

**Health, Social Care and Inclusion Scrutiny and Performance Panel
- 22 March 2007**

The Reprovision of Residential and Day Care Services for Older People

Ward(s) All

Portfolios: Health, Social Care & Inclusion

Summary of report:

Following the previous report and presentation to the Scrutiny and Performance Panel on the 25th January 2007, a report was submitted to Cabinet on the 28th February 2007 at which various recommendations were agreed.

The report to Cabinet included the project risk details which were requested at the last Scrutiny and Performance Panel meeting and is now included as Appendix A.

More detailed information of the consultations with Residents, which wasn't available at the last Scrutiny and Performance Panel meeting is included as Appendix B to this report, together with the agreed response to the consultations.

This report therefore;

- Provides the outstanding information in relation to the project risk register and consultations.
- Updates members of the position in relation to TUPE and the targeted financial close for the project of the end of July 2007 and other programme dates, together with developments in relation to Housing Corporation grant funding.
- Invites comments to be forwarded to Cabinet for consideration in relation to the negotiations with Housing 21 and moving towards an affordable scheme that demonstrates value for money on the basis of the preferred TUPE transfer of staff
- Invites comments on any other issues which the Panel considers appropriate

Background papers:

Site plans and proposals from Housing 21
Reports on consultation prepared by Age Concern
Cabinet paper 28/2/07

Reason for Scrutiny:

To update the panel on progress and to provide Members the opportunity to question project team members prior to the proposed submission of a final report to Cabinet on 18th April 2007, and for any recommendations or comments to be considered by Cabinet

**Signed:**

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Acting Executive Director: Kathy McAteer**Date: 14 March 2007****Resource and legal considerations**

The proposals incorporate the required cash efficiency savings for future years and cater for an increase number of service users. The proposed built environment, which includes a number of two bedroom units, also allows for further demographic capacity issues to be addressed through a proposed infrastructure being in place whereby more couples can be accommodated. Within Housing 21's proposals will be Capital investment of £38 million and lifecycle costs of £12.6 million

The consultations which took place must be procedurally fair and have taken into account the needs of each individual resident. It was important that the consultation commenced early when the proposals were at a formative stage. Age concern acted in an advocacy role

Citizen impact

The plans for the reprovision of Older People's services aim to improve the range, quality, and choice of service for Older People in Walsall, enabling people to remain in their own home as an alternative to residential care. Services will be developed within key locality areas, which will provide opportunities for the development of a range of community based services, including extra care housing that will provide realistic alternatives to residential care.

Environmental impact

There will be a positive impact to the environment on six sites through the provision of new schemes and facilities that are energy efficient, compliant with the building regulations, and designed to a high standard.

Consideration needs to be given to the treatment of a number of residual sites which may become surplus during the transitional period.

Performance and risk management issues

A risk assessment has been undertaken and project risk register produced. The aim is to identify and manage risk by taking the necessary management action and where possible reducing the risk profile over time. The negotiation dialogue will

determine the ownership of various items of risk, which will also be considered alongside the public sector comparator, affordability and value for money.

The reprovision of Older People's services aims to impact positively on the following Performance Indicators:

- PAF C72 Admissions of Older People to residential and nursing homes.
- PAF C32 Older People helped to live at home.
- PAF C28 Intensive home care.
- PAF B11 Intensive home care as proportion of home care and residential care.

Equality implications

This reprovision plan will facilitate the development of appropriate services for Older People and will assist equitable access to services based on individual assessed need. Equality and diversity was a key element of the evaluation of the bid.

Consultation

Meetings have continued to take place with elected members through the Redesign Programme Board. Statutory consultations have taken place with residents and their relatives as detailed within section 2.0 of the cabinet report and the background papers. Initial consultation on the planning proposals has taken place with the Development Team.

Contact Officer

Karen Reilly – Interim Head of Adult Services
Tel. 01922 658218
reillyk@walsall.gov.uk

1. UPDATE SINCE LAST MEETING – OUTSTANDING DETAILS

- 1.1 Following the previous Scrutiny and Performance Panel meeting on the 25th January 2007 a report was considered by Cabinet on the 28th February 2007 where Cabinet agreed:
- (1) That the feedback from the statutory consultation be noted and agreement given to the action responses outlined in section 2.0 of the cabinet report.
 - (2) That the proposed sites as set out in the Cabinet report be agreed.
 - (3) That the proposed leasing arrangements be agreed.
 - (4) That approval be given to the continuation of negotiations with Housing 21 as the Council's preferred provider and move towards achieving an affordable scheme that demonstrates value for money based on a preferred TUPE transfer of staff.
 - (5) That the proposed project timescale with an anticipated contract financial close in July 2007 be noted and a further and anticipated final report be received at the meeting on 18 April 2007.
- 1.2 The Cabinet report included details of the project risks and risk register which was requested by the Scrutiny and Performance Panel at the last meeting and is included as Appendix A. The updated risk register is also provided separately to this report.
- 1.3 The detailed response to the Residents' consultation is included as Appendix B As agreed by Cabinet, officers will action the highlighted agreed response

