

## DETERMINATION

**Case reference: LAN/0054**

**Applicant: Pinchmill Lower School, Felmersham, Bedford**

**Application: Transfer of land from Bedford Borough Council to Pinchmill Lower School, to include the area of land leased by Pinchmill Pre-School**

**Date of direction: 13 August 2013**

### **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 Pinchmill Lower School from Bedford Borough Council to the governing body of the school consequent upon the school becoming a foundation school, shall exclude the area of land leased by Pinchmill Pre-School; and**
- the path adjacent to the school car park which provides pedestrian access to the school and pre-school from the public road shall transfer to the school on condition that the council draw up whatever legal agreement is required to formalise the right of access to the pre-school land using this path.**

### **The application**

1. Pinchmill Lower School (the school) wrote to the Office of the Schools Adjudicator on 2 May 2013 to request that the transfer of land from Bedford Borough Council (the council) to the governing body of the school, that was to have taken place on the school becoming a foundation school on 1 September 2007, be determined to include that land currently leased by Pinchmill Pre-School (the pre-school).

### **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 September 2007. The land was never formally transferred from Bedfordshire County Council at that time. Following unitary changes in April 2009, Bedfordshire County Council ceased to exist and the relevant authority became the council. Failing local agreement within a period of six months from the implementation date, either the council or the governing body might apply to the Adjudicator for a direction. Since no agreement was reached within the prescribed period, and since the school has confirmed its request

that a determination be made by the Adjudicator after the end of this period, I am satisfied that the transfer has been appropriately referred to me and 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.

I have considered all the papers put before me including:

- the referral letter from the school dated 2 May 2013;
- the council's email response dated 20 May 2013 attaching the following documents:
  - a plan of the disputed site dated 13 May 2013;
  - a copy of the lease for the period 17 January 2006 to 29 July 2023 between Bedfordshire County Council and the pre-school;
  - a copy of the memorandum and articles of association of the pre-school; and
  - a copy of the joint letter from the council's Property and Children's Services dated 5 November 2012;
- the school's email response dated 28 May 2013 together with an attached copy of the school's response to the joint letter, dated 8 February 2013;
- the pre-school's response by email dated 13 June 2013 together with a copy of the pre-school's letter to the school dated 22 January 2013;
- the school's response dated 24 June 2013
- the council's summary document dated 4 July 2013;
- the email response from the school by email dated 9 July 2013; and
- the presentation notes used by representatives of the school, pre-school and council at the meeting on 10 July 2013

4. I arranged an informal meeting on 10 July 2013 attended by representatives of the school, the council, and the pre-school, and before that meeting I took the opportunity to visit the school and the pre-school in order to view at first hand the site and the geography of the locality.

5. The correspondence submitted to me following the application has been copied to the council, the school and the pre-school as appropriate. I have considered the correspondence and the representations made to me at the meeting in chronological order.

## **Background to the application**

6. The school is a rural lower school within the authority of Bedford Borough. Part of the school site is occupied by a privately run pre-school that pays a peppercorn rent of £455.04 per annum to the school, but the lease is actually with the council. I note that the lease refers to the "lease of land at Pinchmill Lower School" and that this land had formerly been the site of the school swimming pool which had been dismantled because of financial constraints.

7. The pre-school operates independently on a charitable basis and has existed for 40 years. It opened on this particular site in January 2005 with substantial financial support and goodwill from the local community. The pre-school also attracts children from a wider area, and the children usually then transfer to the school and to another local school. The funds raised to obtain the building were not awarded by the council but came from Lottery funding and donations from the village hall committee, private companies and charitable trusts. The pre-school is located within the boundary of the school site but is fenced off and is entirely separate from the school. Access to the pre-school is by a path adjacent to the school car park which provides pedestrian access from the public road.

8. On 1 September 2007 the school adopted foundation status, and as such, the ownership of the land should have transferred to the school according to the regulations. Although a land transfer took place on the basis of law at that time, no agreement had been reached about whether or not the land leased to the pre-school should be included in the formalisation of the transfer, nor had such agreement been reached in the following six months.

9. It appears that in April 2011 the council informed the school that it would transfer the property to the foundation but that it would retain ownership of the land occupied by the pre-school. The school did not accept that decision and since that date there have been a number of attempts to resolve the issue, but without success. Accordingly, the transfer of land has become a matter of dispute between the school and the council, with the school insisting that the land on which the pre-school has been built should transfer to the school, and the council resisting that view.

10. In an email dated 20 May 2013 the council provided a copy of the lease between the pre-school and the former Bedfordshire County Council, dated January 2006, and explained that after the unitary changes in April 2009, the lease had transferred to the council. The council also provided an updated site plan to amend the version in the lease document, showing changes to the fencing which it said was to remove potential blind spots. Also included was a copy of the pre-school's memorandum and articles of association showing it is an independently constituted organisation, entirely separate from the school.

