ORBACH HUFF SUAREZ + HENDERSON LLP

Attorneys at Law

Suite 575
1901 Avenue of the Stars
Los Angeles, CA 90067
310 788-9200 · PHONE
310 788-9210 · FAX
www.ohshlaw.com

Suite 1630
1901 Harrison Street
Oakland, CA 94612
510 999-7908 · PHONE
510 999-7918 · FAX

Suite 800
501 W. Broadway
San Diego, CA 92101
619 564-4130 · PHONE

Suite 1100
600 Anton Boulevard
Costa Mesa, CA 92626
714 795-3200 · PHONE

File Number
4498.001

July 31, 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*, Case No. S 227786**
Coalition for Adequate School Housing'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 Coalition for Adequate School Housing ("C.A.S.H.") requests review to be granted of *Davis* v. *Fresno Unified School District,* Case No. S 227786 (the "Opinion" or "Op.").[1]

C.A.S.H. is a statewide trade association of California school districts and private consultants that serve those school districts. C.A.S.H. was formed in 1978 to promote, develop and support state and local funding for California school district construction. C.A.S.H. membership contains over 1,500 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 that are in the school facilities industry. C.A.S.H.'s school district members represent 93 percent of

[1] To avoid repetition, C.A.S.H. joins in the petitions for review of Fresno Unified School District and Harris Construction Company, Inc, as well as the letter requesting review submitted by the Los Angeles Unified School District.

the pupils in California and have the greatest need for funding of new classrooms and modernization and repair of old schools.

California has approximately 1,000 school districts and 10,000 school campuses. Those campuses contain classrooms, laboratories, libraries, gymnasiums, cafeterias, multipurpose rooms, play fields and other educational facilities. Those school districts' elected governing boards require access to all available financing and construction delivery options to provide quality educational facilities in extremely diverse geographic and demographic locations. Notwithstanding the foundational decision of this Court in "Serrano 1" (*Serrano v. Priest* (1971) 5 Cal. 3d 584) and subsequent statutory changes that modified school financing, vast differences in wealth per student persist in support of capital project funding, which creates a circumstance of have and have-not school districts in California.

The Opinion limits the use of Education Code section 17406 and creates a conflicting interpretation of Government Code section 1090. Both of these results would take lease-leaseback procurement out of the hands of many school district governing boards that find proven value in that procurement method.

I. <u>The Opinion Found that a Complicated Long-Term Financing is the Only Type of Lease Permitted Under Section 17406.</u>

A school district can enter into many types of leases in addition to leases pursuant to Education Code section 17406, including the following:

- A 30-day lease, without complying with any other requirements, pursuant to Education Code section 17480.
- A 3-month lease for property that cannot be used for school purposes, pursuant to Education Code section 17481.
- A joint-occupancy lease pursuant to Education Code section 17515, et seq.
- A joint-use lease pursuant to Education Code section 17527, et seq.
- A joint-use, fee producing lease pursuant to Government Code section 5956, et seq.

These structures are not exclusive. "[T]the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established." (Educ. Code § 35160.)[2]

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[2] This authority is intended to be very broad:

> "(a) The Legislature finds and declares that school districts … have diverse needs unique to their individual communities and programs. Moreover, in addressing their needs, common as well as unique, school districts … should have the flexibility to create their own unique solutions.
> (b) In enacting Section 35160, it is the intent of the Legislature to give school districts … broad authority to carry on activities and programs, including the expenditure of funds for programs and activities which, in the determination of the governing board of the school district … are necessary or desirable in meeting

There is no provision in Section 17406 that requires a long-term, lease financing of construction projects. Although Section 17406's language is unambiguous, the Opinion states the following:

> "The fact that the same results could have been achieved under an alternate, simpler contractual arrangement leads us to consider why the Legislature chose a ***complicated*** lease-leaseback structure for builder-financed construction. The answer ***appears*** to be related to (1) a constitutional provision that prohibited counties, cities and school districts from incurring any indebtedness or liability exceeding the amount of one year's income without the assent of two-thirds of its voters and (2) the California Supreme Court's determination that leases do not create an indebtedness for the aggregate amount of all installments, but create a debt limited in amount to the installments due each year. (See *City of Los Angeles v. Offner* (1942) 19 Cal.2d 483)." (Op. 11, emphasis added.)

The Opinion states the following as support for that conclusion:

> "Our view that obtaining a new source of school financing was the primary purpose of the lease-leaseback provisions in sections 17400 through 17425 is supported by *Morgan Hill Unified School Dist. v. Amoroso* (1988) 204 Cal.App.3d 1083, which described former sections 39300 through 39325 (the predecessors of §§ 17400-17429) as authorizing a "method for financing school construction." (*Morgan Hill, supra,* at p. 1086.) Similarly, the Attorney General referred to former sections 39300 through 39305 as a construction funding method. (62 Ops.Cal.Atty.Gen., *supra,* at p. 210.)" (Op. 14.)

