

Report of the Built Environment Programme Manager

Report to the Director of Children's Services

Date: 19th August 2016

Subject: Commercial Transfer Agreement and Lease Agreement(s) – Elmete Wood BESD, Tinshill PRU, Burley Park PRU and Oakwood PRU from Leeds City Council to The Wellspring Academy Trust



Are specific electoral Wards affected?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
If relevant, name(s) of Ward(s): Roundhay, Weetwood, Kirkstall and Gipton & Harehills		
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?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, Access to Information Procedure Rule number:		
Appendix number:		

Summary of main issues

The Project Team (including Children's Services, Legal Services and PPPU) have negotiated the Commercial Transfer Agreement ("**CTA**") between (1) LCC; (2) The Governing Body of Elmete Wood School ("**Governing Body**") and (3) The Wellspring Academy Trust ("**WAT**") and agreed a commercial position in preparation for the academy transfer on 1st September 2016. All issues have been resolved to the Project Team's satisfaction and the formalisation of the CTA is recommended in preparation for the transfer of Elmete Wood BESD and associated Pupil Support Centres to Academy status.

Similar negotiations have also taken place in connection with the various agreements required to confirm the Authority's commitment to providing three new buildings across the city to provide exemplar facilities suitable for children with Social, Emotional and Mental Health (SEMH) needs, which will not be ready for occupation until 2018, and will be leased to Wellspring Academy Trust under a standard DfE 125-Year Academy Lease. These discussions are ongoing and are not required to be resolved in advance of the conversion on 1st September 2016, however the short-term leases required for the temporary accommodation that will be used in advance of the new buildings being completed have been agreed.

Recommendations

It is recommended that the Director of Children's Services:

- Notes the negotiations held with Solicitors acting on behalf of the Governing Body of Elmete Wood School and the Wellspring Academy Trust;
- Gives authority for the Commercial Transfer Agreement ("**CTA**") to be executed and completed to enable the Academy to open on 1st September 2016 together with any other documentation required to complete the transfer; and.
- Gives authority for any other necessary action to be taken to effect the transfer.

1 Purpose of this report

- 1.1 The report provides a summary of negotiations to date, advises on issues and risks and requests the Director of Children's Services to:
- Note and approve the negotiations held with the Solicitors for the Governing Body of Elmete Wood School and the Wellspring Academy Trust.
 - Approve the signing of the Commercial Transfer Agreement required to enable the Academy to open on 1st September 2016.

2 Background information

- 2.1 Elmete Wood has been repeatedly judged as 'inadequate' over the past decade. The most recent inspection, in September 2014, judged the school to be 'inadequate', with particular weaknesses in leadership, management and out of date buildings.
- 2.2 As soon as Elmete Wood failed its inspection in 2014, the Regional Schools Commissioner issued an order requiring the local authority to convert Elmete Wood into an Academy with a deadline conversion date of September 2016. The Council has agreed a preferred provider, Wellspring Academy Trust, which is a successful provider of SEMH learning and the only one in the North of England to be judged 'outstanding' by OFSTED. The current BESD and PRU provision will be integrated into the SEMH academy under the management of Wellspring Academy Trust.
- 2.3 In November 2015 the Executive Board approved the principles and direction of the Children's Services 'Social and Emotional Mental Health' (SEMH) programme. This programme aims to improve education and support for children and young people with complex social, emotional and mental health needs. This is part of a wider citywide strategy supported by both the Council and NHS to invest and improve services for children's emotional and mental health. The SEMH programme seeks to replace the outdated and costly provision with specially designed facilities that are managed and led by a leading provider of SEMH learning.
- 2.4 Three new campuses are to be strategically located across Leeds and will cater for their wider areas whilst operating as one multi-site school for administrative and curriculum purposes. Funding of up to £45m for development and construction of the three new facilities was approved at the July 2016 Executive Board and the sites will open in 2018 on a phased basis.

3 Main issues

- 3.1 Under the Academies Act 2010, publicly funded schools in England may become Academies. Schools may be converted into academies by an Academy Order made under s4 of the Act, and the Director of Children's Services received an Academy Order enabling Elmete Wood BESD School to convert.

