARD

Memo of Costs Clerk

FILED / ENDORSED
DEC 2 2009
By M. Milbourne, Deputy Clerk

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO, UNLIMITED JURISDICTION**

**MACKAY & SOMPS CIVIL
ENGINEERS, INC.,**

Plaintiff,

v.

**DUNMORE HOMES, INC., a California
Corporation aka DUNMORE HOMES;
DUNMORE LAND COMPANY LLC,
a Delaware Limited Liability Company;
DHI DEVELOPMENT, a California
Corporation; COMERICA BANK, a Texas
Corporation; JMP SECURITIES, LLC, a
Delaware Limited Liability Company;
JMP REALTY TRUST, INC., a California
Corporation, and DOES 1-200, Inclusive,**

Defendants.

**Case No. 34-2007-00883577-CU-CO-GDS
(PANHANDLE PROJECT)**

NOTICE OF INTENDED DECISION

Trial Date: October 30, 2009

Action Filed: December 18, 2007

Trial in the above matter was held on October 30, 2009 in Department 45 of the Sacramento Superior Court, the Honorable Alan G. Perkins presiding. Plaintiff was represented by Matthew S. Conant and Liza Siu Mendoza of Lombardi, Loper & Conant, LLP. Defendant Dunmore Land Company LLC was represented by Gary W. Gorski of the Law Offices of Gary W. Gorski.

The plaintiff asserted entitlement to recover under theories of quantum meruit and unjust enrichment. The court heard the presentations of each party and reviewed the trial exhibits and

1 materials submitted by each party. Based upon the testimony presented at trial and a review of the
2 documentary evidence submitted, and with consideration given to the arguments of the parties and
3 the applicable law, the court rules as follows:

4 1. The court overrules defendant's¹ objection on jurisdictional grounds. Defendant does
5 not dispute plaintiff provided professional services in the Panhandle project without being fully
6 compensated. Defendant's main contention is that it is not the party responsible for paying
7 plaintiff's services. Defendant contends Dunmore Homes, Inc. is the proper party responsible for
8 paying plaintiff. Dunmore Homes, Inc. is in bankruptcy proceedings in the United States
9 Bankruptcy Court for the Eastern District of California, case number 08-20569-B-11. Defendant
10 contends the proper court to address plaintiff's allegations is the bankruptcy court. This court
11 disagrees. The Panhandle project is not included as an asset in Dunmore Homes, Inc.'s Disclosure
12 Statement in Support of Debtor's Plan of Liquidation. (Exhibits P and Q) Furthermore, plaintiff's
13 creditors' claim does not include a claim for services provided in the Panhandle project. (Exhibit R)
14 Moreover, as the court further discusses below, the evidence shows Dunmore Land was responsible
15 for paying plaintiff's services in the Panhandle project.

16 2. The following evidence was submitted at trial:

17 a. Ken Giberson, civil engineer with plaintiff, testified plaintiff began its services for the
18 Panhandle project in May 2003. Plaintiff worked and was paid for its services until
19 plaintiff stopped receiving payments in January 2007. Mr. Giberson testified that
20 based on assurances and promises he was given from defendant, plaintiff continued
21 to provide services until September 2007.

22 b. From May 2003 to approximately May 2004, plaintiff received payment for its
23 services from Dunmore Homes LLC. Starting approximately August 2004 until
24 January 2007, plaintiff received payment for its services from defendant Dunmore
25 Land Company LLC. There were no payments after January 2007. The last invoice
26

27 ¹ Whenever the court uses the word "defendant," it is referring to defendant Dunmore Land Company
28 LLC. Defendant Dunmore Land Company LLC was the only defendant present at trial. The other
defendants were dismissed prior to trial.

1 defendant paid was October 2006. Defendant did not pay plaintiff's invoices from
2 November 2006 to September 2007. (Exhibit J)

3 c. Mr. Giberson testified and the evidence shows MacKay invoiced "Dunmore Homes,"
4 a generic term referring to the various Dunmore corporations. Mr. Giberson testified
5 MacKay was never told to invoice a particular Dunmore entity and MacKay's
6 invoices were accepted and paid in the past with checks from various Dunmore
7 corporations, including Dunmore Land Company LLC.

8 d. Mr. Giberson met four times with Sidney B. Dunmore, President of Dunmore Land,
9 between June 2007 to January 2008 to discuss MacKay's outstanding invoices.
10 According to Mr. Giberson, Mr. Dunmore assured him MacKay would be paid for its
11 services from the Dunmore Land account. MacKay was specifically instructed to
12 submit the Panhandle, Stone Boswell and Granite Bay² outstanding billings to
13 Dunmore Land, and to submit overdue billings on other projects to the bankruptcy
14 proceedings mentioned above. Although Mr. Dunmore confirms he met with Mr.
15 Giberson to discuss MacKay's past invoices, he denies promising to pay MacKay's
16 invoices.