2. TUPE

- 2.1 Attached at Appendix C describes process undertaken to support the recommendation that a TUPE transfer to Housing 21 offer the best and safest protection for staff. TUPE transfer additionally is identified as the most cost effective for the Council.
- 2.2 Cabinet received a letter from the branch secretary of Unison which emphasised Unison's strong preference for a secondment rather than a TUPE transfer. It requested that "the decision relating to the employment status of employees be deferred until such time as further detailed analysis and negotiation on the secondment option have taken place." Cabinet noted that there is further opportunity to consult with Trade Unions before the final decision on TUPE transfer is made.
- 2.3 Officers continue to consult and meet with the Trade Unions through the specially convened JNCC meetings.
- 2.4 Members may recall that all the Trade Unions were invited to input into the evaluation of the TUPE and Secondment options but chose not to complete the risk matrix pro-forma but instead formally wrote to officers of the Council on the 24th November 2006 and clearly indicated that the preference of all three Trade Unions was the secondment option. The legal position is that if a service is transferred, TUPE applies and any decision by the local authority to take an alternative approach could be judged to be an attempt to avoid TUPE

responsibilities. Also TUPE provides greater protection for staff, as outlined further in section 2.13.

- 2.5 The Trade Unions were informed at the JNCC meeting in January of this year that following the outcome of the analysis that from the Council's perspective there was a recommendation in favour of the TUPE option. This approach was recommended and endorsed by all of the Council's professional advisers and this was reported at the last panel Scrutiny and Performance Panel meeting on the 25th January 2007 and to Cabinet on the 28th February 2007.
- 2.6 Members will recall the legal complexities and issues associated with the secondment model, which were highlighted in the previously issued paper which is again included as Appendix C to this report.
- 2.7 It was also reported that the secondment option was likely to result in additional costs. As more detailed discussions and analysis of the Housing 21's proposed charges and costs are considered the difference in costs between TUPE and Secondment can be more accurately ascertained and predicted, however it is still considered that secondment is the more expensive option and that TUPE will offer better value for money.
- 2.8 At the JNCC meeting held earlier this month the Trade Unions expressed their disappointment at the Council seeking to move forward with the project on a TUPE basis. The Trade Unions expressed their support for the project, but on the basis of a secondment model. One Trade Union stated they would resist a TUPE transfer.
- 2.9 The Trade Unions have been requested to submit the reasons for their objections to a TUPE transfer in writing by the 19th March 2007, and have also been invited to suggest alternative proposals.
- 2.10 The Trade Unions raised the fact that Housing 21 have contracts under both the Secondment and TUPE models. However, TUPE regulations were changed last year and local authorities who have undertaken secondment arrangements are now reviewing these in the light of more recent legal advice. Officers visited the Housing 21 scheme in Suffolk where the workforce had been seconded. Suffolk County Council at the time of the visit was seeking to TUPE transfer the seconded staff in view of the changed legal position. The staff that officers spoke to during the visit did not see this as an issue.
- 2.11 As members are aware a robust analysis of whether to proceed with a TUPE or secondment option for the Reprovision project was undertaken using the framework contained within the Council's risk management strategy. The resultant recommendation from officers and the Council's professional advisers was that the TUPE Day 1 transfer option is preferable to the secondment option in minimising risk to the Council due in the main to the vires, legal, and practical implications and difficulties presented by the secondment option.
- 2.12 Officers and the Council's advisers consider that the workforce is best protected through the operation of the TUPE legislation which is in place to specifically protect the workforce and that there are difficulties and dangers in seeking to

adopt the secondment model particularly in the light of recent case law. Members are again referred to Appendix C prepared by the Council's legal advisers.

- 2.13 The existing workforce is further protected through the contractual requirement for Housing 21 to obtain admitted body status into the West Midlands pension fund so that employees existing pension rights remain unaltered and protected.

3 FINANCIAL CLOSE AND PROGRAMME

- 3.1 The Council has recently received the positive news from the Housing Corporation that the 5 Extra Care Housing schemes have now been formally accepted and included within the forward allocation pool of 2008 – 2010 on the basis of meeting national and regional priorities, accordingly provision is being made within the project agreement to accommodate the anticipated £10.2 million grant.
- 3.2 Whilst at this stage the funding is not guaranteed the news is positive given the status of the forward allocation pool. To quote from the Housing Corporation's notification to the Council the forward allocation pool "consists of a list of proposals which are in various stages of development, but anticipated to ultimately deliver housing projects in the region. By accepting projects into the Pool, the Housing Corporation is anticipating that there will be a commitment to funding the project at a future date to an agreed delivery timetable. "
- 3.3 The proposed scheme mix which has been included within the completed application forms for the Housing Corporation grant is for 25% of the units to be available and offered for ownership and 75% to be rented, thereby offering greater choice to Service Users.
- 3.4 Negotiations and dialogue continues to take place with Housing 21 in order to achieve a scheme and contract that is affordable and demonstrates value for money.
- 3.5 It is anticipated that final approval will be sought from Cabinet at its meeting on the 18th April 2007 and that Cabinet will be asked to:
- Approve entering into the contract with Housing 21 on the basis of a TUPE transfer and the project being affordable and demonstrating value for money
 - Authorise Housing 21 to seek admitted body status into the West Midlands pension fund.
 - Authorise officers to seek to complete all negotiations and achieve financial close and contract signature by the end of July 2007.
 - Subject to the above agree to Housing 21 commencing construction works in accordance with their programme with an anticipated start date at the beginning of September 2007
 - Subject to the above agree to the transfer of staff to Housing 21 in accordance with an anticipated programme date of the 1st October 2007.

