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July 30, 2015

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

RE: *Davis v. Fresno Unified School District* (2015) 237 Cal. App.4th 261
Supreme Court Case No. S227786; Court of Appeal Case No. F068477 (5th District)
California Association of School Business Officials Letter in Support of Fresno Unified
School District's Petition for Review (Cal. R. Ct. 8.500(g))

To the Honorable Chief Justice Tani G. Cantil-Sakauye and the Honorable Associate Justices:

The California Supreme Court's review of the Fifth District of the California Court of Appeal's holding in *Davis v. Fresno Unified School District* (2015) 237 Cal. App.4th 261 ("Davis") is warranted to settle critically important questions of law that are of statewide interest. The Court of Appeal's holding has left California public school districts in a state of paralyzing confusion regarding the legal requirements for a widely used public school construction delivery method, commonly referred to as "Lease-Leaseback," and codified in Education Code section 17406. *Davis* has additionally muddied the waters regarding conflict of interest laws under Government Code section 1090 ("Section 1090") by extending the reach of Section 1090 to non-employee consultants. This misapplication of Section 1090 will substantially interfere with a public entity's ability to hire necessary consultants.

We write on behalf of the California Association of School Business Officials ("CASBO") to support the petitions for review in *Davis* filed by Defendants/Respondents Fresno Unified School District and Harris Construction Company Inc. Since 1928, CASBO has been a premier statewide resource for California's public school districts, serving more than 4,000 individual school district and county office of education members. CASBO members represent every facet of school business management and operations. CASBO promotes business best practices, and advocates for sound policy regarding school business and finance issues. CASBO's members work directly on Lease-Leaseback construction projects, school district financing arrangements and a variety of related matters in support of educational agencies. As a result, CASBO holds a strong interest in supporting this Court's review of the *Davis* opinion. We note that the undersigned also filed an alternative letter requesting the Supreme Court's depublication of the *Davis* opinion.

Limited Liability Partnership

The Court's review is warranted in this matter because the *Davis* holding has created chaos in the field of public school construction. *Davis* has effectively unsettled the law, rewritten Education Code section 17406 to include ambiguous requirements not sanctioned by the Legislature, and left school districts with irreconcilable legal requirements. Review is also warranted and necessary to avoid the ambiguity created by the Court of Appeal regarding the application of Section 1090 to numerous different types of consultants hired by public entities.

Lease-Leaseback School Facility Construction

Education Code section 17406 allows a school district to lease its property to a third party under the condition that the party constructs a building on that property. The Lease-Leaseback delivery method expressly does not require competitive bidding, and the agreement may include any terms that the school district deems to be in the best interest of the district. (Ed. Code, § 17406, subd. (a).) The Lease-Leaseback delivery method was upheld in *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222 ("*Los Alamitos*"), as well as in at least 22 validation actions, as recognized by the Court of Appeal in *Davis*. Additionally, the State Allocation Board has approved State funding for numerous Lease-Leaseback project agreements similar to the lease-leaseback agreement reviewed in *Davis*.

Furthermore, in a 2004 veto message of a bill that sought to limit Lease-Leaseback agreements, Governor Schwarzenegger acknowledged the benefit of flexibility that Lease-Leaseback provides to school districts. (Assem. Bill No. 1486 (2003-2004 Reg. Sess.). See also, Assem. Bill No. 1097 (2005-2006 Reg. Sess.), similarly vetoed.) School districts use this construction delivery method as an effective, efficient, and cost and time saving tool, as well as a means to address specific, unique situations, such as developer built schools, construction projects funded by donors, or projects needed on an expedited basis to accommodate spikes in student enrollment.

Davis unsettles and confuses the Lease-Leaseback statute in a number of ways. The Court of Appeal's analysis of Lease-Leaseback law failed to defer to the Legislature and the plain language of the statute, and ultimately usurped the authority of the Legislature by reading into the statute requirements that have never existed. "If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction. [Citations omitted.] In such a case, there is nothing for the court to interpret or construe." (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083.) It is well established that courts "may not insert qualifying provisions not included in the statute." (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 486.) Additionally, a court "may not speculate that the Legislature meant something other than what it said, nor may [a court] rewrite a statute to make express an intention that did not find itself expressed in the language of that provision." (*Lazar v. Hertz Corporation* (1999) 69 Cal.App.4th 1494, 1503.) "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted" (Code Civ. Proc., § 1858.) A court may not "under the guise of interpretation, insert qualifying provisions not included in the statute." (*Estate of Griswold* (2001) 25 Cal.4th 904, 917.)

