



DETERMINATION

Case reference: LAN71

Applicant: Exeter Learning Trust on behalf of Bowhill Primary School, Devon

Application: Regarding the transfer of a house referred to as the Caretaker's House at Bowhill Primary School, Exeter, Devon

Date of direction: 10 April 2017

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 Bowhill Primary School from Devon County Council to Exeter Learning Trust consequent upon the school becoming a foundation school, shall not include the land and dwelling associated with the property referred to as the caretaker's or school house.

The referral

1. Solicitors representing The Exeter Learning Trust (the trust) wrote to the Office of the Schools Adjudicator (OSA) on 14 November 2016 to request the resolution of a dispute with Devon County Council (the council) concerning the transfer of the house adjacent to Bowhill Primary School, Exeter (the school) that had been used by a school caretaker. The school converted from a community school to become a foundation school with a foundation (commonly known as a trust school) as part of The Exeter Learning Trust on 1 January 2014. The council believes that it should retain the property and the school believes that the property should be transferred to the school.

Jurisdiction

2. The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007 as amended (the Regulations) apply to this matter. I am aware that The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013 came into force on 28 January 2014, but by virtue of Regulation 8(2) of these Regulations, as the proposal to change category was made before this date, the 2007 Regulations continue to apply.
3. Paragraph 2 of Schedule 6 to the Regulations establishes that "*when a school changes category from community to foundation all land which immediately before the implementation date was held or used by the local*

authority for the purposes of the school transfers to the school on that date.”

4. The date when a school changes its status from community to become a school with a foundation is the implementation date. Paragraph 17 of Schedule 6 of the Regulations makes provision that if, *“an agreement has not been reached within a period of 6 months from the implementation date, the adjudicator may give a direction determining that matter.”*
5. Bowhill Primary School changed its status from a community school to become a foundation school with a foundation on 1 January 2014, the implementation date. Since no agreement was reached within the prescribed period, both the school and the council had the right to apply to the adjudicator for a direction. The trust on behalf of the school has requested that a determination be made by the adjudicator after the end of this period. I am satisfied that the matter has been properly referred to me and that I have jurisdiction to consider it under the powers conferred on me.

Procedures

6. In considering this matter, I have had regard to all relevant legislation and guidance.
7. I have considered all the papers put before me including:
 - a. correspondence from the trust’s legal representative with supporting documents;
 - b. correspondence from the council with supporting documents; and
 - c. a plan of the site and buildings of the school.

Background

8. Bowhill Primary School has 425 children on roll with a published admission number of 75 and a capacity of 525 children. It became a foundation school on 1 January 2014 within the Exeter Learning Trust, which is a co-operative trust. It is now seeking to become an academy in a multi academy trust with three other local primary schools. Bowhill Primary School opened on 1 September 2005 replacing John Stocker Middle School and Cowick Road First School, which were closed.
9. The caretaker’s house, which is the subject of this dispute, is referred to in earlier documents as the school house and it is situated at one corner of the Bowhill Primary School site, which prior to the council’s school reorganisation and the establishment of this school in 2005 was the John Stocker Middle School site. It is a detached property with three bedrooms. The tenants have vehicular access to the property through the school car park. For a period before 1975, the headteacher of John Stocker Middle School had lived in the house by agreement with Devon County Council. On 1 April 1975, the council granted, by written agreement, a service licence to a school caretaker who took on the tenancy of the house. The

agreement permitted the tenant to occupy the house as a consequence of his employment as the caretaker at Cowick Street First School, which is located a short walk away. The licence refers to a rent of £5.34 a week.

