

SUPREME COURT OF THE STATE OF CALIFORNIA

Stephen K. Davis  
Plaintiff and Respondent

v.

Fresno Unified School District, and  
Harris Construction Co., Inc.

Defendants and Appellants

No. S266344

Court of Appeal  
No. F079811

After a Published Decision by the Court of Appeal,  
Fifth Appellate District

**APPELLANT HARRIS CONSTRUCTION CO.'S  
ANSWER TO AMICUS CURIAE BRIEFS OF  
CALIFORNIA ASSOCIATION OF BOND OVERSIGHT  
COMMITTEES  
AND  
HOWARD JARVIS TAXPAYERS ASSOCIATION**

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## ARGUMENT

The amicus briefs of the California Association of Bond Oversight Committees (hereafter, “Oversight Brief”) and the Howard Jarvis Taxpayers Association (hereafter, “Jarvis Brief”) both claim that a “yes” answer to this Court’s question would leave taxpayers with too short a time in which to file a lawsuit challenging the validity of a lease-leaseback contract.

Both briefs assume that the public would receive notice of the contract only after the contract is formally entered into (the act that would trigger the 60-day limitation in Government Code § 53511 and Code of Civil Procedure § 863).

This assumption is incorrect. In fact, a school district will provide the public with information about any pending lease-leaseback contract *well before* any contract is actually signed by the parties.

This is exemplified by what happened in the instant case. Indeed, for over *three years* prior to commencement of construction, the public was apprised that Gaston Middle School was slated for construction via the lease-leaseback method.

Fresno Unified duly notified the public — in advance — of each of the following acts:

On **April 29, 2009**, at a public meeting with its agenda published, Fresno Unified’s School Board released a Facilities Master Plan. The Plan noted that in 2007, the School Board had formed a committee consisting of public representatives and FUSD staff, which held over 20 public meetings to develop the plan and recommendations. (See page 2 of the Plan.) At page 64, this Plan refers to a “New Southwest Middle School” (which became the Gaston school), with a preliminary construction cost estimate of \$33 million — based on a “Lease/Leaseback” construction contract. See [https://facilities.fresnounified.org/wp-content/uploads/4-23-09\\_FUSD\\_MP\\_Final\\_Rpt.pdf](https://facilities.fresnounified.org/wp-content/uploads/4-23-09_FUSD_MP_Final_Rpt.pdf).

On **June 16, 2010**, the School Board approved an update of the Facilities Master Plan, calling for a new Southwest Middle School, with a proposed funding source of “Stimulus + New Bond.” The preliminary cost estimate was \$30 million. See <https://facilities.fresnounified.org/wp-content/uploads/6-16->

[10\\_Bd\\_App\\_Updt\\_Fac\\_Mstr\\_Plan.pdf](#). (The eventual cost was \$36 million, not much more than the earlier \$30 million prediction.)

In **November of 2010**, Fresno voters were provided with Measure Q, a bond issue that expressly mentions “Carver” Middle School as a school that could benefit from the bond proceeds. (Carver was later torn down. The new Gaston school was built on the site.) See <https://facilities.fresnounified.org/wp-content/uploads/11-2-2010-Measure-Q-Ballot-Full-Text.pdf>.

On **March 9, 2011**, the School Board issued a Request for Qualifications for Lease Leaseback services. The Request was published in the Fresno Bee (<https://facilities.fresnounified.org/wp-content/uploads/RFQ-No.-110327.pdf>).<sup>1</sup>

On **August 24, 2011**, the School Board adopted Resolution 11-05, authorizing Fresno Unified to issue

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<sup>1</sup> Fresno Unified thereafter released a bidders list for RFQ No. 110327, which included Davis Moreno Construction. The president of Davis Moreno is Respondent Stephen K. Davis.

bonds to fund construction of the Gaston school. See <https://facilities.fresnounified.org/wp-content/uploads/August-24-2011-Adopt-Resolution-11-05-Issuance-and-Sale-of-General-Obligation-Bonds-Measure-K-Series-G-Issuance.pdf>.

