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July 29, 2015

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

Re: ***Davis v. Fresno Unified School District, et al.*** Case No. S 227786
Los Angeles Unified School District's
Amicus Curiae Letter in Support of Petitions for Review of Court of Appeal Decision
Court of Appeal No. F068477
Fresno County Superior Court No. 12CECG03718

To the Chief Justice and Associate Justices of the Supreme Court of California:

Pursuant to California Rules of Court 8.500(g), the Los Angeles Unified School District ("LAUSD") requests the Supreme Court grant review of *Davis v. Fresno Unified School District*, Case No. S 227786 ("Opinion" or "Op.").¹

LAUSD is California's largest public school district, encompassing the City of Los Angeles and 31 other cities within Los Angeles County. LAUSD is currently undertaking a \$19.5 billion voter approved bond funded school construction program. LAUSD has used Education Code section 17406 ("Section 17406") to procure construction services on 116 separate projects with a total expenditure of public funds exceeding \$3.6 billion. Approximately 33 separate general contractors and 1,732 separate subcontractors have worked on these projects.

The Opinion has left unsettled important questions of how procurement of construction services using Section 17406 may now be transacted and has also created a conflict with the opinion of the Fourth Appellate District in *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222 ("*Los Alamitos*"). This uncertainty and conflict must be resolved to ensure that LAUSD (and other school districts) may continue to appropriately procure construction services utilizing Section 17406 without exposure to legal challenges based upon the format of the transactions.²

¹ To avoid repetition, LAUSD joins in the Petitions for Review of Fresno Unified School District and Harris Construction Co., Inc.

² The Opinion likely creates the same issues for community college districts in California. (See Ed. Code, § 81335.)

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I. The Opinion Raises Material Questions Related to Section 17406 that Should Be Reviewed and Corrected.

A. The Opinion Creates a Non-Existent “Financing” Requirement in Section 17406 Transactions.

The Opinion states, “... [T]o fulfill the primary statutory purpose of providing financing for school construction, the arrangement must include a financing component. (See pt. II.A.2, *ante.*)” (Op. 20.) This conclusion was reached despite the Opinion also stating, “... [o]ur review of legislative history did not uncover any material useful in deciding the questions of statutory interpretation presented by this case. Consequently, we did not take judicial notice of any legislative history on our own motion. (See Evid. Code, § 459.)” (Op. 19, fn. 12.)

No requirement for “a financing component” can be found in Section 17406. If anything, the opposite exists, one that permits the instrument to “contain other terms and conditions as the governing board may deem to be in the best interest of the school district.” (Section 17406, subd. (a)(1).)

After reading a financing component into Section 17406, the Opinion fails to explain how this financing component is defined. If the governing board deems it to be in the best interest of the school district to finance \$100 of the project costs, would that satisfy the “primary statutory purpose” or must a school district finance the total construction cost? If the total construction cost must be financed, may the governing board deem it to be in the best interest of the school district to do so for the duration of the project’s construction with monthly payments to the contractor during the course of construction, or must the school district finance these costs for a term of years, and if so, for how many? The Opinion leaves all of these questions unanswered, placing in sharp relief the fact that no financing component requirement exists in the text of Section 17406.

This uncertainty in the Opinion must be reviewed and corrected if Section 17406 is to remain a workable procurement method for school districts. If a Section 17406 transaction “arrangement must include a financing component,” it should be left to the Legislature to define these requirements.

B. The Opinion Finds a Requirement for a Leaseback Term in Section 17406.

The Opinion interprets Section 17406 to require the leaseback by the school district to have a term during which the school district occupies the facilities constructed:

“In summary, a lease-leaseback arrangement qualifies for the exception to competitive bidding created by section 17406(a)(1) only if the instrument containing the leaseback requires the construction firm “to construct on the demised premises ... a building or buildings for the use of the school district during the term of the lease.” We interpret this statutory language to mean the leaseback must have a term during which the school district uses the new buildings.” (Op. 26.)

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This conclusion was reached by applying syntactic canons of statutory construction, allowing the Opinion to ignore the equally plausible alternative interpretation that Section 17406 simply requires that the facilities be constructed during the lease term. (Op. 24.)

However, the Opinion expressly declined to discuss “how long a district use and occupy the project as a tenant before the ‘true character’ of the transaction is a lease and not a traditional construction contract.” (Op. 26, fn. 12.) The Opinion disregarded the Defendants’ argument that the Legislature only addressed the term of the lease as a maximum and remained silent on what minimum term was required. (Op. 25; see Ed. Code, § 17403.) The Opinion leaves entirely unsettled the minimum lease term required for a “genuine” lease. (Op. 19.) School districts are left to guess whether lease terms may be as short as 30 days or one year, or must be much longer to satisfy the new “true lease” standard in the Opinion.

As with the requirement of a “financing component,” this uncertainty must be reviewed and corrected if Section 17406 is to remain a workable procurement method for school districts. If a Section 17406 transaction must contain a “minimum” term to be a “genuine” lease, then the fundamental determination of the minimum term, like the “maximum” term in Education Code section 17403, should be made by the Legislature.

II. Review Should Be Granted to Resolve a Conflict Between the Opinion and the Fourth Appellate District.

The Opinion contradicts the analysis in *Los Alamitos*, which included a discussion of Assembly Bill 1486 enacted by the Legislature, but vetoed by the Governor. A core issue addressed in both the Opinion and in *Los Alamitos* is whether competitive bids are required for Section 17406 transactions to be valid. (Op. 8-27; *Los Alamitos*, *supra*, 229 Cal.App.4th at 1224.)

Assembly Bill 1486, discussed by *Los Alamitos* when reaching the conclusion that competitive bids are not required, sought to amend Section 17406 to read:

“(a) In order to enable school districts to let real property for the purpose of acquiring, ***financing, or constructing facilities***, and notwithstanding Section 17417, the governing board of a school district, through the competitive proposal process set forth in Article 2.2 (commencing with Section 17429.1), 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 the 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 thereof, 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 any other terms and conditions as the governing board may deem to be in the best interest of the school district. [¶] (b) Any rental of



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property that complies with subdivision (a) shall be deemed to have thereby required the payment of adequate consideration for purposes of Section 6 of Article XI of the California Constitution.” (*Los Alamitos, supra*, 229 Cal.App.4th at 1228, fn. 4, emphasis added.)

Los Alamitos concluded, “[t]he attempt to amend section 17406 to delete reference to the language ‘without advertising for bids’ implies that section 17406 as it reads now does not require competitive bidding.” (*Los Alamitos, supra*, 229 Cal.App.4th at 1229.)

Assembly Bill 1486, vetoed by the Governor, sought to **add** the requirement of “... financing, or constructing facilities...” to Section 17406. Following *Los Alamitos*’ analysis, the attempt to amend Section 17406 to add a reference to “financing” implies Section 17406, as it reads now, does not require “financing.” Further, the rejected amendment was stated in the **disjunctive**, suggesting financing **of** construction is not required for a valid Section 17406 transaction. *Los Alamitos*’ analysis of Section 17406, and the Legislature’s attempt to amend it, is directly contradicted by the conclusion reached in the Opinion that a “financing component” is required under Section 17406.

Review should be granted to resolve the inconsistent interpretations of Section 17406 from the Fourth and Fifth Appellate Districts.

For the foregoing reasons, review should be granted.

Respectfully submitted,

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Davis v. Fresno Unified School District, et al.
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