17 e. Kenneth Allred, former Vice President of Land for Dunmore Homes LLC, testified
18 he was responsible for approving MacKay's invoices for payment. Mr. Allred
19 testified he approved some, if not all, of MacKay's outstanding invoices in the
20 Panhandle project. He authenticated the outstanding invoices in Exhibit X as
21 invoices he received from MacKay and testified he approved those invoices for
22 payment with a checkmark and his initials. He also testified he was the person who
23 decided which Dunmore account—Dunmore Homes or Dunmore Land—would pay
24 for MacKay's invoices. Mr. Allred did not dispute Dunmore Land paid for some, if
25 not most, of MacKay's invoices.

26 f. Steve Roberts, former Director of Land Development for Dunmore Homes and
27 Dunmore Land, testified the Panhandle project is a Dunmore Land project and

28 ² Stone Boswell and Granite Bay are two other projects MacKay worked on for Dunmore Land.

1 therefore MacKay's invoices were slated to be paid by Dunmore Land. Mr. Roberts
2 testified his job included reviewing invoices for approval. Mr. Roberts reviewed the
3 invoices in Exhibit X and authenticated them as invoices Dunmore received from
4 MacKay. Mr. Roberts further testified he stamp-approved and initialed these
5 invoices for payment. Mr. Roberts testified he met with MacKay's representatives to
6 reconcile and approve all of MacKay's outstanding invoices in the Panhandle project.
7 (Exhibit S)

8 g. Mr. Giberson, Mr. Allred and Mr. Roberts testified there were weekly meetings
9 between MacKay and managerial employees of Dunmore Land to discuss the
10 Panhandle project. MacKay's job was to obtain entitlements, public approvals, etc.
11 and ready the project for construction. Both Mr. Allred and Mr. Roberts described
12 the Dunmore business model, in which Dunmore Land would obtain ownership
13 interest and/or options to purchase land, and prepare the land for construction. Once
14 the entitlement process was completed and the land was publicly approved for
15 construction, Dunmore Land would transfer its land rights to Dunmore Homes for the
16 actual construction homes. Mr. Allred and Mr. Roberts testified the Panhandle
17 project was in the pre-construction phase and was therefore managed by Dunmore
18 Land.

19 h. The parties executed a contract effective March 28, 2006. The contract expressly
20 provides, "Consultant [MacKay] shall not perform any services prior to full
21 execution of this Master Agreement, and until directed by Owner [Dunmore Homes
22 and certain other designated legal entities that will issue Letters of Authorization] to
23 begin work pursuant to Letters of Authorization." (Exhibit G, ¶ 1) Although the
24 parties drafted a Letter of Authorization, no Letter of Authorization was executed by
25 either party. (Exhibit H)

26 i. The March 28, 2006 contract was set to expire in one year unless it was renewed by
27 both parties in writing. The parties did not renew this contract. (Exhibit G) Mr.
28 Allred testified it was common practice to enter into verbal agreements with service

1 providers. Mr. Allred testified there was a mutual understanding that MacKay would
2 be paid for all of its services regardless of the existence and/or expiration of the
3 contract.

4 j. Mr. Allred further testified MacKay's work was satisfactory and there was no dispute
5 as to the quality of MacKay's services. Mr. Allred also testified that at no time did
6 Dunmore Land request MacKay to stop working on the Panhandle project.

7 k. Based on these facts the court determines that the services claimed were not covered
8 by any contractual obligation that was in force between the parties when the services
9 at issue were rendered.

10 3. Plaintiff seeks compensation for its outstanding bills in the amount of \$955,294
11 (\$790,242 in principal plus \$165,052 in prejudgment interest) under the legal theories of quantum
12 meruit and unjust enrichment.

13 4. Defendant contends it is not responsible for MacKay's outstanding bills because the
14 contract was entered between MacKay and Dunmore Homes, not between MacKay and Dunmore
15 Land. Defendant further contends MacKay is not entitled to quantum meruit and unjust enrichment
16 because there cannot be an implied contract for services when an express contract exists. Defendant
17 cites the following cases in support of its position: *Willman v. Gustafson* (1944) 63 Cal.App.2d 830,
18 831-832; *Wal-Noon Corporation v. Hill* (1975) 45 Cal.App.3d 605, 613; *Wilkerson v. Wells Fargo*
19 *Bank, N. A.* (1989) 212 Cal.App.3d 1217, 1227 (overruled on other grounds).

20 5. The court finds the March 28, 2006 contract was entered between MacKay, Dunmore
21 Homes, and "certain other designated legal entities that will issue Letters of Authorization." (Exhibit
22 G) The court further finds Dunmore Land was a legal entity that had authority to issue Letters of
23 Authorization. The court is aware no Letters of Authorization were actually executed but is
24 persuaded by the evidence showing Dunmore Land drafted, and therefore had authority to execute, a
25 Letter of Authorization. The court is further persuaded by Mr. Allred's testimony that the March 28,
26 2006 contract intended to bind Dunmore Land.

27 6. The contract specifically provided MacKay was not to perform services until a Letter
28 of Authorization is executed. As already discussed, the parties did not execute a Letter of

1 Authorization for the Panhandle project. Yet MacKay performed services regardless of the contract
2 and Dunmore Land paid for most of these services. Moreover Dunmore Land received the benefit of
3 those services.

