



Office of
the Schools
Adjudicator

DETERMINATION

- Case reference:** LAN75
- Applicants:** The Governing Board of Lealands High School and Luton Borough Council
- Application:** By the Governing Board of Lealands High School for a direction that the transfer of land from Luton Borough Council to the Governing Board of Lealands High School shall include the former E Learning Centre
- Application:** By Luton Borough Council for a direction in respect of the area currently being used as a private nursery, and pre-school and the area known as the Community Hub
- Date of direction:** 6 March 2018

Direction

Under the powers conferred on me by regulation 6 of, and paragraph 15 of Schedule 5 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013, having consulted the transferor, transferee and any other interested party

I hereby direct that the transfer of land to the Governing Board of Lealands High School from Luton Borough Council consequent upon the School becoming a foundation school under section 21(1)(c) of the Schools Standards and Framework Act 1998:

- shall exclude the former E Learning Centre; and
- shall exclude the area currently being used as a private nursery and pre-school;

I further direct that

- there will be a lease, licence or other contractual arrangement between Luton Borough Council and the Governing Board of Lealands High School permitting the regular continued use by staff, parents and pupils of Lealands High School of the section of the driveway of the Centre which is currently being used as part of the main entrance to the school, and permitting occasional use of the Centre car park by parents of pupils at the

school as an overflow facility when the school's car park is full. The occasional use of the Centre car park is to be by prior arrangement with the Council; and

- there will be a lease, licence or other contractual arrangement between the Governing Board of Lealands High School and Luton Borough Council permitting the arrangements for the existing shared use currently exercised by the Bizzie Bees 4 Nursery to be exercised by the Council and its lessees or licencees. In particular this shall include use of the school entrance nearest the nursery and pre-school; exclusive use of the 5 space car park at the rear of the school which is currently being used by the nursery and pre-school; use of the main entrance to the school; and use of the main school car park by the staff and pupils of the Council's lessee or licencee, parents and any person taking a pupil to, or collecting a pupil from, any nursery facility permitted by Luton Borough Council to operate from its premises;**

I hereby make a transfer order that the area known as the Community Hub shall transfer by order from Luton Borough Council to the Governing Board of Lealands High School; and

I further direct that there will be a lease, licence or other contractual arrangement between the Governing Board of Lealands High School and Luton Borough Council requiring the Community Hub to continue to be used for its current purpose as a shared school and community facility managed by the Governing Board of Lealands High School.

The Referral

1. Following a statutory consultation process and the issuing of a notice, the Governing Board of Lealands High School (the school) implemented a proposal to change its status from a community school to a foundation school on 12 July 2016 (the implementation date). The transfer of the school land has still not been agreed, and there has been no formal conveyance of the land from Luton Borough Council (the LA) to the Governing Board of the school. On 24 May 2017 the matter was referred to the Office of the Schools Adjudicator (OSA) by lawyers acting for the school's Governing Board on behalf of that Governing Board. I have treated the referral as a request that the transfer of land from the LA by operation of law on the school becoming a foundation school be determined to include the former E Learning Centre (the Centre).
2. The LA's letter in response to the referral indicated that the LA's view is that the Centre was not being used or held for the purposes of the school immediately before the implementation date, and so has not transferred to the Governing Board by operation of law on that date. The LA has said that it needs these premises for a particular use, which will be explained further below, but would be willing to enter into a lease with the Governing Board to allow the school the use of these premises. The Governing Board of the school has declined this offer, therefore it has fallen to me to make a determination in respect of this area of land.

3. The LA's letter also indicated that there are two other areas of land within the curtilage of the school which were also not being used exclusively for the purposes of the school immediately before the implementation date. These are: an area known as the Community Hub, which is a community facility the parties agree is being used extensively by organisations other than the school; and another area which is being used exclusively as a private nursery and pre-school (the nursery and pre-school). The current proprietor of the nursery and pre-school is Bizzie Bees 4 Nursery. The LA submits that, because these areas were not used or held exclusively for the purposes of the school immediately before the implementation date, they will not have transferred to the Governing Board of the school by operation of law on that date. I have treated the LA's letter as a request for a direction in respect of these areas.
4. The LA is willing to transfer the nursery school and pre-school area to the Governing Board for nil consideration, provided the Governing Board will agree to enter into a formal arrangement with Bizzie Bees 4 Nursery to secure the continued existing use of this area as a nursery and pre-school facility. The Governing Board would be permitted to retain any rent paid by the nursery.
5. The LA is also willing to transfer the area known as the Community Hub to the Governing Board for nil consideration provided the Governing Board will enter into a formal arrangement to continue the existing use of this area as a community facility. The Governing Board would retain any charges made for use of this facility (as is currently the case).
6. The head teacher on behalf of Governing Board of the school has stated that, if the nursery and pre-school area and Community Hub were to be transferred to the Governing Board, the existing use of these areas would continue. Notwithstanding this statement, the Governing Board has declined to agree these terms with the LA. Therefore, in the absence of agreement between the Governing Board and the LA as to the treatment of these two areas of land, it falls to me to make a direction in order to determine the matter, and so these two areas of land form part of this determination.
7. It came to my attention at a very late stage in my consideration that there were other areas within the curtilage of the school which are used for both community purposes and school purposes. These were the swimming pool, astro turf 1&2, the activity suite, the sports hall and the dance studio. The LA confirmed on 12 February 2018 that it is prepared to transfer these areas to the Governing Board for nil consideration and without any legally binding conditions – although it is the wish of the LA that shared community use of these areas continue. These areas will transfer by agreement of the LA and do not, therefore, form part of this determination.

