LAND TRANSFER ADVICE – VERSION 9.0 February 2012

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**About this guide.**

This guidance is a toolkit for schools converting to Academy status, and especially for their lawyers. It provides general advice on the arrangements that will need to be put in place to secure the use of land for an Academy and gives the department’s starting point on how this should be handled for each main category of school. It will also be of assistance to local authorities in understanding the framework in respect of land when a school wishes to convert to Academy status,

However, this guide does not constitute legal advice. Experience has shown that land issues can be complex with unique arrangements at individual schools. It will therefore always be important for schools to take their own legal advice, and for the individual history and circumstances of each school to be fully considered. Your Academies Project Lead can provide further information, and model documentation is available on the Department’s website.

**Version control.**

This version of the Department’s advice is version 9.0, dated February 2012. It replaces all previous versions of external advice as published via the Department’s website.

The changes in this version of the guidance are designed to do the following:.

1) Reflect changes arising from the commencement of provisions on the treatment of land contained in the Education Act 2011, especially Schedule 14 to the Act which introduces a replacement to Schedule 1 of the Academies Act 2010.

2) Introduce a new process for identifying land through “land questionnaires”. These will replace the Summary Report on Title introduced in version 8.0 of this guidance, and are designed to be completed earlier in the conversion process. They are tailored for each category of school, and the aim is to focus on the key considerations for each type of conversion, so that we can resolve any issues earlier in the process, and avoid last-minute delays. **Copies of the questionnaire for each category of school are available via the Department’s website, and this guidance should be considered in conjunction with those questionnaires.**

**Key Principles**

1. The key concerns for the Department in resolving land issues are to ensure the appropriate protection of public land and secure the future of the Academy on the site. Arrangements should also ensure the protection of both public and trustee value in land held by any other trust for the purposes of the Academy. These are the Department’s key considerations in dealing with land issues.

**Establishing school status and history**

1. The Department’s arrangements for land transfer need to take account of:
   1. the current category (community, foundation without a foundation, foundation with a foundation, voluntary aided or voluntary controlled) of the existing school;
   2. the history of the school, including details of any change of category, and/or any particular land arrangements that were made when it was set up, and
   3. the current arrangements by which land is held for the purposes of the school (see paragraph 4).
2. The Governing Body (GB) and any trusts of the existing school and the Academy Trust (AT) must be clear about what land is intended to be used for the new Academy and, wherever possible, have confirmed that the relevant local authority agrees with their assessment. Title deeds, copies of land registry entries and plans/maps are all useful source documents. The land questionnaires (further details below) should then be completed in accordance with that view.

1. Set out below are the basic land arrangements which usually apply for different types of maintained schools. There are also flowcharts available via the Department’s website to assist with determining the school’s history and possible land issues. Later sections of this advice deal with each of these categories in further detail and explain how land should be treated when the school converts to Academy status:

|  |  |  |
| --- | --- | --- |
| **Category now** | **History** | **How is land currently held** |
| **Community** | Not usually a factor | Almost always by local authority |
| **Foundation without foundation** | Foundation schools which have been in existence for some time are likely to have been a grant-maintained (GM) school prior to 1998, and a county school (similar to a community school) before that. If the school was previously GM, land will have also been held by the governing body then | Almost always by governing body (if not, refer to Policy Lead) **Note**: publicly funded land will have transferred automatically to the governing body through operation of law when the school became a foundation school – even if the authority have not formally completed the necessary paperwork (form TR1).  Usually no private land (if there may be, refer to Policy Lead). |
| **Foundation with foundation (some of which are also known as Trust schools)** | Is likely to have been a community, VC or VA and/or GM school in the past.  Note that it is possible for a school to have changed from VA or VC to GM and thence to foundation. It is also possible for a school to have been set up as a foundation school with a foundation. | Land will usually be held by foundation or trustees.  Some land may occasionally be held by the local authority or by the governing body.  There may also be private land as well as public land (particularly if the foundation predates 2006). |
| **VA** | May have been a VC and/or GM school in the past.  May have been set up to replace a community school or a foundation school without a foundation.  May previously have been a foundation school with a foundation.  May have been set up – recently or a long time ago - as a VA school. | Land may all be held by foundation or trustees.  Some land may be held by the local authority or by the governing body, and it is very likely that playing fields are.  Very likely to be an element of private land. |
| **VC** | May have been a GM school in the past.  May have been set up to replace a community school or a foundation school without a foundation.  May have been set up recently – or a long time ago – as a VC school | Land may all be held by foundation or trustees.  Some land may be held by the local authority or by the governing body, and it’s likely that playing fields will be.  Very likely to be an element of private land. |

