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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LANDVALUE 77, LLC et al.,

Plaintiffs and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY et al.,

Defendants and Respondents;

KASHIAN ENTERPRISES, L.P.,

Real Party in Interest and Respondent.

F058451

(Super. Ct. Nos. 07CECG02872 & 07CECG02874)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Doyle & Schallert, David Douglas Doyle; Stoel Rives, Melissa A. Foster and Lee N. Smith for Plaintiffs and Appellants.

Crowell & Moring, Ethan P. Schulman, Margaret Dollbaum, Gregory D. Call, and Nathanial J. Wood for Defendants and Respondents.

McDonough Holland & Allen; Best, Best & Krieger, Kimberly E. Hood, and Harriet A. Steiner for Real Parties in Interest and Respondents.

This appeal concerns a mixed-use development project involving 45 acres of land located on the Fresno campus of the California State University. The development is known as the Campus Pointe project and is being completed by a private developer that subleased the land from an auxiliary organization of the university. The development plans include apartments for students, faculty, employees and seniors, offices and retail stores, a hotel, and a 14-screen movie theater.

Appellants sued, challenging the approval of the project. They alleged a university trustee violated a conflict of interest statute, and the project's environmental impact report (EIR) failed to comply with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.).

The trial court found a conflict of interest prohibited by Government Code section 1090[1] and voided a theater sub-sublease between the developer and a trustee of the university. The trial court also concluded the final EIR inadequately analyzed environmental impacts involving (1) the water supply, (2) traffic and parking, and (3) air quality.

Appellants appealed, claiming the remedies imposed by the trial court were inadequate. Appellants contend the trial court should have remedied the conflict of interest by voiding the approval of the entire project, not just the theater sub-sublease. Appellants contend the provisions of CEQA required the trial court to (1) issue the peremptory writ required by its own judgment and CEQA, (2) issue an injunction to prevent the further construction of the project, and (3) mandate specific actions, such as completion of a traffic study, to address the shortcomings of the EIR identified in the trial court's written statement of decision.

We conclude that (1) the trial court was required by Public Resources Code section 21168.9 to issue a writ of mandate and (2) the judgment and writ of mandate

[1]All further statutory references shall be to the Government Code unless otherwise indicated.

should direct that the certification of the final EIR and the approvals of the project be set aside. The trial court did not, however, abuse its discretion in refusing to enjoin construction.

We also conclude that the violation of the conflict of interest prohibition in section 1090 did not require a broader remedy than imposed by the trial court.

The judgment is affirmed in part and reversed in part. The trial court shall modify the judgment and issue a writ of mandate in accordance with this opinion.

FACTS

Parties

Appellants in this case are (1) LandValue 77, LLC, (2) LandValue Management, LLC and (3) James Huelskamp. James Huelskamp is a resident of Fresno County and is the managing member of both limited liability companies. LandValue 77, LLC owns the Sierra Vista Mall in Clovis, California. LandValue Management, LLC manages the Sierra Vista Mall for LandValue 77, LLC. Sierra Vista Mall is located about three miles east of the Campus Pointe project.

Respondents are (1) California State University, (2) the Board of Trustees of California State University (Board of Trustees), (3) California State University, Fresno Association, Inc. (CSUF Association), (4) Maya Cinemas North America, Inc. (Maya Cinemas), (5) Moctesuma Esparza, and (6) Kashian Enterprises, L.P.

Moctesuma Esparza was a member of the Board of Trustees from July 2004 until he resigned in May 2007. In 2007, before his resignation, Esparza served as the vice chair of the Board of Trustees's committee on campus planning, buildings and grounds. Esparza is the chief executive officer of Maya Cinemas and a shareholder in that corporation.

Kashian Enterprises, L.P.'s general partner is Edward M. Kashian, who also is the chief executive officer of Lance-Kashian & Company, a California corporation. For purposes of this opinion, we refer to Kashian Enterprises, L.P. and its affiliated entities as Kashian Enterprises. The affiliated entities include, without limitation, Campus Pointe

Commercial, L.P. (Kashian Enterprises, L.P. owns 15 percent of this limited partnership and Lance-Kashian & Company is its general partner).

CSUF Association, a California nonprofit public benefit corporation, is an auxiliary organization of the California State University authorized by Education Code section 89900 et seq. (See Ed. Code, § 89901 ["auxiliary organization" defined]; Cal. Code Regs., tit. 5, § 42500 [functions of auxiliary organizations].) In an operating agreement executed on August 9, 2003, the Board of Trustees authorized CSUF Association to perform certain functions on behalf of California State University, Fresno. These functions include the development of real property in accordance with the terms of the operating agreement.

The Campus Pointe Project

Before Esparza Was a Trustee

In November 1999, the Campus Master Plan for the Fresno campus of the California State University was amended to include the Save Mart Center project and the student recreation center. In March 2001, the Board of Trustees approved a financial plan for the Save Mart Center that included the development of 45 acres of campus property located to the east of the Save Mart Center. The 45 acres is bounded by Chestnut Avenue on the west, Shaw Avenue on the south, State Route 168 on the east, and undeveloped land south of Barstow Avenue on the north.

In August 2002, CSUF Association invited qualified third-party developers to submit proposals for the ground lease and development of the 45 acres. The invitation stated it was anticipated that the development proposals would include "such uses as theaters, entertainment attractions, shops, restaurants, hotels and the parking facilities necessary to meet the demand generated by the project components" and could include a student residential component. CSUF Association received two proposals and, in January 2003, asked the land development review committee of the Board of Trustees to review those proposals. One of the proposals was submitted by Kashian Enterprises.

In May 2003, the finance committee of the Board of Trustees met and considered whether to give conceptual approval to allow the plan for the development of the 45 acres to progress. Also in May 2003, the Board of Trustees adopted a resolution that approved the concept of a public-private partnership for the mixed-use development of the land on the Fresno campus and authorized the chancellor and the campus to negotiate agreements necessary for the final plan for the development. The resolution noted that, in the future, the Board of Trustees would consider approving (1) a financial and development plan negotiated between the campus and the developer, (2) a master plan pertaining to the project, (3) an amendment to the nonstate capital outlay program, (4) a schematic design, and (5) an EIR.

The foregoing matters involving the Campus Pointe project occurred before Esparza was appointed to the Board of Trustees in July 2004.

While Esparza Was a Trustee

The first set of documents in the administrative record that were generated after Esparza became a member of the Board of Trustees is from November 2005. At that time the committee on finance as well as the Board of Trustees met and considered whether to allow CSUF Association "to enter into a long-term ground lease relationship with the Kashian Enterprises to construct a new 900,000 square foot mixed-used [*sic*] commercial development" on the 45 acres. The committee on finance recommended approval of the Campus Pointe project. The Board of Trustees followed the recommendation and adopted a resolution approving the Campus Pointe project.

On December 1, 2005, the Board of Trustees approved the notice of preparation of a draft EIR for the Campus Pointe project. CSUF Association prepared and sent the notice of preparation later that month. The notice of preparation described the proposed project as including (1) a commercial parcel for office space (30,000 square feet), retail space (150,000 square feet) and a theater (55,000 square feet with 2,700 seats), (2) a hotel parcel, (3) a senior housing parcel for 180 units, (4) a market rate apartment parcel for 342 units, and (5) a possible future parcel for more office space.

On April 27, 2006, CSUF Association and Kashian Enterprises entered a development agreement for Campus Pointe (Development Agreement). The Development Agreement stated its purpose was to effectuate the master plan adopted or to be adopted for the 45 acres by providing for the leasing, subleasing, and development of the site. The Development Agreement stated that the record title for the project site was held by the State of California and that the Board of Trustees had the legal right to lease the property. It also stated that the master plan would be implemented by the Board of Trustees's leasing the site to CSUF Association, which in turn would enter subleases with the developer.

The Development Agreement stated that the master plan separated the project site into five parcels (i.e., a "Commercial Parcel," a "Hotel Parcel," a "Senior Housing Parcel," and two "Market Rate Apartment" parcels), required the development to be implemented in phases, and specified the use of a separate sublease for each parcel.

After the Development Agreement was signed, the Board of Trustees and CSUF Association entered a ground lease dated as of June 28, 2006 (Ground Lease), under which the Board of Trustees leased to CSUF Association the 45 acres intended to be used for the Campus Pointe project. The Ground Lease stated that, in accordance with the Development Agreement, CSUF Association would sublease the parcels comprising the 45 acres to Kashian Enterprises using the form of sublease attached to the Development Agreement and the Ground Lease. The term of the Ground Lease was set at 90 years. Section 20 of the Ground Lease stated that CSUF Association could not sublet the site or any improvements on the site without the prior written approval of the Board of Trustees.

