Consultation Appendix E

The Council has worked closely with LINCA to ensure a better understanding of the market place and cost pressures. The Council instruction to Laing and Buisson was agreed with LINCA. Laing and Buisson presented their findings jointly to the Council and representatives of the sector. The Council then invited all providers to a meeting on the 18 January 2012 to discuss the findings and outlined how the Council intended to proceed with building a cost model. Comments were invited.

Following on from that the Council built a cost model to reflect the cost of care within Lincolnshire and came up with some proposed rates which it sought feedback on. A further meeting was held on the 19 March 2012 to share the proposed rates and costs model and to explain the thinking behind both. Approximately 70 providers confirmed their attendance at the meetings.

The draft decision making report was sent to providers on the 22 March 2012 inviting feedback and indicating a formal period of consultation to the 13 April 2012. Providers were invited to comment generally and particularly on the Council's approach to consultation; the strengths and weaknesses of the costs model; of the two options presented which they preferred and did they have an alternative proposal; had the Initial Equality Impact Analysis reasonably presented the risks and would they prefer the Council to set rates for one or three years.

A further meeting/workshop was held on the 23 March 2012 to allow the providers financial advisers to discuss the Lincolnshire model in detail in order to gauge opinion as to the models validity and to address any perceived faults within the model itself. 12 representatives attended. Nine written responses on the proposed rates were received from seven providers and one response from a firm of solicitors acting on behalf of the Fairer Fee Forum on behalf of its members (it is not clear how many providers they are speaking on behalf of). In addition 2 responses were received regarding the Council's Framework Residential Contract. These responses are attached along with minutes/notes of the meetings held on the 18 January, 19 March and the 23 March. Comments have been themed and are included in this Appendix along with the Council's response in italics.

The two options consulted on were;

Option 1	***2011/12 (current rates)***	***2012/13***	***2013/14***	***2014/15***
Residential	£365.00	£377.00	£389.00	£401.00
Nursing	£414.00	£414.00	£414.00	£414.00
HD	£414.00	£420.00	£426.00	£432.00

Option 2	2011/12 (current rates)	2012/13	2013/14	2014/15
Residential	£365.00	£395.00	£401.00	£407.00
Nursing	£414.00	£396.00	£402.00	£408.00
HD	£414.00	£416.00	£422.00	£428.00

Following consideration of provider feedback the Council carried out further work and developed option 3 which is the recommended way forward. The draft decision making report was revised to reflect this and to capture the consultation and was then re-circulated to providers ahead of Adults Scrutiny Committee on the 16 May 2012. Providers were invited to attend and representatives from LACE Housing, Order of St John Care Trust, Prime Life Ltd and Tanglewood (Lincolnshire) Ltd addressed the Committee. Any new points raised by the providers in Committee have been included.

1. HD2/dementia

The main feedback from the findings of the Laing & Buisson report focused on care for people with dementia and the removal of the HD2 rate within the current contract (taking an average of 2 and 3 star homes this had been set at £458 for 2009/10). Providers confirmed that the removal of the HD2 rate has had a dramatic impact on the level of care for dementia and that people entering residential care have much higher levels of need. It was also identified that one provider now has 18 residents that require two carers.

It was stated that dementia care is underfunded because there is no dementia rate and the removal of HD2 has increased the issue. A rate is required to reflect dementia residents who are challenging, aggressive and unpredictable and at higher risk so homes can provide the service people require.

Concern was expressed that the Council routinely assessed residents with HD needs as standard residential this coupled with the burdensome appeal process and uncertainty around the definition of HD meant that people were being incorrectly placed.

Lincolnshire County Council has not set a dementia specific rate as what matters is the impact of the condition not the condition itself. Until 2011/12 the Council had Higher Dependency Rates 1 and 2. HD1 was for older people who meet the requirements for standard residential home care and had one or more of the following characteristics that necessitated additional staff input as the result of a specific and substantial ongoing condition(s):

- *Problem of mobility requiring two staff to help with such activities as getting up or going to the toilet;*

- *Degrees of wandering, especially at night, and physical frailty that places the Resident at unacceptable risk, which, therefore, requires particularly close supervision;*
- *Behaviour which has not responded to staff and professional intervention which, if not supported by staff presence or input, would have an adverse effect for self or other resident.*

HD2 was for people who meet HD1 and had at least one of the following characteristics that necessitated additional staff input;

- *Multiple care needs;*
- *Requires the intervention of a registered nurse no more than once a day;*
- *Has a condition which is stable and predictable and likely to remain so if treatment and care regimes continue.*

With the removal of HD2 and the creation of a single HD rate it is accepted that rate now has a broad spectrum of people to accommodate. However this has been reflected in the Lincolnshire costs model which has been built up from provider responses on hours covering all residents on the HD rate whatever the extent of their dependency. Consequently whilst providers may have to spend more time than average on some individuals they will spend less on others. In the round therefore costs are covered. More than that the Laing and Buisson survey indicates given the mix of frail residents and those with dementia that 22.9 hours per resident per week is appropriate based on hours in the JRF toolkit.

At the level of policy the Council recognises the different categories of service users and expects that those service users with HD needs will be placed at HD rates. This is necessary in order to maintain quality. The Council wishes to enhance the level of dialogue with the sector around quality and recognises that a discussion around clarifying the definition of HD would be a useful contribution to that dialogue.

2. Council placement policy/strategy

Providers queried the Council's placement policy and indicated that for some homes the Council's influence was falling as it had less than 25% of the business within the homes.

Providers queried the financial viability of meeting future demand with intensive homecare and Extra Care Housing Services and raised concerns that the proposed rates would lead to loss of capacity in the market which would be incapable of providing for the projected increase of elderly people requiring care.

The Council will continue to make placements when people are assessed as needing residential care. It is agreed that the number of placements are falling as the Council finds more effective ways to support people in their homes. In

2010/11 917 new placements of older people were made and by 2011/12 this had fallen to 790 (against a target of 520) and the target for 2012/13 is 691. In 2011/12 Council funded placements accounted for 45% of the market.

The Council in common with many other social care authorities is committed to investing in prevention and re-ablement which is necessary in order to deliver a service sustainable over time given the acknowledged demographic pressures. Domicillary care has an important role to play in this but there comes a point where the intensity of the package becomes less affordable in comparison to residential care. Extra Care Housing is desired by services users and has been supported in the past by significant government funding which is now falling. The Council recognises these limitations and anticipates always buying significant numbers of residential placements.

3. Council savings

There was concern that because of the extent of the savings requirement the Council would make an inadequate pot of money available.

The Council has carried out a detailed exercise with providers assessing the cost of care in Lincolnshire and this has been used to inform the proposed rates. All of the options incur the Council in significant expenditure. Before consultation the Council was minded to set rates which would cost it between £2.8 and £2.9 million. The Council has listened to the comments made in the consultation and has revised the recommended proposed rates under Option 3 which if implemented would cost the Council in the region of £4.3 million. This is a very large sum of money at a time of unprecedented budget restraint and other pressures within adult social care and more widely across the Council.

4. Potential Adverse Impacts

Providers indicate that continued under investment by the Council presents a serious risk of loss of capacity and will reduce the quality of stock adversely impacting on residential care and putting the future of service users at risk. A provider has indicated that any reduction in care hours would be dangerous. They believe the draft Equality Impact Assessment underestimates the impact of the rates proposed in the draft report critiquing some of the wording used i.e. should be "will impact" rather than "may impact".

It is not accepted that there is under investment by the Council. The proposed rates are based on and cover the costs of care within Lincolnshire. The work done by Laing and Buisson and supplemented by the Council (see paragraph 3.5 of the report) indicate that using an economically viable occupancy rate of 90% and taking into account demographic pressures and using the more conservative Council placement figure of 790 up to and through 2015/16 there is still excess capacity in the market. If occupancy levels increase beyond the 90% capacity or if the Council achieves its placement targets spare capacity will increase further and some homes will need to close if the market is to operate efficiently. Because of this spare capacity the impact on service

users is manageable. The Council reviews market capacity projecting well into the future and can take remedial action should this prove to be necessary.

Following and as a result of the consultation the proposed rates have been increased. The potential impact on services users of the proposed rates is covered in the Initial and Full Equality Impact Analysis attached to this report at Appendix F.

5. Geographical rates

The possibility of introducing geographical rates was raised by the Council at the meeting with providers on the 18 January 2012. This was met with little enthusiasm with some providers stating that geographical payments would not work though there was support from a provider on the East Coast. Another provider has pointed out the discrepancy in house prices in Lincoln (North) £126, 803 compared to £177, 683 (South) and states that wages of care home employees are determined locally.

The consultation has indicated that more providers prefer a single rate over geographically differentiated rates. Administering different rates for different geographical areas is more time consuming and costly. It can lead to confusion and has the potential to delay placements and payments. The Council is able to make placements in all parts of the county at the current Usual Rate indicating there is no need for a geographically differentiated rate. Additional payments in the South would impact on the money available for the rest of the county. Whilst it is accepted that property prices vary across the county with parts of the South being more expensive the wages position is less clear. The work carried out by Laing and Buisson identified wage rates across the districts. This indicates that whilst median wages for nurses are lowest in Lincoln City the median wages for care assistants with no NVQ are highest in Lincoln City. Further the differentials are reasonably minimal for example the lowest median wage for care workers is £ 6.13 per hour in East Lindsey with the highest being £6.30 in South Kesteven. For the above reasons the Council does not propose to apply geographically differentiated rates.

6. Council assessment and contracting

Some providers felt the quality of the assessments were poor with some providers concerned that the Council was operating a Tick Box system.

Providers expressed frustration at the delays in the system which some thought were deliberate and which delayed payments to providers. Comments included: social workers are not completing paperwork; when they are off no one else picks up the case; if the payment run is missed providers have to wait four weeks before payment is made; no one comes back to the homes about queries; communications between Mouchel and Health and the Council are poor.