**Land Questionnaires**

1. Once the current status and history of the school is 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. The Report on Title 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, details of trustees, details of any restrictive covenants that apply to the land, and the need for any modification of existing Trust documents.
2. Before agreeing conversion, DfE needs to see similar information to that which is contained in the Report on Title, setting out the proposed land arrangements for the Academy and dealing with the points set out below. Previously we asked for a Summary of the Report on Title to be prepared for us. However, in order to ensure that we target specific issues with particular conversions earlier in the process, we are now replacing this summary report with a dedicated land questionnaire for each category of converting school which asks specific questions which will need to be answered in order for the school to convert. The completed questionnaire should be submitted to DfE for clearance as early in the process as possible – and within any individual deadlines quoted by project leads - along with any Directions to Transfer and Trust Modification Orders that will be required. The questionnaire can be found on the Department’s website**.**
3. The answers given in the land questionnaire will form the basis for all decisions on how the land will be treated, and what leases, directions, and land supplemental agreements are needed. **It is therefore vital that the lawyers acting for the school provide as full and complete answers to all the questions asked as possible, and do so within deadlines set by the relevant project lead. Getting to the bottom of these land queries early on will help reduce the likelihood of delay to the conversion**. Depending on the category of school, the questionnaires will cover the following, and it is advisable to consider the relevant questionnaire alongside this guidance:
   * + Identifying all the land currently held for the purposes of the converting school;
     + by whom that land is held (ie is it held by the local authority, GB, foundation, other trustees or some other third party);
     + whether any land is “publicly funded” within the meaning of paragraph 22(3) of schedule 1 to the Academies Act 2010 (as amended)
     + whether the land is held freehold or leasehold;
     + whether the school has the benefit of any shared use arrangements/shared facilities or allows other parties to use facilities on its land, and if so what arrangements are proposed post-conversion..
     + any additional leaseholds or access rights which have been agreed or granted, or are outstanding to be agreed or granted, against plots of land within the school estate; any disposition of the registered estate by the AT upon conversion will require Secretary of State consent in accordance with the terms of the Funding Agreement.
     + any contracts which are currently outstanding on the land or on improvements to buildings on it;
     + what the proposals are as to how the land will be dealt with on conversion
     + ,where directions to transfer land are required these should be drafted by the school’s solicitors (cleared with Trust’s solicitors where applicable) using the templates on the DfE website and drafts attached to the Land Questionnaire for DfE clearance;
     + where a Trust Modification Order is required a draft should be provided (using templates on the DfE website) along with a copy of the trust document that is being amended, for DfE clearance;
4. 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. However, in most cases, it should not be necessary for lawyers for the GB/AT to go into extensive detailed and complex background searches into previous land ownerships and titles.
5. In cases where land is held by foundations, the foundation’s lawyers will need to check their charitable schemes for restrictive covenants which might require special action (eg they might be restricted to a maintained school, and might need to be changed to allow the use of the land by an Academy). The land questionnaire is the key documentation required by the Department.