Approximately two months after the execution of the Ground Lease and four months after the execution of the Development Agreement, Kashian Enterprises, as landlord, and Maya Cinemas, as tenant, entered an agreement entitled "Theater Sublease"

effective August 24, 2006 (Theater Sub-sublease).[2] Under the Theater Sub-sublease, Maya Cinemas acquired the right to build a 55,000-square foot multiplex theater containing 14 auditoriums and screens with approximately 2,700 seats. The term of the Theater Sub-sublease was 55 years, with an option for renewal. The formula for the rent payments included a base rent, a percentage rent calculated on the tenant's gross revenues, and additional rent relating to expenses associated with the common area. The amount of the base rent and the percentage rent factor were not disclosed in the copy of the Theater Sub-sublease submitted to this court.

Section 29.21 of the Theater Sub-sublease stated that the obligations of both Maya Cinemas and Kashian Enterprises were contingent upon the receipt of any required approvals of the Theater Sub-sublease from the master landlord, a term defined to mean the Board of Trustees and CSUF Association. Section 29.24 of the Theater Sub-sublease provided in part:

> "Tenant [Maya Cinemas] acknowledges that many of the approvals or consents to be given by Landlord [Kashian] hereunder are subject to approval by the B[oard of Trustees] and/or [CSUF] Association. Landlord [Kashian] shall reasonably cooperate with Tenant [Maya Cinemas] to obtain any such required approval or consent; provided, however, that Landlord makes no representation as to whether any such approval or consent may be granted or that any consent or approval granted by Landlord shall indicate that the attendant approval or consent from the B[oard of Trustees] and/or [CSUF] Association is forthcoming. Landlord shall not be in breach of any obligation under this Lease requiring the consent, approval or other action of the B[oard of Trustees] and/or [CSUF] Association if such consent, approval or other action has not been given or completed within the applicable period set forth herein, provided that

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[2]Although the document is titled "Theater Sublease," its section 1.1.5 expressly acknowledges that it is a sub-sublease of a portion of the premises covered by (1) the Ground Lease between the Board of Trustees and CSUF Association and (2) the Ground Sublease between Kashian Enterprises and CSUF Association. Therefore, for purposes of this opinion, we will refer to the document as a sub-sublease.

We also note that the Ground Sublease, the contract that links the Theater Sub-sublease to the Ground Lease, was entered in 2008 (see fn. 4, *post*), which is out of sequence because ordinarily a sublease would be entered *before* a sub-sublease.

> Landlord is then taking all reasonable steps to obtain the required response from the B[oard of Trustees] and/or [CSUF] Association."

In September 2006, a draft EIR for the Campus Pointe project was released for public review and comment. An open meeting for public comments was held on October 12, 2006.

A final EIR was released on February 12, 2007. The final EIR responded to comments received on the draft EIR.

At its meeting in March 2007, the Board of Trustees's committee on campus planning, buildings and grounds recommended that the Board of Trustees certify the final EIR, approve a master plan revision, and approve an amendment to the nonstate funded capital outlay program. Esparza, vice chair of the committee, did not attend. Minutes from the meeting indicate that general counsel for California State University stated "her understanding that a contract exist[ed] between Maya Cinemas and the developer, not with the campus, and therefore there is not a conflict of interest. However, anyone with an ownership interest in Maya Cinemas would need to recuse themselves from any board vote on the project."

The Board of Trustees met on March 13-14, 2007. Esparza did not attend the meeting. The Board of Trustees certified the final EIR for the Campus Pointe project, approved the California State University, Fresno master plan revision dated March 2007, and approved an amendment to the nonstate funded capital outlay program to include the $167 million Campus Pointe project. As a result of the certification of the final EIR, a notice of determination was sent to the state clearinghouse.

On April 11, 2007, the Office of the Chancellor of California State University sent a letter to the state clearinghouse rescinding the notice of determination filed on March 15, 2007.

The next day, April 12, 2007, appellants filed a verified petition for writ of mandate and complaint for injunctive and declaratory relief alleging violations of CEQA,

a violation of section 1090, and the failure of the project to further an educational mission.

Events After Esparza's Resignation

On May 11, 2007, Esparza submitted a letter resigning from the Board of Trustees. The letter referenced the conflict of interest allegations, the legal advice Esparza received on the alleged conflict from counsel for California State University, and his absence from the March 2007 meetings where the Campus Pointe project was considered.[3] Esparza noted the pending lawsuit, stated his wish to avoid the appearance of a conflict of interest and to avoid placing the Board of Trustees in legal jeopardy, and set forth his decision to resign.

Minutes from the May 15, 2007, meeting of the committee on campus planning, buildings and grounds reflect that the committee recommended approval by the Board of Trustees of the proposed resolution to certify the final EIR for the Campus Pointe project, approve the campus master plan revision, and approve an amendment to the nonstate capital outlay program.

On May 15, 2007, the Board of Trustees again considered and certified the final EIR for the Campus Pointe project, approved a revision to the master plan for the Fresno campus, and approved an amendment to the nonstate funded capital outlay program to include the $172 million Campus Pointe project. The resolution was designated "RCPBG 05-07-10" and contained 15 enumerated paragraphs. For example, paragraphs 4 and 5 adopted findings of fact, paragraph 10 certified the final EIR as "complete and in compliance with CEQA," and paragraphs 14 and 15 approved the master plan revision and the amendment to the nonstate funded capital outlay program.

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[3]Among other things, the resignation letter states: "When I first thought of investigating to learn if the project had a theatre operator selected, I advised CSU counsel and was told there was no conflict since the contract would not be with the University or any University affiliated entity but a third party developer who had already entered into an agreement to ground sublease and develop a housing, hotel, retail and theatre project."

By letter dated May 16, 2007, the Office of the Chancellor for California State University submitted to the state clearinghouse a notice of determination regarding the certification of the final EIR for the Campus Pointe project.

Sometime in 2008, CSUF Association, as landlord, and Kashian Enterprises, as tenant, entered a ground sublease (Ground Sublease)[4] covering a 20.73-acre parcel on the project site. It appears that the Ground Lease covers the parcel on the project site intended for commercial development. The Ground Sublease is subject to the Ground Lease and a declaration of covenants, conditions and restrictions recorded in the official records on March 19, 2008. Consequently, it is the sublease between CSUF Association and Kashian Enterprises that covers the premises identified in the Theater Sub-sublease.

PROCEEDINGS

In June 2007, after the second approval of the Campus Pointe project, appellants filed a second lawsuit challenging that approval.

After the second lawsuit was filed, the trial court considered and overruled a demurrer and denied a motion for summary judgment. In their demurrer, respondents argued no section 1090 claim had been stated because the allegations challenged only regulatory approvals of the project and not the entering of any contract by the Board of Trustees.

On May 16, 2008, the trial court held a hearing on the CEQA cause of action. The trial court did not issue a ruling on the CEQA issues at that point. (See Pub. Resources Code, § 21167.1, subd. (a) [all courts shall give CEQA proceedings preference so that the "proceeding shall be quickly heard and determined"].)

On April 10, 2009, the trial court held a hearing or trial on the remaining causes of action. On July 1, 2009, the court issued a 114-page statement of decision. The trial

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[4]Campus Pointe Commercial, L.P. is the affiliate of Kashian Enterprises, L.P. that entered the Ground Sublease. The document states it "is made and entered into as of the __ day of _____, 2008."

court determined the first lawsuit was moot, found a violation of section 1090 and voided the Theater Sub-sublease, and found violations of CEQA.

A judgment was filed on July 1, 2009, but no writ of mandate was issued by the court. Later in July, appellants filed a motion for clarification or a new trial and submitted a proposed form of peremptory writ.

On August 21, 2009, the trial court held a hearing on the motion for new trial and request for clarification. With respect to the failure to issue an actual writ, the trial court stated that it was a technical error that would be corrected "[i]n nunc pro tunc, back to the date of the order …." The trial court denied appellants' motion for a new trial in an order dated September 1, 2009. Despite the trial court's statement at the hearing, the appellate record does not show that a writ of mandate was ever issued.

On September 4, 2009, appellants filed a notice of appeal from the trial court's judgment and its statement of decision.

