

<b>Cabinet</b>	 <b>TOWER HAMLETS</b>
24 March 2021	
<b>Report of:</b> Ann Sutcliffe, Corporate Director of Place	<b>Classification:</b> Open
<b>London Dock School – Update on negotiations with the DfE on the legal agreements</b>	

<b>Lead Member</b>	<b>Councillor Mufeedah Bustin, Cabinet Member for Planning and Social Inclusion (Job Share) - Lead on Social Inclusion</b> <b>Councillor Asma Begum, Deputy Mayor and Cabinet Member for Children, Youth Services and Education</b>
<b>Originating Officer(s)</b>	Rachel Mckoy, Head of Commercial and Contracts Howard Lock, Interim Head of Asset Management (strategy)
<b>Wards affected</b>	St Katharine's and Wapping
<b>Key Decision?</b>	Yes
<b>Forward Plan Notice Published</b>	23 February 2021
<b>Reason for Key Decision</b>	Financial threshold and significant material impact upon the community.
<b>Strategic Plan Priority / Outcome</b>	<ol style="list-style-type: none"> <li>1. A better deal for children and young people: aspiration, education and skills</li> <li>2. Good jobs and employment</li> <li>3. Strong, resilient and safe communities</li> <li>4. Better health and wellbeing.</li> </ol>

### **Executive Summary**

The report is to update Cabinet on the status of negotiations between the Council and the DfE on the funding arrangements for the construction of the London Dock School, including a number of consequential amendments to the respective suite of legal documents, and to seek approval to the terms of a legally binding clawback agreement to be entered into by the Council for the benefit of the DfE.

## **Recommendations:**

The Cabinet is recommended to:

1. Note the position with respect to the current negotiations with the DfE concerning the funding for the construction of the London Dock School, including a number of consequential amendments to the respective suite of legal documents.
2. Approve the terms of both a Clawback Agreement, in respect of the under-lease for the London Dock School site, and the inclusion of a clawback clause within the Works Funding Agreement to be entered into between the Council and the DfE, as outlined in Section 7 of the report.
3. Delegate authority to the Corporate Director of Place, in consultation with the Divisional Director of Legal Services to agree minor changes to the heads of terms as may be appropriate and to complete the legally binding clawback agreement
4. Note the financial risk to the Council and the mitigation set out in section 7 of the Report.

## **1 REASONS FOR THE DECISIONS**

- 1.1 The Council and the DfE have been in negotiations to reach consensus upon acceptable provisions within the various legal contracts relating to the funding and construction of a new school at London Dock for a substantial period.
- 1.2 This has entailed the successful negotiation of a Memorandum of Understanding executed on the 4 December 2020, alongside heads of terms for the related development and grant funding agreements. Discussions with the developer and owner of the site have also taken place in parallel.
- 1.3 Whilst significant progress has been made in relation to specific provisions that exposed the Council to risk, a number of key issues have remained live and are the subject of ongoing negotiations.
- 1.4 The Council and DfE are in mutual agreement that the risk of this project not being delivered is theoretical. The Council has secured the site from the developer, by way of an underlease, entered into a pre-construction agreement with the contractor and the DfE have secured an outstanding Multi-Academy Trust ( Mulberry Schools Trust) to deliver the school.
- 1.5 On 5 January 2021, the Council received a late request from the DfE to enter into a Clawback Agreement in respect of the under-lease for the London Dock School. This was sought in addition to an extant request for the inclusion of a clawback clause within the Works Funding Agreement.

The justification provided by the DfE for both requests was based upon a concern that their grant funding would be exposed to financial risk. In light of this, the DfE have insisted upon the Council's agreement to underwrite any financial losses it may incur in the event of those risks materialising.

