



Department  
for Education

# Land Transfer Advice

April 2013

# Contents

Version control	3
Introduction	4
School characteristics	4
Land questionnaires	4
Registration	5
Department's policy context and key principles	5
Secretary of State's powers to make schemes transferring land	8
Types of school land and how they are made available to academies	9
Public land held by a local authority	9
Public land held by a governing body	10
Public land held by a foundation/trust	11
Private land held by a foundation/trust or other private landowner	13
Private land enhanced at public expense	13
Usual land arrangements for each type of maintained school	15
Community schools	15
Foundation schools without foundations	15
Foundation schools with foundations/trusts	16
Voluntary-aided schools	17
Voluntary-controlled schools	18
Further information for schools' lawyers on directions and Trust Modification Orders	19
Directions to a governing body	19
Directions to a foundation/trust	19
Trust Modification Orders	20
Trust Modification Orders at Church of England and Roman Catholic Schools	20
Disposal of publicly funded land that is no longer to be used for the academy	22

## **Version control**

This version of the Department's advice is version 10.1, dated April 2013. It replaces version 9.0 dated February 2012, and all other previous versions of the external advice as published via the Department's website. The guidance has been reorganised to make it more user-friendly and easier for schools and their lawyers to identify the types of land they may occupy. The guidance places greater emphasis on brokering local arrangements to meet individual needs – and includes some illustrative examples – and sets out the circumstances under which the Secretary of State may be likely to consider using his powers to transfer land to an academy through a scheme.

# Introduction

This document provides general advice on securing the continued use of land when maintained schools convert to academy status. It gives the Department's view on how this should be achieved for each category of school. The document does not, however, constitute legal advice from the Department, and given the complexity of land arrangements which may exist within individual schools, schools should always take their own legal advice, and should ensure that their individual history and circumstances are fully considered. They should also ensure they open up dialogue with local authorities on land issues early in the process. Our advice is that schools should ask their local authority to gather land ownership and land registration documentation and information at the same time as they make their application to become an academy, but only instruct solicitors to work on their land arrangements once the Secretary of State has approved their application and issued an academy order.

## School characteristics

The Department's arrangements for ensuring the continued use of land by academies will need to take full account of the individual school's characteristics. This includes considering the current category of the existing school (community, foundation without a foundation, foundation with a foundation, voluntary-aided or voluntary controlled); the history of the school, including details of any change of category, and/or any particular arrangements that were made when it was set up; the current arrangements by which land is either held for the purpose of the school or used by the school (including the pattern of use and the nature of that land); and any existing arrangements allowing others to make use of the school's land.

Later sections of this guidance provide further advice on determining the characteristics of the school and its land use, but the governing body of the existing school, and any lawyers for the new academy trust, must clearly identify the land it is intended will be used for the new academy and, wherever possible, have confirmed that the relevant local authority agrees with their assessment.

## Land questionnaires

As the current status and history of the school is being established, lawyers acting on behalf of the academy trust will be preparing a "Report on Title" for the school in relation to the land that will be used for the academy. This is a legal document which sets out, amongst other things, the exact nature of those plots of land; who holds them and on what basis; who previously held the land; and details of any trustees.

Before agreeing conversion, the Department needs to see similar information to that which is contained in the Report on Title, setting out the proposed land arrangements for the academy. This should be provided through the dedicated land questionnaire for each category of converting school. The answers given in the questionnaire will form the basis for all decisions on how the land will be treated, and what leases, directions, and other land agreements are needed. It is therefore vital that the lawyers acting for the school provide full and complete answers to all the questions asked, and do so within the deadline set by the relevant Departmental project lead for the conversion, in order to reduce the likelihood of delays to the conversion.

