BARNET LONDON BOROUGH

AGENDA ITEM: 13	Pages 86 – 94
Meeting	Cabinet Resources Committee
Date	13 January 2011
Subject	Frith Manor School, Lullington Garth, Finchley N12
Report of	Cabinet Member for Resources and Performance
Summary	To report the proposed grant to the Oakleigh Park School of Swimming a 50 year lease of an unused plot of land located behind the school playground for the construction of a swimming pool.
Officer Contributors	Richard Malinowski – Principal Valuer (Property Services) Robert McCulloch-Graham – Director of Children's Services
Status (public or exempt)	Public (with separate exempt report)
Wards affected	Mill Hill
Enclosures	Appendix A – Location and provisional lease plan no. 23964-1 Appendix B – Planning Application Drawing and Site photos Appendix C – Planning Consent Extract
For decision by	Cabinet Resources Committee
Function of	Executive
Reason for urgency / exemption from call-in (if appropriate)	Not applicable

Contact for further information: Richard Malinowski Principal Valuer (Property Services), 020 8359 7359, richard.malinowski@barnet.gov.uk.

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### 1. **RECOMMENDATIONS**

1.1 That, subject to the grant of any necessary consent by the Secretary of State, a lease of the land shown edged red on the attached plan no. 23964-1 be granted to Oakleigh Park School of Swimming on the terms detailed in this report and in the accompanying exempt report.

### 2. RELEVANT PREVIOUS DECISIONS

2.1 The Director of Planning, Housing and Regeneration approved under delegated powers on 7 January 2008 the grant of outline planning consent for the erection of a single storey swimming pool building.

# 3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS

- 3.1 The Corporate Plan commits the Council to delivering 'Better services using less money'. A key principle of the medium term financial strategy is to continually review the use of Council assets in order to reduce the cost of accommodation year on year, and to obtain best consideration and use for any surplus assets. This proposal does this by producing an income receipt for the Council and gainfully uses an unused asset.
- 3.2 The Barnet Children and Young People Plan 2010-2013 includes priorities to 'reduce obesity in children and young people' and to 'extend and broaden the role of each school in its community'.
- 3.3 The Regeneration Service has been consulted and confirmed that the proposals in this report do not adversely impact upon any of the Council's regeneration schemes.

### 4. RISK MANAGEMENT ISSUES

- 4.1 It is possible that there will be disruption to the school during the construction period and therefore there will be a need to closely supervise the works.
- 4.2 Officers identified that there was a risk that the proposed transaction could be caught by EU procurement rules and accordingly sought Counsel's opinion. With the benefit of this opinion Officers are of the view that, on the basis that the proposed transaction is a services concession contract to which the regime of the EU procurement rules does not apply, the risk of challenge is low.
- 4.3 Consent of the Secretary of State for Education may be required.

### 5. EQUALITIES AND DIVERSITY ISSUES

5.1 The proposed swimming pool would be constructed to ensure full access for pupils, staff and members of the public with physical accessibility requirements.

# 6. USE OF RESOURCES IMPLICATIONS (Finance, Procurement, Performance & Value for Money, Staffing, IT, Property, Sustainability)

6.1 There are no performance and value for money, staffing, IT or sustainability implications. The financial and property implications are set out in paragraph 6.2 below, and further information on the financial details are set out in the accompanying exempt report.

