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Another Door Slammed Shut? California Court of Appeal Rules That Developer May Not Sue Environmental Consultant In Contract Or Tort For Untimely Delivery Of Environmental Impact Report Even Though (I) The Consultant Contracted With A Public Entity To Provide The Report By A Date Certain, (II) The Consultant Failed To Deliver The Report By The Agreed Upon Date, (III) The Developer's Proposed Development Was Rejected Due In Whole Or In Part To The Consultant's Failure To Deliver The Report and (IV) The Developer Was Required To Pay For The Consultant's Tardy Services

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In a decision which should bring some additional clarity in regard to the liability of professional consultants to third parties involved in public works developments and construction projects, the California Court of Appeal, First District held in Lake Almanor Associates, L.P. v. Huffman-Broadway Group, Inc. (2009) 178 Cal.App.4th 1194 (the "Lake Almanor" case) that a developer could not sue a consultant hired to prepare an Environmental Impact Report ("EIR") even though the consultant breached its contract with the public entity to provide the EIR in a timely fashion and the developer's application was allegedly rejected due to the consultant's failure to provide the EIR within the required time frame.

The facts of the Lake Almanor case are somewhat compelling and should stand as decisive case law. In Lake Almanor, a developer, Lake Almanor Associates, L.P. (herein, "Developer") submitted a project application to the County of Plumas ("County") for a 1,392 acre mixed use development. A complete, revised development application was submitted to the County in April 2005. Under the California Environmental Quality Act ("CEQA"), the County was required to prepare an Environmental Impact Report or "EIR" for the proposed development. See, Public Resources Code section 21151. Under CEQA, the County was also required to establish a time limit for completion and certification of the EIR, not to exceed one year from submission of the project applicant's complete application. See, Public Resources Code section § 21151.5(a)(1). The Developer was responsible for the cost of the EIR.

In July 2005, the County entered into a written contract with Huffman-Broadway Group, Inc. ("Consultant") to prepare the EIR. The Consultant's contract identified the Lake Almanor project, required the Consultant to provide a copy of the EIR to the Developer and did not contain any language which barred other parties from claiming a third party beneficiary status under Civil Code 1559. The Consultant's contract contemplated the submission of an administrative draft EIR to the County by November 14, 2005. The

Consultant failed to meet the deadline under its contract and the County delivered a notice of termination to the Developer in June 2006. The Consultant sought additional time and delivered a "Preliminary Working Draft EIR". The County rejected the Preliminary Working Draft EIR as deficient and sent the Developer a second notice of rejection in September 2006. The Consultant then submitted invoices for its services and the County demanded reimbursement from the Developer. The County also demanded reimbursement by the Developer for the services of a second consultant to prepare the EIR.

The Developer then sued the Consultant on the bases of its being a third party intended beneficiary and in tort. The trial court, after granting leave to amend, sustained a demurrer to the Developer's second amended complaint on the basis that the Developer was not an intended beneficiary under the Consultant's contract given that it was neither a creditor or donee beneficiary and because the Consultant owed no duty in tort to the Developer.

After a judgment was entered in favor of the Consultant, the Developer appealed.

The Court of Appeal affirmed the trial court's decision. In its published opinion, the Court of Appeal ruled that the Developer could not be an intended beneficiary because there was no donative intent and because prior published case law held that the public entity did not owe any duty to a developer to provide an EIR. See, Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal.App.4th 713, 720 (disapproved on another ground in Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1123, fn. 10) ("Mission Oaks" case). The Court of Appeal acknowledged that the Consultant's contract lacked language disclaiming a duty to the Developer (which was the case in Mission Oaks) but noted that there were no terms in the contract which provided for any liability to the Developer in the event of a breach or otherwise demonstrating that the Developer was an intended beneficiary. The Court of Appeal also ruled that the Consultant did not owe any duty under statute to the Developer.

The Court of Appeal went on to hold that that there was no duty in tort, either.

As to this issue, the Court of Appeal examined "the nature of the activity or the relationship of the parties" and determined that no duty in tort existed citing the so called "economic loss rule" which provides that the duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law citing Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370, 397, Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 58 and Ratcliff Architects v. Vanir Construction Management, Inc. (2001) 88 Cal.App.4th 595, 605.

In examining whether a legal duty existed, the Court of Appeal noted that the existence of such a duty is a question of public policy, generally determined by balancing the six factors set forth in the California Supreme Court's decision in Biakanja v. Irving (1958) 49 Cal.2d 647, 650.<sup>1</sup> As for the first factor, the Court commented that the statutory requirement for the preparation of the EIR was primarily intended to provide the public entity and the general public with information they needed to assess the proposed project pursuant to CEQA with any benefit to developers being secondary. As for the second, third and fourth factors, the Court gave little weight to the foreseeability factor and further held that there was no certainty of injury or closeness of connection to injury because the public entity was required to make an independent assessment of the project's compliance with CEQA. As for the fifth and sixth factors - moral blame and potential of future harm, the Court noted that suits such as the developer's would likely compromise the independence and objectivity of the consultants and undermine the Legislature's goal of obtaining accurate EIR's for proposed projects.

The Lake Almanor case may seem harsh on its face and may also be limited to some extent by the public policy which specifically relates to CEQA. On the other hand, the decision may be quite helpful in construing the limits of liability for consultants involved in public works projects who are the subject of lawsuits by third parties.

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<sup>1</sup> The six "Biakanja Factors" as articulated in the California Supreme Court's decision in Biakanja v. Irving (1958) 49 Cal.2d 647, 650 - and which permit the imposition of tort without any contractual or statutory duty, are generally identified as follows:

- (1) the extent to which the transaction was intended to affect the plaintiff;
- (2) the foreseeability of harm to the plaintiff;
- (3) the degree of certainty that the plaintiff suffered injury;
- (4) the closeness of the connection between the defendant's conduct and the injury suffered;
- (5) the moral blame attached to the defendant's conduct; and
- (6) the policy of preventing future harm.

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