4. CONCLUSION

Members are invited to make recommendations and comments to Cabinet in relation to aspects of the re-provision project which may include

- comments in relation to the negotiations with Housing 21 and moving towards an affordable scheme that demonstrates value for money on the basis of the preferred TUPE transfer of staff
- comments on any other issues which the Panel consider are appropriate

APPENDIX A

SUMMARY OF MAJOR RISKS, EXTRACT FROM REGISTER REPROVISION PROJECT RESIDENTIAL AND DAY CARE SERVICES

IDENTIFYING THE RISK						MANAGING THE RISK
	Risk		Assessment of Risk			Controls
			I (S) 1-4	L(P) 1-6	Jan 07	Italics bold means action to be completed
	POLITICAL					
1	Change of Government or Government Policy over the life of the partnership.	Potentially different drivers and definition of success	2	5	10	<i>Build flexibility into contract. Monitor government policy for changes.</i>
3	Lack of political will to implement the initiative that is put forward.	Assessments of Council will be poor and poor performance figures. Delivery of care service will not be sustainable.	4	2	8	Ensure full disclosure of benefits and risks of any proposal, allowing informed and fair decision taking.
5	Opposition from staff and trade unions for a variety of reasons	Greater uncertain and consequential increase risk of disruption to the project	3	4	12	Communication and consultation strategy. <i>Dialogue to reduce the number of potential reasons for opposition and to provide clarity. Implementation of communication strategy, press releases</i>
6	Opposition and lack of buy in from other stakeholders to the required changes. Waltham Forest Experience	Less likely or have or to implement a solution	3	4	12	leadership from project board and partnership boards, linked to communication strategy implementation
	ECONOMIC					
7	Contractor prices higher to take account of its risk (the uncertainty of future requirements).	May become more expensive to implement	3	4	12	<i>Structure for sharing risk needs to be clearly defined within contract and the amount identified.</i> ITN matrix has remained constant
8	Shortage of suppliers or lack of competition – Pricing high.	May not be affordable.	3	3	9	<i>Sufficient responses to advert but only one sole bidder. Ensure prices are benchmarked against competitive bids</i>
	SOCIAL					
11	Demographic future projections require a greater number of clients requiring services – likely to double over the length of the contract.	Change in structure of service delivery is required and essential	3	6	18	<i>Must ensure that the contract allows the service to grow for the same finite financial resource. Consider funding strategy and fairer charging policy.</i>
	LEGISLATIVE					
16	The areas covered in the partnership fail to meet the full requirements of best	Inability to demonstrate best value - probable	3	3	9	Review of project against BV criteria required – <i>Seek to involve Audit and Audit Commission to ensure</i>

	value.	lack of performance data. Will reflect within CPA scores				satisfactory compliance.
18	Changes to powers / responsibilities and legislation during the life of the contract.	May require variations and change to the contract.	3	4	12	Build in flexibility to the contract, allow for variations but link to affordability and financial model.
20	TUPE – Timescales to achieve compliance	failure to comply	3	3	9	Timetabled to be addressed by Human Resource Group
22	Failure to identify legislative requirements and powers to act	May act illegally or contract programme delayed at a later date.	4	3	12	More legal input into project. Legal contact officer needs to be identified in house. Allocation of legal resource. Appointment of legal consultants. Attendance of monthly meetings.
	ENVIRONMENTAL					
23	New centre and buildings will have environmental impact.	May have a negative or positive environmental impact.	3	6	18	Partner would need to work closely with Planners and community to ensure most suitable locations are identified. Environmental impact analysis could be undertaken. Planning process and consultation taking place. Grade A environmental performance
	COMPETITIVE					
25	Other local authorities may be considering similar arrangements to Walsall	Less Potential providers to supply or increase in cost.	3	5	15	Need to be aware of current market conditions and actions of other local authorities Housing Associations/Builders. Contacted West Midlands Centre of Procurement Excellence
27	Market conditions at time of tender unfavourable.	Higher than expected price.	3	3	9	<i>Need to be aware of current market conditions at time of pricing. Also the effect of interest rates</i>
	CUSTOMER/CITIZEN					
28	Reputation risk if project aborted or goes wrong.	Perception of the Council will worsen	3	5	15	Communication strategy to include press releases. Consider alternative plan B. Perception will vary according to Stakeholder.
29	Inadequate consultation process involving service users, Voluntary sector and Independent providers.	Failure to comply with legal requirements around consultation and best value	3	3	9	Identify stakeholders and document process.
30	Mechanism for ongoing community consultation. If Partner in place how to adjust service requirements?	Difficulty in implementing requirements and changes	3	4	12	Flexibility required in contract and procurement process to enable service adjustment.
	PROFESSIONAL / MANAGERIAL					

