

# CLIENT NEWS BRIEF

## Another California Appellate Court Opines On Lease-Leaseback Construction

An appellate court has ruled that a lease-leaseback (LLB) contract without competitive bidding was legally enforceable. In *McGee v. Balfour Beatty Construction, LLC, et al.* (Apr. 12, 2016) 2016 Cal.App.Unpub. Lexis 2626, a California appellate court rejected the holding of *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, that competitive bidding was required for an LLB contract unless additional non-statutory contract terms were included. However, the *McGee* decision agreed with *Davis* that a third party had standing to sue regarding the LLB contractor's potential conflict of interest. Unfortunately, the *McGee* court elected not to publish its decision, meaning that it cannot be cited by other courts as legal precedent. Lozano Smith filed an amicus curiae brief with the *McGee* appellate court on behalf of the California Association of School Business Officials (CASBO).

As in *Davis*, the plaintiffs in *McGee* alleged that the LLB contract documents were not genuine leases, but instead were a "subterfuge" to avoid competitive bidding. However, unlike *Davis*, the appellate court in *McGee* held that the plain language of the LLB statute (Education Code §17406) only required that the school district own the land, that the lease be for purposes of construction, and that the title vest in the school district at the end of the school term. The court held that the plaintiffs' "efforts to engraft additional requirements – such as the timing of the lease payments, the duration of the lease, and the financing – are not based on the plain language of the statute." This in effect repudiates the *Davis* case.

In short, the *McGee* court declined to "rewrite the [LLB] statute." It relied heavily on *Los Alamitos Unified School District v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222, which held that Education Code section 17406's exception from competitive bidding was valid.

*McGee* also focused on whether the taxpayer plaintiff had standing as a third party to allege a cause of action for conflict of interest under Government Code section 1090 (as held in *Davis*), or did not have such standing (as held in another recent case, *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679). The appellate court held that the plaintiffs had standing since the present case was a validation action like *Davis*, and since a prior Supreme Court case (on which *Davis* relied) implicitly gave standing to third parties. In addition, the appellate court held that the plaintiffs' allegations that the LLB contractor acted as an officer or employee of the District when performing pre-construction services were sufficient to let the cause of action proceed to trial.

What does the *McGee* decision mean for school districts? Since it is not binding precedent, it merely provides additional perspective on certain LLB issues, but this perspective highlights the ongoing uncertainty surrounding LLB. The appellate courts have not agreed on LLB and what contract terms are required, or on the standing of third parties to sue regarding an LLB contractor's conflict of interest and the application of conflict of interest laws to private contractors. The California Supreme Court dodged this issue by

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April 2016  
Number 25

denying review of the *Davis* case. There is yet another LLB case pending in another appellate court (*California Taxpayers Action Network v. Taber Construction Inc., et al.*), in which Lozano Smith also filed an amicus brief on behalf of CASBO. The hope remains that clarity will yet come out of these divergent cases.

One or more parties may request reconsideration, publication, or Supreme Court review of the *McGee* decision. If not reconsidered by the appellate court or reviewed by the Supreme Court, the *McGee* action would move forward in the trial court solely on the conflict of interest cause of action. However, the final judgment cannot be predicted, and may yet be appealed.

If you have any questions about the legality of LLB and which appellate court decisions may apply to your project, or about other project delivery methods, please contact one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).

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