

Item No. 34.	Classification: Open	Date: 24 March 2020	Meeting Name: Cabinet
Report title:		Disposal of freehold - 4 D'Eynsford Road, London, SE5	
Ward(s) or groups affected:		All	
Cabinet Member:		Councillor Victoria Mills, Finance, Performance and Brexit	

FOREWORD - COUNCILLOR VICTORIA MILLS, CABINET MEMBER FOR FINANCE, PERFORMANCE AND BREXIT

It is the council's firm commitment that residents of all ages should be supported to live healthy and fulfilling lives and have a safe and secure place to call home, whatever their age or stage of life. Southwark was London's first age friendly borough and over the last decade the council has vastly invested in and improved home care with our Ethical Care Charter.

The next challenge is to make sure our residential care for older people is of the highest standards. Southwark residents should have the dignity and care they need and deserve. So this report sets out the route to securing the second nursing home that we committed to delivering in the Council Plan.

By agreeing to dispose of the council's freehold interest in 4 D'Eynsford Road we will kick start the redevelopment of the property as an 80+ nursing bed and resident care home. Arrangements will also ensure that the council is able to block book beds so a nursing home in Southwark is rightly prioritised for Southwark residents.

RECOMMENDATIONS

Recommendations for the Cabinet

1. To vary the lease of 4 D'Eynsford Road, held by Excelcare Limited, to permit redevelopment of the property as an 80+ nursing bed and residential care home (subject to planning).
2. To note arrangements for the block contract booking by the council of beds in the new care home, including a rebate mechanism should the council from time to time agree to release, at Excelcare's request, any of the beds reserved for its use (see para 12).
3. To dispose of the council's freehold interest in 4 D'Eynsford Road to Excelcare Limited's property company "Latchworth" subject to:
 - a) Satisfactory completion and opening of the new building;
 - b) Its registration with the Care Quality Commission;
 - c) Entering into a care contract of 25 years duration with Excelcare operating

company "Giles Court" under an agreed price structure;

- d) A payment to the council for the freehold, via a rebate and balancing mechanism;
 - e) A time-limited overage clause to protect against alternative use, requiring the transferee to pay the council a proportion of any additional value released through the subsequent development of the property (if any) within a 15 year period.
- 4. That the use of the property shall be restricted to social care including accommodation with support for vulnerable people for a term of not less than 15 years, unless the council decides that it no longer requires care services to be provided under the block contract arrangement.
 - 5. That subject to the above, the negotiation of detailed terms, sign off of due diligence and agreement of transactional documents shall be delegated to Director of Regeneration, in consultation with the Strategic Director of Finance & Governance

BACKGROUND INFORMATION

- 6. The council owns the freehold in 4 D'Eynsford Road. Excelcare Limited holds a long lease, with approximately 92 years unexpired.
- 7. A plan showing the location of the property is provided in Appendix 1.
- 8. The building on the land in question, a c.40 bed nursing home, has been closed for some years. It is considered by the operator to be uneconomic to reopen it in its current format.
- 9. Redevelopment of the existing building can be expected to create a viable and high quality new facility, in which the council would have priority to place residents on a commercially favourable basis. However the terms of the *current* lease act to discourage significant investment by the tenant and do not allow intervention by the council to realise any wider potential or value in the asset.
- 10. Excelcare Limited proposes significant investment to replace the existing building with a new 80+ bed residential care home. This would contribute to the 'Increasing Nursing Home Provision Southwark Cabinet report December 2017' and subsequent Gateway One Nursing Care Report (April 2019).

KEY ISSUES FOR CONSIDERATION

Consideration receivable

- 11. Consideration for the council's freehold interest will be paid via a rebate payment mechanism, from Excelcare to the council and a balancing payment (see below).
- 12. Under the rebate arrangements, the council will have the option to return temporarily vacant beds within the block care contract to Excelcare. This will potentially a) defray some of the block cost on void beds and b) generate an income for the council where Excelcare secures private placements for any bed spaces the council does not need. This will not affect the overall size of the block

in the medium or long term – any beds surrendered to Excelcare for private use are done so on a one-time basis and return to the block after the private resident no longer requires them.

