

DETERMINATION

Case reference: LAN52

Applicant: Old Park Primary School, Sandwell

Application: Regarding the children's centre and associated car park and walkways at Old Park Primary School, Sandwell

Date of direction: 13 June 2014

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 Old Park Primary School from the Metropolitan Borough of Sandwell to the Wednesbury Learning Community Trust consequent upon the school becoming a foundation school, shall not include the children's centre and its associated car park and walkways and that the Metropolitan Borough of Sandwell shall draw up a written agreement to protect the interests of the Wednesbury Learning Community Trust as specified in this determination. The agreement is to include:

- **The arrangements for management of the day care facilities and associated administration spaces;**
- **agreement on the shared use of the car park and administration facilities;**
- **the means to ensure that the cost of utilities, caretaking, cleaning and janitorial services will be met by any tenant of the building acting as the lead provider for the children's centre;**
- **agreement about two-way access arrangements between staff of the school and staff of the children's centre;**
- **agreement about who manages, funds and ensures the maintenance and repair of the building and site to ensure that they remain in keeping with the existing school buildings;**
- **agreement about how the children's centre site landlord ensures the security and integrity of the school site; and**
- **agreement about the future of the land in the event of the children's centre ceasing to operate.**

The referral

1. Old Park Primary School (the school) wrote to the Office of the School's

Adjudicator (OSA) on 28 February 2013 applying for land at the school used as a children's centre and its associated car park and walkways to be included with the land transferred from the Metropolitan Borough of Sandwell (the council) to the Wednesbury Learning Community Trust (WLCT) which is the Foundation Trust holding land on behalf of the eight schools in the area that are full Trust members. The school became a foundation school on 29 March 2011. The governing body of Old Park Primary School (the governors) now manages the land and buildings of the 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 Wednesbury Learning Community Trust, pursuant to the school becoming a foundation school in March 2011. Failing local agreement within six months of the school becoming a foundation school, either the council or the governing body might apply to the Adjudicator for a direction concerning disputed land. Since no agreement was reached within the prescribed period over the land in dispute, and the school has confirmed its request that a determination be made by the adjudicator, 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 with supporting documents;
 - b. correspondence from the council with supporting documents;
 - c. correspondence from the WLCT;
 - d. correspondence from solicitors advising the school and the WLCT; and
 - e. plans of the site and buildings of the school and children's centre.
5. Correspondence submitted to me following the application has been seen by the council or the school, as appropriate, and there has been the opportunity to comment on this correspondence.
6. I visited the school on 20 June 2013 in order to view the school site and to understand the geography of the locality. I met with representatives of the council and the school at a meeting I held while at the school. I have considered the representations made to me at the meeting and in subsequent correspondence.

Background

7. In 2006 the council identified the school as a location for a Sure Start children's centre and with the agreement of the school and its governors, the centre was constructed on the school's playground and attached to the rear of the school. The centre's construction was funded with capital from the Sure Start Programme.
8. The children's centre comprises two community rooms, a reception and a small consulting room together with external walkways and car parking. There is also a day-care facility called the Patch Day Nursery in the building. The school has the contract for managing the day nursery.
9. An initial agreement was made with the council for the school to be the lead agency for the centre and this covered the period 1 May 2007 to 31 March 2011. The centre was formally designated as a children's centre on 29 February 2008.
10. In January 2010 the Department for Children Schools and Families (DCSF) now the Department for Education (DfE) informed the council of the school's interest in becoming a foundation school. In June 2010, the governors decided to formally consult on becoming a foundation school within the Wednesbury Learning Community Trust. On 18 November 2010 the school published a statutory proposal to become a foundation school and on 29 March 2011 the school changed its category to foundation status. The council did not raise any objections to this change and in preparation for the school becoming a foundation school, representatives from the council and the school met on 19 July 2010, 1 December 2010 and 13 January 2011 to discuss the transfer of school land to the WLCT.
11. On 25 June 2010 the council circulated a discussion paper to schools entitled "A consultation on using local authority assets to empower citizens and protecting assets for future generations". This consultation ran until 14 September 2010. The proposal was for land owned by the council to be transferred to a company and then leased back to the council. This meant that the council would only transfer a lease rather than a freehold to education providers who changed status and in this way the council could retain some long-term control over the land and ensure that it could not be sold and used for non-educational purposes. Following the consultation, the council made the decision on 13 October 2010 to set up a local authority controlled company called "Sandwell Land and Property Limited" to which the freehold land for schools and educational purposes would be transferred. The school's proposal to become a foundation school came before this decision and so the council accepted that the school would not be included in this transfer of land to the company.
12. On 4 July 2011 draft land transfer and title documents for the school were sent to the WLCT's solicitors. At this time the children's centre area was included. However, on 12 September 2011 the council sent a letter to the headteacher explaining that the council had decided that the school land

