

AGENDA ITEM: 19

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Meeting	Cabinet Resources Committee
Date	2 March 2011
Subject	Wyevale Garden Centre, Daws Lane, Mill Hill NW7
Report of	Cabinet Member for Resources and Performance Deputy Leader of the Council and Cabinet Member for Education, Children and Families
Summary	<p>To note:</p> <ol style="list-style-type: none">1) The, proposed, consent to the assignment of the Lease, of the above mentioned premises, from Wyevale Garden Centres Limited to Etz Chaim Jewish Primary School Trust (“Etz Chaim”)2) The, intended, temporary letting of vacant space to Etz Chaim at the adjoining Council owned building known as the former civil defence building, during the refurbishment period (ie.whilst conversion works are carried out at the Wyevale Garden Centre premises to make those premises suitable for use as a school) <p>To approve :</p> <ol style="list-style-type: none">1) A Deed of Variation comprising (i) consent for change of the user clause, contained in the Lease. From use as a garden centre to use as a school/provision of education services and services ancilliary to the same; and (ii) other variations to the terms of the lease to provide terms which are more appropriate for use of the premises as a school/education services, the Deed to be completed upon formal completion of the assignment.2) If deemed necessary, a Licence for Works, in favour of Etz Chaim, to be granted by the Council, the Licence to be completed upon formal completion of the assignment.3) Delivery of a one-form entry Primary Free School to be known as Etz Chaim utilising Barnet’s existing Strategic Partnering Agreement with Kier London Limited on behalf of Partnerships for Schools, the Department for Education’s delivery agency on school building programmes.

James Wills-Fleming – Corporate Programmes Manager
(Commercial Services)

Status (public or exempt) Public (with a separate exempt report)

Wards affected Mill Hill

Enclosures Plan

For decision by Cabinet Resources Committee

Function of Executive

Reason for urgency /
exemption from call-in (if
appropriate) Not applicable

Contact for further information: Judith Ellis, Property Services, 0208 359 7364,
Judith.ellis@barnet.gov.uk.

1. RECOMMENDATIONS

1.1 That, in exercise of the council's powers to secure the promotion or improvement of the social well-being of the council's area, pursuant to Section 2 of the Local Government Act 2000 and all other relevant powers and taking account of its Community Strategy, authorisation be given to enter into:

1.1.1 a deed of variation for the change of use and additional variations to the lease as detailed in this report and the accompanying exempt report; and

1.1.2 a licence for works to enable Etz Chaim to carry out, relevant, conversion works,

completion of the documents to be subject to the grant of planning permission for use of the site for educational services and subject to completion of the assignment of the lease from Wyevale Garden Centre to Etz Chaim.

1.2 That authorisation be given for the Council to enter into a binding agreement with Etz Chaim with respect to the matters dealt with in Recommendation 1.1 above and any other matters necessary to assist with the realisation of the proposal for the Jewish Free School

1.3 That, subject to the council being reimbursed for all, relevant costs, the construction works required to provide a one-form entry Primary Free School, to be known as Etz Chaim, be delivered by utilising the Council's existing Strategic Partnering Agreement with Kier London Limited on behalf of Partnerships for Schools, the Department for Education's delivery agency on school building programmes.

1.4 That the construction related costs funded by the Department for Education be included within the council's capital programme to the sum of £2,402,264 plus irrecoverable VAT.

2. RELEVANT PREVIOUS DECISIONS

2.1 Cabinet, 5 December 2005 (Decision item 6) – approved the Building a future for Barnet's Children: the Primary School Capital Investment Strategy.

2.2 Cabinet, 3 April 2008 (Decision item 13 and 17) – approved the selection of Kier London Limited as the Council's strategic construction partner.

2.3 Cabinet Resources Committee, 5 March 2009 (Decision item 12) – approved the re-build of Colindale Primary School and the addition of the project to the Strategic Partnership Agreement with Kier London Limited.

2.4 On 12 April 2010, the Leader of the Council and Cabinet Member for Resources approved under delegated powers (DPR 1057) the acceptance of a tender contract sum from Kier London Limited for works at Childs Hill Primary School.

3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS

3.1 Ensuring every school is a good school for every child is a priority in the Barnet Children and Young People Plan 2010-2013 and supports the corporate priority of 'a successful

London suburb'. Giving consent to the assignment of the lease and consent to change of use (to use for educational services) will help to increase parental choice of schools in Barnet. It will also contribute towards ensuring that there are sufficient school places in the local area, this being a statutory duty of the local authority under section 14 of the Education Act 1996. Supporting those who wish to set up free schools further contributes towards the Council's priority of 'sharing opportunities and sharing responsibilities'.

4. RISK MANAGEMENT ISSUES

Lease

- 4.1 In the absence of the council's consent to change the use of the Garden Centre, Etz Chaim Jewish Primary School Trust will be unable to pursue the provision of a free school in this location, as PfS and the Trust require assurance, on exchange of contracts, that the subsequent deed of variation will be issued by the council at the appropriate time. This will enable PfS to avoid significant investment in a project that may not reach fruition.
- 4.2 If planning permission is not granted for change of use and the conversion works, the assignment of the lease will not proceed.

