General

Report on Title to DfE
From the property perspective, each conversion will require a Report on Title to be provided to the Department for Education (DfE) in their required format. These Reports on Title are usually required by the DfE six weeks before the conversion date. The Report on Title needs to set out who owns the land, what type of school is converting, what the proposals for the land transaction are (e.g. freehold transfer or lease) and any shared use of the site (e.g. caretakers in occupation, third parties using parts of the property, such as sports facilities).

Report on Title to Client
A separate (and full) report on title is sent to the client.

Searches
As a matter of course, the client is asked whether or not they require searches to be undertaken. It is possible, if the Governing Body/Foundation has owned the freehold of the property for some time, that they will feel that they do not require searches. However, they should always be asked.

A report on searches should be sent to the client. DfE do not require searches, but we recommend that they are carried out in order that the school is aware of any potential issues.

Agreed Notice on Transfer of Freehold of Public Land
Where the academy trust is being transferred the freehold of public land, the Funding Agreement contains an Option for the Secretary of State to acquire the land at nil consideration if the Funding Agreement is terminated in order to protect the public asset.

Construction
With regard to construction issues, any build contract and warranties relating to the school site will need to be enforceable by the academy trust. Exactly how this is achieved depends on the type of school converting. Generally, if there have been building works in the last 12 years, the build contracts and warranties will need to be dealt with and a construction lawyer should be allocated to the matter.

Property transactions

The nature of the property transaction will depend on the category of the school converting. The ‘DfE Land Transfer Advice’ sets out what needs to happen in relation to each of those schools. A summary is set out below:
Community Schools
The land will almost always be held by the Local Authority. The Local Authority will grant a 125 year lease to the academy trust, for a peppercorn rent. The DfE model lease must be used for all community schools. The lease is contracted out of the Landlord and Tenant Act 1954, meaning that the academy will have no automatic right to renew the lease at the end of the term - a new lease would need to be negotiated.

If the terms of the lease have been unable to be agreed in sufficient time before the conversion date (i.e. by the DfE’s deadline for finalised lease), a Licence to Occupy/Tenancy at Will can be used to enable the academy to open on the preferred date. This is only a short term solution until the full lease can be completed. This can only be used if the majority of the terms of the lease have been agreed, and the DfE have assurances that the lease will be agreed and completed shortly after conversion.

Foundation Schools without Foundations
The land will (or should be) held by the Governing Body. When a school becomes a Foundation School without a Foundation, the land is automatically transferred to the Governing Body on the date of conversion to Foundation Status. However, quite often the Local Authority has not completed a formal Transfer, and the land may therefore still be registered in the Local Authority’s name. This should not stop the academy process. However, if the Local Authority have not actually agreed what land should have transferred to the Governing Body (note only the land used for school purposes should have transferred), this could complicate matters. Ideally, a formal transfer from the Local Authority would be completed before conversion.

Foundation schools without a foundation have a choice as to whether the academy trust will get the freehold or a leasehold. In the unlikely event that the Governing Body choose for the academy trust to get a leasehold interest, the freehold will need to be transferred back to the Local Authority. They will then need to grant a 125 year lease to the academy trust, in the same way as for community schools mentioned above.

Where the academy trust is to get the freehold, a TR1 Transfer deed will need to be completed.

The Secretary of State will issue a Direction to the Governing Body ordering them to transfer the freehold to the academy trust. This is to ensure that, if the formal TR1 is not completed, the land is deemed to have automatically transferred to the academy trust by virtue of the Academies Act 2010. Clearly though, the TR1 should still be completed. A Direction to Transfer (precedent available on the DfE website) will need to be sent to the DfE with the report on title. Note that this requires the Transfer to be completed before the conversion date (this is because the Governing Body will cease to exist on the conversion date, and therefore would not be able to complete the Transfer on that date).
The client should be asked whether the academy trust is to be granted a freehold or a leasehold (they should be advised that freehold is the best option), and then confirm that decision to the DfE contact (if not already mentioned in the Report on Title to the DfE).