- 3.2 To enable Elmete Wood BESD School to open as an academy on 1st September 2016, the Secretary of State must enter into a legally binding Funding Agreement to establish an Academy (the Funding Agreement is between the DfE and the Academy Trust). To enable the Funding Agreement to be approved by the Secretary of State, a number of further agreements are required including a Commercial Transfer Agreement and 125-Year Lease of the site buildings that the school occupies, although other documents/agreements may also be required depending upon the individual circumstances and for example, where the school buildings are subject to a PFI agreement.
- 3.3 With regard to this particular conversion, due to the new buildings not being available until 2018, there is a requirement to enter into short-term leases for accommodation that will be used in the interim until 2018. Further 'Agreements for Lease' will be required in order to document the commitment that LCC will provide new buildings and lease them to the Academy when completed, although these are not required to be agreed in advance of the conversion date.
- 3.4 Below is an outline of the main issues that have been concluded on each of the above Agreements:
- 3.5 Commercial Transfer Agreement
- 3.5.1 As part of the conversion process for publically funded schools, a Commercial Transfer Agreement (CTA) has to be entered into between the relevant Academy Trust and Leeds City Council. If the Commercial Transfer Agreement is signed prior to the conversion then the Governing Body of the outgoing school also joins into the Agreement, as is the case at Elmete Wood.
- 3.5.2 The Commercial Transfer Agreement deals with the transfer of the assets, staff and contracts from the Council to the new Academy Trust (where applicable). When a community school converts to Academy status, the CTA provides for apportionments of payment of salaries, pension contributions, etc. and indemnities from both parties in relation to employment matters.
- 3.5.3 The standard form (which provides for extensive indemnities from the City Council to the Academy) is usually modified in line with Children's Services policy to accept only the minimum obligations required under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (known as TUPE), specifically in relation to our obligations under Regulations 13 and 14 of the Regulations, or any award of compensation under Regulation 15 of the Regulations. Although Academy Trusts and the DfE do not agree with this position, they have accepted the position previously and the drafting has usually been retained within the final version of the CTA that has been agreed and signed off between LCC and the Academy Trusts.
- 3.5.4 However, due to the historical issues across the BESD and PRU schools, both Wellspring and the DfE have requested that the Council provides full staffing indemnities on behalf of LCC to cover potential future industrial tribunal claims and any other that may arise. It has subsequently been agreed that LCC will offer the following indemnities:

1. LCC indemnifies Wellspring against losses caused if the employee liability information is not provided (or updated) in accordance with TUPE Regs.
2. LCC indemnifies Wellspring against losses due a failure to comply with Regs 13 and 14 of the TUPE Regs (in respect of provision of information and consultation of representatives).
3. LCC indemnifies Wellspring against claims by Transferring Employees for personal injury due to negligence of LCC (or due to breach of a statutory duty by LCC) arising before the Transfer Date.
4. LCC indemnifies Wellspring against costs / liabilities which transfer to Wellspring under TUPE which relate to the period prior to the Transfer Date (including equal pay).

3.5.5 The potential risks involved in offering the above indemnities have been considered against the risk that Wellspring would not proceed with the conversion if indemnities were not offered and the subsequent continued impact on school standards without Wellspring supporting the school. It should also be noted that the Authority can no longer admit pupils into Elmete Wood due to the Ofsted rating and would therefore need to continue to send pupils to other providers outside of the Authority at considerable expense. There is also the risk that the DfE and Regional Schools Commissioner could exercise their powers to force through the conversion independently of LCC if the Authority is not being seen as co-operating with all parties.

3.5.6 It is considered that Points 1 and 2 above should be low risk due to HR's involvement in the TUPE procedure. Whilst Point 3 does carry a risk, the likelihood of this arising is considered to be small. Point 4 is assessed to be the highest risk, but is mitigated to a certain extent by the fact that our HR has been involved in the Managing Staffing Reduction process. It should be noted that LCC does not have any insurance in place to cover such risks and should a claim arise, it would have to be paid from a Council budget.

3.5.7 Key issues that have been agreed are:

- What assets / contracts will transfer
- How historic liabilities will be dealt with

3.5.8 All of the contracts that LCC or the Governing Body currently have in place in respect of the school will be assigned to the WAT where third party consent is not required, or where consent has been obtained. Where consent is required but has not been granted prior to the conversion date, all parties should use their 'reasonable endeavours' to obtain the consent of other parties to the assignment and then assign or procure the Novation of that contract(s). For LCC contracts, where this has not been achieved LCC will continue with the contract as agent for WAT.

3.6 125-Year Lease

- 3.6.1 Under normal circumstances, the land and buildings held by the Authority for the purposes of the school would be leased to the Academy Trust at a peppercorn rent under a standard DfE model 125-year lease. However, the existing sites, with the exception of the Oakwood PRU site, will not form part of the new establishment (although the Tinshill site will be redeveloped as one of the three new sites to open in 2018) and therefore no 125-year leases will be put in place at this stage. Whilst the Oakwood site will form part of the new SEMH estate, the site is currently undergoing refurbishment works and therefore will not be available for occupation until later in the year, which means the 125-year lease will not come into force until then.
- 3.6.2 The 125-year leases of the Oakwood building and grounds and the three new sites will be agreed at the appropriate juncture and will be signed off / approved by the Director of City Development under separate report(s).
- 3.6.3 A number of short-term leases are currently in place (or are in the final stages of being agreed) to cover Wellspring's occupation of interim accommodation at the Meanwood Centre, Brudenell Centre and Leeds City College's Horsforth Campus, which will be in place until the three new sites are available.