Jurisdiction

8. Schedule 5 to The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013 (the Regulations) applies in relation to the transfer of land where a school changes category or

acquires a foundation. Paragraph 2 of Schedule 5 to the Regulations provides that any land which immediately before the implementation date was held by the local authority for the purposes of a community school must, on that date, transfer to, and vest in, the trustees of the school or the Governing Board.

9. Paragraph 13 of Schedule 5 applies in the case of any property, rights and liabilities of the local authority used for purposes wider than that of the school, or partly for the purposes of the school and other purposes. Paragraph 14 of Schedule 5 provides that the transferor and transferee (in this case the LA and Governing Board respectively) must in writing agree what property, rights and liabilities are, or are not, to transfer. Paragraph 15 of Schedule 5 provides that, in the event that a Local Authority and the Governing Board of a foundation school are unable to reach agreement as to the treatment of land including land held partly for the purposes of the school and partly for other purposes, the adjudicator may make a direction determining the matter.

Procedures

10. In considering this matter, I have had regard to all relevant legislation and guidance. I have considered all of the information submitted to me including:
 - correspondence from the school's head teacher and lawyer;
 - correspondence from the LA's lawyer;
 - various supporting documents, plans and maps of the school site; and
 - information provided orally at a meeting convened at the school on 27 November 2017.
11. All correspondence submitted to me by the school has been copied to the LA, and all correspondence submitted to me by the LA has been copied to the school. Each party has been given the opportunity to comment on correspondence submitted by the other party, with the exception of my request for clarification of the LA's position in relation to the swimming pool, astro turf 1&2, the activity suite, the sports hall and the dance studio. This was copied to the school, and the LA's response was copied to the school. Since the LA's response was for the purposes of my own clarification, I did not need the school to comment on this piece of information.
12. I also visited the school on 27 November 2017 in order to view the site and, in particular the areas of land in dispute, at first hand. I arranged a meeting which took place after the site inspection. The meeting was attended by the head teacher of the school and the school's legal representative, the LA's lawyer, the LA's Head of Property and Construction, the LA's Head of Education, Support and Challenge and the proprietor of Bizzie Bees 4 Nursery. At the meeting, I checked my

understanding of each party's position, and invited the parties to make additional representations. At the end of the meeting, I requested that the LA confirm its additional representations in writing in order to give the Governing Board further time to consider and respond to them. I have received a summary of the LA's additional representations and the school's response. Both parties have since made further representations, and it has been necessary for me to write further in order to seek clarification on various points.

13. In seeking and considering the representations of the LA, Governing Board and the nursery proprietor, I have complied with my obligation to consult the transferor, transferee and any other interested party before making a direction.
14. I am bound to say that this visit and meeting took a very long time to set up, which led to an unnecessary delay of more than four months. I am also bound to say that the LA made reasonable offers before the meeting, at the meeting, and in subsequent correspondence, in an attempt to reach agreement. As I have said above, the school declined to accept any of these offers. I had hoped to complete this determination as quickly as I could in January following receipt of additional representations by the parties. This has not been possible as a significant further point arose from this correspondence. The result of all of this is that former E Learning Centre has remained unused and unoccupied for a considerable period of time. This is an unfortunate waste of a public resource which could have been put to good use during that time.

The Application

15. The school became a foundation school without a foundation on the implementation date. There has been no agreement between the Governing Board and LA about the transfer of land, and no formal land conveyance. Accordingly, the matter has been referred to me under paragraph 15 of Schedule 5 to the Regulations. The majority of the school site comprises unregistered land.

The view of the school

16. The school considers that all of the land within the curtilage of the school, including the Centre, belongs to the school. It was accepted at the meeting by the head teacher and the school's legal representative following my explanation of the operation of Schedule 5 to the Regulations that land used for the purposes of the school will have already transferred by operation of law. It is the school's view that all of the land within the curtilage of the school has transferred, but there will nevertheless need to be a formal land transfer. Because the LA will not agree to transfer the Centre to the Governing Board, there will need to be a determination in respect of this land.
17. Although the LA has agreed to transfer the Community Hub and the nursery and pre-school area to the Governing Board, these transfers would be subject to conditions. The Governing Board does not accept that

the LA should be able to impose such conditions. The Governing Board considers that the nursery area and the Community Hub “*belong to the school*”, and the school can use this land as it wishes following the transfer. The fact that the Governing Board intends to continue the existing use of both of these areas is by the by. It will not be held to the terms of an agreement with the LA.