Nevertheless, despite the absence of any such requirement in the language of Education Code section 17406 or any other related statute, the Court of Appeal found that a financing component is required for a lawful Lease-Leaseback arrangement. The Court of Appeal offers no explanation of what a “financing” means or how school districts might comply with such a requirement, nor does the Court reconcile its finding with the Legislature’s omission of such a requirement in the statute.

The Court of Appeal’s central premise that Lease-Leaseback is a financing tool is not only unsupported by the actual language of Education Code section 17406, but it is also not supported by the Legislature, which has never seen fit to codify a financing requirement. While Lease-Leaseback may lend itself to flexibility in project financing and may possibly even have been enacted to provide that option, the statute does not require it. To the contrary, the statute has been treated as a construction delivery method, as evidenced by the Legislature’s recent 2014 amendments to the statute imposing contractor qualification criteria on certain projects. (Assem. Bill No. 1581 (2013-2014 Reg. Sess.)) In Assembly Bill 1581, the Legislature added to Education Code section 17406 the requirement that Lease-Leaseback contractors that construct a building under a section 17406 “instrument” must be prequalified if the project meets the criteria of Public Contract Code section 20111.6. (Ed. Code § 17406, subd. (a)(2).) The contractor prequalification requirements of Public Contract Code section 20111.6 expressly apply to public works projects. Thus, the Legislature acknowledged in 2014 that a Lease-Leaseback instrument under section 17406 serves as a construction delivery vehicle, not merely a financing vehicle.

Despite the Court of Appeal’s central premise that Lease-Leaseback is a financing tool, *Davis* also held that the lease portion of the statutory arrangement must be a “true” lease, with indicia of a traditional lease, including occupancy of the premises by the school district as tenant to the contractor/landlord and monetary rental payments for a property use interest. The Court of Appeal’s decision fails to explain why construction payments for work done on school district property cannot be adequate consideration under a “true” lease or why such payments cannot be consistent with a financing arrangement. The Court also offered little guidance as to how a lease interest relates to a financing component.

In relation to the lease requirement, *Davis* stresses that a school district must occupy the premises as a tenant of the contractor. Since the express condition of Education Code section 17406 is that the tenant must build a facility (“requires the lessee therein to construct on the demised premises, or provide for the construction thereon of, a building ...”), it would be impossible for a school district literally to “occupy” a facility that has not yet been built or is in the process of being constructed. Additionally, the Court of Appeal’s holding fails to address the possibility that a financing arrangement may be completed concurrent with construction of the project, and that the requirement for a landlord-tenant occupancy relationship after such time would serve no purpose. The Court of Appeal’s unwarranted and narrow view of the lease component of Education Code section 17406 renders the statute unintelligible and incapable of secure use by school districts in most instances.

The ultimate effect of *Davis* is a judicial rewrite of Education Code section 17406, throwing the statute into a state of confusion and depriving school districts across the state of an effective construction delivery method. School districts are left with new and ambiguous requirements

added to the Lease-Leaseback statute by *Davis*, but without any guidance as to how to implement those requirements or what they mean. The result has been disruption to pending school construction projects, delays, and increased costs to public agencies. None of these results were necessary for the Court of Appeal to issue its ruling on the lower court's granting of demurrer. The *Davis* holding destabilizes long standing law across California.

Conflicts of Interest

Of additional and perhaps even more significant statewide concern is the ambiguity created by the Court of Appeal's holding regarding the conflict of interest prohibition in Section 1090. Section 1090 prohibits state and local government officers or employees from being financially interested in a contract made by them in their official capacity, or by any body or board of which they are members. *Davis* held that a potentially broad range of private outside consultants, including corporations, hired by local governments, could be "employees" for purposes of Section 1090, and as a result, such consultants would be precluded from participating in the making of a contract touching on a subject about which they had previously advised the local government. This holding is overly broad and unjustifiably expands the scope of Section 1090.

