

DETERMINATION

Case reference: LAN 000037

Applicant: The Governing Body of Upton-by-Chester High School,
Chester

Application: Regarding land and buildings, including a sports
centre at Upton-by-Chester High School

Date of direction: 27 June 2012

Direction

Under the powers conferred on me by regulation 7 of, and paragraph 17 of Schedule 6 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, I hereby direct that the transfer of land at Upton-by-Chester High School from Cheshire West & Chester Council to the Governing Body of Upton-by-Chester High School Trust, consequent upon the School becoming a foundation school, include Areas A, B & C on the attached plan and be accompanied by a revised lease in respect of the Cheshire County Sports Club.

The application

1. The governing body of Upton-by-Chester High School (the school) wrote to the Office of the Schools Adjudicator on 26 August 2011 to request that the transfer of land from Cheshire West & Chester Council (the council) that took place on the School's becoming a foundation school on 1 January 2011 be determined to include the shared use land together with the sports centre.

Jurisdiction

2. Under the terms of regulation 7 of, and Schedule 6 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007 (the Regulations), the prescribed land transferred to the governing body of the school, pursuant to the school becoming a foundation school on 1 January 2011. Failing local agreement within six months of the school becoming a foundation school, either the council or the governing body of the school might apply to the Adjudicator for a direction. I am satisfied that I have jurisdiction to consider this matter under the powers conferred on me.

Procedures

3. In considering this matter I have had regard to all relevant legislation and guidance.

4. I have considered all the papers put before me including:

- a. correspondence from the school's governing body;

- b. correspondence from the council;
- c. correspondence from the Cheshire County Sports Club Ltd (the club);
- d. plans of the site and buildings of the school; and
- e. copies of the lease and management agreement.

5. All correspondence submitted to me following the application has been copied to the council or the school and the club, as appropriate, who have had the opportunity to comment.

6. I have also visited the school, in order to view at first hand the school site and accommodation and the geography of the locality. I arranged an informal meeting on 12 October 2011 attended by representatives of the council and the school. The club had chosen not to be represented at the meeting, but the managing director met the rest of the group for the relevant portion of the site visit. I have considered the representations made to me at that meeting, and subsequent submissions sent by the school, the council and the club.

The application and background

7. The school became a foundation school on 1 January 2011, when a land transfer took place on the basis of law. The council agreed that the eight acre site marked A on the map (Appendix 1) should transfer to the school. This is the site of the current school buildings, car park and tennis court.

8. No agreement had been reached about whether or not two shared use areas (marked B & C on the map) should be included in the transfer and therefore in the formalisation of the transfer. The school argued that they should both be included, but the council resisted that view.

9. The issue is complicated by the fact that use of these two pieces of land (28.69 acres) is shared by the club (a private not-for-profit organisation). It was leased to the sports club by Cheshire County Council under a 40-year lease agreement in January 2009. This lease was inherited by the council from Cheshire County Council in April 2009, as part of Local Government reorganisation.

10. The council is currently seeking legal advice as to whether it can and should challenge the legitimacy of that lease agreement.

11. The site marked B on the map, to the East of the A41, was part of the school land from the inception of the then Upton Secondary Modern School in 1968. At that time, pupils were transported off-site for their sporting activities.

12. In 1975 Cheshire County Council provided a purpose-built recreation centre within the school boundaries on site B, and purchased and developed additional sports facilities on the West side of the A41 (site C), thereby eradicating the need for off-site sports provision. A joint use agreement was agreed in 1977.

13. In April 1994 a formal agreement was reached between Cheshire County Council and the Cheshire County Officers' Sports Club (an unincorporated association, comprising all members of the sports club, many of whom were county council

employees or councillors) together with the school's governing body. The school was given access by legal right to the sports and recreational facilities, which were then available to the sports club when not required by the school. The agreement covered both sites B and C.

14. In 2001, the sports club was incorporated as Cheshire County Sports Club. A lease was signed to run until 2029. There was a parallel management agreement that secured the rights of the school, and made the club responsible for the management and operation of the recreation centre, in return for an annual management fee from the county council.

15. In 2002, a formal joint use agreement was signed between the school and the club, and the school agreed a rental charge equivalent to the relevant part of the school's delegated budget for the purpose together with a small contribution from the governors.

