

**CABINET
7 NOVEMBER 2023**

SPECIAL FREE SCHOOL AT WEST PARK, DARLINGTON

**Responsible Cabinet Member -
Councillor Nick Wallis, Children and Young People Portfolio
Councillor Chris McEwan, Economy Portfolio**

**Responsible Directors –
James Stroyan, Group Director of People
Ian Williams, Chief Executive**

SUMMARY REPORT

Purpose of the Report

1. The purpose of the report is to agree a strategy to enable Darlington Borough Council to secure ownership of and make available to the Department for Education (DfE) 1.25 – 1.35 hectares of land at West Park for the new SEND School, also referred to as a special free school. The indicative masterplan for the area is shown at **Appendix 1**.
2. This report sets out options and a strategy recommendation to provide greater certainty to both DfE and the Council in terms of delivery of the land and the project, whilst mitigating risks for both parties.

Summary

3. Darlington received approval from government to establish a new, 48 place Autism Spectrum Disorder (ASD) special free school in the borough for children aged 11-19.
4. As part of planning permission granted for the West Park development, land was set aside for the provision of education and sports under a separate legal contract known as a Section 106 (s106) agreement. This contract sets out measures and financial contributions the developer must make in order to lessen the impact of the development on the community. This land has been identified as the preferred location for the SEND school. This land is within the ownership of the developer.
5. In order to make the land available, the land must be first transferred into the Council's ownership and then leased to the school operator.
6. As part of the s106 agreement terms, the Council cannot unilaterally trigger the transfer of the land. The Council must wait for the developer to offer to transfer the land prior to the occupation of 150 newly developed houses. Currently, 100 houses are occupied.

7. To provide flexibility and control over timing of the transfer of the land, and comfort to the DfE, it is proposed that the Council will endeavour to enter into an option agreement with the current landowner (the developer). The timing of the transfer of the land must be carefully managed to avoid incurring unnecessary holding and land management costs should the project be delayed or not go ahead.
8. The DfE will fund the construction of the school, but some costs are expected to be met by the Council ("local authority costs"). It is proposed that these costs will be estimated, capped and met by the financial contribution contained within the s106 agreement. .
9. The s106 financial contribution is circa £6 million in total and payments by developers are subject to certain triggers. Currently, the Council holds £2.5 million, the next payment will be received in 2027/28 and the full balance is expected in 2030. Should the local authority costs exceed the amount of contributions held by the Council at the relevant point in the development timeline, it is proposed that the Council agree in principle to forward fund the difference until the collections have been received. It is proposed that members receive further updates on the progress of the funding arrangements.
10. In parallel to the option agreement discussions, it is proposed that heads of terms for the lease of the school to the school operator are negotiated with the DfE, subject to agreement of the above, and subject to agreement of Cabinet.
11. This strategy relies on the agreement to the option by the developer. Should the option fail to be agreed, this poses a risk to the timeline of the delivery of the school as no comfort can be provided upon the timing of the land transfer. Initial discussions with the developer have so far been positive.
12. Cabinet will be updated on a regular basis on the progress and any additional/future risks that have been identified through the process.

Recommendations

13. It is recommended that members agree the following strategy:
 - (a) Begin negotiations with the owners of the sports and education land with a view to documenting the obligations in the s106 Agreement for the land to be transferred to DBC by way of an option agreement.
 - (i) Final agreement of heads of terms to be subject to Cabinet Approval
 - (b) Progress heads of terms for a lease of 1.25 – 1.35 hectares of land to the new school:
 - (i) Subject to agreement of the option
 - (ii) Subject to Cabinet Approval
 - (c) Exercise the s106 obligation to transfer land required for the school at the appropriate time.

- (d) Use the s106 financial contribution to fund the local authority costs arising from the construction of the school. The DfE has provided a non-exhaustive list of costs to be funded by DBC. The costs will be capped at a figure to be agreed.
- (e) Acknowledge that should the amount of s106 financial contributions received by the Council, as at the point of payment of the local authority costs, be insufficient to fully cover the cost, the Council will forward fund the remainder until the remaining contributions are received, estimated to be 2030. Full costs and commitment to be estimated and presented for final decision prior to signing of contracts.

