

SURREY COUNTY COUNCIL

CABINET

DATE: 25 JUNE 2013

REPORT OF: MR MEL FEW, CABINET MEMBER FOR ADULT SOCIAL CARE

LEAD OFFICER: ANN CHARLTON, HEAD OF LEGAL AND DEMOCRATIC SERVICES

SUBJECT: LEGAL FEES FOR ARRANGING ADULT SOCIAL CARE DEFERRED PAYMENT AGREEMENTS AND THE DISCHARGE OF LEGAL CHARGES



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SUMMARY OF ISSUE:

A previous Report to Cabinet dated 8 September 2009 detailed the operation of the Deferred Payment Scheme in relation to adults in residential care in Surrey. That report envisaged that the Council may in the future wish to recover the cost of the work it undertakes in relation to Deferred Payment Agreements. After a thorough review of the matter and after consultation with the Cabinet Member for Adult Social Care, officers are now proposing a charging regime. Authorisation is also sought to increase the legal fees for discharging Legal Charges (mortgages) placed on properties as security for payment of deferred care costs.

RECOMMENDATIONS:

It is recommended:

1. the Council charges £250 for any Deferred Payment Agreement, whether or not the matter proceeds to completion, plus the costs of any Land Registry fees it incurs on each transaction;
2. the Council recovers legal fees of £125 whenever it discharges a Legal Charge; and
3. the level of these charges will be reviewed annually and adjusted appropriately in line with general financial planning and budget setting.

REASON FOR RECOMMENDATIONS:

To ensure that the increased cost of servicing the continuing and growing demand for Deferred Payment Agreements is primarily met by those taking advantage of the scheme.

DETAILS:

Background

1. As part of the Council's responsibility for Adult Social Care in Surrey, the Council provides residential accommodation for persons aged eighteen or over who are in need of care and attention which is not otherwise available to them. This could be by reason of age, illness, disability or other circumstances. The duty on the

Council to do this comes from section 21 of the National Assistance Act 1948 (“the 1948 Act”).

2. At the time a resident enters such accommodation, the Council is also required to assess whether and how much (if anything) the resident should contribute financially to the cost of that accommodation. This assessment is made under the 1948 Act and in accordance with the Charging for Residential Accommodation Guide (‘CRAG’) issued by the Department for Health.
3. If a resident is required to contribute towards the cost of their accommodation (because they have sufficient assets available to them), they may need to sell their home or another property they own in order to meet their ongoing care fees. In these circumstances, the Council has the ability to agree with the resident to defer payment of their care fees until either:
 - a. the resident sells their main home, or
 - b. 56 days after the resident’s death,

whichever is the earlier. This is known as entering into a ‘Deferred Payment Agreement’ (“DPA”).

4. A previous Report to Cabinet on 8 September 2009 (“the 2009 report”) detailed the operation of the DPA scheme since it began in 2002. This report outlined the reasons for operating the scheme as follows:

“The aim of the scheme was to allow a person with property, but without sufficient income and other assets, to fund their chosen residential placement, whilst also enabling the person to either keep their home on admission to residential care or, to assist the person who intends to sell their home, but cannot do so quickly enough to cover the full cost of their care home fees.”

5. Once entered into, the Council cannot unilaterally terminate the DPA and no interest is charged on the outstanding sums. Interest will only be payable on the deferred sums from 56 days after the resident’s death or from the date the resident terminates the DPA.
6. The deferred payments are secured by a Legal Charge (mortgage) on the resident’s property with their agreement. This provides security for the Council that the outstanding sums will be paid eventually. If a resident has not entered into a DPA and will not voluntarily pay the charges as they fall due, the Council may be able to secure payment of the outstanding fees either by imposing a Legal Charge on the resident’s property in exercise of the power contained in section 22 of the Health and Social Services and Social Security Adjudication Act 1983 (“a section 22 Legal Charge”), or by undertaking legal action against the resident through the Courts. The latter is costly, where the Council is ultimately successful it can recover its legal costs, however this imposes a further financial burden on the resident.