The view of the LA

18. The LA considers that the Centre and the area of the school currently being used as a private nursery and pre-school were not being used or held for the purposes of the school immediately before the implementation date, and so have not transferred by operation of law to the Governing Board. The area known as the Community Hub was being used partly for the purposes of the school, but is also being used extensively for community purposes. It is the view of the LA that this area has also not transferred. As mentioned above, the LA has offered to transfer the areas currently being used by the nursery/pre-school and the Community Hub to the Governing Board. The LA has also agreed to lease the Centre building and grounds to the Governing Board for an annual rent of £33,000 plus service charge for a period of five years. This is stated to be “*subject to contract and outside the protection of the Landlord and Tenant Act 1954.*”

Background

19. The initial referral letter of 24 May 2017 from the school’s legal representatives to the OSA stated that the dispute centred upon a former City Learning Centre, which was originally a resource managed by the LA for use by a number of its schools. The letter stated that the Centre was being used at the time of that letter for the purposes of the school, and that the school also uses the Centre car park as an overflow. Students access the school via the driveway which gives access to the Centre. The letter also stated that the Centre was set up on the school land in the Autumn Term of 2003. The Governing Board agreed with the LA that the site could be used as a City Learning Centre subject to the condition that the school would be able to use the facility as part of the school. The Centre has been a fundamental part of the school ever since.
20. I was unclear from this letter what the Centre building is currently being used for. I now understand from viewing the site that the building has fallen into disuse. The school’s legal representatives had threatened the LA with legal action in order to prevent the Centre being used for the LA’s intended purposes as offices for the charity Active Luton pending a determination of ownership of the land by the adjudicator.
21. The Governing Board wishes to use the Centre site for various purposes associated with the school. The letter stated that the intention is to use it to provide facilities for students who have experienced emotional trauma, students at risk of exclusion, students on managed moves and similar purposes, to take on further staff and to offer counselling and support for parents – all of which are educational purposes. I was sent a full summary of

the Governing Board's proposals for the use of the Centre on 19 December 2017, which I have read and considered.

22. The head teacher and the school's legal representative have described a sequence of events. The Centre ceased to be used as a resource for LA schools. Permission was given to the school to use the site because it was empty and unused. The school was subsequently informed that the LA had another user in mind. The school was invited to draft a proposal for its intended use of the Centre, but was then informed that the other user had been successful in bidding for use of the building. The Governing Board submits that it has continued sole use of the Centre grounds and is responsible for grounds maintenance. Part of the grounds of the Centre forms the main entrance route to the school, and is therefore used as a thoroughfare for its pupils every day. The school considers that the LA has allowed the Centre to become "*unviable*" without seeking ways to allow it to operate for its intended educational purpose. On the date of my visit to the school site, the Centre building was not in use and the LA alone was in possession of keys to it.
23. The LA's case is that it does not dispute that there is to be a transfer of land, but precisely what must be transferred and any conditions are disputed. As I have said above, the LA has identified three areas of disputed land, which I have now seen:

- (a) The former E-Learning Centre together with its grounds and car park. The LA deny that the Centre was funded through the Dedicated Schools Grant, (as asserted by the school). It is the LA's case that the Centre does not form part of the school premises; the school has no rights over the land, although they have been permitted to use it; the Centre was built adjacent to the school; it has its own car park and clearly defined boundaries; the shared area is only a very small section of the driveway; although the land on which the Centre was built is within the curtilage of the land occupied by the school, it has at all material times been owned by the LA; the school has been permitted to use the Centre but not because it is part of the school; it was allowed to use it together with other LA schools as a LA resource; the school has not had exclusive rights to this area since 2001. The LA claims that the school has said previously that it would be willing to enter into a leasing arrangement – which indicates that the school does not consider the Centre to be part of the school premises. The Centre has ceased to be viable for its purpose as an LA E-Learning Centre.

The LA is in dire need for accommodation for homeless persons. There is a former hotel which could be converted into suitable housing accommodation at modest expense. The Charity which is currently occupying the hotel could be moved to the Centre building. The LA has obtained temporary planning permission for the building to be used as office accommodation.

The school has only used the facilities of the Centre on an occasional basis, and has no clear plan and funding structure to utilise the building. The LA previously offered the school use of the facilities; that

offer was turned down, and little has changed since then; in the objection to the LA's planning application, the school said that it had only used the Centre for the equivalent of 3-4 days in that calendar year. The LA has tried to start discussions about the land transfer but has received no replies to their letters to the school's legal representative.

- (b) An area used for community purposes (the Community Hub) which is currently managed by the school. It is not disputed by the parties that this area of land was used for both community purposes and for the purposes of the school immediately prior to the implementation date, and continues to be used for both purposes. The LA states that this community facility was built with a significant amount of LA funding. It is the only community centre in the local area, and the LA wishes to secure its long-term use for community purposes by means a binding legal community use agreement.
- (c) An area being used as a nursery and pre-school. The LA has said that, although this area was not being used for the purposes of the school immediately before the implementation date and therefore remains vested in the LA, it will agree to transfer this area of land to the school. However, it wishes the school to regularise the nursery occupation with a protected tenancy agreement. Ensuring the continued use of this area as a nursery and pre-school facility is important to the LA because there are no other pre-schools in the Sundon Park area where the school is located.

This area is on the ground floor of a building. The upstairs is in use by the school. The nursery and pre-school area was formerly used both as a nursery and pre-school during school hours and as a Youth Centre outside school hours. It is no longer being used as a Youth Centre.