Reasons

14. The recommendations are supported by the following reasons :-

- (a) The option would:
 - (i) Enable the Council to call for the transfer of the freehold of the land required for the school at an appropriate time.
 - (ii) Achieve flexibility on precise location of land required, as the option would enable DBC to specify the land it wishes to acquire when exercising the option.
 - (iii) Achieve certainty and flexibility of timescale for the transfer of the land.
 - (iv) Enable site investigations to be carried out across the whole s106 area if required.
 - (v) Final agreement of heads of terms to be subject to Cabinet Approval
- (b) Progressing Heads of Terms for the lease of land to the new school would:
 - (i) Provide comfort to DfE to allow progression to the next step, the feasibility study, and subsequent local authority costs analysis.
- (c) Exercising the s106 agreement at the appropriate time would:
 - (i) Be dependent upon agreement of the option.
 - (ii) Be linked to the timing agreed in the option.
 - (iii) Follow the correct legal process for transferring the land.

- (d) Using the s106 financial contribution to fund the local authority costs arising from the construction of the school would:
 - (i) Be an appropriate use of the s106 financial contribution.
 - (ii) Be subject to agreement of the costs with the DfE.
 - (iii) Be subject to a cap on costs as agreed with the DfE.
- (e) Acknowledging that forward funding may be required will:
 - (i) Allow the parties to progress negotiations in the knowledge that funding is available at the relevant point in time, should it be required at all.
 - (ii) Be subject to final update and decision when costs and payment timetables are known.

James Stroyan
Group Director of People

Ian Williams
Chief Executive

Background Papers

There are no background papers.

Paul Richardson/Sarah Wayman

S17 Crime and Disorder	The project is at an early stage. S17 Crime and Disorder will be brought to the DfE's attention during the feasibility studies. An update will be provided.
Health and Wellbeing	This report seeks to progress the delivery of the SEND School project and therefore directly contributes to health and wellbeing. It is well documented that education is fundamentally important to health and wellbeing for numerous and wide-ranging reasons.
Carbon Impact and Climate Change	The project is at an early stage. Carbon Impact and Climate Change impacts will be brought to the DfE's attention during the feasibility studies. An update will be provided.
Diversity	Local authorities must comply with the Public Sector Equality Duty (PSED) under S.149 of the Equality Act 2010. The project is at an early stage. Due regard to the protected characteristics will be given throughout the project and will be brought to the DfE's attention during the feasibility studies. An update will be provided.
Wards Affected	Brinkburn and Faverdale
Groups Affected	Young people aged 11-19 with an EHCP and a primary need of ASD
Budget and Policy Framework	This report does not recommend a change to the Council's budget or policy framework.
Key Decision	Not an Executive decision.
Urgent Decision	Not an Urgent Decision.

Council Plan	Provide excellent services for children and young people with special educational needs and disability (SEND) - implement a new SEND strategy, increase the number of SEND places in schools and work to raise SEND funding levels from central government.
Efficiency	Providing local SEND provision has the potential to reduce the reliance on the use of high-cost independent placements. providing better value for money and reducing the pressures on the High Needs budget. It also has the potential to reduce the cost of transporting pupils.
Impact on Looked After Children and Care Leavers	For those looked after children with EHCPs this has the potential to provide more local provision, reducing the need for long travel times or even possibly residential provision.