- 1.6 The Council's negotiations with the DfE are at a critical stage and require a resolution that provides both parties with sufficient comfort in regard to securing the necessary grant funding from the Secretary of State to facilitate the construction and delivery of the London Dock School.
- 1.7 Unfortunately, the DfE were not party to the original legal negotiations concerning the under-lease for the school, which was secured by the Council as part of a suite of planning obligations linked to the London Dock Development. As a result, the terms of the agreement were not in the standard legal form that the DfE would ordinarily accept in such commercial arrangements.
- 1.8 This factor has created a number of challenges within the negotiations between the parties due to the DfE's position that the adoption of non-standard terms exposes their funding to risk. In summary, the DfE have advised that although it considers such risks to be low it remains concerned about the possibility of the lease being forfeited by the Developer and the DfE losing their financial investment.
- 1.9 Currently, this could come to fruition in the event that the site stands fallow and is not used as a school for a continuous period of 5 years. In these circumstances the landlord would be permitted to terminate the sub-lease by triggering a break clause. Further, comfort is also sought to safeguard funds in the event that there is a change in Government or policy requiring the need for a clawback mechanism in the Works Funding Agreement. This type of clause being standard in such agreements.
- 1.10 Although the DfE acknowledge these risks are low, it is constrained by Government governance arrangements, which means that this project is referable to the Secretary of State's Accounting Officer (akin to the Council's s151 officer) who may reject the funding request to build the school on the grounds that the London Dock School project presents a financial risk to the public purse.
- 1.11 In order to find a solution to this issue, the DfE have requested the Council enters into a Clawback Agreement, which is a standard clause in DfE leases, and agree to the inclusion of a standard DfE clawback clause within the Works Funding Agreement.
- 1.12 The mechanism of the clawback arrangements are explained in section 7 of the report and would be triggered in the event of two specific scenarios arising. In the event that the works funding Agreement is forfeited, due to a change in Government or education policy, the DfE will meet the reasonable costs of the project incurred at the date of notice. Further, the Clawback Agreement is modelled on a sliding scale of the depreciation of the school

asset over a 15 year period as explained in paragraph 6.4.

- 1.13 The terms of the proposed Clawback Agreement provide that the Council would be required to pay back the respective percentage of the grant funding due, should the school stand fallow, following the exhaustion of a re-provision period. This would provide the Council with the opportunity to step into the shoes of the DfE to prevent the trigger of the break clause. It is therefore considered that the terms of both clawback mechanisms provide both parties with a sufficient level of comfort to protect the funding and ensure that the school will be delivered. In practical terms, the financial and reputational risks to the Council are considered to be low.

## **2 ALTERNATIVE OPTIONS**

- 2.1 The main alternative option available is to not agree the proposed clawback mechanisms. The DfE have expressed that refusal of funding is highly likely without the comfort of these arrangements being secured. This approach would therefore jeopardise the DfE's grant funding request being granted and the delivery of the London Dock School, which the Council has a statutory duty to provide.

## **3 DETAILS OF THE REPORT**

- 3.1 The funding and delivery of the London Dock School has been subject to various Cabinet decisions to date. A brief description of each decision is set out below:
- 3.2 In November 2018 Cabinet granted approval for the establishment of a new 6FE secondary school at London Dock. As with any new school, this new provision must be established as a free school. The DfE appointed the Mulberry Schools Trust as its preferred provider. The Trust was therefore invited to enter into a funding agreement with the Secretary of State, enabling the DfE to make a substantial payment of £47m to the Council, for the development of the new school building. The increased capacity provided by the new school at London Dock will ensure that there will be sufficient secondary places.
- 3.3 In July 2019 Cabinet granted authority to negotiate and complete a lease between the Council and St George, the developer of the London Dock site, and a sublease between the Council and Mulberry Trust. Additionally, authority was granted to run a procurement process to negotiate agree and let the construction contract.
- 3.4 In September 2020 Cabinet approved the budget allocation for the Council's appointment of the contractor as part of the capital programme 2020 to 2023, to be funded primarily by DfE grant, subject to the clawback arrangement, and s106 funding of £5.040m.