24. The school's legal representatives, in their referral to the OSA, had identified only the Centre as being land in dispute. Their view is that the area used by the nursery and pre-school and the Community Hub are both areas of land used for the purpose of the school. These areas have they maintain transferred to the Governing Board by operation of law on the implementation date, and should now be formally conveyed. In response to the points made by the LA, the legal representatives and the head teacher have said that:

- (a) in relation to the Centre, it is not true that the Governing Board has no clear plan or funding structure for its use. They have wide support from Luton Futures and Lea Springs Schools partnerships who would benefit from, and contribute to the school's intended use as an educational facility. The school states that this is not the only building the LA could use to accommodate the Active Luton charity.
- (b) the school has full control of the area known as the Community Hub; the LA has had no part in the management or operation of the Hub; the school employs a Community Development Manager and the

Community Hub is used for both community activities and events, and for delivery of the school curriculum;

- (c) the school has exclusive use of the building in which the ground floor area is occupied by the nursery and pre-school. The school is committed to honouring the continued occupation by the nursery and pre-school.

25. I convened a meeting at the school on 27 November 2017, which gave me the opportunity to view the site at first hand, including the exterior area of the former Centre. I was not able to view the interior of the Centre building because it had been locked by the LA, and no keys were available. I did not consider that it was necessary for me to view the inside of the building. It was sufficient for the purposes of this determination to observe its location in relation to the school site. I viewed the whole school site, not simply the areas in dispute. This gave me a clear picture of the layout and use of the various buildings.

26. Both parties made additional representations both at the meeting and in subsequent correspondence. I am grateful for this detail, and I am very clear about the points being drawn to my attention. All of those present at the meeting were helpful. The correspondence from the lawyers on both sides and from the head teacher has, at all times, articulated the points being made to me in clear and succinct terms. I do not propose to repeat these additional representations, since they served to strengthen the arguments which I have already summarised, except to say that the school and the LA produced details of the current use of the Community Hub, which I have considered carefully. As I have mentioned, the school provided detailed information about its proposals for use of the Centre, and both parties submitted information about the capacity of the school and its need for additional accommodation which I have not summarised. This is because the information is not relevant to my considerations for reasons which I will later explain.

Consideration

27. I now turn to apply the law to the relevant facts and representations. Since the documentation shows that the school implemented a proposal to change its status to a foundation school on 12 July 2016, the legal provisions applicable in this case are in Schedule 5 to the Regulations. I have set out the paragraphs in the Schedule which are relevant. These provide that, where proposals for a community school to become a foundation school have been approved:

- “**any land which immediately before the implementation date was held or used by the local authority for the purposes of the community school**must, on that date transfer to andvest in the trustees of the school or the Governing Board (where there are no trustees) to be held by the trustees or the Governing Board for the purposes of the school.” (Paragraph 2). I have highlighted the above words in bold for emphasis as they are key to the determination;

- *where the procedure for becoming a school of another category is pending, a local authority must not dispose of any land used wholly or partly for the purposes of the school, or enter into any contract to dispose of any such land - or take any action the effect of which is that the land ceases to be used or held for the purposes of the school - except with the consent of the adjudicator.” (Paragraph 10(1);*
- *where proposals for becoming a school of another category have been approved, the procedure is not considered as terminated in relation to any land where agreement is required to be reached until the date upon which that matter is finally determined.” (Paragraph 10(3);*
- *where any property, rights and liabilities of the local authority for purposes **wider than that of the school or partly for the purposes of the school or other purposes** – where the nature of the property, right or liability permits **it is to be divided or apportioned as appropriate.**” (Paragraph 13(1) – again, I have highlighted some of the wording for emphasis);*
- *where any estate or interest falls to be divided, any rent payable must be divided or apportioned – so that it is only payable in respect of the relevant part of the estate.” (Paragraph 13(2);*
- *where the right or liability does not permit division or apportionment, the property, right or liability must either be transferred or remain with the local authority according to-*
 - a) *whether on the transfer date the local authority or the school appears to be in greater need of the security afforded by the estate or interest,*
 - b) *where neither appears to be in greater need of that security, **which of them appears likely to make use of the land to the greater extent,***
 - c) *subject to such arrangements for the protection of the other person concerned as may be agreed – or determined by the adjudicator.” (Paragraph 13(3) – again my emphasis);*
- *the transferor and transferee must arrive at such written agreements and execute such other instruments as are necessary to identify or define the property rights and liabilities transferred or retained, or for making any such arrangements as are mentioned in paragraph 13 as will afford the transferor and transferee as against one another such rights and safeguards as they may require for the proper discharge of their respective functions.” (Paragraph 14);*
- *if such an agreement has not been reached within 6 months of the implementation date, the adjudicator may give a direction determining the matter and may include in the direction any matter*

that may have been included under the provisions relating to agreements. The adjudicator must consult the transferor, the transferee and any other interested person before giving a direction under this paragraph.” (Paragraph 15).