**Community schools**

1. These schools account for the majority of schools in England. They almost always occupy “public” land, which will be held by the LA.
2. For community schools converting to Academy status, the land will be leased to the Academy Trust on a 125 year lease for a peppercorn rent as for most previous Academies. The land clauses preventing the AT from disposing of its leasehold interest in the public land will need to be included in the Funding Agreement (the same as for freehold transfer for foundation schools, as detailed at paragraph 30 below).
3. While there is no requirement for a 125 year lease in statute, we have always been clear that this is the Department’s expectation, and we will not normally accept a shorter-term lease than this – except in exceptional circumstances, for example where the authority itself only holds the land on a leasehold basis, and the term is less than 125 years.
4. It is not possible 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 arrangements, they may not gain land ownership as part of the conversion.
5. Where the school has the benefit of any shared use arrangements or other formal agreement for the use of facilities or allows other parties to use facilities on its land (e.g. a Sports Centre, nursery, Sure Start Centre etc) then depending on the local situation, a number of different arrangements may be possible post-conversion. Where the facility is transferred to the Academy, these could include the leasing back to the local authority of the land on which the facility is located, the signing of a shared use agreement, or the Academy sub-leasing the land to the community user. Where the facility is remaining in the ownership of the local authority (or is owned by some other body), the AT will wish to negotiate an appropriate use agreement with the landlord. Project leads can advise further on available options.
6. 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.
7. The GB/AT will need to confirm with the relevant Project Lead (when the signed Funding Agreement is sent to DfE, having been executed by the Academy Trust) that they have completed and signed a lease with a specific date for transfer (a model is available on our website). In some cases a draft lease, which has been agreed with the local authority (if it is confirmed that all the significant terms of it are agreed) may suffice even if it has not yet been executed by the /AT. Where the authority does not itself hold the freehold interest in the land, but instead holds the land on a leasehold basis, there will need to be a sub-lease from the authority to the AT. The land questionnaire should identify whether the land used for the school is held on a freehold or leasehold basis. Similarly, any sub-leases, shared use agreements, or other contracts relating to that use are also completed and signed with a specific date for transfer
8. If the local authority and the GB/AT have been unable to complete the lease by the time the Funding Agreement is signed and sent to DfE, then if the AT and the authority agree, a Licence to Occupy (also known as Tenancy at Will) can be used to enable the Academy to open on the preferred date (a model is available on our website). However, this is intended only as a short term solution until the full lease can be agreed, and can only be used where public land is held by the authority or transferred back to the authority. A Licence to Occupy will only be approved by DfE 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. It will not be used simply to allow a school to convert on its chosen day if there are still significant issues around the way land transfers will be dealt with.
9. The Department’s expectation is that the local authority and the AT will make the necessary arrangements for the land transfer. The GB/AT should keep their Project Lead updated on progress with the land transfer, and project leads will ask the AT Lawyer for copies of correspondence with the authority.

**Foundation schools without foundations**

1. The land of foundation schools without foundations will almost always be held by the GB. The land will have automatically transferred to the GB when the school became a foundation school, regardless of whether the local authority has formally completed the appropriate documents (TR1 form). The authority’s failure to complete the documentation will not delay the conversion.
2. Because most foundation schools will have become foundations 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, as this is useful to provide background on the land’s history. In very rare cases private land may be used by a foundation school without a foundation. For these, see notes on voluntary schools below.
3. The transfer of public land can either be effected by the transfer of the freehold interest back to the local authority (this happens automatically when the GB dissolves on conversion) which then leases the land to the Academy Trust (using our model lease); or by transfer of a freehold interest to the Academy Trust effected by a Direction to Transfer (under the Academies Act), and the Project lead will check with the AT which it would prefer. There may be rare cases where the GB 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. The land questionnaires should identify whether the land used for the school is held on a freehold or leasehold basis.
4. Where the school has the benefit of any shared use arrangements or other formal arrangements for the use of facilities or allows other parties to use facilities on its land (e.g. a Sports Centre, nursery, Sure Start Centre etc) depending on the local situation, a number of different arrangements may be possible post-conversion. Where the facility is transferred to the Academy these could include the leasing to the authority of the land on which the facility is located, the signing of a shared use agreement, or the Academy leasing the land to the community user. Where the facility is remaining in the ownership of the local authority (or is owned by some other body), the AT will wish to negotiate an appropriate use agreement with the landlord. Project leads can advise further on available options.
5. 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.