32	The Partnership may service Clients directly – losing the benefits of a more joined up service and strategic approach in accordance with Council's priorities provided.	Less ability for the Council to intervene holistically in a strategic way.	4	4	16	Conditions of contract and links to strategies and required outcomes. Targets and restrictive covenants relating to properties. 100% nomination rights
34	Insufficient time allowed to undertake elements of the project	May be rushed and opportunities missed and risk created for both the Council and Service Provider.	3	4	12	Detailed project plan and timetable. Review and where necessary extend time allowances
38	Insufficient Capacity to deliver project requirements and maintain/manage base services during the process.	Failure of one or both of the two	3	4	12	Programme and budget for resources. Consider the secondment of staff full-time to the project
39	Partnership Initiative not fully considered within other Council Plans and strategies and vice versa	Lack of fit, and conflict	3	3	9	Holistic approach and whole Council involvement. Project Board, Cabinet and scrutiny reporting mechanism.
41	Lack of knowledge or skill base to deal with the investigation/preparation work or implementation.	Project is less effective and greater level of risk	3	3	9	Use of consultancy support and current service providers
42	Risk to current service delivery and Performance Monitoring. Performance Management system which may not be fully developed.	Failure or decline in service and lack of intervention or lack of knowledge that there has been a decline.	3	3	9	Audit of current performance and data and maintain during the project. Use project to get baseline data during the consultation process
	FINANCIAL					
45	Parallel running costs on implementation (and termination).	May not be sufficient monies within the budget and therefore overspend.	3	4	12	Needs to be built into the business case and financial modelling of the proposals. May be necessary to discuss approach with Provider.
46	Council may be exposed to loss made by the Partnership.	May not be sufficient monies within the budget	3	5	15	Contractual arrangements to specify the handling of risks and the allocation of any losses. Consider risks associated with alternative bids
47	Affordability. Likelihood of significant cost changes or changes to pricing structure over the life of the contract.	May become unaffordable during the life of the contract	3	5	15	Consider a phased approach over time in relation to risk. Council takes on less risk over time
48	Remaining "core" Support services loose client base and therefore require reductions / redundancies.	May impact and overlap the Council's transformational plan	3	4	12	Arrange transfer of appropriate staff to Partner and enter into SLA's to provide partner a continued service.
49	Capital investment required to realise partnership objectives over and above what the partner can provide.	May be lack of investment and the inability to provide a suitable built environment.	3	4	12	Clarity of objectives and clear investment programme agreed at outset of partnership. Seek opportunities for additional funding.

50	The contract may be structured in a way that doesn't minimise cost and might maximise tax disadvantages eg VAT, and land transfer /sale.	The Partner incurs additional costs which are reflected in the sums paid out by the Council	4	3	12	Seek and Budget for specialist expert advice from tax consultant
	LEGAL					
51	Complexities around transfer of responsibilities may not be easy/ possible.	May possibly act ultra Vires - if not covered by powers	4	3	12	Incorporation of legal into the project team and attendance at meetings.
53	Insurance arrangements	uncertainty or lack of adequate protection for the council	4	4	16	Clarify in contract
56	Property ownership issues	uncertainty around freehold and leasehold requirements	3	4	12	Clarify in contract
	PARTNERSHIP / CONTRACTUAL					
60	Payment mechanisms undefined.	failure to measure success and reward	3	4	12	Will be defined within the contract – core term
62	No contingency arrangements to cover project - A plan B	No plan B	4	3	12	Have an alternative strategy and fall back position.
64	No clear framework of roles, responsibilities and accountability.	Partnership will lack direction	3	4	12	Clarity on the structure of the Council Core, specialist teams and whether any partnership board or contract monitoring board post contract
	OTHER					
70	Contract risk if the Partnership and contract fails	Failure and dispute	4	3	12	Develop partnership approach with incentives to succeed
71	Site contamination and or other site information	Delays and possible increase costs/and or change of plans	3	3	9	Consider having site surveys discuss with Providers. Now actioned
73	Title restrictions / problems	Frustration / delay and need to redesign with increased costs	3	4	12	Investigate and review title
74	Obtaining planning permission	Frustration / delay and need to redesign with increased costs	4	3	12	Consult and liaise with Planning Officers
75	Judicial Review	Frustration / delay and need to redesign with increased costs	4	3	12	Develop and implement consultation plan with legal advisers
	OTHER - Emergent risks					
77	Pensions	As per ITN.	3	4	12	Continue to seek specialist advice
78	Indexation	Rising Inflation may result in increases in costs	3	4	12	Consider hedging arrangements, PwC to advise on H21 proposals. Finance work stream to consider risk