The *Morgan Hill* opinion considered whether a school district could issue a supplemental lease financing without voter approval, a decade after the voters approved the original financing. (*Morgan Hill* at 1087.) The Attorney General opinion considered the use of voter-approved bond funds after the passage of new financing authority. (62 Ops.Cal.Atty.Gen. 209, 211 (1979).) Neither discussed Section 17406's predecessor statute specifically[3] and neither support the conclusion that Section 17406 requires a "complicated lease-leaseback structure" that must consider the constitutional debt limit or whether the indebtedness might violate the *Offner* line of cases. Contrary to the conclusion in the Opinion, an "alternate, simpler contractual arrangement" exists and can be done under Section 17406. A simple six-month lease term that pays a portion of financing should satisfy 17406's language and the District would not have to consider long-term debt requirements or *Offner*. That structure would appear to not satisfy the Opinion, while being within a school district's authority to determine the level of complication to incur in a Section 17406 construction agreement.

> their needs and are not inconsistent with the purposes for which the funds were appropriated. It is the intent of the Legislature that Section 35160 be liberally construed to effect this objective."
> (Educ. Code § 35160.1.)

[3] Former Educ. Code § 39305.

C.A.S.H.'s school district members range from well-funded districts to severely-financially impacted districts. There is no precise one-size-fits-all contractual, lease, or financing structure that works across the board. School districts that choose to utilize Section 17406 as its delivery method should not be forced into a long-term financing structure unless the governing board members, in public meetings, determine that type of financing is essential to achieve the school facility needs identified as necessary for educating the pupils of that district.

II. The Opinion Does Not Allow for School District Payments to be for Construction and for Lease Payments.

The Opinion finds fault in the fact that the school districts payments under the Section 17406 contract were payments for construction:

> "Consequently, the substance of the payment terms in the Facilities Lease is that of compensation for construction, not payment for a period of use of the facilities. Moreover, the payment terms support the allegation that Contractor did not provide any financing to Fresno Unified under the Facilities Lease. Thus, the payment terms and the lack of financing support the allegation that the Facilities Lease was not a genuine lease." (Op. 22)

The Fifth District does not allow for the payments to be for the construction and for the use of the facility. But school districts are not prohibited from making payments that would satisfy the dual purpose of Section 17406, which specifically states that the lease "requires the lessee … to construct … buildings" for the school district. (*See* Educ. Code § 35160.)

III. The Opinion Determined That a Conflict of Interest Under Government Code Section 1090 May Have Existed for a Consultant to the District.

The Opinion concluded that, "the term 'employees' in Government Code section 1090 encompasses consultants hired by the local government." (Op. 40.)

Review should be granted because that conclusion is in direct conflict with: (1) the Third Appellate District's opposite conclusion in *NBS Imaging Systems, Inc. v. State Board of Control* (1997) 60 Cal.App.4th 328 (*review denied*) ("*NBS*"); and, (2) the plain meaning of Public Contract Code section 10365.5 as well as the Legislative Counsel's opposite conclusion when advising the Legislature on the enactment of Public Contract Code section 10365.5. C.A.S.H. and its members have a strong interest in the resolution of the conflict created by the Opinion and its direct impact on billions of dollars of construction services provided to hundreds of California school districts.

A. *NBS Imaging Systems* Specifically Discusses and Declines to Apply Government Code Section 1090 in the Same Circumstance, but the Opinion did not Consider It.

In *NBS,* the Third Appellate District, when considering the applicability of Public Contract Code section 10365.5 in a challenge to a consultant's contract, was also asked to consider the application of Government Code section 1090. The *NBS* Court stated at footnote 13:

> "Among other things, NBS cites a different conflict of interest statute, *Government Code section 1090*, apparently assuming one conflict of interest statute is the same as any other. However, *Government Code section 1090* applies only to specified public officers and employees and thus has no application to this matter. (See *People v. Honig (1996) 48 Cal. App. 4th 289, 313-314 [55 Cal. Rptr. 2d 555].*)" (*Id.*, at 338.)

Despite the direct conflict of conclusions whether "employee" under Government Code section 1090 includes consultants, *NBS* is not addressed by the Opinion.

B. The Enactment of Public Contract Code Section 10365.5 Reveals the Scope of Government Code Section 1090, but the Opinion did not Consider It.