DISCUSSION

I. Conflicts of Interest and Remedies

Appellants contend that the trial court's remedy of voiding the Theater Sub-sublease was too limited for the violation of section 1090 and that the entire project should have been declared void. They argue the trial court's ruling is contrary to the principle that courts applying section 1090 are to focus on the transaction as a whole and should disregard technical relationships. Appellants also argue that the Theater Sub-sublease is integral to the Campus Pointe project and cannot be severed from the rest of the transaction. Because of the social policy underlying section 1090, they contend the entire project must be declared void.

Respondents contend that the trial court did not abuse its discretion because the relief it granted was the only relief authorized by statute. Respondents counter the transaction-as-a-whole argument by contending that the trial court's remedy was

appropriate because courts are not authorized to invalidate contracts that are not "made in violation of … Section 1090" (§ 1092, subd. (a)), much less an entire project.[5]

A. Section 1090

Appellants' conflict of interest claim is the second cause of action in their verified pleading and alleges only a violation of section 1090.[6] Section 1090 provides that public officials and employees, such as Esparza, "shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

Section 1090 "codifies the long-standing common law rule that barred public officials from being personally financially interested in the contracts they formed in their official capacities." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072 (*Lexin*).) The prohibition is based on the rationale that a person cannot effectively serve two masters at the same time. "'If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality.' [Citation.]" (*Id*. at p. 1073.) Consequently, section 1090 is designed to apply to any situation that "would prevent the officials involved from

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[5]In their supplemental letter brief, respondents contend there is no basis for the trial court's conclusion that section 1090 was violated and, therefore, this court should reverse the trial court's invalidation of the Theater Sub-sublease. Because respondents did not cross-appeal, we will not consider this contention. Respondents' reliance on *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222 does not require us to ignore the cross-appeal requirement as the adversaries in that case, the plaintiffs and the intervenors, both had appealed. (*Id*. at p. 226.)

[6]Appellants did not allege a violation of (1) the common law principles prohibiting conflicts of interest, (2) the Political Reform Act of 1974 (§ 87100 et seq.), or (3) any other conflict of interest statute.

On appeal, respondents have not challenged appellants' standing to bring the conflict of interest claim under section 1090, probably because it is generally recognized that either the public agency or a taxpayer may seek relief for a violation of section 1090. (E.g., *Thomson v. Call* (1985) 38 Cal.3d 633 [taxpayer suit successfully challenged validity of land transfer from city council member through intermediaries to city]; see Kaufmann & Widiss, *The California Conflict of Interest Laws* (1963) 36 So.Cal. L.Rev. 186, 200.)

exercising absolute loyalty and undivided allegiance to the best interests of the [public entity concerned]." (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Section 1090's goals include eliminating temptation, avoiding the appearance of impropriety, and assuring the public of the official's undivided and uncompromised allegiance. (*Thomson v. Call*, *supra*, 38 Cal.3d at p. 648.)

There are two primary elements of a violation of section 1090. The first element involves the making of a contract either by a public officer in his or her official capacity or by a body or board of which the public officer is a member. The second element concerns whether the public officer holds a cognizable financial interest in the contract. (*Lexin*, *supra*, 47 Cal.4th at p. 1074.)

1. Making a contract

Issues raised by the application of the first element to a particular situation include questions about the scope of (a) the *contract* and (b) the process of *making* that contract.

When a transaction is complex with many parts, questions can arise about which parts of the transaction are included in the "contract" for purposes of section 1090 and which parts are excluded. (E.g., *Thomson v. Call*, *supra*, 38 Cal.3d 633 [developer's building project involved multiple parties whose actions were connected with getting the project approved by the city].)

The scope of the activity included in the process of making a contract was addressed by the California Supreme Court when it considered the meaning of the statutory phrase "made by" and stated "the negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of the decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense." (*Stigall v. City of Taft*, *supra*, 58 Cal.2d at p. 569.)

2. Conflicting financial interest

The determination whether the public officer holds a conflicting financial interest in the contract involves the application of the statutory term "financially interested." That term is not interpreted in a restricted or technical manner. (*Lexin*, *supra*, 47 Cal.4th

at p. 1075.) "*In considering conflicts of interest* we cannot focus upon an isolated 'contract' and ignore the transaction as a whole." (*People v. Honig* (1996) 48 Cal.App.4th 289, 320, italics added.) That court also stated:

> "And, '[w]e must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts. [Citation.] However devious and winding the trail may be which connects the officer with the forbidden contract, if it can be followed and the connection made, *a conflict of interest is established*.' (*People v. Watson* [(1971)] 15 Cal.App.3d [28,] 37.)" (*People v. Honig*, *supra*, at p. 315, italics added.)

The essential characteristic of a prohibited financial interest is its "potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting." (*Lexin*, *supra*, 47 Cal.4th at p. 1075.)

3. Questions of timing

Applying the two primary elements of a section 1090 violation to a particular case may raise questions about when the conflicting interest arose relative to the making of the contract. (See Kaufmann & Widiss, *The California Conflict of Interest Laws*, *supra*, 36 So.Cal. L.Rev. at pp. 197-198 [section of article titled "*When Must the Conflict Exist?*"].)

The California Supreme Court addressed the question of timing in *Thomson v. Call*, *supra*, 38 Cal.3d at page 645:

> "[T]he policy goals of section 1090 support the rule that public officers 'are denied the right to make contracts in their official capacity with themselves *or to become interested in contracts thus made*.' (*Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 602.) (Italics added.) We have recognized an exception to this rule where the conflict arose after the award of the contract, but this exception turns upon the fact that no earlier agreement—express or implied—existed between the official and the entity contracting directly with the city. (*City of Oakland v. California Const. Co.* (1940) 15 Cal.2d 573, 577 [councilman accepted employment with defendant construction company after council awarded contract to defendant and had no interest in the contract at the time it was awarded]; *Escondido Lumber etc. Co. v. Baldwin* (1906) 2 Cal.App. 606, 608 [contractor who received construction contract from school district purchased—without previous arrangement or agreement—materials from

> corporation in which a school district trustee was a stockholder and officer]; see, also, *People v. Deysher* (1934) 2 Cal.2d 141, 146.)"

The apparent rationale for the exception to the general rule is that when a conflict arises after the contract is awarded, the terms of the contract are finalized before the conflict creates the potential to divide the loyalties of the public official.

B. Section 1092

In *Lexin*, the California Supreme Court described the consequences of a violation of section 1090:

> "Where a prohibited interest is found, the affected contract is void from its inception [citation] and the official who engaged in its making is subject to a host of civil and (if the violation was willful) criminal penalties, including imprisonment and disqualification from holding public office in perpetuity. [Citations.]" (*Lexin, supra*, 47 Cal.4th at p. 1073.)

Section 1092 is the source of some of the consequences for a civil violation of section 1090's rule against conflicts of interest:

> "(a) Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless the contract is made in the official capacity of the officer, or by a board or body of which he or she is a member."

Section 1092 uses the phrase "may be avoided" twice. Ordinarily, the word "may" connotes a discretionary or permissive act. (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 433; see § 14 ["'may' is permissive"].) Thus, it is possible to read section 1092 as granting trial courts the discretionary authority to render void[7] a contract made in violation of section 1090.

The California Supreme Court, however, has not interpreted section 1092 as granting discretion. In *Lexin*, the court stated: "Where a prohibited interest is found, the affected contract is void from its inception." (*Lexin, supra*, 47 Cal.4th at p. 1073; see

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[7]Black's Law Dictionary (9th ed. 2009) defines the verb "avoid" as "[t]o render void." (*Id*. at p. 156.)

Schaefer v. Berinstein (1956) 140 Cal.App.2d 278, 290 [contract is void as against public policy because it was made in violation of an express statutory provision].) In a case decided 25 years earlier, the court stated "this contract violates section 1090 and is therefore void." (*Thomson v. Call*, *supra*, 38 Cal.3d at p. 646.) Based on these statements, we conclude that the decision to declare a contract void is not discretionary and, therefore, an abuse of discretion standard of review does not apply to that decision. (*Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831 [an "abuse of discretion standard … measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria"].)

C. Trial Court's Ruling and Remedy

The trial court found that Esparza was involved in the planning of the Campus Pointe project while he was a member of the Board of Trustees from July 2004 to May 2007. It also found that Esparza was a trustee (1) when the December 2005 notice of preparation was approved, (2) when his corporation, Maya Cinemas, entered a landlord-tenant relationship with Kashian Enterprises, and (3) when the Board of Trustees certified the final EIR for the first time in March 2007.