4 7. The court is not persuaded by defendant's argument that Dunmore Homes was
5 responsible for MacKay's invoices because these invoices were addressed to Dunmore Homes.
6 Given the evidence presented, the court finds the fact that MacKay's invoices were addressed to
7 Dunmore Homes does not preclude Dunmore Land from being responsible for payment of these
8 invoices.

9 8. Furthermore, Mr. Allred and Mr. Roberts, both former employees of Dunmore
10 Homes who had authority to approve invoices on behalf of Dunmore Land, testified they approved
11 all of MacKay's outstanding invoices for payment by Dunmore Land.

12 9. The court further finds MacKay's services benefited Dunmore Land because
13 MacKay readied the land for construction and increased the value of the land by doing so. Mr.
14 Giberson testified Dunmore Land owns and/or holds options to purchase the land that comprises the
15 Panhandle project. The court notes defendant has not provided any evidence to the contrary.
16 Furthermore, the court is persuaded from evidence showing Dunmore Land was the entity
17 responsible for the entitlement and public approval process of development, and evidence showing
18 Dunmore Land met with MacKay weekly to discuss work performed in the Panhandle project. The
19 court finds MacKay's services added value to the land and that Dunmore Land benefited from
20 MacKay's services.

21 10. Quantum meruit and unjust enrichment are quasi-contractual remedies used to
22 compensate a party in equity for services performed for the benefit of another. (*McBride v.*
23 *Boughton* (2004) 123 Cal.App.4th 379, 388, fn. 6) Here, the court finds (1) MacKay provided
24 services in the Panhandle project without being fully compensated; (2) Dunmore Land benefited
25 from MacKay's services; (3) Dunmore Land previously paid MacKay for its services; (4) it was
26 reasonable for MacKay to expect payment for its outstanding invoices from Dunmore Land; and (5)
27 justice requires Dunmore Land to pay a reasonable value for the services MacKay provided. The
28

1 parties stipulated \$955,294 is the reasonable value for MacKay's services (\$790,242 in principal plus
2 \$165,052 in pre-judgment interest of ten percent per annum).

3 11. Having determined the parties acted as if there was no express contract, this court
4 finds the cases defendant cited in support of its position inapposite. Those cases do not deal with the
5 scenario, as here, where parties entered into an express contract but blatantly disregarded the terms
6 of the contract.

7 12. The court therefore orders judgment in favor of plaintiff and awards plaintiff
8 \$790,242 in principal as compensation for its outstanding invoices in the Panhandle project. Plaintiff
9 is also awarded prejudgment interest at the rate of ten percent per annum from December 18, 2007,
10 the date on which the complaint was filed. (See *George v. Double-D Foods, Inc. (1984) 155*
11 *Cal.App.3d 36, 45-47* and *Wegner, California Practice Guide: Civil Trials and Evidence at §§*
12 *17:187-188* regarding the limitation on the court's authority to award prejudgment interest in a
13 quasi-contract action.)

14 STATEMENT OF DECISION

15 If either party timely requests a Statement of Decision, this notice of intended decision
16 will be the statement of decision unless within 10 days, either party specifies controverted issues
17 or makes proposals not covered herein. California Rules of Court Rule 3.1590(c). If a separate
18 Statement of Decision is required, counsel for Plaintiff shall prepare the proposed Statement of
19 Decision.

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If this notice of intended decision becomes the statement of decision, counsel for Plaintiff is directed to prepare an appropriate order and judgment. California Rules of Court Rule 3.1312.

IT IS SO ORDERED.

DATED: December 2, 2009


ALAN G. PERKINS
Judge of the Superior Court

PROOF OF SERVICE
MacKay & Soms Civil Engineers, Inc. v. Dunmore Homes, Inc., et al.
(Panhandle Project)
Sacramento Superior Court Case No. 34-2007-00883577-CU-CO-GDS

I, Noelle Duncan, hereby declare:

I am a citizen of the United States, over 18 years of age and not a party to the within action. I am employed in the county of Alameda; my business address is Lombardi, Loper & Conant, LLC, 1999 Harrison Street, Suite 2600, Oakland, CA 94612.

On May 17, 2010, I served the within:

ABSTRACT OF JUDGMENT – CIVIL AND SMALL CLAIMS

on all parties in this action, as addressed below, by causing a true copy thereof to be distributed as follows:

Larry Gomez
Mackay & Soms Civil Engineers, Inc.
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Pleasanton, CA 94588
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Dunmore Land Company LLC

By E-Mail or Electronic Transmission: Based on a court order or an agreement of the parties to accept service by email or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

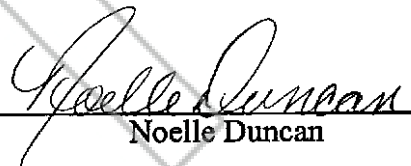
By United States Mail: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope/package for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing documents for mailing. On the same day that the document is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Oakland, California.

- By Fax Transmission:** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed above. No error was reported by the fax machine that I used.
- By Overnight Delivery:** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- By Personal Service:** I personally delivered the documents to the persons at the addresses listed above. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with the receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.
- By Messenger Service:** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service.)*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 17, 2010, at Oakland, California.



Noelle Duncan