

CHESHIRE EAST COUNCIL

CABINET MEMBER FOR FINANCE & ASSETS

Report of: Property Services Manager
Subject/Title: School Land Transfers
Date of Meeting: 20th June 2016
Portfolio Holder: Councillor Peter Groves

1.0 Report Summary

- 1.1 On 1st August 2011 authority was delegated to the Assets Manager and Borough Solicitor by the then Cabinet Member for Prosperity to transfer School Sites to the relevant Academy Trusts once an Academy Order had been issued by the Secretary of State.
- 1.2 Since this authority was granted, it has become apparent that the process requires further documents to be completed. This need arises both as part of the conversion process and from time to time throughout the duration of the proposed academy leases to address issues which were not contemplated at the time of the conversion process.
- 1.3 Approval is therefore sought for the purposes of authorising all educational disposals and the transference of the appropriate rights interests and liabilities that the Council is required by various legislative provisions to address in connection with changes of school status or the provision of new school sites. This also will allow the Council to deal with routine licences to which consent must contractually be given and other minor matters that will inevitably arise from time to time in consequence of the retained interests of the Council as freeholder without the need to seek an individual authority on each occasion.
- 1.4 The purpose of this report is to generate efficiencies in the reporting process on land matters relating to Academy Transfers, where the Council is constrained by legislation and the opportunity to make a different decision is limited.
- 1.5 To seek delegated authority for the Property Services Manager to agree heads of terms for and the Director of Legal Services to agree the full terms of and execute and complete:
 - all academy leases and foundation transfers of school sites or parts of school sites so far as required by law;
 - all documentation reasonably necessary to effect the transfer of assets upon change of school status (from community, community special, voluntary controlled or voluntary aided to foundation, trust or Academy);

- any documentation reasonably necessary to protect the Council's interests in connection with those properties (including, but not limited to, licences for works, subletting, assignments, wayleaves, easements, leasebacks, or energy efficiency improvements);.
- Preparing executing and completing associated procedures (where appropriate) necessary for HMRC and Land Registration purposes and for protection of the Council's interest(s); and
- any other documentation that is reasonably necessary in connection with a change of school status that deal with matters other than land transfers (including, but are not limited to; Commercial Transfer Agreements, Shared Use Agreements and Novations or Assignments of existing contracts with third parties).

2.0 Decision Requested

2.1 It is recommended that:

In relation to the following, authority is delegated (a) to the Property Services Manager to negotiate the terms with relevant parties (and, if appropriate, the referral of matters where agreement has not been reached to the Office of the Schools Adjudicator (the OSA)) and (b) to the Director of Legal Services to agree the full terms of and execute and complete:

- 2.1.1 Leases granted under the provisions of the Academies Act 2010 as amended by the Education Act 2011 (and any statutory amendment or re-enactment thereof) of land used wholly or mainly for the purposes of the relevant converting school.
- 2.1.2 Statutory transfers of school land made under the School Standards and Framework Act 1998 as amended by the Education and Inspections Act 2006 and in accordance with the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007 and the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013.
- 2.1.3 All academy and foundation agreements related to matters other than land transfers. These include but are not limited to Commercial Transfer Agreements, and Novations or Assignments of Existing Contracts and other ancillary documents necessary to effect the transfer of rights interests and liabilities in connection with the change of status of a school.
- 2.1.4 Any ancillary legal documentation including, but not limited to, (and before or after any lease relating to Academy transfers), licences for investigations or works, wayleaves and easements.
- 2.1.5 The taking of any steps necessary for the protection of any interest(s) of the authority in connection with any matter authorised by this delegation.

2.1.6 Following the completion of an academy lease to enter into appropriate formal licences giving Landlord's consent where it is proper to do so and in accordance with the terms set out in the relevant academy lease.