Placing a Legal Charge

7. Once a DPA has been agreed with the resident, Legal Services is required to undertake the following steps to effect the agreement:-
 - a. investigate title to the property,
 - b. complete identity checks (a Land Registry requirement),

- c. prepare the legal documents – both the Deferred Payment Agreement itself and the Legal Charge for the property,
 - d. ensure any necessary authorities are received from existing mortgage holders or those with power of attorney for the resident, and submit the approved documentation to the Land Registry.
8. Title investigations currently incur Land Registry fees of £10 and registration of the Legal Charge incurs a fee of £40, both currently payable by the Council.
 9. The legal work is undertaken by a Legal Charges Assistant under the supervision of the Principal Property Solicitor. A typical transaction takes up to 6 hours to complete. The resident or their representative is involved throughout the process. No two matters are the same and Legal Services is responsive to the difficulties facing the resident and their family at what is often a sensitive time
 10. Other local authorities generally now ask for a contribution to their legal fees on DPAs. Examples of current charges are shown in Annex A. On assessment of these and the cost to the Council of employing appropriate staff etc, officers are proposing that £250 plus applicable Land Registry fees is a reasonable charge to impose.

Discharging a Legal Charge

11. A resident who has entered into a DPA, or who has had a section 22 Legal Charge imposed on their property may discharge it by paying the sums owed to the Council. This usually happens when the property is sold and so Legal Services is often only notified of the proposed discharge a few days before it is needed. The Financial Assessments & Benefits Team must create a redemption statement, accurate to that date, and forward this to Legal Services, which then deals with the resident’s conveyancer to effect a smooth discharge. Legal Services approves the necessary documents and receives the payment due from the sale monies on behalf of the Council. At this stage, Legal Services also collects its fees for the discharge.
12. A discharge application usually takes up to 2.5 hours to complete. Legal Services currently charges its legal and administrative fees at £100 for the work involved in undertaking the discharge. A fee has been in place for discharges since 2010 and was considered reasonable upon a review of the work involved and the charges other mortgage holders imposed on discharges at that time. Examples of current charge rates by financial institutions include: Nationwide Building Society at £90 (the lowest charge); Barclays Bank at £275 (the highest charge); HSBC Bank charges nothing upon discharge (instead charging higher fees at the outset). Most lenders charge in excess of £125 and at present there are no Land Registry fees involved in a discharge process. Therefore, the proposal to charge £125 per discharge is considered reasonable and appropriate.

Other considerations

13. It is anticipated that payment of the legal fees for placing a DPA Legal Charge will be requested upfront at the time the resident’s application is approved. The relevant literature produced by the Council about DPAs would be updated to incorporate this. Both Legal Services and the Financial Assessments and Benefits Team sometimes encounter difficulties with a resident or their representatives being slow to cooperate with the process. It is expected that requiring an upfront payment will contribute to limiting insincere applications (as

this can be an issue) and hasten the process itself; reducing the period during which the Council is not receiving the payments due but does not have security for the debt.

14. Should a resident be legitimately unable to pay the legal fees upfront, this would not be a bar to the resident entering into a DPA. In such circumstances, it is proposed the fees would be added to the sums due upon the discharge of the Legal Charge. This approach would enable the resident to continue with their DPA application and still enable recovery of the legal fees in the longer term.
15. A new DPA scheme will be coming through from central government next year. The Care Bill, published on 10 May 2013, contains provisions for a new, universal deferred payment scheme. All local authorities will have a duty to offer deferred payments. The intention is to give people peace of mind, choice and control when they enter residential care and to ensure that no one has to sell their home in their lifetime to pay for care. The new scheme proposes consistent rules for the operation of DPAs and will include provision for local authorities to charge for administrative costs and interest on the deferred sums. The Department of Health intends to consult on the proposals later this year.
16. This new DPA scheme, with its aim of widening participation, and the aging population of Surrey is likely to lead to an increase in the number of DPAs. The legal fees recovered by these proposals would enable the Council to employ the necessary staff to deal with this increasing and demanding area of work.