MAIN REPORT

Background

s106 Agreement

15. A s106 agreement is an agreement between the developer and the Council as local planning authority. The agreement contains concessions and financial contributions from the developer which reduces the impact of the development on the community and makes a development possible that would otherwise not be possible. Financial contributions are often made in tranches and linked to certain trigger events, such as the completion of an agreed number of houses.
16. The land earmarked for the SEND School is owned by a developer and is subject to certain obligations contained within a s106 Agreement. The land subject to the relevant s106 obligations is shown in dark purple (five hectares of land for education use) and light purple (8.2 hectares of land for sports and playing fields) on the attached plan (Appendix 1). The two areas of land are subject to identical albeit separate conditions:
 - (a) The owners must reserve and hold the land for a period of 10 years from 2018 solely for the provision of sports and education facilities.
 - (b) The owners must offer the Sports and Education Land to the Council for £1 prior to occupation of 150 dwellings on the Mount Pleasant Farm Land (the land shown turquoise and to the North East of Newton Lane on Appendix 1).
 - (c) The Council and the owners shall use reasonable endeavours to agree the other terms of the transfer and complete as soon as possible.
17. A financial contribution of £6,087,000 was made as part of the s106 and can be used for the construction of a secondary school on the dark purple land. The financial contribution will be received in staged payments which are subject to defined trigger events.

Collaboration Agreement

18. The developer assembled the education and sports land required for the s106 for £8m. The Council contributed £2.3m to the purchase of the land and this was documented in a Collaboration Agreement with the developer.
19. If all or part of the dark and light purple land is not needed for education and sports, it can be released from the s106 obligation, and the Council will receive a reimbursement of the £2.3m contribution or a proportion of such sum (assessed on a pro-rata basis) in the event that part of the land is not needed for sports and education purposes.

Legal Charge

20. As security for the £2.3m a charge was placed on the dark and light purple land. The charge would be released if the ownership of the land was transferred to the Council.

Delivery of the SEND school

21. The DfE are currently procuring a suitable developer and operator for the proposed new school. The window for applications opened on 9 May and closed on 31 August. Applications have been received and are currently in evaluation stage. The DfE has set out terms and a timeline for the construction and operation of the SEND School once an operator has been selected. The DfE has provided a model lease which is largely non-negotiable.

Delivery of the school DfE timescales

22. The delivery of the school DfE timescales are as follows:-

1.	Agree Heads of Terms for lease DBC and DfE	October/November 2023 and subject to Cabinet decision
2.	DfE assess applications	September and October 2023
3.	DfE interview strongest applicants	November and December 2023
4.	DfE announce successful applicant	January 2024
5.	DfE feasibility study and agree local authority costs.	Completed by early Spring 2024
6.	Developer to transfer FH of land to DBC	Spring 2024
7.	DfE to tender construction contract	End Spring 2024
8.	Successful applicant to begin planning process: pre-app, community involvement exercise & submission of planning application	Autumn 2024
6.	DBC grant lease to successful applicant	Early Spring 2025
7.	Construction and opening	Autumn 2026

Model lease summary

23. The model lease summary is as follows:-

Landlord	Darlington Borough Council
Tenant	The school operator
Term	125 years
Rent	peppercorn
Repairs and Insurance	The tenant shall be responsible for all outgoing

Local Authority Costs

24. The local authority costs are those development costs which the Council must meet as a condition of the approval of the application to establish a special free school in Darlington.
25. The DfE will let the construction contract and fund the construction of the school, except for the costs listed below which are to be paid by the Council. It has been confirmed that these costs can be met from the financial contributions made by the West Park developers as agreed in the s106 agreement. Several of the developers due to make their financial contributions at previously defined trigger points have recently applied to make these payments at later dates (due to market conditions). There is a risk therefore that the Council may need to pay a proportion of the total local authority costs ahead of receiving sufficient financial contribution payments. This situation will be kept under review as potential costs and timescales for payments become clearer.
26. Once the DfE has some comfort that the land is available and terms are agreed in principle, they will commission a feasibility study which will enable a cost estimate to be drawn up and a cap on costs agreed. At present it is too early to begin cost estimates, however it is likely that they will not exceed the s106 agreement £6m financial contribution.
27. Local authority costs to be paid from the s106 financial contribution – including (but not limited to):
- (a) Geophysical conditions and geochemical exceedances relative to guidelines for school use (including asbestos removal).
 - (b) Flooding and alleviation measures.
 - (c) s278 and s106 costs.
 - (d) New road provision from the adopted highway to the site boundary.
 - (e) Retaining structures required as a function of topography.
 - (f) Ecological provision – reserves, species protection and relocation.
 - (g) Title consolidation and registration.