on which any children's centre in the borough stood should not form part of the land transferred in the event of a change of category of school. This letter was sent in response to a letter to the council from the headteacher of the school dated 8 September 2011. This council's decision was confirmed in a further letter sent on 7 October 2011 to the headteachers of all schools in the council's area that had a children's centre on their site. The letter repeated the statement that the council had decided that children's centres would be excluded from any land transfers. On 31 October 2011 the school received an amended site plan showing the centre and its associated areas as land that would be retained by the council.

13. On 15 December 2011 the council completed the transfer of its educational land to Sandwell Land and Property Limited. The land transferred included the site of the disputed children's centre at the school but as explained above, the school land was excluded. The council did not inform the school or WLCT that this transfer had taken place.
14. On 12 January 2012 the council completed the transfer of title of the school's land to the WLCT; a reference is made in the document to "the school (whole)" with no reference to the children's centre. The school says that the transfer document was not clear that the children's centre had been excluded from the transfer and the reference to "the school (whole)" was assumed by the school to mean that the children's centre was included. The council had taken the view that it had already informed the school in September and October that the children's Centre was not considered part of the school and provided a marked plan of the site so the reference to the "school (whole)" in the transfer document was to the land that was to be transferred. In other schools where land was transferred at the same time as this transfer parcels of land were excluded in accordance with their marked plans.
15. During the period in 2011 when these land transfer discussions were taking place the council was also inviting tenders to run its 20 locality children's centres for the next three year period. Some of these 20 children's centres are on school sites, others are free standing. In the interim, the school was offered, and accepted, an extension of its initial contract to 31 July 2012 to cover an interim transition period. The school decided not to submit a tender for the new contract because the children's centres were grouped together in lots and the governors considered that the financial liability of taking on more than the children's centre on the school site was an unrealistic financial liability. The day care facility was not part of the retendering process and the school continues to manage it.
16. On 1 August 2012 "Health for Living" was awarded the contract with the council as lead agency for the delivery of this children's centre. It receives the children's centre revenue funding from the council and is invoiced quarterly by the school for the cost of utilities used and apportionment of rates and other services provided including cleaning and building maintenance. Prior to this, the school as lead provider had received the children's centre revenue funding and had used this to pay these costs. The school retains the responsibility for the operation of the childcare

facility within the centre.

17. In March 2013 the school submitted its appeal to the Office of the School Adjudicator. In June 2013 a way forward was agreed at the round table meeting held in the school subject to committee approval. The committee decision to reject the proposal was not made until 28 January 2014.