**Transfer of Leasehold Interest**

1. For the AT to have a leasehold interest, the existing GB’s interest will have to be transferred back to the local authority and then leased by the authority to the AT on a 125 year lease for a peppercorn rent. The GB/AT will need to confirm that they have completed and signed a lease with a specific date for transfer (a model is available on our website). All leases of public land between the local authority and the AT should at inception be for a minimum of 125 years (although a sub-lease where the authority does not hold the freehold may be governed by the original lease between the authority and the freeholder). The GB/AT (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. Similarly, any sub-leases, shared use agreements, or other contracts relating to that use are also completed and signed with a specific date for transfer
2. Under the provisions of the Academies Act 2010 any land held by the Governing Body will automatically transfer to and vest in the local authority when the Governing Body dissolves on conversion (unless the SoS has directed otherwise). The Department will check that the authority has drafted a lease and that this is for at least 125 years for a peppercorn rent.
3. The GB/AT will need to inform their named DFE contact that they have completed and signed a lease with a specific date for transfer (a model is available on our website).
4. The Funding Agreement must contain the land clauses as detailed at paragraph 30 below to prevent the AT from disposing of its interest in the public land (as for transfer of a freehold interest in land).
5. Project Leads dealing with transfers of a leasehold interest will ensure:

* That the AT (or their lawyers) confirm in writing/by email that they wish to have a leasehold interest and that they have agreed this with the LA.
* That the local authority has drafted a lease and that this meets the requirement that it is for at least 125 years for a peppercorn rent. These schools will need to confirm to PLs that they have completed and signed a lease with a specific date for transfer (model available on the website).

1. If the local authority and the GB/AT have been unable to finalise the terms of the lease by the time the Funding Agreement is signed and sent to DfE , then if the AT and the authority agree, a Licence to Occupy (also known as Tenancy at Will) can be used to enable the Academy to open on the preferred date (a model is available on our website). However, this is intended only as a short term solution until the full lease can be agreed, and can only be used where public land is held by the authority or transferred back to the LA. A Licence to Occupy will only be approved by DfE 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. It will not be used simply to allow a school to convert on its chosen day if there are still significant issues around the way land transfers will be dealt with.

**Transfer of Freehold interest**

1. The GB of a foundation school without a foundation may wish the AT to have the freehold interest in the land on conversion. In such cases, the Secretary of State will need to use his powers under the Academies Act 2010 to direct that the land currently used for the purposes of the school (and held by the GB) is transferred from the existing GB directly to the Academy Trust. In these cases:
   1. the land **MUST** be transferred further to a direction as set out in paragraph 31 below. It cannot be transferred by private arrangement between the GB of the converting school, the AT and the local authority and
   2. the funding agreement **MUST** contain: (1) provisions protecting the public land from disposal (e.g. by being leased or mortgaged) without the Secretary of State’s consent; (2) requiring a restriction to be registered with the Land Registry to reflect these provisions; and (3) requiring the AT 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.
      1. Project Leads dealing with transfers on a freehold basis will ensure:
      * That the GB/AT (or their lawyers) confirm in writing/by email that they wish to have the freehold interest of the land currently held by the GB for the existing school transferred to the AT. If the GB does not do this the land will revert to the authority when the school converts.
      * That the AT lawyers have prepared a draft Direction to the GB to transfer the land from the GB to the AT (a model direction to the GB can be viewed on our website). The Direction will require the transfer to be effected (by the lawyers for the AT/GB) 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.
      * That the GB/AT has informed the local authority of the land transfer arrangements.
      1. The lawyers, acting for the GB and the AT, will need to carry out the legal work of transferring and conveying the land from the GB to the AT. The transfer should take place prior to the conversion date, because the GB will, by law, be dissolved on the conversion date.
      2. If, for some reason, the lawyers for the GB/AT 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(as amended)) the land of the GB will automatically vest and be transferred to the AT provided that a Direction to Transfer that land has been issued to the GB. If no such direction is made the land will revert to the local authority on conversion by operation of law.