13. A property covenant, in the nature of an overage clause preventing alternative use, will be in place for a period of 15 years. Although the covenant would be lifted at 15 years; the block care contract will remain in place for 25 years for as long as the council requires it. Whilst the block contract remains in place Excelcare would continue to provide the service according to the terms of the care contract.
14. At year 15 Excelcare will pay the council a balancing payment at an agreed amount, less any rebate received by the council, on condition that at that point the covenant is lifted. Nevertheless, the care contract would still continue if the council required it, for a term of up to 25 years in total, and the rebate would also continue during that period.

Rebate mechanism and disposal at an undervalue

15. The present value of the minimum payments through the rebate mechanism and the balancing payment will be less than the estimated value of the council's freehold interest. However, the scheme would be of wider social value.
16. The council's Head of Property is of the opinion that the disposal will be at an undervalue. There are a number of variables at play here, not least that it is impossible to predict whether the council might be able to release any value whatsoever from the property before the existing lease ends in 92 years time.
17. The disposal arrangements outlined above will secure a defined amount as a result of the rebate payments and / or the operation of the balancing payment. Potentially this may increase through the continuing operation of the rebate mechanism.
18. Circular 06/2003 "Disposal of land for less than the best consideration that can reasonably be obtained" provides that the council may proceed provided it considers that the transaction will contribute to (amongst other things) the promotion or improvement of social well-being. In this case:
 - a) The transaction will bring back into use, at greatly increased capacity and quality, a care home that has lain dormant for several years.
 - b) The council currently places 70% of its nursing care service users outside of the borough. This deal will create opportunities to keep more people within their local communities and potentially reduce the number of residents being placed out of borough to approximately 47% based on current activity.
 - c) Bringing provision back in borough will give the council a greater control over working terms and conditions for the local workforce through its commitment to the Residential Care Charter.
 - d) Keeping residents within borough enables them to receive greater continuity of health and social care provision, as well as maintaining social and familial links.
 - e) Allowing a greater proportion of service users to remain in borough reduces the hidden cost of social workers and other professionals who currently have to make longer journeys to visit people.

- f) The flexibility of the rebate scheme means that whilst there is a 'floor' to protect the minimum consideration received, there is no ceiling and therefore there is potential for additional income to offset the estimated undervalue.
- g) The design of the building and expertise of this provider will enable the council to better serve its residents with more complex and challenging care needs that might otherwise be placed out of borough.

Policy implications

- 19. The investment strategy for Nursing Care Homes is set out in the Council Plan 2018-22, which makes commitments under A Fairer Future A Healthier Life to:
 - a) Open Two Nursing Homes, and;
 - b) Raise Standards with a Residential Care Charter.
- 20. Reports presented to Cabinet (From December 2017 to April 2019). Set out the commissioning intentions and the case for development of new nursing care provision within Southwark highlighting:
 - a) The need to increase access to local in borough nursing home beds to approximately 186.
 - b) The Care Act 2014 places a duty on the Council to assess and support frail and disabled adults with their eligible care needs. The Act also places duties on local authorities to facilitate a vibrant, diverse and sustainable market for high quality care and support in their area, for the benefit of their whole local population, regardless of how the services are funded.
 - c) The nursing care home procurement is firmly shaped by the Fairer Future Promise 1 (value for money) and Promise 2 (Age Friendly Borough – with links to the dementia communities program) and links to Promise 9 (revitalised neighborhoods)

Community impact statement

- 21. The Council uses nursing care beds to fulfil its statutory social care duties under the Care Act 2014 towards the frailest residents with complex health problems who can no longer live safely in less dependent accommodation.
- 22. Many of the Southwark residents requiring access to nursing care homes will come within the groups identified as having 'protected characteristics, within the Equalities Act 2010. The provision of this service will directly benefit the older population and those living with complex disabilities. Providing care homes based within the borough ensures they live out their last days within their community and enables not only family but friends to remain involved in their lives.
- 23. The location of nursing care homes will also provide employment opportunities for local people.

