

School land and premises: due diligence for academies transactions - the options



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Introduction

For schools looking to convert to academies status, it is important to understand the options in terms of the levels and types of land and premises due diligence that should or could be carried out.

Once the school becomes an academy and the new 125 year lease granted or the freehold interest acquired, the new academy or the federated provider will be the new owner occupier of the school site. However, with ownership and occupation come responsibilities, duties and liabilities

Getting the level of land and premises due diligence right is important for all conversions, but perhaps particularly so for a federated academy provider bringing a new converter school into its group of existing academies. Like any prospective purchaser, or tenant, the federated provider will have relatively little knowledge of the school site and matters affecting it, as compared to straightforward academy conversion.

For academies projects there are broadly four applicable levels of property due diligence which may be carried out by the party acquiring an interest in land, with Level 1 being the least and Level 4 the most extensive.

As a preliminary point, and premises due diligence is broadly comprised of three main elements:

- Title due diligence (analysis of the registered title and/or unregistered title documents relating to the land in question, and assessment of any leases held by the school);
- Searches (there is a very broad range of information-providing property searches that can be undertaken); and
- Enquiries of the landowner (standard form enquiries and site or project specific enquiries)

The key point with land and property due diligence is that the landowner has very limited obligations to provide information about a site and so the buyer or tenant must undertake its own investigations.

Level 1 - DfE requirements for academy conversions

In February 2012, DfE introduced new

requirements for reporting (to DfE) on the land elements of an academy conversion. The reporting exercise is on the basis of a 'land questionnaire' to be completed by the lawyers acting for the school (or as the case may be lawyers acting for the federated academy provider). For academies converting from 1 May 2012, the land questionnaires replace the standard form 'report on title' previously required by DfE. There are different questionnaires for different types of school.

Through the land questionnaire DfE is focused on understanding such things as:

- the extent of the school site and current ownership;
- whether the school site is subject to any third party occupation (for example, a nursery or children's centre) or other shared occupation arrangements;
- whether there are any outstanding building works; and
- whether there are any community leisure or sports facilities on site (and whether any sports grant type funding arrangements apply).

For trust schools, the questionnaire includes questions as to the extent of any publicly funded land, and for foundation schools without a foundation there are particular questions relating to land ownership. In short, DfE wants to understand as early as possible whether there are any issues that might prejudice the conversion going ahead on the planned conversion date.

The extent of land and premises due diligence (in the conventional sense) required to be able to answer the questions in the land questionnaire would be limited to checking the registered or unregistered title documents for current ownership of the school site and as to whether title boundaries match the proposed plan attached to the lease or transfer (under which the interest in the school site would pass to the academy or provider). Strictly speaking, no other investigation of the title would be required although it would be prudent to review the title entries and documents to understand if there are any adverse matters or other important issues revealed. Certainly, where the type of school is anything



other than a community school there is likely to be the need for more extensive enquiries as to land ownership and, where applicable, the extent of any publicly funded land.

That said, the majority of the questions included in the land questionnaires will be questions of fact which the school (rather than the lawyers) would be best placed to answer. Subject to this, DfE requires no standard property enquiries or any property searches to be undertaken. However, in DfE's guidance it assumes that the school's lawyers would be carrying out some title investigation and reporting matters to the school. The implication is that in the land questionnaire DfE requires only certain information which would have been included in a title investigation report.

Level 2 - Report to client on registered or unregistered title and any leasehold interests

For most academy conversions, the completion of the DfE questionnaire will have necessitated a review of the registered or unregistered title to the school site(s), if only to establish the extent of the registered and unregistered titles and how legal ownership of different pieces of land match the agreed school site plan. Any leases held by the school should have also been identified.

Usually however, when a party is acquiring an interest in land the title documents these would be reviewed by the lawyers acting for the tenant or transferee. The title would be investigated so that the existence of any title restrictions (e.g. charges requiring consents to be obtained before the lease or transfer can be registered), restrictive covenants (e.g. forbidding certain types of use), and any rights benefitting the school site or rights to which the school site is subject. In simple terms, the analysis would be to identify any anomalies or anything that may affect the use and operation of the school.

Most academy conversions will not involve a third federated academy provider and a school's view of the title entries and documents (including adverse entries) might be different than a third party provider. The school will have been affected by the title matters to date and this will continue when the school is an academy. As such, the school might simply let the conversion take place 'warts

and all' without reviewing the title matters any further than is necessary to meet DfE requirements in terms of completing the land questionnaire. However, it is prudent to understand more fully the title matters that affect the school land. For example, if there was a restriction preventing the registration of the academy lease and transfer or other significant adverse matters revealed from the title, then it would be best to understand and, where possible, resolve such matters prior to conversion.

As a third party with no prior knowledge or interest in the site, a federated academy provider is more likely to be interested to understand the title matters. The federation or the company set up to acquire the land interest would be taking a lease or a transfer of a freehold interest in the site and as such will take on liabilities as tenant or owner. This being the case an academy provider would be best advised to undertake a 'normal' full review of the registered title or unregistered title document, so that such liabilities or any anomalies, rights and restrictions can be understood.

Level 3 - Full property due diligence including searches and enquiries (non-development site)

In a straightforward conversion (without the involvement of a federated provider) the school's view in relation to any land and premises due diligence may be that it 'knows about itself' and in any event will be prepared to convert to academy status 'warts and all' (without needing or wanting to know what the warts are). However, carrying out no due diligence can leave the academy exposed.