On **January 25, 2012**, the School Board approved agenda Item A-8, a contract to demolish existing structures for new southwest middle school. See <https://facilities.fresnounified.org/wp-content/uploads/January-25-2012-Approve-Award-of-Bid-121113-Structural-Demolition-and-Land-Clearance-for-New-Southwest-Middle-School-Phase-1.pdf>.

On **May 23, 2012**, the School Board approved a contract with Harris Construction Co. for a pre-construction services agreement for Phase 2 of the Gaston project. See [https://facilities.fresnounified.org/wp-content/uploads/20120523\\_Resolution11-21.pdf](https://facilities.fresnounified.org/wp-content/uploads/20120523_Resolution11-21.pdf).

On **May 23, 2012**, Fresno Unified released the Site Lease for Gaston Phase 1. See <https://facilities.fresnounified.org/wp-content/uploads/Gaston-Middle->

[School-Phase-1.pdf](#). Phase 1 pertained to the construction of site improvements such as earthwork, site electrical and plumbing, soil remediation, and demolition of Carver Academy Middle School.<sup>2</sup>

On **September 26, 2012**, the School Board adopted Resolution 12-01, approving the lease-leaseback contract with Harris Construction Co. for the construction of the Gaston Middle School. This was Phase II. See <https://facilities.fresnounified.org/wp-content/uploads/September-26-2012-Adopt-Resolution-12-01-Authorizing-the-Execution-of-Lease-leaseback-Agreements-for-Construction-of-Rutherford-B.-Gaston-Sr.-Middle-School-Phase-II.pdf>. (Plaintiff Davis has challenged only Phase II.)

Thus, beginning on April 29, 2009, and continuously through the issuance of the lease-leaseback contract to Harris on May 24, 2012 — *three and a half years later* — the public was kept well-informed that Fresno Unified was planning to build the new middle school through a lease-leaseback construction project. That was plenty of time to prepare a lawsuit challenging the

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<sup>2</sup> Thus, actual construction activities were going on for almost 6 months before Davis filed its complaint, on November 20, 2012. Davis did not challenge Phase 1.



validity of the project. And these communications to the public were supplemented by the actions of Fresno Unified's "Citizen Oversight Committee" (formed pursuant to Education Code § 15282(a)). In fact, the January 24, 2012, draft minutes of the Citizens Oversight Committee for Measures K and Q, item 4.a., bullet 5, expressly refers to the new Southwest Middle School. See <https://operational.fresnounified.org/wp-content/uploads/12Jan24-DRAFT-minutes.pdf>.

The Legislature has expressly directed Citizen Oversight Committees to keep the public informed about school boards' expenditures of money for school construction. See Education Code § 15278(b): "The purpose of the citizens' oversight committee shall be *to inform the public* concerning the expenditure of bond revenues. The citizens' oversight committee shall actively review and report on the proper expenditure of taxpayers' money for school construction." Emphasis added. And Education Code § 15280 provides: "All citizens' oversight committee proceedings shall be open to the public and notice to the public shall be provided in the same manner as the proceedings of the governing board of the district. The citizens' oversight committee shall issue regular reports on the results of

its activities. A report shall be issued at least once a year.

Minutes of the proceedings of the citizens' oversight committee and all documents received and reports issued shall be a matter of public record and be made available on an Internet Web site maintained by the governing board of the district.”<sup>3</sup>

And the bylaws of Fresno Unified’s Citizen Oversight Committee specify the Committee’s duties to monitor the District’s financial decisions and keep the public informed:

## **Section 2: PURPOSE**

The purpose of the Committee is *to inform the public* at least annually concerning the expenditure of proceeds of the bonds which were approved by the voters at an election held on November 8, 2016 (the “Measure X Bonds”) and proceeds of the bonds which were approved by the voters at an election held on March 3, 2020 (the “Measure M Bonds”). [Emphasis added.]

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<sup>3</sup> Education Code section 15282(a) provides that the citizens’ oversight committee must be comprised of 7 members including someone involved in the business community and “[o]ne member [...] active in a bona fide taxpayer’s organization.” The legislature has thus encouraged and even mandated broad public participation by the persons tasked with overseeing the expenditure of bond funds.

