

DETERMINATION

Case Reference: LAN/000029

Applicant: Nottinghamshire County Council

Application: Regarding transfer of land at Toot Hill School,
Bingham, Nottingham

Date: 18 May 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 direct that the transfer of land at Toot Hill School from Nottinghamshire County Council to the Governing Body of the school, consequent upon the school becoming a foundation school, shall include the Landscape Maintenance Service Depot. As a condition of the transfer, a lease agreement will be drawn up by the transferor for a period of up to 125 years at a peppercorn rent with break clause to the effect that if the Council no longer requires the Depot it will give 6 months notice to terminate the lease. The alienation clause will clarify that should the Council decide to sublet the Depot, terms will be agreed with the School.

The Referral

1. Solicitors for Nottinghamshire County Council ('the Council') wrote to the Office of the Schools Adjudicator on January 26, 2011 to request that the transfer of land from the Council to Toot Hill School ("the School") that took place on the school becoming a foundation school on 1 September 2009 be determined to resolve the dispute which relates to the transfer of the Landscape Maintenance Depot ("the Depot") as the School and the Council have been unable to reach an agreement.

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, pursuant to the school becoming a foundation school on 1 September 2009. Failing local agreement as to the appropriation of the land and buildings which house the Depot, which is used partly for the purposes of the School and partly for other purposes, either the Council or the Governing Body must

refer the matter to the Adjudicator (under Regulation 10(3), who may give a direction determining the matter under Regulation 17. I am satisfied that I have the 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 from the Council including plans of the School Campus;
- E mail correspondence between the School and the Council during 2010 and 2011
- The Heads of Terms lease proposals and amendments
- The views of the Governing Body and of the Council

4. I visited the School on 24 March 2011 and met with officers and the senior solicitor from the Council and representatives of the Governing Body, 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 that meeting.

5. Both parties wrote to me following my visit, setting out their aspirations for future use of the Depot. I have consulted the main parties on the proposed content of this Direction, and have considered carefully the responses to that consultation.

The application

6. The School converted to foundation status on 1st September 2009, when a land transfer took place on the basis of law. A number of issues needed to be resolved concerning the Leisure Centre, the Young People's Centre ("the Centres") and the Depot.

7. The School and the Council have reached agreement about the Centres but have been unable to reach an agreement about whether or not the Council should retain the freehold of the land and buildings which house the Depot or alternatively, transfer this land and freehold to the School with a long term leasehold interest.

8. The land in question is located on a small area adjacent to the school playing field at one corner of the School site. There is no direct access from the main road to the Depot, and vehicles must pass through the area where school buses arrive and depart each day and then follow a route on the grassed area alongside one of the playing fields onto a small forecourt. A diesel fuel storage tank used by the Landscape Service is also sited there.

9. The building comprises the main vehicle depot, storage areas and several small offices all of which are accessed by the Landscape Management Service (“the LM Service”) through the main depot door. The Council is the key holder. One of these small offices also contains the School’s main utilities supplies. When access has been required in the past the School makes a request to the Council to facilitate this.

10. At the rear of the Depot is an attached storage area which has always been used by the School and which currently houses decommissioned computer equipment and for which the School is the key holder.

The views of the Council

11. The Council initially considered that the freehold of the land on which the Depot is sited might be retained, as in its view; the principle purpose of the Depot is to serve a large number of Council establishments across the Borough of Rushcliffe.

12. However, taking account of the location of the Depot on the School site and the access route to it, and the fact that part of the Depot housed utility supplies and additional storage for the School, the Council proposed to the Governing Body that rather than retain the freehold, this should be transferred and it should instead, take a long lease.

13. The Council contends that the Governing Body was initially agreeable to this proposal and it formalised this understanding in a letter to the School dated 25 June 2010. The letter referred to a 125 year lease of the Depot along with associated rights of access from Tithby Road. The Council acknowledged the need to negotiate the detailed terms of the lease and advised that the School would need to contribute towards the upkeep of the Depot as it uses part of the building for storage.

14. The School then raised concerns about the length of the proposed lease stating that 125 years appeared to be excessive and might hinder any potential development of the area. It suggested ‘a looser agreement’ which would facilitate appropriate accommodation for the Depot.

15. In response the Council advised the School that prior to the change to foundation status, the Depot had not been held by the Council for the sole purposes of the School but rather for the purposes of the LM Service which serves approximately 20 Council sites. It reiterated that it would be seeking agreement for long leasehold rather than a freehold interest in the Depot, together with appropriate access rights.