The court examined the relationships between CSUF Association, Kashian Enterprises, and Maya Cinemas:

> "Respondents … have attempted to avoid the conflict of interest by arguing that the 'contract' was between Kashian [Enterprises] and the 'private' Association, and that Maya[Cinemas'] later entry into a sublease with Kashian [Enterprises] was not prohibited by … section 1090 because it was not a governmental agency involved in the 'contract' and because Maya [Cinemas] was not a party to the original contract between the [CSUF] Association and Kashian [Enterprises]. They are mistaken.
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> "In determining if a conflict of interest exists, courts will 'disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts. However devious and winding the trail may be which connects the officer with the forbidden contract, if it can be followed and the connection [can be] made,

> a conflict of interest is established.' (*People v. Watson*[, *supra*,] 15 Cal.App.3d 28, 37; see *People v. Deysher*[, *supra*,] 2 Cal.2d 141, 146; *People v. Honig*, *supra*, 48 Cal.App.4th 289, 315, 320 [Court cannot focus on isolated contract and ignore transaction as a whole.]; *People v. Darby* (1952) 114 Cal.App.2d 412, 429.)
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> "The winding trail here leads to the conclusion that Esparza was involved in the planning of the project, negotiated the contract with Kashian [Enterprises] and executed the contract on Maya[Cinemas'] behalf. It doesn't matter whether Esparza acted in good faith or whether the contract was fair; Esparza had a conflict of interest."

The trial court then considered whether Esparza's personal interest was remote or minimal under provisions set forth in sections 1091 and 1091.5 and concluded it was not. Based on its findings, the trial court determined that Esparza violated section 1090.

The trial court addressed the question of remedy and decided to void the Theater Sub-sublease between Kashian Enterprises and Maya Cinemas. The court stated the remedy would uphold Esparza's mandatory duties to avoid conflicts of interest.

The judgment filed on July 1, 2009, implemented the trial court's determination with the following provision: "3. The movie theater sublease between Kashian Enterprises, L.P., and Maya Cinemas North America, Inc., be voided as against public policy."

In addition, the portion of the judgment addressing the CEQA issues stated that the resolution of the Board of Trustees concerning the Campus Point project was set aside, in part, but did not state which parts were set aside and which parts of the resolution remained in effect. Among other things, the resolution (1) certified the final EIR, (2) approved the campus master plan revision, and (3) approved the amendment to the 2006-2007 nonstate funded capital outlay program.

D. Rules of Appellate Review

Based on our rejection of the abuse of discretion standard of review (see pt. I.B., *ante*), we conclude the ordinary rules of review should apply—the trial court's findings of fact will be reviewed under the substantial evidence standard, and its conclusions of

law will be subject to independent review. (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.)

The application of the proper standard of review occurs within the context of other principles of appellate review. The most basic of these principles is that appellate courts presume the trial court's order or judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) This basic principle produces the corollaries that (1) an appellant must affirmatively demonstrate an error occurred and (2) when the appellate record is silent on a matter, the reviewing court must indulge all intendments and presumptions that support the order or judgment. (*Ibid*.) An important aspect of the presumption of correctness and its corollaries is that an appellate court will infer a trial court made implied findings of fact if those findings support the order or judgment and are supported by substantial evidence.[8] (See *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 745 [implied finding inferred by appellate court only if supported by substantial evidence].) Thus, appellants overcome the presumption of correctness by (1) providing the appellate court with a record that indicates what was done by the trial court and (2) demonstrating what the trial court did constituted error. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:19, pp. 8-6 through 8-7.)

E. Appellants' Theories of Trial Court Error

1. Section 1090 concerns contracts, not projects

Our request for supplemental letter briefs asked the parties whether, as a matter of statutory construction, it was appropriate to interpret the reference to "any contract" in section 1090 and the reference to "[e]very contract" in section 1092 to include more than contracts—namely, plans or transactions. Respondents answered "no." Appellants

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[8]One practice guide includes the following observation: "Because of the presumption of correctness, judgments and orders are sometimes affirmed on the assumption the trial judge made a particular finding of fact or decided an issue in a particular way, even though this may not actually have occurred." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶ 8:18, p. 8-6.)

answered "yes" and argued that the approval of the project was contractual in nature because it resulted in the underlying conditional contracts becoming enforceable and effective.

Issues of statutory construction are questions of law subject to independent review by appellate courts. (*Neilson v. City of California City* (2007) 146 Cal.App.4th 633, 642.)

The first step in construing a statute is to examine the words used by the Legislature and give them their usual, ordinary meaning. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.) Generally, the analysis of statutory language is near its end once a court has determined that the words used are clear and unambiguous. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775.) The end of the analysis is reached if the court determines that a literal construction would not frustrate the purpose of the statute or produce absurd consequences. (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1495.)

Both section 1090 and section 1092 use the term "contract" and do not include other terms such as plans, projects, transactions, or regulatory approvals. The statutory text undoubtedly influenced the California Supreme Court when it addressed the applicability of section 1090 by stating: "What differentiates section 1090 from other conflict of interest statutes such as the Political Reform Act of 1974 … is its focus on the making of a *contract* in which one has an impermissible interest." (*Lexin*, *supra*, 47 Cal.4th at p. 1074.) The statutory language also is the basis for the Attorney General's conclusion that section 1090 "is restricted to activities of a contractual nature …." (26 Ops.Cal.Atty.Gen. 5, 6 (1955).)

The statutes' use of the word "contract" is unambiguous. Consequently, we conclude that the statutes apply to contracts, not projects or plans. As a result, if appellants wish to invalidate the project based on a violation of section 1090, they must present a contract-based theory explaining why the approval of the project was a

contractual act. Here, appellants have presented contractual theories, which we will discuss *post*.

2. Appellants' single-contract theory

Appellants' main theory for why the trial court should have voided the entire project is based on the position that the various documents related to the Campus Pointe project were a single "contract" for purposes of section 1090. Under this theory, appellants contend the entire project should be declared void because (1) the project documents were interrelated and (2) the interrelated documents must be viewed as a single contract for purposes of section 1090. Appellants support their position by asserting that "the California courts have consistently treated individual agreements in a development project as part of a single contract under section 1090. (*See, e.g., Thomson v. Call*, [*supra*,] 38 Cal.3d 633, 644; *Campagna* [*v .City of Sanger* (1996) 42 Cal.App.4th 533,] 538-39.)"

Appellants' factual assertion that the project documents are interrelated is beyond dispute. The Theater Sub-sublease, in which Kashian Enterprises transferred rights in the space to be occupied by a theater to Maya Cinemas, obviously is related to the Ground Sublease, the document in which Kashian Enterprises obtained rights from CSUF Association in that and other space. Similarly, the Theater Sub-sublease and the Ground Sublease are related to the Ground Lease. The evidence that establishes this relationship includes the documents themselves. For example, section 1.1.5 of the Theater Sub-sublease states:

> "The parties acknowledge that this Lease represents a sub-sublease of a portion of the premises covered by the Ground Sublease. [CSUF] Association has previously leased the Project from the Board of Trustees … pursuant to that certain Ground Lease dated June 28, 2006 …. The Ground Sublease and Ground Lease are sometimes hereinafter collectively referred to as the 'Master Leases.' This Lease is subject and subordinate to the Master Leases and Tenant will comply with the applicable terms and conditions under the Master Leases."

In addition, provisions in the Development Agreement establish that it is connected to the Ground Sublease. Section 9.1 of the Development Agreement describes the form of sublease that CSUF Association will enter with Kashian Enterprises to implement the development of the parcels included in the project.

In short, no reasonable trier of fact that examined the evidence in the appellate record could find that the project documents are not related to one another.

Next, we consider appellants' contention that the interrelated documents must be viewed as a single contract for purposes of section 1090. The initial step of our analysis is to determine whether the existence of the single contract presents a question of fact or a question of law.

It is well established that the existence of an implied agreement is a question of fact. (E.g., *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 829.) Furthermore, where the question is the *existence* of a contract (as opposed to its construction or validity) and the evidence is conflicting or admits more than one inference, a question of fact is presented. (*Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407.) One reason that the existence of a particular contract or agreement presents a question of fact is that the existence of an element essential to the formation of the contract—mutual assent—is a question of fact. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141; see BAJI No. 10.60 [mutual consent].)

Based on the foregoing principles, we conclude that whether a single contract exists for purposes of section 1090 presents a question of fact that depends upon the assent of the multiple parties to that single contract. In this case, the multiple parties are the Board of Trustees, CSUF Association, Kashian Enterprises, and Esparza or his company, Maya Cinemas. Consequently, for appellants to establish that the Campus Pointe project involved a single contract, they must establish that the parties mutually assented to that single contract. In other words, the existence of a single contract is the product of the mutual understanding of the parties and the fact that the contracts are interrelated does not necessarily establish that there is one agreement.