- 6.2 As mentioned in section 4.2 above this is a services concession contract and it is not, therefore, caught by the regime of the EU procurement rules and, on the basis that this is a land transaction, the Council's own procurement rules are not engaged.
- 6.3 The proposed Lease Terms are set out below with the financial terms contained in the accompanying exempt report.
  - 1) A Full Repairing lease for a term of 50 years be granted to Oakleigh Park School of Swimming from the date of completion of the legal documentation.
  - 2) The lease to be outside the provisions of sections 24-28 of the Landlord & Tenant Act 1954.
  - 3) The Council will insure the building and the tenant will reimburse the premium.
  - 4) An initial Rent Free period of 12 months to allow for the construction of a new swimming pool building of around 500m<sup>2</sup> in area, housing a pool 21m x 8m, all in accordance with the outline planning consent granted on 7 January 2008 (Ref W13168F/07).
  - 5) The building costs and related fees will be borne entirely by the tenant.
  - 6) The Frith Manor School (or another local school substituted following a year's prior notification) will be able to use the pool during the 37 week school year for 2½ hours every day, Monday to Friday mornings. Initially this will be made up of two hours water time and half an hour changing time from 9.30 am to 11.45 am, making a total of 462½ hours a year (or 370 hours of water time) of usage.
  - 7) An additional Rent will be payable to the Council by the tenant in the event of the Frith Manor school ceasing to use the pool, and no substitute school being found, in either part or total of the time allocated. The additional rent payable will be based on 50% of the achievable cost for the pool hire per hour.
  - 8) A right of way is to be granted to the tenant over the land coloured brown on the attached drawing. The tenant will contribute a fair and reasonable proportion for repair of the access way. The tenant will also be granted a right to park in spaces to be designated in the school car park outside school hours and if not required by the school.
  - 9) A Mutual Break Option on the expiry of 30 years on two years prior notice. Compensation to be payable to the tenant if the break is exercised by the Council. The compensation sum to be paid will be based on 2 years' loss of profit, to allow time for the tenant to find an alterative site and original build costs subject to indexation but discounted 30 years (that is build costs x 30/50) so some of the build costs can be recouped.
  - 10) The tenant will be permitted to assign or sublet the whole with the Council's prior consent which shall not be unreasonably withheld. Subletting or assigning of part only will not be permitted.
  - 11) The tenant will be responsible for the payment of the Council's legal fees in the preparation of the lease.
  - 12) Such other terms as the Legal Department may consider reasonable.

# 7. LEGAL ISSUES

7.1 Arising from the European Court of Justice decision in the case of *Helmut Muller*, the Advocate General's opinion in the case of *European Commission v Kingdom of Spain*; and guidance from the Office of Government Commerce, there was concern that the proposed transaction could be caught by EU procurement rules. Consideration was given to the matter and Counsel's opinion sought. Counsel advised that as the 'main purpose' of the proposal is the urgent provision of swimming facilities for the pupils of Frith Manor School, and not the provision of the pool itself, the proposal is a services concession contract and not, therefore, caught by the EU procurement rules.

- 7.2 There is a query whether the land on which the site is located can be classified as a playing field or habitat area and so the disposal may require the consent of the Secretary of State under Section 77 (7) of the School Standards and Framework Act 1998. The guidance issued by the (former) Department for Children, Schools and Families entitled "The Protection of School Playing Fields and Land for Academies July 2007" gives the Department's view of what can be considered as school playing fields for the purpose of Section 77 of the 1998 Act.
- 7.3 Section 77(7) of the School Standards and Framework Act 1998 defines playing fields as "land in the open air which is provided for the purposes of physical education or recreation, other than any prescribed description of land".
- 7.4 The Department's view, as stated in the 2007 guidance, is that for the purposes of Section 77 of the 1998 Act, school playing fields includes the following:
  - 1) Grass pitches and artificial surface pitches;
  - 2) Hard surface games courts;
  - 3) Informal and social areas;
  - 4) Marginal areas (for example playing field run offs);
  - 5) Habitat area (set aside for the formal teaching of nature or informal curriculum purposes, including meadowland, wildlife habitats, gardens, nature trails and outdoor science areas); and
  - 6) Local authority parkland (used in the last 10 years for the purposes of a maintained school).
- 7.5 The Department also takes the view that land described in paragraph 7.6 below is not considered to be school playing fields under Section 77 of the 1998 Act.
- 7.6 Soft landscaped or grassed areas that are not suitable for use for physical education or recreation purposes, such as marginal waste land outside of a school's physical boundary fencing.
- 7.7 The plot to be leased lies on land which, according to the head teacher has never been used for any purpose and is unsuitable as a marginal or habitat area. Furthermore, the land lies outside the school's physical boundary fencing. The question is whether the site can be described as a "Habitat area" under Section 77 of the 1998 Act and the 2007 guidance. Further investigations are being carried out by officers to establish whether the proposal comes within the terms of the General Consent relating to the disposal or change of use of school playing fields issued by the Secretary of State in 2004. The effect of the General Consent is that where the circumstances described apply, and where any conditions are met, the specific prior consent of the Secretary of State will not be required under Section 77 of the 1998 Act. Where the General Consent does apply, the relevant body is to decide whether the disposal, or change of use, meets the circumstances and criteria set out in the Consent order and provide the Department with details. Where the General Consent does not apply, the relevant body must apply for and be granted Special Consent. Consequently, the Committee's approval is being sought subject to any consent of the Secretary of State being obtained if it is considered that this is required.