Construction of the School

- 4.3 A project risk register is maintained by the Corporate Programmes Team and there are no risks which are considered to be significant.
- 4.4 To ensure accurate costs the project budget has been rigorously reviewed by the project team including the project's technical advisors, Gardiner & Theobald LLP (G&T). The Council's project team will monitor all aspects of the build to ensure continued assessment of the finances from construction start to completion.
- 4.5 The Council has a Strategic Partnering Agreement (SPA) with Kier London Limited. The SPA has successfully delivered or is in the process of delivering multiple school projects including: Whittings Hill, Broadfields, Northway/Fairway, Colindale and Childs Hill Schools.
- 4.6 Kier London Limited will be working to an agreed design specification with a fixed design and build contract sum. Any changes requested after entering into the contract that incur additional costs will need to be approved and funded by either Partnership for Schools or Etz Chaim. Therefore the risk to the council from cost overrun is mitigated.

5. EQUALITIES AND DIVERSITY ISSUES

- 5.1 The Council in the conduct of its officers has statutory duties to:
- promote equality of opportunity;
 - eliminate unlawful discrimination and harassment; and
 - promote good relations between people.
- 5.2 The (i) grant of consent to the assignment of the lease; (ii) variation of the Lease; and (iii) utilisation of the contract with Kier are in keeping with these statutory duties.

5.3 Further, Schedule 8 of the SPA outlines Kier's Race Equality Requirements and states that Kier, including agent's/contractors working on behalf of Kier, will comply with race relations legislation, shall not discriminate and will promote equality in performing its obligations under the agreement.

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

6.1 The council's freehold reversionary interest in 102 years' time does not release any value to the council on assignment, subject to the terms of the lease remaining the same.

6.2 Converting the property to a school will require both planning consent and a variation to the user clause in the lease. The grant of consent to change of user does release additional value and it would be expected that in these circumstances would result in a capital receipt to the council of approximately £330,000. This potential capital receipt is being foregone under the council's well-being powers.

6.3 It is considered that the assistance which is being provided by the council to the school - that of foregoing the potential receipt - falls within the 'well-being' criteria set out in subsection 4 of Section 2 of the Local Government Act 2000. Subsection 4 provides that, in exercising its Section 2 power, a Local Authority may: (a) incur expenditure; (b) give financial assistance to any person; (c) enter into arrangements or agreements with any person; (d) co-operate with or facilitate or co-ordinate the activities of, any, person; (e) exercise on behalf of any person any functions of that person; and (f) provide staff, goods, services or accommodation to any person. The provision, by the council, of assistance to the school in its provision of a primary school in the Mill Hill area will contribute towards ensuring that there are sufficient places for children from the local community, alleviate the pressure on primary school places in the area and meet the demands of a particular section of the community for primary school places.

6.4 Subject to authority being granted, the deed of variation for the change of use and other variations and the Licence for works will be completed upon completion of the assignment. This will ensure that the variations are only granted to the Etz Chaim and its successors under the terms of the Lease.

6.5 Future assignment provisions (to be one of the variations of the lease) may be more in accordance with the standard form of new academy leases but the provisions will need consideration as to the detail including ensuring that the benefits resulting to the local authority's area continue

6.6 Other variations in the lease include: Amendment to the hours of use, playing of music, floodlighting, assignment to a corporate body, or charity with the minister's consent, subletting to organisations providing uses are consistent with that of a school and with the continuation of the benefits resulting to the local authority's area.

6.7 These variations are acceptable in principle and are, where relevant, subject to planning and any other necessary consents. This makes the lease more in keeping with an Academies lease. Detailed negotiations on these and any additional minor variations will be concluded and reported under delegated powers.

6.8 It is anticipated that the school will open in September 2011, and the school have committed to parents and staff that this will happen. As a result, should the conversion works not be completed in time, temporary accommodation will be required. Etz Chaim have identified the adjoining building, known as the former Civil Defence Building, as a

suitable temporary building. The Civil Defence Building is in the ownership of the council. The ground floor is currently empty following the relocation of the Drug and Alcohol project and the archive store, and totals approximately 4000 sq ft (400 sq m). The first floor is occupied by the Sea Cadets who are holding over under a lease.