In cases where land is held by a foundation, the foundation's lawyers will need to check their charitable schemes for restrictive covenants which might require special action (e.g. they may be restricted to a maintained school, and might need to be changed to allow the use of the land by an academy). Title deeds, copies of land registry entries and conveyances, and plans/maps are all useful source documents in preparing the Report. The completed land questionnaire should be submitted to the Department along with any directions to transfer and Trust Modification Orders (further explanations of both are contained later in the document) that will be required. ([Download the questionnaires](#))

## Registration

For some schools, becoming an academy may be the first ever trigger for the land to be registered with the Land Registry as much school land is currently unregistered. We would prefer that local authorities take steps to register their land before schools convert. However, if the registration process has not been completed, this should not in itself prevent the school from converting. In most cases, it should not be necessary for lawyers for the governing body/academy trust to go into extensive, detailed and complex background searches into previous land ownerships and titles, but schools will wish to assess the likelihood of any claim to the land.

## Department's policy context and key principles

The Department's key policy principle in resolving land issues for converting schools is to ensure that the appropriate protections for both public and trustee value in land are in place, and that the academy has both a secure future on its site, and access to the same facilities it used as a maintained school. The Department will always seek to ensure that the rights over the use of land given to an academy will be no worse than if the school had not changed its status.

Our expectation is that all land and facilities used wholly or mainly for the purpose of the converting school will transfer and be made available to the academy in accordance with the mechanisms set out in this guidance. We expect local authorities, foundation trusts,

and schools to take timely steps to ensure that such transfers are completed in time for conversion.

However, experience has shown that schools make use of land in a number of different ways, and to differing degrees. It has also shown us that school land is used by third parties under a broad spectrum of formal and informal arrangements. We think that the best way forward is for the parties concerned to reach local agreements where these preserve all rights the school enjoyed as a maintained school.

We strongly encourage all parties concerned with conversions to open up early dialogue not just about the possible transfer of land, but also about other mechanisms by which the existing use of facilities by the school (or role in managing those facilities), and use by the authority and local community, can be preserved. Such open discussion often helps prevent unnecessary delays to conversions.

For example, a converting community primary school sits on a large site which also contains another community school. The site includes outdoor play areas and access/parking areas shared by the two schools, and a nursery unit which is run by another provider. The converting school sends a number of pupils to a special unit in the nursery, and historically has had a role in managing it, but those pupils are not in the majority of pupils at the nursery. The academy argues for a leasehold interest in all the land to be transferred to it on conversion, believing a formal transfer of the land in this way is necessary to protect access to the shared areas, as well as its continued role in support of the nursery. The local authority would prefer to retain the shared areas, and the land occupied by the nursery.

For the main school site, a normal lease may be appropriate. But, since the shared outdoor area and the nursery unit cannot be said to be used wholly or mainly for the purpose of the converting school, it may be more appropriate for the academy to acquire use of this part of the land through a formal shared use agreement. The parties concerned can draw up the shared use agreement in a way which continues to give the academy access and use of the site in the same way it has used it up until now. Such an agreement can additionally contain provisions related to certain facilities – for example protecting both the number of pupils at the nursery, and also the school's current role in managing and supporting the facility.

Where a school has the use of facilities or allows other parties to use facilities on its land (e.g. a sports centre, nursery, Sure Start centre etc) and the facility is transferred to the academy, agreed arrangements could include the leasing back to the local authority or other landowner of the land on which the facility is located, the signing of a shared use agreement or letter of comfort, or the academy sub-leasing the land to the community

user. Specific arrangements will apply for academies that have a Children's Centre on site, and further advice will be available directly from the project lead. In situations where the school will be running a community use sports centre or other such community facility, the Department will need to consider the arrangements and may require a subsidiary company to be set up and require additional clauses to be inserted in the Funding Agreement and articles. Project leads can advise further.

Where the facility is remaining in the ownership of the local authority (or is owned by some other body), the academy will wish to negotiate an appropriate use agreement with the landlord. All leases/subleases entered into by the academy trust will need to be cleared by the Department.

For example, an option that may be considered where it is not easy to exclude a Sure Start centre from the main lease is for the academy trust to take on the management and operation of the Sure Start centre. For this to happen, the local authority must first notify and consult with the Department about the plans to transfer the asset. The Department will not invoke clawback if the use of the asset remains unchanged. However, the Department will retain its interest in the asset and the clawback provision will stay in effect for the remainder of its useful economic life. If the asset is subsequently disposed of at a later date and it is deemed appropriate to invoke clawback at that time, the Department would recover funding from the local authority. Accordingly, whilst the Department will not insist that a local authority enters into an agreement with an academy trust to recover funding in the event of a later sale or change of use, such a clause is advisable.