### 8. CONSTITUTIONAL POWERS

8.1 The Council's constitution in Part 3, Responsibility for Functions, paragraph 3.6 sets out the functions delegated to the Cabinet Resources Committee including all matters relating to land and buildings owned, rented or proposed to be acquired or disposed of by the Council.

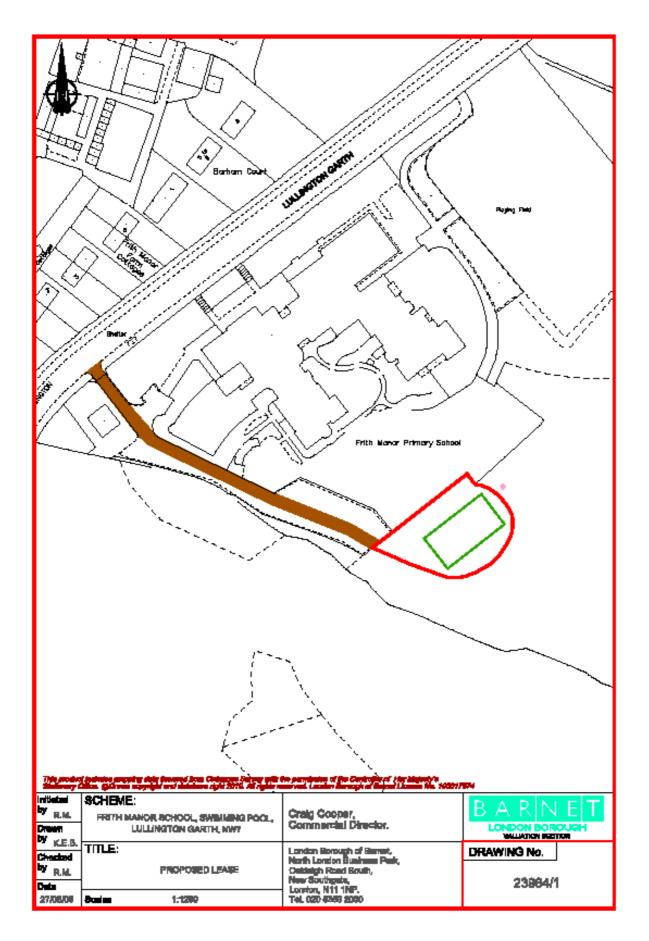
## 9. BACKGROUND INFORMATION

- 9.1 The school currently sends 90 pupils to Copthall Swimming pool each week for 2 terms of the academic year at a considerable cost and time wasted in travelling. Taking into account the hiring charges currently at Copthall the equivalent cost to the school of using the pool for 370 hours over a school year as agreed in the heads of terms would equate to around £26,000 a year. There would be additional savings in travel time to and from the Copthall pool. The head-teacher's estimate, including all costs for the equivalent usage being negotiated, is summarised in the accompanying exempt report.
- 9.2 Around the end of 2004 the school head-teacher received an approach from Mr Jonathan Rolfe the operator of the Oakleigh Park School of Swimming in Whetstone with a proposal to construct a swimming pool on some vacant land at the rear of the school. For a variety of reasons negotiations have taken a considerable time to conclude with Mr Rolfe. One of the reasons for the prolonged negotiation was that before outline terms could be agreed it was essential for Mr Rolfe to submit a planning application because the subject land is located within the Green Belt and it was uncertain that a building housing a pool would be permitted. Mr Rolfe duly submitted an application and outline planning consent was granted in January 2008 (Ref: W/13168/F/07) to construct a 500m<sup>2</sup> building to house a 21m x 8m swimming pool. Another reason was due to concern raised over the proximity of a newly erected wind turbine. The tenant will be financing the construction of the new swimming pool and any associated costs. Further information on the breakdown of the build costs is awaited but a preliminary budget estimate is contained in the accompanying exempt report.