3.7 Agreement for Lease

- 3.7.1 The Agreement for Lease will provide a formal contract between Wellspring and LCC which commits LCC to leasing the three new buildings to Wellspring once they are built and completed in 2018, along with the refurbished Oakwood building when works are completed later this year. The agreements will detail the scope of works being undertaken at Oakwood and includes details of the proposals for the three new facilities that will be provided, in so far as they are currently developed, with an acknowledgment that the final agreed designs will have to be within a cost ceiling which may lead to some degree of change to those design proposals currently in circulation.

4 **Corporate Considerations**

4.1 **Consultation and Engagement**

- 4.1.1 It should be noted that the statutory consultation process is no longer required, as the Academies Act 2010 streamlined the process so that when there is a conversion from a single school into a single academy (rather than a merger), there is no longer the requirement to issue a closure notice, as the school converts to academy status rather than closing and re-opening as an academy.
- 4.1.2 All consultations regarding the proposed academy are undertaken by the Governing Body and it is for the Governing Body to decide upon a level of consultation which is deemed appropriate under the circumstances. However, it should be highlighted that there is no set guidance on how to quantify what appropriate consultation actually means in terms of duration and consultees. All interested parties should however, be provided with opportunity to respond and ask questions.

- 4.1.3 Whilst the Authority has no ability or rights to prevent the conversion from taking place, a number of stakeholders within the LA have been consulted as part of the conversion process including Finance, HR and Built Environment teams within Children's Services and also Legal Services, City Development and PPPU. The Director of Children's Services was made aware of the proposed conversion on receipt of the Academy Order, and numerous briefings have taken place with the Executive Member for Children and Families, whilst a number of reports have also been submitted to Executive Board, the latest one being in July 2016

4.2 Equality and Diversity / Cohesion and Integration

- 4.2.1 An Equality, Diversity, Cohesion and Integration Screening form around the whole SEMH programme has been completed and submitted as part of the Executive Board reports. The Screening process specific to this report has been undertaken on all previous academy conversions and have always determined that although the conversion to Academy status could potentially have an impact on a number of groups, it is not necessary to undertake an EIA in relation to either the applicable reports or the entering into the Commercial Transfer Agreement between LCC and the Academies, due to the decision to convert not being a decision the Council has made, and that the Council has limited control over the process.
- 4.2.2 The DfE have undertaken an Equality Impact Assessment in relation to the Academies Bill and have also completed a Race Impact Assessment in relation to the Academies Programme – both of these are publicly available on the DfE's website.

4.3 Council policies and Best Council Plan

- 4.3.1 The 'Leeds for Learning' policy is an ambitious city-wide commitment to achieving a child friendly city that drives school improvement and reflects the new relationship with schools, the integrated children's services and the changes to national policy and funding.
- 4.3.2 The Local Authority has a duty to promote high standards and champion educational excellence. The relationship between the authority and its schools must influence the city wide agendas such as 'improve attainment and close the achievement gap', 'improve attendance and develop positive behaviour' and to 'create a life ready for learning'; all of which are aspirations from the Children and Young People's Plan. We will continue to apply the cycle of monitor, evaluate, challenge and support with schools in order that they become strong and capable of contributing to the key priorities of the city.

4.4 Resources and value for money

- 4.4.1 The City Council has incurred costs relating to legal, finance and project management in connection with this conversion. It should be noted that there is no DfE funding support for these costs.
- 4.4.2 All approvals in relation to costs and funding in connection with the three new buildings will be subject to separate reports to Executive Board and the Director of

Children's Services in accordance with Financial Procedure Rules and therefore do not form part of this report.

4.5 Legal Implications, Access to Information and Call In

4.5.1 Legal implications are outlined above in 3.0 Main Issues.

4.5.2 This is Significant Operational decision. On the basis that LCC has offered a number of indemnities around staffing, there is a risk that the Council could potentially be liable for future costs arising from Employment Tribunals should any arise, however this has been assessed against the impact of the conversion not proceeding, which is considered to be a greater risk for the Council under the circumstances.

4.5.3 This report does not contain exempt information under Access to Information.

4.6 Risk Management

4.6.1 Negotiations around the various agreements detailed in this report have been handled by procurement and contract specialists in Legal Services and PPP&PU who have given appropriate due diligence and advice. No risks have been identified which have not been raised within the body of the report. No future risks have been identified which are not mitigated through the CTA and other agreements.

5 Conclusions

5.1 Under the circumstances, negotiations have progressed well and have been concluded – furthermore the relationship with the Wellspring Academy Trust and their advisors continues to be positive. Therefore the Commercial Transfer Agreement is agreed and ready for sealing/signing as appropriate.

6 Recommendations

6.1 It is recommended that the Director of Children's Services:

- Notes the negotiations held with Solicitors acting on behalf of the Governing Body of Elmete Wood School and the Wellspring Academy Trust;
- Gives authority for the Commercial Transfer Agreement ("CTA") to be executed and completed to enable the Academy to open on 1st September 2016, together with any other documentation required to complete the transfer; and
- Gives authority for any other necessary action to be taken to effect the transfer.

7 Background documents¹

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.

7.1 None