

Cabinet – 18 April 2007

The reprovision of residential and day care services for older people

Portfolio: Councilor Alan Paul, Social Care & Inclusion

Service Area: Older People Services

Wards: All

Key decision: Yes

Forward Plan: Yes

Summary of report

The report builds on previous reports to Cabinet and the Social Care and Inclusion Scrutiny and Performance Panel on the 18 October 2006, 25 January 2007, 28 February 2007 and 22 March 2007.

The current position is considered under the headings of:

- Background Information
- Contract with Housing 21
- The Sites
- Value for Money, Commercial Considerations and risks
- TUPE
- Project Programme

The report concludes with a number of recommendations.

Recommendations

It is recommended that Cabinet:

- 1) Agrees to the Acting Executive Director for Social Care and Inclusion writing to Housing 21 to inform them of the Council's decision, once the Acting Executive Director for Social Care and Inclusion and the Executive Director Corporate Services consider that the proposals put forward by Housing 21 are affordable and demonstrate value for money.
- 2) Authorises Officers to continue negotiations with Housing 21 and agree the terms of the documents (as defined below).
- 3) Authorises Housing 21 to seek admitted body status into the West Midlands pension fund.

- 4) Subject to the Acting Executive Director for Social Care and Inclusion and the Executive Director Corporate Services considering that the project is affordable and demonstrates value for money, approve the authority's authorised signatory to sign, seal, execute, deliver and/or initial (as required) the documents (as defined below).
- 5) Approves and authorises the signature, sealing, execution, delivery, performance and/or initialling of the following documents (together the "documents") signature of which is required in order to reach financial close.
 - 5.1 the Project Agreement;
 - 5.2 the Senior Lender Direct Agreement;
 - 5.3 the Collateral Warranties;
 - 5.4 any Independent Certifier's Deed of Appointment
 - 5.5 the Leases; and
 - 5.6 any other consents, waivers, undertakings, notices, letters, certificates and documents to be signed and/or initialled by the authority, whether pursuant to the terms of the Project Agreement or otherwise (and including, without limitation, any documents referred to in the Project Agreement as 'Agreed Form' documents).
- 6) Authorise the issues of certificates under the Local Government (Contracts) Act 1997 to the Contractor and the Senior Lender in respect of the Project Agreement and the Senior Lender Direct Agreement.
- 7) Subject to the documents having been executed pursuant to recommendations 4 and 5 above, authorises Housing 21 to commence construction works in accordance with the programme set out in the Project Agreement (with an anticipated start date at the beginning of September 2007).
- 8) Subject to the documents having been executed pursuant to recommendations 4 and 5 above, agrees to the TUPE transfer of staff to Housing 21 in accordance with the terms of the Project Agreement (an anticipated programme date of the 1 October 2007).
- 9) Agrees that Officers shall continue to report on progress to the monthly Redesign Programme Board meetings.
- 10) Delegates decision making powers in relation to the recommendations outlined in paragraphs 1-9 above and the project generally to the Acting Executive Director for Social Care and Inclusion and the Executive Director Corporate Services

Resource and legal considerations

The proposals cater for an increased 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.

Citizen impact

The plans for the re-provision 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.

Community safety

Community Safety will be taken into account as part of the design of the new facilities.

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 re-provision of Older People's services is a key element in the drive to improve the performance rating of adult social care in Walsall and 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 re-provision 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

Statutory consultations have taken place with residents and their relatives as previously reported to Cabinet. A number of meetings have taken place with Ward Members. Initial consultation on the planning proposals has taken place with the Development Team. Meetings continue to take place on a monthly basis with the Redesign Programme Board.

Vision 2008

- The re-provision of the Council's residential and day services has synergy with priority 5 "to make Walsall a healthy and caring place" The re-provision of these key services will enhance opportunities to remain living at home and provide alternatives to conventional residential care.
- The proposals will also contribute to meeting priority 9 "listen to what local people want". Intrinsic to the re-provision plan will a process of consultation with all key stakeholder groups, including Older People both as service users and as citizens.
- The proposals will also contribute to priority 10 "make Walsall an excellent local authority" because Department of Health expectations, expressed through the Commission for Social Care Inspection's annual performance assessment of adult social care, are that an excellent service makes the minimum possible use of long term residential and nursing care for older people, maintaining people in their own homes or other homely settings. Progress on the re-provision programme is a key element in the drive to improve the performance rating of adult social care in Walsall.

Background papers

Site plans and proposal
Report to Scrutiny and Performance Panel
Risk Register

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Signed



Kathy McAteer
Acting Executive Director

Date: 2 April 2007

Signed



Councilor Alan Paul
Portfolio Holder

Date 3 April 2007

1.0 Background Information

The previous report to Cabinet on the 28 February 2007 considered

- The Outcome of User Consultations
- Consultations with Ward Members
- Site Selection and Programme for Site Development
- TUPE or Secondment Option
- Affordability
- Value for Money, Commercial Considerations and risks
- Project Timescale including Contract Approval Date

A letter was received from Unison requesting that the decision be deferred and it was pointed out that the decision would not be made until the April Cabinet meeting.