16. In January 2009, the county council agreed a deed of surrender with the club. The lease was then renewed for a 40 year period with no break clause, and it is this lease that is currently in operation and, as stated in paragraph 10 above, the legitimacy of which is being questioned by the council who took office in April of that year.

17. At the time of the visit to the school, the school remained of the view that the two shared use areas should be included in the transfer but the council were resistant to that view. The club was and is on record as supporting a transfer to the school.

18. At the meeting I convened on 12 October 2011 each side aired its views and some of the financial and legal complexities. There was agreement that it would not be unreasonable at least to consider a transfer of the school's historic site (map area B) whilst leaving area C with the council. The council and the school agreed to discuss the issues further to see if they could together furnish terms which both would be content to see reflected in my determination.

19. The meeting between the council and the school took place on 1 November 2011. Notes of that meeting were provided by the school, the substance of which was agreed by the council, albeit with a caveat about the weighting put by the school on certain aspects of the discussions. At that meeting, the school brought forward a proposal that the council transfer all the land to the school and cease its legal challenge of the lease. The school would open its own facilities in order to enhance the community provision. The club would agree to the Management Fee becoming a Commissioning Fee, conditional on the achievement of measurable performance targets.

20. A subsequent email from the council dated 8 November 2011 put forward its own proposal. It reiterated its desire to retain ownership of the shared use land, but would be content that a temporary surrender provision be put into the lease between the council and the club in respect of land identified as being needed by the school to accommodate contractors whilst building work is done on the school site.

21. The school and the club met on 9 November 2011 and discussed both proposals. Subsequent exchanges of emails between them reveal that the council and the school rejected each other's proposal, and that the club was adamant that it would resist both the school's and the council's proposals, indeed any alteration to the lease.

22. On 7 March 2012 the council sent a substantial formal submission to me together with a number of appendices. This additional information had been promised for some time. The school and the club were given some time in order to make considered and detailed responses if they wished. The school did so on 29 March 2012 and the club made its first substantive submission on 13 April 2012.

The view of the school

23. Paragraph 32 of 'The Transfer & Disposal of School Land in England – A Guide for Schools, Local Authorities and the Adjudicator' states: *"The overarching assumption is that except where there is good cause, all the land being used by a school before it proposes to change category should transfer to its governing body or to the trustees of its foundation when its change of category is implemented."* The school maintains that the council have yet to show any "good cause".

24. A school with 1,700 pupils on roll should, according to DfE guidelines hold land within the range of 108,800 m² to 117,600 m². Area A on the plan, which is basically the footprint of the school, is in the region of 32,400 m². Area B, on the East of the A41, would only increase the total school area to 60,700 m² – i.e. 55.8% of the bottom indicative area required. If all the land is transferred, it would be 149,750 m² – 137% of the bottom and 127% of the top of the range.

25. Dividing the shared use land by transferring only Area B to the school, would create major legal complexities, with separate leases and management agreements needing to be agreed, particularly as the school would still need use of Area C.

26. Transferring the whole site to the school would be the most straightforward solution. There would be no need to modify either the lease or the management agreement other than to transfer their ownership from the council to the school. Ownership has already passed from Cheshire County Council to the council.

27. The school will need to develop, improve and possibly enlarge its existing buildings in the not-too-distant future. There is insufficient space on Area A for builders to manoeuvre, even if developments were limited to the existing footprint. It would be unnecessarily complicated to negotiate with the council as landlord and the club as leaseholder to use some of Area B even temporarily to enable building works to take place.

28. Whilst the school is successful, numbers are a matter for constant concern, especially at a time of falling rolls in the area. Governors have projected that over the next four years overall numbers will remain relatively constant, but that a greater proportion of students will be in the 6th form. The governors are working hard to maintain levels of applications, but are having to be concerned about the security of the school's future should there be a need to reduce the number of school places in the locality. They believe that without owning the whole site they could in the future be vulnerable to a judgement of non-viability on acreage grounds.

29. The school does not believe that the council needs the security of ownership. Although it was the previous Cheshire County Council that was responsible, the school points to the 28 year agreement signed in 2002, and the 40 year lease entered into in 2009. The land is therefore effectively tied up for the foreseeable future.