11. In the same email of 20 May 2013, the council provided a copy of a joint letter from Children's Services and Property Services to the school, dated

5 November 2012. As council officers had last met with the governing body in June 2012 to discuss the proposal to transfer the school site to the governing body, but excluding the site of the pre-school, the purpose of the letter was to provide an update following discussions with local stakeholders in the intervening period. The council had met with the committees of the pre-school and of the village hall, and also with the clerk to the Parish Council, and reported that all discussions had commented on the desire to ensure the future of the successful and independent pre-school for the benefit of the wider community. The council hoped to increase the number of pre-school places for two and three year old children, and that given the views of the local stakeholders, the council saw no reason to alter the proposal to retain the site of the pre-school within council ownership.

12. In the email of 28 May 2013, the school commented that an adequate rationale had not been provided to justify this council's proposal to retain the site of the pre-school within council ownership. The school expressed concern that the land occupied by the pre-school is "an island within the school's boundaries" and that at the end of the current lease, if the local authority had ownership of the land, it could theoretically dispose of it or utilise it for another purpose, but if the school owned the land, that uncertainty would not exist. The school argued that because the pre-school is an island site, access to it crosses the school's land and places a *'theoretical unaccountable risk'* to the children in the school, and there could potentially be child protection issues if the land were to transfer to a third party in the future. So the school wanted to have ownership of the land to mitigate against any such eventuality and were concerned that the council seemed unable to accept the school's real concern and that instead of providing explicit guarantees, the council repeated *'that would never happen platitudes'*. The school emphasised that it has no wish to take over the pre-school; rather it respects the pre-school's independence existence which is of benefit to the school as it recruits children into the reception year almost exclusively from the pre-school.

13. In an earlier letter to the council, dated 8 February 2013, the school explained that it fully endorses the objective and duty of the *council 'to provide a significant number of places for young children in a variety of settings'* but argues that the existence of the pre-school would be *'more secure if the land were to be transferred to the school as its very continuance is essential to the future life of the school'*. However, the letter questioned the appropriateness of the council's consultation with stakeholders and the lack of fairness when compared to the case of another (unnamed) school within the area.

14. As a response to the proposed land transfer, in a letter dated 13 June 2013, the pre-school expressed doubts about the school's intentions and referred to a letter sent previously by the school, dated 22 January 2013, in which the school explained that it wished *'to have the land transferred to the school ... because it is part of the original school site being the site of the old swimming pool; to foster and enhance community cohesion; to maintain control of the site ...for the benefit of the village...as at the end of the current lease the borough could theoretically do anything with the site, potentially*

*causing issues to us as a school; and because we need to ensure the safety of the children... safeguarding is a top priority.* The school offered four 'incentives' for the pre-school to *'keep the school as the land owner'* including waiving the rental charge; a very long lease; continued use of the school facilities; and an "associate" governor position on the school governing body. However, if the pre-school were to prefer the council as the land owner and therefore landlord, then *'none of the above four points would be offered; access to, what is in effect, an island site would need to be seriously considered by the school governing body'*, and as the council *'are legally obliged ...to charge the "going rate" so the rental is almost certain to rise.*

15. The school's letter of 22 January 2013 made clear that it had no wish to see the pre-school closed, or become part of the school, as the pre-school was the school's *'recruitment ground'* and that good, supportive and collaborative relationships would offer a great start for the children in the community in terms of transition between pre-school and the school. However in the response dated 13 June 2013, the pre-school had clearly interpreted the letter as a threat to withdraw access to the school's facilities if the pre-school *'did not agree to their [the school's] terms.... an attempt to browbeat us into submission and seemingly putting their agenda ahead of those of the children we, and in due course, they will serve'*. In fact, the use of facilities by the pre-school children is longstanding and designed to help the younger children's transition into the lower school.

16. In the response of 13 June 2013 the pre-school appreciated that child protection is the prime responsibility of all concerned, but did not understand the school's contention of a *'theoretical unaccountable risk'* as the pre-school has been in situ for the last eight years with no known risk realised in this time. The school has ensured the site is safe and secure and the pre-school felt there was no clear reason why this would change. Although there is a right of way along the side of the school site, many of the parents using this pathway to access the pre-school are current and future lower school parents. Arguably, if there was any risk, it *'would come from the general public who also has access to the village hall on the lower school site along the same pathway'*.