10. The tenant was the caretaker of Cowick Street First School until his retirement in 1984. When the tenant retired from his work as a caretaker at that time, the service licence could have ended automatically because it linked to his employment as a caretaker. However, correspondence from the time that the council has provided shows that the council had a policy of allowing service tenants to remain for a period of twelve months after they retired and the same correspondence sought advice about the impact of the new housing legislation referred to below. The outcome was that the tenant was allowed to remain in occupation with his family. The council increased the rent to £29.75 a week. This tenancy became a secure tenancy under section 79 of the Housing Act 1985.
11. Correspondence provided indicates that, in 2003, the council's property department considered the matter of the house and a valuation was attached to it. The email ends by stating in reference to the tenants that the council "*should retain the property until their demise and consider its future at that time.*"
12. The tenant died in 2011. A letter sent to his widow by the council's property management agents dated 16 May 2011 invited her to accept that she was a first successor to that secure tenancy under section 89(1) of the Housing Act 1985, and she signed an endorsement indicating that she did so. The letter also clarified that her adult daughter would not be entitled to succeed her to the tenancy, which will therefore terminate on the death of the widow. The widow and her adult daughter remain in occupation at the house.
13. At some point in the tenancy, the council began to pay the rental income from the tenancy to the school next to the school house. If this began before 2005, it would have been to John Stocker Middle School. After John Stocker Middle School's closure in 2005, any rent paid would have been to Bowhill Primary School, which then opened on the site in 2005. Neither the trust nor the council is able to clarify when this began. The trust speculates that this might have been at the time that school budgets were delegated to schools under local management of schools (which would have been in the period between 1990 and 1995) but has not provided any evidence of this. The only firm evidence is the record of expenditure on the house that relates to the last five years and has been provided by Bowhill Primary School. In 2005, Bowhill Primary School opened as a new school on the site so it is also possible to speculate that this might have been the starting point for this arrangement. The council says that this is an arrangement used in other council schools where similar situations can be found. Both Bowhill Primary School and the council agree that the tenant pays the rent to the council and then the council transfers it into the school's budget. The school has maintained the building in consultation with the council's property services company for at least the last five years as shown by the expenditure that has been provided by the school. The school says that it paid £15,000 for

replacement windows between 2009 and 2010. The council does not dispute this.

The application by the trust

14. Bowhill Primary School joined the trust on 1 January 2014. The trust argues that a transfer of all the school land took place automatically on the basis of law but it still needed to be registered, since the freehold was registered land. It goes on to argue that *“in this situation the registered title has remained vested in the local authority even though the school has become a foundation school; and in this circumstance, the registrar may agree to accept a statement to the effect that the property has been vested in the 2007 Regulations rather than requiring any more detailed or complex information.”* The trust argues that it remains open to it to apply to the registrar for a registration in respect of the caretaker’s house.
15. The trust asserts that the land and the house were previously part of the school and used as the headteacher’s house of the John Stocker School, and thus held by the council for the purposes of John Stocker Middle School and this is how it was held immediately before the 1975 agreement was made. The 1975 agreement between the council and the tenant did not change this and permitted the house to be occupied by the caretaker of Cowick Street First School. When this agreement became a secure tenancy upon the tenant’s retirement, the trust argues that there was no indication that the purpose changed. The trust supplied a quote from an email sent by a project officer in the council’s Built Environment Team in 24 January 2014 to the Bowhill Primary School’s headteacher, which said *“the building has always been a bit of an anomaly as far as the County Council’s property estate is concerned as it is classed as part of the school. There is currently an opportunity to pass the responsibility for the building over to the corporate estate team which would mean losing the income and the responsibility for repairs, however it would also mean relinquishing the opportunity to incorporate it into the school when the tenant moves on (the expectation would most likely be sale to the highest bidder). XX had always had a long term strategic ambition to use the property – which I confess I always thought might be over optimistic because of the nature of the building and the problems with making it comply with the regulations for anything other than the residential use.”* The headteacher reports in the email dated 28 June 2016 where she shared this previous email, that she *“politely declined ‘the opportunity to pass the responsibility over’.”*
16. The trust also argues that the house was, and is, used for the purposes of Bowhill Primary School. It accepts that after the licence agreement it was occupied initially for the purposes of Cowick Street First School. However, once it was occupied by the tenant who had retired as a caretaker and his wife, and in recent years by the widow, under a tenancy at a rent set by the council but payable to Bowhill Primary School, the trust believes that it was being held for the purposes of Bowhill Primary School and not for any other purposes of the council.