Here, appellants have cited no evidence that the assent of CSUF Association and Kashian Enterprises to the Development Agreement in April 2006 and the Ground Lease in June 2006 was in any way connected to Esparza's assent to the Theater Sub-sublease, which was finalized in August 2006. The record shows that the idea for a theater as part of the Campus Pointe project was included in CSUF Association's 2002 invitation to bid and, thus, the Development Agreement and the Ground Lease contemplated the inclusion of a theater in the commercial part of the project. This evidence might establish that a theater was an integral part of the project. It does not establish, however, that the parties understood that Esparza or Maya Cinemas would build and operate the proposed theater and that this understanding was a basis or a condition for the formation of the Development Agreement or the Ground Lease.

In short, appellants have not shown that the record required the trial court to find that the Development Agreement, the Ground Lease, the Ground Sublease and the Theater Sub-sublease were part of a single contract between multiple parties. Accordingly, appellants have failed to show reversible error under their single-contract theory.

Appellants reliance on *Thomson v. Call*, *supra*, 38 Cal.3d 633 to support their single-contract theory does not contradict the conclusion that the existence of a single contract is a question of fact or compel this court to decide, as a matter of law, that a single contract existed in this case. In *Thomson v. Call*, the trial court determined that a single contract existed between multiple parties and the California Supreme Court accepted that determination because, among other things, the evidence showed that the transactions to be completed by the parties were contingent upon the other parties' performance. (*Thomson v. Call*, *supra*, at pp. 644-645.) Thus, *Thomson v. Call* is a case where the appellate court accepted the lower court's finding of fact because it was supported by sufficient evidence, rather than a case where the appellate court made an independent legal determination that a single agreement existed.

Furthermore, *Thomson v. Call* is distinguishable from this case because there is no evidence that the completion of the Campus Pointe project was contingent upon the proposed theater being completed and operated by Esparza or his company. In other words, the project could have gone forward regardless of what company built and ran the theater. In *Thomson v. Call*, the city's approval of the permits required by the project were dependent upon the city receiving the councilmember's land.

Therefore, the principles set forth in *Thomson v. Call* do not require us to rule as a matter of law that a single contract exists in this case.

Similarly, *Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th 533 is not a case that compels us to treat the various documents in this matter as a single contract. In that case, a deputy city attorney negotiated an agreement with a San Francisco law firm to represent the city on a contingency fee basis in a well contamination case. (*Id*. at pp. 535-536.) The deputy city attorney also worked for a local law firm and entered a separate oral agreement with the San Francisco firm that his firm would receive 35 percent of the total contingency fee as a referral fee. (*Id*. at pp. 536-537.) After the contamination lawsuit was resolved, the city refused to pay the percentage of the contingency fee owed to the deputy city attorney and deposited that portion into a bank account. (*Ibid*.) The deputy city attorney was, by then, no longer working for the city, and he and his firm sued to obtain the money. (*Id*. at p. 537.) The trial court determined that the activity of fee negotiation did not fall within the ambit of section 1090 and awarded the law firm the money. (*Campagna*, at p. 537.)

This court reversed, finding as a matter of law that the deputy city attorney was acting in his capacity as a city attorney[9] when he negotiated with the San Francisco firm for a referral fee. (*Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th at p. 541.) Based

[9]We note that section 1090 covers two types of contracts—contracts made by the public official in his or her official capacity and contracts made by a body or board of which the public official was a member.

on this finding, we concluded that the deputy city attorney had violated section 1090 and, therefore, had no rights in the $420,000 referral fee. (*Campagna*, at p. 542.) Although *Campagna v. City of Sanger* is a case where this court made a finding of fact as a matter of law, the reasoning of that case does not compel a finding that the Campus Pointe project involved a single agreement among multiple parties.

The outcome in *Campagna v. City of Sanger* was not dependent upon a single-contract theory. The opinion described the referral fee arrangement as a separate oral agreement between the deputy city attorney's firm and the San Francisco law firm. (*Campagna v. City of Sanger, supra*, 42 Cal.App.4th at p. 536.) This court concluded that the referral fee agreement was subject to section 1090 because the deputy city attorney negotiated it in his official capacity. (*Campagna*, at p. 541.) Consequently, the application of section 1090 was not dependent upon there being a single tripartite contract among the city and the two law firms.

3. Focus on the whole transaction

Appellants also attempt to establish error by arguing the trial court's decision to void only the Theater Sub-sublease "is contrary to the general principle under … section 1090 that the trial court is to disregard the technical relationships of the parties and focus on the transaction as a whole. [Citations.]"

In part I.A.2., *ante*, we discussed this principle and noted it applies when a court is determining *whether the public official holds a conflicting financial interest*. The inquiry into a public official's financial interests requires a broad examination because section 1090 proscribes both direct and indirect financial interests in a contract. (*Thomson v. Call*, *supra*, 38 Cal.3d at p. 645.) Indeed, the California Supreme Court has referred to this broad examination as "ferreting out any financial conflicts of interest …." (*Lexin, supra*, 47 Cal.4th at p. 1073.)

Appellants' argument takes this principle out of context and attempts to expand the scope of section 1090, which "is restricted to activities of a contractual nature …." (26 Ops.Cal.Atty.Gen., *supra*, at p. 6; see part I.E.1., *ante*.) They have not demonstrated

the trial court erred in its application of the principle. Rather, the record shows that the trial court correctly applied the principle in its proper context. First, the trial court's statement of decision clearly indicates that it was aware of the principle. At pages 108 and 109 of its statement of decision, the trial court quoted the language from *People v. Watson*, *supra*, 15 Cal.App.3d 28 that the court quoted in *People v. Honig*, *supra*, 48 Cal.App.4th at page 315 (see part I.A.2., *ante*). Following the trial court's citation to *People v. Watson*, it included the following citations:

> "[S]ee *People v. Deysher*[, *supra*,] 2 Cal.2d 141, 146; *People v. Honig*, *supra*, 48 Cal.App.4th 289, 315, 320 [Court cannot focus on isolated contract and ignore transaction as a whole.]; *People v. Darby*[, *supra*,] 114 Cal.App.2d 412, 429."

Thus, the statement of decision unequivocally shows that the trial court was aware of the principle that it was required to consider the transaction as a whole when identifying the financial interests of Esparza.

Second, the statement of decision shows that the trial court did consider the transaction as a whole and did disregard technicalities when it determined that Esparza had a conflict of interest. After setting forth the rule and providing citations, the trial court's next paragraph stated:

> "The winding trail here leads to the conclusion that Esparza was involved in the planning of the project, negotiated the contract with Kashian [Enterprises] and executed the contract on Maya[Cinemas'] behalf. It doesn't matter whether Esparza acted in good faith or whether the contract was fair; Esparza had a conflict of interest."

This paragraph shows that the trial court looked beyond the Theater Sub-sublease and considered the "winding trail" created by the various entities and contracts. As a result, we conclude that the principle that the trial court must examine the transaction as a whole when determining whether the public official holds a conflicting financial interest does not provide a ground for error in this case.

4. Postsigning approvals

Appellants also assert that the Board of Trustees's certification of the EIR and other project-related approvals adopted in March 2007 and readopted in May 2007 were necessary to complete the Development Agreement and the Ground Lease and make them enforceable. Since these approvals were adopted after the Theater Sub-sublease was signed, appellants argue, Esparza held a conflicting interest while the agreements were still in the process of being "made by" the Board of Trustees for purposes of section 1090. Therefore, the Development Agreement and the Ground Lease should be void.

Appellants have cited no authority for the proposition that postsigning approvals that are undertaken and completed in accordance with the obligations set forth in a contract are part of the making of that contract for purposes of section 1090. In addition, appellants have cited no evidence that the Development Agreement and the Ground Lease were not enforceable apart from the required EIR and other project-related approvals. In other words, although the Board of Trustees and CSUF Association retained some discretion in how to complete the environmental review necessary to comply with CEQA, they had committed themselves to going forward with the environmental review and could not have walked away from the project as they could have done during the negotiation of the contracts before they were signed.

5. Other improprieties and conflicts

Appellants also argue "the record is replete with additional evidence of improper conduct and potential conflicts of interest." We conclude that appellants have not demonstrated these additional concerns are legally relevant under section 1090 to the choice of remedy for Esparza's conflict of interest. At most, the argument raises additional questions of fact that the trial court did not resolve in favor of appellants. Appellants have not provided citations to evidence in the record that demonstrates the trial court's implied findings of fact were erroneous. Therefore, we conclude appellants'

arguments regarding other improper conduct and other potential conflicts of interest have failed to identify trial court error.