2.2 It is further recommended that authority is delegated:

2.2.1 To the Executive Director of Economic Growth & Prosperity to include within the relevant academy lease, if required, any property on the relevant school site, which prior to such lease is not used for education purposes but will become so following the grant of that lease (and which may or may not be subject to arrangements for leasing back or shared use agreements);

2.2.2 To the Executive Director of Economic Growth & Prosperity to take a lease back of any part or entering into an agreement for the shared use of any facilities or any part of a school site that is included in an academy lease or is statutorily transferred under the provisions set out above that is used or is intended to be used temporarily or permanently for use or uses other than solely by the school and for which it is desirable that local authority use or community use continues after the school has changed status; and

2.2.3 To the Property Services Manager to negotiate the terms with relevant parties and the Director of Legal Services to agree the full terms of and execute and complete all documentation reasonably necessary to give effect to any decisions of the Executive Director under paragraph 2.2.1 and/or 2.2. above.

3.0 Reasons for Recommendations

3.1 There is an opportunity for the Council to generate efficiency in dealing with this category of land. Taking this decision on a blanket basis reduces the administrative burden on the service, creating the opportunity to increase tempo on the delivery of the service, which is currently stretched. It also will allow the service to be more reactive to change as each transfer progresses, reducing time, risk and cost of each transfer.

3.2 There is very limited opportunity for the Council to influence the transfer of land relating to Academy conversion and as a result, without a blanket approval each element relating to a conversion would require the relevant approval to be completed and this significantly increases the administrative burden to the Council that it has little control over. In granting an approval, the decision taker is constrained by the pieces of legislation as set out in this report and therefore does not have the freedom of action to make an unencumbered decision.

3.3 There is an opportunity to consider the detail of Academy Transfer and consider this asset rationalisation strategically. This report brings together all the separate property elements that are required as part of an Academy Transfer so they can be considered in the round rather than on a piece meal

basis and therefore gives decision takers the opportunity to consider the area covered in the report strategically rather than in operational detail.

- 3.4 Officers are seeking this delegated authority as an update the original approval granted in 2011 to expedite the procedures and avoid the repetition of the need to seek authority in respect of disposals of educational property in accordance with the provisions set out above, the associated documentation and in respect of those subsequent requests for landlord's consent to which consent cannot reasonably or contractually be withheld.
- 3.5 Under the provisions of the School Standards and Framework Act 1998 as amended by the Education and Inspections Act 2006 and the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007 and the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013 the local authority has a statutory obligation to transfer certain land provided by it (whether in connection with a new school or the enlargement of an existing school or the conversion to foundation status) for the purposes of controlled, foundation and aided schools in accordance with the relevant statutory provision.
- 3.6 When there are proposals that a school converts to academy status and an Academy Order is issued by the Secretary of State under the provisions of the 2010 Academy Act as amended by the Education Act 2011, the local authority is requested by the Secretary of State to grant a 125 year academy lease of the school premises at a peppercorn rent to the proprietor of the new academy. The Department for Education has an expectation that an academy lease of land vested in the Council and used wholly or mainly for the purposes of the relevant school will be granted substantially in the form of a model academy lease drawn by it (subject only to site specific amendments). If the parties fail to agree on the extent of land to be comprised in an academy lease the parties must refer the matter to the Office of the Schools Adjudicator. The extent of such land may not be immediately clear if there are other uses of school premises or facilities and where it is desirable that any use by the local authority or community is preserved. If the local authority fails to engage in the process or there is an unacceptable delay in the process, under the provisions of the Academies Act the Secretary of State may make a scheme or direction invoking the Academies (Land Transfer Schemes) Regulations 2012 in relation to the land compulsorily transferring school land or a scheme or direction transferring any existing interest, rights or liabilities for the purposes of an academy.
- 3.7 On a change of school status it is necessary to look at the individual circumstances and at other documentation that is necessary to ensure the necessary rights and liabilities is in place following conversion. When a transfer or lease of educational land is proposed it is also necessary for other assets in use by the school to be transferred, for example classroom and office equipment. If there are recent or ongoing contracts for works at converting schools there may be a need to novate building contracts.