The Council acknowledges that it is has failed to manage the paperwork around the process of placements well causing delays to payments which it accepts is unacceptable. It recognises and is grateful for the sectors patience in this regard. Having listened to provider concern specified officers are working though the backlog of outstanding fees and progress has been made. As of 6th February 2012 there were 307 queries 259 have now been resolved. Further queries continue to arise but work has been carried out to streamline the approval and payment process. As a consequence IFAs will be sent directly to the providers instead of via the Council's contracting team; common errors have been identified and a guidance paper for operational staff has been created embedding all cost code lists and Usual Costs to ensure the correct process is followed; training has been provided and from the 30 April 2012 Mouchel will be processing all SOFs which will reduce confusion for operational staff as to where to send the form. Priority will continue to be given to resolving the existing backlog of payments and reports will be delivered to Adult Social Care's Management Team on any outstanding and delayed payments. A provider helpline will be operational from the 21st May for providers to call if they have not received an IFA within the agreed timescales. Amendment of the framework contract to require the Council to pay interest to all providers on any outstanding fees will also help to drive further performance improvement going forward.

7. Change in personnel/strategy
Lack of partnership working

Providers have pointed out that the frequent change of senior personnel and strategy often poorly managed has adversely impacted and hampered effective engagement and partnership working with the sector which the Council has not invested in sufficiently or in a timely way for example the quarterly contract monitoring meetings were stopped a couple of years ago and nothing put in their place. They point to the Council's unilateral replacement of a contract which provided for an automatic inflationary increase with a contract where payment was linked to quality and the subsequent unilateral shift away from the quality approach and the 2011/12 reduction in fees. A large provider is uncomfortable that decisions on rates are made without the Council visiting the homes to see the magnitude of what providers do in their care of residents which should be reflected in appropriate rates above the absolute minimum.

The Council recognises that both the Council and the sector would benefit from a period of stability and further Council investment in partnership working. To this end the Council has listened sympathetically to provider comments in the consultation and has significantly increased the recommended proposed rate at a cost to the Council of over £4.3million (some £1.4 million more than was first proposed) and proposes to set the rates for the next 3 financial years giving providers as much security as possible in the current economic climate. Further the Council commits to improving the effectiveness of its workings with LINCA through better agenda management, early provision of key documents, greater focus in meetings on outcomes and where necessary increased meetings. It is hoped that this will

enable matters of mutual interest to be better discussed and for both the Council and the sector to find new ways of supporting each other. The Council is mindful that not all homes are members of LINCA and therefore it proposes to hold locality meetings where providers can raise concerns, queries or matters of interest and where the Council can report back on its work with LINCA. The Council is happy to be guided by the sector's views on how engagement could be improved without becoming burdensome to providers. Increased investment in partnership working will enable more visits with homes however in the meantime it is of note that the decision maker in this matter, the Executive Councillor has indeed visited homes and has high regard for the quality of care delivered.

8. Issues with the Council's proposed Framework Agreement

The Council held locality meetings with providers in Horncastle, Spalding and Lincoln in March 2012 to discuss proposed changes for 2012/13 to its standard terms and conditions. The changes were minimal and centred around updating the contract to reflect the Essential Standards of Quality and Safety which providers comply with in any event as part of the registration requirements. Little or no feedback on the contract terms and conditions was received save that at the Horncastle meeting providers asked the Council to liaise with home managers as well as with home owners around contract management issues. At all 3 meetings considerable interest was expressed on the proposed rates would be.

Subsequently and as part of the written feedback some providers have said that the terms and conditions are unfair and unreasonable and lacking in clarity.

The Council is happy to meet with providers either as a group or individually to discuss providers concerns with the Council's standard terms and conditions. The Council's interest is to seek to safeguard the well being of service users and to ensure that public money is properly spent, once that is achieved it has no wish to be burdensome.

9. Consultation process

Whilst recognising and welcoming the engagement providers say that communications from providers have been ignored; that the Council is more interested in protecting itself from legal challenge; that the report and methodology are unclear; that little time given for providers to respond and service users and family members should be consulted as they will need to subsidise LCC rates with top ups.

The Council has taken into account comments made in the consultation see in particular Council responses in relation to comments on the rates at paragraph 10 below leading to a very significant increase in the cost to the Council of the recommended option 3 over Options 1 and 2. The Council has asked providers to specify what communications have been ignored and in the event any substantive points have been overlooked they will be brought to

the attention of the decision maker. The Council has shared its costs model and draft decision making report with the sector and has done its best to explain the methodology. The Council has engaged with the sector over a prolonged period starting with the instruction to Laing and Buisson in September 2011and following production of the proposed rate, costs model and draft decision making report provided a 3 week consultation period. There is nothing in the statutory scheme requiring or advising consultation with residents or their families and whilst it is always possible that some residents may suffer a detriment, for example having to move to continue to occupy accommodation at "usual cost", or to pay a top up instead, that prospect is remote. Indeed the proposed rates now offer increases over all categories of care and as a result the Council would hope that providers reconsider the third party top ups currently in place with a mind to reducing them.

10. General comments on rates

(i) Fees are too low and do not reflect the rates across the country, the true cost of providing the service and guidance to be gained from recent case law. Fees should be in the ball park of £460 – £500 (which is approximately the figure coming out of the JRF toolkit for residential care) particularly for nursing and HD and for residents with dementia.

A nursing provider was very disappointed with all 3 options which offered very little for nursing care. Their view was that the Council and health had much to benefit from working with Lincolnshire's excellent private sector.

The report deals with the recent case law see paragraphs 1.5-1.12. Comments made about specific rates in other parts of the country in those cases cannot give guidance as to the true cost of care in Lincolnshire. More generally, it is difficult to compare rates across authorities as costs vary considerably and authorities structure their rates differently some differentiating geographically and on the quality of the physical accommodation with some having numerous categories of care and some only a few. That said the Laing and Buisson report indicated that the Council's 2011/12 rates compared well see paragraph 6.6 of the report. The Council has taken care to construct a costs model which covers the costs of providing care and to amend it in the light of provider comment. In particular, initially because of affordability issues the Council was not proposing to reflect the full cost of residential care immediately rather the Council was only going to cover the cost in its rate in year 3 of the 3 year period. That is no longer the case. The increases to the proposed rates for 2012/13 following consultation amount to £26 per resident per week for residential care a percentage increase of 7% ; £2 per resident per week for nursing care a percentage increase of 0.5% ; and £18 per resident per week for HD a percentage increase of 4% . The Council is confident that the revised increased proposed rates cover costs.

By way of illustration if the Council were to increase the rates to £500 per resident per week for all categories of care and to include elderly, physical

and learning disability and mental health service users the cost to the Council over 3 years would be approximately £16m. This is unaffordable.

The Council would like to work with health in a way which is supportive of the sector and whilst it will be constrained by the national picture, the Council sees opportunities for collaborative working through the Clinical Commissioning Groups.

(ii) Significant distortion and "cherry picking" of figures from different models to support proposed rates rather than setting rates based on findings that represent the true cost of care. Providers felt that Laing and Buisson should have been commissioned to carry out a true cost of care exercise including setting occupancy and rate of return on investment. Alternatively other more soundly based sources of data should have been used such as the Laing and Buisson model based on the East Midlands in 2010 or the original Laing and Buisson model which it is said the Council accepted in 2003.

It is recognised that there are four main components of care home costs; staffing; repairs and maintenance; other non-staffing costs and capital costs. The Council in discussion with LINCA asked Laing and Buisson to collect costs data from the market for the first three non controversial components as the Council felt that providers would be more willing to provide sensitive costs data to Laing and Buisson. It is this data that has populated the costs model with only 2 adjustments being made as explained in paragraphs 2.3 and 2.4 regarding occupancy rates and care hours where it is considered some variation is necessary to the Laing and Buisson Lincolnshire survey to reflect the national data set out in the JRF toolkit. This was not cherry picking but an attempt to ensure inefficiency was not rewarded and to address concerns raised in the consultation around the reliability of the data in so far as it suggested that more care hours were expended on residential residents than nursing residents. The Council has been provided with and has considered the Laing and Buisson Fair Price for Care Model East Midlands 2010 which was prepared under the direction of Philip Mickleborough. The East Midlands Model follows the JRF toolkit approach as does the Laing and Buisson Lincolnshire survey, also carried out under Philip Mickelborough, in relation to the first three components of care. Philip Mickelborough has subsequently confirmed this to be the case. Consequently there is little if any material difference between them and the Council has used the data collected from the Lincolnshire survey as it is local and current. The Council has not followed the JRF toolkit or the East Midlands Model for the fourth component of cost and has not applied a 12% rate of return on capital for the reasons set out in paragraphs 2.5-2.26 of the Report. The Council is fulfilling its obligations to ascertain and take account of the current costs of providing care in Lincolnshire. Comments need to engage with the data and analysis put forward by the Council through this exercise not approaches adopted across wider areas or nearly a decade ago.

(iii) The proposed rates focus on elderly and not other client groups such as Learning Disability, Mental Health and Physical Disability and it is not clear how these rates will be dealt with.

There is insufficient data in the Laing and Buisson Lincolnshire survey to enable a cost of care calculation to be carried out for these categories of care. The Council intends to carry out a similarly detailed analysis in the near future in discussion with the sector. However in the meantime the Council recognises that similar cost pressures apply and where specialist placements are below the proposed rates they will be increased by the same percentage as the most comparable elderly rate see paragraphs 2.28 and 2.29 of the Report.

(iv) Providers asked why figures from Council care homes were not used.

Council care homes were recognised as being too expensive and as a consequence have now been closed. To have included cost data from them would have skewed the outcome.

(v) Providers are concerned that self funders and health funded placement figures were subsidising LCC funded placements.

As indicated the Council is confident that its proposed rates cover provider costs and as a result no subsidy exists. It is accepted that some providers charge more for self funders but that is a commercial decision made by the sector and not something the Council is able to control.

(vi) Providers had a mixed view on whether the rates should be set for 3 years or 1. Some felt with the increasing cost in providing care and economic uncertainty a 1 year agreement was preferred whilst others preferred a 3 year agreement, either with increases linked to inflation or a realistic fee structure as the current process is very costly in time and financial resources for both the Council and providers.