Or, a foundation school occupies a site which contains a sports centre in use by the community, and occasionally used by other schools. It also sometimes makes use of local authority owned playing fields belonging to another local school, and allows a professional keep fit class to be run from the school hall on a weekly basis - for which it charges the instructor a rental fee. The academy trust may enter into leases or less formal agreements with the other schools to continue their use of the sports centre, and separate arrangements with the local authority to protect community use. It would also need to sign up to a shared use agreement with the local authority to protect the academy's use of the local authority held playing field. The academy would enter into a rental agreement with the keep fit instructor for the use of the hall, and it may be necessary for the academy to set up a subsidiary company for arrangements relating to the sports centre.

## **Secretary of State's powers to make schemes transferring land**

Local authorities should take the necessary steps to ensure that any land they hold is transferred to the successor academy in accordance with this guidance. Even where the land is not to be transferred, the LA should put in place mechanisms to ensure that the academy may continue to use its current facilities on the same basis. As previously, the Department expects that locally agreed solutions will be possible in the vast majority of cases. However, in circumstances where the parties concerned cannot reach agreement and/or in the Department's view there are unacceptable delays to the process, we will consider whether the Secretary of State should exercise his powers under Schedule 1 of the Academies Act 2010 to either make a scheme compulsorily transferring school land, or a scheme or direction transferring any existing interest, rights, or liabilities.

# The types of school land and how they are made available to academies

There are a number of different types of school land depending on the original source of funding, the school's history, and who currently holds land for it. For each there are mechanisms by which that land is usually then made available to an academy. Below is a breakdown of each type of land, and the following section contains a breakdown of which types of school usually have which type of land:

## Public land held by a local authority

Local authority public land is leased to the academy trust on a 125 year lease for a peppercorn rent. Under the Education Acts, local authorities require the consent of the Secretary of State to dispose of any interest in land. This includes where a school converts to academy status. Consent would normally involve application to the Secretary of State through the Education Funding Agency, but in the case of conversions, this need for consent is taken forward as part of agreeing the conversion, and the Department does not require a distinct application.

The requirement for a 125 year lease is not contained in statute, but is the Department's expectation and we will not normally accept a shorter-term lease than this except in circumstances where the authority itself only holds the land on leasehold basis, and the term is less than 125 years. In this case there could be a shorter-term sublease from the local authority to the academy trust. Model leases are available on the Department's website ([download the model](#)). The model land clauses preventing the academy trust from disposing of its leasehold interest in the public land will need to be included in the relevant academy's Funding Agreement ([download the Funding Agreement](#)).

Where such land is to be leased, the academy will need to confirm with the Department (when the signed Funding Agreement is sent to us having been executed by the academy trust) that they have completed and signed a lease with a specific date for transfer. In some cases a draft lease which has been agreed with the local authority may suffice even if it has not yet been executed by the academy trust - provided that it is confirmed that all the significant terms have been agreed. Similarly, any sub-leases, shared use agreements, or other contracts relating to the land should be completed and signed with a specific date for transfer.

If the local authority and the academy trust have been unable to complete the lease by the time the Funding Agreement is signed and sent to the Department, then if the parties agree, a licence to occupy (also known as tenancy at will) can be used to enable the academy to open on the preferred date ([download a model](#)). However, this is intended only as a short term solution until the full lease can be agreed, and will only be approved where all significant terms of the lease are already agreed by both parties such that there

are assurances that the lease will be agreed shortly after conversion. Such an option is not appropriate to allow a school to convert on its chosen day if there are still significant issues to be resolved.

## Public land held by a governing body

The transfer of public land held by a governing body can either be effected by the granting of a leasehold interest by the maintaining local authority to the academy trust; or more commonly by transfer of a freehold interest to the academy trust by the governing body, effected by a direction to transfer. The Project lead will check with the academy trust which it would prefer. There may be rare cases where the governing body has only ever had a leasehold interest in the land. If this is the case then only a leasehold will be able to be transferred to the academy trust by direction to transfer.

