

Report of the City Solicitor, Director of Children's Services and the Director of City Development

Report to Scrutiny Board (Resources and Council Services)

Date: 23rd February 2015

Subject: The Former Fir Tree Primary School

Are specific electoral Wards affected? If relevant, name(s) of Ward(s): Alwoodley	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: Appendix number:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

Summary of main issues

1. On 10th October 2014, the Under Secretary of State for Education gave notice to the Council that he was making a Scheme to transfer the site of the former Fir Tree Primary to the Khalsa Science Academy Free School. The Scheme was to come into force on the 13th October 2014. These powers are exercised at the discretion of the Secretary of State and authorise the transfer of the freehold interest of a local authority former school premises, within prescribed time limits, to a Trust, Academy or Free school for nil consideration. There is nothing that a Local Authority can do to prevent such a transfer taking place under these circumstances. This report sets out the circumstances which led to that course of action being taken.
2. The Department for Education launched the Free School Programme in June 2010, Ministers expected the first wave of Free Schools to open in September 2011.
3. Under such a transfer, a beneficiary Free School cannot profit from the acquisition, should the school ultimately cease to operate. Upon closure, the Secretary of State can direct that all or part, of any proceeds are returned to the Local Authority.
4. Throughout the Council's dialogue with the Education Funding Agency (EFA), an Executive Agency of the Department for Education, Council officers have solely been concerned with protecting the Council's position, to ensure it was acting within the relevant legislation, within its Powers and not acting 'Ultra Vires' if transferring a valuable asset at nil value without the appropriate Council approvals in place.

5. In October 2013 the EFA identified the former Fir Tree Primary School as a potentially suitable site for the Khalsa Science Academy Free School. The EFA made it clear that they intended to acquire the former school site on a 125 year lease at a peppercorn rental and nil consideration and that the powers granted within the Academies Act 2010 (as amended by the Education Act 2011) provided the necessary authority to do so.
6. The Council's Legal Officers' interpretation of the legislation was that, although a Local Authority can transfer former school land for nil consideration to an existing school converting to Academy status, the legislation did not make it clear that the Council was compelled to do so in respect of a Free School (a Free School having no legal meaning within the legislation). A Free School is a new school as distinct from an Academy school converting from a pre-existing local authority school. Clarification of the relevant powers was sought from the EFA on a number of occasions. The site was valued at £900k and officers sought to ensure that the Council would not be contravening the 1972 Local Government Act s123 which specifically obliges local authorities to dispose of property at "Best Consideration". The Council's Legal Officers wanted to ensure that any proposed transfer was done using the correct powers.
7. Reports were submitted to Executive Board in June 2014 and September 2014 and on both occasions, further information and clarification was requested by Executive Board to inform a way forwards. The clarification on relevant powers was not provided by the EFA until 29th September 2014.

Recommendations

8. Scrutiny Board (Resources and Council Services) is asked to note the contents of this report.

1 Purpose of this report

- 1.1 The purpose of this report is to provide Scrutiny Board (Resources and Council Services) with the information and background leading up to the transfer of the freehold of the former Fir Tree Primary School site to the Khalsa Science Academy Free School.

2 Background information

- 2.1 Fir Tree Primary School closed in 2007. The school was built in 1961 and occupies a site of 4.5 acres just off the Ring Road in Alwoodley Ward (please see the site plan attached at Appendix 1). During 2009/10 the school was used to accommodate pupils from Allerton High School during works on their main site and in the following year, 2010/11 provided decant space for pupils from Bankside Primary school as a new school was built on their site in Harehills. The site was last used as a school in 2011.
- 2.2 The Education Act 2002 contains provisions that a Local Authority must not dispose of or appropriate land that had been used solely or mainly as a school within eight years from the date of its last use as a school without the consent of the Secretary of State. This Act also contains a provision that the Secretary of State can make a Scheme to provide land for use by an Academy if the land had been used solely or mainly as a school within the previous eight years since its last use as a school. A 'Scheme' is effectively a compulsory purchase of a property but without provision for compensation. These same regulations were carried forwards into the Academies Act 2010.
- 2.3 The Khalsa Education Trust founded the Khalsa Science Academy Free School in 2013 and opened in the Sikh Centre on Chapeltown Road, Leeds on 2nd September 2013. The school is a primary school with an admission capacity of 210 pupils or one form of entry (1FE, 30 pupils per year group). It is not designated by the DfE as a faith school but the Trust and DfE note that its teaching will operate with core Sikh values.
- 2.4 Members will be aware that the Council is managing the Basic Need programme of school expansion in the city to deal with the increased demand for school places. Since 2008 the Council has delivered over 1,300 new reception places in those parts of the City where demand for places has exceeded the established school admission limits. Despite the rising demand in Leeds, the requirement to provide new school places can be quite localised. In Alwoodley, Children's Services assessed the level of need for new school places to be provided. It was determined, at that time that demand for additional places did not require the provision of a new school in the area. In August 2013 Children's Services declared the Fir Tree primary school site surplus to its requirements. This had the effect of potentially releasing the site to be considered for other Council uses or to be considered for disposal through the Council's capital receipts programme. The site was valued in May 2014 at £900k.
- 2.5 On 10th October 2014, the Secretary of State for Education informed the Council that he had made a Scheme to come into effect of the 13th October 2014, to

