

CABINET – 15 SEPTEMBER 2009

CARE HOME AND COMMUNITY HEALTH FACILITY, CHIPPING NORTON – PROPOSED HEADS OF TERMS

**Report by Director for Social & Community Services,
Head of Property Services and County Solicitor**

Introduction

1. At its meeting on 20 March 2007, the Cabinet received a report which outlined proposals for a 50 place registered residential and nursing care home and a separate but closely linked community health facility on County Council owned land at Chipping Norton. The report included details of the scheme, the outstanding issues to be resolved before construction could start and extracts from the proposed Heads of Terms to be signed by the partners in the scheme – the County Council, the Oxfordshire PCT, the Oxfordshire Care Partnership (OCP), the Orders of St John Care Trust (OSJ) and Bedfordshire Pilgrims Housing Association (BPHA). The Community Health facility will be operated clinically by the Oxfordshire PCT (community and primary care) and the Oxford Radcliffe Hospitals NHS Trust (maternity unit).
2. The Cabinet resolved to
 - (a) agree to confirm the Council's commitment to the purchase of 20 places in the new Chipping Norton Care Home; and
 - (b) authorise the Cabinet Member for Adult Services to agree to Heads of Terms for the scheme, subject to any advice from the County Solicitor.
3. The March 2007 report mentioned that the project required a complex contractual and leasehold structure to ensure the best arrangements were in place to minimise the partners' tax burden, provide proper good quality care for the residents of the Care Home and users of the Community Health Facility, arrange the financing and make the most efficient use of resources. The arrangements entered into by the County Council would, as far as possible, be those which were put into place at the time of the transfer of Homes to OCP in December 2001. The arrangements between the PCT and OCP would be consistent with, and follow from, them.

4. The Annex to the March 2007 report explained that OCP would act as developer of the combined facility and that the capital cost would be approximately £7 million, being broadly £3.5 million for the Care Home and £3.5 million for the Community Health Facility. OCP had commissioned the work through its development partner, BPHA, which would fund the capital costs and recover those costs plus a return through property leases with OCP. OCP would in turn recover its costs through the prices charged for places in the Care Home and a lease of the Community Health Facility to the PCT.
5. Whilst the partners have not been able to meet the timetable in the March 2007 report (principally due to complexities in the planning process), there has been considerable progress since then. Construction of the Care Home has now started on site and the new access road is largely complete. The partners have agreed Heads of Terms and the resulting suite of legal documents covering the arrangements has been largely prepared by their respective legal advisers. Although the resolution on 20 March 2007 authorised the Cabinet Member for Social Care and Policy Co-ordination to agree these terms, the County Solicitor has advised that it would be preferable for certain elements of that agreement to be approved by the Cabinet as a whole.

The Proposal

6. There are two provisions in the proposed legal structure which require the County Council to “guarantee” repayment of BPHA’s outstanding development costs. These are a feature of the Chipping Norton scheme only (although please see paragraph 7 below regarding similar arrangements for Care Homes and Extra Care Housing generally) resulting from the addition of the Community Health Facility, and are not covered by the arrangements in the Project Agreement with OCP dated 20 December 2001 which were fully debated and agreed then and which have subsequently been the subject of a (satisfactory) review by District Audit.
7. The first provision applies in the event of the Project Agreement being terminated by the County Council and/or OCP or in the circumstances otherwise specified in that document. If this happened (due to default by either party or in such other circumstances), the Headlease between the County Council and OCP would be terminated and possession of the site *and buildings* would revert to the County Council. Under the terms of the Project Agreement, the County Council would be due to pay any outstanding finance charges on the Care Home to OCP/BPHA – because these would no longer be recoverable through the bed price, as the Council would own all the places. For the avoidance of doubt, this obligation under the Project Agreement applies to all the new Care

Homes and Extra Care Housing built on land owned by the County Council. However, the County Council should achieve money's worth for its payments - it would own the Care Homes and have these as assets, and could levy charges for places sold on the open market or to the PCT and/or other partners. Considerable research on the demand for places - including those to be offered on the open market - has been undertaken before pursuing any of the new developments and it is reasonable to assume that there would be a continuing demand in each of the locations.

8. Any decision to terminate the Project Agreement would not be taken lightly as it would have a major impact on delivery of the Homes for Older People service, staffing contracts etc and it could result in significant payments falling due. The County Council has a representative on OCP's governing Board of Trustees (currently Councillor Jim Couchman) and a Council Officer also attends Board meetings (currently the Head of Major Programmes). In addition, the County Council rigorously monitors standards under the contract. Thus, any issues about service delivery, finance etc would be highlighted well before they reached crisis level and an agreed remedy would be sought. If termination was the only way forward, the initial capital burden could be very considerable and the County Council would need to find an alternative partner or arrangement quickly.
9. At Chipping Norton, the situation is further complicated by the Community Health Facility – which would also revert to the County Council in the event of termination of the Project Agreement and Headlease. OCP/BPHA has, therefore, asked the County Council to pay any outstanding finance charges applicable to the Community Health Facility as well as the Care Home. The potential additional cost would be around £3 million if the Headlease was ended in the first few years, reducing annually to nil after 30 years. The County Council and the PCT have agreed that, *if* this should happen, the Council would be obliged to grant and the PCT would be obliged to take a direct lease of the Community Health Facility. This would ensure continuation of the vital services delivered to the local community via the Community Health Facility. Equally, it would ensure repayment of the County Council's capital outlay – albeit by way of an annual rent. The amount of that rent has already been fixed at £128,000 per annum for years 1 -3 of the PCT's lease and £191,361 for years 4 – 30.
10. The County Council's Officers and advisers believe this to be a reasonable and proper course of action to take to protect all partners and it is in the spirit of the 2001 Project Agreement. There is a relatively low risk to the County Council because (a) the Project Agreement would not be terminated lightly and (b) the capital cost would be recovered through the direct lease to the PCT. The County Solicitor has advised