The application

18. The school became a foundation school on 29 March 2011, when a land transfer took place on the basis of law. The school's application to the OSA refers to the children's centre and associated car park and walkways. The parties supplied me with a map of the site on which the disputed areas are clearly outlined. There is no disagreement as to the area of land and the building in dispute.
19. The school argues that from the time that it made a decision to consider consulting on making a statutory proposal to become a foundation school within the WLCT on 18 November 2010 the council acted in breach of the restriction on disposal of land contained in paragraph 11 of schedule 6 to the Regulations by deciding to transfer the freehold interest of land that was in dispute to Sandwell Land and Property Limited and by executing this decision on 15 December 2011.
20. The school considers that the disputed land and building form part of the school site and should be transferred to the WLCT. The school explains that the children's centre, the Patch Day Nursery and the school work in an integrated way. Children's centre staff use rooms in the school for meetings, parent's sessions and stay and play while the school uses the children's centre rooms for parents meetings. The day nursery makes similar use of the whole building. The school continues to manage the day nursery which occupies 50 per cent of the area of the building and the school has an administrative office within the children's centre which is associated with its management of the day-care nursery.
21. The school points out that all the mains services for the building are provided through the school, including water, sewerage, electricity, broadband and heating. The school provides all the caretaking services to the building including in and out of hours security and cleaning. The school site manager conducts routine health and safety checks and maintenance in the children's centre and nursery. The school decorated the children's centre in July 2012 as it wished to ensure it was consistent with the high standards that it set for the whole school site. The school comments that the council has made no apparent attempt to check on the maintenance or security of the building since it was transferred to Sandwell Land and Property Limited in December 2011.
22. The school argues that the security of the site is compromised if the school does not oversee the janitorial arrangements; that the school's provision of services to the children's centre; the connecting door between the school and the children's centre and the fact that the school manages 50 per cent of the building through the day nursery and that the school has an

administrative office in the building are important features and show the close working relationship between the school and the children's centre and evidence that it is not a facility that can easily be divided from the day to day working of the school.

23. The school states that at the time of transfer to foundation status, it had believed that the children's centre building was to be transferred as the land that it occupies together with the car park area have always been part of the school site and the building is attached to the school building. It was aware of the proposal to create Sandwell Land and Property Limited but it was not consulted on or made aware of the action that took place on 15 December 21011 to transfer the disputed land and building into this newly created holding company.
24. The school has set out what it considers to be the safeguarding and operational issues aligned to the council retaining both the land and building. The school is also concerned that it has no involvement in the commissioning process for the children's centre which will thus make it difficult for it to negotiate fair service charges for the facilities provided unless this is clearly part of the commissioning process.

The view of the council

25. The council, in its comments dated 12 April 2013 set out its case for retention of the children's centre and associated car park. It argues that while the land was once used for the purposes of the school, since the building of the children's centre the land has been used for this new purpose. The council states that it is required under Section 3 of the Childcare Act 2006 to "*..make arrangements to secure that early childhood services in their area are provided in an integrated manner..*". It then refers to section 198 of the Apprenticeships, Skills, Children and Learning Act 2009 that adds a section on children's centres to the provisions within the 2006 Act. "*..Arrangements made by an English local authority under section 3 (2) must , so far as is reasonably practicable, include arrangements for sufficient provision of children's centres to meet local need*". It goes on to define these children's centres as Sure Start children's centres and as "*..a place or group of places which is managed by or on behalf of, or under arrangements made with, an English local authority, with a view to securing that early childhood services in their area are made available in an integrated manner..*". The council argues that it will be hampered in this duty if it does not retain ownership of the children's centre site and building.
26. The council's view is that the building is a children's centre that was purpose built with the agreement of the school. The land was once part of the school but is now used as a children's centre. In order to ensure that it could maintain control of its children's centre facilities across the borough, the council decided in September 2011 and then wrote to the schools involved on 7 October 2011 to say that any children's centre on a school site would be excluded from the land transfer upon a change of school category in order to protect the council's ability to let the children's centre facilities to successful bidders following future tendering processes.