If the academy wishes the academy trust to have the freehold interest in the land on conversion, the Secretary of State will use his powers under Schedule 1 of the Academies Act 2010 to direct that the land currently used for the purposes of the school (and held by the governing body) is transferred from the existing governing body directly to the academy trust. In these cases:

- the land should be transferred further to a direction from the Secretary of State. Whilst it is possible for the land to be transferred by private arrangement between the governing body, the academy trust, and the local authority, a direction will normally be issued in order to avoid the possibility of the land automatically reverting to a local authority against the wishes of the academy trust should there be a problem in finalising any private arrangement; and
- the Funding Agreement MUST contain:
  - the model clauses protecting the public land from disposal (e.g. by being leased or mortgaged) without the Secretary of State's consent;
  - the model clauses requiring a restriction to be registered with the Land Registry to reflect these provisions; and
  - the model clauses requiring the academy trust to apply for notice to be entered in the Land Register to protect the Secretary of State's option to acquire the land for nil consideration. The Funding Agreement will also oblige the academy trust to insure the land and buildings and maintain them in at least as good a condition as when they were transferred. Standard Funding Agreement clauses can be viewed on our website ([download the Funding Agreement](#)).

If the academy trust wish, they may instead choose that their publicly funded land returns to the local authority and they hold it on a lease, as for ex-community schools. The academy trust (or their lawyers) will need to confirm in writing/by email that they are

content to have a leasehold interest and that they have so informed the local authority. Under the provisions of the Academies Act 2010, any land held by the governing body will then automatically transfer to and vest in the local authority when the governing body dissolves on conversion, in the absence of a contrary direction from the Secretary of State that it should otherwise be transferred.

Project leads dealing with transfers on a freehold basis will ensure that the academy trust (or their lawyers) confirm in writing/by email that they wish to have the freehold interest of the land currently held by the governing body for the existing school. As stated, if the governing body does not do this and no direction is issued, then in the absence of an agreed private arrangement the land will revert to the authority when the school converts. They will also ensure that the lawyers have prepared a draft direction to the governing body to transfer the land to the academy trust ([download a model direction](#)). The direction will require the transfer to be effected prior to the conversion date. The direction to transfer will be formally issued and signed on behalf of the Secretary of State when the Funding Agreement is executed by the Secretary of State. The academy trust will also need to inform the local authority of the land transfer arrangements.

The lawyers, acting for the governing body and the academy trust, will need to carry out the legal work of transferring and conveying the land. The transfer should take place prior to the conversion date, because the governing body will, by law, be dissolved on the conversion date.

If, for some reason, the lawyers for the academy trust fail to effect the transfer by the conversion date, then as a matter of law (further to paragraph 13 of Schedule 1 to the Academies Act 2010) the land of the governing body will automatically vest and be transferred to the academy trust provided that a direction to transfer that land has been issued to the governing body.

## **Public land held by a foundation/trust**

As with public land held by a governing body, the transfer of publicly funded land held by a foundation/trust can be effected by the transfer of a freehold interest to the academy trust through a direction to transfer, or by the granting of a leasehold from the maintaining local authority if the land is first transferred back to them. The project lead will check with the academy trust which it would prefer. There may be rare cases where the foundation/trust has only ever had a leasehold interest in the land. If this is the case then only a leasehold will be able to be transferred to the academy trust by direction to transfer. There may also be cases where older or faith foundations/trusts are continuing, and the parties are agreed that it would be preferable if they continued to hold all the land they currently hold, both public and private, so that the necessity for separate treatment of public and private land arises only when the school closes or the land is otherwise disposed of (though note that the Department expects every effort to be made to reach a

conclusion on whether land is publicly funded prior to conversion). The Department is content with this arrangement where it does not create further problems. So in some cases land will continue to be made available to the academy from the current foundation/trust.

