

## CLIENT GUIDANCE

### USE OF THE MODEL DOCUMENTS FOR THE CONVERSION OF CHURCH OF ENGLAND SCHOOLS INTO ACADEMIES UNDER THE ACADEMIES ACT 2010

#### Developments since the Academies Act received the Royal Assent

1. The Academies Bill was taken through parliament during the summer of 2010 with the intention that schools could apply for conversion while the Bill was under debate and that the first group of new academies could be brought into being for September 2010.
2. Hence, some schools applied for conversion (as the government intended) while the legislation was still being debated and before any guidance or model documentation was published by the DfE.
3. Once model documents began to become available it became clear (a) that the DfE model documentation was not suitable as it stood for application to Church of England schools and (b) that there were significant aspects of government policy that had not been apparent in the Bill.

#### Land issues and the “as is” policy

4. In particular extensive negotiations were required on how land in the ownership of trustees (especially when there was some admixture of public value) was to be handled in academy conversions. DfE guidance now indicates that (regardless of the issue of any public value) land in the ownership of trustees need not be transferred freehold to the new academy company but may be made available either by lease (especially if some public value is involved) or by such other arrangements as may be agreed between the trustees and the company. This includes the (undocumented) licence arrangements whereby sites in trustee ownership are currently made available to schools. We strongly advise that land in trustees' ownership should never be transferred freehold to the academy trust. Indeed given the “as is” policy of the government described in 5 below, enfranchisement issues in the model lease and other concerns, our preference is to continue with current licence arrangements as they stand at present. The documentation set out below depends in part on this

continued involvement of the existing trustees and is designed to protect the trusts on which they in turn hold the land. Also DfE guidance now reflects an agreement that any issues about relative public/private shares of the value of sites are matters which need be settled only on the disposal of part or all of any site and that (while dealt with under the powers of the Academies Act) these matters would in fact be treated in broadly in the same way as such sales and determinations are currently carried out in respect of maintained schools. Hence it is extremely important that in the meantime no transfer of freehold is agreed which might be interpreted as a disposal.

5. This important (indeed essential) change in respect of the handling of land was made easier by a second development which otherwise created many issues that needed to be solved – the emerging government policy that (while of course conversion into an academy was a radical change from a maintained to an independent school) none the less in a number of important respects schools would have to convert “as is”. In particular the government has insisted that the governance, RE and employment regimes that are currently in force for VC and Foundation schools with a religious character must be reflected in the academy trust constitution set up for those schools and in their funding agreements.

#### Preservation of statutory protections

6. This in turn required a detailed consideration of how the considerable range of statutory protections for ethos-related powers for both VC/Foundation and (to a lesser extent) VA schools with a religious character could be reflected in the suite of conversion documents. The trustees have a legal obligation to ensure that the trusts on which they hold their sites are made effective in the life of any school they allow to occupy their land and buildings. The various statutory provisions that apply to maintained schools with a religious character have been developed over the years to ensure that the trustees (and dioceses as the relevant religious authorities) have sufficient powers to

be able to carry out that obligation. This has required some attention to detail in the VA-converter context, but has been essential and fundamental in that of VC/Foundation-converters.

## The suite of model documents

7. The documents described below have therefore been agreed with the DfE to permit the necessary safeguards for ethos-related issues to be replicated in the new independent school context of academies:

## Supplemental Agreement

8. We itemise this first because it in fact sets out the context within which the academy company is to operate. It is not optional, but an essential part of the conversion package for both VA and VC/Foundation schools with a Church of England character. It records the overall concordat between the Secretary of State and the trustees/diocese. The academy company is made a party in order that it is clear about its obligations and the obligations of all parties. It contains provisions that safeguard the trustees' land and the ethos of the school, and that enable the relevant Diocesan Board of Education to request the Secretary of State to intervene on its behalf should there be issues as set out in respect of SIAS inspections or serious concerns on the part of the DBE in respect of the conduct/management/standards of the school. Other than as indicated below, we advise clients that the contents of the Supplemental Agreement are not intended to be negotiable and should form a condition of the agreement of trustees and of other relevant parties to any application for conversion. The details of the Supplemental Agreement have been agreed with the DfE as appropriate articulations of the "as is" policy and are essential to ensure that existing statutory safeguards for maintained schools are reflected in this new context. Note however:

- That the Supplemental Agreement is drawn so as to cover quite a wide range of circumstances, from a VA school with the Diocesan Trustees or DBE/DBF as the trustee and a narrow group of church bodies currently appointing governors, to a VC school with Incumbent and Churchwardens as trustee and a much wider group of current governor appointments.
- Some Church of England dioceses (where they are the existing trustees but not otherwise) may wish to take on a substantial central role in respect of the land, insuring and in part at least

maintaining the site themselves with funding provided by the academy. Others however may not wish to take on this role and to leave it (as in the current VA situation) as a role for the governors of the academy who may of course continue to use the DBE as their agent as is common at present. We advise that (in those exceptional circumstances where the diocese wishes as Trustee to take the first course) it should be careful to ensure that it takes on no obligations it is not funded by the academy company to carry out. It must not put itself in a position where the academy company could require it to undertake major repairs without the cost being met by the academy company. Where the DBE/DBF is not itself the trustee it may not in any case demand to undertake the centralised role, but of course may act as the agent of the academy company/governors if they so wish. Any trustees may in theory take on this land role if they wish. We advise however that Vicar and Churchwarden trustees (or similar) should not do so and instead either leave this task to the academy company or agree that the DBE will act on their behalf.

- In general, if a DBE wishes to take on the central role in respect of land, it might also prefer to use model Memorandum and Articles 3, which was designed to match it. However, model Memorandum and Articles 1 is also suitable for this purpose. Dioceses wishing to use Model 3 and to take on the central land role must take specific advice on this and be sure that they are willing and able to undertake the role and to accept the consequent consolidation of accounts. Model 1 does not lead to consolidation of accounts.
- At present the suite of model documents does not offer to trustees an express licence to an academy trust to occupy a site. This would have the advantage that terms and conditions upon which the site is made available to an academy trust could be set out, but one would have to be certain there was no risk of this creating a lease in law. Such an express license is not strictly necessary as it does not (after all) exist for the present use of their sites by voluntary or foundation schools and such arrangements have proved entirely satisfactory over the years.
- The suite of conversion documents (the academy trust constitution, the funding agreement, the supplemental agreement and long lease), all fit together. We advise that clients consult us carefully before agreeing any changes in individual documents as such changes may have an impact elsewhere or may make some existing statutory protections impossible to replicate.

## Funding Agreement and possible later changes

9. Some important issues for all conversions and especially in respect of VC/Foundation schools (RE, worship and employment powers) are set out in the Funding Agreement and have themselves been agreed in order to safeguard the DfE's "as is" policy and government policies more generally. Therefore, they are not expected to be subjected to further local negotiation and we advise that they should be used by Church of England converting schools as they stand and that trustees/DBEs should insist on that. It is however possible that (in some limited circumstances and only where all local parties have indicated their willingness) a VC/Foundation school may be allowed by the DfE to utilise a VA Funding Agreement and/or VA Majority Memorandum and Articles (Model 1) on conversion. Government policy is also that, after conversion, VC/Foundation converters may apply subsequently to change to the VA-converters regime. After all, they could apply to become a VA school before converting, so "as is" requires that they must also be able to do so afterwards. Such a subsequent change will also of course require the agreement of the local parties in the academy company and may require some form of consultation. Since the Funding Agreement can only be changed with the agreement of the Secretary of State, the final decision as to such subsequent changes would be his. We advise that VC/Foundation schools should always discuss this issue in detail with their diocese prior to sending in an application to convert. They should then jointly agree (and record formally) whether (a) to convert and remain for the time being as they are now, or (b) to go through the procedure to change to Foundation Majority prior to conversion (which produces a consequent Majority Memorandum and Articles on conversion but does not result in the VA-type employment or RE regimes) or (c) to change to VA prior to conversion (which of course results in the full VA powers in all respects being transferred on conversion) or (d) to agree that the academy will seek to change to the Majority Model within (say) two years of conversion. It is our advice to dioceses and trustees that (if there is a willingness on the part of VC/Foundation school to consider a stronger model to sustain the Church of England character and ethos of the school for when the school converts) they should be encouraged to make one or other of the changes, as the Minority Memorandum and Articles (Model 2) (and the other documentation that matches with them) cannot fully replicate the consequences of Majority Membership (Model 1) in respect of the management of any aspect of the academy. Note that the admissions policy of the school must in any case not be changed on conversion and may only