28. At the meeting, I checked firstly whether there was any part of the school land which was owned by a person other than the LA immediately before the implementation date. The parties each confirmed that all of the school land, including the Centre, was owned by the LA immediately before this date.
29. I then referred the parties to paragraph 8(2) of Schedule 5, and asked them whether this was relevant. The parties confirmed that there had been no agreement in writing for any land to be excluded made after the proposal had been approved but before the implementation date.
30. The points that fall for me to consider are whether the former Centre building, grounds and car park; the area known as the Community Hub; and the area currently occupied by a private nursery and pre-school were being used or held for the purposes of the school immediately before 12 July 2016. I will consider each of these areas in turn, applying the statutory tests set out in the Regulations. I have also had regard to relevant guidance.
31. I should firstly say something about my interpretation of the phrase “*for the purposes of the school*”. There is no definition of the phrase in the Regulations, and so it must be given its ordinary and natural meaning. The school’s legal representative suggested that the phrase has been given a wide meaning in the context of schools acquiring Academy status; that I should interpret the phrase widely in the context of this determination; that the “*spirit of the Regulations*” suggests that the school land, as a whole, must transfer; and that this would allow me to conclude that each of the areas in dispute have already transferred to the Governing Board by operation of law under the Regulations. The school’s representative also argued that the phrase “*for the purposes of the school*” in paragraph 2 of Schedule 15 to the Regulations should not be interpreted to mean exclusively for the purposes of the school.
32. I do not agree with either of these arguments. My view in relation to the first argument is that the Regulations are clear, and that the question of whether a building, part of a building or area of land is being used or held for the purposes of the school immediately before the implementation date is a question of fact.
33. My view in relation to the second argument is that, if it is correct, paragraph 13 of Schedule 5 to the Regulations would have no function. My reading of the Regulations is that paragraph 2 of Schedule 5 to the Regulations applies where the area in dispute is a distinct area being used or held for a single purpose – whether for the purposes of the school or the LA. Paragraph 13 of Schedule 5 applies to property, rights and liabilities being held partly for the purposes of the school and partly for other

purposes or for purposes wider than that of the school. Paragraph 14 deals with the need to make written agreements and execute instruments covering what is to happen to property, rights and liabilities but is not limited to property, rights and liabilities falling within paragraph 13. It follows from this that in the case of an area which was being used or held for a single purpose, as is the case with the Centre and the nursery and pre-school area, this will fall within paragraph 2 of Schedule 5. In the case of an area used for more than one purpose, as is the case with the Community Hub, this will fall within paragraph 13 of Schedule 5.

The Centre Building, car park and grounds

The building

34. I consider firstly the Centre building. My conclusion is that there is no logical interpretation of the phrase "*for the purposes of the school*" which would allow me to reach a conclusion that this building was being used for that purpose immediately before the implementation date.
35. The facts I rely upon in reaching this conclusion are as follows: immediately before the implementation date, the building had fallen into disuse, so it was clear from the evidence of both parties, and from my own observations, that the Centre building was not being used for anything at all. As I have said above, the school's legal advisers had threatened the LA with injunction proceedings to prevent the building being used for the LA's intended purposes as an office. Prior to falling into disuse, the Centre had been used for many years as an LA resource available to LA schools. It was built for the purposes of an LA resource. The building has never been used for any other purpose. The LA chose to build the Centre on this particular piece of land because it comprised playing fields that were not being used for the purposes of the school, so the land on which the building is situated has not been used for the purposes of the school for a very considerable amount of time.
36. The school was permitted to use the facilities at the Centre along with other schools, but this was with the permission of the LA. The Centre has clearly always been treated as a separate entity to the school; it has its own postal address; and is registered separately for non-domestic rates purposes. On the information submitted by both parties, the only recent use of the building by the school was access to the facilities for a few days in February 2016 in order to produce a short film in preparation for the Luton Investment Framework. Use of the Centre was subject to the permission of the LA who have had sole control of the building's use since its inception. The school only had the right to use the building with the consent of the LA, and this was no different to the rights of any other LA school. If the school's arguments about there not being a requirement to have exclusive use are correct (which in my view they are not), logically the building would be owned jointly by all of the LA schools which had permission to use it. This is definitely not the case.

37. The second question for me to consider is whether the building was held for the purposes of the school immediately before the implementation date. The school states, anecdotally, that permission was given to the LA to use the land to build and then operate the Centre on condition that the school would retain continued use. The agreement is said to have been an oral agreement. It was not suggested that any witnesses could be produced who had been present during the relevant conversation, and there is no other evidence to support the assertion that such an agreement was made.
38. The LA has no record of any such agreement. The LA's lawyer makes the reasonable point that it would not have been in the school's gift to grant any sort of permission, conditional or otherwise, for the LA to use the land since the land belonged to the LA. The lawyer's statement is factually correct, and the lack of any supporting evidence on this point has meant that I am not able to conclude that there is any agreement in force which would be binding upon the LA at this point in time. My conclusion on this point is that the Centre building was not being held by the LA with the intention of returning it to the school or allowing the school to use it for its own purposes, and so this area of land was not being held for the purposes of the school.
39. This conclusion is strengthened by the fact that the LA has made clear its intended use of the former Centre building which does not envisage use by the school (except by way of a compromise under a five year lease for payment of rent). The LA has applied for, and obtained, temporary planning permission to use the building as office accommodation for the Charity, Active Luton. Allowing the Charity to use the building as offices will enable them to move from their current office accommodation in Wigmore Hall. This, in turn, will allow Wigmore Hall to be adapted and used to accommodate the growing number of homeless persons in the city. According to the LA, this is the only available suitable LA resource that can be adapted for this purpose cost-effectively; use of the former Centre building for this purpose will better enable the LA to comply with its statutory duties to house homeless persons; and will bring a saving of approximately £210,000 per annum. Had the school's lawyers not threatened the LA with injunction proceedings, the LA would presumably have taken steps to begin the necessary work in order to advance this project.
40. It is clear that the former Centre building was not being used or held for the purposes of the school immediately before the implementation date, and has not transferred to the Governing Board by operation of law. Any formal conveyance of land to the Governing Board must exclude this building. As mentioned above, the school has submitted detailed proposals in relation to its intended use of the Centre building. Although I have read these proposals, they are not relevant to my consideration. Paragraph 13 of Schedule 5 to the Regulations provides a formula to be followed in a case where "*the right or liability does not permit division or apportionment*". I do not need to follow the formula in this case because use of the former Centre building does not require division or apportionment. The building