CONSULTATION:

17. Mel Few, Cabinet Member for Adult Social Care; Sheila Little, Chief Finance Officer; Dave Sargeant, Assistant Strategic Director for Adult Social Care; and Toni Carney, Benefits and Charging Consultancy Team Manager have been consulted during the preparation of this report.

RISK MANAGEMENT AND IMPLICATIONS:

18. The costs recovered should be fair and set at a level which does not deter residents from entering into Deferred Payment Agreements. Legal Services will continue to carefully record the time taken for these transactions and ensure the charges remain appropriate to the work involved.

Financial and Value for Money Implications

19. This is an ongoing and increasing area of work for Legal Services. It is anticipated that by recovering these charges, Legal Services will increase its income recovery total by approximately £34,000 per year.

Section 151 Officer Commentary

20. The section 151 officer confirms that the financial implications are as set out in the paper and that additional income will be reflected in the future budget of Legal Services.

Legal Implications – Monitoring Officer

21. Deferred Payment Agreements are a discretionary service provided by the Council for the benefit of its residents. As such, the Council is able to charge for the provision of these services subject to some statutory limitations.
22. The relevant limitations are that the Council must ensure:
 - a. it is only seeking cost recovery and that it is not making a profit from these charges taking one financial year with another, and
 - b. those residents entering into these agreements are aware that there are charges involved and agree to pay these.
23. The Council's ability to charge for discharging a Legal Charge comes from its position as a mortgage provider (by virtue of either a Deferred Payment Agreement or a section 22 Legal Charge). The Council is not subject to the same statutory limitations as with Deferred Payment Agreements. However, as a general legal principle, the Council must not impose such charges as are unreasonable or prohibitive to residents having their legal charge discharged. Therefore, the Council must ensure what it charges for discharging a legal charge is reasonable and in alignment with other mortgage providers.

Equalities and Diversity

24. An Equality Impact Assessment has not been undertaken in relation to this report.
25. Residents seeking to enter into a Deferred Payment Agreement are, by virtue of being in residential care, vulnerable adults. Despite this, in consultation with colleagues in Adult Social Care, it is considered that the protections already in place for dealing with Deferred Payment Agreement applications will sufficiently safeguard against any potential prejudicial impact caused by the imposition of the legal fees amounting to £250 plus the applicable Land Registry charges.
26. It is proposed that, should a situation of genuine financial hardship be identified, the legal fees would also be deferred until discharge of the legal charge. It is not anticipated that this situation would occur with any regularity. Residents or their representatives typically approach the Council to enter into a Deferred Payment Agreement once their remaining capital approaches the 'threshold' to be considered for such an Agreement (being £23,250). Should exceptional circumstances arise, the Financial Assessments and Benefits Team would be able to review the residents financial situation (having had all the resident's information provided to them as part of the application process) and make a reasonable decision about whether to defer the payment of the legal fees. The proposed legal fees will therefore not prevent a resident from pursuing a Deferred Payment Agreement.
27. This safeguard suitably protects residents from suffering any adverse impact at the time of their application for a Deferred Payment Agreement.

WHAT HAPPENS NEXT:

28. Adult Social Care will amend the information it provides to residents when they are considering entering into a Deferred Payment Agreement. The proposed legal

fees will apply to all new Deferred Payment Agreement applications effective from 1 August 2013 onwards.

29. In relation to applications for the discharge of Legal Charges, the fee will be increased with immediate effect.

30. The level of these legal fees will be monitored and reviewed annually.

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Consulted:

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Sheila Little, Chief Finance Officer

Dave Sargeant, Assistant Strategic Director for Adult Social Care

Toni Carney, Benefits and Charging Consultancy Team Manager

Annexes:

Annex A -Table of legal fees charged by other councils.

Sources/background papers:

Annex A -Table of legal fees charged by other councils.

Report to Cabinet of Toni Carney dated 8 September 2009, Item 7 'Deferred Payment Scheme'.