79	Insurance	Inadequate cover or risk profile and exposure inappropriate	3	4	12	Appoint specialist adviser, inform and consider / follow advice and requirements.
80	Losses – as discussed yesterday, “and losses” added into clauses as example of project agreement / legal and financial risk	May seek to be affordable during the life of the contract. Risk may be too high	4	3	12	Seek to ensure that risk profile is not at odds with the general market position. Thus reducing the likelihood of change. Use PwC as regulator. Summary and identification of risks to cabinet based on final negotiated project agreement
81	SPV and Charitable status Change in tax laws	Structure which Council originally wanted and saving in Corporation tax and scheme affordable	3	4	12	Consider trends scenarios and options. PwC/Eversheds to advice whether low or very low, and all alternative. Negotiate acceptable position
82	Benefits income	Reduction in income	3	3	9	Consider trends and scenarios
83	Impact on retained services – payroll, finance, personnel etc (could be a positive impact)		2	4	8	Consider fully the different effects of a TUPE and secondment model. Consider phased reduction of corporate support.
84	Retained services located in homes– cost of moving, relocating etc	Additional costs over and above that budgeted	2	4	8	Develop affordability model
85	Void Management issues		3	4	12	Develop and Define protocol
86	Allocations Panel issue		3	4	12	Develop and Define protocol
87	Affordability	Scheme too expensive and doesn't proceed or scheme proceeds and risks are too high	4	4	16	Manage risk and consider the right risk profile, have shopping list of potential savings. Seek additional funding opportunities. Negotiate acceptable and appropriate risk profile with H21
88	Registration standard	Failure to Register and or failure to de-register	4	4	16	Continue Dialogue with CSCI - was to meet again in November 2006. Clarify responsibilities and meeting
89	Failure to understand risks and pick up full implications and costs of the contract prior to entering into contract.	Additional costs emerge during the contract period. Changes may occur during the contract period that increases the Council's costs.	3	4	12	Modelling of all the costs and consideration of the risks and various scenarios. E.g protected salaries, additional care hours, redeployment costs etc. Prepare project/contract indicative risk matrix once decision on TUPE and Secondment is made.

APPENDIX B

MAIN THEMES HIGHLIGHTED THROUGH CONSULTATION

The main themes highlighted through the consultations are listed below together with the Council's proposed response.

- **Quality of care**

- Concern centred regarding staffing numbers and who would deliver the care.

Response

Staff will be transferring and continue to provide high level of care and a high number of care hours.

Effective care planning will be ensured throughout the transition period and beyond.

- **Staff**

- Very high regard for current LA staff. Main concerns related to maintaining teams who would move with residents and continue the care relationship.

Response

The Council has been explicit in explaining that the core of staff teams will move with the core of residents in their care. Some staff though may seek new opportunities such as the new dementia care unit.

The Council should continue to communicate and re-assure Service Users.

- **Cost**

- Concern regarding limited information relating to rents, service charges, meals etc;
- Approach has high reliance on attracting welfare benefits which leaves self-funding residents in a precarious position.

Response

The Council will provide the Service Users with clear information relating to their rents and charges.

The Council will take steps to ensure that self funders and others are not financially disadvantaged. It is however essential service users claim their full entitlement to benefit and that the Council supports them in this action

- **Furnishings and equipment**

- Concern as flats would need to be furnished. Residents had already given up their furniture and possessions and would now have to start again. Residents desire adequate financial assistance for this purpose.
- Welfare benefits grants could be sourced but are unlikely to cover the full cost required.

Response

The Council will support Service Users to claim grant entitlement and the Council will make provision to meet any shortfall.

- **Access & Locality**

- Generally residents wanted to remain in their current localities and relatives wanted to ensure they could access new sites, public transport etc;

Response

Whilst it will not be possible to ensure all residents remain in their current locality, the Council will seek to offer as much choice as possible, in consultation with individual residents, giving the widest possible options.

All new sites are on major routes and served by public transport.

- **Model Suitability for frail elderly**

- Concern centred around model of independent living as many residents were significantly dependent on care 24 hours a day, 7 days a week.

Response

The Extra Care Housing model provides care 24 hours a day, 7 days a week similar to the current model of care.

- **Number of Moves**

- Concern that moves would be detrimental to the health and wellbeing of residents, multiple moves would be even worse.

Response

Minimize the moves residents would make.

Suspend admissions to homes at the appropriate time to minimise the impact on numbers of residents where two moves are likely and to provide additional care and support to existing residents during the transitional period.

Ensure timely planning and on-going preparation and consultation with individual residents and where required consult with residents GP.

Ensure effective and consistent care planning.

- **Choice**

- Concern that choice could be limited or that the opportunity for residents to exercise choice may not be recognised.

Response

The Council will seek to offer as much choice as possible, in consultation with individual residents and their relatives giving the widest possible options.