6. Public policy

Appellants' reply brief contends that the public policy underlying section 1090 mandates that the entire project be declared void. This argument, however, fails to identify reversible error. In any event, the action taken by the Board of Trustees after Esparza signed the Theater Sub-sublease—that is, the certification of the final EIR, the approval of the revision to the master plan, and the approval of the amendment to the nonstate funded capital outlay program—will be set aside because of the CEQA violations. (See pt. II.C., *post*.) Consequently, we need not consider whether the conflict of interest invalidates those actions because such a remedy would be redundant.

7. Summary

Based on the foregoing, we conclude that appellants have failed to demonstrate that the trial court erred when it did not invalidate the approval of the Campus Pointe project to remedy the section 1090 violation.

II. CEQA and Returns of Writs

A. Trial Court's Decision and Judgment

The statement of decision included the trial court's analysis and determinations that certain CEQA violations had occurred. It discussed the remedies for those violations as follows:

> "The Court has determined that there was inadequate traffic analysis, and in particular, failure to respond to comments made by the City of Fresno concerning the project's impact on traffic caused by the elimination of overflow parking for the Save Mart Center. The Court has also determined that there was a failure to adequately analyze the project's water issues. The Court has also determined that there was a failure to discuss the applicability of ISR 9510 [San Joaquin Valley Unified Air Pollution Control District's 'indirect source rule'].
>
> "Upon entry of the judgment and issuance of the writ, Respondents should take action with respect to the comments concerning traffic, analyze water issues, and discuss the applicability of the [indirect source rule] in

accordance with the court's opinion, and to revise the findings and recirculate for comment as necessary. The severance and consideration of these noncomplying aspects of the project should not prejudice complete and full compliance with CEQA. The court does not direct Respondents to exercise their discretion in any particular way. [Citation.]"

On the same day it filed its statement of decision, the trial court also filed a "Judgment Granting Peremptory Writ of Mandate." The judgment included the following orders:

> "2. A peremptory writ of mandate directing Respondent to set aside, in part, the Resolution of the Board of Trustees Certifying the final Environmental Impact Report and Approval of the Campus Master Plan Revision and Amendment to the 2006-07 Non-State Capital Outlay Program for Campus Pointe at California State University, Fresno (RCPBG 05 07-10), and to reconsider its opinion and judgment, in light of this Court's accompanying combined statement of decision, and to take such further action as is specially enjoined upon them by law, but the judgment does not limit or control in any way the discretion legally vested in the Respondents, as follows:
>
> "(a) Respondents are to respond to the City of Fresno's comments concerning the project's impact on traffic caused by the elimination of overflow parking for the Save Mart Center.
>
> "(b) Respondents are to revise its comments in its water supply analysis.
>
> "(c) Respondents are to discuss the applicability of the San Joaquin Valley Unified [A]ir Pollution Control District rule 9510 to the project. [¶] … [¶]
>
> "4. Respondent shall file a return to this peremptory writ of mandate within 120 days of service of the peremptory writ of mandate. The Court reserves jurisdiction to determine, by return to the peremptory writ of mandate, whether Respondent has taken those actions necessary to comply with the Court's order on petition for writ of mandate."

Despite the judgment's mention of a peremptory writ of mandate and the statement of decision's reference to the "issuance of the writ," an actual writ of mandate was not filed, issued, or served upon respondents before the notice of appeal was filed in early September 2009. Because an appeal was filed, respondents have not taken action to

comply with the terms of the judgment. Their appellate brief acknowledges this fact: "It is now up to Respondents to complete that additional environmental review, analyze the results, prepare an appropriate environmental document, and circulate as necessary under CEQA. What that environmental document will be and what conclusions it will reach have not yet been determined."

B. Necessity of a Writ of Mandate

Appellants contend the trial court erred in implementing its remedies for the CEQA violations because it failed to issue the peremptory writ required by its own judgment and CEQA. Respondents argue that the judgment effectively operates as a writ of mandate and the mere fact it was not denominated as such is not prejudicial error.

Subdivision (a) of Public Resources Code section 21168.9 addresses what a court should include in its order when it finds that a public agency has not complied with CEQA. Subdivision (b) of Public Resources Code section 21168.9 provides in part:

> "Any order pursuant to subdivision (a) shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division. *The order shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with this division*.… The trial court shall retain jurisdiction over the public agency's proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division."

This provision is clear in its use of mandatory language with respect to the issuance of a peremptory writ of mandate and the use of a return.

In this case the trial court did not comply with the mandatory language requiring the issuance of a peremptory writ of mandate. On remand, we will direct the trial court to comply with subdivision (b) of Public Resources Code section 21168.9 and actually issue a peremptory writ of mandate.

The disputes regarding what should be set forth in the writ of mandate are addressed in part II.D, *post*.

C. Severance and Overturning the Entire Project Approval

Appellants contend that the trial court erred by severing the identified CEQA defects and instead should have overturned the entire project approval. Respondents contend that it would violate Public Resources Code section 21168.9, subdivision (b) for this court to void the entire Campus Pointe project even though the trial court found only three limited defects requiring additional environmental analysis.

The trial court did not here sever a "portion or specific project activity or activities" from the remainder of the project. (Pub. Resources Code, § 21168.9, subd. (b).) It did not, for example, allow the development of one parcel to proceed and stop the development of another parcel. (See *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1181 [trial court properly severed gas station from the rest of the Wal-Mart Supercenter].) For that reason, appellants' assertion that the trial court erred in its application of the concept of severance set forth in Public Resources Code section 21168.9, subdivision (b) must be rejected.

Appellants' misunderstanding of severance, however, does not necessarily undermine the merit of their related assertion that the entire project approval should have been overturned. The following treatise describes the application of the provisions of Public Resources Code section 21168.9, subdivision (b) when the project has not been severed.

> "In contrast to a case where severance is proper, a situation may arise where an EIR is inadequate in some respects, but not others. This requires the local agency to set aside all project approvals and the certification of the EIR, but the writ of mandate need only require the preparation, circulation and consideration under CEQA of a legally adequate EIR on limited issues." (Robie et al., Cal. Civil Practice: Environmental Litigation (2010) § 8:33.)

The treatise's statement about the requirement "to set aside all project approvals and the certification of the EIR" supports appellants' contention that the trial court "should have overturned the entire project approval." (Boldface and some capitalization omitted.) The treatise's statement of the requirement also is compatible with the wording

of the regulation and statutes that address certification of the final EIR. "Prior to approving a project the lead agency shall certify that: [¶] (1) The final EIR has been completed in compliance with CEQA …." (CEQA Guidelines,[10] § 15090, subd. (a); see Pub. Resources Code, §§ 21100, subd. (a), 21151, subd. (a) [lead or local agencies shall certify completion of EIR on any project they propose to approve].) The wording of the guideline and statutes indicates that a final EIR should not be certified if it is not complete or in compliance with CEQA.

In many cases, the courts of appeal have set aside the certification of a final EIR because of an inadequacy in part of the document. For example, where the only deficiency in the EIR was the failure to explain why reduced water flow in local creeks would not be environmentally significant, the appellate court remanded for issuance of a writ directing the agency "to set aside its certification of the final EIR and to take the action necessary to bring the water resources section of the EIR into compliance with CEQA." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1112; see *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 143 [certification of EIR vacated based on inadequate discussion of water issues; traffic analysis in EIR upheld].)

Respondents argue that setting aside the entire certification is excessive because CEQA states that the trial court's order "shall include only those mandates which are necessary to achieve compliance with [CEQA]" (Pub. Resources Code, § 21168.9, subd. (b)), and setting aside the entire certification is not "necessary" because CEQA authorizes agency decisions (such as certification) to be voided "in part" (Pub. Resources Code, § 21168.9, subd. (a)(1)). We disagree with respondents' statutory construction and reject the idea of partial certification. The statutes and CEQA Guidelines provide for the

[10] "CEQA Guidelines" refers to the regulations that implement CEQA and are codified in California Code of Regulations, title 14, section 15000 et seq.

certification of an EIR when it is complete, and the concept of completeness is not compatible with partial certification. In short, an EIR is either complete or it is not.

Next, we consider whether the approval of the project should be set aside. Our discussion of this question is short; this court has answered it in published decisions. In *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, we concluded that a lead agency must certify a legally adequate EIR prior to deciding whether to approve a contested project. Based on this conclusion and a determination that certification of the EIR in that case was an abuse of discretion, we stated that "the project approvals and associated land use entitlements also must be voided. [Citations.]" (*Id*. at p. 1221.) We followed this approach in *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 672 and shall follow it here because respondents have not acknowledged this precedent, much less set forth a compelling argument for overturning it.