It was minuted and resolved that:

- 1) Feedback from the statutory consultation be noted and agreement given to the action the responses outlined in section 2.0 of the report.
- 2) The proposed sites as set out in the report be agreed.
- 3) The proposed leasing arrangements be agreed
- 4) 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
- 5) 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 its meeting on the 18 April 2007.

A report was presented to Scrutiny and Performance Panel on the 22 March 2007 which effectively concluded the Gateway Review stage 3 which:

- Provided the outstanding information in relation to the project risk register and consultations.
- Updated 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.
- Invited 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
- Invited comments on any other issues which the Panel considered appropriate

The report concluded by stating that it was anticipated that final approval would be sought from Cabinet at its meeting on the 18 April 2007 and that Cabinet would 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 1 October 2007.

2.0 Contract with Housing 21

At the previous Cabinet report it was identified that an affordability model had been developed and that this included supporting people funding in view of the housing support services being offered by Housing 21.

It was also stated that any contract figure and unitary charge would need to be contained within the existing budget allocation and that Officers and advisers would therefore:

- Continue to determine the input costs and challenge the assumptions
- Consider the achievable care income and review the impact of various policies including the current Fairer Charging policy.
- Continue to explore with Housing 21 and the Housing Corporation funding and grant opportunities.

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.

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.

Members will recall that at the last Cabinet meeting it was reported that a letter had been received from Housing 21 requesting that the Council underwrite Housing 21's additional costs in relation to progressing the planning applications in the event that the Council withdrew because it was unable to deliver politically. Officers responded that such an undertaking could not be given, and stated that they were seeking to work towards the earliest possible commitment to contract date from the Council.

In order that Officers may progress the details and to further firm up of the contract figure and unitary charge Cabinet are asked to approve entering into a contract with Housing 21 subject to the final figure being affordable and representing Value for money and to delegate decision making powers to the Acting Executive Director for Social Care and Inclusion and the Executive Director Corporate Services. It is proposed that the Acting Executive Director for Social Care and Inclusion writes to Housing 21 to inform them of the Council's decision, once the Acting Executive Director for Social Care and Inclusion and the Executive Director Corporate Services consider that the Housing 21 proposals are affordable and demonstrate value for money.

Such action will enable Housing 21 to commit additional resources and to submit planning applications in relation to the agreed sites and for outstanding surveys to be undertaken and thereby reduce the planning applications and construction risks.

Officers will continue to report progress to the Redesign Programme Board at the monthly meetings.

3.0 The Sites

Cabinet agreed the sites to be developed at its previous meeting together with the proposed leasing arrangements.

As previously reported the site proposed for development at Brownhills is currently in the ownership of Whg. Discussions have taken place and the acquisition of this site has now been agreed in principle with Whg through a land swap of equivalent value.

As previously reported the Northgate site is being held and considered as a reserve site in the event that the Baytree site proves too difficult to develop due to site constraints and value for money issues. This continues to be explored with the Council's development team who are considering the challenges and sensitivities around the density of the development, mature trees that need to be preserved and the site's location within a conservation area.

It had always been assumed that the land for the reprovion project would be made available at no charge and this is reflected within the affordability model and budget. Accordingly Cabinet is asked to agree to include within the budget for funding the leasing costs associated with the Goscote site which is likely to be in the order of £80,000 a year.

By developing on Goscote an additional residual site will be realised which is likely to realise additional monies to the Council.

As previously reported to Cabinet a number of residual sites are likely to be declared surplus by Social Care and Inclusion in a phased manner over a three year transitional period. For these residual surplus sites it is proposed that a residual sites strategy is developed and led by the Corporate Property Group and options generated and reported back to Cabinet for consideration outside of the reprovion project.

4.0 Value for Money, Commercial Considerations and risks

PricewaterhouseCoopers ("PwC"), the Council's financial advisers continue to assist the council in reviewing issues around affordability and value for money.

At the previously Cabinet meeting, whilst a brief summary of the main risks, as an extract from the risk register was included within the Appendices it was reported that further details relating to the project agreement issues, commercial considerations and risks would be reported to this Cabinet meeting.

The basic position in relation to the allocation of risk is not dissimilar to that originally included within Appendix 7 of the invitation to negotiate document.

The risks and whether they are likely to be an authority or contractor risk is outlined within Appendix A (further work required to refine and agree). There will be a general obligation on both the Council and Housing 21 under the contract to mitigate costs.

5.0 TUPE

Officers continue to consult and meet with the Trade Unions through the specially convened JNCC meetings.

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 24 November 2006 and clearly indicated that the preference of all three Trade Unions was the secondment option.

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 to the Scrutiny and Performance Panel meetings on the 25 January 2007 and 22 March 2007 and to Cabinet on the 28 February 2007.

Members will recall the legal complexities and issues associated with the secondment model, which were highlighted in the previously issued paper.

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.

At the JNCC meeting held last 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.