Resource implications

24. Although the land to be disposed undoubtedly has both development value and strategic potential in alternative use, the prospect of ever realising this is complicated by the existing lease.
25. In particular it is not possible to predict whether the council might be able to release any value whatsoever from the property before the lease ends in 92 years time. The Council's existing interest has little value itself; a peppercorn income for 92 years without review or any form of uplift.
26. Nevertheless, it should be noted that the transaction as proposed *potentially* represents a disposal at an undervalue (not exceeding £2million). Circular 06/2003 "Disposal of land for less than the best consideration that can reasonably be obtained" provides that the council may proceed in these circumstances provided that:

The local authority considers that the purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of the following objects in respect of the whole or any part of its area, or of all or any persons resident or present in its area;

- i) the promotion or improvement of economic well-being;*
 - ii) the promotion or improvement of social well-being;*
 - iii) the promotion or improvement of environmental well-being.*
27. The significant capacity to contribute to the promotion or improvement of social well-being is explained in detail at para 19-20.
28. At this time Southwark does not hold any 'block contracts' for nursing care home provision in or out of borough. To summarise, this means that:
 - a) All of those individuals placed by and paid for by Adult Social Care are on individually negotiated placements – variable prices.
 - b) Benchmarking research referenced in the Gateway Zero, Nursing Care Homes Report indicates that Southwark is paying higher fees for nursing care home beds compared to sixteen London Authorities.
 - c) Southwark is competing to access nursing care homes with other local authorities and health colleagues. Due to the limited local market this is primarily out of borough.
 - d) Most homes will have some level of block contract with their host authority and/or they will usually give them priority.
 - e) Southwark has the highest number of residents experiencing a delay in being transferred out of a hospital bed to a nursing care home in London.

Legal implications

29. Excelcare propose that the care contract will be with their operating company, Giles Court (who will be responsible for providing the care services), and the freehold will be with their property company Latchworth,

30. Three legal documents will contractually link together the operation and ownership of the home:

Operations / Care Contract - a contract will be entered into between Southwark and the operator to deliver the agreed service over the agreed term. Within this contract there will be clauses which allow the authority to change operator, subject to performance criteria, providing that the lease of the building is transferred at the current prevailing market rate.

Lease - a lease will be executed between the operator and property owner on commercial terms for the duration of the contract, subject to regular rent reviews and a clause to transfer the lease in the event of the provisos outlined in paras 3-4 being fulfilled.

Acquisition Contract - a contract to sell the property will be made between Southwark and the group company purchasing the property. The contract will set out the agreed covenants for the use of the property and confirm the development works for the new home.

Financial implications

31. This report proposes to sell the freehold of 4 D'Eynsford Road at less than market value in order to realise wider strategic objectives which are covered within the body of this report. The service and finance team are in agreement that there are significant operational, social and revenue benefits to this arrangement which outweigh the undervalue consideration.
32. Providing the the promotion or improvement of social well-being test set out in para. 18 above are satisfied, the council may decide to proceed. The business case supporting the transaction on his basis is also set out in para. 18.

Consultation

The nursing care home consultation and engagement work:

33. The procurement and commissioning process around developing the programme of work for acquisition of nursing care homes has been designed around the principles of co-design/production and is an on-going aspect of the broader piece of work. Over a hundred residents in sheltered, extra care and care homes have participated in discussions around what they want and don't want from a care home.
34. The Nursing Care Co-design group (local residents and voluntary sector representatives) will have the opportunity to discuss their views and ambitions around what makes a 'good nursing care home' – this is a current and on-going piece of work.
35. Professionals with different interests across the health and care system have also been involved/are involved in the current nursing care home negotiations.
36. The contract award for the care contract will be in consultation with the Lead Member for Children, Schools and Adults.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Democracy