It should be checked that the Direction has been formally made to the Governing Body, before completing the Transfer. The Secretary of State will issue a letter to the client confirming that conversion will take place, and enclosing the Direction, prior to the conversion date.

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

Note: if the school has at any point been a voluntary aided or voluntary controlled school (or otherwise has an historic foundation that owns some of the land, and which will continue when the school becomes an academy), then the arrangements set out in relation to voluntary aided or voluntary controlled schools below will apply.

If the school has never been a voluntary school (or otherwise had any private interest in its land), then broadly the same arrangements as for foundation schools without a foundation will apply. Alternatively, it may be possible (in exceptional circumstances) for the freehold of the land to remain with the trust, and for the academy trust to occupy the land either under a lease, licence or other informal arrangement.

If the academy trust is to get the freehold, then a Direction for Transfer to a Foundation (see DfE website) will need to be completed and sent to the DfE with the report on title.

If the freehold is to remain with the trust, then the trust will need to sign up to a Supplemental Agreement (which will be prepared by the commercial/corporate lawyer with some input from the property lawyer), whereby they agree not to dispose of the land or terminate the academy trust’s occupancy of the land for two years. In circumstances such as these, there is no need for a full 125 year DfE model lease to be granted by the trust to the academy trust, but if the academy trust does want a lease, a draft should be prepared with an appropriate balance between the model lease and one containing tenant amendments. If a leasehold interest is to be granted, then the Secretary of State will need to issue a Direction (precedent available on DfE website - to be drafted and sent to the DfE with the report on title).

If the trust wish to retain the freehold, but not grant a formal lease, then the Local Authority’s consent for the land to be used for an academy will be required. A Notice pursuant to A13(7) of Schedule 22 of the School Standards and Frameworks Act 1998 will need to be sent to the Local Authority as soon as possible, giving them 6 weeks to oppose the proposal. DfE guidance to Local Authorities is that they should accept the proposal.
If any of the land used by the school is wholly public land (see below for definition of public land) held by the Local Authority or the Governing Body in addition to land held by the Foundation, then:

- in relation to Local Authority land, the academy trust will need to come to arrangements with the Local Authority in relation to that land (a 125 year lease in the DfE model); and

- in relation to any land held by the Governing Body, then the process for Foundation schools without a foundation mentioned above will need to be followed.

Voluntary Aided and Voluntary Controlled Schools

The land arrangements for these two types of schools are the same - the only potential variation being the type of land held and by whom it is owned.

Voluntary aided schools typically occupy land that is a mix of private and public land (often the school buildings will be on private land and the playing fields will be public land), whereas voluntary controlled schools often occupy land which has been enhanced at public expense, and is therefore deemed to be public land. (Please see the DfE Land Transfer Advice for the distinction between private and public land.)

Agreement with the Local Authority will need to be sought as to whether or not the land is public or private, but if this has not been possible before sending the report on title to the DfE, the wording in paragraph 44 of the DfE Land Transfer Advice must be put in the report on title, confirming that if the land is to be disposed of in the future, the public/private question will need to be resolved.

Private land (including private land which has been publically enhanced (and therefore treated as public land)), is generally held by the School’s Foundation e.g. the Diocese. Public land may be held by the Governing Body or the Local Authority. The Report on Title will need to set out ownership of all of the land held for the purposes of the school.

Public Land

Where the Foundation/trustees hold public land, the Secretary of State is able to direct them to transfer the land to the academy trust. The same applies where any such land is held by the Governing Body.

However, the Secretary of State’s policy is that the school should convert very much ‘as is’. Most Foundations (especially Diocese) wish to retain the freehold (be it public or private land). If that is the case, the DfE is happy for the Diocese to grant a lease to the academy trust. The Secretary of State would use a Direction to ensure that the lease was granted (model available on the DfE website). The Direction would need to be sent to the DfE with the report on title and to the Land registry when registering the lease.
Where Foundations retain a freehold interest in public or private land, the Secretary of State will require them to enter into a Supplemental Agreement (as mentioned above for Foundation schools with foundation). A commercial/corporate lawyer will deal with this. As such there is technically no need for a 125 year lease, and this is the route which we advise is taken, particularly with regard to costs. As with Foundation Schools with a Foundation, where the Foundation is to retain the freehold of public land, the Schedule 22 School Standards and Frameworks Act 1998 Notice needs to be sent to the Local Authority.