The Trade Unions were requested to submit the reasons for their objections to a TUPE transfer in writing by the 19 March 2007, and have also been invited to suggest alternative proposals. Responses have now been received which reiterate their support for secondment. Unison provided a paper entitled Employment Risk Matrix written by the European Services Strategy Unit. Whilst the paper presented from a public sector employee perspective favoured the secondment model, it is a standard paper and does not reflect the additional protections which the Council is offering employees in relation to their pensions as a requirement under the contract. Nor does the paper address the vires, legal, and practical implications which are highlighted within Appendix B.

Housing 21 have contracts under both the Secondment and TUPE models. 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. The staff that officers spoke to during the visit did not see this as an issue.

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.

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 B prepared by the Council's legal advisers.

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.

Accordingly Cabinet is asked to approve entering into the contract with Housing 21 on the basis of a TUPE transfer and to authorise Housing 21 to seek admitted body status into the West Midlands pension fund.

6.0 Project Programme

The proposed timetable is to seek to complete all negotiations and achieve financial close and contract signature by the end of July 2007 and to then commence construction works in accordance with Housing 21's programme with an anticipated start date for the construction works of the beginning of September 2007.

Subject to the above staff would transfer to Housing 21 on the 1 October 2007. A key issue in relation to any TUPE transfer relates to pensions. Details were forwarded to the West Midlands Pension Fund actuaries for a risk and contribution rate assessment a number of months ago, their response and details have now been received.

Achieving a likely contract financial close date of the end of July is dependent on Housing 21 applying for initially an interim decision relating to their admittance into the pension scheme and then the more detailed completion of the legal process. This is likely to take a minimum of 3 months. It is therefore important that the application proceeds in a timely manner.

7.0 Recommendations

It is recommended that Cabinet:

- 1) Agrees to the Acting Executive Director for Social Care and Inclusion writing to Housing 21 to inform them of the Council's decision, once the Acting Executive Director for Social Care and Inclusion and the Executive Director Corporate Services consider that the proposals put forward by Housing 21 are affordable and demonstrate value for money.
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Appendix A

| | Key risk | Issues | Authority Risk | Contractor Risk | Shared Risk | Notes |
|----|---|--|--|---|-------------|--|
| 1. | Planning | <ul style="list-style-type: none"> - planning permission not granted - delay in obtaining planning permission - receipt of unsatisfactory planning permission - judicial review risk | <ul style="list-style-type: none"> ✓ ✓ ✓ ✓ | | | Variation Variation 'Onerous conditions' to be defined |
| 2. | Title Due Diligence and Site Conditions | <ul style="list-style-type: none"> - inability of WMBC to warrant replies to enquiries - site conditions disclosed by relevant surveys - site conditions that should have been disclosed by survey - historic site contamination - future migrating contamination | <ul style="list-style-type: none"> ✓ ✓ | <ul style="list-style-type: none"> ✓ ✓ ✓ | | Certificates of Title to be produced |
| 3. | Change in tax treatment of SPV | <ul style="list-style-type: none"> - payment of corporation tax | <ul style="list-style-type: none"> ✓ | | | Should the SPV lose its charitable status |

| | Key risk | Issues | Authority Risk | Contractor Risk | Shared Risk | Notes |
|----|-------------------------------|--|---|---|--------------------|---|
| 4. | Housing corporation funding | <ul style="list-style-type: none"> - funding not forthcoming at all - funding not at the level assumed at financial close | <ul style="list-style-type: none"> ✓ ✓ | | | Assume at financial close that funding not forthcoming with a mechanism to incorporate it later |
| 5. | Employment, TUPE and pensions | <ul style="list-style-type: none"> - liability for past pensions deficits and the 15.4% allowance and variations | <ul style="list-style-type: none"> ✓ | | | |
| 6. | Demand | <ul style="list-style-type: none"> - inability to provide tenants - failure to allocate tenants in agreed timescales - surplus unoccupied units available - void turnover - loss of income resulting from voids | <ul style="list-style-type: none"> ✓ ✓ ✓ ✓ ✓ | | | |
| 7. | Decant | <ul style="list-style-type: none"> - provision of decant facility - management of the decant process | <ul style="list-style-type: none"> ✓ | <ul style="list-style-type: none"> ✓ | | |

| | Key risk | Issues | Authority Risk | Contractor Risk | Shared Risk | Notes |
|----|--|---|----------------|-----------------|-------------|---|
| | | <ul style="list-style-type: none"> - tenant cannot or refuses to move - failure to deliver services to decant facilities | ✓ | ✓ | | |
| 8. | Construction and Commissioning: - Extra-care Housing - Goscote - Rushall Mews | <ul style="list-style-type: none"> - construction costs and changes - cost of adaptations required by specific individuals | ✓ | ✓ | | |
| | | <ul style="list-style-type: none"> - ongoing lifecycle responsibility for fixtures, fittings and adaptations - vandalism (by tenants and third parties) | | ✓ | | |
| 9. | Insurance | - increases in insurance premia | | | ✓ | Increases above inflation an Authority risk |

APPENDIX B

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.

10. 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.

11. 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.

12. **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.

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