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To: Deputy Directors-General, Chief Directors, Directors, Deputy Directors: District Corporate Services, Circuit Managers, Heads: Management and Governance and Principals and Chairpersons of governing bodies of public schools

Short summary: *Amendments to the South African Schools Act, thereby granting usage rights to governing bodies in respect of the school's immovable property*

Subject: Amendments to the South African Schools Act which grant usage rights to governing bodies in respect of the school's immovable property

1. This circular has been revised and repeals Circular 0032/2012 in its entirety.
2. The purpose of this circular is to advise all Western Cape Education Department (WCED) schools situated on state land and occupying state buildings about the obligations of governing bodies in respect of section 36 of the South African Schools Act (SASA), 1996 (Act 84 of 1996).
3. The Basic Education Laws Amendment Act, 2011 (Act 15 of 2011), as published in the *Government Gazette* No. 34620 of 19 September 2011, amended, among others, section 36 of SASA by the insertion of the following subsections:
 - “(4) (a) A governing body may, with the approval of the Member of the Executive Council—
 - (i) lease, burden, convert or alter immovable property of the school to provide for school activities or to supplement the school fund of that school; and
 - (ii) allow any person to conduct any business on school property to supplement the school fund.
 - (b) A governing body may not allow any activity on school property that is hazardous to learners or prohibited by this Act.
- (5) For the purposes of subsection (4), 'school property' means immovable property owned by the State, including property contemplated in sections 13 and 55 and

any immovable property bought by a school from the school funds or donations to the school.”

4. The WCED recognises the right of its schools, in accordance with sections 13(2) and 36(1) of SASA, to occupy and use immovable property owned by the state for the benefit of the school for educational purposes, as well as the responsibility of the governing body to take all reasonable measures to supplement the resources supplied by the state in order to improve the quality of education provided by the school to all its learners.
5. However, the WCED wishes to bring the following to the attention of all governing bodies and principals of ordinary and special needs public schools on state property:

5.1 **Authority of the Provincial Minister for Education**

The Provincial Minister for Education is the approving authority for the purposes of the implementation of section 36(4) of SASA. The powers granted to the Provincial Minister by section 36(4) limit the authority of the governing body to lease, burden, convert or alter immovable property of the school.

5.2 **Responsibilities of the governing body**

- 5.2.1 In terms of section 16(2) of SASA, “*a governing body stands in a position out of trust towards the school*”. It is expected of all governing bodies to act in accordance with accepted corporate governance principles in the discharge of their functions. The governing body must conduct due diligence exercises in respect of any understanding that has governance and financial implications for the school.
- 5.2.2 The governing body must ensure that learner members are not bound by any contract a governing body may sign.
- 5.2.3 Section 20(1)(g) of SASA states that the governing body “*must administer and control the school's property, and buildings and grounds occupied by the school, including school hostels, but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy*”.
- 5.2.4 All decisions taken by the governing body must be in the best interest of the learners.

- 5.2.5 When a governing body intends to allow the use of a school for business purposes, it must:
- (a) employ the necessary legal and financial expertise to assist with contractual demands;
 - (b) ensure that the contract that is signed does not disadvantage the school in future (this could involve agreeing on income projections based on sound financial considerations);
 - (c) approach the local municipality or city council to ensure that there is compliance with municipal or council bylaws, especially in relation to rezoning;
 - (d) consider the safety implications for learners and all employees at the school by taking cognisance of section 36(4)(b) of the Act;
 - (e) ensure that the reasons for the application referred to in paragraph 5.4.1 below are clearly stated so that the Provincial Minister is in a position to make an informed decision; and
 - (f) where the governing body applies for alteration or conversion of state property, submit building plans, duly costed, with the application.

5.2.6 The governing body must take all reasonable steps to ensure that the peace of residents in the neighbourhood of the school will be maintained as far as it is reasonably possible.

5.3 **The WCED's position and rezoning of land**

5.3.1 The Department of Transport and Public Works is the custodian of all state property in the province, and the WCED does not have the legal power to depart from existing rezoning arrangements, which are the responsibility of the City Council or other relevant local authority.

5.3.2 It remains the responsibility of the school concerned to ensure that no business or commercial venture is undertaken in contravention of the municipality's zoning regulations and bylaws.

5.3.3 Should the application referred to in paragraph 5.4.1 below be the subject of a rezoning application, the Provincial Minister will also seek the approval of the Provincial Minister of Transport and Public Works in this regard.

5.4 **Application to Provincial Minister in terms of section 36(4)**

5.4.1 A governing body must submit an application, to the Provincial Minister, to lease, burden, convert or alter immovable property of the school, or to allow any person to conduct any business on school property.

5.4.2 The application referred to in paragraph 5.4.1 above must:

- (a) give sufficient reasons for applying so that the Provincial Minister can make an informed decision;

- (b) indicate the extent to which the school stands to benefit from the projected income or profit of the potential lessee;
 - (c) if it concerns the alteration or conversion of any state property, be accompanied by building plans, duly costed;
 - (d) include a copy of the agreement for the proposed lease, burden and commercial/business enterprise, with clear stipulations on, inter alia,
 - (i) all rights and liabilities of the contracting parties;
 - (ii) the purpose and duration of the contract; and
 - (iii) a stipulation that the activity will not be hazardous or disruptive to learners or prohibited by SASA; and
 - (e) include a brief statement on how the intended agreement will secure the school's future demands or sustainability.
6. The Provincial Minister will deal with applications on a case-by-case basis.
7. Take note that construction related applications must include the following:
- (a) Letter of application with a motivation detailing the need for the project
 - (b) Signed minutes of the governing body meeting agreeing to the project
 - (c) Professional, structural drawings including a clear site plan indicating the footprint of all existing structures, roads abutting the school property and the intended position of the proposed structures
 - (d) Project plan with specifics of who will incur the cost and how much is budgeted for the proposed project
 - (e) Memorandum of Agreement if multiple parties will use the facilities.
8. If financing a project with debt, the school is required to apply to the relevant district office for approval to enter into a loan.
9. For permission to lease the premises, a copy of the intended lease to be entered into must be provided. This will also be written up in a submission to the Provincial Minister for approval. Leases should not exceed nine years and 11 months and shorter terms are preferred so as not to burden the property over too long a period.
10. Please note that no construction work may commence on site until the Provincial Minister has signed off on the relevant project and the Department of Transport and Public Works has approved the building plans.
11. Applications in this regard must be sent to the following address:
For attention: Tebogo Diketane
Western Cape Education Department
Private Bag X9114
Cape Town
8000

12. Please bring the content of this circular to the attention of all staff and members of the governing body.

SIGNED: BK SCHREUDER

HEAD: EDUCATION

DATE: 2019-02-20