For the freehold interest in the land to transfer from the foundation/trust to the academy trust, the same arrangements will apply as for the freehold transfer of land from a governing body, except that the direction to transfer the land will be from the foundation (rather than the governing body) to the academy trust and lawyers will need to ensure the schedule to the direction is fully completed and describes all the land held by the foundation/trust for the purposes of the school. For a leasehold in the land to be granted by the local authority, there will first need to be a direction to transfer from the foundation/trust to the local authority, and the local authority will then need to issue a lease.

For the existing trust rather than the academy trust to continue to hold the land, the Department will need to be satisfied that the foundation has an historic association with the school, or else has functions wider than simply holding land for the school, which will continue once the school becomes an academy, and which could not be carried out by the academy trust. In this case the academy may have a formal lease with the other trust, or there may be other locally agreed arrangements.

The Department would mostly expect trusts to continue in the case of current or former voluntary schools, and not in the case of schools that have previously converted to foundation status under the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007. However, in exceptional circumstances the Department may agree that a more recent foundation should continue to hold land for an academy where it can demonstrate the sort of wider functions mentioned above. The project lead for the conversion can advise. Where foundations are to continue to hold land, the Secretary of State would issue a direction to transfer the leasehold interest from the foundation to the academy trust.

The Education Act 2011 introduced additional protection for academies through restrictions on the disposal of public land, and the inclusion of a statutory notice period where trustees wish to dispose of land currently held for the purpose of an academy. If the freehold of any public land is to remain with a foundation/trust, then they will need to sign up to the Land Supplemental Agreement ([download the Agreement](#): please note there is secular and a faith version), as this agreement provides additional protections over public land not covered in statute, as well as providing the academy with security of tenure of two years.

## **Private land held by a foundation/trust or other private landowner**

Where converting schools sit on entirely private land (most often diocesan church land) a variety of arrangements will be possible between the landowner and the academy trust. They may agree a lease, a licence to occupy, or they may agree the land arrangements in an informal manner which does not transfer the land to the academy trust, but ensures that the academy still has security of occupancy on, and/or use of, the site (and which may reflect the current arrangements between the landowner and the school). The academy trust, and those advising it, will need to satisfy themselves that the arrangements give the academy trust the required assurance of occupancy. If the private landowner is the school's foundation/trust then it may be that their significant governance role in the academy trust will provide assurance of their continued association with the academy.

As with public land, if any private land is to remain with a foundation/trust, then the Department requires that they sign up to the Land Supplemental Agreement. (The Department also wishes to encourage non-trust private landowners to sign up to this agreement wherever possible, in order to safeguard the academy).

## **Private land enhanced at public expense**

In some cases what was originally “private” land at either a voluntary or foundation school will have been enhanced at public expense and may therefore count as “publicly funded land” under the Education Acts (which in turn means it is treated as the equivalent public land for the purpose of this advice). The definition of what is and is not publicly funded land is complex, and in the first instance academy trust lawyers should aim to reach a view on whether the school’s land qualifies as publicly funded within the meaning of paragraph 22(3) of Schedule 1 to the Academies Act 2010 and then approach the Department for agreement. The academy trust lawyers should also give the local authority the opportunity to comment as to whether or not the land qualifies as publicly funded.

Academy trust lawyers should make every effort to reach a definite conclusion on whether land is publicly funded. The Department would prefer to see the answer in the land questionnaire either:

- That there is publicly funded land, which would then be dealt with as “public land” in accordance with the relevant sections above; or
- That there is no publicly funded land, and that the relevant local authority has confirmed this is the case, which therefore means the land is private land and will be treated as such in accordance with the private land section above.

However, we accept that in some cases it will not be possible to make this definite statement, and where this is the case, we will allow a school to convert with the issue deferred until the land is disposed of. In these cases we will expect to see the following statement added to the land questionnaire without substantive alteration:

“We note that there has been no determination at the date of this questionnaire of the extent to which any land held by the trustees is “publicly funded” within the meaning of the Academies Act 2010. It is acknowledged that such a determination will be necessary at the point of closure of the academy and/or prior to any disposal of all or part of the land by the trustees. The Secretary of State expects such a determination to be carried out by the academy, the trustees and the local authority (or the Secretary of State on behalf of the local authority) at the appropriate time and, in the event of any disagreement between such parties, will be determined by the Secretary of State having regard to any guidance issued by him in relation to such determinations.”