30. The school did express also some concern about possible plans by the council that might affect the school and the club. In 1995 there had been a consultation about creating a new roundabout, parking and entrance to the school on the land marked B on the plan. Although the council representatives confirmed that they had not heard of such a plan being resurrected, the school stated when and from whom they had heard rumours to that effect. The council wrote to the school on 13 December 2011 with “categorical assurance from the Director of Environment and from his Highways team that the scheme referred to is an old scheme and there are no plans to build a roundabout on the main school field. ... as LEA the council has a primary obligation to ensure that the School needs are met ... it is hard to imagine a scheme which would create such an exceptional need that this council would consider compromising its obligation to the School.”

31. The school believes that it has a positive and creative relationship with the club, which works to their mutual benefit. Without what it sees as the complication of a third party (the council), it is confident that mutual priorities and interests could be addressed more easily. The Government’s emphasis on communities seeking to improve the life chances of the most vulnerable would be well served by the partnership of school and club.

32. The school accepts that the council’s political priorities and demands are different from those of the previous County Council. There is now a commitment to encourage more use of sport and leisure facilities by and for the wider community. The school wishes to support this, and argues that provision and use would increase more effectively were the school and club to work together as landlord and leaseholder. For example, they could work together to make the facilities of the whole school site more widely available to the community (e.g. drama/dance studio, school gym and computer facilities).

The view of the council

33. The council states unequivocally that it is a new local authority with a very different approach to that of its predecessor, Cheshire County Council. The County Council was the Local Education Authority with a responsibility to provide appropriate sports facilities for its schools. The council combines county and district functions. It continues to hold responsibility for education as the Local Authority, but it combines that with a wider remit for leisure. Indeed it has identified the transformation of its leisure services as a political priority. It intends to utilise leisure as a means of increasing levels of participation in sport and leisure, reducing health inequalities and improving pathways to excellence for elite athletes. The emphasis will not simply be on providing facilities, but on actively encouraging their use – an ‘active model’.

34. In order to achieve its aims more effectively and efficiently, the council’s preference is to have one single operator to manage all its leisure facilities. It is partly for this reason that the council considers the agreement between the former County Council and the club unsatisfactory.

35. The council is committed to permitting and encouraging the school’s use of the club’s facilities. However, it believes that the balance of activity is in favour of the wider community interest, and that this should be reflected in the ownership of the freehold. The suite of arrangements and agreements that currently govern the tri-partite relationship between the council, the club and the school incorporate, document and

protect the financial obligations of the local education authority to the school and significantly also the community use of the club facilities at the school. These arrangements are working well and it would be wise to allow them to continue.

36. With reference to the size of the site (para 24 above), the council points out that transferring the three areas in their entirety would mean that the school had significantly more land than it needs for curriculum use.

37. The council acknowledges that there would be a problem were the school to need to re-build or enlarge its premises. Land that has been transferred to the school (marked A on the map at Appendix 1) would not be adequate to allow the school or contractors to operate whilst significant building works were undertaken, as they will undoubtedly have to be in the coming years. Following the meeting of council and school representatives, the council suggested on 8 November 2011 a possible way forward. Their suggestion is for a temporary surrender provision to be inserted by the Adjudicator into the lease between the council and the club. Essentially this would be an option that the school could exercise to use some of the land in area B for the purposes of relocating student accommodation and building contractors while its existing buildings are demolished and new ones constructed. This could be exercised as of right and, they argue, be a simple solution to the school's major perceived problem. The council has already given some thought as to legal, practical and financial ways of achieving this, and believe it would "cause the least disturbance to the existing arrangements between the three parties and therefore the least need for compensation from the public purse".

38. The previous and current leases were the result of a balance struck by the County Council between the legitimate needs of the school which were comprehensively protected for the term of the lease and development opportunities for the club. The council argues that the school has more security and certainty for a period until 2047 than most other schools, all the more so with achieving Foundation status.

The view of the sports club

39. The club decided early on not to engage directly with the discussions between school and club. However it subsequently made a submission of rebuttal to the substantial the council submission.

40. On 16 August 2011 the Managing Director wrote confirming the club's full support for the school's case. It holds that a more direct relationship with the school, "free from the complications of a third party involvement" would be in everybody's best interests and would provide a stronger platform from which to develop the facilities for all users and for the community. The school is the single biggest customer of the club and, as such, there are good commercial reasons for wishing to cooperate as fully as possible with the school. This they do.