Private Land
For private land, various arrangements are possible - a transfer, a lease, a licence or some Dioceses prefer that the land arrangements be in an informal manner which does not transfer the land to the academy trust. Such arrangements would need to ensure that the academy has security of occupancy on the site and the academy trust will need to be satisfied that this will be the case. As mentioned above, a Supplemental Agreement will be needed if the Foundation is to retain the freehold, which would mean that no formal lease is needed.

Where public land is held by the Local Authority (e.g. playing fields), then the standard DfE model lease will need to be used, as for community schools.

In summary then:

- 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 academy trust or may be retained by the foundation and made available to academy through a lease or informal agreement - a Supplemental Agreement would be required for a lease or informal arrangement
- 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 the academy through a lease agreement, or through an informal agreement. A supplemental agreement would be required to provide 2 years’ security of occupation for the academy
- public Land held by the Governing Body of the converting school - transferred by direction of the Secretary of State to the academy trust
- public land held by the local authority for the purposes of the school (usually school playing fields) - leasehold transfer to the academy trust. 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 academy trust.

Shared Use
Shared use is a big issue for the DfE. Often, third party users will have use of parts of the site (for example, the Local Authority may have the ability to use sports facilities for community purposes). Or, caretakers may be in occupation.
With regard to shared use, copies of all documents dealing with this will need to be obtained. These documents can usually be dealt with by transferring them to the academy trust under the Commercial Transfer Agreement (dealt with by a commercial/corporate lawyer). If no such documentation exists, the arrangements may need to be formalised and full details will therefore be needed (e.g. area of site shared, when, by whom, and costs/payments made by whom and to whom etc). For example, if a lease is being granted to the academy trust and no documentation is in place regarding use of the property by the Local Authority, use of the property by the landlord can be dealt with by way of the Landlord reserving rights to use the relevant part of the property for the relevant purposes, or a specific licence or underlease can be entered into.

Caretakers will usually occupy under Assured Shorthold Tenancies (and therefore the lease/transfer will be subject to their terms) or service tenancies which are linked to their employment (dealt with by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) and also the lease/transfer will be subject to the terms of occupation). A copy of their terms of occupation will be needed. If, for example, the terms of occupation included an obligation to provide the caretaker with alternative accommodation on retirement, this could clearly have implications for the academy trust. Any documentation regarding caretakers’ occupation should be checked by an employment lawyer, as there might be implications under TUPE.

If there are nurseries, Surestart Centres, telecoms masts etc, these will need to be dealt with. There may be documentation in place, or this may need to be formalised with new leases, service level agreements etc.

It should be determined whether there are any temporary buildings (such as portable classrooms/portacabins) which are leased from a supplier. If so, the leasing arrangements will need to be assigned to the academy trust (and the obligation to pay the hire charges passed to the academy), or the temporary buildings could be purchased outright (if permitted).
Other matters

- For Foundation schools with foundations, Voluntary Aided and Voluntary Controlled schools, it is possible that the land may have been transferred to the Foundation/Diocese/trust for a specific purpose, which would not include Academies (e.g. specifically for ‘the purposes of a Local Authority maintained school’). Alternatively, the trust documents themselves may only allow that trust/Foundation/Diocese to support e.g. Local Authority maintained schools. As such, these restrictions would need to be dealt with.

- It is possible that a school may be subject to a Private Finance Initiative Agreement (PFI). If this is the case, then specific action will need to be taken. Where the academy trust is to be granted a leasehold interest in a school subject to PFI, provisions specific to PFI will need to be inserted in the lease.

- It should be determined whether the school has received any grant funding (e.g. BIG Lottery Fund, Sport England, Football Foundation) in relation to any facilities on the site. If so, the funding arrangements will need to be novated to the academy trust.