- **Fear of isolation**

- Concern that the model, "One's own front door", was more individualised and less communal. Linked to the misconception of reduced staffing, residents and relatives felt the risk of isolation was high.

Response

Staff will be transferring and continue to provide high level care and a high number of care hours.

Ample communal space will be allowed for within the designs that will reduce any risk of isolation.

Direct feedback at each event indicated that residents and relatives felt that the overall plan and the resulting range of services was good for Walsall in that it improved on what was currently provide by offering more choice and an improved standard of accommodation.

It would be safe to say however that in general the current cohort of residents would rather not see change and upheaval affect them. There are exceptions of course but on the whole the residents would prefer for there to be no change.

APPENDIX C

REPROVISION OF RESIDENTIAL DAY CARE

LEGAL ANALYSIS OF TUPE AND SECONDMENT OPTIONS

This annexe sets out the legal advice on the TUPE and Secondment options and also incorporates the discussions that took place at a "TUPE/Secondment Workshop" on 27 November 2006.

1. SUMMARY

The general consensus reached at the Workshop was that the TUPE option is preferable to the Secondment option for moving staff to Housing 21 (assuming that their appointment as preferred bidder is confirmed) to deliver the Reprovision of Residential Day Care Project ("the Project"). In summary, it was felt that the vires, legal, and practical implications and difficulties presented by the Secondment option was a greater burden than the pensions difficulties presented under the TUPE option.

TUPE itself carries risks (as identified below) but from a purely employment perspective, it is a "cleaner" option than Secondment as the Secondment option requires ongoing management on a day to day basis by the Council. This carries resource and cost implications in addition to the vires and legal issues.

It should also be noted that the discussions took place without the benefit of knowing precisely what structure will be required by Housing 21 going forward. My understanding is that the up to date TUPE lists have now been finalised by the Council and the Council, in conjunction with Housing 21, will be working to ascertain the differences and similarities between the TUPE list and the requirements of Housing 21 in terms of employees going forward. My further understanding is that the Council's expectation is that, assuming there is to be a TUPE transfer and that the TUPE transfer is to take place on Day 1, there will not be any significant changes to the structure or the working arrangements immediately post transfer. The new service will instead evolve over time.

As we are aware, Housing 21 expressed a strong preference for a Secondment arrangement at our meeting in early October 2006 and it may be necessary to revisit the position following further discussions with Housing 21. I should also point out that I am not a pensions specialist. I appreciate that the Council does have its own pensions specialists but should the Council require any advice from us on pensions issues then I will be more than happy to involve one of my pensions colleagues.

2. TUPE

The purpose of this letter is not to provide any detailed advice on the application and implications of TUPE but in summary, and following the implementation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (which entirely replace the former 1981 Regulations) for there to be a transfer under TUPE, there must be:-

- a business or "undertaking" capable of transfer which does in fact transfer from one person to another, retaining its identity; or
- a change in contractor where services carried out by one service provider cease and are carried out instead by another.

We briefly tested the issue as to whether or not TUPE is likely to apply to this Project. Again, the overwhelming consensus, based on my advice, is that there is little or no merit in pursuing any argument that TUPE will not apply. The factual position is that the service will initially be run almost exactly on the same basis by Housing 21 as it is currently being run by the Council. Clearly, over the life of the contract, the service will evolve but issues around the application of TUPE at the expiry of the contract will be dependent on the factual position at that time.

We also briefly explored the possibility of a series of TUPE transfers of part of the service. It is entirely possible to have TUPE transfers of part. However, the view here is that this is one service and it will be very difficult if not impossible to break down the service into a number of discreet economic entities that will facilitate a series of TUPE transfers. If it becomes necessary at a later date, we can explore this in more detail.

I advised that, following the House of Lords decision in *Celtec v Astley* the notion that there could be a "phased" TUPE transfer over a period of time is now highly questionable in law. The House of Lords in this case decided that a TUPE transfer has to occur at a single point in time (i.e. on a given date) as opposed to over a period of time. I would therefore strongly advise the Council against considering a phased TUPE transfer but if necessary this can again be reviewed at a future date.

It is worth noting that under the new TUPE Regulations, pre-existing case law has been confirmed in that "purely administrative" transfers within the public sector are not covered by TUPE. My view is that this Project is an outsourcing and clearly not a purely administrative transfer within the public sector.

Further, and in any event the Cabinet Office Statement Of Practice, January 2000 ("the Statement"), provides that within the public sector, even though TUPE may not strictly apply, the matter should be dealt with as if it does. Specific protection is also applied to pension rights. The Statement has no force of law but is followed in practice.

Further, in local government, the then ODPM Best Value Circular, March 2003 (containing the Code of Practice on Workforce Matters) provides protection for transferring staff (including regarding pensions) and also seeks to preclude a "two tier workforce" i.e. new starters being recruited on less favourable terms than their colleagues who were formerly employed by the local authority. Sections 101 and 102 of the Local Government Act 2003 give the Government the power to make directions as to local authority staff transfers.