Following the consultation the proposed rates for 2012/13 standard residential and HD and linked rates have increased significantly and there has been a modest proposed increase for nursing and related rates. Further a low but realistic inflationary increase has been added to all rates for 2013/14 and 2014/15 providing a realistic fee structure which providers said they wanted. In the light of improvements made to the proposal more providers may be happy for rates to be set over a 3 year period. This is the Council's preferred way forward because of the time and cost in proceeding on a year by year basis and because the Council would like to offer some stability to the market and to assist in budget management.

11. Issues on the costs model

(i) The 6% rate of return on capital is too low and will not encourage investment in Lincolnshire. Providers say that no investor would invest in

residential care homes at that rate – it can be as high as 15%, and certainly no less than 8%. Providers refer to the 12% rate of return used in the JRF toolkit which would allow reinvestment and say that the comparison to the CBRE figures for Prime Healthcare (6%) and Good Secondary Healthcare (7%) are flawed as these relate to real estate investment where the investor is leasing the property to an operator and its risk is limited to its capacity as a landlord which is not comparable to the higher risk associated with the provision of 24 hour care to vulnerable people. It is also lower than the interest rate charged to a provider to fund new developments. It is more of an issue as the number of Council placements are falling.

The Report deals in detail with the rationale behind the 6% rate of return which was used to inform the amount to pay providers for the provision by them of accommodation see paragraphs 2.5 to 2.26. However in brief the Council is satisfied that the £53 per week per resident in the model for accommodation is reasonable and is more appropriate given the Lincolnshire market and more consistent with the calculation of cost than the JRF toolkits 12%. The case law is clear that there is no need for the Council to adopt the JRF toolkit when calculating costs.

(ii) The £42,000 care home bed valuation is too low and would put providers in breach of their banking covenants, sampled from only 15 care homes for sale with no details as to whether they are compliant with the 2002 Environmental Standards or how many shared rooms/en suite facilities there are. More credible data about this can be collected from sector valuers Knight Frank, GVA or Christies. The JRF Toolkit 2008 suggests £59,500 and there is no clear reason why LCC model should be less. One respondent suggested £60,000 per room for a new build was appropriate, another £70,000 and a third in excess of £80,000. Another provider indicated that its experience indicated it was at the bottom end for purchasing existing homes "we have never paid less than £40,000 per room and more commonly in excess of £50,000". Yet another provider indicated they

The Council accepts the sample size was small and it is unable to provide specifics of the homes included. However all homes on the market at the time were included so there is no reason to believe that the sample is unrepresentative, the exercise was carried out very recently (14 February 2012), all the homes were within Lincolnshire and the price used was the valuation which may well have been higher than the eventual sale price. There is also some support for the figure from the consultation see above and further a Lincolnshire group home as part of this consultation has provided information which states that for 2011 it has valued each of its rooms as a going concern at approximately £30,000. Also the figure is supported by figures elsewhere for example by Terra Firma's acquisition of Four Seasons, announced on or around the 28 April 2012, for £825m relating to 445 care homes, with 22,364 beds, and 61 specialist care centres, with 1,601 beds amounting to an average value per bed of £34,500 (the cost of each care home bed will be less than this as the specialist care centre beds will be more expensive). The £59,500 figure in the JRF toolkit on the other hand is based on figures from "major corporate groups" engaged in the development of new

home capacity anywhere in the country. Local respondents also provided new build figures spanning a wide range but as indicated in paragraph 3.5 of the report, currently there is sufficient capacity not to require building additional capacity.

(iii) Providers say that the Council has underestimated the degree of risk for Providers in contracting for Council funded residents. In particular, the percentage of the market that Council-funded placements represent is on the Council's own plans set to fall by 45% over the next two years with a consequential reduction in occupancy rates which will substantially increase the risk to Providers.

This is dealt at paragraph 2.17 in the report but in brief Council demand will fall gradually over time and the number of bed losses is likely to be small. The sector is aware and is able to take advantage of other market opportunity set out in paragraph 6.4 of the report.

(iv) Providers say that the Council has failed to take into account certain costs, including; nursing care hours, back office costs, management, administration (included under the Laing and Buisson Lincolnshire data under marketing), PR advertising and communications, maintenance capital expenditure, activities coordinators or higher pay for senior carers, has ignored pressures on food and fuel and has used median figures where mean would be more appropriate.

In the light of this feedback changes have been made to the costs model;

- *Senior Care Assistant rates in terms of the % of total hours were incorporated into the average hourly care cost. Changes were also made to the % care assistant hours with or without NVQ 2 and incorporating % of care assistant hours for senior care assistants, adding £0.18 per hour onto the average hourly rate for care staff (pre inflation) and similar increases to the other rates.*

- *Unit cost of Capital maintenance was included in addition to revenue costs already included adding £11.53per resident per week (pre inflation) on all rates.*

- *1.8% increase in minimum wage rates were applied to all wage rates prior to on-costs adding £0.12 per hour onto the average hourly rates for care staff and similar increases to the other rates.*

- *Inflation has been added to the elements produced from the L&B Lincolnshire data and where appropriate were based upon specific elements of the Basket of Goods used to formulate the Consumer Prices Index inflation reports provided by the Office of National Statistics. Data was taken from the February 2012 report. Where specific elements were not used the rate applied to miscellaneous goods was applied adding on average £4.55 to the overall hourly cost of all rates.*

The Council has also increased NI on Costs by 1% to reflect increases in employer NI contribution adding a further £0.63 per hour overall to the hourly rate (pre inflation) for standard residential rates and similar increases for all other rates. No additional allowance has been made for activities co-ordinators because there was no significant information available other than hourly rates of pay within the Lincolnshire data collected by Laing & Buisson (median rate of £6.28 per hour). The treatment of activity coordinator rates of pay within the Laing and Buisson model is to incorporate the hourly rate within the overall hourly cost of providing care and specific activity is included within the 18.5 hours that the model applies to standard residential rates. As such to incorporate the Lincolnshire hourly rate into Lincolnshire County Council's cost model would have the effect of reducing the average hourly rate of pay applied within the model and therefore reducing the overall staffing cost calculated. No allowance has been made for PR advertising and communications which is costed at £3.46 per resident per week as the Council is of the view that minimal activity of this sort is necessary to attract Council funded placements. The costs model does include an amount for administration, £9.01 as indicated by the Laing and Buisson Lincolnshire data. No additional allowance has been made for back office costs such as managing and paying staffing as it is felt this is sufficiently covered in the payment for administration and management in keeping with the JRF model. The Council has used the median rather than the mean as by excluding the extremes at each end of the scale reduces the potential for rogue numbers to skew the results. This is a very common approach in statistical analysis.

v) The Providers maintain that the cost model must be flawed as it leads to the same costs for residential and nursing rates. The Providers maintain that this is incorrect as it does not recognise the number of nurse-hours used in the provision of the services and the degree to which nurses carry out non-nursing activities and does not recognise the additional equipment to be provided and serviced.

The hours used for nurses is 7.5 hours per week as indicated by the JRF toolkit even though the Laing and Buisson Lincolnshire survey indicates that more nursing hours are used within Lincolnshire. This is because the cost of nursing care is covered by the NHS-Funded Nursing Care Contribution set nationally (currently £108.70 per week) which just about equates to the 7.5 hours. It is noted that only minimal increases have been made to this in April 2009 it was £106.30, in April 2010 - £108.70 and there have been no increases since then. Whilst this might be impacting on providers a shortfall in the NHS-Funded Nursing Care Contribution is a matter for the NHS and the Council cannot lawfully make up the difference. That said the Assistant Director will do his best to raise this matter within the Association of Directors of Adult Services and will seek to encourage providers to do likewise at a national level. It has been suggested that nursing hours are being used for non nursing activity but there is no evidence to support or quantify this.

Similarly the NHS is responsible for the costs of any additional equipment related to a health condition that nurses need for care in addition to the

standard equipment that a nursing home provides as part of its services. Further, residents of care homes (residential and nursing homes) should have access to the full range of specialist NHS support as available in other care settings and at home for instance, chiropody or physiotherapy, as well as to the full range of available community equipment services, including pressure relief mattresses, aids to mobility, communication aids etc, funding for such services is the responsibility of the NHS and not the local authority.

APPENDIX E - CONSULTATION RESPONSES

- Minutes from the meeting on 18th January 2012
- Letters from Primelife dated 21st March, 10th April and 15 May 2012
- Notes from Residential Fee meeting on 19th March 2012
- Minutes from the Finance Workshop on 23rd March 2012
- Letter from LACE dated 2nd April 2012
- Email from Waverley regarding the Framework dated 14th March 2012
- Email from Andy Hibberd regarding the Framework dated 23rd March 2012
- Email on behalf of Richard Durance dated 5th April 2012
- Letter from Holbeach and East Elloe Hospital Trust dated 12th April 2012
- Letter from Tanglewood dated 12th April 2012
- Letter and attachments from Priory dated 12th April 2012
- Letter from Aston Brooke dated 13th April 2012
- Communication from OSJCT dated 13th April 2012
- Letter from Halcyon dated 17th April 2012

Notes of a meeting held on the 18th January 2012

The meeting was between the Council and providers to feedback the findings from the Laing & Buisson report and to discuss the next steps in relation to residential care fees.

A presentation was given in relation the current status of residential care provision and fees at Lincolnshire County Council; this was followed by an overview of the Laing & Buisson report.

The main feedback from the findings of the Laing & Buisson report focused on care for people with dementia and the removal of the HD2 rate within the current contract.

In relation to dementia it was stated that dementia care is underfunded particularly because there is not a specified dementia rate within the contract and that now the HD2 removed it has increased the issue.

Providers also commented that Lincolnshire County Council have stated we wish to keep people in their homes and providers questioned what the cut of point was. The response was that it is fundamentally on need however providers further questioned that there was not an actual cut of point and that some authorities fund care packages at residential care level costs. It was confirmed that Lincolnshire does not currently have such a policy.