27. The council states that although the school was the lead partner for managing the children's centre for the first three years of the project, the school has not used the building for curriculum purposes and so there can be no apportionment on the basis of shared usage. The day care facility is not a school based facility even though the school has taken on the management of it. The administration office is associated with this day care facility. The shared access to the car park cannot be considered as school use of the facility and while the close interaction between the children's centre and the school is highly desirable, it does not constitute school use of the children's centre in the curriculum sense. In policy terms the council works on the basis that children's centres are facilities that come under direct management of the council and which are leased to lead partners on a three year contract. Where a children's centre is on a school site there are opportunities for close working with the school but this does not change the principle that this is a council commissioned facility. The provision of utilities through the school is an expedient but does not bring with it landlord responsibilities. In this case the school had the first lead partner contract and a subsequent extension while the contract was retendered. This meant that the school had less need at the time to clearly identify the distinction between services provided to the children's centre and to the school.
28. The council argues that because it had decided that the children's centre land is not part of the school, the Regulations concerning disposal of land do not apply because the Regulations only apply to land that is "*used wholly or partly for the purposes of the school*". In consequence, the council does not consider that it needed to consult with the school over the transfer of the children's centre land and building to Sandwell Land and Property in December 2011. The land is still "held or used" by the local authority so there is no impact on the school.
29. The council acknowledges that the children's centre building is within the school grounds but does not accept the school's argument about security issues because there are measures in place to prevent unauthorised access from the pedestrian access and shared car park area using security fencing. It also points out that there is an electronic keypad operated door between the school and the centre to prevent unauthorised access.
30. The council questioned why it took from January 2012 when the land transfer took place until February 2013 when the school lodged its dispute with the OSA given that the negotiations over this had begun in July 2010. The school had been aware of the council's views about the children's centre land in September 2011.

Consideration of Factors

31. When I met with the parties in June 2013 at the school to discuss this case, a way forward emerged that found favour with both parties. This solution involved the council retaining the freehold for the land and leasing it to the school with the condition that it remained as a children's centre so that the school could then sublease it on to the relevant lead provider as a

fully serviced facility. In this way the council retained the controlling interest that it sought and the school retained some involvement in the facility so that it could retain oversight of security issues and have a day to day role in service provision.

32. The council officers supported the solution and left to seek committee approval for this. A deadline of 31 October 2013 was thought to be achievable by all parties. This deadline was not met and the council eventually wrote to the OSA at the end of January 2014 to say that this way forward was not agreed by its Asset Management and Land Disposal Committee. The reasons given were that:

- this might set a precedent for other educational institutions in the borough to follow suit;
- there have been and continue to be difficulties between the school and the children's centre provider which council committee members feel could impact on the effective delivery of a children's centre from this site; and
- there are concerns regarding the jurisdiction of an adjudicator to determine this matter given that the freehold ownership of the site sits within a private limited company, Sandwell Land and Property Limited.

33. Following the delay in reaching this decision, the situation returned in January 2014 to the point in March 2013 where there was an unresolved dispute over the transfer of land on which the children's centre stood that began when the school changed from community to foundation status in March 2011.

34. The council's decision was shared with the school and the headteacher commented that she was unaware of the difficulties to which the council referred in its second reason unless it was referring to a couple of reminders that had had to be sent by the school to ask the lead provider to settle their agreed bills for the utilities and other services provided through the school. The chairman of the WLCT commented:

“Over the past two years, Sandwell Council has conducted a tendering process for the delivery of services through Children's Centres. As a result of this process, a consortium was awarded the contract to run services through the combined Children's Centres at Wednesbury North and Friar Park. This has meant considerable disruption to the smooth running of two very different but excellent Children's Centres, but through hard work and good will on both sides, there is now a single staffing structure and a single Advisory Board for the combined Wednesbury Children's Centre. It is disappointing now to see this represented as 'historical difficulties' within the local authority's recent letter, as justification for refusing to offer a leasing arrangement. In our view, relations with the lead agency are now good.”

35. The council provided a copy of a briefing note from the lead provider sent to the council dated 5 July 2012 to substantiate its claim about “historical difficulties” that explained that in the period April to July 2012 there were difficulties in negotiating with the school because the school asserted that

it was in dispute with the council concerning the title of the building in which the children's centre was situated and the lead provider was concerned that the school's position on this might jeopardise the new lead provider's access to the children's centre when it took up the contract on 1 August 2012. It appears that such matters are resolved and the children's centre and the school are working closely together.