**Foundation Schools with a foundation (Trust Schools)**

* + 1. 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 how the land is treated, and it is therefore extremely important to gather all the available information on the school’s history.
    2. 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 does the school fits into:
       - **Newer, and non religious, foundation schools**. These tend to occupy public land at one time provided by the local authority, and are schools which in their previous incarnations were never church schools (or otherwise had 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**. In these schools broadly the same arrangements as for foundation schools without a foundation will apply,** with the exception that the land will either need to be directed to be transferred back to the authority (and then leased to the AT), or will be directed to be transferred from the foundation to the AT (rather than from the GB to the AT). The existing foundation will usually cease to be in existence when the school acquires Academy Status. However, in exceptional cases where the Department is satisfied that the Trust would continue to have a remit and objectives beyond holding the land which would be beneficial to the Academy and which could not be carried out with the Academy Trust holding the land, it may be possible for the freehold of the land to remain with the Trust and the AT to occupy the land either under a lease, or under an informal arrangement such as a licence, as described at paragraph 50-52 below..
       - **Older and religious foundation schools**. These tend to be schools that were at one stage voluntary aided or voluntary controlled schools (or otherwise have an historic foundation that owns some of the land). In this type of school the foundation will continue when the school becomes an Academy, and **the arrangements set out below for voluntary aided schools will apply**.
    3. If the school falls within the **first** bullet above, and the GB of the school and the AT wish to ensure that the freehold land currently used for the school is transferred to the AT, Project leads will take steps to:
* Ensure that the GB /AT (or their lawyers) complete the Direction for Transfer (of land held by a Foundation - a template for the Direction is available on our website), and in particular the Schedule to the Direction. This should describe appropriately all the land held by the Foundation for the purposes of the school, in order to ensure that this is all transferred to the AT.
* Ensure that once agreed, the Direction to Transfer is formally issued and signed on behalf of the Secretary of State, when the Funding Agreement is executed by the Secretary of State.
* Check that the relevant land clauses have been included in the draft Funding Agreement (or, if appropriate, the supplemental FA).
  + 1. The Education Act 2011 introduced additional protections 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. However, if the freehold of **any land, whether it is wholly private land, public land, or publicly enhanced land**, is to remain with the Trust then the Trust will need to sign up to the Land Supplemental Agreement (available on the DfE website, note there is a secular version 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.
    2. If the school falls into the first bullet above and the Department has agreed, in exceptional circumstances, that the Trust may continue and grant the Academy a leasehold interest in the land, then a direction can be made by the Secretary of State to transfer the leasehold interest. As described above, where the AT is transferred a freehold and/or leasehold interest in land from a Trust/Foundation, the Funding Agreement must contain the necessary land clauses to protect the public investment in the land by preventing the Academy Trust from disposing of its leasehold interest in the land without the consent of the Secretary of State.
    3. It is for the lawyers, acting for the GB and the AT, to carry out the legal work of transferring and conveying the land from the Foundation to the AT (or preparing a lease as applicable)– in accordance with the Secretary of State’s Direction. The transfer should take place on the conversion date.
    4. If the land questionnaire identifies that the land held for the school also includes wholly public land held by the local authority or the GB, in addition to land held by the foundation, then:
       - In relation to local authority land, the GB/AT will need to come to arrangements with the authority in relation to its land.
       - In relation to any land held by the GB, then the process described at paragraph 21 above (ie for foundation schools without a foundation) will need to be followed in relation to the GB held/owned part of the school’s land.
    5. Where the school has the benefit of any shared use arrangements or other formal arrangements for the use of facilities or allows other parties to use facilities on its land (e.g. a Sports Centre, nursery, Sure Start Centre etc) depending on the local situation and ownership of the land, a number of different arrangements may be possible post-conversion. Where the facility is transferring to the Academy, these could include the leasing to the authority of the land on which the facility is located, the signing of a shared use agreement, the Academy leasing the land it holds to the community user (or sub-leasing land the AT itself holds via a lease). Where the facility is remaining in the ownership of the authority or existing Trust (or is owned by some other body), the AT will wish to negotiate an appropriate use agreement with the landlord. Project leads can advise further on available options.
    6. 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