transfer the freehold of the former Fir Tree Primary School site to the Khalsa Science Academy Free School using the powers contained within the Academies Act 2010. These powers are exercised at the discretion of the Secretary of State and the only issue to be determined was whether the transfer was to be by way of freehold or long leasehold at nil premium. There is nothing the Council could have done to prevent the site being transferred for the purposes of the Free School. This report sets out the events leading up to the transfer.

- 2.6 Notwithstanding the fact that the freehold was transferred, under the terms of the funding agreement between the Secretary of State and Khalsa Academy Trust, should the premises cease to be used as a school, the Secretary of State would have to grant consent to the disposal of an asset that was transferred from a Local Authority to a school at 'nil consideration' and that the Secretary of State may only give such a consent on the basis that all or part of the proceeds from the disposal should be made over to the Local Authority.

3 Main issues

- 3.1 In October 2013 the Education Funding Agency (EFA), an Executive Agency of the Department for Education, identified the Fir Tree site as a potentially suitable location for the Khalsa Science Academy Free School. It is usual when an operating school transfers to Academy status that a 125 year lease is granted to the new governing body at a peppercorn rental and nil consideration. The EFA sought to transfer the Fir Tree site on the same basis. However, officers were concerned that this proposal was not covered by the appropriate legislation and that the Council was being asked to agree, without legitimate reason, to the loss of a capital receipt in the region of £900k.
- 3.2 There had been no prior transfers of surplus school sites in Leeds for the purpose of accommodating an Academy or Free School. Indeed, prior to Fir Tree being identified, the EFA, acting on behalf of the Khalsa Science Academy Free School, had submitted a financial offer to acquire the Council owned former Elmete Centre. Also, part of the City of Leeds School was leased by the Council to the Lighthouse Free School at a 'market rent'. At no point had the EFA sought to obtain these premises for the Lighthouse Free School at nil consideration.
- 3.3 The Council has made a number of transfers, under the Academies Act 2010, of sites to academy schools where they have converted from existing, operational local authority schools. These transfers were at nil cost as dictated by legislation.
- 3.4 Legal Services were concerned as to whether the Academies Act 2010 applied in respect of a transfer of land to a Free School. Council officers requested evidence from the EFA detailing the relevant powers upon which such a transfer at nil consideration could be made. In the alternative, the Council could transfer the site at nil value, but this would have required Executive Board approval as a less than best disposal. In order to protect the Council's interests, officers were obliged to ensure that the Council was acting within its powers or that the Council was receiving "Best Consideration".

3.5 The Academies Act 2010 states that:

- *“The Secretary of State may make a Scheme in relation to land if at any time in the period of eight years ending with the day on which the Scheme is made the land was used wholly or mainly for the purposes of a county school or community school”.* At the time only a handful of schools throughout the UK had been transferred by the EFA and none had been Schemed.
- *“Section 123(2) of the Local Government Act 1972 (c.70)(disposal for consideration less than the best reasonably obtainable) does not apply to a disposal to a person for the purposes of an Academy.”* Section 123(2) of the Local Government Act states *“Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.”*

3.6 Legal Services’ interpretation of the legislation was that a Local Authority can transfer land on a ‘less than best’ basis for the purposes of an Academy, but that there was nothing in any of the legislation quoted to say that the Council is compelled to transfer land at less than best to a Free School. Furthermore, officers were not clear that a Free School would be covered by the provisions of the Academies Act 2010.