17. The trust says that Bowhill Primary School continues to receive the rental income from the house, which is currently approximately £4,000 per annum. The trust says that the school has undertaken and paid for all maintenance responsibilities, including replacing all of the windows between 2009 and 2010 at a cost of about £15,000. The rent received contributes to the cost of this kind of expenditure and the trust says that the 2014 email quoted in paragraph 15 above suggests that the intention was for the school to maintain the house until the tenancy ended and then it was possible that the house could revert to the school. It argues that if this was not the case there appears to have been little purpose in transferring the rent and the maintenance responsibility to the school.
18. The trust argues that it is only as a result of the council's failure to remove the caretaker when he retired from that job in 1984 and the subsequent granting to his widow of a succession to the secure tenancy in 2011, that the house had not been incorporated into John Stocker Middle School at that time. In consequence, the trust argues that the house should therefore be regarded as being used by Bowhill Primary School at the implementation date, even though in fact it is not, because this is entirely due to the council's failure to return the house to John Stocker Middle School at the end of the caretaker tenancy. It argues that the council cannot use its oversight in terminating the licence at the end of the caretaker's employment and its failure to return the house to John Stocker School's use in the 1980s as the basis for its argument that the house is not held for the purposes of the successor school, Bowhill Primary School. The trust argues that it can be seen from the history of the house that it was originally part of the school and is not at this time only through the council's error.
19. The trust says that the house could be used by small groups of pupils for intervention work. Using the facilities in this way would be educationally advantageous for children with particular needs and who benefit from being away from the classroom, whether those with special educational needs, or gifted and talented pupils. The garden of the house is the only green space on Bowhill Primary School and would add to the educational experiences of the pupils if it were available for such purposes.
20. The trust reports a comment from a council officer who said that one possible future use of the property could be for a road junction improvement. It also reports a comment made by a council employee concerning the planning position of the house because of its use as a dwelling. It rejects these comments as being without basis in fact and asserts that they have no bearing on whether the house is held or used for school purposes now or in the future.

The view of the council

21. The council argues that prior to the implementation date of the transfer of the school land when Bowhill Primary School became a foundation school on 1 January 2014 the house was not being held for or used for the purposes of this school.

22. The council says that the 1975 agreement referred to by the trust and described above provided that the caretaker could occupy the house for so long as he continued “*..in the employ of the council...*” At the point that the caretaker retired in the 1980s he was granted a tenancy and became a secure tenant under the Housing Act 1985 and this or any subsequent rights of succession that this might have created are only relevant in that they show that the house was not held or used by the local authority for the purposes of Bowhill Primary School immediately before the implementation date of the foundation status of the school.
23. The council accepts that what it refers to as “operational school land”, should transfer to the trust. It does not accept that the house is part of this land and so does not consider that it should transfer to the trust. The council agrees that it passes the rent to Bowhill Primary School and that these rents were used to maintain the house. The council says that it does not have records that show whether this was always the case or just the case in more recent years, nor can it show if it has ever contributed to the maintenance of the house.
24. The council says that it is speculation by the trust as to the purpose that the house might have been put if it had not had a tenant living in it. It also says that it is speculation about what the house could be used for in the future by the school. The council points out that as the house has been in residential use since 1975 and certainly since the point when the new tenancy was agreed in the 1984, it is likely that it would have from the planning perspective a deemed use for residential purposes rather than educational use.
25. The council says that it does not agree with the trust’s assertion that “*it follows on any footing that the caretaker’s house (school house) is held by the council on trust for the Exeter Learning Trust*”. The council believes that it has shown that the house has not been used for academic or school purposes since the 1980s. The council says that it has no plans strategic or otherwise for the house nor are there plans for any part of the house to be used for highway purposes as mentioned by the trust in its submission.

Consideration of Factors

26. For my consideration and decision, I must apply the terms set out in paragraph 2 of Schedule 6 to the Regulations, which apply with regard to land transfers when a school changes category; in this instance when a community school becomes a foundation school with a foundation. The word “land” in this context includes any buildings on that land.
27. Paragraph 2(2) of the Regulations says that

“any land which, immediately before the implementation date, was held or used by a local authority for the purposes of the community school must on that date transfer to, and by virtue of this paragraph vest in—

(a) the trustees of the school, to be held by them on trust for the purposes of the school

(b) if the school has no trustees, the governing body, to be held by that body for the relevant purposes.”

