

Fresno Unified asks state Supreme Court to review lease-leaseback case

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Fresno Unified School District trustees want the state Supreme Court to review a controversial lease-leaseback deal deemed illegal by an appellate court last week.

The school board on Friday voted 4-1-1, with one absence, during a special closed session meeting to ask the Supreme Court to review a 5th District Court of Appeal opinion that found Fresno Unified illegally used an exception to competitive bidding when it awarded a deal to build Rutherford B. Gaston Middle School in southwest Fresno.

Trustee Brooke Ashjian was the lone no vote and trustee Carol Mills abstained. Trustee Luis Chavez was present via phone during the meeting but absent for the vote. Board President Cal Johnson, and trustees Valerie Davis, Christopher De La Cerda and Janet Ryan voted yes.

The vote came a day after the Fresno builder who's snarled in the legal battle with the district and Harris Construction Co. urged board members to end their fight against his case.

Stephen Davis, a principal at Fresno-based Davis Moreno Construction, sent a letter to the trustees and Superintendent Michael Hanson on Thursday asking them not to challenge the appellate court decision.

The decision last week put Fresno Unified in hot water over using a method of awarding construction projects called lease-leaseback. The case looked at whether the \$36.7 million Gaston Middle building deal with Harris Construction was a true lease-leaseback, an alternative to giving the project to the lowest bidder.

Under the method, which was initially used by small or cash-poor districts to finance school buildings, a district is allowed to lease to the developer the land where the building is to go up. The developer pays to construct the school, then the district "leases back" the building until it has paid down the cost of construction.

The three justices who wrote the decision said the Gaston Middle deal was illegal: it was never a true lease-leaseback, they said, since Fresno Unified paid off the project as soon as it was completed. The district never actually leased the building, they said.

Critics including Davis call the deal a sham, and a way to award Harris Construction the project without going through the time-consuming process of collecting bids. Harris has been awarded other Fresno Unified projects through lease-leaseback, including a \$35.2 million project in 2014 to renovate Bullard High.

The school board met with the district's legal counsel during the special closed-door meeting on Friday afternoon to discuss the case. After nearly three hours behind closed doors at the district's downtown Fresno office, the board took a vote. The trustees did not open the board room doors to report the decision, in violation of the state's open meetings law.

Hanson later apologized to The Bee for the locked doors via Twitter.

He couldn't say much about the board's decision since it was made in closed-session, only that the majority voted on a recommendation made by the district's legal counsel.

Hanson also said that the appellate court's opinion doesn't prevent the district from using lease-leaseback in the future, but that some changes may need to be made.

“Without any guidance from the court, (we’re trying) to figure out what we can do to not have something like this happen again,” he said. This is a conversation districts across California will need to have, but he said everyone is trying to “find their way in the dark.”

The district had a few other options. It could have done nothing or asked the Court of Appeal to reconsider its opinion. Another option was to ask the Supreme Court to de-publish the case, which means the appellate court opinion wouldn’t set precedent or bind any lower courts to use its legal interpretation.

Davis and his attorney Kevin Carlin says the district had another choice, too: the district could join Davis’ side.

Why would school trustees do that?

In his letter, Davis says that if the district keeps fighting the case and ultimately loses, the contract with Harris Construction will be invalidated.

California Supreme Court law dating back to 1942 puts contractors on the hook to pay back to public agencies any taxpayer dollars spent on an illegal contract, Carlin said Friday.

In short: Harris Construction would need to write Fresno Unified a check for \$36.7 million if Davis wins.

“If Fresno (Unified) were to continue fighting and prevail, they would win themselves out of \$36 million,” Carlin said.

Davis says in his letter that it doesn’t make sense to spend one more penny on legal counsel when the district could get back the money it spent building the school. The district’s legal costs total about \$117,000 so far.

“How much more money is the district going to pay these attorneys to continue to oppose my efforts to return \$36.7 million to the district?” he wrote.

After hearing about the board’s vote, Carlin said, “I can understand how the contractor may want to do that, but why would the district ever want to spend another dollar trying to do that?”

Ashjian and Mills both declined to discuss their votes. But Ashjian said that during the meeting he did call for an outside investigator to probe the district’s use of lease-leaseback. It’s a matter of safeguarding taxpayer dollars, he said.

“I want to look at the policies and procedures Fresno Unified has in place, starting with the Gaston project all the way up to the current one, to make sure we are within the bounds of the law legally, and the spirit of the law and the letter of the law.”

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