subsequently be changed with the agreement both of the DBE and of the Secretary of State. Use of the Majority Model (Model 1) does not automatically mean the use of religious criteria in admissions and we presume that many Church of England schools would in any case not wish to change their existing neighbourhood admissions policies.

### Land Guidance

10. Not part of the suite of documents, but essential in order to make sense of them is the DfE's guidance (on its Academies website) in respect of the handling of land on conversion. In any individual conversion the interpretation of this guidance will be an essential aspect of LBMW's detailed advice to its clients. In general the position is this.
- Land currently owned by the Local Authority will be leased by it to the academy company.
  - Land currently owned by the governing body (eg of a Foundation School without a foundation) may be handled in various ways, but we advise in general that the GB should determine that it should be transferred freehold to the academy company.
  - Land owned by the existing trustees may also be handled in various ways but we advise either (i) that it be leased to the academy company by the Trustees using our model lease that has also been agreed with the DfE (this will be probably be required by the DfE if some public value is involved and therefore for most VC/Foundation schools but NOT for most VAs) or (ii) that the land be occupied by formal or informal licence.

The DfE's requirement that for school sites where there is some "public value" that there be a lease is a departure from the "as is" principle. At present all maintained schools occupy sites without any formal lease or licence arrangement in place. The sites are simply made available for the school to occupy and in the case of sites held by private trustees this is because such occupation is consistent with the terms of the trusts. Strictly speaking a licence rather than a lease arrangement is in place. For schools where there is no public value that arrangement can continue and if a written licence is required to spell out the terms upon which that occupation is to continue that can be done, although one must be careful to ensure that no landlord and tenant relationship is thereby created. A model licence is in preparation.

11. It is our understanding that the DfE does not regard VA capital grant or BSF/Primary Capital Programme

funding as resulting in public value to VA sites. Hence, in general, those portions of VA sites in the current ownership of trustees will not have any public value unless (a) the site (or part of it) has been given (other than in exchange) at some point by the LA or (b) the LA has at some stage provided VA capital in order to assist the GB and has formally at the point of the gift indicated that it does regard the grant as bringing the trustees' land within the concept of its having public value. We anticipate these circumstances to be rare but it is essential that we check these for you and the DfE will require this.

12. Conversely, the DfE considers that the maintenance of VC and Foundation schools wholly by the public purse results in these sites always having some measure of public value. This reflects "as is" in that it has always been accepted that some division of value between the LA and the trustees is appropriate on disposal (although it is not "as is" to insist that in these circumstances there be a lease). In exercising his powers under Schedule 1 of the Academies Act 2010, the Secretary of State will use criteria that are similar to those in existing DfE Guidance for such Determinations. This is made explicit in the Supplemental Agreement and confirmed in the DfE land guidance in respect of academy conversions.

## Lease

13. The model Lease is drafted and agreed with the DfE to reflect the circumstances of Church of England schools. Apart from the obvious variations to allow for local circumstances, we advise that it should be used intact. Any thought of changes should be discussed in detail with us. It contains important safeguards for the trustees which reflect those of the Memorandum and Articles and is designed to mesh with these and with the Supplemental Agreement. In particular it preserves the ultimate right of trustees to declare the lease forfeit and require the removal of the school from their site if the school is conducted in such a way as to bring the trustees' own obligations under their trust into serious question. This also reflects "as is" and must not be undermined, as to do so would put in jeopardy the trustees' power to carry out their responsibilities to their trust.

