

educational facility. So, for that reason alone, I certainly think this is a Bill that should pass. Thank you, Mr. Speaker.”

30. The legislative history as well as a plain reading of the statute clearly indicates that the purpose of the exception is to allow a district that is *already leasing* an *existing* building either to buy the building (“purchase ... of any such building”) or to make life safety improvements to the building while it is being leased (“construction, or building of any such building”).

31. Neither the legislative history nor the plain reading of the statute supports the District’s position here: that the District can have a building constructed from scratch or “built to suit” without referendum, merely by calling its transaction a “lease”.

V. Even if the District’s Proposal Is Otherwise Permissible, the Lease Exception Requires that a True Lease Exist; the Proposed Lease is Not a True Lease

32. The Lease Exception to the referendum requirement (“no referendum shall be required if the purchase, construction, or building of any such building (1) occurs *while the building is being leased by the school district*”) does not apply because the District’s proposed financing arrangement is not in fact a lease under Illinois law.

33. A purported lease transaction is in fact a naked borrowing/financing arrangement, and not a lease within the meaning of Illinois law, where the purported tenant retains all incidents of ownership. In fact, the Lease is deliberately structured to maintain sufficient incidents of ownership such that the Project will remain exempt from taxation.

34. The purported Lease contains the following provisions (references are to sections of the Lease):

- a. The lease term commences prior to the date the leased premises are constructed (2.02);
- b. The lease can be cancelled if Lease Certificates are not issued (2.03);
- c. The lease cannot be cancelled even if the building is not completed or does not comply with the Plans and Specifications (2.03a), if the building is destroyed or

condemned (2.03b), if there is a title defect interfering with the use of the property (2.03c), if the Lessor fails to perform all or any of its obligations (2.03d), or if the Lessor lacks authority to enter into the lease (2.03e);

- d. The Lessee's obligations continue after the term of the lease until payment of the Lease Certificates (2.04);
- e. The building can be purchased for \$1 at lease end (2.05, 13.01);
- f. The District as tenant covenants that the lease payments are a general obligation of the District (3.03a), to appropriate funds to make such payments (3.03b), and to continue to make payments even if the Lessor defaults (3.03d);
- g. The District is obligated to borrow money to pay the cost of constructing the project, such that the purported landlord has no funds at risk (4.06);
- h. The building although purportedly "owned" by the Lessor, is intended to be treated as actually owned by the District (7.01a).
- i. The District as tenant can alter or improve the building without Lessor's consent (8.01);
- j. There is no rent abatement if the building is destroyed (9.01a);
- k. The District as tenant can without Lessor's consent grant easements and rights of way on the property (11.03a), or sell, abandon, or destroy the property (11.03b); and
- l. The District retains ownership of the underlying land, and title to the building "is vested in the Lessor solely for the purposes of effectuating the terms and provisions of this Lease" (13.02), *e.g.*, there is no intention to transfer beneficial ownership.

35. Indeed, as stated in an email from Bob Lewis to William Farley on February 15, 2018, "The District will own the land on which the Building is constructed through the term of the lease, and will have full and absolute right to use, control and possess the Building throughout the lease as if the District owned the Building." A copy of the email is attached as **Exhibit K**.

36. If the "Lease Exception" wording in the School Code is to be given any meaning at all, it must refer to an arrangement that is actually a lease. The statute advisedly uses the word "leased" rather than "built to suit" or equivalent words. The purported Lease is simply a build to

suit purchase agreement with the title of “lease” but none of the substance. The purported Lessor bears no financial risk and has no real obligations. The only risk falls upon the purchasers of the “lease certificate” bonds – and upon the District taxpayers such as Plaintiffs who must pay for them. The taxpayers aren’t even guaranteed a building that is completed, or complies with life safety requirements (Lease, section 2.03).

VI. Current Status

37. On information and belief the Board has obtained architectural plans and taken other substantial steps toward the construction of a new school, pursuant to the 2018 Resolution, and has expended and/or committed to expend tax monies toward the cost thereof.

38. On information and belief the Board intends to issue Lease Certificates to finance all or a substantial portion of the cost of the building of a new school.

39. On information and belief the Board has not sold its Lease Certificates and has not commenced construction work on the building of a new school.

40. The financing of the Lease and the building of a new school are subject to the requirements set forth in 105 ILCS 5/19-3 and 5/10-22.36 of the School Code, and particularly the requirements for obtaining the consent of the voters of the District through a referendum.

41. Contrary to the requirements of Sections 5/19-3 and 5/10-22.36, the District has not submitted the question of whether the District should issue debt to fund the building of a new school to the voters of the District as required by law.

42. The proposed actions of the Board to issue the debt, enter into the Lease, and commence construction are *ultra vires*.

43. The failure of the Board to submit the question to a referendum violates the due process rights of the Plaintiff and of the voters of the District who have twice spoken on this matter through binding referenda.