3.7 It should be noted that the General Disposal Consent 2003 removed the requirement for authorities to seek specific consent from the Deputy Prime Minister and First Secretary of State (“the Secretary of State”) for any disposal of land where the difference between the unrestricted value of the interest to be disposed of and the consideration accepted (“the undervalue”) is £2,000,000 (two million pounds) or less if the authority considers it will help to secure the promotion or improvement of the economic, social or environmental wellbeing of its area.

3.8 Any decisions on asset disposals for less than “Best Consideration” are taken in line with the Council’s Financial Procedure rules and taken at the appropriate level. In the case of a property valued at £900k only Executive Board could make such a decision to grant a disposal of this site on a ‘less than best’ basis.

3.9 Due to the uncertainty of the legislative powers it was proposed to take a report to Executive Board in December 2013 to seek authority to enter into negotiations with the EFA and approve the basis for such negotiations. This intent was communicated to the EFA. In response, the EFA alleged that the Academies Act 2010 removed the requirement for a local authority to transfer a former school at “Best Consideration” and therefore there was no requirement for the Khalsa Free School to make a payment for the Fir Tree site. As Khalsa Free School was not a former school – it was unclear as to whether the Academies Act covered this.

3.10 Council officers set out the position that, in their opinions, this legislation was insufficient to dictate that a local authority must voluntarily transfer land at nil consideration to a Free School and sought clarification from the EFA on this point. Officers requested the EFA to provide detail of the powers which would compel

the Council to do so. The December 2013 Executive Board report was delayed pending such clarification from the EFA.

- 3.11 The EFA explained that a Free School is an Academy for the purposes of the Academies Act 2010, but did not state the source of that information and relied on the previous advice about the terms of the transfer. Officers therefore took the view that any such transfer at less than “Best Consideration” would be an Executive Board decision.
- 3.12 In April 2014 the Secretary of State wrote to the Director of Children’s Services advising that he was minded to make a Scheme to transfer the site for the purposes of the Khalsa Science Academy Free School. The Academies Act 2010 gives the Secretary of State Statutory Powers to make a Scheme to transfer land to an Academy. In these circumstances the Local Authority would be obliged to comply, although this part of the legislation does not add any information as to an obligation or otherwise for any value to be paid for such land. DfE preferred to resolve the matter by negotiation rather than make a Scheme.
- 3.13 A letter was sent in response from the Chief Officer Strategy, Performance and Commissioning in Children’s Services dated 7th May 2014 to the EFA stating that the Council was “prepared to progress a negotiated transfer of a leasehold interest of the site of the ex-Fir Tree Primary School to the Khalsa Science Academy on a 125 year lease at nil consideration”. The letter confirmed that the proposal would be subject to Executive Board approval. Members are asked to note that whilst the letter was sent in ‘good faith’, officers in Asset Management and Legal Services were not copied into the letter, but regardless of this, it would not have affected the outcome.
- 3.14 A meeting was held between Council officers and representatives of the EFA on 2 June 2014 during which officers suggested that the EFA serve a Scheme but on a leasehold basis, thereby replicating transfers made to existing academies. The EFA response was that this was possible but deemed to be too difficult from an EFA perspective.
- 3.15 A report was submitted to Executive Board on 25 June 2014 to determine the approach to be taken. Two options were set out: for the Council to progress either a negotiated transfer for a long lease at nil consideration or to decline a voluntary transfer of the site and accept that the Secretary of State would be minded to create a Scheme to enforce the transfer of the freehold of the site at nil consideration. Executive Board did not come to a conclusion and sought further information and requested that a further report be submitted to a subsequent meeting.
- 3.16 A further report was submitted to Executive Board on 17th September 2014 which sought a recommendation on whether the Council should negotiate the transfer of a long lease at nil consideration or to continue discussions with DfE and EFA to seek market value for the site. Executive Board resolved that further information and clarification be sought from DfE in respect of those matters considered during the meeting, specifically as to whether the Government’s legal powers enabled a Scheme to be served on the Council which would compel it to transfer the freehold of the site in question to the Khalsa Education Trust.

