

2020 1002  
CASE No. B252570

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

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JAMES McGEE

*Plaintiff and Appellant,*

vs.

TORRANCE UNIFIED SCHOOL DISTRICT; BARNHART-BALFOUR  
BEATTY, INC., DBA BALFOUR BEATTY CONSTRUCTION; HARRIS  
CONSTRUCTION COMPANY, INC.; ET AL.

*Defendants and Respondents.*

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF  
CALIFORNIA'S COALITION FOR ADEQUATE SCHOOL HOUSING IN  
SUPPORT OF DEFENDANT/RESPONDENT TORRANCE UNIFIED SCHOOL  
DISTRICT [SUBMITTED CONCURRENTLY WITH ATTACHED AMICUS  
CURIAE BRIEF]

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On Appeal From the Superior Court for the State of California,  
County of Los Angeles, Case No. YC068686, Hon. Stuart Rice

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**APPLICATION OF CALIFORNIA'S COALITION FOR  
ADEQUATE SCHOOL HOUSING FOR LEAVE TO FILE AMICUS  
CURIAE BRIEF IN SUPPORT OF DEFENDANT/RESPONDENT  
TORRANCE UNIFIED SCHOOL DISTRICT**

Pursuant to rule 8.200(c) of the California Rules of Court, California's Coalition for Adequate School Housing ("CASH") respectfully requests leave to file the accompanying brief as amicus curiae in this proceeding in support of respondent Torrance Unified School District ("District").

CASH is a nonprofit organization formed in 1978 to promote, develop, and support state and local funding for K-12 school construction. Approximately 93 percent of the K-12 students in California attend schools in school districts that are members of CASH. Such school districts have a great need for new classrooms and modernization of old schools. CASH membership includes over 1,100 school districts, county offices of education, and private sector businesses, including architects, attorneys, consultants, construction managers, financial institutions, modular building manufacturers, contractors, developers, and others in the school facilities industry.

CASH has a substantive and abiding interest in ensuring the Lease-Leaseback project delivery method authorized by Education Code section 17406 ("Lease-Leaseback") remains a legally viable option for schools in California. Hundreds of school districts have relied upon the plain and unambiguous language of Education Code section 17406 for completion of major facilities projects, resulting in safer and better quality schools for California students. A decision that weakens or destroys Lease-Leaseback as a construction option, despite its clear language, would negatively affect many school projects.

This brief is designed to assist the Court by illuminating the practical realities that are implicated by this Court's decision. For example, this case is one of several challenges to the implementation of the plain language of Education Code section 17406. On September 17, 2014, the Fourth Appellate District published *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222 (S221894, app. pending), which validated the implementation of the Lease-Leaseback method. A petition for review of the *Los Alamitos* case has been filed with the California Supreme Court. Additionally, the Second Appellate District is currently considering *Davis v. Fresno Unified School District* (Fifth Appellate District, Court of Appeal Case No. F068477), which also challenges the viability of the Lease-Leaseback project delivery method. In short, this case is but one cog in a strategic wheel designed to cause a divergence of appellate opinions on the Lease-Leaseback method, and CASH has an interest in maintaining a uniformity of judicial opinion permitting Lease-Leaseback.

As a further example of how this brief will assist the Court in deciding this matter in its practical context, hundreds of schools have relied, and continue to rely, upon the plain language of Education Code section 17406 to permit utilization of Lease-Leaseback. As discussed within the amicus brief, the utilization of this method does not spring from a desire to spend more on school projects than is necessary; rather, it is a recognition of the temporal, *financial*, and practical benefits which school districts find (on some projects) outweigh the benefits of the low-bid method.

No party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. (See Cal. Rules of Court, rule 8.200(c)(3).) For the foregoing reasons, CASH respectfully

requests permission to file the accompanying brief as amicus curiae in this matter.

Respectfully submitted,

Dated: October 24, 2014.

FAGEN FRIEDMAN & FULFROST LLP

By 

James R. Traber

Attorneys for Amicus Curiae Coalition for  
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AMICUS CURIAE BRIEF OF  
CALIFORNIA'S COALITION FOR ADEQUATE SCHOOL  
HOUSING IN SUPPORT OF DEFENDANT/RESPONDENT  
TORRANCE UNIFIED SCHOOL DISTRICT

I. INTRODUCTION

For decades, Education Code section 17406 has stood as the unambiguous will of the electorate. Now, dissatisfied parties seek to effect through judicial means that which they could not effect by popular vote: the invalidation of the Lease-Leaseback project delivery method.