17. The pre-school argued that their site does not have to be an island site as there could be immediate access from the road (subject to any necessary planning permissions) but due to the small size of the site, future utilisation of the site by the council or anyone else would be extremely limited. The pre-school acknowledged that at the end of the current lease it does not have an automatic right of renewal, but as the council has a duty to provide early years education for two, three and four year olds, it was likely that the lease would be renewed as the council would have no other purpose for the use of the land, whereas there was no guarantee that the school would renew the lease. The pre-school also asserted that the implied comparison with another school was *'unfair and usually incorrect'* and that *'individual entities should be considered on their own merits'*. Accordingly, the pre-school judged that the school had *'failed to provide bona fide reasons in favour of the change of ownership'* and as there was no tangible reason or additional

benefit in a change of ownership, the future of the pre-school would be better assured with the site remaining under council control. Accordingly, the pre-school wanted their lease agreement to remain with the council.

18. In the response dated 24 June 2013, the school said it was pleased to find out the views of the pre-school as invitations to meetings had been rejected. The school felt that their remarks in the letter of 22 January 2013 had been misunderstood, and this could have been clarified if there been an earlier meeting. The school explained that the *'theoretical unaccountable risk'* refers to the potential risk in the future if the pre-school site was no longer a pre-school but used by a third party, which was a real concern to the school in the context of safeguarding. The school contended that although the site was not being used by the school prior to 2007, it was not being used only because the school was happy for a pre-school to occupy the site, otherwise the land would have been used for the benefit of children in the school. The school argued that *'the simple act of placing a building on a piece of land does not, consequently, remove ownership of that land from the whole site; it simply enables someone else to use it'*. The school suspected that from the nature of the language used in the pre-school's letter, there may have been collusion with the council, and repeated the contention that a rational argument for the council's proposal to retain ownership of the pre-school site had not yet been made.

19. An informal meeting was arranged on 10 July 2013 to allow the school, the council and the pre-school to present their views and have the opportunity to address any remaining misunderstandings. In the week before the meeting, the council sent by email an extensive summary document dated 4 July 2013, and attached as evidence copies of all correspondence from 5 April 2011 and notes of meetings related to the disputed transfer of land. The council stated there had been meetings with the school on several occasions and that the consultation approach had been discussed with the governors of the school. As a result of the consultation it was apparent that *'no other parties wished the pre-school to be transferred to the school... and that it was not the preferred option* [of the pre-school]. Consequently the council had written to all parties on 5 November 2012 confirming the intention to keep the pre-school as a separate entity from the school and exclude it from the transfer. The council assured that it would not have resisted enacting the transfer of the pre-school site if all the parties involved had agreed with the proposal, but given the strength of response, the council was of the view that it should not transfer the pre-school site against the wishes of the wider community.

20. In the response dated 9 July 2013, the school felt that an earlier meeting between the three parties, with the opportunity to disclose all the facts and concerns in an open and transparent manner, may have been helpful. The school also noted that from the very first email attached to the summary document, it was evident that the council's intention was that the pre-school site would remain in council ownership, and this was *'well before any "consultation process" with "stakeholders" had even taken place; the decision was made at the onset and they have simply tried to bulldozer this*

*through since*'. The school also took the opportunity to highlight inaccuracies found in the summary document.

21. At the informal meeting on 10 July 2013 I consulted the parties about the matters of fact and the areas for consideration, and I noted the representations made to me at that meeting. The school reiterated the three main concerns: about safeguarding the school's pupils if the pre-school were to vacate the site and what the council might then do with the land; that other schools had been treated in a different way regarding the transfer of land on the change of status of the school; and that the council had not provided any reasoned argument for wanting to retain the land on which the pre-school was located. The school wanted to repair relationships with the pre-school, regretting that the dispute had dragged on since 2011. The council then explained that the summary document gave a chronology of what has happened thus far, and that the purpose of the voluntary consultation process was to involve all stakeholders, particularly as some had been involved in funding the land and buildings on the school site. The council emphasised that the starting point had been what the legislation says with respect to land held for the use of the school at the time of the change of status of the school. The school asked the council whether the consultation had been on two options or just one and had the "deal" from the school been included? The council responded that the consultation concerned who owns the land, not what happens to it. The pre-school then explained that its aim was to protect the provision for parents. The pre-school had considered matters such as what might happen, for example, with a change of leadership at the school in the future and concluded that the most secure future would be for the land to remain with the council. There were references to the tone of the school's letter of 22 January 2013, and the pre-school suggested that discussions had been amicable until its receipt, but I noted the letter could be interpreted in different ways. Arguments and counter arguments repeated what had already been said by the parties and no new points were made.