36. Before moving on to look at the arguments in this case I observe that there is no evidence that I have seen from either party that points to constructive discussion between the parties about this disagreement as land transfers were completed. The school claims that it was unaware of the council's decisions regarding the children's centre yet there is correspondence about this in September and October 2011 and the council says that a plan was sent to the school. The council questions the schools slowness in raising its dispute with the OSA and then in turn creates a significant delay in coming to its own view. The council cites historical difficulties between the school and the new lead provider of the children's centre yet the briefing note from the lead provider explains that difficulties led back to the unresolved issue of the transfer of land.
37. I also observe that both parties in this dispute have some shared goals. They have both said that they wish to see a fully functioning children's centre on the site that works in an integrated way with the school and the day-care facility. Each of the parties has also stated that it is suspicious of the long term intentions of the other in respect of the use of the land should the children's centre programme funding come to an end. At the same time both parties have asserted their desire to see the land continue to be used for educational purposes.
38. In considering the council's three reasons quoted above for rejecting the proposed way forward I make the following comments. The situation in each school is different and that in this case the overlapping timings of the school's consultation on becoming a foundation school and the council's consultations about protection of land assets and about children's centres are applicable to this school in particular. I have made observations about the relationship difficulties above and I shall refer to the concerns about my jurisdiction in relation to the disposal of assets to Sandwell Land and Property later.
39. I now turn to the Regulations and consider how these relate to the land transfer dispute. New Regulations have now been made (the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013), but the old Regulations (with the same title, but dated 2007) continue to apply to any proposals published before 28 January 2014.
40. Schedule 6 to the 2007 Regulations sets out what happens to land when a school changes category and becomes a foundation school and it is to this schedule that the paragraph references given below refer. The key principle is that all land held or used by the local authority for the purposes of the school should transfer. Paragraphs 11 to 13 prevent the local

authority from disposing of land that is used wholly or partly for the purposes of the school while proposals for a change of status are pending except with the consent of the adjudicator. Paragraphs 10 and 15 allow the parties to change the principle that all land should transfer by agreement. Paragraph 10 provides for land to be excluded from the transferring parcel if both parties agree in writing and paragraph 15 deals with the position when land is held for purposes which are wider than the purposes of the school or partly for the purposes of the school and partly for other purposes. In the circumstances covered by paragraph 15, land should be divided if that is possible, or retained or transferred (dependent on the effect of the tests described in paragraph 15(3) of the schedule) if that is not possible. If division is not possible, the parties are required to agree appropriate safeguards to protect their respective interests. Paragraph 16 obliges the parties to enter into written agreements identifying the land that will be subject to the statutory transfer with any additional conditions/provisions agreed under paragraph 15.

41. Paragraph 17 empowers an adjudicator to decide what should happen if the parties cannot agree what land should be excluded under paragraph 10. Paragraph 16 gives powers to assist in arriving at an agreement identifying the land that should transfer or be retained, and recording what has been agreed to protect the different interests of parties involved.
42. The DfE guidance (the Guidance) called “The Transfer and Disposal of School Land in England” was published with revisions on 3 July 2007. The following extract sets out the position:

“EXCLUDING LAND FROM TRANSFER

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.

Shared Occupation

Where an occupier which is not part of the school shares the overall site of the school.

A school site could include, for example, a City Learning Centre, an early years centre, a health centre or other non-school activity, or a facility which the school uses such as a community sports centre. In these cases, the school might not want the responsibility for managing and maintaining the buildings, particularly where they are used solely by another user or have complex needs, and would be content for the transferor to retain the freehold of the facility provided the school’s rights to use the facility are fully protected. In these cases, the preferred route would be, where possible, to divide the freehold, and exclude from transfer the part of the site which is occupied by the other facility. It may be necessary to guarantee rights of access over one or both parts of the land.....”

“If it is impracticable to divide the land, the next test is whether it is possible to determine which party has greatest need for the security afforded by owning the land. Here the term ‘security’ applies not only to the physical security of pupils and the school site, but also to the security required by a school to continue to provide, for instance a proper PE/sport curriculum or to improve its buildings to meet modern standards and curriculum needs.