- 3.8 Once an academy lease has been completed under its terms, the tenant must seek landlord's consent if it proposes to alter the premises or underlet the premises or to assign the lease in certain circumstances. The DFE permit local authorities to negotiate certain very limited terms of the model form lease, and, in particular the tenant's ability to underlet. The Council presently permits underlets in accordance with the model form user provisions that are for a term certain of not more than seven years and are excluded from the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954. Requests for Landlord's consent to underlet part of the premises on this basis must be forthcoming and not unreasonably withheld or delayed.
- 3.9 The current model form of academy lease also stipulates that a tenant must seek Landlord's consent if it wishes make alterations or additions to the premises. The consent must be forthcoming unless such erection, alteration addition or variation will (a) adversely affect the Landlord's statutory obligations as a landlord or as a local authority; and/or (b) such erection alteration addition or variation will have an adverse effect on the structural integrity of any structures on the premises or any part or parts of any structures on the premises; and/or (c) such erection alteration addition or variation will adversely affect the value of the Landlord's reversionary interest in the premises. The delegated power sought will provide the means to deal with licences that fall within the stated criteria and to which Landlord's consent must be forthcoming in a practical manner. The Council must not delay or withhold such consent. Such consent is normally effected by means of the formal grant of a licence setting out any conditions attached to such consent. Specific authority will be sought in respect of those requests for consent that do not fall within the stated categories.
- 3.10 Prior to progressing each transfer or lease, the Property Services Manager will consider the disposal in the context of verifying the land appropriate to be transferred or leased in the context of paragraph 3.6 above. Where there are likely to be negotiations regarding the extent of land to be included in a transfer or lease the Property Services Manager will consult with the Portfolio Holder and other relevant stakeholders, and give consideration to the Council's position on the potential disposal of any asset and assess the effect of the release of part or the whole of such asset. Where a school seeks the inclusion of property that is not in use wholly or mainly for school purposes or agreement is not reached with the converting school, the Director of Legal Services may take appropriate steps to protect the Council's position by the referral of the matter to the OSA. Upon receipt of the decision of the OSA any land that is required to be transferred or leased will be included in the relevant disposal. Other Assets will not be included (unless de minimis) and a report will be submitted to the Portfolio Holder in the usual way.
- 3.11 The delegated authority sought in this report is to ensure that disposals may be made is in line with legislation and Government guidance and where there are no exceptional circumstances that would permit an alternative course of action to be followed.

4.0 Wards Affected

4.1 All Wards

5.0 Local Ward Members

5.1 All Members

6.0 Policy Implications including - Carbon reduction - Health

6.1 None

7.0 Financial Implications

7.1 Cheshire East Council will cover its own legal and surveying fees associated with these land transfers and any ancillary legal agreements.

8.0 Legal Implications (Authorised by the Director of Legal Services)

8.1 The Localism Act 2011 introduced the General Power of Competence, which allows the Council to do anything an individual can do, provided it is not prohibited by other legislation. These powers have replaced the previous wellbeing powers, however, the use of these powers must be in support of a reasonable and accountable decision made in line with public law principles.

8.2 The Council has the power to dispose of land but if it does so any disposal that is an interest for 7 years or more shall not be made at less than the best consideration that can reasonably be obtained pursuant to s123(2) of The Local Government Act 1972. The Academies Act exempts transfers made by virtue of schedule 1 of that act, as does The School Organisation (Prescribed Alterations to Maintained School) (England) Regulations 2007 and 2013 and s22 Sch3 Pt 3 para 12 of the School Standards and Framework Act 1998 for disposals made for the respective purposes of those provisions.

8.3 Whilst disposals must comply with the European Commission's State aid rules they do not apply in principle for funding of non-economic activities, state education being a good example of an activity not deemed to be "economic".

8.4 If a school is registered as an asset of community value, any disposal land to be held for the purposes of a school as defined in section 4 of the Education Act 1996 (not including independent schools other than those in respect of which Academy arrangements have been entered into by the Secretary of State under section 1 of the Academies Act 2010) is an exempt disposal from

the usual restrictions on disposals of assets of community value by virtue of the Assets of Community Value (England) Regulations 2012 (SI 2012/2421).

8.5 Notwithstanding such powers the Council has a fiduciary duty to the taxpayers and must fulfil this duty in a way which is accountable to local people.

8.6 In disposing of assets the Council must behave prudently to fulfil its fiduciary duty

9.0 Risk Management

9.1 It is perceived that there are no risks associated with the proposals outlined within this report.

10.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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