was not being used or held for the purposes of the school, and remains vested in the LA. Accordingly, I direct that any transfer of land to the Governing Board of the school must exclude the Centre building.

41. The school's lawyer alleges that the LA is in breach of paragraph 10 of Schedule 5 to the Regulations by applying for planning permission to use the Centre as an office without the consent of the adjudicator. Paragraph 10 precludes the disposal of land or entry into a contract for the disposal of land which was being used wholly or partly for the purposes of the school. I do not consider that applying for planning permission to change the use of the building places the LA in breach of paragraph 10. The Centre was not being used for the purposes of the school immediately before the implementation date. It was LA land, and the LA was entitled to apply for planning permission in order to enable its intended future use of the building. By applying for planning permission, the LA was not disposing of the land. In granting temporary planning permission for use of the Centre as an office building, Luton City Council followed the required statutory procedures and considered the interests of the wider community, having taken into account representations made by the school.

The car park and grounds of the Centre

42. The school has its own car park within the grounds of the school; however, the school's head teacher has said that the Centre car park is occasionally used by the school as an overflow car park on parents' evenings and on other occasions when the school car park is full. The LA has said that this is not an entitlement. There have been occasions when permission has been given to the school to use the car park, but the school has never been allowed unrestricted access. The Governing Board suggests that pupils use the bike racks outside the Centre, and that they need to continue to do so. The LA has stated that this is without its knowledge or permission. In light of the facts described to me, I have concluded that the car park was built for the purposes of the Centre; it is an integral and discernible part of the Centre; and was used for the purposes of the Centre whilst it was in operation. Along with the Centre building, the car park has largely fallen into disuse pending the building being used for the LA's intended new purpose. It is currently being held in readiness for the LA's new intended use for the Centre building as an office space. It was not being used or held for the purposes of the school immediately prior to the implementation date, and has not transferred to the Governing Board.
43. However, since the Centre car park has been used for the purposes of the school on an occasional basis with the permission of the LA, I direct that there must be a lease or licence allowing the occasional use of the Centre car park by the school as an overflow facility when the school's car park is full. Since it appears that the bike racks are being used by pupils of the school without the knowledge or agreement of the LA, I will not direct that this use continue since arguably this is a form of trespass. It will be for the LA to decide whether it wishes to allow the use of the bike racks by pupils of the school to continue.

44. The head teacher also says that the school has been responsible for maintenance of the grounds of the Centre and has added block-paving steps. The LA states that there is no evidence to support the suggestion that the school has been maintaining the grounds. If the school did indeed take on this task, it was of their own volition. The LA has its own site agent to maintain the whole site, and has submitted invoices to me as proof of this assertion. From my own observations, the grounds unsurprisingly had the appearance of having fallen into disuse.
45. Given that the Centre building and car park have not transferred to the school, I doubt very much that the Governing Board would wish me to direct that the grounds of the former Centre must transfer in order to allow the school to continue to maintain them. The grounds are a discernible area of land which is clearly part of the Centre, and so I have concluded that the grounds have been treated as part of the Centre since its inception, and were not being used or held for the purposes of the school (other than occasional use with permission, in the case of the car park and unauthorised use in the case of the bike racks). I direct that any transfer to the Governing Board of the school must exclude the car park and grounds of the former Centre building.

The driveway

42. There is a small section of the Centre grounds which is being used as vehicular access to what the school's representatives describe as the main entrance to the school (it is signposted as such). This area is discernible and identifiable. The LA has said that this has not always been the main entrance to the school, and that it would be possible for the school to reinstate use of the previous main entrance.
43. The LA has, however, also stated that it would permit the school to continue to use this section of the Centre land. In order to protect the interests of the school, I direct that there must be a lease or licence permitting the school continued use of this area of land.

The Community Hub

44. When I observed the site, I was shown an area consisting of two rooms, which could be made into one, plus a kitchen area. I was informed that this was the staff kitchen and indeed a member of staff was leaving the kitchen with food as we approached this area. The kitchen is also used by other organisations. I requested details of the use of this facility for a six month period from the school, and was sent a timetable for w/c 18 December 2017. This confirmed use of the area by the school on Monday, Tuesday and Wednesday, and use of the area on Monday, Tuesday, Wednesday and Thursday for various purposes by a variety of organisations – Sundown Park Community Trust, Brownies, Weight Watchers, Tai Chi, line dancing and bingo. School use was 19 hours and community use was 23 hours. The school manages the community use of the area.

