



August 3, 2015

The Honorable Tani Cantil-Sakauye, Chief Justice, and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Re: Letter in Support of Fresno Unified School District's Petition for Review
Stephen K. Davis v. Fresno Unified School District, et al., Case No. S227786
After the Published Opinion in Court of Appeal, Fifth Appellate District,
Case No. F068477, published June 1, 2015, as modified June 19, 2015
Fresno County Superior Court No. 12CECG03718

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to the California Rules of Court, Rule 8.500, subdivision (g), the California School Boards Association ("CSBA") through its Education Legal Alliance ("ELA") submits this amicus letter in support of the Petition for Review filed by the Fresno Unified School District ("Fresno") with regard to the June 1, 2015 decision (as modified on June 19, 2015) in the above-referenced case, *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261 ("Court of Appeal decision").

CSBA is a non-profit corporation duly formed and validly existing under the laws of the State of California. CSBA is a member-driven association composed of the governing boards of almost all 1,000 K-12 school districts and county offices of education ("COEs") throughout California. The ELA is composed of nearly 730 CSBA members dedicated to addressing public education legal issues of statewide concern to districts and COEs and to their students. The purpose of the ELA, among other things, is to ensure that local governing boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy decisions for their local educational agencies.

The ELA strongly supports the Petition for Review. A ruling by the Supreme Court in this matter is "necessary to secure uniformity of decision" and "to settle an important question of law." (Cal. Rules of Court, rule 8.500, subd. (b)(1).) As described in more detail below, the Court of Appeal decision striking down a lease-leaseback school construction ("LLB") contract stands in contrast to other decisions that have approved them. Moreover, such contracts serve as a critical tool that districts and COEs use to build school facility projects. The Court of Appeal decision has created significant confusion and uncertainty regarding the viability of LLB contracts. The result is that many facility projects have been put on hold, cancelled, or scaled back – harming students, districts and COEs, and taxpayers. A ruling by this Court would help clarify the law, thereby helping students, districts and COEs, and taxpayers.

With respect to Government Code section 1090, the appellate court's expansion of the scope of the statute to include corporate consultants also conflicts with other appellate court precedent. Additionally, given the consequences associated with violating Government Code section 1090, districts and COEs (and all local government generally) need clear guidance as to its scope. Only this Court can provide the necessary clarity and resolution to this important issue.

I. Lease-Leaseback Contracts

The Court of Appeal decision discussed two constitutional methods for districts and COEs to finance the cost of facilities: (i) voter approval for the issuance of general obligations bonds to be used to pay for the construction (what the Court of Appeal decision referred to as the "traditional method for financial new school facilities") and (ii) the LLB contract. This second method is explicitly permitted by Education Code section 17406, subdivision (a)(1),¹ which states:

Notwithstanding Section 17417, the governing board of a school district, without advertising for bids, may let, for a minimum rental of one dollar (\$1) a year, to any person, firm, or corporation any real property that belongs to the district if the instrument by which this property is let requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building or buildings for the use of the school district during the term of the lease, and provides that title to that building shall vest in the school district at the expiration of that term. The instrument may provide for the means or methods by which that title shall vest in the school district prior to the expiration of that term, and shall contain other terms and conditions as the governing board may deem to be in the best interest of the school district.

For decades, districts and COEs have been using this statute and its predecessors as the legal basis to enter into LLB contracts. A comprehensive list of reasons for choosing a LLB contract over the traditional method is impossible to compile given the distinct and unique facilities needs of the more than 1,000 districts and COEs. However, two primary reasons are the ability to place the risk of cost overruns on the contractor and the ability to select the most capable construction company for the specific project. A LLB contract reduces the level of financial risk from cost overruns for the district or COE because the cost of the project is fixed by a "guaranteed maximum price" pursuant to the contract; under the traditional bid-build method, it is the district or COE that bears the financial risk from cost overruns by being subject to change orders while the project is being built. Additionally, the traditional method may not ensure selection of an architect, project manager, or contractor with the expertise necessary for the project given its size, type, or location; a LLB contract allows the district or COE to assemble a single project team that includes the architect, project manager, or contractor that is best suited for the unique needs of the project.

The long, successful track record of using LLB contracts also exists because courts have previously approved LLB contracts (see, e.g., *Los Alamitos USD v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222 [upholding a recent LLB contract] and, as a result, they have not been contested (see, e.g., *Alhambra USD v. All Interested* (2010) 2010 Cal.Super.LEXIS 1472 (Super. Ct., Case

¹ All further statutory references are to the Education Code unless otherwise stated.

No. BC435175) [uncontested LLB validation action). The Court of Appeal decision stands in stark contrast to these precedents and requires this Court's resolution.