**Voluntary aided (VA) schools**

* + 1. These are mainly church schools, and typically occupy land that is a mix of private and public (including publicly enhanced) land (often the school buildings will be on private land and the playing fields will be public land).
    2. 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 “public” land under the Education Acts However, there are some VA 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 EIA 2006 and is built on land provided by the local authority. This land is nevertheless currently held by the trust of the school.
    3. The definition of what is and is not “publicly funded land” is complex, and in the first instance AT 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 (as amended) and then approach the Department for agreement. The GB/AT lawyers should also give the local authority the opportunity to comment as to whether or not the land qualifies as “publicly funded”. In practice, most land at voluntary schools would be unlikely to meet the legal definition of “publicly funded” land, since central grant from the Department was not covered prior to 2007, and since 2007 has required specific notice that the grant will act to meet the definition of “publicly funded”. With foundation schools, there may be more chance of funding being caught by the Schedule. Notwithstanding this likelihood, the Department still requires that the local authority be offered the chance to give their view on whether or not the land is publicly funded.
    4. Private land (including “private land” that has been publicly enhanced and is therefore treated as “publicly funded land”) will generally be held by the school’s foundation (eg by the diocese or religious order for most faith schools, but possibly by a foundation which exists purely to hold land for that school – which will be the case for Foundation schools). For both Foundation and VA schools, public land may be held by the GB or the local authority.
    5. The land questionnaires answered by the GB/AT lawyers will need to confirm the ownership of all of the land held for the purposes of the school, bearing in mind that it is likely that some will be held by the school’s foundation/trustees and some by the GB of the existing school or by the local authority. In seeking to confirm whether any land at a foundation or voluntary school is wholly private, or is private land which has been publicly enhanced, it may be helpful to take the following into account:
* If it’s a **foundation school with a foundation**, consider the school’s history – when did it become a foundation school? What was it beforehand? Does the Trust appoint governors?. If it is a recent Trust school established since 2006 then again it is probably going to have been a former community school and the land is going to be public land which originally came from the LA.
* If it’s an **older foundation school, or a voluntary school**, look for confirmation of land being owned by the Diocese / religious body, by a named charitable foundation, held by the official custodian. Those are the first indications that land may be private.
* For foundation schools, look to see whether any documents concerning the original transfer of land set out who provided the original funding and under what circumstances.
* Speak to the local authority to see what their view is. If the authority don’t believe there has been public investment, that might be a good indication that the land is indeed private
  + 1. As explained at paragraph 45, AT lawyers should make every effort to reach a definite conclusion on whether land is publicly funded, based on the factors set out above. 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 this land guidance note; or
* That there is no publicly funded land, and that the relevant LA has confirmed this is the case, which therefore means the land is private land and will be treated as such in accordance with this land guidance note.

