

DETERMINATION

Case Reference: LAN/000034

Applicant: London Borough of Haringey Council

Application: Regarding transfer of land at Fortismere School,
Tetherdown, London N10 1NE

Date: 15th December 2011

Determination

Under the powers conferred in 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 determine that:

- (i) the transfer of land at Fortismere School from the London Borough of Haringey to the Governing Body of the school, consequent upon the school becoming a foundation school, shall address matters relating to car parking and fire exit provision through an irrevocable licence drafted by Fortismere School in a way which is acceptable to both parties;**
- (ii) the irrevocable licence provides Blanche Neville School with an entitlement to park 14 vehicles in the northern car park, though not to any specific parking spaces, and demarcates fire exit access routes;**
- (iii) the termination and dispute resolution procedures contained in the Services and Shared Facilities Agreement be as drafted by the Council.**

The Referral

1. Solicitors for the London Borough of Haringey ('the Council') wrote to the Office of the Schools Adjudicator on 26th May 2011 to request that the transfer of land from the Council to Fortismere School ('the School'), associated with the school becoming a foundation school on 1 September 2007, be determined so as to resolve a dispute between itself and the School. This referral is made as the School and the Council have been unable to reach an agreement. The Council contend that an agreement which meets the requirements of paragraph 16(1) of The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007 ('the Regulations') has not been completed and that, therefore, the transfer itself has not been completed.

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 land held and used by the Council solely for the purposes of the School transferred to the Governing Body of the School on 1 September 2007, pursuant to the school becoming a foundation school on that date. Failing local agreement to the terms of the transfer, the number and location of certain staff parking facilities and other matters, the documents relating to this transfer have not been concluded. In such circumstances, the Adjudicator may give a direction determining the matter under paragraph 17 of Schedule 6 to the Regulations. The Council decided to make this referral and I am satisfied that I have the jurisdiction to consider this matter under the powers conferred on me.

3 The Adjudicator originally agreed to meet with the parties and Blanche Neville Community Special School for Deaf Children ("BNS") as an interested party on 12th July 2011 but the School and BNS requested that this meeting be postponed because both had new headteachers and chairs of governors who were unfamiliar with the details of this matter. The Adjudicator agreed to this request. The parties met on 22nd September 2011 with a view to resolving this matter between themselves but this proved to be impossible. Both parties then made further submissions to the Adjudicator.

Procedures

4 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 initial referral from the Council including plans of the campus of which the School forms part;
- e-mail correspondence between the School, its solicitors, and the Council between 2008 and 2010;
- submissions made by the Council and the School before and after their meeting on 22nd September 2011;
- the draft transfer of freehold Interest;
- the draft transfer of sub leasehold interest;
- the draft deed of indemnity;
- the draft shared facilities agreement;
- responses to my draft determination made by the Council (dated 12th December 2011) and the School (dated 13th December 2011).

5 I visited the School on 16th November 2011 and met with officers from the Council and representatives of the governing bodies of the School and BNS which shares the site with the School, to gain greater understanding of the details of the situation and to discuss the issues involved. I have considered the representations made to me at, and subsequent to, that meeting.

6 I have consulted the main parties on the proposed content of this Direction, and have considered carefully the responses to that consultation.

The application

7 The School converted to foundation status on 1st September 2007, when a transfer of land took place by virtue of the Regulations. In order to facilitate this the Council sent the following documents to the School's solicitors for approval:

- transfer of freehold Interest (referred to in this case as the Transfer Agreement ("TA");
- transfer of sub leasehold interest;
- deed of indemnity;
- shared facilities agreement, (known in this case as the Services and Shared Facilities Agreement ("SSFA")).

8 The Council's freehold title to the School site is subject to a lease dated 30th November 2000, granted to Haringey Schools Service Limited under a PFI agreement dated 30th November 2000 and, in return, the Council took a sub-lease back on the same date. The PFI agreement is, at present, suspended by a suspension agreement dated 1st February 2008, but not terminated.

9 In order to protect its contractual obligations to the PFI provider, the Council requires, in relation to obligations concerning the School, an indemnity from the School in the form of a deed of indemnity that will require the School to comply with the relevant parts of the PFI agreement. This is why the Council has drafted two Transfers for the School site. The transfer relating to the PFI scheme is not part of this dispute.

10 The School, which caters for pupils aged 11-19, is located on an educational campus which is shared by pupils in Keys Stages 3, 4 and 5 of BNS, a community special school. Provision for pupils in Key Stages 1 and 2 of BNS is located elsewhere. The School and BNS share certain facilities and services (including catering facilities, classrooms, library, sports facilities, parking and access routes), some of which the Council wishes to preserve.