- (h) Utility provision.
- (i) Environmental conditions that may require specific mitigations such as acoustics or air pollution.

Current Position

28. Under the s106 Agreement developer must offer the Sports and Education Land to the Council prior to occupation of 150 dwellings on the Mount Pleasant Farmland. Although the Council has this right to acquire the land it does not have sufficient control over the timing of the transfer at this stage to enable it to provide comfort to DfE. On that basis it is proposed that an option agreement be entered into to enable the Council to have control over the timing of the acquisition rather than waiting for the developer to make the offer. This is a structural change rather than a fundamental change to the obligation entered into pursuant to the s106 Agreement, the Council would have the same right to acquire the same parcel of land but would be able to trigger that transfer itself at the most suitable time to fit around the transaction with DfE.
29. The Council cannot unilaterally draw down the s106 land. It must wait for the developer to offer to transfer the land prior to the occupation of 150 units. 100 units are currently occupied and whilst the occupations are increasing over time, they are unlikely to surpass this threshold prior to the point at which some certainty must be provided to the DfE in order to progress the project.
30. It is likely that if the Council were to accept a transfer of the whole of the light and dark purple land for £1 as per the s106 agreement, the current owner would seek to place a restriction on the use to education and sports land. Under the terms of the s106 both parties must act reasonably. It would be difficult for the Council to assert that a restriction on use would be unreasonable. Typically, removal of a restriction on use enabling development of the land would involve a payment by the Council to the developer which would be linked to the development land value.
31. The SEND school site has been provisionally plotted in the area marked on the attached plan (Appendix 1). Based on DfE area guidelines (Building Bulletin 104) approximately 1.25-1.35 hectares are required for the school leaving a remaining 3.65-3.75 hectares. With reference to the paragraph above, ideally only the land required for the school would be transferred to the Council.
32. Members will be aware of several risks associated with large scale capital projects which contributes to some uncertainty regarding the delivery or delays to the delivery of the school. It has been reported in the press recently that in other Local Authority areas, several construction contracts have not been let following the tender exercise due to increasing build costs. Applications for the school have been received for the school in Darlington and there is no requirement to appoint an operator should the applications be unsuccessful, although the opportunity can be re-advertised. Therefore, the timing of the transfer of the land must be carefully managed to avoid incurring unnecessary holding and land management costs should the project be delayed or not go ahead.

33. The option would strike a balance of providing comfort to the DfE that the land could be made available for the school and unlock funds to further progress the project whilst at the same time minimising risks for the Council in taking on a liability of land management ahead of having sufficient certainty regarding the completion of the project.
34. There is no clear commercial advantage to taking a transfer of the whole of the education land as it is likely that a restriction on use would be placed on the title by the seller, and the Council would be burdened with holding and land management costs.
35. Should the remainder of the education land and the playing fields land not be required by the Council for the duration of the holding period, a reimbursement of the remaining collaboration monies would be requested prior to the expiry of the period.
36. The proposal is to seek to enter into an option agreement with the developer
 - (a) Opportunities:
 - (i) Enable DBC to call for the transfer of the freehold of the land required for the school at an appropriate time.
 - (ii) Achieve flexibility on precise location of land required, as the option would enable DBC to specify the land it wishes to acquire when exercising the option.
 - (iii) Achieve certainty and flexibility of timescale for the transfer of the land.
 - (iv) Enable site investigations to be carried out across the whole S.106 area if required.
 - (b) Risks:
 - (i) Incur legal costs.
 - (ii) Time taken to complete agreement may coincide with occupations trigger.