There are certain objections a Diocese might have to using a lease at all rather than continuing with licence arrangements with an academy trust, formal or informal. Licence arrangements are entirely consistent with an "as is" principle and give the trustees the theoretical ability to withdraw a site from an academy trust on short notice without any need to first find a default on the academy trust's part. We say "theoretical" not because in practice this could not

happen, but because in practice this power is so rarely exercised. Also the lease option is somewhat cumbersome. Residential property on site must be excluded from the long lease to avoid any risk of enfranchisement of such property and must be let separately under a shorter lease supplemental to the principal one. The development of residential property, or conversion of buildings to residential which are demised by the main lease must also be prohibited. When one considers this and other issues arising in relation to the lease, simply continuing with licence arrangements instead may appear a more attractive option for trustees.

## Memorandum and Articles

14. This is a key document and represents (we remind you) the core agreement between the members of the academy company on the one hand and the academy company on the other as to the nature of the enterprise they are jointly conducting and as to various matters that they agree will regulate the running of the academy company. There are three separate models of academy trust constitution which have been developed. We describe them here with their numbering as on the DfE Academies website:-

**Model 1.** A Church member majority model constitution – This is drafted for the VA school converting to an academy. It is also the model to be used for a Church Majority Foundation school converting to an academy, but some changes would/might be needed to the staffing, worship and RE provisions to reflect the DfE "as is" policy outlined above. Foundation Majority converters should check this carefully with us. This model strongly advises that DBEs and other appropriate bodies become corporate members of the academy company, hence ensuring continuity without requiring consolidation of accounts.

**Model 2.** A Church member minority model constitution – This is drafted for the VC/ Foundation-minority school converting to an academy "as is". It includes therefore a considerable number of safeguards that are not needed in the majority model in order to protect worship, RE, employment and ethos generally. These are focussed in the concepts of foundation members and governors and in the powers given to them.

**Model 3.** This model was originally drawn up for Roman Catholic dioceses, but is also suitable for Church of England dioceses who (a) wish to have all members and governors appointed by the DBE (b) are willing to accept that the consolidation of academy and DBE accounts will be required under existing accountancy rules

The risk of consolidation of accounts under accountancy rules where the same person or group of persons control a number of academies is a serious one, but for a Church of England school with the range of local persons who might be members of an academy trust this can be avoided if one proceeds with care and uses Model 1 or Model 2.

A multi academy model constitution has not yet been finalised for church schools, although it is appreciated this could be useful and no doubt in practice will be needed. We are working on these now in relation to specific Church of England school academy projects underway. This model will be available shortly.

In relation to all of the academy trust constitution models, changes to them may only be made subsequently with the agreement of the Secretary of State. In addition, at various points power is given to the relevant DBE and (in the case of VC/Foundation-minority converters) to the Foundation Members/Governors to prevent changes that would impact on the ethos and religious character of the academy. We advise these provisions must never be removed or weakened. They are entrenched in Models 1 and 2 so that no changes can subsequently be made without the agreement of the DBE.

15. Note that since the Memorandum and Articles constitute a contract between the members and the academy trust they are (except to the extent that the Contracts (Rights of Third Parties) Act [1999] applies) enforceable only by the members and the academy trust itself. For this reason we strongly urge that provided the DBE is a corporate body the DBE should always be a Corporate Member as provided in Models 1 and 2 and hence can (if ever necessary) ensure that provisions are enforced and (should the other members refuse) have the possibility in the most serious cases of referring the matter to the Secretary of State for the exercise of his powers of intervention. If the DBE is not a corporate body then the DBF (if it is willing) could be a corporate member but in any case the DBE also has powers in the Supplemental Agreement to make such a referral whether or not it is a company member. .
16. In consequence of the development of the “as is” principle, it became necessary (unexpectedly, since there is no reference to it in legislation) to adapt for this independent school context the provisions for Foundation Governors in force for VC and Foundation schools in the Minority Model Memorandum and Articles (Model 2). They are not required for the VA converter model (Model 1), as here the membership is overwhelmingly that of Church bodies (note again our strong preference for church corporate members) and the members nominate the majority of Governors.