45. I considered whether to make a further request for evidence of use for a longer period, but on balance decided that what I had been sent was sufficient to give me a reasonable picture of the ongoing use of this area. I say this because the parties do not dispute that the area is used for both school purposes and community purposes. As I have explained above, this being the case, paragraph 13 of Schedule 5 to the Regulations applies.
46. Under this paragraph, it falls to me to consider first whether the area could be divided or apportioned. I considered the possibility of division carefully since it would be possible to determine that one of the rooms could be used for the purposes of the school and the other for community purposes, but this would reduce the flexibility of the space and may not be workable for larger group gatherings. My conclusion is that division or apportionment of the space would not be reasonable.
47. Where the right or liability does not permit apportionment or division, it falls to me to determine whether it must be transferred to the Governing Board or remain with the LA. This will depend upon which of the two parties appears in greater need of the security afforded by the estate or interest. Where neither appears to be in greater need of security, the question then is which of the parties appears likely to make use of the land to the greater extent.
48. On the question of security, my conclusion is that the school has the greater need. The reasons for this are essentially that the Community Hub is an integral part of the school site and buildings in terms of its location. The school therefore needs to control its use in order to ensure the physical safety of school pupils and staff; provide the security necessary to enable community activities to be conducted on the site; and ensure the security of the school site as a whole. The school also needs the security of being able to manage and control the extent of community access in order to ensure that the area can continue to be used, as necessary, by school pupils and staff. I therefore make an order that the area known as the Community Hub shall be transferred to the Governing Board of the school.
49. However, under paragraph 13, it is open to the adjudicator to direct that a transfer shall be subject to such arrangements for the protection of the other person concerned as may be determined by the adjudicator. The LA states that part of the Building School for the Future (BSF) grant which facilitated the refurbishment of the school in 2006 included £1.32m of LA funds to secure "*operations encapsulated in the BSF school strategy document, such as community use for the area*". More significantly, the LA has also said that it is "*imperative*" that this area continues to operate as a community facility. There are no other such facilities in the area following the closure of the Sundon Park Area. This is a point of significant local importance. I therefore direct that the transfer of this area to the Governing Board shall be subject to the Board entering into a community use agreement with the LA.

50. I am bound to say that it should not be necessary for me to have to make a direction in these terms, given that the school has indicated a commitment to facilitating the continued use of the Community Hub area by local community groups. However, it is my view that the LA's interest needs to be protected by way of a formal and binding legal arrangement. The school has declined to deal with this issue - or indeed any of the aspects of this dispute - by way of agreement. It has therefore fallen to me to make all of the disputed areas of land ownership and access rights the subject of formal directions and a transfer order.

The nursery and pre-school area

51. This area of the school site was being used as a private nursery/pre-school immediately before the implementation date of the school's proposal to change status. The proprietor of the Bizzie Bees 4 Nursery attended the meeting at the school on 27 November 2017, which was helpful. She said that she had taken over the running of the nursery in 2004, but the nursery had been there much longer. My recollection is that she mentioned a period of 30 years. Originally, she paid a rental cheque to the school, but following the BSF development project this had changed. She then paid rent to the LA of £450 per month, which increased periodically. The LA purported to increase the rent significantly to a figure which the proprietor considered was unaffordable. The nursery has no formal legal agreement with the LA. Heads of terms were agreed in 2012/13, but no documentation has been signed because the rent has not been agreed. The proprietor considered that she would prefer to enter into a rental agreement with the Governing Board of the school because "*it would be easier to sort out the small things*". But she was "*happy to go with anybody so long as the nursery gets an affordable lease.*"

52. As mentioned above, the nursery is situated on the ground floor of a building. The area was also previously used as a Youth Centre but is no longer so used. The school has told me that the upper floor is currently used by the school as a "*re-engagement centre*" for pupils who have been excluded for a fixed term. There is a staircase leading down from the school's re-engagement area to the nursery with a gate at the bottom. The nursery is a separate and discernible area with its own entrance. There is access via an entrance to the school grounds at the rear of the nursery facility which is used by the nursery staff, pupils and parents. There is a secure gate, and I was informed that nursery staff control access to the nursery through this gate. I was also told that the nursery has a small car park with five spaces. When this car park is full, nursery staff ring the school reception staff at the front entrance of the school to be given access to the nursery through the front entrance.

53. From the evidence provided by the nursery proprietor and by both parties, I am in no doubt that this area of the school site has not been used for the purposes of the school for a considerable period of time, and therefore was not so used immediately before the implementation date. Neither can it be said that it was, or is being, held for the purposes of the school. The LA has made clear that it considers it essential that the area continue to be

used for the purposes of a nursery, so there is no alternative intended use for this area.