This Court's decision will have far-reaching consequences. CASH believes, based upon its knowledge of the school facilities industry, the Lease-Leaseback method has been used by hundreds of school districts on thousands of projects. Lease-Leaseback is widely used by California schools today in the same manner as it was used by the District in this case. The legal challenge in this case is similar to numerous challenges to the Lease-Leaseback project delivery method in various appellate districts throughout the State, and is part of a broad attack on this widely used construction method. These challenges have largely been filed by, and are based upon the incorrect legal analysis of, a single attorney.

Schools use Lease-Leaseback to control the final price (as opposed to the bid price) of their projects. Schools often utilize subcontractor bidding and overhead and profit cost comparisons to ensure fair pricing. The Lease-Leaseback method allows for a collaborative project dynamic that produces, in some circumstances, better facilities outcomes for schools. In short, CASH believes that while hard bid projects have a place, the Lease-Leaseback method is an *option* that was afforded to schools by the Legislature and must be upheld.

Finally, if the plain language of Education Code section 17406 is to be changed, it should be put to a vote of the legislature. The legislature is

the appropriate vehicle for effecting statutory change. The legislative process was used to enact Education Code section 17406, and if disappointed parties wish to change that law, they should engage that same legislative process. This attempt to circumvent the legislative process should be denied.

## II. ARGUMENT

### A. This Decision Will Have a Widespread Impact, Because Many Schools Throughout California Use Lease-Leaseback As It Was Used in This Case

According to the California Department of Education, approximately six million students in California attend over one thousand school districts. (See <http://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp>.)

School districts are required to educate all children who seek to attend school, and all children aged 5 to 16 are compelled to attend. Such students are entitled to adequate school facilities. These facilities needs are amplified by requirements compelling attendance for students with special needs from age 3 to 22. The two main project delivery methods used by schools to meet these facilities needs are *Lease-Leaseback* and the “*hard bid*” method authorized by Public Contract Code section 20111.

Many school districts in California have relied upon the plain language of the decades-old Lease-Leaseback provision found in Education Code section 17406 to provide an invaluable alternative to the inflexible hard bid method. While it is not possible to pinpoint exactly how many school districts have utilized the Lease-Leaseback delivery method, it must be noted that it is used by many districts throughout California. CASH estimates that easily over 100 school districts *currently* use Lease-Leaseback to provide school facilities for students. Based upon its widespread experience in the school facilities industry, CASH estimates that *hundreds* of school districts have likely used Lease-Leaseback over the



past decade on *thousands* of projects. In the short time available, CASH has compiled a non-exhaustive list of districts that have been confirmed to have used Lease-Leaseback, which is attached hereto as Exhibit A.

The Lease-Leaseback contract used in this case is consistent with the way many schools use Lease-Leaseback throughout California. The concepts of a ground lease and a leaseback of the facilities with payments coinciding with construction progress are standard provisions in Lease-Leaseback agreements. Similarly, the Guaranteed Maximum Price and contingencies are standard provisions used by schools throughout California. In short, the Lease-Leaseback used in this case is consistent with the use of Lease-Leaseback throughout California.

As an example of the prevalent use of Lease-Leaseback, CASH has confirmed that Los Angeles Unified School District has a Lease-Leaseback program that has produced more than 70 projects exceeding \$2.7 billion.

As a result of the widespread use of Lease-Leaseback in California, the Court's decision in this case is likely to have an extraordinary reach, touching many school districts and affecting millions of students. A negative decision for the District affecting how Lease-Leaseback is used would create confusion amongst school districts, and would also, in light of the *Los Alamitos* decision, create disparity of options in project delivery methods for school districts in different judicial districts.

There are other cases pending in the California Courts of Appeal addressing issues similar to this case, for example, *Davis v. Fresno Unified School District* (Fifth Appellate District, Court of Appeal Case No. F068477) involves a similar attack on Lease-Leaseback. On October 16, 2014, a premature petition for review of the *Los Alamitos* case was filed by Howard Contracting, Inc. (the Defendant in that case). Thus, the California Supreme Court will likely be presented with the opportunity to rule on the same issues presented in this case. In short, this case is part of a broad legal

challenge winding its way through various courts of appeal, which may find their way to the California Supreme Court.

**B. Why Schools Use the Lease-Leaseback Delivery Method**

1. Lease-Leaseback Allows Schools to Control the Final Price of a Project

In hard bid projects, school districts are forced to contract with the lowest responsive, responsible bidder. For a school district to avoid awarding a contract to a nonresponsible bidder, it must go through a due process hearing, and is often subjected to costly legal challenge that can temporally and financially sabotage a project. Thus, in practice, the hard bid method prevents a school district from avoiding contractors who may be undesirable for reasons related to the *actual work* they will perform.