One particular provider raised concerns in relation to the savings required over the next two years. The provider referred to there only being 11 counties with a greater problem than Lincolnshire and that LCC has an obligation to pay a fair price for care.

It was highlighted that Leicestershire County Council have also commissioned L&B to undertake a fair cost of care exercise and they are facing £150,000 in court costs as they did not undertake any consultation with providers. The provider also highlighted that the Pembrokeshire case has returned to court as a price was agreed but the calculation was incorrect.

The provider also commented that they have made a commitment to save money but if they loose accommodation it can not be replaced very quickly. Providers also commented that a conversation in relation to the inadequate pot of money are required.

Providers welcomed that LCC have requested financial information from providers as no one currently checks the finances of the homes. However, it was suggested that LCC should not take into account the rateable value as the information is old and where a home would have been trading at £40,000 per bed it is probably now £100,000 per bed, therefore a more robust methodology is required. LCC confirmed that the band data is also important and a broad view is required.

Providers also stated that the quality of stock devalues and that a downward spiral is not easy to measure and that the provision of residential care will be poor if there is no investment into the sector.

It was confirmed by some providers present that LCC now have less that 25% of the business within the homes and that will possible decrease further to 15% as providers are unsure of what involvement LCC will continue to have in relation to the placements in the homes. It was also confirmed that private residents are subsidising the LCC funded residents.

The Interim Assistant Director made reference to the possibility of introducing Geographical rates and asked for feedback in relation to the possibility, the issue in relation to Dementia was also touched upon.

Providers confirmed that the removal of the HD2 rate has had a dramatic impact on the level of care for dementia and that people entering residential care have much higher levels of need. It was also identified that one provider now has 18 residents that require two carers.

The question to establish if providers feel there should be a higher rate for dementia was raised by the Interim Assistant Director and providers were in agreement that a rate is required as residents are challenging, aggressive and unpredictable. It was also highlighted that such residents are higher risk and the homes are unable to provide the service they require.

Some providers stated that geographical payments would not work and questioned who would state what the rates would be in each area. It was also highlighted by a provider operating within the East of the county that staff working within homes at Skegness move on to different jobs during the summer season.

Discussion also took place in relation to the quality of the assessments that are being undertaken and that is felt by providers that LCC is operating a Tick Box system. Providers also expressed that they feel as though the delays in the system are deliberate in order delay payment to providers. Officers from LCC confirmed that this was not the case and that they are aware of the issues with payments and that the issues are being addressed.

Further comments and feedback received including the following:

- Why don't we contract in a timely fashion?
- Social worker are not completing paperwork
- Social workers are off work with stress or other illness and not one else is picking up the case
- If the payment run is missed for particular residents providers have to wait four weeks before payment is made
  Pre organised everyone – no one knows what doing
- No one comes back to the homes about queries
- Homes can only pay minimum wage but people can receive a higher wage else ware for example a supermarket in Grantham pays more per hour

- How can homes provide care on minimum wage?
- Once a resident is entitled to continuing Healthcare providers have to wait for payment to come through and the payment is paid through Mouchel but it is felt Mouchel and Health do not talk.
- Number of clients under continuing Healthcare in Lincolnshire very small
- Other authorities provide much more
- Why Lincolnshire PCT ask for more staffing when they pay less
- West Berkshire appointed nurse to do continuing care assessments in residential also
- If we invested money would go further

The interim Assistant Director stated that the report should not be criticised and that the full report would be issued to all homes. It was also confirmed that LCC would like providers to engage with the consultation.

Providers were also thanked for all of their comments.

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21th March 2012

Mr Steve Hochin
Lincolnshire County Council
Orchard House
Orchard Street
Lincoln
LN1 1BA

Dear Steve,

Re: Care Fees Review

Acknowledging our recent consultation meeting in the Council Chamber, and your subsequent telephone conversations with Jay Hairsine, my Finance Director, herewith some information for the benefit of your forthcoming meeting this Friday, together with other care providers, to discuss fee levels, Jay and I apologise for not being able to make the meeting, but with such short notice, unfortunately we are unavailable, but I hope that you will offer the information that we have provided to the group, copies have already been sent to the Care Home Association and other corporate providers who are anxious that our contribution should be taken into account.

Before we respond directly to your own presentation on your residential care funding formula, and your own findings, it would be wise to take into account the bigger picture, whilst we accept there may be some small regional variances in cost base, as all commissioners are involved in the same process being the start of the financial year, and some early outcomes have already appeared, it is wise to take note of same, they consist of the following:

Scotland has a national agreement, and I have included a document (Appendix A), that suggests that their fees are being uplifted by 2.75%, giving a residential fee of £487.00 and a nursing fee of £565.00.

More locally in England, we have some well tested cases, three of which have had the benefit of High Court intervention, through the judicial review process, whilst they have yet to be concluded, they do offer some important market evidence as follows:

The first challenge to be assessed in the High Court involved Pembrokeshire County Council and I have included documents (Appendix B), which summarise the first hearing, where it was suggested that the Authority acted unlawfully as a result of poor consultation, and therefore the consequential setting of the fee, but I have included a commentary on a second hearing, where an offer to increase the fee for residential care from £390.00 per week to £464.00, was rejected as apparently the Council had understated a fair return on

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capital, in the sense that the definitive outcome is yet awaited, we do know that it is likely to be greater than the figure stated.

In the Sefton case, documents again enclosed (Appendix C), there is an absence of any useful information in terms of projected fees, but there is a statement made within the summary confirming the current fees, and confirmation that during the period of the price freeze, inflation had been virtually 10%, as the fees initially were greater than the current fees in Lincolnshire, particularly the nursing care fee, this gives us valuable evidence as to which direction we should be looking.

More locally, in fact our home county, has been the subject of a further judicial review, again for which we have enclosed the relevant documents (Appendix D), the document contains details of the current fees, but as well the outcomes of a recent exercise carried out by Laing & Buisson, that conclude that the fair cost of care in the County of Leicestershire is £528.00 per residential care and £688.00 for nursing care. The relevance of the above is that as we operate in both the Counties of Leicestershire and Lincolnshire, and have the benefit therefore of management accounts on our provider units, and as we contributed to the research process carried out by Laing & Buisson in both Counties, we know that the local variances are minimal, and although we respect the fact that you chose to terminate your arrangement with Laing & Buisson to determine the fair cost of care, it is not unreasonable to assume that had it been completed, likely as not it would have been at similar levels.

In summary therefore, the evidence that we have provided as detailed above and there is more available, points in one direction, the fair and reasonable cost of care is higher than the two proposals that you have put forward, with residential care as likely as not being in the region of £480.00 per week, and nursing care in excess of £100.00 per week more, the question therefore is as to why your own assessment varies so dramatically from the current market evidence.

In the limited time available, and accepting that your presentation is a simple summary of the situation, and if it would be helpful Jay Hairsine is prepared to work you to look at the detail, we have however identified some key areas that may offer explanation as to why your figure is apparently so far from market norm and they include the following:

Income

In assessing your sample homes, you indicate that you have taken into account the total income, whereas you have also stated that as a commissioning body you purchase an average of just over half the available placements. In effect therefore your calculation has failed to take into account that the placements purchased essentially by this self-funded market are at a premium level, and as such you have accommodated the premium into your calculation to provide an average, but in effect you are seeking for the self-funded clients to pay high prices to subsidise the underpayment on your part.

The whole issue of the self-funded clients subsidising your own placements is highly contentious, but as well for homes that provide services to client groups who are in the main funded by yourselves, i.e. the clients with learning disabilities, adults with mental

health needs or physical disabilities, this creates an unfair disadvantage, and substantially effects the financial viability of such units.

Expenditure
Your summary does not give a breakdown of expenditure, simply an average cost, without the detail we cannot comment meaningfully, other than stating that the cost appears artificially low, it is possible that you have left out of your calculation certain costs, and to which end we would be grateful if you could therefore supply more detail, indicating the costs that you have include.

We are however mindful that your formula suggests that nursing care is disproportionately cheaper than high dependency residential care, this is in complete contrast with all available evidence across the national market, we would suggest that two areas where the error may lay, are firstly the assessment of the labour content necessary to provide an appropriate nursing service and secondly, to provide a nursing service, there is additional equipment to be provided and serviced, including specialist beds, pressure relieving mattresses, moving and handling equipment and additional procedures to be followed, mainly focusing on infection control, the administration of medications, that lead to increased costs, with the benefit of your detailed costing, we can advise as to whether or not you have been made aware of the impact of same.

Return on Capital Employed
Your presentation has established your assessment of the average room value or placement in the County, at £42,000 and on this you have therefore applied a fair return on capital.

The value of £42,000 is certainly at the bottom end of the market, we know this in the sense that we have both purchased homes in the County in the past few years, and likewise we have constructed brand new accommodation and in both instances, to purchase a home that is compliant with current standards, in other words offering spacious single room accommodation, and all the required facilities, we have never paid less than £40,000 per room and more commonly in excess of £50,000 and that to construct a brand new facility, the construction, land and design costs always exceeds £70,000 per room, as such therefore your figure appears understated.

The issue of a fair return on capital employed is probably far simpler to address in the sense that there are many authoritative reports available, not least from our colleagues Laing & Buisson and such returns are echoed by other authoritative bodies, such as Knight Frank, Christies and many other major players in the industry. Perhaps most importantly this matter has been tested in the High Court, and the return on capital employed of between 12% and 16% assessed relative to the quality of provision, is well established both within the industry and with the benefit of the High Court endorsement, your assessment therefore of 6% is wide open to challenge.

Conclusion
With the limited time and information available, I hope that you find the above useful, and that you will take it into account in formulating your final proposal, which we understand is being taken to elected members shortly.