Public Contract Code section 10365.5, entitled "Proscription against submission of bid for provision of services or procurement of goods by entity awarded consulting services contract," is part of the State Contract Act, and provides:

> (a) No person, firm, or subsidiary thereof who has been awarded a consulting services contract may submit a bid for, nor be awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract.
>
> (b) Subdivision (a) does not apply to any person, firm, or subsidiary thereof who is awarded a subcontract of a consulting services contract which amounts to no more than 10 percent of the total monetary value of the consulting services contract.
>
> (c) Subdivisions (a) and (b) do not apply to consulting services contracts subject to Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

Subdivision (a) enacted a new law to prohibit consultants from having a financial interest in contracts that are linked to a previous contract with the same consultant. But if "employees" includes "consultants" for Government Code section 1090 purposes, then Section 10365.5 would be superfluous. This necessarily begs the question: why did the Legislature enact the proscription of Section 10365.5, subd. (a) in 1990

given it had already amended Government Code section 1090 twenty-seven years earlier to broaden its scope to include "employees?" As discussed below, this question was answered by Legislative Counsel during the deliberative process of the bill.

Subdivision (b) demonstrates that the proscription against "financial interests" under Government Code section 1090 is not absolute. Instead, the Legislature provided that a consultant may be financially interested in any contract, so long as the value of the contract does not exceed 10% of the related original consulting services contract. This is important here because, if consultants are to be included within the definition of "employees" in Government Code section 1090, then this Subdivision (b) would be completely incompatible with the "remote interest" exception of Section 1091.

Subdivision (c) directly contradicts the Opinion. Reading both Government Code section 1090 and Public Contract Code section 10365.5 so as to give meaning to both, the contracts subject to Government Code section 4525 (architects, engineers, construction project management, etc.) made pursuant to the State Contract Act are exempt from Government Code section 1090 prohibitions. Otherwise, Government Code section 1090 and Public Contract Code section 10365.5 cannot be harmonized.

Reading Public Contract Code section 10365.5 with Government Code section 1090, the Legislature has proscribed the activities of consultants in making contracts with the state pursuant to the State Contract Act. The Legislature has not applied this proscription to all public agency contracts.[4] Therefore, the Section 10365.5 prohibition does not apply to consulting contracts made by school districts and other local agencies. Government Code section 1090 controls this situation, but the Opinion has taken an incompatible proposition of law by including consultants as part of "employees" under Government Code section 1090.

C. Whether Consultants Were Covered in Government Code Section 1090 Was Considered by the Legislature.

The legislative history of Public Contract Code section 10365.5 reveals the Legislature's consideration of the same question undertaken by the Opinion. In particular, the author of the bill asked the Legislative Counsel opinion on the following:

> "Does any provision of state law prohibit a private firm which contracts with a state agency for consulting services in connection with the development of a capital outlay plan for the construction and operation of a veterans' home from thereafter contracting with the agency for the construction and operation of the home?" (Ops. Cal. Legis. Counsel, No. 26011 (Jan. 25, 1990) (Assem. Bill No. 3285) State Contracts: Consulting Services; Legislative History, Author's File, p. 27.)

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[4] The Public Contract Code is organized into several sections. General provisions applicable to all public works contracts are found in Sections 100-9203. Specific provisions related to public works contracts with the state are found in Sections 10100-19102. Thereafter, specific provisions applicable to the various local public agencies of the state, including school districts are found in Section 20100 *et seq.*

The opinion of the Legislative Counsel was as follows:

> "There is no provision of state law which prohibits a private firm which contracts with a state agency for consulting services in connection with the development of a capital outlay plan for the construction and operation of a veterans' home from thereafter contracting with the agency for the construction and operation of the home." (*Id.*)

This opinion of Legislative Counsel was attached to each of the legislative digests during committee deliberations.

Moreover, the bill as originally drafted did *not* contain any of the language in Subdivision (c). The California Legislative Council of Professional Engineers as well as the California Council of Civil Engineers and Land Surveyors opposed the bill raising the same kind of practical concerns C.A.S.H. is concerned about here. These groups highlighted that it is often within the best interests of the public to have a consultant perform both planning related services as well as services related to the plan's implementation. The author *agreed* and added Subdivision (c) to clarify that the provisions of the bill "do not apply to contracts with … construction project management firms."

D. <u>California School Districts and Their Consultants Need This Review to Resolve the Incompatible Propositions of Law Created by the Opinion.</u>

School districts and their governing boards have no interest in engaging in transactions that violate the procurement or conflict of interest laws of the state. Instead, with independent contractors, school districts find true value for the public fisc in having consultants provide continuous service throughout a public works project. For example, independent contractors, such as architects and construction project managers on school construction projects, are often paid fees based upon a percentage of the total project construction costs. If an architect and/or construction project manager recommends approval of additional or different work (commonly a change order) requested by a contractor, they will financially benefit from that recommendation if adopted by the school district. It is simply infeasible to hire a new architect of record or construction project manager on a school construction project each time such a decision is required and to do so would result in tremendous waste of project time and public funds.