### **Section 3: DUTIES**

To carry out its stated purpose, the Committee shall perform the following duties:

- 3.1 ***Review Expenditures.*** The Committee shall review quarterly expenditure reports produced by the District to (a) ensure that proceeds of the Measure X Bonds and the Measure M Bonds (collectively, the “Bond Proceeds”) are expended only for the purposes set forth in the respective ballot measures; and (b) ensure that no Bond Proceeds are used for any teacher or administrative salaries or other operating expenses.
- 3.2 ***Annual Report.*** An annual report on behalf of the Committee shall be presented (“Annual Report”) at a public meeting of the Board in January of each year for the prior fiscal year. The Annual Report shall include the following:
  - (a) A statement indicating whether the District is in compliance with the requirements of Article XIII A, Section 1(b)(3) of the California Constitution with respect to the expenditure of the Bond Proceeds; and
  - (b) A summary of the Committee’s proceedings and activities for the preceding year.

## Section 4: AUTHORIZED ACTIVITIES

4.1 **Activities.** In order to perform the duties set forth in Section 3.0, the Committee may engage in any of the activities which are authorized under Section 15278 of the California Education Code (the “Education Code”), including any of the following authorized activities:

- (a) Receive and review copies of the District’s annual independent performance audit and annual independent financial audit required by Article XIII A of the California Constitution.
- (b) Inspect school site facilities and grounds for which Bond Proceeds have been or will be expended, in accordance with any access procedure established by the Chief Operations Officer.
- (c) Review the District’s efforts to maximize Bond Proceeds in ways designed to: (1) reduce costs of professional fees or site design; (2) encourage joint use of core facilities; or (3) involve cost-effective and efficient reusable facility plans.

See <https://operational.fresnounified.org/wp-content/uploads/BYLAWS-Amended-November-19-2020.pdf>.

These actions are not atypical. *All* school boards are required to post their agendas for public viewing. *Each* school district is supposed to have a Citizen Oversight Committee that reviews the district's financing and reports to the public.

And every instance of school construction involves a long process with multiple steps — from initial approval of a financing mechanism (such as bonds), through several interim decisions, to final approval of the construction contract. This process normally takes several years. Each of these steps requires school board approval, so each step will be communicated to the public via the board's agenda.

The Oversight Brief, at page 12, asserts that “[o]nly the most fortuitous of discoveries of improprieties or violations of the law by such citizens’ oversight committees could be legally challenged within the narrow validation time frame even though those challenges would have no effect or impact on the already completed bonds or public financing.” This supposedly “narrow validation time frame” fails to mesh with what actually happens in the real world — and what happened in the current case. The public was given more than *three years* of opportunity to review this project and decide whether to prepare to challenge it.

And, as we explained in our Opening Brief and Reply Brief, it is simply not true that the challenge to the lease-leaseback contract “would have no effect or impact on the already completed bonds.” If the challenge causes the project to be delayed beyond the three-year period specified by the IRS, the bonds could lose their tax-exempt status — a possibility that would effectively prevent the district from using tax-exempt bonds as a source of financing school construction.

In sum, the two amicus briefs fail to show that taxpayers who might decide to challenge the validity of a lease-leaseback project have too little time to do so.

Respectfully submitted,  
Moskovitz Appellate Team

Date: September 17, 2021

/s/ Myron Moskovitz  
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## CERTIFICATE OF WORD COUNT

I hereby certify that the attached ANSWER TO AMICUS CURIAE BRIEFS, including footnotes, contains 1,764 words, according to the word count indicator on my Microsoft Word program.

Date: September 17, 2021

/s/ Myron Moskovitz

By: Myron Moskovitz  
Attorney for Appellant  
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**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

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Supreme Court of California

Case Name: **DAVIS v. FRESNO UNIFIED SCHOOL DISTRICT**

Case Number: **S266344**

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9/17/2021

Date

/s/Myron Moskovitz

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