The evidence suggests that you are in the region of 20% behind the market place generally; we understand and have listened patiently to Terry Hawkins assessment of the overall situation, including the pressures upon your Authority to make budgetary savings, and whilst we have a degree of sympathy, the High Court in its summing up of the various challenges that have gone forward have attached little weight to same, but have stressed the importance of effective consultation, to achieve a fair outcome, such that you as commissioners pay a reasonable cost of care, but with the knowledge that you are receiving value for money.

We would further encourage consideration to be given to both the short term objectives and the longer term pressures, in Lincolnshire, following the national trend we are facing an unprecedented increase in the number of elderly and frail people requiring care, your Authority has chosen to close its own inefficient, expensive in-house services, which we commend, but the result of which is that you now more heavily rely upon services provided by the independent sector and it is important therefore, that in setting your fees they are at a level that maintains the viability of existing homes and it was noted at our recent meeting that in the past two months three homes have already closed, but as importantly that the fee levels accommodate a fair return on capital to encourage investment in new services for the future and at the level that you have offered, 6%, there is not a bank, nor an investor, nor a developer that would be attracted by your market, as such an understated fee with an unreasonable rate of return, prohibits any potential growth in the market, and is the signal for undersupply in the future and if a market is undersupplied we all know where costs will go.

This begs the question as to where the solution lies, our view would be that it is above the levels that you are currently offering, but realistically we cannot perhaps expect to address the shortfall within the first financial year, but we would like to see material inroads into the current deficit, as well as a commitment to giving the whole issue of the fair costs of care priority in the future years to ensure that the right signal is given out, that Lincolnshire are using their best endeavours to pay a fair fee, that they can attract investment in the future, and that they do not become the next Authority to be summoned before the High Court, for what will be the second time, we need to use all of our available resource for positive purpose, not to fund the legal profession!

Please therefore take into account the information that we have offered and can we reaffirm that we remain committed to working with you, we need sight of the detail behind your equation in order to give a more informed response, but we hope that you find our early finding a positive contribution.

Yours sincerely,

Peter Van Herrewege
Chairman

A.

Scottish providers vote to accept 2.75% fee increase

Scotland is already enjoying its independence for its care for the elderly – with fee increases announced for 2012.

In February, Scottish Care members, a group comprising most care home operators in Scotland, voted to accept the 2.75% fee increase offer from the Scottish Government after discussions between Scottish Care and COSLA (the representative voice of Scottish local government and of all 32 Scottish Councils). The fee increase will be effective from April 2012.

Fees in Scotland have grown by more than 75% over the last eight years although more recently, only marginally at around 2% in 2010 with no rise seen in 2011. Fees at present are generally £550 and £474 per resident, per week, for nursing and residential care respectively.

The increase is welcomed by operators. Research undertaken by Walton Healthcare Property Consultants shows that many have seen their margins squeezed due to inflation; rising wage costs and overheads. With inflation predicted to fall to around 2% by the end of 2012 coupled with less than anticipated National Minimum Wage increase at the forthcoming budget, this suggests the fee increase may have a positive impact on the values of care homes in Scotland. However, on the downside, it is probable it may just help to sustain valuations due to the reduction in profit levels which have been apparent over the last year or so.

Forest Care Home Limited & others v Pembrokeshire County Council

By David Collins (solicitor)

We all know that the rates paid by local authorities for the care services they commission from care homes is notoriously low and below what can be considered as a fair price.

In October 2001, the Department of Health issued "Building Capacity and Partnership in Care" in respect of which commissioners of health and social care were required to have regard when setting fee rates. In my view, the following extract best summarises the concerns and objectives that were recognised at the time:

"Providers have become increasingly concerned that some commissioners have used their dominant position to drive down or hold down fees to a level that recognises neither the costs to providers nor the inevitable reduction in the quality of service provision that follows. This is short-sighted and may put individuals at risk. It is in conflict with the Government's Best Value policy. And it can destabilise the system, causing unplanned exits from the market. Fee setting must take into account the legitimate current and future costs faced by providers as well as the factors that affect those costs, and the potential for improved performance and more cost effective ways of working. Contract prices should not be set mechanistically but should have regard to providers' costs and efficiencies, and planned outcomes for people using services, including patients."

We are now ten years on, yet this extract chimes no less today than it did in October 2001.

Regard should also be had to the Guidance on the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 which states that:

"In setting and reviewing their usual costs, councils should have due regard to the actual costs of providing care and other local factors [in addition to also having] due regard to Best Value requirements under the Local Government Act 1999."[1]

A care provider's ability to challenge a local authority's fee rate has been and remains dependent on various factors:

- Whether the provider offers care services which are in high demand, which will principally be because they deliver specialist care.
- The provider's share of the local market.
- Whether there is a contractual entitlement (and there are precious few) to a price review that applies a sensible methodology which recognises the increasing costs of delivering care despite increases in efficiencies.
- Whether there is a unified voice amongst the providers within the area, or whether the local authority can adopt a divide and rule approach.
- Whether a provider has the appetite and resources to engage in challenging an authority under any available contractual mechanisms (such as mediation, or arbitration), or indeed court action.

[1] The Local Government act provides that: "A best value authority must make arrangements to secure continuous improvements in the way its functions are exercised, having regard to a combination of economy, efficiency and effectiveness".

In the absence of any identifiable breach of the contract between a local authority and a provider, judicial review is the only legal route through the courts that is available to a provider[2].

Most lawyers view judicial review as somewhat of a blunt instrument. In crude and simple terms, it is a legal process by which public bodies can be ordered by a court to either carry out a duty that they are required to perform, or to refrain from an act that they have no authority to perform. The limitations of judicial review lie in the fact that in the former instance, a court will only ever rule that the authority has failed in its duties. The court will not go on to state what the outcome should have been, nor will it impose an outcome on the local authority. The authority will simply be ordered to go back and do properly that which they failed to do properly in the first place. In other words, the ultimate outcome will remain uncertain at the time of the court's judgment. Further, there is no guarantee as to the outcome once the process has been correctly repeated.

This said, judicial review does most certainly have its place, particularly if a local authority refuses to engage in a sensible resolution of fee rates.

This is what has happened within the recent judicial review judgment delivered by the High Court in Cardiff on 21 December 2010. Within its judgment the court found that Pembrokeshire County Council's ("PCC") decision as to the price it would pay for the commissioning of care home services was unlawful because it was irrational. Given the limits of its judicial review function, the Court did not and could not say what the price ought to be.

When considering the decision we must recognise that the Court's decision was based upon the particular facts before it. Therefore, just because PCC's decision was unlawful, it does not necessarily mean that decisions as to price by other local authorities (even though considered by providers to be derisory) are also unlawful. However, the judgment gives the Court's approval to a number important principles and interesting points of note which we have been advocating for some time[3].

1. The Court did not dissent from previous rulings that if a local authority deviates from government guidance "without a considered and cogently-reasoned decision, it acts unlawfully and in a manner which is amenable to judicial review". The Court also echoed the view that even if there is a considered and cogent reason for deviating from guidance, the local authority does not have "the freedom to take a substantially different course". Further, if an authority has apparently acted in a way that deviates from governmental guidance, then it cannot be assumed that the authority has acted lawfully.

2. Although a local authority is required to consult with providers and to consider the consequences of its decisions, at the end of the day, the rate is to be set by an authority in accordance with its statutory public functions. There is

[2] Judicial review cannot be pursued if there is any other remedy available.

[3] It should be noted that the judgment was made within the context of the legal framework in Wales. However, in substantive terms there is very little difference between this framework and that which is operative in England.

no requirement for the rate to be set by agreement[4]. However, the rate must be set properly and lawfully. If the process is not proper and lawful, then it is amenable to review by the court. As already stated above, in judicial proceedings, the court can only express a view as to the lawfulness of the process and will not determine the rate that should be set.

3. Good decision making by a local authority requires "appropriate recording and communication of decisions made, and the essential reasons for them".

4. PCC accepted the Laing & Buisson ("L&B") cost model as a toolkit for calculating the price. The issues in this case revolved around the information that was being used to populate that toolkit[5]. The court did not (nor could it) rule that a local authority ought to or is required to follow the L&B's methodology. Nor did it say that were an authority to do so, it would discharge its duties in setting the price. However, the court did not criticise or take any issue with PCC's decision to adopt L&B.

5. PCC accepted that an appropriate percentage rate for return on capital costs was 12%.

6. Were a national model for calculating the price to be employed, then national benchmarking (for example when looking at staffing ratios) may be appropriate. However, a local authority must at least consider whether there are any local factors which militate against such an approach. For example, there may be historic reasons as to why local practices have developed, which if changed, could have a negative impact upon residents. One such local variation may be that the authority's region is rural and that the services are essentially provided by small providers who do not have the benefit of economies of scale which larger providers may have. If benchmark costs are set against these larger providers nationally, then a local authority should take this into consideration.

7. In making its decision to keep its rates static, PCC failed to take into account inflation and the recent changes in the Working Time Regulations. This meant that in real terms, a static rates review translated into a fee rate cut. The court did not say that this meant that a static review could not be maintained. However, before reaching any such conclusion PCC should have considered the impacts of such a decision. If it would be reflected in a loss of service to residents, then PCC had to balance whether this was acceptable in terms of proportionality. There was no evidence before the court that PCC had engaged in this sort of consideration and therefore its decision "was an error of law".

8. We are all rather accustomed to the familiar response from local authorities of "that's all we can afford". The Claimants argued that the PCC could not lawfully take into

[4] I would qualify this general statement of the law in circumstances where the contract with the provider requires agreement.

[5] This toolkit is widely recognised for determining a fair price. In short, price is calculated by reference to staffing costs, repairs and maintenance, other non-staff current costs, and return on capital costs.