The hard bid often results in contractors “gaming” the system by submitting the lowest bid possible, even when that bid does not represent the true, final cost to the district. Once a hard bid contract is awarded, a contractor will submit “change orders” that increase the cost of the project, thereby increasing the *final* price to the district. Such “change orders” can increase the contract price up to 10 percent before such work needs to be bid. (Pub. Contract Code, § 20118.4.) As a result of these “change orders,” the *bid* price is often not the *final* price, and the hard bid’s objective of obtaining the *lowest* price is lost. Ironically, consideration of a contractor’s work quality (something any private person or entity would consider) is often sacrificed in favor of a lowest price objective, which is often not produced by the hard bid method.

In a Lease-Leaseback project, the District can focus on factors other than price, such as a contractor’s *quality*. Moreover, the Guaranteed Maximum Price mechanism allows the school district to know in advance what the final price will actually be, which is not the case in a hard bid scenario.

2. Lease-Leaseback Allows for Cost Control Through Subcontractor Bidding and Open-Book Accounting

In a hard bid or Lease-Leaseback scenario, the District contracts with a general contractor, who subcontracts significant portions of the work to other companies. In either scenario, the subcontracts are generally put to a bid.

In a hard bid project, a school district knows very little about how the contractor estimated its bid, such as how much the subcontractor bids were, or perhaps more importantly, *how much the general contractor is charging for overhead and profit*. Contractors bidding on projects where there is little or no competition can (and do) inflate the amounts for overhead and profit without recourse from the school districts. Strong construction markets render higher overhead and profits reflected in bid prices, and the school district is left with no ability to negotiate.

In Lease-Leaseback, the school district can obtain open access to the subcontractor bids, and openly negotiate the contractor's overhead and profit costs. The District can obtain the subcontractor bids and negotiate every aspect of the price. As a result of subcontractor bidding and through the school district's ability to compare overhead and profit percentages with other contractors, a school has greater latitude to check and negotiate price fairness.

School districts have no incentive to pay more for a project than is necessary. Governing Board members are accountable to the public through elections, and are prohibited from participating in the ratification of contracts in which they have financial interest. (Gov. Code, § 1090 et seq.) School districts' financing projects through local bonds are accountable to bond oversight committees. In short, schools who use the Lease-Leaseback method implement cost control measures that ensure competitive pricing in the absence of a blind, hard bid.

3. Lease-Leaseback Allow for Project Timing That Gels With Complicated School Calendars

Hard bid projects create temporal issues that can compromise a school district's facilities objectives. Hard bids require preparation of the plans and specifications to be complete (and usually approved by the Division of the State Architect) prior to the publication of the notice inviting bids. Additionally, even after the plans and specifications are complete, a notice inviting bids must be published for at least two weeks prior to bid opening. After bids are opened, there can be bid protests that can cause further delays and ultimately derail a school project entirely.

School calendars can be complicated and are often not amenable to such temporal restrictions. School calendars are legally required to be negotiated with employee unions, and must provide a specific number of instructional days while still accounting for staff development days and holidays. School calendars especially can create conflict on hard bid projects when work is being done on *existing* school facilities that house students, and which cannot be shut down in the middle of a school year.

In Lease-Leaseback projects, contractors are often involved very early on. As opposed to hard bid projects where contractors learn of the scope of work for the first time when preparing their bids, Lease-Leaseback contractors are often *involved* in the development of the plans and specifications. This can reduce the amount of time needed to allow the contractor to enter into a contract with the District, and allows for collaborative planning to minimize disruption of the school calendar.

4. Lease-Leaseback Allows for a Collaborative Project Dynamic, and Creates Productive Relationships

In a hard bid project, the project's dynamic is often contractor versus school district. The contractor is presented with a stack of construction

plans and specifications prepared independently by an architect (which almost inevitably contains errors and omissions) and is forced (often on a short two-week timeline) to submit a bid to complete the required work. This disjointed process results in conflict among the contractor, the architect and the school district.

In contrast, the Lease-Leaseback method allows schools to bring a contractor in early to work with the architect as the plans are being developed. While the hard bid process incentivizes the submission of the *lowest* bid (not necessarily the lowest final price), the Lease-Leaseback method incentivizes the preparation of the most *accurate* price (because it will be guaranteed). The result is a *collaborative* dynamic between contractor and district. Contractors are incentivized to *proactively* address omissions in the plans and specifications, and assist with the generation of a realistic and accurate project timeline.