As third parties without any prior knowledge or understanding of a particular school site, many some federated academy providers will be more inclined to carry out the kind of due diligence that a commercial enterprise would normally carry out when proposing to acquire an interest in land, since when the land is acquired by the academy or provider the inherent liabilities are also acquired.

For sites where no development is contemplated, it would be usual for the following land related due diligence to be undertaken by the academy provider's lawyers and the results summarised in a report on title:

1. Title investigation: As referred to in relation to Level 2 above.
2. Searches (non-development site):
 - *Local search*: a local search might reveal details of notices issues or certain enforcement action taken in respect of the property (for example, in relation to breach of planning or other development control or in relation to breaches of certain other statutory requirements). If a local search result referred to additional documents, such as planning consents or statutory agreements or building regulations documents, then copies of these could be requested (and local authority copy fees would usually apply). For example, statutory agreements are local land charges and the relevant obligations within them would usually bind owners and occupiers of a site.
 - *Highways search*: this would determine whether each entrance and exit to the site each about the adopted public highway. If they do not abut then there can be serious issues in terms of establishing rights of way, access, etc.
 - *Environmental desktop search*: this would provide guidance as to whether the site might be contaminated or contaminative.
 - *Flood risk search*: a flood risk assessment would reveal whether the site is at risk of flooding.
 - *Chancel repair search*: the land might attract liability for chancel repairs (the cost of repair to a local church chancel).
 - *Water and drainage search*: to check whether the school is connected to mains water and sewerage.
3. Standard enquiries of landowner: The party acquiring an interest in land would usually require the current landowner

The cost of obtaining these search results can be expensive. A full package of searches can cost up to £1,500 and beyond on search provider fees alone.



to provide replies to standard enquiries, so that the organisation has from the landowner as full a picture as possible as to the features of the land and anything adverse or unusual. The landowner, broadly speaking, duty to provide such details and by raising enquiries the issues can hopefully be understood.

Where a federated provider requires replies to enquiries, or at least further information about the school, the school itself may be best placed to answer the enquiries, but might be unwilling to carry out this exercise. Many local authorities will also resist giving replies to enquiries to a federated provider - usually on the basis that it is outside of DfE requirements and that, in any event, the school would be best placed to respond.

Where replies to enquiries are given, these should be in the form of industry standard replies to CPSE enquiries. It is also important that site specific and project specific enquiries should also be raised, where information is required in relation to a potential issue or particular feature.

Level 4 - Full property due diligence including searches and enquiries (development site)

Where a site is being redeveloped we would recommend that in addition to the Level 3 due diligence summarised above, the acquiring party also carries out utilities searches. The usual statutory undertakers (gas, electricity, etc) can supply information such as the route of any services serving or crossing the site. These search results would provide details of gas, water, electricity, telecommunications equipment and other utilities apparatus crossing or within the development site boundaries, and details of equipment benefitting the site which crosses adjacent land. These searches enable the acquiring organisation to understand how the presence of such equipment might affect or impact upon the development proposals. These additional searches can cost in the region of £500 to £1,000 (exclusive of VAT) in search provider fees.

It is also worth mentioning that there are additional site-specific searches that can be undertaken where relevant. E.g. if the site is near to a body of water (certain rights, liabilities and

restrictions might apply) or if the site is in a coal mining area then a coal mining search would be recommended to check whether the site is located above a mine shaft, for example. There is a wide variety of searches available. Also, where works have recently been carried out, it may be advisable for construction related due diligence to be carried out – for example, as to availability of contractors warranties, terms of building contracts and appointments to be reviewed and summarised.

Non-lawyer due diligence

For any acquisition, the legal due diligence exercise does not necessarily cover everything (even a Level 3 and 4 due diligence exercise), and quite a number of matters will be beyond the lawyers' role. The academy provider would need to understand and resolve a number of additional important matters, such as:

Plans: the demise or transfer plan needs to accurately shown the site boundaries and detailed physical inspection will always be necessary to make sure that the plan is accurate. Walking the boundary line is a must.

Buildings and structures: lawyers cannot and do not advise, and cannot express any opinion of the physical structure and condition of the particular site or its market value. Those matters need to be addressed by a surveyor, and we would always recommend taking a surveyor's advice as to the obligations in any lease, in particular the repair obligations in this lease which the academy will be required to comply with. A surveyor should also be able to advise as to whether planning regulations and applicable planning conditions have been complied with.

Ask questions: discussions with the Principal and other key personnel at the school combined with an inspection should help draw out issues such as informal or formal occupation of parts of the site by third parties, whether any rights are exercised over adjacent land or over the school site itself, and such things as whether there are any grants affecting any part of the particular site or the facilities on it (such as sports facilities) whether the public access any parts of the site (there can be serious issues with this), and other points that your lawyers can provide guidance on. It is always important for the academy provider to ask

questions, but particularly so where the lawyers have not been able to obtain replies to standard or specific enquiries.

Conclusion

With land and premises due diligence the onus is on the person taking the interest in the school site to find out as much as it can about the school site. By working with your lawyers a federated academy provider can focus its efforts in understanding the key issues that will affect its occupation and operation of the school site. Timely and focused due diligence can help a provider bring the new school on board with its 'eyes open' to the matters and issues affecting the site. If carried out early enough, any matters arising from due diligence can be understood and, where possible, resolved through negotiation, insurance or other means well in advance of the conversion deadline.

For further information on this subject please contact:

Julia Poulter

Managing Associate

T + 44 (0) 20 7074 8043

Julia.Poulter@lewissilkin.com