41. Following the 1 November 2011 meeting between the school and the council, the school consulted with the club again. The club takes the view that the best and simplest solution is for the school to receive the transfer of all the land. The two proposals, one from the school (para 19) and one from the council (para 20) would not be acceptable to the club, nor would a division of the land between the council and the school.

42. The club argues that the council's proposal to insert a clause is fundamentally flawed as the school is not currently a party to the lease, nor is there such a thing as a

'temporary surrender of a lease'. Were the school to become the landlord under the lease and were something like this to be considered the best way of proceeding, then the club is certain that ways could be found of effecting what is needed.

43. The club maintains that it has significantly increased general community use in recent years and has also continued to develop the site. This has never been a condition of a lease, but rather the natural expansion of a very successful operation. The landlord, even one whose policy is the same, has no influence over the direction the club takes so long as it operates within the legal framework of the lease. Over the years no council has questioned the legality of the club's operations.

44. The club formally took over the running of the site in 2002 and has widened and enhanced the provision of sports, leisure and other facilities. It has invested approximately £2.5 million of its own funds since 1990 and has attracted approximately £2 million from external funds.

Consideration

45. Schedule 6 of The Schools Organisation (Prescribed Alterations to Maintained Schools) (England) 2007 sets out some statutory tests to be applied when land is held by the transferor partly for the purposes of the school and partly for other purposes.

- a. Is it possible to divide the land? Already some division has been agreed, in that the council has agreed that the land on which the school buildings are situated (Area A) shall be transferred to the school. At the meeting held on 12 October 2011, the representatives of the council agreed that it would not be unreasonable if the Adjudicator were to make a direction giving the school title to the land forming its historical site (Area B) and they agreed to meet with the school to explore this further. However, whilst each proposed a way of achieving this, there was no agreement.
 - i) The school proposed that the council agreed to transfer the whole site and agree not to pursue a legal challenge to the lease. In return the club would agree to the management fee becoming conditional on the achievement of well-defined and measurable targets – I.e. The management fee would become in effect a commissioning fee. The council did not accept this proposal and subsequently the club refused to countenance a redefinition of the lease and of the management fee.
 - ii) The council offered to retain ownership but, as stated in paragraph 37 above, to accept an insertion by me which would enable the school to use such land as is necessary during the redevelopment of the school buildings "as of right". The school rejected that proposal, as did the club, and the club challenged its legality

So, in the event, no side was prepared to consider a division of ownership of the land. Having considered all the arguments I agree that to divide ownership in any way would create significant additional complexities to the lease and financial arrangements with little or no practical benefit to anybody and the possibility of a souring of relations. So I have concluded that the land should not be divided.

- b. If dividing the land is impracticable, is it possible to determine which party has greatest need for the security afforded by owning the land? There can be little argument that the school will continue to feel a need for such security. The educational world is changing rapidly and schools are increasingly standing independently and having to attract pupils and funding. They will need to look to improve the quality of the educational provision they offer, which will inevitably include buildings together with sports and other facilities. This school is no exception and ownership of the land would be helpful in this regard.
- c. As far as being able to use some of Area B during building work at the school is concerned, the school expects such work to be needed shortly, and is also planning sensibly for such a need. As things stand a solution would have to be negotiated with the Club and with the council, both of whom have promised to be sympathetic to such needs. Were the land to transfer to the school, an agreement would still have to be reached with the club, but only two parties would need to be involved. Either way this does not seem to be an insuperable problem, and the council and the club both confirm their willingness to ensure that such works can happen.
- d. The council acknowledges the school's need for security of sporting provision, and underlines that it has a statutory obligation to ensure that the school's needs for sporting facilities are met. It believes that the school is more secure in that respect over the next 40 years under current arrangements than it would be were the land to be transferred, as they have the resources of the local authority behind them.
- e. However, the council has a political determination to enhance, encourage and increase the public's use of sporting facilities, which it maintains it would be unable to do as effectively were ownership to be transferred to the school. The council plans to use one organisation to develop this strategy across the authority, and this would be thwarted were the land transferred. However, much rests on the formal agreement with the Club, and it is difficult to see how the present lease gives the council any ability to influence the way the club works, and certainly not to give another organisation any control over it. Currently, whether the council or the school is the landlord, the Club for the next 40 years has a formal obligation to give the school sole access to most of the facilities during the school week and Saturday mornings in term time. Whether the council or the school is the landlord, it is in the club's interests to ensure continued and greater use of its facilities. Only if the council succeeds in negating the lease would the situation change. Although this remains hypothetical, were it to happen the school's access to sporting facilities would remain. The council's security of ownership really only becomes significant if there is a major change in the political landscape regarding local government ownership of land or were the school to close. As things stand, whether the council or the school own the land, it remains essentially in some sense in public ownership.
- f. If it is not possible to determine which party's need for security is greater, then the final test is to which will be the major user of the land. Use of the two areas of land in dispute is very largely reserved for the school during