This Court should also accept this case due to the importance of school facilities and the difficulties surrounding how to finance them. The Legislature has declared that "it is in the interest of the state and of the people thereof for the state to aid school districts . . . in providing necessary schoolsites and buildings for the pupils of the public school system, this system being a matter of general concern inasmuch as the education of the children of the state is an obligation and function of the state." (Educ. Code, § 16001.) The California Department of Education has also noted the importance of school facilities: "There is a growing body of research demonstrating that clean air, good light, and a small, quiet, comfortable, and safe learning environment are important for students' academic achievement."²

Districts and COEs cannot meet their distinct and unique facility needs using just the traditional method of financing school facility projects. Indeed, in some instances the traditional method is not legally available. (See, e.g., § 15276 [prohibiting COEs from utilizing so-called "Proposition 39" bonds].) Moreover, there is currently no significant state funding available for school facility projects.³

The Court of Appeal decision puts into serious doubt the ability of districts and COEs to utilize a LLB contract if the need arises. Technically, the appellate court simply found that the LLB contract at issue did not "satisf[y] the criteria set forth in section 17406(a)(1)." (237 Cal.App.4th at p. 283.) More specifically, the court "conclude[d that] the terms in the [leaseback portion of the LLB contract] regarding the construction, payment, use, occupancy, possession and ownership of the new facilities adequately support[ed the] allegation that the arrangement [was] not a true lease that provided financing for the project." (*Id.* at p. 286.)

For instance, the appellate court relied on the fact that Harris "never acted in the capacity of a landlord" and that Fresno "never occupied and used the new facilities as a tenant." (237 Cal.App.4th at p. 287.) However, the court provides no guidance as to what actions by Harris would have been sufficient to "act[] in the capacity of a landlord" and what actions by Fresno would have been sufficient to "occup[y] and use[] the new facilities as a tenant." Similarly, the appellate court held that "the leaseback must have a term during which the school district uses the new buildings." (237 Cal.App.4th at p. 290.) Yet there is no guidance as to the minimum length of the term that would have been necessary for Fresno to "use[] the new buildings."

The result of the Court of Appeal decision is that districts and COEs do not know how to structure a LLB contract that would withstand a legal challenge. This uncertainly creates the risk that any

² See "School Facilities Improve Learning" (available at <http://www.cde.ca.gov/ls/fa/re/documents/learnercenter.pdf> [last visited July 31, 2015]). See also "Re-Visioning School Facility Planning and Design for the 21st Century" (available at <http://www.cde.ca.gov/ls/fa/sf/documents/roundtablereport.pdf> [last visited July 31, 2015]).

³ See "Showdown Looms Over California's School Construction Needs" (available at <http://ww2.kqed.org/news/2015/01/23/showdown-looms-over-california-school-construction-needs> [last visited August 3, 2015]).

new LLB contract could be invalidated, leading to financial loss and years of delay in a project's timeline. Indeed, the ELA is aware of districts or COEs that have opted not to pursue a LLB contract because of the uncertainty created by the Court of Appeal.

In sum, this Court's attention is required both "to secure uniformity of decision" and "to settle an important question of law." (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

II. Government Code Section 1090

The relevant part of Government Code section 1090 ("Section 1090"), subdivision (a), states that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees 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." The Court of Appeal decision found that corporate contractors were included in the meaning of "employees." This ruling stands in stark contrast to a number of other appellate court decisions that found otherwise, including:

- *NBS Imaging Systems v. State Board of Control* (1997) 60 Cal.App.4th 328. In considering whether another conflict of interest provision (Public Contract Code section 10365.5) applied to a contractor, the appellate court noted that "Government Code section 1090 applies only to specified public officers and employees and thus has no application to this matter."
- *People v. Christianson* (2013) 216 Cal.App.4th 1181. The appellate court reversed a conviction of defendant, an independent contractor, for violating Section 1090. "Because [the defendant] was not a member, officer, or employee of the relevant public body, section 1090 does not apply to her."

To the extent that the Court of Appeal decision is supported by other case law (e.g., *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal. App. 4th 682), this only further demonstrates the point that there is a conflict at the appellate level and this Court is needed "to secure uniformity of decision."

The need for uniformity is particularly important given the serious consequences of violating Section 1090 and the significant constraints that the Court of Appeal decision would have on utilizing independent contracts. Not only is there the potential for criminal penalties (see, e.g., *Lexin v. Superior Court* (2010) 47 Cal. 4th 1050) but the financial impacts of the civil penalties can be quite harsh as well. In this case, for instance, the effect of upholding the Court of Appeal decision would be to void the contract in its entirety. This would mean that the contractor in this matter would need to refund Fresno for the cost of the project – a loss of over \$36 million – otherwise Fresno could be subject to further legal action alleging a gift of public funds.

More generally, the Court of Appeal decision would prevent districts and COEs from having a company provide preconstruction services and then be chosen to actually perform the construction work itself. Yet districts and COEs frequently do this because the company that provides such preconstruction services is often best suited to do the actual construction work. The loss of this

Honorable Chief Justice and Associate Justices

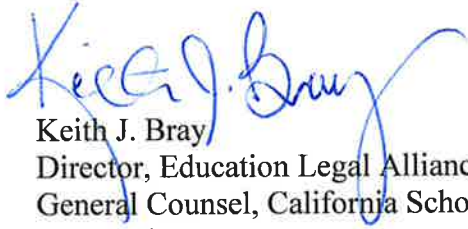
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ability would be higher construction prices and longer construction periods – again harming students, districts and COEs, and taxpayers. This Court must take up this matter as well because of the importance of the issue presents.

For the reasons stated above, the ELA respectfully joins with Fresno in requesting review of the Court of Appeal decision.

Respectfully submitted,



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cc: Parties of Record (See attached Proof of Service)