28. My assessment therefore has to be whether the property was being “*held for or used for the purposes of the school*” immediately before Bowhill Primary School became a foundation school on 1 January 2014.
29. There are two opposing arguments. The trust argues that if there had not been a tenant in the house then the house would have been incorporated into the school buildings and put to some educational use. It states that the rent from the house was given to Bowhill Primary School in order that the school could undertake the maintenance of the house and that there would be no reason for the council to do this if it did not intend that the school should use the house at the end of the tenancy. It therefore believes that it is the council’s intention that the house should become part of Bowhill Primary School when the tenant vacates the house. As a result, it believes that the house was being held by the council for the future use of Bowhill Primary School.
30. The council for its part argues that the house was used by a school caretaker between 1975 and 1984 as part of his employment package. When the caretaker retired, his tenancy was continued. Correspondence from the time suggests that this was the council’s policy on the retirement of those with a service licence for a property owned by the council at the time. Under the terms of the Housing Act 1985, the tenancy became a secure tenancy. When the caretaker died in 2011 the successor rights for the tenancy passed to his widow. An adult daughter lives with the widow but it has been established that she does not have successor rights to the tenancy on the death of her mother.
31. The council acknowledges that the rent from the house is being passed to Bowhill Primary School in order that maintenance can be undertaken on it. Neither the school nor the council can say when this arrangement began. The council does not believe that the arrangement has a bearing on the ownership of the house and land. The council argues that the house was not held or used for the purposes of Bowhill Primary School immediately prior to the change of category of the school from a community school to a foundation school on 1 January 2014.
32. In applying the test set out in the Regulations referred to above there are two questions to be answered. The first is whether on the relevant date the land and house were used for the purpose of Bowhill Primary School. The second is whether they were held for the purpose of Bowhill Primary School. These are two distinct questions and I shall first consider whether the house was “*used by*” the school. Material in the submissions on behalf of the school concerns what might have happened if the house had not had a tenant and what it could be used for in the future. This is speculation and in this respect is not relevant to the decision I must make. Both the parties have confirmed in different ways that the house has not been used by the school while it has been let. It seems to me that this matter is clear. The question is not what the historical use of the house

was or what its future intended use might have been but simply whether it was used for the purpose of Bowhill Primary School immediately prior to the implementation date. I have to conclude that it was not. From the caretaker's retirement in 1984, the house was used as a private residence by someone who was not working for any school. From 2011 until the implementation date in 2014 it was used as the private residence of the caretaker's widow. It was clearly not used for the purposes of Bowhill Primary School at that time.

33. I must now consider if the house was being "*held*" by the council "*for the purposes of the school*". This is a more difficult question and even though I have concluded that the house was not used by Bowhill Primary School it could nonetheless have been held for the purposes of the school at the relevant date. Bowhill Primary School opened as a new school in 2005. Before that time the site was used by John Stocker Middle School which was closed in 2005 so that Bowhill Primary School could open.
34. When the house was vacant in 1975, the council decided to let it to the caretaker of Cowick Street First School which was a short walk away. Although the property adjoined John Stocker Middle School it was leased to the caretaker as a separate entity. The organisation of the local schools has changed over the years and the John Stocker Middle School and Cowick Street First School were closed in 2005 and a new school, Bowhill Primary School, opened in 2005 on the site of the former John Stocker Middle School. At that time the council will have made decisions about the use of the school sites but I have been shown no evidence that the decision making included consideration of the now disputed property.
35. The trust considers that the council failed to end the service tenancy on the retirement of the caretaker as it could have done but the council did appear to consider the matter and had a policy to allow retiring members of staff to remain in their service tenancies. There did not appear to be any consideration that the house should be incorporated into the school at that time. The Housing Act 1985 came into force the following year.
36. I note that Bowhill Primary School has been receiving the rent from the house in recent years and that neither the council nor the school can say how long this arrangement has been in place. In exchange for receiving the rent, the school has been undertaking the maintenance in collaboration with the council's property management company. The council states that this is an arrangement that exists in other similar situations in the county. The trust argues that the arrangement is evidence of the council's intention to transfer the house to the school at the end of the tenancy and that if this were not the case then there is no point in the arrangement. The trust also referred to an email that suggested that the property was classed as part of the school. The council says that it is incorrect to conclude that this is the case and while not directly justifying the financial arrangement suggests that it is possible that the school can benefit financially from it. The expenditure schedule for the last five years that the school provided shows that expenditure was comfortably below the level of income received.