term time. The current management agreement is clear that the school is and will remain a major user of the site. The school “shall be guaranteed sole and exclusive use of parts of the Recreation Centre during core times – Monday to Friday between 9am and 6pm and Saturday mornings 9am to 12 noon during term time”. Areas so available include the sports hall itself together with most of the fields, tracks, courts and pitches. Members of the general public, both individuals and teams, can use the facilities of the club house and the facilities when they are not being used by the school through the sports club. The club is a non-profit making organisation. The council itself is not a ‘user’ of the land in any recognisable meaning of the word. The wider community already have access when the school is not using the facilities, and that access continues to develop.

46. Some other questions need to be addressed.

- a. Educational, school organisation and safety factors. The school has three capital projects currently under consideration. These plans were designed to address issues raised by Ofsted and by the latest condition surveys undertaken by the council and the school. These will certainly involve demolishing and building, and although for obvious reasons no detailed planning has happened, the land available in area A would not provide safe and appropriate access, nor sufficient room to build temporary teaching spaces nor to house building staff. The council and the club both argue that when the time comes they would work together with the school to enable land to be available for this purpose. The school maintains that as landlord they would be in a better position to reach an agreement with the club were they to own the site.
- b. Alternative use of part of the site. There are no current plans by the council, the school or the club to use any portion of the site for anything other than sport, leisure and education. The council has stated unequivocally that earlier plans for a bus park and roundabout are not to be resurrected. Indeed, such ideas as there are would probably involve further development of sporting facilities, and would necessarily be open to public consultation, and would be affected by the fact of the current lease.
- c. Which claim will give greater benefit to school and local community? From the school’s point of view, a transfer of the entire site to its ownership would be of significant benefit, albeit that the club has its 40 year lease. The club states that “quite simply we are passionate about sport. That is why we are proud to be considered one of the North West’s leading sports and social venues where sportsmen and women of all abilities and ages have access to a wide range of top quality sporting and social facilities on their doorstep at a price they can afford. With such affordable rates and members of all ages, we aim to encourage as many people as possible to embrace fitness and well-being.” It points to real growth over the past ten years – growth in participation and numbers, enhancement of facilities, and significant grants being received. The school too has a commitment not just to enhancing the sporting opportunities for its students, but for the whole community. It would argue that in the current climate where schools

are increasingly independent, it is in its interest to be active in making a contribution to the wellbeing of the community it seeks to serve, and to increase participation in sport, leisure and education. The school and the club believe that together they could continue to attract grants and work with partners. The council argues that it has greater resources at its disposal to engage proactively to encouraging wider participation in sport and leisure by the local community, and points to links it is currently developing with private providers. While it might be argued that the limited funds available to local authorities might not readily be spent on land or facilities that they do not own, there is no reason at all why the school and the club could not become active partners in authority-wide projects or partnerships with private providers.