If it does not prove possible to determine which party’s need for security is greater, the final test is to determine which will be the major user of the land.

Whichever party is afforded ownership of the land will need to make arrangements to protect the interests of the other party by means of a lease, licence or any other contractual arrangement. These arrangements will also be recorded in the transfer agreement.”

43. I shall first consider paragraphs 11, 12 and 13 of the schedule concerning the disposal of land while a change of status is pending. The council was informed that the school was seeking to change status in January 2010 and the school governors voted to consult in June 2010. The council began consultation on disposal of all of its educational land and property in June 2010 which is while this change of status was pending. The Regulations refer to land that is used wholly or partly by the school. The land used by the children’s centre was part of the school site. The school uses some of the car parking and manages the day-care facility which occupies half the children’s centre building. On this basis the school argued that the land is used partly by the school. The council took the view that none of these reasons are evidence that the land is used by the school in the accepted curriculum sense. In consequence, it considered that it was dealing with land that is not part of the school and therefore exempt from the Regulations.

44. It is open to discussion about whether there was a “disposal” of the land when the council transferred the land to a holding company that holds the freehold on behalf of the council while granting a lease back to the council. Section 142(6)(a) of the School Standards and Framework Act defines “disposal” as “granting or disposing of any interest in land (for example by sale..., lease, transfer, exchange, easement)”. I have decided not to investigate this matter further because I consider that it is not relevant to this determination whether the land is held by the council or by its wholly owned company, since in either case it is land that is “held or used by the local authority”. I referred earlier to the lack of discussion about these matters and it would have been helpful at this point if the council and the school had discussed the council’s view and intentions even though the council believed that it did not require permission to “dispose” of this land as it was not used by the school. Having looked at the issues I am persuaded that the land in question is not used by the school for the purposes of the school and was not therefore covered by the Regulations that prevent “disposal”, however, given the lack of agreement over this I would have expected to have seen evidence of discussion about this and

in the absence of agreement an earlier referral to the adjudicator.

45. When the council decided that it would not accept the suggested compromise, it said that it did not consider that the Adjudicator had the jurisdiction to consider this case because the land in question was now in the ownership of a limited company. I am taking my jurisdiction from paragraph 10 (3) of the Regulations that says that "*where the prospective transferee or transferor cannot agree what land should be excluded they must refer the matter to the adjudicator.*" The council's argument that the land has been transferred to a company does not remove the lack of agreement that gives me jurisdiction in this case under paragraph 10.
46. Before 2007 when the children's centre was built, the land in question was "held and used by the local authority for the purposes of the school". With the building of the children's centre there was a change of use of this part of the school site. The first lead partner for the children's centre was the school but this does not alter the fact that there was a change of use. My interpretation of what happened at this time is that the council with the agreement of the school and its governing body decided to use this piece of school land to build a children's centre attached to the school. As the school became the first lead partner for the children's centre it was a matter for the governing body of the school who also then managed the children's centre to apportion costs for all the shared services. The school's contract for the provision of the children's centre services was with the council and the contract brought the grant to fund the running costs of the children's centre. I observe that if the school had not been the first lead partner for the children's centre then it might have viewed its provision of services and utilities in a different way.
47. There was sharing of the space in the car park to allow school staff to park. Existing security arrangements were enhanced to ensure that the remainder of the school site was kept separate from the children's centre area. The new building was built within this site and attached to the school and connected to all the school's services and designated as a children's centre. About half of the building is managed by the children's centre lead partner. The other half of the children's centre building is designated as a day-care facility and this facility is managed by the school in agreement with the council. This situation has remained the same since the children's centre opened. When the council retendered the children's centre contract it decided to group the children's centres. The school's governing body did not tender to be lead partner of this centre because it did not have the capacity to take on more than one centre as required in the tender. The school has continued to act as the provider of caretaking and cleaning and utilities in its relationship with the new service provider while the council has acted as the commissioner in tendering and funding the service.
48. My first consideration was whether it was feasible under paragraph 15 to divide the disputed land. I can see that the land in dispute can be separated from the rest of the school site however I can see no obvious means by which the children's centre site could be apportioned between the parties and if it could be whether this would provide any resolution to

the dispute. When I visited the site it was self-evident that this was not a practical solution and such a way forward does not provide any comfort or security to either party and neither supported this as a possible way forward. I have therefore rejected apportionment as an option and any decision must be made about the entire site of the children's centre.