37. The council asserts that no decision about the future of the house has been made and it was not at the relevant date holding the house for the purposes of Bowhill Primary School. It argues that the financial arrangements referred to in the previous paragraph are not relevant to this consideration. There is a reference in correspondence from 2003 that the council should wait until the end of the tenancy before considering the future of the building.
38. The trust argues that because the rent was being paid to council and then transferred to the school this indicates that the property was being held by the council for the school. However, the council's solicitor asserts that this is not the case and that this is a practice used in other similar situations in Devon. The council's solicitor also points out that the lease was with the council and that since 1975 the house has not been used by not been used by John Stocker Middle School and subsequently Bowhill Primary School for any purpose and the current tenant was not given the property for the better performance of her duties.
39. The trust has produced an email from January 2014 that is quoted above and which highlights the anomalous position of the property. The email is evidence that the situation was unclear at the time of writing. The council is now clear in stating that it did not intend that the property was to transfer to Bowhill Primary School.
40. In weighing the balance of these matters, there are some factors that support the view that the house was not held for the purposes of the school:
- The house has not been used for the purposes of the adjoining school since it was occupied by the headteacher of John Stocker Middle School. This arrangement ended in 1975.
 - The house was then used by the caretaker of a school on a different site until 1984.
 - The occupation of the house between 1984 and the implementation date was as a private residence.
 - The secure tenancy limits the council's ability to deal with the land as it pleases and it is effectively limited to using the house for accommodation until the tenancy ends or it can prove a ground for possession.
 - There is no clear evidence as to the intended future use of the house. If there were clear evidence that the council had always intended the land to revert to the use of the school at the end of the tenancy then I would have expected to have seen it. The council has not made any statement about what it will decide about the house at the point that the tenancy ends.
41. There are some factors that point the other way:
- The physical location of the house indicates a historical connection to

the school together with the name “school house” given to the property.

- The council gave Bowhill Primary School the rent for the house and Bowhill Primary School has undertaken the maintenance of the property.

42. I have carefully read all the correspondence supplied by both parties. In considering the factors above, I have concluded that on balance the house was not held for the purposes of Bowhill Primary School immediately prior to the implementation date. While I note that the school was involved in the maintenance of the house I do not consider that this is enough to establish an intention that when the secure tenancy ended the house would revert to the use of the school. The council appears to have treated the house as part of its holdings for general educational purposes rather than specifically for this school. The fact that the tenant came to live and retire in the house following his employment at another school in the area underlines this point. It appears that the council is waiting for the end of the tenancy before making decisions about its future use.

Conclusion

43. I have considered all the documentation provided and reviewed all the points made to me. My decision has to be based on the Regulations, which require that property is transferred to the trustees or governors of the foundation school as appropriate if it was held or used by a local authority for the purposes of the community school immediately before the implementation date.

44. The relevant implementation date is 1 January 2014. I considered two questions, the first was whether the house was used by Bowhill Primary School and the second was whether the council was holding the house for the purposes of Bowhill Primary School. Taking the first question, I could find no evidence that the house was being used by the school just before the implementation. The house was being used as a private residence by a person who is not employed by the school or the council and who pays rent to the council as the landlord.

45. I then considered the second question that deals with whether the house was being held by the council for the purposes of Bowhill Primary School. This is a more difficult question and I have had to consider the balance of the points that have been made by the two parties. I can see that the house was associated with a school when John Stocker Middle School or its predecessor and the house were built. However, at that time, the school was a county school and the council was responsible for the school's premises. The evidence is that the council decided in 1975 as the owner of the property to lease the house through a service tenancy to the caretaker of another school. This is evidence that the council saw the house as a part of its wider property holdings that it could let independently to the adjoining school. The service tenancy became a secure tenancy as a result of the 1985 Housing Act. I have found no evidence of the council's subsequent decision making about the house. When the predecessor schools were reorganised and closed in 2005 and Bowhill Primary School established, the council could have reviewed matters but appears not to have done so. I

have seen evidence about the name and location of the house, which are historic, and the fact that the council chose to collect the rent and then to give it to Bowhill Primary School to maintain the house. However, I have been shown no other evidence to indicate that the council was holding the house for the purposes of Bowhill Primary School. The fact that the house and one of the predecessor schools to Bowhill Primary School were associated does not in itself provide evidence that the council was holding the house for the purposes of the school; they had a common landlord but that is about as far as it goes. I have noted that Bowhill Primary School is involved in the maintenance of the house but I do not consider that this is enough to establish an intention that when the secure tenancy ends the house would revert to the use of the school.

46. The council appears to have treated the house as part of its holdings for general educational purposes rather than for this specific school. It appears that the council is waiting for the end of the secure tenancy before making a decision about its future use.
47. My overall conclusion is, therefore, that the council did not hold or use the property for the purposes of Bowhill Primary School immediately before the implementation date. In consequence, the school's claim to the property cannot be upheld and the property therefore remains with Devon County Council.

Direction

48. 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 Bowhill Primary School from Devon County Council to Exeter Learning Trust consequent upon the school becoming a foundation school, shall not include the land and dwelling associated with the property referred to as the caretaker's or school house.

Dated: 10 April 2017

Signed:

Schools Adjudicator: David Lennard Jones