16. The Council confirmed that following written agreement from the School dated August 2010, it sent a draft lease agreement in November 2010, to cover a period of 125 years at a peppercorn rent. The ‘tenant’ would be responsible for meeting the cost of all outgoing with the exception of electricity, for carrying out all repairs and decoration. The Council agreed neither to sublet the premises nor to make any structural alterations to the premises without the prior consent of the School.

17. In a subsequent communication the Council advised the School again that the Depot was not connected exclusively with schools but provided services to libraries, fire stations and other council property and the loss of such an amenity would be problematic. It confirmed that in the event that the LM Service was outsourced the Depot would be occupied by the successful bidder for the contract and remain in use.

The views of the Governing Body

18. The School states that the Depot was built by and at the expense of Toot Hill School at the request of the Council which has never had exclusive use of the Depot as it houses the mains supplies for gas and electricity and has always been used for storage.

19. In a written communication to the Council the School agreed that the Council should retain a long leasehold interest rather than the freehold of the Depot. However, Governors did not anticipate a lease over a 125 years period.

20. During the autumn term the Governing Body then noted the possibility that the Council might not continue to supply its services at subsidised rates and had plans to publish information about a future offer of services that reflect their true cost. Governors were also advised that the LM Service might in the future, be outsourced to a commercial company and expressed a range of concerns about how this might hinder any potential site development, about the presence onsite of a commercial company whose services they might not wish to use and crucially about the safeguarding of pupils.

21. The School states that it may not, in the future continue to use the LM Service provided by or outsourced by the Council and that in view of these developments the Governors have subsequently changed their view. They consider that a long term lease of 125 years at a peppercorn would be an obstacle to their obtaining best value for the School.

22. Although the Governing body does not wish to be constrained by any long term lease agreement it would be willing to construct a yearly rental agreement. The governors have expressed a willingness to consider a shorter lease of 3 to 5 years but wish to lease the Depot for a commercially viable rent. A shorter lease would in the view of Governors provide greater control and they feel this is necessary because of the uncertainties about the future organisation of Council services.

Consideration of Factors

23. The School states that the Depot was built by and at the expense of the Toot Hill School at the request of the Council and that this was a goodwill gesture at a time when the school wished to build a new Business Studies block. The Council acknowledges that it had approached the Governing Body to ask for a contribution towards rebuilding costs and that Governors agreed to provide £7000 to purchase a building pack of materials, to which it added a further £2000 to put in foundations and to erect the building.

24. The School's view is that its' contribution to the rebuild costs conferred ownership of the Depot but that the Council does not share this perception. This is correct and the Council confirmed that it was built on land where the Council owned the freehold and there has never been any question of the School owning the Depot which has always belonged to the Council. Further, had the Governing Body not agreed to buy the building materials the Council would have found a different source of funds. In the Council's view the rebuild was necessary to deal with Health and Safety issues and was a joint venture of benefit to both parties.

25. The School states that it has no issue with the LM Service continuing to have shared access to the Depot. It gave its agreement to the transfer of land with a long lease on two occasions and then withdrew agreement when new information became available, before a final lease agreement had been reached with the Council. Governors could foresee the possibility that at a future date a situation might arise where they did not choose to use the services provided from the Depot by either the Council (or by a contractor if the service was outsourced). The School feels there is a principle at stake that it should not have to agree to be tied into a long term lease that fetters its ability to obtain best value for the school in the future should the Council no longer directly provide services and in the event that a commercial organisation obtains the contract.

26. The Council maintains that it undertakes an annual review of services and that in the case of outsourcing, the contract remains with the Council. The Council's position is that the key determining factor must be the how the Depot was used at the point in time when the School converted to Foundation Status. The Council LM Service has been continuously delivered from this site for over twenty years. It is strategically sited in the centre of the area that it serves and the Council feels that it is entitled to retain the freehold. However rather than retaining it, it would agree to a 125 yr lease. At the meeting in March the Council offered to build in a break clause to the lease, if at any future point there is no strategic need to maintain the LMS from the Depot on site.

27. Both parties, using different arguments reach a similar point of agreement that the freehold should transfer to the school. The only remaining issue to be resolved relates to the terms of the lease.

28. The overarching assumption is that except where there is good cause all land used by the school before it proposes to change category should transfer to its governing body when the change of category is implemented. Land is defined in Sect 579(1) of the Education Act 1996 as "*buildings and other structures, land covered in water and any interest in land*".

29. 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".

30. Land held by the Council partly for the purpose of the School and partly for other purposes should have its ownership determined by reference to the statutory tests set out in the Schedule 6 of the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007.