- 9.3 The pool is to be available to the School's pupils for 2½ hours every weekday morning during the school term, 2 hours of pool use and ½ hour changing time. The hours are to be agreed but most likely will be between 9.15 and 11.45 am, making a total of 462½ hours a year. Outside these hours the pool will be open to the general public as permitted by the planning consent. The planning consent allows a number of parking spaces within the site and the pool operator will be permitted, under a separate arrangement with the school, to use some of the school's car park spaces in the evenings, at weekends and during school holidays.
- 9.4 The Valuation Office Agency was asked to carry out an independent rental valuation and this is summarised and commented on in the accompanying exempt report. An alternative operator was shown the site and invited to put forward proposals but no interest was expressed.

# 10. LIST OF BACKGROUND PAPERS

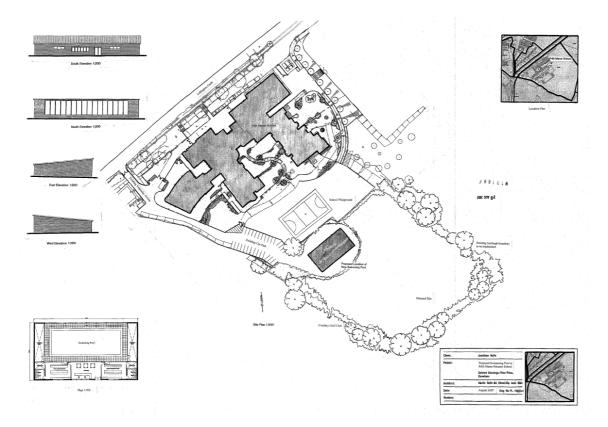
10.1 None.

Legal – SWS CFO – JH



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# Appendix B – Planning Application Drawing and Site photos



# Car Park Access



# View from site looking back at School







ifector of Planning and Environmental Protection, Building 4, North London Business Park Gakleigh Road South, London N11 1NP Contact Number: 020 8359 4925

# PLANNING

App'icant: Mr Jonathan Rolfe Agent: Martin Rolfe 62 Thorpebank Road Shepherds Bush London W12 0PG Application No: W13168F/07 Registered date: 18 September 2007

#### TOWN AND COUNTRY PLANNING ACT 1990

#### GRANT OF PLANNING PERMISSION

TAKE NOTICE that the Barnet London Borough Council, in exercise of its powers as Local Planning Authority under the above Act, hereby:

#### **GRANTS PLANNING PERMISSION for:-**

Erection of a single storey swimming pool building.

#### At:- Frith Manor Primary School Lullington Garth Woodside Park N12 7BN

as referred to in your application and shown on the accompanying plan(s):

#### Subject to the following CONDITION(S):-

Approval of the details of the scale and appearance of the building(s), the means of access thereto and the landscaping of the site (hereinafter called "the reserved matters") shall be obtained from the local planning authority in writing before any development is commenced.

Reason: To ensure a satisfactory appearance to the development.

2 Plans and particulars of the reserved matters referred to in Condition (No.) above, relating to the scale and appearance of any buildings to be erected and the landscaping of the site, shall be submitted in writing to the local planning authority and shall be carried out as approved.

Reason: To ensure a satisfactory appearance to the development.