# **Usual land arrangements for each type of maintained school**

## **Community schools**

Community Schools account for the majority of schools in England. They almost always occupy public land held by the local authority. The school's history will probably be less of a factor in the case of community schools than for other categories of school, as the school will not have changed status, and will not have a foundation attached. There may be rare cases where land at community schools is not held by the local authority for some reason, or where the governing body holds additional land on trust. If this is the case, your project lead will be able to advise.

It is not permissible for the academy trust of a converting community school to have a freehold interest in the land on becoming an academy. Community schools have no ownership of the land before becoming academies and, because as much as possible we wish to see schools convert with arrangements that mirror their current position, they may not gain land ownership as part of the conversion.

## **Foundation schools without foundations**

The land at foundation schools without foundations will almost always be public land held by a governing body. The land will have automatically transferred to the governing body when the school became a foundation school through operation of law, regardless of whether the local authority has formally completed the appropriate documents (TR1 form). The authority's failure to complete the documentation does not mean that they still hold the equitable interest in the land, and should not delay the conversion. The Land Registry has agreed to accept confirmation of the date on which the school changed category as proof that the land is now held by the governing body.

Because most foundation schools will have become foundation schools after being something else, it is important to trace back the school's origins and determine what it was before it was a foundation school, in case it was something other than a community school, or there are other complications. Foundation schools which converted automatically following the School Standards and Framework Act 1998 are likely to have been a grant-maintained (GM) school prior to 1998, and a county school (similar to a community school) before that.

In very rare cases, private land may be used by a foundation school without a foundation. If this is the case, the arrangements for private land as at other schools will apply, and project leads can advise.

## Foundation schools with foundations/trusts

The land arrangements for foundation schools with foundations (trust schools) can vary from school to school. The history and origins of the school play a very large part in determining what sort of land is held - and thus how the land is treated - and it is therefore extremely important to gather all the available information on the school's history and ensure the land questionnaire is fully completed.

A guiding principle the Department will use to determine the appropriate transfer arrangements is which of the two main types of foundation schools with foundation the school fits into:

- **Newer, and non-religious, foundation schools.** These tend to occupy land at one time provided by the local authority but which is now public land held by the foundation/trust. They are schools which in their previous incarnations were never church schools and are therefore unlikely to have any private interest in their land; those which have acquired a foundation recently; or those which were set up as a new foundation school with a foundation. Land will have transferred to the foundation when the school was set up, changed category to become foundation, or when the trust was otherwise acquired.
- **Older and religious foundation schools.** These tend to be schools that were at one stage voluntary schools (or otherwise have an historic foundation that owns some of the land). They may have public land held by the foundation/trust, but importantly are much more likely to have a private origin for their land and thus are also more likely to sit on at least some private land held by a foundation (especially if the foundation predates 2006).

Some land at either type of school (not usually the main school site) may also be public land held by the local authority, or even public land held by the governing body.

Due to the possibility of different land ownership, lawyers acting on behalf of the academy trust will need to ensure that they identify all the land currently used for the purposes of the school. It may be helpful to look for documentation naming a specific charitable foundation, or stating that land is held by the official custodian, as these are the first indicators that the land may be private. Lawyers should also consider any documents relating to the original transfer of land, which may set out who provided the original funding and under what circumstances, and will also need to consider the issue of whether any previously private land has been enhanced at public expense.

In some circumstances it may be necessary for the Secretary of State to issue a 'Trust Modification Order'. This Order, if required, would only apply to foundation and voluntary

schools with a continuing foundation/trust.<sup>1</sup> There is more information on trust Modification Orders later in this document.