- 3.5 In the Planning for School Places 2020/21 Annual Update report to Cabinet in November 2020, the progress in relation to the development of a new secondary school at London Dock was reported.
- 3.6 The current lease arrangements require construction to be completed within five years of the lease being signed. If construction has not been completed, the Developer can terminate the lease. This is considered to be very low risk.
- 3.7 In the event that the school is unused for a five-year period, within the first 15 years of the lease, the land returns to the Developer. This is considered a low risk because the Council will have the benefit of the lease enabling the DfE to establish an alternative education provider.
- 3.8 In relation to the funding agreement with the DfE, the Clawback Agreement comes into effect if the land returns to the Developer. Grant funding is re-paid to the DfE in full less depreciation of 1/60 per year. The range of the financial risk is between £35m and £42m.
- 3.9 The DfE reserves the right to cancel the funding, under the terms of the Works funding Agreement, in the event of a change in policy by the Secretary of State or change in government. The DfE will meet the costs of the project up to that point of notice. This is a standard clause in many grant agreements. This is considered to be very low risk.
- 3.10 Whilst the DfE have appointed Mulberry Schools Trust as a provider and are confident in this decision based on their strong performance and proven ability to establish and run excellent education provision, they have the right to install another trust.

### 3.11 **Project Timetable**

Current Project Timetable is:-

4 <sup>th</sup> January 2021	Enter into Pre-Construction Services Agreement (PCSA) with Kier
January – April 2021	On-site works, site investigations, surveys etc.
End of May 2021	Discharge of pre-commencement conditions
28 <sup>th</sup> June 2021	Stage 4 design completed
6 <sup>th</sup> August 2021	Confirmation of price for second stage tender
18 <sup>th</sup> October 2021	Main contract award
26 <sup>th</sup> June 2023	Anticipated completion date

## The Need for a New Secondary School at London Dock

- 3.12 The new school at London Dock is being established to meet the increased demand for secondary school places in Tower Hamlets, as reported to Cabinet on Wednesday 25<sup>th</sup> November 2020.
- 3.13 Below is a chart with the projected pupil numbers alongside the planned capacity for the 2023/24 school year and through to 2030/31. The Council's most recent DfE return on School Capacity (SCAP) showed projections for secondary pupil numbers were 99.1% accurate, which is well within the DfE's tolerances and therefore ensures confidence in the methodology and approach.

Year	Year 7	Capacity
2020/2021	2991	3213
2021/2022	3083	3170
2022/2023	3034	3170
2023/2024	3130	3374
2024/2025	3073	3374
2025/2026	3114	3374
2026/2027	3093	3374
2027/2028	3176	3374
2028/2029	3161	3374
2029/2030	3123	3374
2030/2031	3109	3374

- 3.14 The pupil numbers do not include any potential drift reversal from other boroughs, or any increased interest in Tower Hamlets schools from out of borough residents. The new school at London Dock is likely to attract pupils from neighbouring areas, given its location and proximity to the borough boundaries.
- 3.15 From 2023 the total secondary school place capacity assumes the establishment of London Dock at 6FE (180), the expansion of Canary Wharf College to 6FE (162) and George Green's remaining at its current 7FE size (210). The potential surplus of 6% falls within the range of 5 to 10% recommended by the DfE and is not unreasonable in allowing for the need to ensure that the Local Authority fulfils its statutory duty with operational flexibility, whilst enabling families to have choice. The national standard is for a surplus of between 5 – 10%.
- 3.16 Children living in Wapping do not have easy access to a good local secondary school. They will often travel across the borough or even outside the borough to access such provision. The GLA measures cross border movement between boroughs for pupils moving from primary to secondary school. There

is currently a 9% drift outwards for pupils in the Wapping Area. Admission trends also show that, despite the pupil drift, the demand for secondary school places is increasing in the St Katherine's and Wapping ward. Rising from three forms of entry in 2015 to four forms of entry in 2021. The new school at London Dock will therefore improve access to good local secondary school places for families in the Wapping area and significantly reduce the current level of pupil drift.

- 3.17 At present the Isle of Dogs housing development is not yet resulting in the expected increased demand for secondary places in that part of the borough. The new school at London Dock would provide an interim solution should the developers' pace increase and pupil numbers rise before plans to expand existing secondary school(s) in Isle of Dogs are complete.
- 3.18 The new school at London Dock will enable the Local Authority to meet its sufficiency duty, improve school access, increase choice and diversity for families within Tower Hamlets and the wider region.