49. I then considered which of the parties has the greater need for the land and building. The council has stated that it has statutory duties to ensure the provision of children's centres for its local communities. In order to discharge its duty it must be able to ensure that it has the necessary facilities available to pass to a lead partner following a successful tendering exercise. There must be a sufficient controlling interest to ensure the security of tenure of the facility for as long as there is a requirement for there to be a children's centre in that location. The children's centre is provided for the local community and works with more schools than the one it is physically attached to.
50. The school has argued that it has lost the use of a piece of land that is wholly enclosed within the perimeter of the school. It welcomes its use as a children's centre and is fully supportive of this. The school argues that if it does not have some long term interest in the land, then if, or when, funding for children's centres comes to an end, the council could decide to use the land for some other purpose that is not compatible with the primary school that surrounds it and there is no guarantee that the governing body would be consulted over this. The school is the current provider of all the utilities and janitorial services to the children's centre, it takes the risk that bills run up by a future tenant will be covered in the event of insolvency or similar financial difficulty. The school also wishes to be able to ensure the security of its site and that the good presentation of the children's centre is maintained in keeping with the adjoining school buildings.
51. In the extract from the Guidance quoted above there is the assumption expressed that all land should transfer to the school unless there is a good cause and there is an example given of a school with an early learning centre on the school site. It says that "*the school might not want the responsibility for managing and maintaining the buildings....*". However in this case the school has indicated that it does wish to take on this responsibility. The guidance goes on to say "*.....and would be content for the transferor to retain the freehold of the facility provided the school's right to use the facility are fully protected.*" In this case there is no agreement between the parties on this point. If there is no agreement, the guidance goes on to describe the next test which is to determine which party has the greatest need for the security offered by owning the land. Security here refers not only to the physical security of pupils and the school site but also to the security required to continue to provide the facility in question.
52. The arguments to be weighed in considering which party has the greater need for the security of ownership of the site are as follows:

The council:

- needs to be able to let the children's centre contract following a tendering process and to do this it needs to have a sufficient controlling interest. This could be through having the freehold of the site or a suitable lease from the school if the school is the owner; and
- wishes to retain sufficient long term control of the site to ensure that it continues to be used for educational purposes.

The school needs:

- the existing security arrangements to be maintained;
- security that services and utilities provided through the school do not put the school financially at risk;
- access to the day care facility that it manages;
- continued access to the car park for school staff; and
- the security that if the site ceases to be used as a children's centre the council will consult with the school about future use and preferably decide to return it to school use.

53. I have earlier concluded that the children's centre cannot be divided between the parties so I must now decide which party has the greater need for the site alongside the argument about whether the land is used wholly or partly for the purposes of the school. I have concluded earlier that the land is not currently used by the school so unless the school has a greater need for the security of owning the land than the council I can see little justification for it to be transferred to the school. I agree that the land was once part of the school but this changed when the site became a children's centre. The arguments above lead me to conclude that the council has the greater need for the security of the site in order to secure the provision of the children's centre but at the same time the school has security needs and if the council retains the ownership of the site it must take immediate steps to protect the school's interests.