It is common in Lease-Leaseback projects for a contractor to be hired by a school district as a consultant for the early stages of project development, and then later to be hired under separate agreement as the Lease-Leaseback contractor for that project. This division in contracting results, in part, from the inability of a school district to hire a Lease-Leaseback contractor before project plans are approved by the Division of the State Architect. (Ed. Code, § 17402.) The contractor's preliminary consulting work provides school districts with valuable assistance in project development before construction plans are finalized, and helps ensure that the Lease-Leaseback entity is fully informed about, and has given feedback on, the facilities project. In turn, the Lease-Leaseback arrangement offers school districts the potential for fewer construction disputes with the contractor, and resulting cost and time savings to the school district.

Davis effectively ended this efficient and sound practice by making the unprecedented leap that Section 1090 suggests that a corporate consultant can be an "employee" of the public agency who can be "financially interested" so as to prohibit the corporation from being engaged by the public agency. A California court has already concluded that Section 1090 does not apply to private consultants for criminal purposes. (*People v. Christiansen* (2013) 216 Cal. App.4th 1181.) *Davis* inappropriately reaches the conclusion that Section 1090 nevertheless applies for civil purposes, with no guidance as to what point a consultant becomes sufficiently like an employee of the agency to trigger Section 1090 concerns.

The Court of Appeal's holding that such consultants may be precluded from subsequent related contracting affects not only Lease-Leaseback projects, but a host of other consulting arrangements undertaken by school districts and other public agencies. Just a few examples of common arrangements now rendered suspect under *Davis* include: architectural firms that provide master planning services and then project specific design services for facilities addressed in that master plan; financial advisors who provide assistance with bond campaign or program development and then act as a designated financial advisor on related financings; educational consultants who review programs and later are retained to assist in implementing programs;

The Honorable Chief Justice Tani G. Cantil-Sakauye

The Honorable Associate Justices

July 30, 2015

Page 5

energy consultants who help prepare energy management plans and later are retained to install solar panels; and construction consultants who are retained to analyze construction deficiencies, and then later retained to assist in remedying those deficiencies. To a certain extent, such limitations exists for State agencies pursuant to Public Contract Code section 10365.5, but there is no similar law applicable to local agencies. (See Public Contract Code § 10335, subd. (a), specifying that sections 10335, *et seq.* are applicable to State agencies.) The Court of Appeal has thus again improperly engaged in a legislative role by importing laws ascribed by the Legislature only State agencies to all public agencies.

Conclusion

The implications of the Court of Appeal's holdings with respect to Section 1090 and Lease-Leaseback are of significant statewide concern and have rendered the relevant law unsettled, confusing and unusable. CASBO respectfully requests that this Court grant the Defendants'/Respondents' petition for review of the *Davis* opinion.

Sincerely,

LOZANO SMITH

A handwritten signature in black ink, appearing to read "Harold M. Freiman", written in a cursive style.

Harold M. Freiman

HMF/

PROOF OF SERVICE

I, Gena Morettini, am employed in the County of Contra Costa, State of California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is 2001 North Main St., Suite 650, Walnut Creek, CA 94596.

On July 31, 2015, I served the attached:

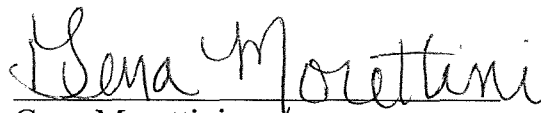
**AMICUS CURIAE LETTER IN SUPPORT OF THE CALIFORNIA
SUPREME COURT'S REVIEW OF THE FIFTH DISTRICT OF THE
CALIFORNIA COURT OF APPEAL'S HOLDING IN
DAVIS V. FRESNO UNIFIED SCHOOL DISTRICT,
(2015) 237 CAL. APP. 4TH 261**

on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope addressed as follows and I caused delivery to be made by the mode of service indicated below:

SEE ATTACHED SERVICE LIST

- (***Regular U.S. Mail***) on all parties in said action in accordance with Code of Civil Procedure Section 1013, by placing a true and correct copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth above, at Lozano Smith, which mail placed in that designated area is given the correct amount of postage and is deposited at the Post Office that same day, in the ordinary course of business, in a United States mailbox in the County of Contra Costa.
- (***By Electronic Mail***) on all parties in said action by transmitting a true and correct to the persons at the email addresses listed attached. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- (***By Personal Service***) by causing to be personally delivered a true copy thereof to the addressee attached.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 31, 2015, at Walnut Creek, California.


Gena Morettini

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