31. The first consideration must be given to whether it is practically possible to divide and apportion the land, in such proportions as may be appropriate.

32. The Council feels that the site could be apportioned and presented diagram to this effect at the meeting. The School agreed that this might be possible but it would always need access rights to the utility services. One proposal was for new locks to be installed allowing separate access by both parties to the office area which houses the meters. However the School does not wish to pursue this arrangement and it would not be straight forward to divide the building as the school would still require access to that part belonging to the LM Service even if it were outsourced to a commercial company. Division of the building would only be practical if it provided two completely separate areas and this is not the case.

33. In cases where the land and property or interest in such, does not permit its division or apportionment the next test to be applied is whether it is possible to determine which party has greatest need of the security afforded by owing the land. 'Security' applies not only to the physical security of the pupils and the school site but also to the security necessary to provide the activities conducted on the site. The history of the land use and recent practice indicate that the Council held the land originally and on a continual basis for the purposes of its landscape service and not for the sole purposes of the School. The Council has confirmed that the Depot is required strategically for the continued delivery of its services to a number of different establishments. However the School has also used the adjoining storage area on a continuing basis for a long period and will continue to require access into the Depot to reach utility services.

34. There has been continuous use of parts of the building by the LM Service and of other parts of the building by the School for storage and access to the utilities. It is therefore not possible to determine which party's need is greater and so I turn to the final test which is to determine which party will be the greater user of the land.

35. I have considered carefully the use by the two parties at the implementation date of foundation status and School usage constituted a relatively small part of the total usage. It is accepted by both parties that the Depot has been used on a continual basis for the purposes of the LM Service on behalf of the Council and that the land was not held by the Council for the sole purposes of the School. However because of the access arrangements into the Depot and the School's continuing need to access utilities based within the offices of the Depot the Council is agreeable to the transfer of the freehold to the School provided that a long lease can be agreed.

36. The Council has listened to the concerns expressed by the School throughout the protracted discussions and has made continued efforts to accommodate the School's request for greater clarity in the Heads of Terms lease agreement. It has confirmed its intention to amend the break clause in the revised lease of the Depot, to state clearly that if the Council no longer requires the Depot it will give 6 months notice to terminate the lease. Similarly the Council has amended the alienation clause to clarify that in the event of the Council needing to sublet the Depot, if the service was subcontracted out, it would intend to do so for a peppercorn rent unless agreed otherwise with the School. This will enable the Governing Body to consider the issues of concern at that point in time in discussion with the Council.

Conclusion

37. Guidance for decision makers states that *'Whichever party is awarded ownership of the land will need to make arrangements to protect the interests of the other party by means of a lease, licence or contractual arrangement'*

38. Although the School made a financial contribution to the replacement building some years ago, this was entirely voluntary and did not at any time confer ownership to the School and ownership of the land and buildings therefore remains with the Council.

39. The Council has proposed a transfer of the freehold and a lease at a peppercorn rent for 125 years, but the School is strongly of the view that this period is too long and has confirmed that it would be willing to agree to a lease of only 3 to 5 years. In my view this period of time would not be either reasonable or sufficient to protect the interests of the Council.

40. The School objected to the wording of the break clause on the grounds that it was insufficiently clear and the Council has since amended the wording to provide the certainty requested.

41. The Governing Body expressed concerns about the need to secure the safeguarding of pupils and to obtain best value in the future, should the Council's landscape services be outsourced to a commercial company and these have also been accommodated by the Council. To protect the interests of the School the Council has agreed that the lease should also contain a break clause, so that in the event that the Council determines that it no longer wishes to provide services directly but wishes to sublet the contract to a commercial organisation the Heads of Terms lease will be reviewed to allow the Governing Body to reconsider the terms, to enable them to secure the arrangements for the safeguarding of pupils and to obtain best value for the School.

42. I therefore conclude that the freehold of the land should transfer to the School and that the interests of both parties will be protected through a formally agreed lease with revised Heads of Terms to include the break clause and the amendment to the alienation clause.

Determination

43. 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 direct that the transfer of land at Toot Hill School from Nottinghamshire County Council to the Governing Body of the school, consequent upon the school becoming a foundation school, shall include the Landscape Maintenance Service Depot. As a condition of the transfer, a lease agreement will be drawn up by the transferor for a period of up to 125 years at a peppercorn rent with break clause to the effect that if the Council no longer requires the Depot it will give 6 months notice to terminate the lease. The alienation clause will clarify that should the Council decide to sublet the Depot, terms will be agreed with the School.

Dated: 17 May 2011

Signed:

Schools

Adjudicator: Carol Parsons