Contractors cannot enter into a development agreement under Section 17406 or any type of construction contract until *after* the plans and specifications for a project have been approved by the Division of the State Architect. (See Education Code sections 17297 and 17402; Cal. Code Regs., tit. 24, Part 1, § 4-315, subd. (a).) Yet, it is of material benefit to a school district to have those contractors perform "value engineering," "constructability reviews" and other preconstruction services – it is well established in the industry that such efforts reduce construction costs and project time. Consequently, school districts often engage contractors on a professional services basis to perform value engineering or preconstruction services, and once the plans and specifications are approved, and after following all applicable procurement laws related to construction services, utilize the same contractor for the construction work.

These contractors, architects or construction project managers do not sit in positions to contract *for* the school district in any official capacity like the individual in *Hub City Solid Waste Servs.*, Inc. *v. City of Compton* (2010) 186 Cal.App.4th 1114, and certainly not as an "employee." They remain at arm's length from the school district as independent contractors throughout the course of the public works project, each performing a statutory and/or regulatory defined role that may necessarily include advising on matters related to these projects that could increase or decrease cost.

For the foregoing reasons, review should be granted.

Very truly yours,
ORBACH HUFF SUAREZ & HENDERSON LLP

Philip J. Henderson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, Tessa Hicks, am an employee in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1901 Harrison Street, Suite 1630, Oakland, California 94612.

On July 31, 2015, I served the foregoing document described as: **Letter dated July 31, 2015 to Honorable Tani Gorre Cantil-Sakauye, Chief Justice, and Honorable Associate Justices, Supreme Court of California** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

_X_ (By Mail) I placed the envelope for collection and mailing on the date shown above, at this office, in Oakland, California, following our ordinary business practices.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. It is deposited with the United States Postal Service in a sealed envelope with postage fully prepaid on the same day that the correspondence is placed for collection and mailing in the ordinary course of business. I am aware that a motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing of affidavit.

_X_ (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 31, 2015, at Oakland, California.

Tessa Hicks

Tessa Hicks

SERVICE LIST
Davis v. Fresno Unified School District, et al.
California Supreme Court Case No. S227786
Court of Appeal Case No. F068477
Fresno County Superior Court Case No. 12CECG03718

Kevin B. Carlin Carlin Law Group, A.P.C. 4452 Park Boulevard, Suite 310 San Diego, CA 92116 (619) 615-5325 / Fax (619) 615-5326	Attorneys for Appellant STEPHEN K. DAVIS
Martin A. Hom Jennifer D. Cantrell Atkinson, Andelson, Loya, Ruud & Romo 16870 W. Bernardo Drive, Suite 330 San Diego, CA 92127 (858) 485-9526 / Fax (858) 485-9412	Attorneys for Respondent FRESNO UNIFIED SCHOOL DISTRICT
Matthew R. Dildine Donald R. Fischbach Lynne Thaxter-Brown Steven M. Vartabedian Dowling Aaron Incorporated 8080 N. Palm Avenue, Third Floor Fresno, CA 93711 (559) 432-4500 / Fax (559) 432-4590	Attorneys for Respondent FRESNO UNIFIED SCHOOL DISTRICT
Sean M. SeLegue Ryan M. Keats Arnold & Porter LLP Three Embarcadero Center, 10th Floor San Francisco, CA 94111-4024 (415) 471-3100 / Fax (415) 471-3400	Attorneys for HARRIS CONSTRUCTION CO., INC.
Anthony N. Kim Briggs Law Corporation 99 East "C" Street, Suite 111 Upland, CA 91786 (909) 949-7115 / Fax (909) 949-7121	Attorneys for Amicus Curiae KERN COUNTY TAXPAYERS ASSOCIATION
James Richard Traber Fagen Friedman & Fulfrost 520 Capitol Mall, Suite 400 Sacramento, CA 95814 (916) 443-0000 / (916) 443-0030	Attorneys for Amicus Curiae CALIFORNIA'S COALITION FOR ADEQUATE SCHOOL HOUSING

Hon. Donald S. Black
Fresno County Superior Court
1130 O Street, Dept. 502
Fresno, CA 93721-2220

Clerk of the Court
Fresno County Superior Court
1130 O Street, Dept. 502
Fresno, CA 93721-2220

Clerk of the Court
Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721