54. As the landlord, the council must protect the school's interests and put in place the means to do this through a written agreement. The areas that the written agreement must cover include:

- The arrangements for management of the day care facilities and associated administration spaces;
- agreement on the shared use of the car park and administration facilities;
- the means to ensure that the cost of utilities, caretaking, cleaning and janitorial services will be met by any tenant of the building acting as the lead provider for the children's centre;
- agreement about two-way access arrangements between staff of the school and staff of the children's centre;
- agreement about who manages, funds and ensures the maintenance and repair of the building and site to ensure that they remain in keeping with the existing school buildings;
- agreement about how the children's centre site landlord ensures the

- security and integrity of the school site; and
- agreement about the future of the land in the event of the children's centre ceasing to operate.

55. The school has been a willing partner with the children's centre and while there are benefits to be gained from integrated working, the council must take an active role as landlord of the facility and ensure that all parties are happy with arrangements.

Conclusion

56. I have looked at the timeline for events to understand how they relate to each other. The school and the WLCT complained that the council had acted without reference to the requirement to put a moratorium on the disposal of disputed land from the time that a school proposes to change category and in this case to become a foundation trust. I am persuaded by the council's argument that the land is not used by the school and so is exempt from this requirement.

57. The school refers to the disposal of the children's centre land to Sandwell Land and Property Ltd. I have decided not to investigate this matter further because I consider that for this determination it is not relevant whether the land is held by the council or by its wholly owned company, since in either case it is land that is "held or used by the local authority".

58. The school and the council did not agree whether the disputed land should be excluded from the transfer of the school land and in these circumstances the school referred the decision to the Adjudicator for determination.

59. I considered whether the disputed land could be apportioned or whether the disputed land should be awarded to one party or the other and I concluded that apportionment was not a practical way forward and that the whole site for the children's centre should be transferred to one or other of the parties.

60. I have concluded above that the land is not used by the school for the purposes of the school and that the school's management of the day care facility is not directly related to its operation of the school and is a separate arrangement with the council. I have also concluded that the council has the need for a continuing interest in the land in order to be able to commission the children's centre. The school's interest in the land is currently as a collaborative partner with the children's centre, as a tenant of the day care facility and as the provider of caretaking and cleaning services. In my opinion, none of these provide sufficient interest to justify ownership of the site when measured against the council's overall duty for commissioning the children's centre. In continuing with the ownership of the site, the council has a responsibility to protect the school's interests and in doing this must negotiate a written agreement as described above that ensures that the security of the site is maintained; that the school does not carry the risk for unpaid utilities or for unpaid provision of caretaking

and cleaning services and that the school's management and use of the day care facility and the car park are recognised. A key concern for both the school and the council is what happens if the children's centre closes. I have concluded that this is a question for which I cannot determine an outcome. However, consideration should be given to the land reverting back to its former use as part of the school, particularly as the council is currently consulting on expanding the capacity of the school.

61. In writing the agreement the council needs to bear in mind that the school has shown great willingness to engage with the spirit of an integrated children's centre as a lead partner and endeavour to draft an agreement that helps protect this spirit of collaboration while allowing another lead partner to run the children's centre and ensuring that the short and long term interests of the school are protected.

Direction

62. 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 Old Park Primary School from the Metropolitan Borough of Sandwell to the Wednesbury Learning Community Trust consequent upon the school becoming a foundation school, shall not include the children's centre and its associated car park and walkways and that the Metropolitan Borough of Sandwell shall draw up a written agreement to protect the interests of the Wednesbury Learning Community Trust as specified in this determination. The agreement is to include:

- The arrangements for management of the day care facilities and associated administration spaces;
- agreement on the shared use of the car park and administration facilities;
- the means to ensure that the cost of utilities, caretaking, cleaning and janitorial services will be met by any tenant of the building acting as the lead provider for the children's centre;
- agreement about two-way access arrangements between staff of the school and staff of the children's centre;
- agreement about who manages, funds and ensures the maintenance and repair of the building and site to ensure that they remain in keeping with the existing school buildings;
- agreement about how the children's centre site landlord ensures the security and integrity of the school site; and
- agreement about the future of the land in the event of the children's centre ceasing to operate.

Dated: 13 June 2014

Signed:

Schools Adjudicator: David Lennard Jones