**Mulberry Schools Trust and its Selection as the Academy Trust Provider for the London Dock School.**

- 3.19 The new school at London Dock will be run by the Mulberry Schools Trust. Mulberry was chosen as the provider by the Department for Education because of its strong performance and its proven ability to establish and run excellent education provision. This decision is supported by the Local Authority.
- 3.20 This Mulberry Schools Trust was established in 2017 following the academy conversion of Mulberry School for Girls, which has been adjudged as an Outstanding school since 2010 with Ofsted citing its "exceptional leadership" as a particular strength. Since its inception Mulberry has successfully established the Mulberry University Technical College in September 2017 and then the Outstanding Mulberry Academy Shoreditch in September 2018, following the closure of Bethnal Green Academy.
- 3.21 Both Mulberry Girls and Mulberry Academy Shoreditch are popular with parents and are able to fill their Year 7 places. The same is anticipated with its new school London Dock, which the Local Authority expects to be wholly sustainable, in view of the good reputation and performance of the existing Mulberry Schools.
- 3.22 Applications for Year 7 Places at Mulberry Trust Schools are shown below:

**Mulberry School for Girls**

Year	2019	2020	2021
Places Available	240	240	240
Applications	724	647	624

### **Mulberry Academy (Shoreditch)**

Year	2019	2020	2021
Places Available	180	180	180
Applications	303	298	337

- 3.23 Mulberry Schools have an excellent track record for pupil progress, inclusion and attainment and maintain positive links with the Local Authority, Tower Hamlets Education Partnership, and other schools in the borough. The Trust has established a National Teaching School for school leaders, a College of Arts for enrichment, family and community learning provision; and is developing its charitable foundation that has been at the forefront of the community response during the Covid pandemic. The Trust has recently been successful in applying to be the single Teaching School Hub for all of Tower Hamlets and Hackney.
- 3.24 A review of the finances of the Mulberry Schools Trust shows that the Trust held unrestricted balance in their accounts for the Financial (Academic year) 2019/20 of £1.986m, this was £1.991m at the end of the 2018/19 Financial year, showing the Trust overall is operating within their current budget allocation whilst maintaining a prudent level of reserve. The Trust currently operates two secondary schools and a University Technical College (UTC).
- 3.25 Schools are funded through the Education and Skills Funding Agency (ESFA), for both pre and post 16 Education. Funding levels for 2021/22 are expected to increase by 2% per pupil. The two Secondary Schools currently operate within their budget, whilst the UTC is undersubscribed and showed a small deficit in the last two reported periods, the accounts state that this is expected to be recovered as the pupil numbers increase.
- 3.26 If as expected the Tower Hamlets pupil population and the popularity of the Schools within the Trust are maintained, then the Trust should retain the current strong Financial position.

## **4 RISK MANAGEMENT**

The risks are estimated as low for the following reasons:-

- 4.1 The DfE has appointed an 'outstanding' school provider with an excellent track record to establish and manage the school. This means that the likelihood that the building will stop being used as a school in the first 15 years, resulting in the DfE clawing back their grant, is low.
- 4.2 The DfE has the right to install another education provider if the chosen provider should fail and the school building becomes disused. This means that



- the likelihood that the school building will remain empty for a period of 5 years within the first 15 years, resulting in the DfE clawing back their grant, is low.
- 4.3 The Planning for School Places 2020/21 Annual Update report presented to Cabinet in November 2020, confirms that there is a need for additional secondary school places in Wapping, that this need is likely to increase in future years as development increases and that provision of good quality secondary school places in this part of the borough will result in less pupils looking for school places outside the borough. This means that the likelihood that the school would stop operating because of a lack of pupil numbers, resulting in the DfE clawing back their grant, is low.
- 4.4 The lease with the Developer was signed in August 2020. The contractor has been selected on a two-stage tender basis and has been appointed. The detailed design of the school is expected to be completed in July 2021, after which the main contract can be signed and construction on site can begin. Completion is estimated to take place in July 2023, with the school opening in September 2023, only three years after the lease start date. This means that the likelihood that the Developer will terminate the lease because construction is not completed within the specified 5-year period, resulting in the DfE clawing back their grant, is low.
- 4.5 The terms of the lease specify that the building is used as a secondary school. As part of the standard lease terms, the DfE prefer the phrase 'educational facility' to be used to give flexibility of use. As the DfE have appointed an 'outstanding' provider, DfE have the right to install a different provider and pupil projections are strong, the likelihood that the building will stop being used as a school, resulting in the DfE clawing back their grant, is low.
- 4.6 If the DfE were to claw back their grant because the building was unused for a 5-year period in the first 15 years, the payback provision is on a sliding scale, reducing the percentage to be repaid over time. This means that the level of financial risk reduces over time