## Voluntary-aided schools

These are mainly church schools, and typically occupy land that is a mix of private and public land. Often the main school buildings will be on private land, and the playing fields will be public land held by the local authority. Private land will generally be private land held by a foundation. For the majority of voluntary-aided schools, this foundation will be the diocese (or religious order), but may possibly be a foundation which exists purely to hold land for that school. It is also possible that voluntary-aided schools may have some public land held by the governing body.

There are some voluntary-aided schools which may have little or no private land. For example where a new voluntary-aided school has been set up to replace an existing school and is on the site of a former community school, or where a voluntary-aided school has won a competition for a new school under the Education and Inspections Act 2006 and is built on land provided by the local authority. This would count as public land held by a foundation.

Lawyers acting on behalf of the academy trust will need to ensure that they identify all the land currently used for the purposes of the school, and will also need to consider the issue of whether any previously private land has been enhanced at public expense. It may be helpful to look for documentation naming the Diocese or a specific charitable foundation, or stating that land is held by the official custodian, as these are the first indicators that the land may be private. Lawyers should also consider any documents relating to the original transfer of land, which may set out who provided the original funding and under what circumstances.

In practice most previously private land at voluntary-aided schools would currently be unlikely to meet the legal definition of publicly funded land following enhancement, since central grant from the Department was not covered prior to 2007, and since 2007 has required a specific notice that the grant will act to make the land meet the definition of publicly funded land. Notwithstanding this likelihood, the Department requires that the local authority be offered the chance to give their view on whether or not the land is publicly funded.

---

<sup>1</sup> Trust Modification Orders will not be required for foundation schools without a foundation (where the land is held by the governing body), or to 'trust' schools under the EIA 2006.

## **Voluntary-controlled Schools**

Arrangements for holding land at voluntary-controlled schools will be very similar to voluntary-aided schools, in that land will often be owned by a foundation. The difference is that it is more likely that any originally private land held for the purposes of the school will meet the definition of being publicly funded land (and playing fields, even when wholly public, may have been transferred to the foundation rather than remaining with the local authority).

# **Further information for schools' lawyers on directions and Trust Modification Orders**

## **Directions to a governing body**

Under paragraph 10 of Schedule 1 to the Academies Act 2010 the Secretary of State can direct that an interest in publicly funded land which is held by the governing body for the purposes of a voluntary, foundation, or foundation special school, is either returned to the local authority or transferred freehold to the academy trust. Such a direction to the governing body will be required for any public land that is held by the governing body – for example a foundation school without a foundation, but also potentially for some schools with a foundation or voluntary schools, where some of their land may be held by the governing body. The lawyers for the converting school should complete the land questionnaire identifying this land and confirm whether a direction will be required. The transfer of the land will still need to be effected by the traditional method of conveyance by the converting school's lawyers, although if this has not taken effect by the conversion date then (under paragraph 5 of Schedule 1 to the Academies Act 2010) the land will vest in the academy trust (the converting school's lawyers will then need to take the usual steps to register this transfer with the Land Registry). Public land is defined in paragraph 22(3) of Schedule 1 to the Academies Act 2010.

Separate directions are available for use by single academy trusts and multi-academy trusts. [Download a model direction.](#)

## **Directions to a foundation or trust**

Also under paragraph 10 of Schedule 1 to the Academies Act 2010, where there is publicly funded land which is held by the trustees for the purposes of a voluntary, foundation, or foundation special school, the Secretary of State can direct a transfer of a freehold or leasehold interest in this land, or the grant of a lease in respect of this land to the academy trust. Such a direction will be required when any public land is owned by a foundation or trust and is to be transferred to the academy. The transfer of the land will still need to be effected by the traditional method of conveyance by the converting school's lawyers. The schedule to the direction needs to list and identify all the land that is to be transferred. The lawyers for the converting school should complete the schedule which will need to capture all the land identified in the land questionnaire as being foundation/trust- owned and land that falls within the definition of public land.

Under the Act the Secretary of State can also make a direction to the foundation or governing body to transfer the land to the local authority. The local authority can then lease this to the academy trust. It is for the school to decide (in conjunction with the foundation where appropriate) whether it wants to have the freehold or leasehold of the

land transferred to the academy trust by the governing body of foundation, or whether it wants a lease of the land from the local authority.