- 6.9 Terms for the temporary letting are to be agreed and will be determined by the area of the building Etz Chaim require and the works to be carried out to improve the council's interest in the building. These works would benefit the Council on a subsequent letting. In addition, the Etz Chaim would be liable for the outgoings and security of the building which would otherwise fall to the Council during a void period.
- 6.10 The future of the former Civil Defence building is currently under consideration, with legal and planning investigation being undertaken. It is not considered that a short-term letting of the ground floor is likely to impinge on the Council's plans. The occupation of the first floor by the Sea Cadets will not be affected.
- 6.11 The short term agreement would, in addition, mean that the building is occupied whilst consideration is being given to the future of the site and/or preparation is being made for a subsequent letting.
- 6.12 Agreement to the detailed terms of a short term lease will be reported separately under delegated powers.
- 6.13 The SPA with Kier was the result of a rigorous procurement process and was structured to enable the addition of further building projects such as this and still ensure value for money.
- 6.14 The SPA, with Kier London Limited, relates to the carrying out of works in designated primary schools across the Borough. However, the SPA allows for additional projects to be included to give the Council full flexibility and control over the programme. Therefore, authority for this variation already exists.
- 6.15 The total construction cost of £2,402,264 plus irrecoverable VAT, including internal council project and programme management resource and external technical and legal advisors will be fully funded by the Department for Education. The scheme will be incorporated into the council's capital programme, £200,000 plus irrecoverable VAT & £2,202,264 plus irrecoverable VAT, 2010/11 and 2011/12 respectively.
- 6.16 Funding will be delivered through Standards Fund to an agreed payment schedule that is aligned to the payment schedule agreed with Kier London Limited to ensure that the council receives funding in advance of each payment to the contractors.

7. LEGAL ISSUES

- 7.1 These are addressed in the body of the report.

8. CONSTITUTIONAL POWERS

- 8.1 The Council's Constitution in Part 3, Responsibility for Functions, states in paragraph 3.6 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 On 6 September 2010, Michael Gove MP, Secretary of State for Education announced that Mill Hill Jewish Primary School (now known as Etz Chaim) was among the first 16 free schools nationally to be granted permission to progress their application to open a free school in September 2011.
- 9.2 Free Schools are all-ability, state-funded schools, set up in response to parental demand. These new schools will be publicly-funded independent schools, free from local authority control. They will enjoy the same freedoms as traditional academies, which include setting their own pay and conditions for staff, freedom from following the National Curriculum and the ability to change the lengths of their terms and school days. All Free Schools will be accountable like other state schools via inspections and tests.
- 9.3 Etz Chaim Jewish Primary School Trust investigated various locations within the Borough and found that Wyevale Garden Centre in Daws Lane provided the right size and location for their proposed School and pursued negotiations to secure ownership of the lease with 102 years unexpired term.
- 9.4 The Council owns the freehold reversion in the land and buildings shown outlined in black on the attached plan, which until closed in 1982 was a former swimming pool. The land was disposed of on a 125 year lease in 1988 to Country Gardens PLC with in effect a restriction on use to a garden centre. The lease was granted for payment of a premium at a peppercorn rent throughout the term, and now has 102 years unexpired.
- 9.5 The lease was later assigned to Wyevale Garden Centres, who are now seeking to assign their interest to Etz Chaim Jewish Primary School Trust. The lease provides that consent to the assignment cannot be unreasonably withheld. As the rent passing is notional (peppercorn only) there is no concern, on the part of the council as landlord, about the, proposed, new tenant's ability to pay rent. Therefore, it is considered that it would be reasonable for the council to consent to the assignment so long as consent for change of user is, also, granted. Consent to assignment will be dealt with under delegated powers.
- 9.6 Negotiations have taken place between Wyevale and the Etz Chaim Jewish Primary School Trust, in conjunction with PfS who are funding the acquisition and conversion works, and Heads of Terms for the assignment have now been agreed.
- 9.7 In order for the site to be used as a school, planning permission for change of use and for alterations is required, and it is anticipated that the planning application will be submitted by the beginning of March, and completion of the assignment will be subject to planning permission being granted.
- 9.8 PfS are anxious to be in a contractual position with the Garden Centre to ensure that if they achieve planning consent the transaction will complete and enable them to carry out the required works and open the school in September, although it is accepted that temporary accommodation may be required for a short period of time. Failure to achieve a binding agreement may leave Wyevale free to negotiate with an alternative purchaser, subject to the constraints of the Lease.

- 9.9 In order for exchange of contracts to occur, PfS require comfort from the council as freeholders that a licence for works will be granted and a deed of variation will be issued for change of use, together with various alterations to the lease terms to provide a lease agreement that is more appropriate for school/ educational use. The documentation will not be completed until planning permission is granted and the assignment has completed, which is anticipated to take a minimum of 3 months to achieve,
- 9.10 The lease provides that consent for change of use cannot be unreasonably withheld. It is considered that where planning permission is granted, and a lease has 102 years unexpired at a notional rent, it would be deemed unreasonable to refuse consent and it is likely that an application to the Lands Tribunal to modify or discharge a covenant could be sought by the lessee. Consent would not under normal circumstances be refused provided that an appropriate financial remuneration was negotiated for the increase in value due to this consent.
- 9.11 In addition Etz Chaim Jewish Primary School Trust have requested a 1 year lease from May 2011 of the vacant accommodation in the adjoining Council-owned building premises at the former Civil Defence Building. This was until recently used by the Drug and Alcohol Project, and the archive store. The first floor is occupied by the Sea Cadets whose occupation will not be affected. Terms have been discussed and subject to approval of this report will be agreed and reported under delegated powers.

10. LIST OF BACKGROUND PAPERS

- 10.1 None.

Legal – SCS/JO'H
CFO – DM

PLAN



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