Cordinarily (not fixed)
Duty to support those in need of accommodation and services

account its own limited resources when setting the price. The court said that it could not "accept that submission in its extreme form". The court held that a "Council is entitled to take into account its own financial position when exercising its discretion as to the manner in which and the standard to which such assistance is given, provided that the minimum requirements of section 21 [of the National Assistance Act] are met". The court continued: "However, when exercising its discretion in a manner which is adverse to an interested party – e.g in this context, a provider or resident – the Council's own financial position is of course not necessarily determinative". In other words, the response of "that's all we can afford" is simply not good enough in itself. A local authority must ensure that the price it sets is sufficient to allow care to be provided to the requisite standards and for there to be stability within the sector. Only once those standards as a base line have been met can a local authority take its own financial resources into account. In short, those resources are relevant, but only to a point and cannot by themselves form the rather familiar excuse as to why rates are not being increased. If an authority focuses solely on its resources when setting fee rates at the exclusion of the adverse consequences to both providers and residents, it will have "erred in law".

9. The court held that the claimant provider was not contractually entitled to claim third party top-ups without the consent of PCC, as the contract between the provider and PCC required PCC's prior consent. PCC did not therefore act unlawfully in trying to prevent the Claimants from doing so. The effect of the judgment on this one issue will of course depend upon whether you have a contractual restriction to request third party top-ups.

Conclusion

The Pembrokeshire case is not a judicial magic wand that will lead to proper commercially acceptable prices being paid by local authorities.

In my view, it will lead to authorities becoming being much more careful in how they audit trail their decision on the usual cost that they pay. This may well inevitably lead to a degree of window dressing by them, particularly I suspect with regards to consultation with providers.

However, the inescapable truth is that the courts are prepared to intervene in decisions and will not be fobbed off by the rhetoric and restrictions which authorities have employed with providers for years.

Each decision by an authority will have to be carefully looked at to consider whether or not it has erred in law. If it has, then providers should not be afraid to bring this to their attention and indeed use it as leverage during the course of their negotiations at price reviews. If their voice is disregarded then providers should give serious consideration as to whether judicial review is a sensible option. When undertaking this consideration, one must bear in mind that judicial review must be brought within 3 months of the act complained of.

If a local authority has refused to increase, or indeed has reduced its

price, it is more likely than not that its decision is unlawful.

If there is a mechanism for reviewing price within the contract with the local authority, then the Pembrokeshire decision is still likely to be highly relevant to how that mechanism is to be employed.

In short, the Pembrokeshire decision should undoubtedly prove very effective in the care home sector's armament.

David Collins is the Managing Director of David Collins Solicitors who provide legal advice exclusively to care homes

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P.V.H

Amanda Akerman

From: Helen O'Leary [Helen.OLeary@barchester.com]
Sent: 05 January 2012 15:47
To: Peter Van Herrewege
Subject: FW: Hazlewoods Upate - The Latest Judicial Review

FYI

Helen

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From: Campion Hilary [mailto:Hilary.Campion@shakespeares.co.uk]
Sent: 04 January 2012 11:39
To: Helen O'Leary
Subject: FW: Hazlewoods Upate - The Latest Judicial Review

Hi Helen,
I thought you might be interested in the attached.
Happy New Year (again)
Hil

Hilary Campion
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From: Roddy John
Sent: 04 January 2012 11:08
To: Healthcare
Subject: FW: Hazlewoods Upate - The Latest Judicial Review

More on the topical issue of JRs on Care Home Fee rates.

Difficult to see how LAs can ignore true costs of care any longer when looking at the fee rates for the new year commencing in April.

Regards, John.

John Roddy
Consultant

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From: Andrew Brookes [mailto:healthandcare@hazlewoods-online.co.uk]
Sent: 21 December 2011 14:57
To: Roddy John
Subject: Hazlewoods Upate - The Latest Judicial Review

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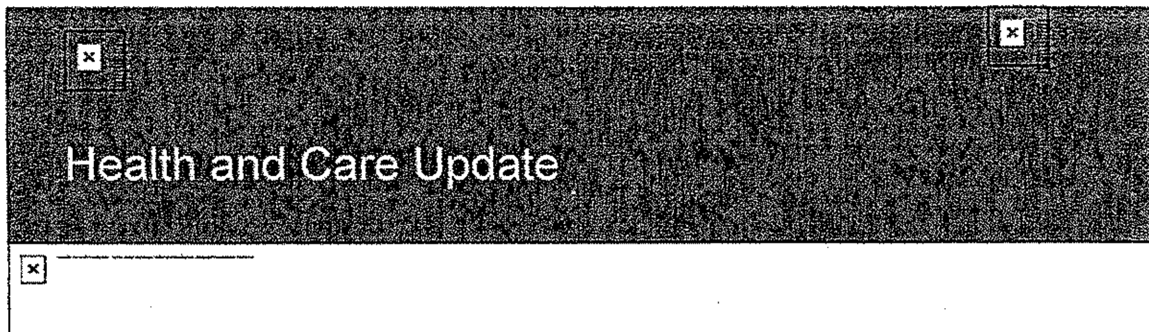

Dear John

Healthcare Update - December 2011

Many of you may recall the Forest Care Homes Judgement in December 2010, where Pembrokeshire County Council were found to have not applied the proper processes when setting the weekly fee rate.

Next steps:

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The Authority looked at this during January 2011 and agreed an uplift in the weekly fee rate. The
fee was initially £390 per week and was ultimately raised to £464 per week.

A group of home owners in Pembrokeshire have taken the Council to the High Court again, on the basis that they have still failed to calculate the fee correctly.

Hazlewoods carried out a review of some of the data used by the Authority when setting the rate of £464 and provided an expert witness report to the Court.

Last Friday, 16 December, the Judge handed down his decision that the Authority had indeed failed to consider all of the facts in an appropriate way and agreed that the Defendant (Pembrokeshire County Council) should give further consideration to this and re-determine the rate.

This latest judicial review is another example of the fact that the Authorities are going to have to give due consideration to fee rates in April 2012 and they will need to show that they have given proper consideration to all of the facts.

The decision hinged upon the fact that the Council had not given due consideration to the appropriate rate of return on capital and it is clear that this is going to need detailed discussion in all areas before fee rates can be set next year. We are working with many clients to establish detailed information ready for April 2012 and should you have any queries concerning this, we would be delighted to discuss matters further with you.

Kind regards

Andrew Brookes
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SEFTON CARE ASSOCIATION & OTHERS v SEFTON COUNCIL

By David Collins - solicitor and Managing Director of David Collins Solicitors

On 9 November 2011 (following a two day trial on 25 and 26 August 2011) the High Court of Justice Administrative Court, sitting in Manchester, ruled that Sefton Council acted unlawfully when making its decision to freeze care home fees for the second year running.

The Court quashed the Council's decision and ordered that it pay the Claimants' legal costs.

David Collins Solicitors acted on behalf of The Sefton Care Association and four private care home operators who pursued the judicial review proceedings against the Council.

The Complaint

Sefton Council funds 45% of the 3,545 residential and nursing care beds within Sefton.

On 16 December 2010, the Council made a decision (to be effective from 1 April 2011) not to increase the fees that it paid to care homes in Sefton. This was the second year running that the Council had decided not to increase fees.

The Sefton Care Association and a number of independent care home providers (within this bulletin referred to collectively as 'the Association' for ease of reference) challenged the Council's decision through a claim for judicial review. The main thrust of the Association's challenge was that:

1. The Council had failed or failed properly to assess or take into account the actual costs of care.
2. The Council failed or failed properly to assess the risks of its decision to care homes and to residents.
3. The Council failed or failed properly to assess or take into account local factors relevant to the provision and cost of care.
4. As a result of the above three grounds, the Council was unable to demonstrate that the fees were sufficient to allow it to meet assessed care needs and to provide residents with the required level of care services.
5. The Defendant failed or failed properly to comply with its general equality duty under section 49A of the Disability Discrimination Act 1995[1].
6. The Defendant failed or failed properly to consult with the care home proprietors.

The Legal Framework

Under the National Assistance Act 1948 and directions ('the Directions') made under it, where a local authority has assessed a person as requiring residential accommodation due to their age, illness, disability or any other circumstances, the authority is required to make arrangements to

[1] This duty is now to be found in section 149 of the Equality Act 2010.

accommodate that person at a place of their choice.

However, the Directions also provide that the local authority is only required to make arrangements for the person's accommodation in their preferred accommodation if:

"the cost of making arrangements for him at his preferred accommodation would not require the authority to pay more than they would usually expect to pay having regard to his assessed needs".

This is referred to as the 'usual cost'.

Formal guidance[2] (hereafter referred to as "the Guidance") issued by the Secretary of State regarding the setting of the 'usual cost' states as follows:

"This cost should be set by councils at the start of a financial or other planning period, or in response to significant changes in the cost of providing care, to be sufficient to meet the assessed care needs of supported residents in residential accommodation. A council should set more than one usual cost where the cost of providing residential accommodation to specific groups is different. In setting and reviewing their usual costs, councils should have due regard to the actual costs of providing care and other local factors. Councils should also have due regard to Best Value requirements under the Local Government Act 1999."

[2] The 1992 Choice of Accommodation Directions in Local Authority Circular LAC (2004) 20

The Guidance further provides that:

"When setting its usual cost(s) a council should be able to demonstrate that this cost is sufficient to allow it to meet assessed care needs and to provide residents with the level of care services that they could reasonably expect to receive if the possibility of resident and third party contributions did not exist."

As well as the formal Guidance, the Department of Health in October 2001 issued an agreement between the statutory and independent social care, health care and housing sectors called "Building Capacity and Partnership in Care" (hereafter referred to as "the Agreement"). Amongst other things, the Agreement provides that commissioners (which term includes local authorities) should ensure that they have in place *"clear systems for consultation with all (and potential) providers".* The Agreement further states that:

"Providers have become increasingly concerned that some commissioners have used their dominant position to drive down or hold down fees to a level that recognises neither the costs to providers nor the inevitable reduction in the quality of service provision that follows. This is short-sighted and may put individuals at risk. It is in conflict with the Government's Best Value policy. And it can destabilise the system, causing unplanned exits from the market. Fee setting must take into account the legitimate current and future costs faced by providers as well as the factors that affect those costs, and the potential for improved performance and more cost effective ways of working. Contract prices should not be set mechanistically but should have regard to providers' costs

and efficiencies, and planned outcomes for people using services, including patients."