22. The meeting also provided the opportunity to clarify several matters:

- the reason why the local parish council had been included as a stakeholder was that if the village hall committee ceased to exist, then given it had provided funds towards part of the school building, the village hall committee interest would revert to the parish council which would then have a financial interest in the school;
- contrary to the view held by the school, the council confirmed that the influence of the village hall committee on the council's decision not to transfer the pre-school site to the school had not been significant;
- the school does not maintain the pre-school in any way and that the pre-school is entirely independent of the school;
- all parties agreed that the school owns the path adjacent to the school car park which provides pedestrian access to the school and pre-school from the public road and that there is a presumed right of access to the pre-school land; and
- it was confirmed that the area at the end of the path that was currently without tarmac would be resurfaced by the council.

## Consideration

23. In considering this transfer of land I am guided by the regulations. I note that paragraph 2(2) of Schedule 6 to the regulations specifies that the land and buildings to transfer to the governing body is the land which before the implementation date was *'held or used by a local authority for the purposes of the community school'*. Accordingly, it is clear that the land *'held ... for the purposes of the community school'* must transfer to the governing body on the date that the change of status takes effect, which in this case is 1 September 2007. It is very clear that the land used currently by the school was being used by the school in September 2007, and the council have agreed that this land should transfer to the governing body of the school. However, there has been a long-standing dispute about who owns the land occupied by the pre-school, and whether it should also transfer to the school.

24. The crux of the dispute is whether the land on which the pre-school was built was, in September 2007, *'held ... for the purposes of the community school'*. From the evidence available, it is clear that in September 2007 the pre-school had already been using the disputed land for some time. I have been informed that the site has been used exclusively by the pre-school since January 2005 and the current lease dates from 17 January 2006. Although the land on which the pre-school had been built had previously been the location of the old swimming pool and part of the original school site, it had not been used by the school for a number of years before 2007.

25. The regulations are clear that the land held for the school transfers (unless there is good reason why it should not) and the council have agreed that this land should transfer to the governing body of the school. The land used by the pre-school was not held for the school at the date of the change of status of the school so that land does not transfer unless there is good reason why it should.

26. The first strand of the school's contention that the pre-school land should transfer to the governing body of the school was the safeguarding concerns related to a *'theoretical unaccountable risk'* to the children in the school if the land were to transfer to a third party in the future. It must be said that there is no certainty about any organisation at some time in the future. However, the pre-school enjoys the support of the local community and so its success seems assured for the foreseeable future. In addition the council stated that there are no plans for the site as the pre-school provides vital places for two, three and four year old children, so I am not persuaded by the vagueness of this thread of the school's argument.

27. Secondly, the school believes that it has been treated unfairly by the council in comparison to another school claimed to be similar but any comparison with how the council treated another school with its own particular circumstances is beyond the scope of this land transfer.



28. The school also argued that the council had not provided any reasoned argument for wanting to retain the land on which the pre-school was located. In fact, because the land used by the pre-school was not held for the school, it would not transfer unless there is good reason why it should, so the council is not required to provide reasons why the land should remain in its ownership, rather it is for the school to show why it should not remain with the council. Nevertheless, I did consider whether the pre-school land should transfer to the school, despite the land not being used by the school at the time of its change of status. This would then have required a lease to be entered into with the pre-school, but from the responses to the consultation, and from the views expressed by the pre-school at the meeting, transferring the pre-school land from the council to the school would be against the wishes of the pre-school and the wider community.

29. The school have been unable to convince me of any reason why the land used by the pre-school, which was not held for the school at the date of the change of status of the school, should transfer to the school so I then considered the implications of dividing the site to exclude the pre-school land. From my visit to the site, it is clear that the pre-school is a self-contained area, entirely separate from the school so that the division of the site in order to exclude the pre-school area from the transfer would be practicable.

30. Regarding the footpath adjacent to the school car park which provides pedestrian access to the school and pre-school from the public road, all the parties at the meeting agreed that the school owns it but that there is a presumed right of access to the pre-school site. Accordingly I am persuaded that this footpath should transfer to the school but that the right of access to the pre-school land using this path should now be formalised.

## **Conclusion**

31. I conclude that for the reasons stated in paragraphs 23 to 30, the transfer of land from the council to the school should exclude the area of land currently leased by the pre-school, but should include the footpath adjacent to the school car park which provides pedestrian access to the school and pre-school from the public road, on condition that the right of access to the pre-school land will be formalised. The council should therefore draw up whatever legal agreement is required to formalise the right of access to the pre-school.

## **Direction**

32. 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 Pinchmill Lower School from Bedford Borough Council to the governing body of the school consequent upon the school becoming a foundation school, shall exclude the area of land leased by Pinchmill Pre-School; and

- the path adjacent to the school car park which provides pedestrian access to the school and pre-school from the public road shall transfer to the school on condition that the council draw up whatever legal agreement is required to formalise the right of access to the pre-school land using this path.

Dated: 13 August 2013

Signed:

Schools Adjudicator: Cecilia Galloway