11 Although there have been long discussions between the Council and the School's solicitors, the School has not accepted the draft documents. The School's initial position was that it was not prepared to accept any formal agreement with the Council and, instead, they wished to preserve BNS's existing rights by a non-binding mutual understanding between the governing bodies of both schools expressed in the SSFA. The School has now accepted that the Council is a legitimate party to the transfer.

12 The issues which are now subject to dispute are as follows:

- (i) The Council believes that car parking and fire exit rights are rights which attach to the land and therefore should be dealt with in the formal TA. The School would prefer that both these matters be dealt with in the SSFA.
- (ii) The draft SSFA produced by the Council contains certain provisions relating to termination and dispute resolution. The latter involves the appointment of a suitably qualified arbitrator whose decision would be binding on both parties. The Council believes the School wishes to suspend the SSFA whilst any disputes are resolved and to reserve the right to terminate the agreement if it does not agree with the arbitrator's conclusions. The Council states that both of these provisions are unreasonable and unacceptable.
- (iii) The use of the term "maintained" school in the SSFA. The School wishes to see this word inserted whilst the Council does not.

The View of the Council

13 The Council's view is that it remains the owner of the BNS site and that the TA itself "*should contain such rights and liabilities as are normal in any other transfer of parts*". It follows that the TA must be between the Council (BNS is a community school), as transferor, and the School as transferee, in order to be compliant with paragraph 16 of the Regulations. The School now accepts this.

14 The Council contends that it has a duty to preserve the long term future and interests of BNS and any successor school, "*no matter what the wishes of the governors of Blanche Neville might be*". Although it accepts that BNS's rights in relation to their use of the School's facilities are currently set out in an existing shared facilities agreement the Council believes that such an approach needs to be modified in the new circumstances as it is not legally enforceable, would not apply to potential successor schools, and does not comply with the requirements of paragraphs 15 and 16 of the Regulations. The Council states that the new SSFA is "*designed to deal only with shared services, it should not be dealing with land issues*", and that "*the Council could not accept the removal of the rights previously agreed in the TA (Form TR5) and for these to be placed instead in a shared services agreement*".

15 The specific matters which are the foci of this dispute are car parking rights and fire exit provision. In relation to car parking, the Council believes that BNS has historically used 14 spaces in the shared car park, which the School accepts that this is the case, at the northern edge of the site and that these spaces should now be demarcated for BNS use. At present, there is no such demarcation. In relation to fire exits, the Council believes that "*without the fire exits it would be impossible to operate the building in any shape or form.*"

16 In the Council's view, the use of the parking spaces and the fire exits can both be considered as "*a right or easement which belongs to the land and is enjoyed with the use of the land, it is not a form of licence or permission*

that could be taken away at the will of Fortismere” and that “where there are such legal rights ... these should be in the transfer document”.

17 As stated in paragraph 14 above, the Council are not prepared to accept amendments to the SSFA which were requested by the School in relation to (i) the suspension of the SSFA during disputes and (ii) the School’s indication that it would not necessarily accept the arbitrator’s decision on any dispute as being final and binding on all parties.

18 The Council does not accept the School’s suggested use of the term “*maintained*” school (in the draft SSFA at paragraph 10) in connection with the future use of the site as such a user could, conceivably, be a non-maintained school of some sort and the SSFA should cover such an eventuality.

19 Underlying the Council’s position is the wish to preserve car parking and fire exit rights into the future so that, if relationships between the School and BNS deteriorate, the interests of the latter and the Council are protected in law and that the same rights should be afforded to any future users of the site should BNS cease to occupy it. The Council accepts that current working arrangements between the School and BNS work well and that BNS will occupy the site for the foreseeable future.

20 Following the meeting between the parties on 16th November 2011 the Council submitted a statement that *“it would accept the proposal to have the 14 parking spaces on the Fortismere site as long as there is a school (whether or not it is a maintained school), on the BN site. The Council however still maintains that such rights should be in the Transfer of the freehold interest.”*

21 The Council also restated its belief that, if the car parking and fire access rights are not in the TA, then *“the LEA would not be able to operate a school on the site if the school was one that was not for deaf children. This would in effect prevent the Council from exercising its functions.”*

The View of the School’s Governing Body

22 The School’s view is that the existing shared services agreement works well, relationships between the School and BNS are good, and that the future relationship between the School, the Council and BNS should be set out only in the SSFA and that this document should include clauses relating to car parking and the use of fire exits.