Further still, the Agreement provides that commissioners should ensure that they have in place:

"Fee negotiation arrangements that recognise providers' costs and what factors affect them (as well as any scope for improved performance) and ensure that appropriate fees are paid".

Whilst the Agreement is not formal statutory guidance, a local authority is not free to ignore it. As with the Guidance, a local authority will have to justify any departure from the Agreement and there must be sufficiently compelling grounds for it to do so. The greater the departure from the Guidance or the Agreement, the more compelling the grounds must be.

The Facts

Back in 2003 an agreement was reached between the Council and care home providers in Sefton. Under this agreement, the Council agreed to implement a new fee structure from the 1st of April of that year. There was no evidence as to how the fees were set in 2003 and whether there had been any analysis at that time of the actual costs.

Between 2004 and 2009, the Council had reviewed its fee rates. Those reviews involved three stages: (1) meetings between the Council's adult social care officers and care home providers (represented by the Association); (2) a report by the Council adult social care officers to the Cabinet setting out the ever increasing concerns of providers' about the fees and the recommended fee level; and (3) the Cabinet's decision which followed the recommendations contained within the reports. There were fee increases in each of these years. Notwithstanding, in the 2005 report filed by the Council officer, there was a recognition that the Council was still some way off paying a "fair price for care".

In the report for 2009, the Council officer made three points of note: (1) the Association was of the view that a large increase in fees was required to prevent potential contractions in the care home market; (2) this concern had been countered by the fact that there had not been any home closures due to fiscal reasons during the last four years; and (3) new operators were coming into Sefton to expand their businesses. This report recommended a 2% increase in the fees as against the 6% requested by the Association.

By letter dated 3 February 2010, the Council informed care home operators that there would not be any fee increase for the year 2010/11. The Council informed the care homes that it was facing an £800,000 overspend on community care during 2010/11 and that given the economic climate, the Council could not support any increase in the fee rates. However, it stated that it had allowed for a 2% increase in its medium term financial plan for the following two years, albeit that this may be affected by "unforeseen pressures". In reaching this decision and in contrast to previous years, the Council had not engaged in any consultation with the care homes, whether through the Association or otherwise.

Back in 2009, the Council had identified the need for it to develop plans to address future expected financial problems being faced both nationally and globally. The Council's expectation was that there would be a resultant £25million shortfall in its budget over the subsequent three years[3]. This ultimately led to the Council identifying savings of £1.4million if it were to freeze the fee rates over the years from 2011 to 2014. The Council failed to communicate this to the Association.

In July 2010, the Association wrote to the Council asking for a meeting with the Council's Chief Executive to discuss its concerns. That meeting eventually took place in September 2010. During this meeting the Association raised the issue of the Council's chronic underfunding in respect of its fee rates, notwithstanding the Council's attempts to encourage investment and transformation within the sector. The Association made representations about the need for the Council's fee rates to reflect the actual cost of providing the services which the Council were commissioning from care home providers.

The Council's Chief Executive (whilst expressing sympathy) focused on the Council's difficult financial position and the looming budget cuts. She did not mention the Council's intentions to freeze the fee rates for 2011/12 and beyond.

Earlier, in August 2010, the Association had met with the Council's Strategic Director for Social Care and Wellbeing. During that meeting the Association repeated its concerns about the Council's underfunding and the need for the Council to increase its fees commitment if care homes were to remain viable and capable of meeting the requisite standards.

The Association again attempted to raise its concerns about the fee rate during a meeting with the Council in November 2010.

On 16 December 2010, the Council made its decision not to increase its fee rates to care homes for 2011/12. This would enable the Council to make a saving of £1,513,000.

Within a letter to the Association sent after the decision had been made, but before it had been communicated to the Association or care homes generally, the Council's Chief Executive stated:

"...we are still not in a position to offer any element of increase and unfortunately we will have to wait to see if the outcomes you predict come to fruition".

By letter dated 12 January 2011, the Council eventually notified the care homes of its decision not to increase fee rates for the second year running. This decision was made despite an increase in inflation alone (measured by the RPI) of 4.6% in 2010 and 5.2% to the end of May in 2011.

The fee rates paid by the Council were therefore to remain in the range of: £349 to £389 per resident per week for

[3] By November 2010, the Council's estimated shortfall had increased to £58.5million.

residential homes and £470 to £510 per week for nursing homes.

On 23 March 2011, David Collins Solicitors sent a letter to the Council detailing why they believed the Council's decision to be unlawful. The Council rejected this and proceedings for judicial review were issued on 11 April 2011.

The Judgment

The Court quashed the decision as being unlawful.

In its judgment handed down on 9 November 2011, the Court held that:

"***The Guidance and the Agreement do not contemplate that there will be any significant imbalance between the usual cost of care and the actual cost.***[4] *If a local authority consciously fixes the usual cost in a sum significantly less than actual costs, then [the court could] not see how it could be said to be having "due regard to the actual costs of providing care" as required by...the Guidance. Furthermore, such action by a local authority would [in the court's] judgment amount to a breach of the guidance contained in the Agreement, namely to take account in fee setting of the legitimate, current and future costs faced by providers, as well as the factors that affect those costs, and to ensure that appropriate fees are paid. If fee levels are set significantly below actual cost, then, in the words of the Agreement, there will be "inevitable reduction in the quality of service provision", which "may put individuals at risk...*

Whilst...there is nothing in the guidance that requires a local authority itself to undertake an assessment of actual costs, it seems to [the Court] that once the claimants asserted (as was done at the meetings in August and September 2010) that there was an underfunding of placements and the Basic Fee did not reflect the actual cost of providing the services commissioned, and was set at a level below what was required to ensure a viable sector, then at the very least, the Defendant, pursuant to its obligations to have due regard to the actual costs of care and the provisions of the Agreement referred to above, should, before re-fixing the fees at the 2009 levels, have asked the Claimants to submit a detailed assessment of what they contended were the actual costs of care so as to substantiate (insofar as they were able) their contention that placements were substantially under-funded in relation to the actual cost of care....

there is a plain risk of a fall in standards, which may put residents at risk, and of possible home closures, if indeed it is right that the fees, which have been frozen since the April 2009 increase, no longer adequately meet the cost of the provision of care. Whilst it is true that these fees are not out of line with those of other authorities, that does not mean that the fees are adequate, or indeed that these other authorities had due regard to the actual costs of the provision of care..."

The court held that there were real grounds for concern about the

[4] My emphasis.

adequacy of the fees at the end of 2010. It further held that:

"...*the Council did not act in accordance with the Guidance or Agreement when it dismissed the Claimants' concerns without first having sought particulars of the actual costs of care*".

During the proceedings, the Council accepted that it was under a duty to consult. The Court expressed the view that this was clearly right. Not only did the duty arise under the Agreement, but also through a legitimate expectation borne out of: (1) the Council's past practice; (2) the importance of the fees to the Claimants and residents; and (3) common law fairness. Further still, consultation must be carried out properly. This requires:

- it to be undertaken at a time when proposals are still at a formative stage;
- it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;
- adequate time must be given for this purpose; and
- the produce of consultation must be conscientiously taken into account when the ultimate decision is taken.

The Court held that the Council had failed to engage in consultation in any meaningful sense with regard to its proposal to freeze the fees. The Associations concerns regarding the future were simply discounted, with no attempt being made by the Council to obtain substantiation of the Association's contentions. There was no evidence whatsoever that the Association's views and concerns were taken into account either conscientiously or at all at a time when the ultimate decision was taken by the Council.

On the evidence, the Court found that in the autumn and winter of 2010, the Association had been confronted with a fait accompli.

The Court stated that the failure to consult would be grounds alone to quash the Council's decision.

As to whether the Council had failed to properly assess the risks of its decision contrary to its duties under common law and/or Article 8 of the European Convention on Human Rights, the Court held if the Association can make good its contention that the fees are significantly below the actual cost of care, then this will by definition invalidate the Council's risk assessments. This is because the Council failed to take the actual costs of care into account and, therefore, it must have also failed to properly take into account the implications of paying a fee rate significantly below the actual costs of care.

By the Court's finding that the Council had failed to have due regard to the actual cost of care, it must have also failed to pay due regard to local factors relevant to costs, such as local pay levels and property costs. Further, the Court agreed that the Council's dominant position within the market

was a relevant factor that it should take into account when it comes to reconsider its decision.

As to whether or not the Council is capable of demonstrating that its fee rates are sufficient to meet assessed care needs, the Court held that whether the Council can do so, will depend upon the content of the further costs submissions by the Association when the Council comes to reconsider its decision.

Finally, with regards to the question about whether the Council had complied with its duties under the Disability Discrimination Act 1995, the Court held that:

"provided that the usual cost of care is properly determined in accordance with the Directions and Guidance, the Defendant will be entitled to proceed upon the basis that the requirements of the public sector equality duty have been complied with in the preparation of individual needs assessments and care plans and in [the Court's] view need go no further when fixing the fees payable in respect of its placements."

In other words, if the Council properly discharges its duties when setting the fee rates, then it will comply with its equality duties. If the Council does not properly set the fee rates, then it will also be in breach of its equality duties.

Commentary

The care home sector is acutely aware of the financial difficulties facing local authorities. However, by contrast, many local authorities have shown little regard to the financial difficulties that face care homes. Instead and after years of underfunding, local authorities simply look yet again to the care sector to help absorb the difficulties facing the public purse. This is despite the persistent representations from the care sector about the devastating effect that this chronic underfunding can have on service standards and the viability of the sector.

It is deeply worrying that the risks of underfunding were recognised by the Department of Health over ten years ago (see the reference above to Building Capacity and Partnership in Care). Despite this, local authorities in the main continue to abuse their dominant market position by setting fees at a rate that suits their budget, without any proper regard to those who have the duty to provide the service, their residents, or the risks of underfunding. In the words of the Department of Health, "this is short-sighted and may put individuals at risk".