3.17 On 29th September 2014 a letter was sent from the EFA which finally clarified the relevant powers:

- *“Free Schools are Academies as they are run by companies (known as Academy trusts) which have entered into Academy arrangements with the Secretary of State (as per S.1 Academies Act 2010) and the educational institutions they establish and maintain meet the requirements of either S.1A, 1B or 1C of the Academies Act 2010. Part 1 of Schedule 1 to the Academies Act 2010 sets out the requirements which must be met before a land transfer scheme can be made, at paragraph 1 and sub-paragraph 3(1). These requirements do not include payment of compensation by any person. Had Parliament intended that consideration was to be paid by the Secretary of State or the transferee then provision would have been made for this in Part 1. Such provision would have included identifying who is liable to make the payment and a formula for calculating the payment. By contrast, the amendment to the Schools Standards and Framework Act 1998 – which was brought in by the same legislation which brought in the amendments to the Academies Act 2010 regarding land transfer schemes (The Education Act 2011) – does specifically provide for the Secretary of State to consider paying “such sum by way of consideration (if any) as the Secretary of State determines to be appropriate” on directing that “playing fields, or any part of them, be transferred to a person concerned with the running of an Academy School.” As no such payment is provided for in relation to land transfer scheme, it is clear that Parliament intended a different approach for such schemes.*

This was the first occasion that the EFA had brought this particular piece of information to the Council’s attention. Although the 29 September 2014 letter from the EFA, did make a persuasive argument, it wasn’t from their lawyers. The Council’s request for a dialogue with their lawyers had not been taken up. In addition, whilst this letter was based on the position that the Khalsa Education Trust met the statutory definition of an academy, the EFA did not provide any actual evidence that this was the case.

3.18 On the basis of this subsequent information, Legal Services advised that the EFA’s argument on the issue of the requirement for payment appeared persuasive.

3.19 Also In September 2014, Children’s Services were advised by OFSTED that the Elmete SILC was being put into ‘Special Measures’ and that one of the reasons was the poor quality of accommodation. This gave rise to an urgent Council requirement for accommodation for the SILC and Fir Tree was identified as a potential solution.

3.20 Further to the resolution of Executive Board on 16th September 2014, the Director of City Development wrote to the EFA on 1st October 2014 making the following points:

- Seeking clarification on the Secretary of State’s powers to make a Scheme in respect of a Free School;

- Providing the reasons the Council considered the site not to be suitable for the proposed Scheme given the location, level of educational need in the area, nature and size of the school proposed;
- Suggesting two alternative sites which were considered more suitable;
- Identifying the urgent need for an alternative site to relocate the SILC school.

It should be noted that this letter 'crossed' with the DfE's letter of 29th September 2014.

The Secretary of State took into account that the site might possibly be needed by a Special school, and that the special school may have pupils who share the protracted characteristic of disability and decided that any negative effect on such pupils by making a land Scheme would be outweighed by the benefits of providing a greater choice for parents who may be seeking a Sikh faith ethos education. The Secretary of State proceeded to make a Scheme and transfer the title of the freehold of the site using the statutory powers contained within the Academies Act. This course of action was outside the control of the Council. The Council remains unclear of the basis of the decision as the Council's letter did not disclose the name of the school and therefore the Secretary of State could not take into account the needs of the children

- 3.21 On 10th October 2014 an email was received from DfE rejecting all offers made by the council in its 1st October letter. The DfE informed the Council that the Secretary of State had made a Scheme for the site and that it would be transferred to Khalsa on effectively the next working day, with effect from 00.01 Monday 13th October 2014. DfE contractors changed the locks of the Fir Tree site on that date and took 'forced' possession of the site. The Council wrote to the DfE on 13th October 2014 advising that the Council believed it had grounds to seek a judicial review.
- 3.22 A meeting was arranged for 7th November 2014 between senior officers and the EFA. At that meeting it was agreed that to continue legal proceedings would not represent good value to the public purse and would only serve to deteriorate relations between Leeds City Council and The Department for Education.

4 Corporate Considerations

4.1 Consultation and Engagement

- 4.1.1 There are no implications for Consultation and Engagement from the contents of this report.

4.2 Equality and Diversity / Cohesion and Integration

- 4.2.1 The contents of the report have no impact on Equality and Diversity / Cohesion and Integration.

4.3 Council policies and City Priorities

- 4.3.1 There are no implications for Council policies or City Priorities.

4.4 Resources and value for money

4.4.1 The report advises Scrutiny Board of the circumstances surrounding the transfer of land for the purposes of a Free School and therefore has no direct implications for Resources and value for money.

4.5 Legal Implications, Access to Information and Call In

4.5.1 There are no Legal or Access to Information implications.

4.5.2 As a report to Scrutiny Board the report is not eligible for Call In.

4.6 Risk Management

4.1 The report contains no Risk Management issues.

5 Recommendations

5.1 Scrutiny Board (Resources and Council Services) is asked to note the contents of this report.

6 Background documents¹

6.1 None.

¹ The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.