## **5 EQUALITIES IMPLICATIONS**

- 5.1 When making decisions the Council must act reasonably and rationally. It must take into account all relevant information and disregard all irrelevant information and consult those affected, taking into account their views before final decisions are made. It must also comply with its legal duties, including relating to equalities.
- 5.2 The Equality Act 2010 requires the LA, when exercising its functions, to have due regard to eliminate discrimination, harassment, victimisation; advance equality of opportunity; and to foster good relations between persons who share a relevant protected characteristic and those who do not ("the Public Sector Equality Duty").
- 5.3 An Equalities Assessment has been conducted by the LA and is attached at **Appendix 1**. The assessment has found that there are no obvious equalities issues arising from this proposal, either for staff, parents or children. It does show that there are a number of positive impacts including providing additional

choices for parents with regard to co-education, age, race and students with an impairment.

## **6 OTHER STATUTORY IMPLICATIONS**

### (i) Best value implications

6.1 The report refers to proposals to meet the need for secondary school places in the Wapping area of the borough by delivering a new school and securing funding from central government to contribute towards the overall costs.

### (ii) Risk Management

6.2 The council has a statutory duty to provide sufficient school places. The delivery of a new secondary school at London Dock contributes towards enabling this statutory duty to be met.

### (iii) Safeguarding

6.3 The supply of good quality school places contributes to the safeguarding of children by ensuring access to education.

### (iv) Data Protection / Privacy Impact Assessment

6.4 Tower Hamlets Council will handle information in accordance with the Freedom of Information Act 2000 and the Data Protection Act 2018 and is the data controller for the purposes of the Data Protection Act 2018.

## **7 COMMENTS OF THE CHIEF FINANCE OFFICER**

7.1 The approved Council capital budget for London Dock School assumes a cost of £52m. The funding to be provided by DFE, subject to clawback arrangement, is £47m (capital grant).

7.2 The approved Council capital programme provides for the remaining £5m cost financed through s106 contributions.

7.3 In the event construction is not completed within 5 years, the developer, St George, can terminate the underlease. Potentially the cost of this can be up to a maximum of £47m. This is currently not provided for in the approved Capital Programme.

7.4 In the event that the school is unused for a 5-year period (within the first 15 years – the fallow period) the land returns to St George. The range of financial risk is between £35-42m dependent on when the break clause is activated

within the fallow period. This is currently not provided for in the Capital Programme or the accounts, where treatment will be dependant on the level of risk and corresponding mitigations the council has in place to avoid any break clause.

- 7.5 As referenced in paragraph 1.7, the DFE considers the risk of the break clause being activated as being low. In addition, please see paragraph 1.11, where it states the terms of the Clawback Agreement provide both parties with a sufficient level of comfort that funding is safeguarded and the school will be delivered.
- 7.6 The Council will need to include a contingent liability disclosure note in relation to the clawback provisions within the Statement of Accounts in the financial year the agreement is signed in consultation with the Auditors.