that the County Council would appear to have the legal power to agree to make this payment by virtue of the wellbeing power contained in section 2 of the Local Government Act 2000 to promote the economic, social or environmental well being of its area. There has been recent case law which has sought to interpret this power more narrowly but there is a clear link here between the giving of the guarantee enabling the Community Health Facility to be built and achieving the promotion or improvement of one or more of those objects. Section 2(4) of the Act makes it clear that the well-being power includes a power to provide financial assistance and there is statutory guidance that states that that may include the giving of guarantees. The exercise of these powers must have regard to such guidance and the County Council's own community strategy and its advisers confirm these have been taken into account in the preparation of this report and its recommendations. The County Council must also comply with its best value duties under section 3 of the Local Government Act 1999 to carry out its functions effectively, efficiently and economically and this is relevant to the fact that in these circumstances it would become owner of the land and buildings subject to a continuing lease to the PCT.

11. The second provision applies in the event of default by the PCT: either failing to enter into the Sub-subunderlease with OCP after the Community Health Facility has been constructed, or a major breach of covenant resulting in forfeiture of the Sub-subunderlease. By virtue of the terms agreed between the partners the PCT would, in both these circumstances, be contractually obliged to pay the outstanding finance charges on the Community Health Facility to OCP/BPHA. The PCT is not objecting to this obligation and has consistently said that, as a statutory body, it (or a successor body, if applicable) would honour that obligation. However, BPHA and its funders are nervous about relying on this assurance from the PCT and would not wish to have to enforce it by taking legal action for breach of covenant/contract (considering this to be at odds with its charitable status and objects).
12. OCP/BPHA has, therefore, asked the County Council to stand as guarantor for the PCT and to be responsible for payment to BPHA of any outstanding finance charges applicable to the Community Health Facility in the event of default by the PCT. As above, the potential cost would be around £3 million if payment fell due in the first few years, reducing annually to nil after 30 years. The PCT is willing to enter into a legally binding "Compensation Agreement" with the County Council whereby the PCT agrees to repay the County Council's costs in event of this guarantee being called upon by BPHA. This would ensure repayment of the County Council's capital outlay – although it may be necessary to instigate legal action if the PCT did not comply with the terms of the Compensation Agreement. The Community Health Facility buildings would revert to the County Council, allowing alternative use if

the Sub-subunderlease had never commenced or continuation of the vital services delivered to the local community via the Community Health Facility in the event of forfeiture some years into the future.

13. This is an unusual request and reflects the particular features of this partnership project. Considerable work has been done to have in place effective mitigation for any risk that the County Council may face:
 - (i) if there is a default the PCT is due to pay BPHA direct and it has agreed to do so, meaning that the guarantee would not be required, and
 - (ii) there will be a Compensation Agreement protecting the County Council's payment and the County Council will have possession of the Community Health Facility building..
14. It should be noted that the PCT has recently confirmed its commitment to the project. The partners would be very surprised if it did not enter into the Sub-subunderlease,
15. The County Solicitor has advised in similar terms to the advice set out in paragraph 10 above save that it in relation to its best value duties, while it will likewise own the land and buildings in these circumstances, it will be relying on the compensation agreement and such other uses or arrangements for the buildings as it might enter into at the relevant time rather than a direct lease with the PCT.

Financial and Staff Implications

16. The Financial Implications are set out in this report. In the case of the Chipping Norton scheme, the references to charges which can be levied on the PCT/other partners in paragraph 7 can be estimated as follows: for Intermediate Care (purchased by the PCT or through the pooled budget) – 14 places at £776 per place per week equalling £565,000 per annum; and Private purchases – 16 places at an average of £566 per week per place equalling £470,192 per annum.
17. There are potential staff implications should the Primary Health Centre come under the County Council. These relate to the staff who may have transferred at some point in the life of the arrangements from the NHS to OCP or who have been employed directly by OCP to work in the Primary Health Care Centre. In these circumstances the County Council would have to make arrangements for the continued employment, deployment and management of these staff that would comply with the regulatory requirements in force at that time.

RECOMMENDATIONS

18. **The Cabinet is RECOMMENDED to approve the proposed arrangements with the Oxfordshire Care Partnership, Bedfordshire Pilgrims Housing Association and the Oxfordshire PCT whereby**
- (a) in the event of the Project Agreement dated 20 December 2001 being terminated, the County Council would meet the outstanding finance charges applicable to both the Care Home and the Community Health Facility and would grant a direct lease of the Community Health Facility to the PCT at a rent sufficient to repay those charges over the remainder of the initial 30 years finance period; and**
 - (b) in the event of the PCT either failing to enter into the Sub-subunderlease with OCP after the Community Health Facility has been constructed or committing a major breach of covenant resulting in forfeiture of the Sub-subunderlease and becoming liable to pay the outstanding finance charges on the Community Health Facility to OCP/BPHA, the County Council would stand as guarantor for the PCT. This would make the County Council responsible for payment of the outstanding finance charges on the Community Health Facility to BPHA and recovering such payment through a “Compensation Agreement” with the PCT (or by taking legal action if the PCT did not comply with the terms of the Compensation Agreement).**

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Background papers: Nil

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