54. The area currently being used as a private nursery and pre-school has not transferred to the Governing Board of the school by operation of law on the implementation date of the school's proposal to change status. I therefore direct that any transfer of land from the LA to the school shall exclude this area. I further direct that the Governing Board of the school shall enter into a lease, licence or other contractual arrangement with the LA enabling the arrangements for the shared use of the school land which are currently in operation to continue. In this way, Bizzie Bees 4, or whichever alternative provider the LA chooses, will be able to make use of the premises effectively.
55. Since the LA has stated that the continued use of this area as a nursery and pre-school is essential to its overall planning of local provision, it is surprising that no formal agreement has been signed by the LA and the nursery and pre-school in order to secure this provision. As mentioned above, this is said by the nursery proprietor to be because the rent which the LA proposes to charge is unaffordable. If the rent is unaffordable, the nursery and pre-school will not be able to continue to operate. I therefore hope that the LA will offer a rent which is reasonable and affordable to the Bizzie Bees 4 Nursery. I do not have power to direct this.

Additional community use

56. In an attachment to a letter sent to me by the LA dated 11 December 2017, there is reference to weekly community use of the school premises of 66 hours in term-time. The letter encloses a spreadsheet which shows community use of the Community Hub, and also community use of the swimming pool, astro turf 1&2, activity suite, sports hall and dance studio. As mentioned above, notwithstanding that these other areas are used for both the purposes of the school and for community use, the LA has agreed to transfer them unconditionally for nil consideration. Therefore, these areas do not form part of this determination.

Conclusion

61. For the reasons set out above, I have concluded as follows:
- a) the Centre, car park and grounds were not being used or held for the purposes of the school immediately before the implementation date. There is no agreement between the parties as to what should happen to these areas. They fall under paragraph 2 of Schedule 5 to the Regulations. They have not transferred to the Governing Board by operation of law, and are to be excluded from the transfer of land from the LA to the school;
 - b) a direction to exclude land may provide for the land to be used for the purposes of the school as directed by the adjudicator. In order to protect the school's existing rights to have occasional use of the Centre

car park and everyday use of the small area of the Centre land which adjoins the main entrance to the school, it is necessary for the LA to enter into a lease, licence or other contractual arrangement with the Governing Board permitting this continued use;

- c) the Community Hub was being used and held for both the purposes of the school and the purposes of the community immediately before the implementation date. There is no agreement between the parties as to what should happen to this area. It falls under paragraph 13 of Schedule 5 to the Regulations, and has not transferred to the Governing Board by operation of law. The area cannot reasonably be divided, and the school has greater need for security than the LA. This area is to be transferred from the LA to the Governing Board of the school;
- d) in order to protect the interests of the LA in ensuring the continued use of the Community Hub for the purposes of the local community, it is necessary that the Governing Board enter into a community use agreement with the LA;
- e) the nursery and pre-school area was not being used or held for the purposes of the school immediately before the implementation date. There is no agreement between the parties as to what should happen to this area. It falls under paragraph 2 of Schedule 5 to the Regulations. It has not transferred to the Governing Board by operation of law, and is to be excluded from the transfer of land to the Governing Board; and
- f) in order to permit the nursery and pre-school's existing arrangements for access and shared use of the school premises to continue, it is necessary for the Governing Board of the school to enter into a lease, licence or other contractual arrangement with the LA permitting the LA and its lessees and licencees to operate these arrangements.

Direction

62. Under the powers conferred on me by regulation 6 and paragraph 15 of Schedule 5 to, The School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2013, having consulted the transferor, transferee and any other interested party

63. I hereby direct that the transfer of land to the Governing Board of Lealands High School from Luton Borough Council consequent upon the School becoming a foundation school under section 21(1)(c) of the Schools Standards and Framework Act 1998:

- shall exclude the former E Learning Centre; and
- shall exclude the area currently being used as a private nursery and pre-school

63. I further direct that

- there will be a lease, licence or other contractual arrangement between Luton Borough Council and the Governing Board of Lealands High School permitting the regular continued use by staff, parents and pupils of Lealands High School of the section of the driveway of the

Centre which is currently being used as part of the main entrance to the school, and permitting occasional use of the Centre car park by parents of pupils at the school as an overflow facility when the school's car park is full. The occasional use of the Centre car park is to be by prior arrangement with the Council; and

- there will be a lease, licence or other contractual arrangement between the Governing Board of Lealands High School and Luton Borough Council permitting the arrangements for the existing shared use currently exercised by the Bizzie Bees 4 Nursery to be exercised by the Council and its lessees or licencees. In particular this shall include use of the school entrance nearest the nursery and pre-school; exclusive use of the 5 space car park at the rear of the school which is currently being used by the nursery and pre-school; use of the main entrance to the school; and use of the main school car park by the staff and pupils of the Council's lessee or licencee, parents and any person taking a pupil to, or collecting a pupil from, any nursery facility permitted by Luton Borough Council to operate from its premises;

64. I hereby make a transfer order that the area known as the Community Hub shall transfer by order from Luton Borough Council to the Governing Board of Lealands High School; and

65. I further direct that there will be a lease, licence or other contractual arrangement between the Governing Board of Lealands High School and Luton Borough Council requiring the Community Hub to continue to be used for its current purpose as a shared school and community facility managed by the Governing Board of Lealands High School.

Dated: 6 March 2018

Signed:

Schools Adjudicator: Dr Marisa Vallely