

Court reverses decision on Fresno Unified's controversial contract to build Gaston school

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A Fresno County Superior Court decision involving two of the city's biggest-name public and private players — Fresno Unified School District and Harris Construction Co. — has been reversed, calling into question a controversial construction deal the district made for Rutherford B. Gaston Middle School.

[The ruling by the 5th District Court of Appeal](#), filed Monday, means the case could go back to Superior Court, where a judge could take up whether Fresno Unified properly used a method of financing construction called lease-leaseback when it built the southwest Fresno school.

Richard Spencer has come under attention in an appellate court ruling. | CRAIG KOHLRUSS Fresno Bee file photo

Also at issue is whether Richard Spencer, owner of Harris Construction, had a conflict of interest when he took the bid on the \$36.7 million school that opened last fall. Stephen Davis, a principal at Fresno-based Davis Moreno Construction Inc., alleges that Spencer was hired by Fresno Unified as a consultant on the Gaston project before he was actually awarded the construction bid.



The appellate court doesn't tackle the conflict-of-interest question. But the court does say Davis has grounds to press the issue in Fresno County Superior Court.

The court also makes it clear that corporate consultants like Spencer, not just elected officials and government employees, are subject to state conflict-of-interest laws.

"What I was most impressed with in this appellate court opinion was the level of analysis and detail this appellate court went to," said Kevin Carlin, Davis' attorney. "This is a significant public interest issue and I think it's a big win for taxpayers because it clarifies integrity in the process." Carlin said he and Davis are weighing whether they'll request a new case in Fresno County Superior Court. Davis did not return phone messages from The Bee.

\$36.7 million cost of building Rutherford B. Gaston Middle School, which opened last fall

School officials had little to say about the decision on Tuesday. The district's legal counsel is still reviewing the 42-page decision, Fresno Unified Superintendent Michael Hanson said.

Trustee Carol Mills said she's asked the school board to discuss the decision as soon as possible in closed session. Board President Cal Johnson and Trustees Christopher De La Cerda and Brooke Ashjian said they had not yet read the decision and were waiting to receive more information during that closed-session conversation.

"Personally I have not been a fan of lease-leaseback and ... believe in the lowest responsible bidder (method)," Ashjian added.

Spencer did not return several phone messages left by The Bee.

Lease-leaseback

The method called lease-leaseback differs from the traditional competitive process that public agencies typically use to bid out big construction projects.

Instead of choosing the lowest bidder, the process allows school districts to hand pick a general contractor.

The original intent behind the method was to give cash-poor school districts a way to finance school buildings.

For a small amount, typically \$1, a school district would lease to a developer the land where the school was to be built. The developer would pay all the up-front costs to construct the school. The school district would sign a lease with the developer for possibly several years, time it would use to pay back the negotiated price of construction. At the end of the lease the school district would own the building.

The process has drawn critics like Davis, who say the method avoids competitive bidding and unfairly gives certain companies a leg up. Former Trustee Michelle Asadoorian has also criticized lease-leaseback and called out Harris Construction as an example of how the method can be abused.

Even so, Fresno Unified and school districts across California have engaged in lease-leaseback in recent years as a way to lock down a guaranteed maximum price and streamline construction work.

But sometimes, as in the case of Gaston Middle School, school districts pay back the developer by the time the school is constructed. In the case of Gaston, the school was paid for through the \$280 million Measure Q bond. The district never “leased” out the building after it was built, but had the cash in hand to pay back the developer right away.

That’s a problem, Davis and his attorney argued.

Fresno Unified might call it a “lease,” but that doesn’t make it one, Carlin said.

“You can’t enter into a lease that is a sham or a subterfuge to avoid other obligations, and that’s really what the district was doing here,” Carlin said. “They were calling it a lease-leaseback. But in reality, it was structured as a traditional design, bid, build project.”

The appellate court agreed.

The terms of the lease agreement with Harris Construction were mostly just a list of construction costs, the court wrote. The way the lease was written also made it clear that Harris Construction was never acting as a true landlord. And Fresno Unified never occupied the building like a tenant would, since it paid off the lease as soon as construction was completed.

“We conclude the terms in the facilities lease regarding the construction, payment, use, occupancy, possession and ownership of the new facilities adequately support Davis’ allegation that the arrangement is not a true lease that provided financing for the project,” the court wrote.

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Kevin Carlin, attorney for Davis Moreno Construction

Why is this interesting?

Carlin said that if a trial court judge sees it the same way, and the lease is voided, Harris could be on the hook to pay Fresno Unified back the millions it cost to build Gaston Middle.

The school is already built. But the [1942 Supreme Court case Miller vs. McKinnon](#), which concluded public agencies are owed back money they pay through an illegal contract, sets precedent, he said.

His client isn't seeking any payment, Carlin said, but that, "all monies paid (to Harris Construction) gets paid to the public agency. That's what we've been fighting for."

Conflict of interest

The appellate court also dives into California's Political Reform Act of 1974, which bars public officials from using their position to benefit financially.

Since Davis alleged Spencer had an earlier contract with Fresno Unified, one where he was asked to consult on the Gaston Middle project before he was officially hired to construct the school, the court decided to weigh whether Spencer could be subject to the Political Reform Act.

Did Spencer use his influence as a consultant to snag the Gaston Middle construction project?

The three-member court never answers this question. But they did carefully pick through the Political Reform Act and what it means for those who contract with public agencies.

The court says corporate consultants are considered "public officials" in the sense that the reform act described.

And they say Davis could bring a conflict of interest claim against Spencer in the future if he and his attorney decide to try the case again in Superior Court.

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