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 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.”*

* + 1. If the foundation/trustees hold publicly funded land, then the Secretary of State is able to direct the foundation/trustees to transfer the land to the AT. The most expedient option at the moment is that the land should be so directed. If there is also any land held by the GB, the Secretary of State is also able at the same time by way of a further direction to the GB to direct the GB to transfer that part of the land to the AT.
    2. The Secretary of State’s policy is that schools should convert with as little disturbance to existing arrangements as possible. Many existing older and faith foundations holding the land of schools have said that they think 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 (as with maintained schools at the moment).
    3. We are in favour of this arrangement where it is possible without creating other problems. It may often be possible where the existing trust is happy to lease the land to the Academy Trust.
    4. Previously, If the existing trust wishes to use any **publicly funded** land for the purposes of an Academy without a direction from the Secretary of State (eg because they wish to enter into some less formal arrangement than leasing the land) then the local authority had the power to object to the use of the land for anything other than a maintained school, and refer the matter to the Schools Adjudicator. However, the Education Act 2011 removes this right of objection. As such, there is no longer a requirement for Trustees to notify the LA that they wish to proceed without a formal lease, and the Department’s previous statutory guidance to local authorities on this matter, issued in 2011, is superseded.
    5. For private land a range of arrangements will be possible between the landowner and the Academy Trust. They may agree a lease, a licence or they may agree the land arrangements in an informal manner which do not transfer the land to the Academy Trust, but ensure that the Academy has security of occupancy on the site (and which may reflect the current arrangements between the foundation and the school). The AT, and those advising it, will need to satisfy themselves that the arrangements give the AT the required assurance of occupancy. It may be that the foundation/trustees significant governance role in the AT will provide assurance of their continued association with the Academy. In cases where private land is made available in this way, we would look to the landowner to enter into a supplemental land agreement, as set out in paragraph 37.
    6. So, in summary: in the case of public land (this includes “private land” that has been publicly enhanced) at voluntary aided schools the following approaches will be taken:
* Public land or land which is publicly enhanced, held by the existing foundation – may be transferred by direction from the Secretary of State to the AT or may be retained by the foundation and made available to Academy through a lease or informal agreement. A supplemental agreement would still be required in order to provide additional security for the AT not contained in legislation.
* Private land held by the existing foundation (to also include land where the question of public enhancement remains to be determined) – may be retained by the foundation and made available to Academy through a lease agreement, or through an informal agreement. A supplemental agreement would.still be required in order to provide additional security for the AT not contained in legislation.
* Public Land held by the GB of the converting school – transferred by direction to the AT.
* Public land held by the local authority for the purposes of the school (usually school playing fields) - leasehold transfer to the AT. This approach must be followed as the Academies Act does not allow for the Secretary of State to make a Direction to transfer such land to the AT.
  + 1. Additionally, as with other categories of school, where the school has the benefit of any shared use arrangements or other formal arrangements for the use of facilities /shared facilities or allows other parties to use facilities on its land (e.g. a Sports Centre, nursery, Sure Start Centre etc) depending on the local situation and ownership of the land, a number of different arrangements may be possible post-conversion. Where the facility is transferred to the Academy, these could include the leasing to the authority of the land on which the facility is located, the signing of a shared use agreement, the Academy leasing the land it holds to the community user (or sub-leasing land the AT itself holds via a lease). Where the facility is remaining in the ownership of the authority or existing trust (or is owned by some other body), the AT will wish to negotiate an appropriate use agreement with the landlord. Project leads can advise further on available options.
    2. 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…

**Voluntary controlled schools**

* + 1. These schools often occupy land that has been enhanced at public expense, and so falls within the definition of publicly funded land under the Academies Act 2010.
    2. Arrangements will be as for VA schools above.

**Directions and Trust Modification Orders**

* + 1. There are model documents, relating to the land arrangements described above, on the website for converting schools and their lawyers to use. The following paragraphs give further detailed information for schools’ lawyers considering the arrangements under the Academies Act 2010 for enabling Academies to occupy land and buildings, and completing the required documents.