Based on the foregoing, the trial court's determination that the final EIR was inadequate in certain respects requires an order directing the Board of Trustees to set aside its certification of the final EIR as well as its approval of the project. We will instruct the trial court to modify its judgment and to issue a writ of mandate that includes these directions.

D. Sufficiency of the Directions in the Judgment

Appellants contend that the directions contained in the judgment are not as detailed or complete as required by CEQA. In contrast, respondents argue that the judgment's express terms are sufficient to satisfy CEQA and are consistent with the trial court's statement of decision.

For purposes of this appeal, we will assume that the judgment's terms would have been repeated in any writ of mandate issued. Therefore, we will treat the arguments regarding the contents of the judgment as though they also concern the contents of the writ of mandate.

The directions in question are set forth in paragraph 2 of the judgment. That paragraph directs respondents to (1) "set aside, in part, the Resolution of the Board of Trustees" that, among other things, certified the final EIR, (2) reconsider their opinion and judgment in light of the statement of decision, and (3) "take such further action as is specially enjoined upon them by law … as follows: [¶] (a) Respondents are to respond to the City of Fresno's comments concerning the project's impact on traffic caused by the elimination of overflow parking for the Save Mart Center. [¶] (b) Respondents are to revise its [*sic*] comments in its water supply analysis. [¶] (c) Respondents are to discuss the applicability of the San Joaquin Valley Unified [A]ir Pollution Control District rule 9510 to the project."

1. Setting aside the resolution

The first part of paragraph 2 of the judgment concerns setting aside, in part, a resolution of the Board of Trustees. The trial court's judgment—and any writ issued to implement that judgment—is not required by law to reference the resolution of the Board of Trustees in its directions. For example, a directive simply stating that the Board of Trustees was required to set aside the certification of the final EIR would have been sufficient to deal with the certification issue. (E.g., *Protect the Historic Amador Waterways v. Amador Water Agency*, *supra*, 116 Cal.App.4th at p. 1112.) Thus, the trial court was not required to specifically reference the resolution that included the certification, although such specificity is not forbidden. (See *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors*, *supra*, 87 Cal.App.4th at p. 143 [trial court directed to issue writ of mandate ordering board of supervisors to vacate specific resolution]; cf. *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1231-1232 [this court directed trial court to compel city to "set aside the resolution or decision approving the project"].)

Nevertheless, because the trial court chose to phrase its judgment in terms of setting aside, *in part*, the May 2007 resolution of the Board of Trustees, we will address the problems created by not stating which parts are set aside and which parts remain in

effect. Because the directions are ambiguous, respondents are unable to tell which parts of the resolution must be set aside and which parts may be left in effect.[11] For example, the judgment is unclear about whether paragraphs 8 and 10 of the May 2007 resolution of the Board of Trustees, which certify the final EIR as complete and in compliance with CEQA, are among the parts of the resolution the court intended to be set aside. Similarly, the judgment does not indicate whether paragraphs 14 and 15 of the May 2007 resolution, which approved the master plan revision and the amendment to the nonstate capital outlay program, must be set aside.

Based on our conclusions in part II.C., *ante*, the paragraphs of the May 2007 resolution of the Board of Trustees that should be set aside include paragraphs 8 and 10 (certification of the final EIR) and paragraphs 14 and 15 (other project approvals).

In addition, certain of the findings of fact adopted by the Board of Trustees in the resolution are no longer appropriate because the final EIR is not complete and the steps taken to complete the EIR might affect the findings. The trial court recognized as much when it considered appellants' argument that the findings of fact were deficient: "This challenge to the environmental review conducted and request for a writ of mandate is granted, in part, to permit revision of the findings as they relate to the other reviews that will be conducted, as discussed above."

The wording of the judgment does not make clear which, if any, findings of fact contained in the resolution the trial court intended to leave in effect. Consequently, to avoid further ambiguity on remand, if the trial court chooses to reference the May 2007 resolution of the Board of Trustees in the writ of mandate, the writ should direct the Board of Trustees to set aside all findings of fact set forth in that resolution except those specifically identified by the trial court as being allowed to remain in effect. Alternatively, the trial court may choose to issue less specific directions that set aside the

[11]The Board of Trustees may, in an exercise of its discretionary authority, decide to void more of the resolution than is required by the trial court.

findings of fact and statement of overriding considerations using language similar to that contained in the statement of decision.

2. Specific action regarding traffic and parking

Subparagraph (a) of paragraph 2 of the judgment specifically directed respondents "to respond to the City of Fresno's comments concerning the project's impact on traffic caused by the elimination of overflow parking for the Save Mart Center."

Appellants contend this direction is not adequate to fully remedy the deficiencies identified in the statement of decision. They assert respondents should be directed to revise the traffic analysis in the draft EIR as set forth in the statement of decision and to include in the revised traffic analysis a study of the impact on the Save Mart Center, adjacent facilities and students of the planned elimination of 2000 overflow parking spaces. "[T]he study," they contend, "should be done at appropriate times, including when a sold out event is at the Save Mart Center, and school is in session." In their reply brief, appellants assert that the statement of decision requires a traffic analysis and additional studies.

We have reviewed pages in the statement of decision that address appellants' claim that the traffic analysis was inadequate and have not found a statement by the trial court that "additional studies" are required. At pages 43 through 44, the statement of decision indicated that a February 1, 2007, report "did not respond in any way to the City of Fresno's comments concerning the impact of the loss of overflow parking for the Save Mart Center." Appellants may have viewed this report as a "study" and inferred that it must be expanded to provide an adequate analysis of parking and the impact on traffic.

In any event, we conclude that the directions given in subparagraph (a) of paragraph 2 of the judgment are sufficient to address the inadequate traffic analysis found by the trial court, especially when these directions are read in conjunction with the part of paragraph 2 of the judgment that directs the Board of Trustees "to reconsider its opinion and judgment, in light of this Court's accompanying combined statement of decision." These directions allow the Board of Trustees the flexibility inherent in the exercise of

discretion, but still require it to meet its legal responsibility of producing an analysis that complies with the requirements of CEQA and the Guidelines.

Appellants argue more specific directions are required because respondents have shown that their response will not comply with the terms of the judgment. This argument, however, does not demonstrate trial court error. We cannot conclude the trial court erred based on what a litigant might or might not do in response to a court order. If respondents produce an inadequate response in revising the analysis of traffic and parking, those inadequacies can be addressed when the trial court considers the return respondents must file to show what they have done to comply with the writ.

3. Specific action regarding water supply

The trial court's statement of decision ended its section on water supply assessment with the following:

> "The challenge that Respondents failed to adequately analyze the project's water issues has merit. This challenge to the environmental review conducted and request for a writ of mandate is granted."

Subparagraph (b) of paragraph 2 of the judgment implemented this determination by directing respondents "to revise its comments in its water supply analysis."

Appellants contend that this language in the judgment was insufficient to remedy the CEQA violations regarding water supply.

The directions in the judgment are somewhat ambiguous because they refer to "its *comments* in its water supply analysis." (Italics added.) This appears to refer to the comments of the Board of Trustees. Typically, however, the public submits comments about the draft EIR and the lead agency produces a final EIR that includes its responses to the public comments. This approach was followed in this case. Chapter 3 of the final EIR contains the comment letters received from other agencies and interested members of the public as well as the responses to the comment letters. Thus, requiring the Board of Trustees to revise "its comments" is imprecise. Despite this imprecision, when the judgment is read as a whole, it appears the trial court intended to direct the Board of

Trustees to revise its analysis of the water supply to address the inadequacies discussed in the court's statement of decision.

Because the judgment is being reversed and remanded on other grounds, we will direct the trial court to revise its directions regarding the water supply assessment to avoid the imprecision resulting from its use of the word "comments." We note that in another case involving water issues, the appellate court remanded for issuance of a writ directing the agency "to take the action necessary to bring the water resources section of the EIR into compliance with CEQA." (*Protect the Historic Amador Waterways v. Amador Water Agency*, *supra*, 116 Cal.App.4th at p. 1112.) On remand, we will direct the trial court to track this language in its judgment and writ. The trial court may, in an exercise of its discretion, choose to include additional instructions. For example, it would not be an abuse of discretion for the trial court to expand the instructions to reference the inadequacies discussed in the statement of decision.