## **8 COMMENTS OF LEGAL SERVICES**

- 8.1 The Mayor in Cabinet will note that the clawback mechanisms are legally binding and have financial implications for the Council as set out in the finance comments above at section 7 of the report.
- 8.2 The Mayor in Cabinet will note from section 7 of the Report that the Council will be exposed to potential significant abortive costs in the event of the circumstances set out arising. This presents a financial and reputational risk for both Parties which will be triggered, at the various juncture described, in the event that either the fallow period is triggered or Works Funding Agreement is forfeited. However, this risk is considered to be low.
- 8.3 At the Cabinet meeting 25 November 2020 a recommendation was approved which provided the Corporate Director Place with delegated authority to enter into the necessary agreements with the DfE to secure substantial funding to fund a large proportion of the construction costs of London Dock School.
- 8.4 The Council ran a competitive exercise to find a construction contractor to deliver the school building. However, to date the construction contract has not been awarded beyond some initial pre-construction works due to protracted discussions with the DfE relating to the terms of the grant.
- 8.5 The current status of the grant arrangement is not without risk to the Council. It is considered that the likelihood of crystallisation of the various risks is low. However, due to the shape of the current arrangement, in the event that the risk does crystallise the impact on the Council's resources could be severe. Therefore, it is legal services advice to the Council that the matter return through this report to update the Mayor in Cabinet for affirmation of the previous decision made in November 2020.

- 8.6 The main risk is that in certain circumstances the DfE will seek to claw back their funding.
- 8.7 In the event that this occurs during the construction period the Council would be obligated to continue to pay the construction contractor under the construction contract. In such circumstances, it would therefore either have to engage in further costs in winding up the construction contract or find alternative funding to continue the construction work. In the event that the claw back occurs post completion, then the Council would have to secure the entirety of the grant funds from an alternative source in order to reimburse the DfE. .

#### Clawback Circumstances.

- 8.8 In the event that there is a change in Government policy during the construction period the DfE reserves the right to cancel the funding in the event of a change in policy by the Secretary State or change in government. In order to operate this right, the DfE would be bound to pay the Council's reasonable costs associated with this cancellation. It is not clear that this would amount to the entirety of the costs associated with the winding up of the construction contract although may be similar. However, the nature of the funding agreement is that the Council's contribution to the overall works cost (£5m) is spent prior to the use of any DfE funds.
- 8.9 Therefore, in the remote event that the DfE operates this right it is considered that the Council's contribution would be lost in its entirety unless funds are found from elsewhere to continue the construction of the school.
- 8.10 Post construction, in the event that the school building is unused for education purposes for a continuous 5 year period, within the first 15 years of the school's life and stands fallow there are two consequences. Firstly, the land (and therefore the building stood on the land) returns to the ownership of the Developer. Secondly, the DfE gain the right to demand the return of the grant funding less 1/60 per year (to represent depreciation) from the date of practical completion to the date the land reverts to the developer.
- 8.11 The Council has negotiated in fairly limited circumstances to take over the building use as temporary accommodation in order to prevent the occurrence of a continuous 5 year fallow period. However, should the DfE then wish to resume use of the building they are allowed so to do, which means options relating to more permanent use of the school building by the Council are closed to the Council. The Council also has the ability to propose alternative uses of the building as appropriate to assist the DfE in continuing the use of the school building (such as arranging an alternative provider in the event the existing provider fails) although the DfE is not bound to take on this suggestion or any other. Notwithstanding the return of the grant funds and the need for the Council to source these funds, it is also the case that the Council would suffer the loss of its own construction cost contribution in the event that the land reverts to the developer.

8.12 One further issue is that the Council does not have the right to nominate the identity of the trust who will run the academy. It is the Council's understanding that the Mulberry Trust have successfully completed the DfE's application process and it is anticipated that they will be the organisation who will run this academy school. However, the DfE reserves the right to install any other trust into the school should it so wish.

8.13 The Council has a duty under s.149 Equality Act 2010 to have due regard to the impact of its decisions upon those individuals who share a particular protected characteristics. Cabinet will note the equalities impacts set out at paragraph 5.3 of the report which advises that an equalities assessment has been undertaken (see appendix 1) and that the Recommendations will have a number of positive benefits upon the identified groups. Further, no negative impacts have been identified.

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## **Linked Reports, Appendices and Background Documents**

### **Linked Report**

- None

### **Appendices**

Appendix 1 – Equalities Impact Assessment

### **Background Documents – Local Authorities (Executive Arrangements)(Access to Information)(England) Regulations 2012**

- None

### **Officer contact details for documents:**

N/A