However, the requirement for Foundation Governors is essential for VC and Foundation-minority converters, as is the corollary – Foundation Members. The National Society’s agreement with the DfE on these matters is set out in the Minority Model Memorandum and Articles (Model 2) and we advise that this should be carefully adhered to following the detailed examples that we give separately. The Foundation Members and Governors have important roles in safeguarding the ethos on behalf of the trustees. This is made more secure if the Foundation Members are (as advised) Church corporate bodies. These are listed in the documents, but it may be helpful to explain here that the bodies set out below all have appropriate corporate characters. It is the office that is being appointed Member or Governor, not the present individual occupant. This replicates the current position for ex-officio governors and we advise that in general it is the existing ex-officio offices that should be recognised in this way, with the addition of the Board of Education. However there is no restriction to the creation of corporate members, save that they should be “relevant” to the situation of the school. Hence several deaneries or parishes may be involved if they are relevant, even if their Deans and Incumbents are not currently ex-officio governors and they do not at present appoint foundation governors. This gives some flexibility to reflect the actuality of a school’s present life. Appropriate corporate bodies to become Members are:

- The DBE or DBF.
- The Incumbent of any relevant parish (or parishes).
- The PCC of any relevant parish or parishes.
- The Area Dean of any relevant deanery.
- The Diocesan Bishop
- The Trustees

17. Note that:

- a) The Board of Education can only be a Corporate Member if it is an incorporated body. Non-incorporated DBEs will need to request the DBF to become the Corporate Member on their behalf, or find another body to represent them. Of course this might also be a moment for the DBE to consider whether it should now become an incorporated body. We can advise on this if required.
- b) Corporate Members will need to appoint an individual to attend and act on their behalf. Since we recommend that in general Corporate

Members should also be governors, it would be most convenient (we suppose) for the same person to be appointed by the Corporate Member as the corporate representative to exercise both roles on its behalf but this is not required.

- c) This power should be distinguished carefully from the quite separate power which may (and we recommend normally should) be exercised by the DBE to appoint members in its own right. If this power is used clients must be careful not to arrive at a position where the combination of DBE as a corporate member plus the number of its nominees produces a majority of members. If this happens then consolidation of accounts will be required. Model 1 is drafted so as to avoid this outcome in normal circumstances.
- d) Those Corporate Members that appoint individuals to represent them may remove and replace such persons at will and may instruct them as to policies they should follow and (where they believe it necessary) ways in which they should vote.
- e) Individuals appointed by the DBE in its own right or by the members as a body (or indeed by anyone else) may be removed by those who appoint them. This power is not hedged around with process as in the maintained sector and note that it is the appointing bodies that remove, not the academy governors or indeed the academy company (except where the company is itself the appointing body). We have so drafted Models 1 and 2 that no-one may remove the Corporate Members.
- f) As it is the academy company that appoints most governors in Models 1 and 2, it may remove them, but some governors are excepted from this rule and in particular we have provided that church corporate bodies acting as foundation governors in the VC converter context may not be removed in their corporate capacity, though they may of course themselves change their nominated individual representatives. In consequence we have provided that Incumbents, Area Deans and the Diocesan Bishop (in their corporate capacities) should be treated as ex-officio and are exempt from the four year re-election requirement imposed on everyone else except the Principal. In model 3 it is the DBE that would appoint governors and hence may remove them.
- g) Deanery Synods are not corporate bodies, hence it must be the Area Dean in his corporate capacity who must be listed where deanery membership is required. More than one deanery may be included where this relevant to the school and agreed by the parties.

- h) A power is built into the relevant definition enabling the Archdeacon to nominate a person to replace the Incumbent in cases where the individual is unable or unwilling to act, but note that the Incumbent may himself nominate an individual (though this would presuppose the fundamental willingness/ability of the Incumbent to act, as the individual would be representing him).
- i) We suppose that the Diocesan Bishop would not normally wish to take on this role in the Church of England context, but remember he too may appoint an individual to act for him. This may be appropriate perhaps for secondary schools.
- j) We presume (and advise) that where the trustees are the Incumbent and Churchwardens (or similar), they would normally exercise their role in the Academy Company via the Incumbent's corporate role rather than separately in their own. We have already noted that where the DBE or the DBF is trustee it should be a Corporate Member. However, in other circumstances (eg where the trustees are a local body with a substantial membership) such Trustees may well wish to have their own Corporate Membership and in that case the DBE may well desire its own corporate place as a member and should be accorded one.
- k) We have developed worked-out examples for both VA and VC/Foundation converters of possible configurations of members and governors. These cover both secondary schools with intakes from quite wide areas and primary schools covering perhaps only one parish. These will be supplied to you by us in order to help you think through the options available. We also have experienced consultants who are available to you (either by email/telephone or at meetings) to advise on such matters.