23 In relationship to car parking, the School has three concerns. The first is that *“granting an easement for parking in the transfer would cause problems should the land be disposed of in the future for non-school use (eg residential development) as it would mean that the new owners of the land would have an easement to park on the school land which might cause major concerns in respect of safeguarding.”* The School believes the same concern applies to the provision of fire exits.

24 The second concern is that, if the parking spaces were to be demarcated, this could pose constraints on the School's flexible use of the site in the future. The School accepts that, historically, BNS has regularly used 14 parking spaces in the shared northern car park.

25 The third concern is that should BNS leave the site and be replaced by another school it may not necessarily be the case that the new provision is compatible with that provided by the School. For example, if the site was used for a nursery, primary, or other type of special school, or a pupil referral unit. The School believes that, in such circumstances, it would be reasonable to review all aspects of the shared use of the site and not be limited by the inclusion of matters relating to parking and fire-exits in the TA.

26 By seeking to include parking and fire exit provisions in the SSFA rather than the TA the School is seeking a position where, should BNS cease to use the site, all aspects of the SSFA are terminated. They believe this is necessary to protect the long term interests of the School.

27 Finally, the School wish to be able to terminate the SSFA whether or not the independent decision maker proposed by the Council "*comes to this conclusion.*" Again, the School see this as protecting their interests should the nature of the pupil population served by BNS materially change due to it being re-designated to serve a different pupil population.

28 Following the meeting between the parties on 16th November 2011 the School submitted a further statement in which it stated that it still wished that any formal agreement relating to parking and fire exits should cease *if "the land is no longer used as a school for deaf children,"* and that "*should BNS change its use or the land be sold, these rights will no longer be exercisable.*" The School also wished to see the fire escape route marked on the relevant plan of the site.

29 The School also restated its position on the termination and dispute resolution clauses which it wishes to include in the SSFA to protect its interest should any user, other than BNS in its current form, occupy the site.

The View of the BNS Governing Body

30 At a meeting between both sets of governors and the Council on 2nd March 2010, both governing bodies stated they did not want the Council to be involved in the present arrangements between the two schools. The position of BNS was confirmed in a letter from the chair of the school's governing body to the Council dated 3rd September 2010. However, BNS has now changed its view and now believes that the shared services agreement should be focused entirely on the provision of shared services with a separate and formal agreement on land issues between the Council and the School.

Consideration

31 The School accepts that the issues of car parking and fire exit provision are land related issues and I agree. It is therefore reasonable that the Council

wishes that these matters are dealt with via the TA rather than the SSFA. This is also the wish of BNS. Such an agreement would protect the legitimate interests of BNS and the Council.

32 However, the School's concerns about the implication of these matters being part of the TA, should the provision at BNS, or on the BNS site, materially change are also reasonable. The two schools have developed a strong working partnership between a mainstream secondary school and a secondary phase school for the deaf. This partnership reflects the needs of the current pupils on the site. Evidence, such as Ofsted inspection reports, suggests this works well. This would not necessarily be the case if the BNS site were to be occupied by a different type of provision. For example, if it became a primary school or a school for pupils with severe learning difficulties and/or disabilities. In such cases, access, suitability and safeguarding issues might make joint provision more difficult or impossible.

33 Matters such as those in dispute in this case are usually dealt with through the mechanism of easements in a TA. However, in this case, I believe that such an approach would not properly balance the need for security of the Council and the School. The nature of an easement would offer the Council all the security it seeks whilst providing the School with none. Similarly, I believe that the opposite would be true if these matters were dealt with through the SSFA.

34 Instead, I am of the opinion that the matters relating to car parking and fire exits should be dealt with through the School granting the Council an irrevocable licence until such time as the site ceases to be used by BNS as specialist provision for deaf pupils, or unless and until the parties agree otherwise, whichever is sooner. I believe this will provide both parties with the protection they require. Being irrevocable, the Council would have the security of knowing that the School could not change its mind a few years down the line and revoke the licence. The School would have the assurance that the licence would not continue if the site ceased to be used by BNS to provide the current specialist provision. Whether the Council retains ownership of the BNS site or not, this solution will give the parties the flexibility to change the terms of the licence by agreement should the situation of the respective parties change in the future. I also note that, as things stand, there are no plans or suggestions that the provision at BNS will change or be relocated.