Best Consideration

37. The disposal would be a sale at an undervalue. Although the Council is under a general statutory obligation to secure best consideration on the disposal of property the Secretary of State has published general exemptions from this duty, including one where the reduction is less than £2m and other conditions are fulfilled.
38. The Council however has identified a business case highlighting the additional benefits that the proposal delivers as identified in this report. The Council is entitled to proceed with a transaction at an undervalue where it is satisfied that the wider benefits justify this.
39. As a result of the importance of the wider benefits identified by the Council in considering the justification for the sale it is important that the delivery of such benefits and the enforceability of the relevant obligations is evaluated.
40. The existing lease (where the Council is the landlord) is to be varied so as to allow the proposed development works. It is not proposed that positive development obligations will be imposed or that the lease (or the conditional sale agreement) be treated as a contract for works that would be subject to the Procurement Rules.
41. It is noted that if the conditions to the agreement for the sale of the freehold are never satisfied that the varied lease will remain in place and will govern the future relationship between the tenant under that lease or its successors and the Council. Consequently the lease is proposed to be modernised to the extent consistent with the commercial terms. It is not proposed to vary the lease to such an extent that it represents a surrender and re-grant in view of the SDLT and tax implications of this for the buyer.
42. The conditional freehold sale agreement will impose conditions to the freehold transfer. As highlighted in this report the approved development will have to have been completed, CQC accreditation obtained and the facility opened for trade before the freehold is transferred.
43. The conditions mean that the buyer group will have expended funds before the freehold is transferred. It is believed however that the Council will not hold sufficiently proximate land so as to benefit from a restrictive covenant imposed on the freehold title to prevent change of use or otherwise the enforcement of the obligations proposed. As a result it is proposed that the covenants are enforced through a chain of covenants initially entered into by the buyer and subsequently by its successors in title.
44. The intention is that a restriction will be added to the register at the time of the transfer of the freehold which requires certification by a conveyancer for the Council that identified terms of the sale agreement are complied with before a disposal can be registered.
45. It is anticipated that the buyer will grant a lease to the operational entity in the

group (which entity is likely to be the counter party to the care contract). The Council will look to ensure that the terms of such lease (particularly where it is for a long term) are not such that it could be transferred to a future buyer so as to avoid the protection of the restriction on the freehold title and the obligation to enter into a deed of covenant with the Council.

46. The Council will enter into a care contract relating to the operation of the facility on the terms outlined in this report and so as to benefit from the terms (as to unused beds) and the discount identified. There is however a risk that the counter party to such care contract becomes insolvent and that the contract is no longer enforceable or is disclaimed (terminated by a liquidator of the counter party). The Council will need to consider its procurement process in respect to the care contract as an agreement for services. It is assumed that the objective of securing terms for the availability of beds in or close to this location may give rise to exceptional circumstances preventing a wider procurement process. The terms proposed in relation to the property assume that the Council is able to properly select the buyer group for entry into the care contract in order to then secure the discount that can be deducted from the balance of the consideration payable.
47. As a result it is proposed that the consideration (which it is proposed is deferred) is secured by a charge against the freehold (or where this is not practicable) that the terms of the sale contract protected by the restriction include an obligation to pay the balance of the consideration before any transfer. The amount secured would be reduced by the operation of the care contract and receipt of the benefit of the discounts. A material breach of the care contract or the termination of such care contract or an insolvency event arising in respect to the counter party to the care contract would trigger the payment of the balance of the consideration. Where a charge had been taken this could be enforced against the freehold to recover this.
48. As any charge would be subject to and with the benefit of the operational lease its terms will need to be reviewed and approved.
49. The deed of covenant to be entered into by the buyer (and by any successor) will include an obligation to pay overage on a change of use. This is to be calculated by reference to any increase in value arising from such change of use and any works undertaken to facilitate this. It is proposed that the % overage is set at such a level that it would not be viable for the buyer or its successor to pay for securing a new consent and undertaking conversion works.
50. The Council has considered the possible benefits of granting a very long lease (quasi freehold) to the buyer instead of selling the freehold. Whilst this would improve the Council's ability to enforce the various obligations (and in particular to ensure the user is not changed) it is not commercially acceptable to the buyer.

Procurement

51. The proposed transaction comprising the variation of the existing lease and conditional agreement for the sale of the freehold has been structured in a way that means that it does not fall within the scope of the Procurement Rules. The terms proposed assume that the selection of the facility as suitable for and the terms agreed in relation to the proposed care contract will justify the selection of the buyer group entity to enter into the care contract as it may fall within the

scope of the Procurement Rules.

Equalities

52. Officers have considered the equalities consequences of the proposed transaction. The disposal of the freehold of the property does not raise any identified issues. The proposal to enter into a contract to secure care home services offers the Council opportunities to provide services for those within the Borough. When bed spaces are offered care will need to be taken to ensure that equalities issues are addressed. The Council will seek to ensure in the contract that its policies in relation to equalities are addressed in the operation of the facility. No adverse equalities implications are identified.