### **Which model Memorandum and Articles should we choose?**

- 18. VC/Foundation Minority converters must use the Church of England Minority Model Memorandum and Articles (Model 2). None of the others is suitable in this context unless the Secretary of State has agreed (exceptionally) that a change may be made to the Majority Model as noted above.
- 19. VA converters are advised to use the Church of England Majority Model Memorandum and Articles (Model 1). However, where the DBE intends to exercise a very strong central role (for example

requiring the insurance and maintenance to be undertaken by it) then the RC/C of E Model (Model 3) may be suitable. Schools must consult us with care on all options as detailed choices need to be made within them. Dioceses/schools seeking to use Model 3 must take detailed advice on consolidation of accounts.

20. Foundation majority converters will need to use the C of E majority model Memorandum and Articles (Model 1) but will need VC/Foundation options in the Funding Agreement (unless they have the agreement of the Secretary of State to convert as though they were VAs). They should consult us in detail about the best options for them in the various documents.

## Members Agreement

21. Finally there is a Members Agreement which sets out some residual (but potentially important) matters about ethos that are not appropriate for either the Memorandum and Articles or the Supplementary Agreement. The DfE is aware of this document and of the topics covered but is not otherwise involved in it and does not require to agree or approve it. It is therefore a matter for the local parties alone to determine whether they wish to use it and to agree its contents. We advise that its inclusion should always be seriously considered and should be regarded as normal. We can of course advise on any changes which local parties may propose.

## The process

22. LBMW has been deeply involved in negotiating the above documents on behalf of the National Society and with the interests of all our clients in mind. In addition we have already taken schools right through the conversion process including in the very first wave. We have therefore experienced members of our team available to guide you fully through the process as well as provide you with the legal advice you need.
23. Hence, in general, we believe that a secondary school will be able to make the conversion without having to employ external consultants other than ourselves to undertake work for them and without undue strain on either school or diocesan staff. This will not be so easy for a small primary school however and careful thought will need to be given to workload and to how appropriate assistance can be funded if it is thought possible that the cost will go beyond the £25,000 standard grant made available by the DfE.
24. Now that the government has indicated that non-outstanding schools may proceed with conversion, we advise that schools and dioceses should always

consider the possibility of local groups of academies under one company (or indeed with several companies linked by a heads of agreement). This may be particularly attractive for primary schools, with or without their nearest Church secondary and is capable of offering to all parties efficiency savings not only in the process of conversion but in the buying in of services into the future. We have models available both for wholly Church of England groups and for mixed groups. We would be glad to advise dioceses at an early stage over such matters.

25. Both because of potential costs and as a general principle, we advise that the school leadership (both Headteacher and leading governors) should discuss the possibility of conversion frankly with the DBE and their trustees before any move is made to gain agreement for a formal application to the Secretary of State. This will allow an initial assessment of any potential areas of difficulty and aid the parties in assessing work-load and consequent costs. It will also allow the parties to see whether they are likely to be largely of one mind (and hence need only ourselves to undertake the legal work) or whether there are likely to be areas of fundamental disagreement which may lead to a requirement for the various parties to have separate legal advice.

## National Society guidance

26. LBMW has been extensively involved in drafting the National Society Guidance on conversion. The two sets of guidance interlock and our detailed work for you will reflect this. We therefore advise that you read the Society's Guidance in parallel with this. Also useful will be the LBMW client guidance on academy conversion set out on our website. This deals with the process issues whereas this document is concerned with use of the model documents.

## General guidance only

27. This paper (and other guidance documents on the LBMW website) are necessarily of a general nature only. They must not be relied upon as determinative in your specific local situation. LBMW will work closely with you to ensure that you receive the detailed advice that your project will need. The above, gives you an outline in order that you look in the appropriate directions, ask the most relevant questions of us and instruct us in ways that are most appropriate to your context.

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