- d. Additional responsibilities facing the school. The council raised some concerns about whether the school has the necessary expertise to fulfil the not inconsiderable extra responsibilities of a landlord. The school responded that, like many other schools, it already has many similar responsibilities and is engaged in a range of other legally contractual situations. It pointed to the range of experience and qualifications of its governing body and many members of staff, all of which were affirmed by Ofsted. The club remarked that in ten years there had been no suggestion of the terms of the lease being broken. There are excellent relationships between school and club based on proximity, the level of day to day contact, and the fact that the school is by far its biggest customer. It would in future be easier to develop the relationship between club and school flexibly were there no third party involved as landlord.
- e. The Council and the wider community. The council has a fiduciary duty to taxpayers and this is a strong reason for seeking to maintain its ownership. It maintains that a transfer of ownership would have an adverse effect upon the wider community and other educational stakeholders. However, as mentioned elsewhere, schools are an integral part of that 'wider community'. The direction taken by this Government is, and by the previous Government was, to encourage schools to greater independence and interdependence, and, through the development of their governance, to make them more rather than less accountable to stakeholders in the local communities. It is therefore difficult to see how a transfer of ownership would adversely affect the wider community.
- f. Legal consequences.
 - i) As has been mentioned in the determination, the council are consulting lawyers about the legality of the agreement drawn up between the county council and the club. I have asked the council to keep me in touch with its considerations on this matter. In its last submission, the council wrote: "The council confirms that the Adjudicator should treat the lease to the Sports Club in 2009 as valid and subsisting for the purposes of considering and issuing any Direction under the adjudication. ... The council therefore acknowledges that the Adjudicator can attribute no evidential weight to the council's concerns regarding the validity of the lease in reaching his decisions on a Direction." The school, the club, and

the council all agree with that position and I believe that I must proceed in that way.

- ii) The legal situation today, therefore, is that the 2009 40 year lease and the management agreements prevail. Were I to determine that the freehold interest of the land held by the council be transferred to the school, then this can be achieved by a simple legal conveyance. The result of the transfer would be that the school steps into the shoes of the council taking on the legal burdens and benefits arising from the 2009 lease. The lease would continue to be in full effect and would not require any consents or renegotiation for it to continue.
- iii) The Management Agreement between the council and the club will in practice continue to prevail. There will need to be a legal opinion as to the precise nature of the agreement so as to determine if it can carry on unamended, as it did when the council took on the responsibilities of the County Council. On the other hand it may be simply amended by a Deed of Variation.

g. Financial consequences.

- i) The council currently pay a management fee to the club which is currently £150,000 in round numbers. The school pays into that the relevant proportion of its delegated budget, currently £60,000 in round numbers, together with a small contribution from the governors. The current rent received from the club is £14,000.
- ii) The council point to Schedule 2.9 of the Agreement between the council and the governing body of the school. "For the avoidance of doubt and the information of the parties the initial governors' contribution has been calculated as an allocation of the costs of the provider attributable to the use by the school of the facilities and services being a time usage allocation of 29 per cent of the overall annual running costs of the provider of its sports and recreational facilities at Upton." The council have said that it would not be right for tax payers to continue to put in their portion of the fee were it to lose the freehold and the community use of the facilities. In consequence it maintains that the school would receive the rental income but would be responsible for the entire management fee.
- iii) The club has responded that from the time that the lease became operational in 2002 quarterly invoices from the club to the council, council committee papers, official minutes of meetings between club and council officials, and other correspondence clearly confirm that the management fee relates to 100 per cent use by the school. I have seen a selection of these papers which bear this out.
- iv) The school has also tried to make sense of the figures. It points out that there is a dichotomy between the council pointing to the school's use of the facilities as 29 per cent whilst the school is currently paying an amount equal to at least 40 per cent of the total

management fee depending on how the sums are done.

- v) It is important to recognise that, although there are no community related contractual terms to be found within the management agreement, even if the council were to lose the freehold, the community use of the facilities would certainly continue and be part of the council's overall leisure and sporting provision for local people.
- vi) If the land were to be transferred and responsibility for paying the entire management fee were to fall on the school then there would need to be a renegotiation with the council regarding the council's funding formula as it applies to the school. Also discussions would need to take place with all parties regarding the contribution that the council, the club and the school could and would make towards the council's leisure and recreation responsibilities and targets for the enhancement and expansion of community provision.

Conclusion

47. Given the range and complexities of arguments on all sides, I find myself returning to paragraph 32 of 'The Transfer & Disposal of School Land in England – A Guide for Schools, Local Authorities and the Adjudicator' quoted above, which states: *"The overarching assumption is that except where there is good cause, all the land being used by a school before it proposes to change category should transfer to its governing body or to the trustees of its foundation when its change of category is implemented."* Put simply, I have to ask whether the council has argued persuasively that there is indeed "good cause" why the land in dispute should not transfer to the school.