**Direction to a Governing Body**

* + 1. Under the Academies Act 2010 (Schedule 1, paragraph 10) 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 (and the authority can then lease it to the AT) or transferred freehold to the Academy Trust.  As a matter of policy we will normally be guided by the school’s wishes in this. Such a Direction to the Governing Body will be required for any public land that is held by the Governing Body – ie a foundation school without a foundation, but also potentially for some schools with a foundation or VA/VC schools, where some of their land may be held by the GB.  The lawyers for the converting school should complete the land questionnaire identify 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) 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 as amended. Further details can be provided by your DfE contact.
    2. Separate directions are available for use for single Academy Trusts and Multi-Academy Trusts and are on the website.
    3. The land clauses will need to be included in the Funding Agreement as described earlier in this document. These are available on the DfE website.

**Direction to a Foundation or Trust**

* + 1. Under the Academies Act 2010 (Schedule 1, paragraph 10) 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.  As a matter of policy we will normally be guided by the school’s wishes in this. Such a Direction will be required when any wholly 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.
    2. Model directions are available for a freehold and/or leasehold interest to be transferred from Governing Bodies and Foundations or Trusts to local authorities for both single and multi-Academy Trusts.
    3. As a general rule (but this will not always be the case):
       - If the school is voluntary aided, then the land that is owned by the foundation (note this may not be all of the school land) may be wholly private and a transfer direction to the foundation for that private land will not be required.  The lawyers for the converting school should confirm the matters referred to in paragraph 45.
       - If the school is voluntary controlled, then the land may be a mixture of public and private land.
    4. It may be that in the case of some voluntary schools (or even older foundation schools) the existing trust will continue (particularly in Church schools). See note on “Land Arrangements” on the Website for details of the options where the trust wishes to continue to hold the land and make it available to the AT through other arrangements.
    5. Under the Academies Act the Secretary of State can also make a direction to the Foundation or GB to transfer the land to the LA. The local authority can then lease this to the Academy Trust. The local authority will then need to provide a lease for a peppercorn rent (a model lease is available on the Academies website) to lease the land to the Academy Trust. The lease must, at inception, be for a minimum of 125 years. Before the Funding Agreement is signed the DfE will check that such a lease has been completed and includes a specific date for transfer. 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 AT by the GB of Foundation, or whether it wants a lease of the land from the LA.
    6. The land clauses will need to be included in the Funding Agreement as described in the relevant sections above. These are available on the DfE website.

**Trust modification orders**

* + 1. In some circumstances it be 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. [[1]](#footnote-1)
    2. 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.
    3. 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.
    4. The lawyers for the converting school should know the terms of the constitution or scheme and should advise the converting school and DfE if, in their view, there is a necessity for a Trust Modification Order to be made. The precise terms of the Order will be a matter, primarily, for the lawyers for the converting school and it’s Foundation.
    5. There are two DfE templates available for lawyers to use. One is for where land is held on a “permanent endowment” 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.
    6. 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 DfE contact, along with a copy of the trust deed/governing document for clearance.

**Trust modification orders for Church of England or Roman Catholic Church Schools [[2]](#footnote-2)**

* + 1. 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 DfE contact 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.
    2. DfE strongly encourages the school’s lawyer 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 DfE. The DfE contact will write to the Diocesan Authority, inviting their views on the plans to amend the school’s Trust Deed and asking for their views. Subject to those DfE will confirm whether the Secretary of State agrees to make a Trust Modification Order.
    3. Where consultation with the Diocesan Authority is required, the views of that Authority must be sent to DfE **before** the Academy Trust and Secretary of State can enter into a Funding Agreement

**Disposal of Publicly Funded land that is no longer to be used for the Academy**

* + 1. 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 Body 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.
    2. In exercising his powers under part 3 of Schedule 1 to the Academies Act 2010 (as amended), 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 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.

1. 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. [↑](#footnote-ref-1)
2. ‘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. [↑](#footnote-ref-2)