My understanding is that the Council has every intention to abide by the principles of the Code of Practice on Workforce Matters. At a later date, it will be necessary to determine precisely how the Council interprets the Code of Practice on Workforce Matters and to ensure that appropriate provisions are included in the contract documentation to ensure that Housing 21 abides by the provisions of the Code of Practice.

The effect of TUPE in broad terms is that the contract of employment of any employee who transfers is deemed to operate after the transfer as if it always existed between the employee and the transferee. Continuity of employment is also preserved. With regard to Union recognition, any voluntary recognition of an independent Trade Union by the Council will transfer to Housing 21 if the undertaking or part undertaking transferred maintains its identity distinct from the remainder of the Housing 21 undertaking. Further, any collective agreements in which the Council is a party to in relation to the affected employees will, in its application to transferred employees, also transfer to and must therefore be honoured by Housing 21 unless and until that agreement is lawfully ended. If the terms of the collective agreement have been incorporated into an employee's contract of employment, those terms will survive the termination of the collective agreement unless and until the transferee validly varies the terms of the employee's contract.

Liabilities arising in connection with the employment relationship, for example, arrears of wages or a negligence claim will transfer to Housing 21 and statutory rights and liabilities will also transfer such as breaches of the employees' rights under employment rights,

discrimination, personal injury and other legislation. This will usually be the subject of warranties and indemnities in the contract documentation.

TUPE is effectively a snapshot in time and preserves terms and conditions of employment as at the date of transfer. There is nothing within TUPE itself which provides any guarantee with regard to changes to terms and conditions of dismissals going forward. There are inbuilt restrictions in TUPE as to when and how terms and conditions can be changed and how dismissals can be effected. Dismissals or changes which are TUPE related will be void and/or automatically unfair dismissals unless an economic, technical, or organisational reason entailing changes in the workforce can be established. Again, I will be more than happy to provide further advice on this going forward as necessary.

Note that there are also specific information and consultation obligations under TUPE which are applicable to both the Council and Housing 21. My understanding is that this process has already been commenced but I will be more than happy to input into this process as necessary.

3. SECONDMENT

The other main alternative to a TUPE transfer is a Secondment arrangement. There are a number of different types of "Secondment" and it is also possible to have more informal arrangements whereby employees from both Housing 21 and the Council continue as employees of their respective employers (Housing 21 or the Council as the case may be) but work side by side on an "informal" basis. It is important to note that it is a fundamental principle of employment law as it stands (albeit that there are some movements away from this) that there can only be one employer per employee over one contract of employment. It is possible to have dual contracts of employment where the employee genuinely undertakes part of his or her time for one employer and part for another employer. This is effectively two contracts of employment with two different employers sitting side by side. However, it is not at present possible to have two organisations undertaking the role of an employer over the same contract of employment.

Traditionally, Secondments have been used by organisations to "loan" individuals to another employer for a relatively short period of time. The Council will undoubtedly be seconding employees internally and externally on a daily basis and there will be a fairly standard Council Secondment Agreement to regulate this arrangement.

Secondment, as identified above, does carry with it vices; legal and practical implications. Should the Council be minded to pursue a Secondment arrangement, my advice is that this should closely resemble the Retention Of Employment Model ("ROE Model") which has been pioneered quite successfully in the NHS.

Until the Local Government Act 2000 was introduced there were constraints on the legality of Secondments from public to private sector. However, Section 2 of that Act has made the position more straightforward by introducing a wide ranging power of wellbeing which now makes Secondment more feasible. However, assuming that the 2000 Act provides the power, or vices, to undertake Secondments, the Council will still need to be satisfied that it is exercising its power for proper public law reasons (i.e. correct motive and is acting reasonably). It will also need to satisfy itself that this method promotes wellbeing and delivers best value in the context of the Council's community strategy.

The next critical issue is whether Secondment works in law where part of the Council's undertaking is being outsourced to a private contractor. In many cases, including this Project, there is the significant risk that the outsourcing arrangement will constitute a relevant transfer for the purposes of TUPE. In this scenario, the contracts of employment of employees wholly or mainly assigned to the outsourced service would transfer to the private transfer by operation of law regardless of the wishes of the parties. This is subject to the right of employees to object to a TUPE transfer. However, by objecting to a TUPE transfer, ordinarily an employee loses all his or her employment rights unless the employee can

demonstrate that the reason for objecting is that they would suffer a significant detriment by virtue of the transfer.

It is because of the automatic transfer principle that the ROE Model requires staff who wish to be retained in the NHS to make a formal objection to the transfer of their contracts of employment pursuant to TUPE. It is hoped that the effect of this is to prevent the automatic transfer occurring by essentially terminating the existing contract of employment with, simultaneously, the member of staff being re-employed by the NHS under a new contract which makes arrangements for the employee to be seconded to the contractor.