35 The Council is concerned that any solution that places car parking and fire exit access rights outside the TA will mean that the Council would not be able to operate a school on the site if the school was one that was not for deaf children and that this would in effect prevent the Council from exercising its functions. I am not persuaded by this argument for the following reasons:

- (i) this presupposes that the Council and the School would not be able to arrive at a solution that addresses the concerns of both parties should the BNS site cease to provide education for deaf children;
- (ii) the School's concern about how shared facilities might work if the pupil population catered for on the BNS site change is reasonable;

- (iii) whilst the solution set out in this Determination may limit the Council's ability to undertake its functions in relation to the provision of education it certainly does not prevent it from doing so.

36 The parties may wish to consider executing the licence in a separate document to, although executed at the same time as, the TA. The parties may also wish to consider having the licence executed by way of deed which includes a nominal consideration clause (e.g. that the Council pays the School £1) as this would ensure the licence is enforceable.

37 Both parties accept that there is increasing pressure on parking places and it may soon be the case that demand exceeds supply. It is also clear that the Council's contention that the car park could be divided between the parties is correct. In such circumstances, and given the nature of the provision at BNS which is dependent on many peripatetic staff, I believe it is reasonable that the School provide BNS with an entitlement to park 14 vehicles in the northern car park though not to any specific parking spaces. Such an approach will protect the needs of BNS whilst enabling the School to have the flexibility to develop its site which it seeks.

38 Given that the issue of fire exit routes is also a land related issue I believe that these routes should be delineated in the way suggested by the School in its letter of 22nd November 2011. In its response to my draft determination the Council requested that fire exit provision should be treated differently to car parking and that "*either the fire exits remain within the transfer or that as far as the licence is concerned the fire exits remain in perpetuity so long as the building has a non-domestic use.*" I believe that such a change is too wide ranging in scope (by covering any non-domestic use), pre-supposes that the parties will not be able to agree a reasonable solution, and assumes that the existing fire access arrangements will be suitable for possible future users of the BNS site. For these reasons I cannot accept this request.

39 The School should draw up an irrevocable licence which reflects the considerations set out above and which is agreed by all parties. Should it not prove possible to agree on the contents of an irrevocable licence or the location of the fire access routes, the matter should be resolved by a further referral back to the Schools Adjudicator.

40 I note that the Council's proposed dispute resolution procedure in the SSFA involves the President of the Law Society appointing a Counsel with at least 10 years experience of education law. This appointee would seek to resolve disputes and their decision would be final. Such an arrangement promises independence, impartiality and decisions well-grounded in experience. This seems entirely reasonable and it is difficult to see how the School can expect a dispute resolution process where it can terminate the agreement whatever the conclusion of the duly appointed Counsel.

41 Neither, given the existence of a well-defined and well-designed dispute resolution process in the draft SSFA, do I see any good reason why the agreement should be suspended whilst a particular dispute is resolved. The School's concerns on these matters should also be alleviated by the existence of an irrevocable licence. In response to my draft determination, the School asked to maintain the right to suspend the SSFA whilst any dispute with a party other than BNS was being resolved. I believe such a clause would mitigate against the swift resolution of any such dispute and that, as clause 17 of the draft SSFA already refers to BNS and the Council, no additional safeguard is necessary. I conclude that the dispute resolution and termination clauses of the SSFA be as drafted by the Council.

42 The conclusions I have set out above should mean that the disagreement between the parties over the use of the term "*maintained*" school in clause 10 of the draft SSFA becomes irrelevant and I conclude that clause 10 of the SSFA be as drafted by the Council.

Conclusion

43 I believe that by the School being required to grant the Council an irrevocable licence (as outlined in paragraphs 34-39) which contains both an entitlement for BNS to park 14 vehicles on the School's northern car park and the demarcation of fire exit access routes for BNS's use (in the way suggested in paragraphs 37 and 38 respectively) this Determination balances the interests and need for security of both parties.

44 The Council should redraft the SSFA and the TA and the School should draft an irrevocable licence so that all three documents reflect this Determination.

45 Should it not prove possible to agree on the contents of an irrevocable licence the matter should be resolved by a further referral to the Schools Adjudicator.

Determination

46 Under the powers conferred in 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 determine that:

(i) the transfer of land at Fortismere School from the London Borough of Haringey to the Governing Body of the school, consequent upon the school becoming a foundation school, shall address matters relating to car parking and fire exit provision through an irrevocable licence drafted by Fortismere School in a way which is acceptable to both parties;

(ii) the irrevocable licence provides Blanche Neville School with an entitlement to park 14 vehicles in the northern car park, though not to any specific parking spaces, and demarcates fire exit access routes;

(iii) the termination and dispute resolution procedures contained in the Services and Shared Facilities Agreement be as drafted by the Council.

Dated: 15th December 2011

Signed:

Schools

Adjudicator: John Simpson