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Lozano Smith

ATTORNEYS AT LAW

2001 North Main Street, Suite 500 Walnut Creek, California 94596
Telephone: (925) 953-1620 Fax: (925) 953-1625

MEMORANDUM

PRIVILEGED & CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

DATE: August 20, 2019 **CLIENT/MATTER:** 738-602
TO: Oakland Unified School District Board
CC: Jody Talkington, Senior Director of Strategic Projects
Tim White, Deputy Chief of Facilities Planning & Management
FROM: Harold M Freiman
Kelly M. Rem
RE: Talking Points Regarding Ability of Board to Limit Scope of 7-11 Committee

On June 26, 2019, the Board of Education approved Resolution No. 1819-0247, which directed the 7-11 Committee to limit its initial consideration of surplus properties to five specified vacant or underutilized properties. The following summarizes the reasoning why a school board may limit the scope of a 7-11 Committee's review in this manner. Attached are also bullet points in power point format.

No court has specifically addressed this issue in a published opinion. The process of focusing the 7-11 Committee's scope of review on certain properties is common. For example, Dublin Unified School District, San Carlos School District, Napa Valley Unified School District, San Jose Unified School District, among others, have all engaged in such a practice, and none of the aforementioned districts have been challenged. The 7-11 committee is a creature of Board authority – it has no charge beyond that given by the Board, particularly where there is no express statutory authority to the contrary.

1. Statutory Authority

Education Code section 17390 uses broad, general language in instructing the 7-11 Committee's process, supporting an argument that the Education Code leaves room for the Board to determine the best method to achieve the statute's purpose.

Education Code section 17390 states:

{SR379523}

The school district advisory committee shall do all of the following:

- (a) Review the projected school enrollment and other data as provided by the district to determine the amount of surplus space and real property.
- (b) Establish a priority list of use of surplus space and real property that will be acceptable to the community.
- (c) Cause to have circulated throughout the attendance area a priority list of surplus space and real property and provide for hearings of community input to the committee on acceptable uses of space and real property, including the sale or lease of surplus real property for child care development purposes pursuant to Section 17458.
- (d) Make a final determination of limits of tolerance of use of space and real property.
- (e) Forward to the district governing board a report recommending uses of surplus space and real property.

The applicable law indicates that the 7-11 Committee shall establish a priority list of use of surplus space. It does not refer to "all space," or otherwise indicate that all surplus space must be considered simultaneously. Because the language used in the statute is broad and general, it supports an argument that the Education Code leaves room for the Board to determine the best method to achieve the statute's purpose.

There is a counter-argument that subsection (b) requires the 7-11 Committee to review all potentially surplus properties within the District simultaneously, which could be interpreted as requiring a priority list of all eighty-seven properties at one time. Given the possibility of multiple interpretations, rules of statutory construction are instructive.

The legal rules of statutory interpretation support the Board's authority to focus the scope of the 7-11 Committee's review.

When interpreting a statute, "[t]he primary rule of statutory construction is that the courts should attempt to ascertain the intent of the Legislature and construe a statute so as to effectuate its purpose." (*People v. Superior Court (Arthur R.)* (1988) 199 Cal.App.3d 494, 498.) Despite the general rule that ambiguity is a condition precedent to interpretation, the literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute's legislative history, appear from its provisions considered as a whole. (*California Insurance Guarantee Assn. v. Liemsakul* (1987) 193 Cal.App.3d 433, 439.)

As discussed in further detail below, the intent of the Legislature was to increase community input and involvement. In requiring the 7-11 Committee to review all eighty-seven properties at issue simultaneously, community involvement would be impeded and the Legislative intent would be frustrated. Input on each specific site would lose meaning if the Committee had to consider all properties at once. The result would be absurd, requiring the 7-11 Committee, as well as the community as a whole, to review and evaluate data pertaining to eighty-seven properties before any action could be taken by the Board.

2. Legislative Intent

The stated legislative intent behind the statute's enactment is to provide for increased community input and involvement. The community is more likely to have a meaningful opportunity to participate if the scope of property to be studied is focused.