48. At its heart, the council's argument is two-fold.

- a. The local authority has various duties in relation to education. It can best fulfil those duties if it retains ownership of the land. While this is undoubtedly true, it does nothing to negate the legislation that grants foundation schools the right to own their own land and requires the local authority to transfer it and vest it in the trustees or governing body.
- b. While the land is being used by the school, it is also being used by the wider community, and the council has a publicly stated political priority to transform its leisure services. "The Authority has established from its inception its intent to utilise leisure as a means of increasing levels of participation in sport and leisure, reducing health inequalities and improving pathways to excellence for elite athletes". To this end it is seeking to have a single operator for all its leisure facilities. Were the current lease to be negated, then this would be the authority's preferred route. As things stand currently, the club holds a 40 year lease. The council believes that the club currently works to a 'passive' model, where community provision is granted by making facilities available for community groups and individuals either on a pay-and-play basis or, in the case of the gym and fitness facilities, to those who pay an annual membership fee plus pay-and-play. Were it to retain ownership, it would

seek as landlord to move the club to a more 'active development' model which addresses the actual need of the community and seeks to reduce barriers to participation. The club points to the terms of the lease and to the fact that it is entirely responsible for its own priorities, strategies and plans. Its partnership with the school is already close and mutually beneficial. Transfer of ownership to the school would make that relationship potentially even more fruitful. It would be happy to work creatively with the local authority in the future too, and believes that this would actually be easier were the continuing threat of legal action to be withdrawn, and were the council not to be the landlord.

49. I am not persuaded by the council's argument that it has shown 'good cause' for not transferring the land to the school. There is strength in the general assertion that where a local authority owns land and facilities it is directly within its power to determine how they should best be used. But the fact of the lease makes such an assertion unconvincing in this case, and I have seen no evidence that the council has in the past put forward any proposals for widening and enhancing sports and leisure facilities to the wider community through the club or the school.

50. Were this land to be transferred to the school, the council would still have two very significant partners who, in their different ways, have commitment to the general thrust of the local authority's aim to increase participation in sport and leisure. Further, given the 40 year lease to the club and, one must presume, the long term existence of the school on its current site, continued ownership of the land by the council would not hold any benefit save a fiscal one.

51. I have considered whether or not to divide the land. Physically that would be straightforward, given that Area B is land that once formed part of the school whilst Area C is over the main road, distinct and separate. However, whilst the possibility was raised both by the school and by the council, each argued a different set of practical and legal proposals, neither of which actually involved a division of ownership. In addition the club was loath to renegotiate its lease and to add complexities to it. Were there to be significant advantages in so dividing the land, then it might be worth entering into the legal and financial complexities that would ensue. I can see no such advantages and so have rejected that as a way forward.

52. So I come to the conclusion that there is no 'good cause' why the land should not be transferred to the school. Indeed, there are significant advantages to the transfer being made and the lease being transferred also. The school has the security that foundation status presumes, and will be free to develop its own educational work over the coming years working always in partnership with the club and with the local community, including the local council. The club will continue to have the security of its lease, albeit in a new relationship with the school each in some sense as landlord and tenant. The council will be able to develop new partnerships with school and club, both of whom in different ways are committed along with the council to encouraging a widening participation in sport and leisure across the community.

53. There will be legal and financial matters to sort out between the council, the school and the club following this determination. These I have outlined above. Hopefully agreements can be achieved relatively speedily and amicably. All parties have an interest in maintaining and further developing good relations not least in their common commitment to enhancing the provision of leisure and sport for those in education and

in the wider community.

Direction

54. Under the powers conferred on me by regulation 7 of, and paragraph 17 of Schedule 6 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, I hereby direct that the transfer of land at Upton-by-Chester High School from Cheshire West & Chester council to the Governing Body of Upton-by-Chester High School Trust, consequent upon the School becoming a foundation school, include Areas A, B & C on the attached plan and be accompanied by a revised lease in respect of the Cheshire County Sports Club.

Dated: 27 June 2012

Signed:

Schools Adjudicator: Dr Stephen Venner

Appendix 1