4. Specific directions regarding air quality

Part I.M. of the trial court's statement of decision addressed the analysis of air quality impacts. The trial court concluded that there was a failure to comply with the San Joaquin Valley Unified Air Pollution Control District's indirect source rule.

Subparagraph (c) of paragraph 2 of the judgment addresses this deficiency by directing respondents to discuss the applicability of the indirect source rule to the project.

Appellants contend this language in the judgment fails to provide clear guidance to respondents so that all necessary changes can be made to the environmental documents. Appellants propose that respondents be directed to revise the EIR with respect to air quality as set forth in the statement of decision, including the applicability of the indirect source rule and the addition of mitigation measures.

Because the judgment is being reversed and remanded on other grounds, we will direct the trial court to revise its directions regarding the air quality assessment so that the Board of Trustees is directed "to take the action necessary to bring the [air quality] section of the EIR into compliance with CEQA" (*Protect the Historic Amador*

Waterways v. Amador Water Agency, supra, 116 Cal.App.4th at p. 1112), which action shall include a discussion of the applicability of the indirect source rule. Because the applicability of the indirect source rule resulted in the adoption of mitigation measures, we conclude it would be redundant to include mention of such measures in the instructions.

E. Enjoining Construction

Appellants contend that the trial court should have enjoined all construction of the project until the project was brought into compliance with CEQA. Appellants assert the trial court abused its discretion by not issuing an injunction under Code of Civil Procedure section 526 or under CEQA.

Respondents contend that the trial court properly exercised its discretion in denying injunctive relief because, among other things, substantial evidence supports its findings that continued construction would not irreparably harm the environment or prejudice full CEQA compliance.

Subdivision (a)(2) of Public Resources Code section 21168.9 provides the court's order shall include "a mandate that the public agency and any real parties in interest suspend any or all specific project activity or activities … that could result in an adverse change or alteration to the physical environment" until the public agency has complied with CEQA. The issuance of this mandate, however, is conditioned upon the court finding "that a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project …." (*Ibid*.)

In this case, the trial court made no such finding. Instead, the court stated that appellants' "'cause of action' for an injunction fails because it is not authorized in this case. (Code Civ. Proc. § 526, subd. (a)(1)-(7).)"

In effect, appellants' argument is that the trial court erred in failing to find that a specific project activity or activities would prejudice the consideration or implementation

of particular mitigation measures or alternatives to the project. (Pub. Resources Code, § 21168.9, subd. (a)(2).)

In response, respondents argue that substantial evidence supports the trial court's finding that the deficiencies in the environmental review would not prejudice their ability to fully comply with CEQA. They point to Kashian's declaration of August 2009 that stated (1) the hotel component of the project had not begun and that site remained available for overflow parking for Save Mart Center events and (2) the housing components completed or under construction included parking for the residents. Kashian's declaration also indicated that construction of the infrastructure for the project, including all of the utilities, had been completed and that construction of the commercial component of the project is not anticipated to begin until after this lawsuit is resolved.

Appellants' reply brief counters respondents' position by asserting that the project's entire infrastructure was constructed while the matter was being litigated, and it is not credible for respondents "to now argue that by finalizing the construction of the Project's infrastructure that alternatives or mitigation that should have been analyzed in the EIR process have not now been foreclosed."

Based on our review of the appellate briefing, we conclude that appellants' arguments are too general to demonstrate the trial court erred by failing to find that construction of aspects of the Campus Pointe project would "prejudice the consideration or implementation of particular mitigation measures or alternatives to the project." (Pub. Resources Code, § 21168.9, subd. (a)(2).) Simply asserting prejudice is not enough. There must be some showing of prejudice to support the assertion. Here, appellants have provided no examples of mitigation measures that were feasible but would be foreclosed by the construction.

Based on our conclusion that appellants have not demonstrated the trial court erred in applying the provisions of CEQA, we also conclude that appellants have not shown an error occurred when the trial court denied injunctive relief under Code of Civil Procedure section 526. If an error has not been demonstrated under the more specific statute, we

conclude that the trial court did not violate the requirements of the more general statute addressing injunctive relief.

F. Recirculation

The trial court's statement of decision indicated that respondents should "revise the findings and recirculate for comment as necessary."

Appellants argue that the writ of mandate should require the Board of Trustees and CSUF Association to recirculate the EIR, along with the new environmental review documents generated to comply with CEQA and the writ. (See CEQA Guidelines, § 15088.5 [recirculation of EIR prior to certification].) Respondents argue that directions to recirculate would be premature and should be decided by the agency after it knows what those documents contain.

In *Protect the Historic Amador Waterways v. Amador Water Agency*, *supra*, 116 Cal.App.4th 1099, the plaintiff filed a petition for writ of mandate challenging the adequacy of an EIR for a proposal to replace a canal with a water pipeline. The trial court denied the petition for a writ of mandate. (*Id*. at p. 1102.) The appellate court reversed and remanded with directions for the issuance of a writ. (*Id*. at p. 1112.)

In that case, the EIR indicated that leaks from the 130-year-old canal contributed to the surface flow of water in local streams. (*Protect the Historic Amador Waterways v. Amador Water Agency*, *supra*, 116 Cal.App.4th at p. 1102.) The EIR concluded that the reduction in the summer flow of the southern fork of Jackson Creek would be significant, but also concluded that the reduction would not constitute a significant effect on the environment for purposes of CEQA. (*Ibid*.)

The appellate court concluded the agency abused its discretion because the EIR did not contain a required statement of its reasons for finding the reduction in the flow of local streams would not be significant. (*Protect the Historic Amador Waterways v. Amador Water Agency*, *supra*, 116 Cal.App.4th at p. 1103.) As a result, the court reversed the trial court's denial of the petition and "remand[ed] the case for issuance of a writ directing the Agency to set aside its certification of the final EIR and to take the

action necessary to bring the water resources section of the EIR into compliance with CEQA. [Citation.]" (*Id*. at p. 1112.) The court stated the agency was required to correct only the deficiency identified before considering recertification of the EIR, and the form of the correction was to be decided by the agency in the first instance. "Likewise, whether the correction requires recirculation of the EIR, in whole or in part, is for the Agency to decide in the first instance in light of the legal standards governing recirculation of an EIR prior to certification." (*Ibid*.)

Based on this precedent, we conclude that the decision whether to recirculate the EIR with the additions created to comply with CEQA and the writ should be decided by the Board of Trustees in the first instance. If appellants disagree with the decision of the Board of Trustees regarding recirculation, they can raise that issue in the trial court after the return has been filed. In that situation, the trial court would review the Board of Trustees's decision not to recirculate and determine whether that decision complies with CEQA.

DISPOSITION

The judgment filed on July 1, 2009, is affirmed in part and reversed in part. Paragraph 3 of the judgment is affirmed. Paragraph 2 of the judgment is reversed, except for the part regarding traffic and parking analysis. The superior court is directed to modify paragraph 2 to direct respondents to (1) set aside the certification of the final EIR, (2) set aside the approval of the project, (3) set aside its adoption of findings of fact and statement of overriding considerations to permit the revisions of findings as they relate to the additional review that will be conducted pursuant to the judgment and writ of mandate, (4) take the action necessary to bring the water supply assessment in the EIR into compliance with CEQA, and (5) take the action necessary to bring the air quality section in the EIR into compliance with CEQA, which action shall include a discussion of the applicability of the San Joaquin Valley Unified Air Pollution Control District indirect source rule (rule 9510).

The superior court may, in an exercise of its discretion, (1) reference the May 2007 resolution of the Board of Trustees in the modified judgment and writ of mandate, provided that such references are in accordance with this opinion and (2) may alter the time for filing a return to the writ.

The superior court is directed to issue a peremptory writ a mandate as soon as practicable after it has filed the modified judgment.

The parties shall bear their own costs on appeal.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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GOMES, J.

Filed 3/16/11—Order for Publication

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LANDVALUE 77, LLC et al., Plaintiffs and Appellants, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY et al., Defendants and Respondents; KASHIAN ENTERPRISES, L.P., Real Party in Interest and Respondent.	F058451 (Fresno Super. Ct. Nos. 07CECG02872 & 07CECG02874)

It appearing that part of the nonpublished opinion filed in the above entitled matter on February 23, 2011, meets the standards for publication specified in California Rules of Court, rule 8.1105(c), IT IS ORDERED that the opinion be certified for publication in the Official Reports with the exception of Facts, Proceedings, and parts I., II.D., II.E., and II.F. of Discussion.

_____
DAWSON, J.

WE CONCUR:

_____
CORNELL, Acting P.J.

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GOMES, J.