Human Rights

53. No implications arise in relation to human rights as a consequence of the proposed transactions.

Strategic Director of Finance and Governance (76TJ201920)

54. The Strategic Director of Finance & Governance notes the contents of this report and in particular the financial implications referenced in paras. 31-32. This report seeks to delegate negotiation of terms and final disposal of the asset to the Director of Regeneration in consultation with the Strategic Director of Finance & Governance. In finalising this deal it will be critical that the council;

- a) secures a legal structure that maximises the likelihood of receiving the full value of the agreed consideration over the period of the deal (noting that payments may be made over an extended period and that a balancing payment may be required) and,
- b) guarantees the continued usage of the site for care purposes available to the Council for the minimum term (as this outcome is one of the socio-economic benefits by which the under-value disposal is justified), noting the risks and complexities outlined in this report and in the comment from the Director of Law and Democracy.

55. The rebate mechanism proposed may become the primary means by which payment of the consideration is received. Operation of this mechanism, including monitoring of surrendered beds, invoicing the provider and monitoring of the value of receipts against the outstanding consideration will be the responsibility of the service in conjunction with property colleagues.

56. In the event that officers are unable to satisfy the critical requirements outlined above there may be a need to refer back to cabinet.

Strategic Director of Children's & Adults Services

57. Cabinet received a Gateway 1 – Procurement Strategy - report in April 2019, which sought permission to let Nursing Care Home contracts. There are currently two Nursing homes operating in the borough but until recently the council had access to only one, Tower Bridge. The second is Queens Oak, where the council will have access to up to 33 beds during 20/21. The Gateway 1 report explained that 70% of placements were out of borough and that 80% of

the people in these placements would prefer to be in the borough. This equates to about 130 people. The report suggested a procurement strategy that is a two stage competitive procedure with negotiation and Cabinet approved this approach. Potential bidders were requested to propose how they would provide local Nursing Care Home provision and if this provision would be in addition to the existing beds that are currently available to the council.

58. We currently have two bidders who are offering to build two new nursing homes in the borough and provide over 100 beds between them. One of these providers is Excel Care which is a family run business that has over 20 care homes, many of which are rated Good by CQC. Officers recently visited Queens Oak, as did our resident-led Co-design Group – both officers and the Co-design Group identify good practice and a caring culture in relation to nursing care and nursing with dementia care.
59. Building 21st century care buildings for the borough, and developing forward thinking care models for our residents, supports what we know about future demand for services. Our demographics show that the number of people with dementia amongst the over 65s will double and therefore this proposed property deal could support the council in fulfilling our duties under the Care Act to develop the local market so that there is a choice of services for our residents.

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
Title of document(s) Increasing Nursing Home Provision in Southwark Cabinet Report December 2017	Children and Adult Services Partnership Commissioning Team Older People and Complex Needs	Carol O'Brien 020 7525 4754
Cabinet report link Increasing nursing home provision 2017		
Gateway Zero Nursing Care Strategic Options Assessment 2018	Children and Adult Services Partnership Commissioning Team Older People and Complex Needs	Carol O'Brien 020 7525 4754
Gateway Zero report link GW 0 Nursing Care Strategic Options Assessment 2018		
Title of document(s) Gateway One Nursing Care April 2019	Children and Adult Services Partnership Commissioning Team Older People and Complex Needs	Carol O'Brien 020 7525 4754
Gateway One report link GW1 Nursing Care 2019		

APPENDICES

No.	Title
Appendix 1	Location plan

AUDIT TRAIL

Cabinet Member	Cllr Victoria Mills, Lead Member for Finance, Performance & Brexit	
Lead Officer	Kevin Fenton, Strategic Director of Place and Wellbeing	
Report Author	Matthew Jackson / Carol O'Brien	
Version	Final	
Dated	11 March 2020	
Key Decision?	Yes	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments Sought	Comments Included
Director of Law and Democracy	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
Director of CAS	Yes	Yes
Cabinet Member	Yes	Yes
Date final report sent to Constitutional Team	11 March 2020	

APPENDIX 1 – PLAN