Additionally, the Lease-Leaseback contractor is only as good as his last project. Unlike the hard bid process, future work depends upon the school district's satisfaction. This simple change in the project's dynamic can mean the difference between a project that is free of defects and under-budget and a project with cost overruns that is done just well enough to avoid a defect claim.

**C. The Voice of the Electorate Which Enacted the Plain Language of Education Code Section 17406 Should Not Be Ignored**

Schools have relied upon the will of the people as reflected in the plain language of Education Code section 17406 for decades. Parties dissatisfied with the state of the law are afforded a legislative mechanism for effecting change: vote. The voice of the electorate resulted in the enactment of Education Code section 17406, and should not be ignored.

### III. CONCLUSION


This Court's decision will have a widespread impact on many school districts and their ability to provide the best facilities outcomes possible for their millions of students. School districts have relied upon the plain language of Education Code section 17406 not as a way to inflate their own facilities costs, instead, they have used this method because it allows them to control the actual cost of their projects, avoid conflict with school calendars, and produce better facilities outcomes for their students. The will of the voters in enacting the Lease-Leaseback method authorized by the plain language of Education Code section 17406 should stand.

Respectfully submitted,

Dated: October 24, 2014.

FAGEN FRIEDMAN & FULFROST LLP

By

  
James R. Traber  
Attorneys for Amicus Curiae Coalition for  
Adequate School Housing


CERTIFICATE OF WORD COUNT  
(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 3,644 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: October 24, 2014.

FAGEN FRIEDMAN & FULFROST LLP

By



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James R. Traber  
Attorneys for Amicus Curiae Coalition for  
Adequate School Housing

No.	Name of District
1	Alvord Unified SD
2	Ackerman USD
3	Black Oak Mine USD
4	Briggs Elementary SD
5	Campbell Union SD
6	Cardiff SD
7	Carlsbad USD
8	Chula Vista Elementary SD
9	Colton Joint USD
10	Corona-Norco USD
11	Culver City USD (CCUSD)
12	Del Mar Union SD
13	Elk Grove SD
14	Enterprise USD
15	Fairfield-Suisun SD
16	Fallbrook Union Elementary SD
17	Fallbrook Union High SD
18	Folsom Cordova USD
19	Folsom/Cordova SD
20	Fremont USD
21	Garden Grove USD
22	Gateway USD
23	Glendale USD
24	Grant Joint Union HSD
25	Hacienda La Puente USD
26	Hemet USD
27	La Mesa/Spring Valley USD
28	Leroy Greene Academy
29	Live Oak USD
30	Loomis USD
31	Madera USD
32	Manteca USD
33	Manteca USD
34	Manzanita Elementary SD
35	Maria Montessori Charter Academy
36	Martinez USD
37	Marysville Joint USD
38	McCabe USD
39	Menifee Union SD
40	Mesa Union SD
41	Mill Valley USD
42	Modesto City SD
43	Mt. Diablo USD
44	Natomas USD
45	Nevada Joint USD
46	Oceanside USD

No.	Name of District
47	Pacheco Union SD
48	Patterson USD
49	Placer County Office of Ed
50	Pleasant Ridge USD
51	Plumas Lake Elementary SD
52	Poway USD
53	Ramona USD
54	Red Bluff Union SD
55	Redlands USD
56	Redondo Beach USD
57	Rialto USD
58	Rocklin SD
59	Rocklin USD
60	Roseville Joint USD
61	Sacramento City USD
62	Sacramento SD
63	Saddleback Valley USD
64	San Dieguito Union High SD
65	San Jacinto USD
66	San Juan USD
67	Santa Ana USD
68	Santa Rosa City Schools
69	Santee SD
70	Saugus Union High SD
71	Shasta Union High SD
72	Sierra Sands USD
73	Solana Beach SD
74	South Bay Union SD
75	Stanislaus Union SD
76	Stockton USD
77	Stockton USD
78	Sutter Union SD
79	Sweetwater Union High SD
80	Torrance USD
81	Tracy USD
82	Turlock USD
83	Tustin USD
84	Twin Rivers USD
85	University of California, Riverside
86	Vacaville USD
87	Valley Center Union SD
88	Washington USD
89	Western Placer USD
90	Wheatland Elementary SD
91	Wiseburn SD
92	Yuba City SD

**EXHIBIT A - School Districts Who Have Used Lease-Leaseback**