Whether early termination provisions of particular school board lease are inconsistent with requirement that lease's term be equal to or longer than useful life of repairs or improvements to real property is question of fact to be determined by school board's counsel on a case-by-case basis and not by Attorney General. Requirement indicates legislative intent to assure that public will receive benefit of expenditure of public funds by school board, as lessee, to improve property.

The Honorable Linda T. Puller

Member, House of Delegates

November 11, 1996

You ask whether, pursuant to § 22.1129(B) of the Code of Virginia, a school board has the authority to expend funds for capital repairs and improvements on real property it leases, as lessee, where the lease provides for its termination at any time for certain named events beyond the control of the school board.

Section 22.1129(B) grants a school board the power to lease property "either as lessor or lessee." As amended in 1973, § 22.1129(B) further provides:

As lessee of real property, a school board shall have the power to expend funds for capital repairs and improvements on such property, if the lease is for a term equal to or longer than the useful life of such repairs or improvements.

You advise that since 1969, the Fairfax County School Board has used and operated three schools established by the Secretary of the Army on the army post of Fort Belvoir in Fairfax County. The three schools are now obsolete and need replacement. The Department of the Army proposes to lease a portion of Fort Belvoir to the school board for constructing and operating a new public school. The lease provides for a 50-year initial term and a 25-year renewal term. The school board is to design, construct, operate and maintain the new school.

You advise that of the estimated $15.34 million construction cost, the Army and the United States Department of Education will pay $13.8 million and the school board will pay $1.54 million. The school board anticipates that it will also have to expend approximately $15 million for future renovations over the expected life of the property. You ask whether, consistent with § 22.1129(B), the Fairfax County School Board may expend the funds when the lease permits the Secretary of the Army to terminate the lease at any time in the event of national emergency, base closure, deactivation or substantial realignment, or in the interest of national defense, and contains no provision for reimbursing the school board for any of its unamortized capital investment in the new school upon such termination.

Opinions of the Attorney General issued before the 1973 amendment to § 22.1129(B) conclude that a school board lacks authority to expend funds on property not owned by the school board or on property held under a short-term lease. The 1973 amendment alters these conclusions, subject, however, to the express qualification that the lease be for a
term "equal to or longer than the useful life of such repairs or improvements."

The qualification indicates a legislative intent to assure that, in expending public funds to improve property not owned by a school board, the public is to receive a benefit equivalent to the expenditure. A lease may contravene this intent if, although technically for a term equal to or longer than the useful life of the repairs and improvements, the lease may be terminated at an earlier date at the discretion of the lessor for reasons outside the board's control.

It is my opinion that early termination provisions may create a significant risk that the public will not receive the benefits of the expenditure and, accordingly, may violate the requirement of § 22.1-129(B). Whether the early termination provisions of a particular lease actually are inconsistent with the requirement is a question of fact to be determined on a case-by-case basis. Opinions issued by the Office of the Attorney General pursuant to § 2.1118 are restricted to interpretation of issues of law. In addition, where a question raises issues of fact, rather than questions of law, Attorneys General historically and consistently have declined to render official opinions deciding or interpreting such facts.

1See Ch. 220, 1973 Va. Acts 259 (amending § 22161, predecessor statute to § 22.1129). The 1995 Session of the General Assembly substituted the words "if the lease" for "provided that the lease," which was part of the last sentence added in 1973 to former § 22161. See Ch. 513, 1995 Va. Acts 780, 781.


41973 Va. Acts, supra, at 259 (part of last sentence added to predecessor statute to § 22.1129(B)).

5See also 1974-1975 Op. Va. Att'y Gen. 91, 9293 (county's expenditure of funds to improve school owned by city is for public purpose and does not necessarily conflict with constitutional prohibition on extending credit for private purpose; in formulating actual arrangement, however, consideration should be given to relative cost of contemplated improvements and benefits to be received by city).

6Counsel to the school board is the appropriate person to advise the board and, in this instance, has determined that the early termination provisions in the lease create an impediment to the school board's authority pursuant to § 22.1129(B) to agree to expend the funds. This decision is consistent with prior opinions of the Attorney General concluding that the powers of a school board are limited to those expressly granted or necessarily implied and are to be narrowly construed. See Op. Va. Att'y Gen.: 1984-1985 at 89, 90; 1979-1980 at 302, 302; 1973-1974 at 309, 310. I have no basis on which to disagree with this decision.