The ROE Model provides for staff who work in defined soft facilities management services at non-managerial level to have the option to remain as employees of the NHS and be seconded to the private sector. The ROE Model does not apply to management grade and nor does it apply to facilities management services. This may not be appropriate to this Project. If management staff were to be seconded then this could increase the risk of Housing 21 becoming the employer in law.

It is hoped that the Tribunals and Courts will not see reason to interfere with the ROE Model arrangements as they are intended to benefit rather than prejudice the staff who are retained by the NHS. However, it is recognised that there is a risk that the objection mechanism might be seen by a Tribunal or Court as a device to get around TUPE in which case these arrangements could be declared void as being in breach of TUPE. TUPE provides that any attempts to contract out of TUPE is void.

The decision in the *Celtec v Astley* case above has cast further doubt on the legality of the objection method as a basis for the ROE. This case suggests that an objection to transfer to the private provider's employment, while in practice agreeing to work for the private provider on a secondment basis, will in fact fall foul of the automatic transfer principles under the Acquired Rights Directive and TUPE (TUPE derives from the European Acquired Rights Directive). However, even if this is the case, there is an argument that, under Regulation 4(1) of TUPE 2006, TUPE only applies to transfer employees if their employment contracts "would otherwise be terminated by the transfer". A strict reading of this wording would suggest that a Secondment arrangement should be valid, on the basis that employment does not need to be terminated by the Council; or rather the Council can continue to employ the employees while seconding them to the private provider (Housing 21). On the face of it, this analysis appears to cut across the automatic transfer principles but if in practice employees have given free consent to the Secondment arrangements then arguably this should not defeat the purpose of TUPE, namely to protect employees. Further, and in any event, it is unlikely in such situations that any employee or indeed the Trade Unions would challenge the position.

As discussed in the Workshop however, it should be noted that even if a Secondment option is pursued, employees could still maintain that they have a right to transfer under TUPE. In practice, this is usually not an issue as the employees will generally prefer to be retained by the Council. I am however mindful that Housing 21 is a "quasi" public sector organisation.

Assuming that the vires and legal issues can be defended, there are still practical implications associated with the Secondment option. In summary, these include responsibility for making sufficient staff available to perform the services; responsibility for day to day management; responsibility for dealing with disciplinary and grievance issues; responsibility for recruitment; and issues around risk, both in terms of employment law liabilities and also liabilities to third parties.

The ROE Model typically affects terms and conditions in the following way: -

- NHS Trusts determine the terms and conditions of seconded employees.
- NHS Trusts' procedures for disciplining employees are followed and implemented by the private sector partner.

- NHS Trusts retain the right to terminate the seconded employees' contract of employment.
- The private sector partner can in certain circumstances terminate a particular employee's Secondment but this will not necessarily result in the dismissal of the seconded employee.
- The private sector pay seconded employees as agents for the NHS Trust.
- The private sector partner is responsible for recruitment of new staff to work in the services as the agents for the NHS Trust on the basis that the private sector partner must comply with the Trust's recruitment policies.

None of these issues are insurmountable but they do require careful consideration and appropriate drafting to reflect the position in the contract documentation. There is a balance to be struck between providing the private contractor with sufficient autonomy to properly manage the employees but at the same time for the council to retain sufficient employment responsibilities so as to reduce the risk of employees being deemed to be employees of Housing 21. There is a huge amount of case law, particularly in the field of agency employees, as to who is the correct employer.

There are also potential issues with regard to ensuring compliance with the Statutory Dispute Resolution Procedures both in terms of dismissal and grievance. With regard to discipline, the better view is that as long as the ultimate decision on dismissal is by the original employer (the Council in this case), then, all things being equal, a Tribunal should not find that procedures have been breached in this respect. With regard to grievances, employees might be best advised to raise grievances with both the Council and Housing 21 and the Council would be advised to retain a minimal level of involvement in all workplace grievances from seconded staff particularly where there is a possibility that the Statutory Grievance Procedure could apply.

The scope of third party liability is beyond my expertise but clearly appropriate insurance provisions will need to be in place. With regard to recruitment and promotions generally and agreement would be necessary as to how this is to take place in practice. The ROE Model does potentially effect the career development prospects of the seconded employee. As management staff are not subject to the ROE Model, the only way that top services non-management employees can progress to a management position is by ending their NHS employment and taking up employment with a private sector partner. There are also issues around potential industrial action depending on exactly who the dispute is with.

There are practical issues as well in terms of managing the Secondment at the outset and in particular that the sequence of objecting and signing contracts of employment is right so as to minimise any risk of liability. This is something that I would be happy to advise further on.

Finally, consideration will have to be given as to what is going to happen at the expiry of the current contract. The position will be governed by the factual position as at that time, in particular whether TUPE (or whatever legislation may be in place by then) applies. There is clearly a risk that the Secondment will terminate at that stage and the Council will be left with having to re-house seconded staff. Due to the nature and length of this particular Project, the likelihood is that most employees will have left by that stage but there may be employees who have stepped into the shoes of seconded local authority employees.

Huw Rolant Jones

**EVERSHEDS LLP
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