## Trust Modification Orders

Land which is held by a foundation or trust for a voluntary or foundation school may be held for restricted and defined purposes either further to a trust deed or the constitution/governing documents of that trust/foundation. In such cases it may be necessary to issue a trust Modification Order, depending on the constitution or scheme relating to the foundation or trust, so it can be occupied by the academy. This would normally apply where the school's lawyers confirm that the terms of the governing document are not sufficiently wide to enable the foundation/trust to transfer and/or use the land for an academy.

The lawyers for the converting school should know the terms of the constitution or scheme and should advise the converting school and Department if a Trust Modification Order is necessary. The precise terms of the Order will be a matter, primarily, for the lawyers for the converting school and its foundation.

There are two Departmental templates available for lawyers to use. One is for where land is held on a permanent endowment<sup>2</sup> trust, and one for where it is not held on permanent endowment. It is for the school and its lawyer (and the trust's lawyer if different) to decide which of these templates it needs depending on the nature of their trust deed and whether it is permanent endowment or not.

The school's lawyers must complete and/or amend the template as appropriate to make the necessary amendments to the trust deed/governing documents. This should be sent to the project lead, along with a copy of the trust deed/governing document for clearance.

## Trust Modification Orders for Church of England or Roman Catholic Church schools<sup>3</sup>

Where a Trust Modification Order is required for these schools there must first be consultation with the appropriate Diocesan Authority. The trust's lawyers should inform the project lead at the outset (when they ask for the Trust Modification Order) whether the converting school is such a school. If so, they should also advise who is the school's Diocesan Authority is, and provide a contact at that Authority.

---

<sup>2</sup> Permanent endowment is property of the charity (including land, buildings, cash or investments) which the trustees may not spend as if it were income. It must be held permanently, sometimes to be used in furthering the charity's purposes, sometimes to produce an income for the charity. The trustees cannot normally spend permanent endowment without authority from the Charity Commission

<sup>3</sup> 'Church of England School' and 'Roman Catholic Church School', for the purposes of this requirement to consult are defined at s.142 of the School Standards and Framework Act 1998.

The Department strongly encourages school lawyers to speak with the Diocesan Authority as soon as possible in order to inform them that they will be asked to provide their views on the proposed modification of the trust to the Department. The project lead will write to the Diocesan Authority, inviting their views on the plans to amend the school's trust deed. Subject to those the Department will confirm whether the Secretary of State agrees to make a Trust Modification Order.

Where consultation with the Diocesan Authority is required, the views of that Authority must be sent to Department before the academy trust and Secretary of State can enter into a Funding Agreement or make a Trust Modification Order.

## **Disposal of publicly funded land that is no longer to be used for the academy**

In respect of publicly funded land used for an academy which has been transferred to the academy trust by a local authority, governing body, foundation/trust or trustees of a maintained school – or land previously held by the trustees of a maintained school which following conversion is used by an academy but is still held by the trustees - the Secretary of State may need to make a determination in order to protect the public investment in the land where the land ceases, or will cease, to be used for an academy.

In exercising his powers under part 3 of Schedule 1 to the Academies Act 2010, and/or consenting to a disposal of land as required under the terms of the Funding Agreement (or in the case of land held by trustees, the terms of a Land Supplemental Agreement between the trustees, academy trust and Secretary of State), the Secretary of State will act fairly and justly and, in determining any proceeds of disposal or compensation to be paid, will have regard to:

- the degree of public investment in the land and the degree of any enhancement to the value attributable to that investment;
- the degree of private investment in the land and the degree of any enhancement to the value attributable to that investment;
- the length of time that the land has been in public use;
- the value of the land at the date of determination.



© Crown copyright 2013

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit [www.nationalarchives.gov.uk/doc/open-government-licence](http://www.nationalarchives.gov.uk/doc/open-government-licence) or email [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to us at [www.education.gov.uk/contactus](http://www.education.gov.uk/contactus).

This document is available for download at <http://tinyurl.com/aescfft>

Reference: DFE-00237-2013