The intent of the Legislature in enacting Education Code sections 17387, *et seq.*, states:

It is the intent of the Legislature that leases entered into pursuant to this chapter provide for community involvement by attendance area at the district level. This community involvement should facilitate making the best possible judgments about the use of excess school facilities in each individual situation.

It is the intent of the Legislature to have the community involved before decisions are made about school closure or the use of surplus space, thus avoiding community conflict and assuring building use that is compatible with the community's needs and desires.

(Ed. Code, § 17387.) Focusing the scope of properties affords the community a greater ability to review the pertinent issues and comment publicly if desired, because the community will not be forced to review, track, and investigate all eighty-seven properties simultaneously. Additionally, those living near, or in the case of in-use sites, attending a particular facility, can best have the opportunity to become involved and weigh-in if they know the facility nearest them is being studied.

Requiring the 7-11 Committee to review all eighty-seven sites at one time is not in the best interest of community involvement; it would undoubtedly hinder the process, thus wholly obstructing the community's need to lease or dispose of the property in an orderly and timely manner. The result would be an excess of data to be examined, and issues to consider. An individual community member would have difficulty participating in a meaningful way, in order to "...facilitate making the best possible judgments about the use of excess school facilities in each individual situation." (Ed. Code, § 17387.) If the community were required to review eighty-seven properties at one time, its work would be diluted. Furthermore, no action could arguably be taken until each of the eighty-seven properties had been reviewed, and a final determination had been made.

3. Permissive Education Code

The Constitution and Education Code grant school district boards broad authority in the decisions such boards make to carry out their duties.

In 1972, the California voters amended the California Constitution. As a result, as long as a statute does not prohibit a school district's particular program, activity, or action, and that program, activity, or action is consistent with the purposes for which school districts are established, it can be undertaken. This is commonly referred to as the "permissive education code." Specifically, the Constitution states:

The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner

which is not in conflict with the laws and purposes for which school districts are established.

(Cal. Const. art. IX, § 14.) In 1976, the Education Code was amended to reflect the Constitutional amendment. The Education Code now states:

On and after January 1, 1976, 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.

(Ed. Code, § 35160.) The Education Code plainly states that the school districts are permitted to take any action not expressly prohibited by law, and in conformance with the district's purpose. The Education Code thus grants broad authority to districts to determine the manner in which they execute their duties. Therefore, Education Code section 17390 does not expressly prohibit the 7-11 Committee from limiting its initial consideration of surplus properties to five specified vacant or underutilized properties, and therefore such action is allowed.

4. Board Resolution

Grounded in the authority discussed above, on June 26, 2019 the Oakland Unified School District Board of Education approved Resolution No. 1819-0247, which charges the Committee with review of specific sites. The Board approval was in conformance with applicable laws, including the Brown Act.

Courts grant school district boards broad discretion in decisions relating to the ways in which boards carry out their duties. "In determining whether an abuse of discretion has occurred, a court may not substitute its judgment for that of the administrative board, and if reasonable minds may disagree as to the wisdom of the board's action, its determination must be upheld." (*Manjares v. Newton* (1966) 64 Cal.2d 365, 370-371). A decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." (*Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 106.) (*See also Mooney v. Garcia* (2012) 207 Cal. App. 4th 229, 235.) In sum, the Board's action would be reviewed by a court under a deferential standard, and could only be overturned if were found to be an abuse of discretion, which is a high bar to meet.

Conclusion

The Education Code section governing the 7-11 Committee process uses language that is both broad and general, allowing room for interpretation based on statutory intent. The stated legislative intent behind the statute's enactment is to provide for increased community input and involvement. The Constitution and Education Code instruct that districts may take action in furtherance of their purpose, so long as such action does not directly conflict with the express law.

We believe that focusing the scope of the 7-11 Committee's review to five locations is permissible for a variety of reasons, including: (1) such approach does not directly conflict with

the applicable Education Code section; (2) such an approach furthers the stated legislative purpose of the Education Code; and (3) school district boards are granted broad authority by the courts in the decisions they make to carry out their duties.