Perhaps the most concerning point that I took from the Council's representations to the Court was its stated belief that if it could, by virtue of its dominant position, obtain the provision of care at less than the actual cost, even if it is "way off" the actual cost, then that is perfectly acceptable if the Council can demonstrate that assessed care needs are being met. This shows a total misunderstanding/disregard by the Council (shared in my experience by many other local authorities) of simple economics. That is to say, the funding shortfall has to be made up (as best it can be) elsewhere. This will either take the form of private funding

residents or third parties having to be charged more, staff wages being depressed (thereby making it more difficult to recruit and retain quality staff), and cut backs in the standards of care and the services that can be offered. This thinking (or rather lack of it) also fails to pay any proper regard to the consequential restriction on prospective resident choice and the viability of the sector as a whole.

I am delighted that the Court has recognised what the care home sector has considered to be blindingly obvious. That is, in simple terms, a local authority cannot be said to have paid due regard to the actual costs of care if it: fails to allow for a proper inquiry into the actual costs of care; it deliberately sets a fee rate below the actual costs; and it fails to properly consult with and pay heed to the concerns of the care sector. It is simply not good enough for local authorities to benchmark themselves against the fee rates being paid by neighbouring authorities. To coin the old adage, "two wrongs do not make a right".

Without doubt, this judgment is extremely important and has been a long time in the waiting. Hopefully it will go some considerable way to help level the playing field.

The Council now has until 9 February 2012 by which to make a fresh decision about its fees for the year 2011/12. That decision will have to be made lawfully, following proper meaningful consultation and taking into account representations made and evidence provided during that consultation.

Notwithstanding the significance of the judgment, how care homes approach local authorities and handle the consultation process remains critical to their prospects of securing a fair fee rate.

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EMCARE Ltd is the local association representing views of independent care home providers in Leicester, Leicestershire and Rutland.

The association is committed to supporting providers in delivering a high quality service, and for many years, representatives have worked in partnership with Leicestershire County Council, to develop several innovative projects that have resulted in improvements for people who live and work in care homes.

Last April, the council made the decision to freeze fees for care homes for the second year running. This follows 10 years of annual increases that have failed to match inflation, let alone the costs of providing better standards of care.

In recent years the shortfall between the actual cost of delivering the service and the amount paid by the council has grown to the extent that people paying for their own care have been charged a higher rate which subsidises those being paid for by the Council. Alternatively, family members have had to "top up" the payment made by the council in order to cover the cost of the care. Many of those family members are telling care providers that they are facing increasing difficulty in covering these monthly payments.

EMCARE fully acknowledges the difficult decisions that the council is having to take regarding the future of vital services, but nothing is more important than the safety and well-being of the most frail and vulnerable people in our society.

EMCARE's successful challenge in the High Court means that the Council must carry out a full review of the actual cost of care before deciding the rates that they pay for care. The decision that they made in April has been held as unlawful, and they must now properly consult and take into account EMCARE's representations before making a fresh decision about the rates paid to care homes.

Allison Cowley, Chairperson of EMCARE said that she "is delighted that the legal challenge has been successful", but that "the action was taken with great reluctance". She added that "she is looking forward to continuing the collaborative working relationship with the Council, not only in the resolution of determining a fair price for care, but also in the ongoing development of services which will ensure that the changing needs of our ageing population are properly catered for".

East Midlands Care Limited A Company Limited by Guarantee
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EAST MIDLANDS CARE LTD v LEICESTERSHIRE COUNTY COUNCIL

By David Collins – solicitor and Managing Director of David Collins Solicitors

On 2 December 2011 (following a two day hearing on 15 and 16 November 2011) the High Court of Justice Administrative Court, sitting in Leeds, ruled that Leicestershire County Council had acted unlawfully when making its decision not to increase the fees payable to care home providers for 2011/12.

The Court quashed the Council's decision and ordered it to pay the Claimant's legal costs.

David Collins Solicitors acted on behalf of the Claimant, East Midlands Care Limited ('EMCARE') who brought the judicial review proceedings on behalf of care providers within Leicestershire County.

Summary of the Complaint

EMCARE is an association representing care home owners (both, residential and nursing) within Leicestershire, the City of Leicester, and Rutland. Of the 3,171 beds within EMCARE's membership, 2,215 are within Leicestershire County.

On 7 March 2011, and for the second year running, Leicestershire Council decided not to increase its fees payable to care homes.

In brief, the complaint made by EMCARE was that the decision was unlawful as it was made (i) without proper consultation and (ii) without due regard being paid to the actual costs of care, the statutory needs set out by section 49A of the Disability Discrimination Act 1995, or the risks to the residents within the care homes.

Permission to pursue the claim for judicial review was granted by the High Court on 30 June 2011.

The Facts

For at least the last ten years, EMCARE has met with elected members of the Council on an annual basis to discuss the costs pressures faced by care home providers. These discussions have been in addition to the more routine meetings between EMCARE and Council officers.

In June 2007, after requests from EMCARE, the Council agreed to work with providers to try to establish a 'Fair Price for Care', and the Council engaged the services of a consultant to assist. As a consequence, a number of workshops and consultative meetings took place with the Council. Not unsurprisingly, those workshops identified concerns about the adequacy of the Council's fee rates. Equally unsurprisingly, those concerns were not formally accepted by the Council.

At the end of the process, the consultant produced a report for the Council. The Council has not made that report known to the public.

The Council's weekly fee rates for 2009/10 were as follows:

Band 1 (Older people)	£288
Band 2 (Mental illness)	£304
Band 3 (Dependent older people)	£341
Band 4 (Learning disability)	£354
Band 5 (High dependency older people)	£404

The Council's weekly fee rate for nursing homes was £353, net of RNCC.

On 24 February 2010, the Council decided not to increase the rates for the year 2010/11.

During the remainder of 2010, the issue of the Council's fee rates was a regular topic of discussion at the bi-monthly Provider Forum meetings attended by care home providers and the Council.

On 14 December 2010, the Cabinet of the Council were to meet to consider a proposal from the Council's Director of Adult and Communities, to introduce a Quality Assessment Framework ('QAF'), under which providers (who attained the required standards) would become eligible for extra (albeit minimal) funding. Before this meeting, EMCARE wrote to all Cabinet members. Within that letter, EMCARE welcomed the implementation of the QAF, but highlighted its concerns about how homes who did not meet the criteria could improve their standards in the absence of any fee increase. So as to highlight the Council's underfunding, EMCARE also highlighted some figures from a recent Laing & Buisson report (that it had obtained in October 2010 in conjunction with other associations) regarding the costs of care within the East Midlands. EMCARE also highlighted the Council's failure to pass on increases in the basic state pension to care home providers.

During its meeting, the Cabinet approved the implementation of the QAF from January 2011, with applications from providers to be dealt with on a first-come, first-served basis, with the higher quality applicant getting the higher level of payments available.

EMCARE sent a full copy of the L&B report to the Council on 10 January 2011. This report concluded (in respect of homes meeting the national standards) a cost of care as being £528 for residential homes and £688 for nursing homes.

On 25 January 2011, EMCARE met with the Council's Assistant Director of Adult Social Care. The purpose of the meeting was to discuss the process that the Council would be following to review the fees for 2011/12. The Director explained that there was insufficient time to carry out a full review of the fee rate, which the Council would have to conduct internally. However, a full review was promised for 2012/13. It was during this meeting that EMCARE drew the Council's attention to then recent decision in Forest Care Home Ltd v Pembrokeshire County Council. EMCARE also made representations that the Council should look at its own cost information on the provision of care (as an operator of its own care homes) and the Laing & Buisson report provided by EMCARE.

On 7 February 2011, EMCARE again met with the Council. This time the Council was represented by its

Director of Adult Social Care and its Councillor responsible for Adults and Communities. During this meeting EMCARE informed the Council that any payments made under the QAF would not be sufficient to bridge the shortfall in its standard fee rates, which fell far below the actual cost of care. EMCARE again repeated the cost pressures facing care homes. It was during this meeting that EMCARE was informed that it was unlikely that there would be any increase in the fees for 2011/12.

On 9 February 2011, the Council's Fee Review Panel met, when they considered and discussed a report produced for the meeting which recommended a 0% fee rate increase. This report had not been made known to EMCARE during its meeting with the Council on 7 February 2011, despite the Director of Adult Social Care being aware of it. Amongst many other factors, the report highlighted the serious nature of public finances, with local government having to cover a funding shortfall of around £6.5bn in the next financial year. The report commented that the Council had to achieve £80m efficiencies and service reductions over the next four years including £28.9m in 2011/12, with the contribution from Adults and Communities being £10.7m in 2011/12.

The report also highlighted the Laing Buisson report and what was happening in other local authorities within the East Midlands. EMCARE's concerns about the level of underfunding were also highlighted.

Confirmation was given during the meeting by Council officers that they had followed the proper process when considering the 0% increase, and that they had given due regard to all the relevant factors. Consideration was also given to the Pembrokeshire decision.

The Fee Review Panel concluded that the recommendation of a 0% increase be presented to the Director of Adult Social Care, who ratified the decision on 7 March 2011, despite some anxiety about a possible future challenge of the decision.

The claim for Judicial Review was issued by EMCARE on 3 June 2011.

The Grounds of challenge & the Outcome in respect of each Ground

The Council's decision was challenged on the following grounds:

Ground 1: The Council failed or failed properly, contrary to guidance, to assess or take into account the actual cost of care.

The Court accepted this ground and quashed the decision.

Ground 2: The Council failed or failed properly to consult with care home providers.

The Court accepted this ground and quashed the decision.

Ground 3: The Council failed adequately to assess the risks of its

decision to care homes and to residents.

The Court accepted this ground and quashed the decision. The Court agreed that this Ground must stand or fall with Ground 1. In other words, if the Council failed to take proper account of the actual costs of care then the full consequences of a 0% increase could not have been known to the Council. By definition, it could not therefore have properly assessed the impact of its decision.

Ground 4: The Council failed or failed properly to comply with its general equality duty under section 49A of the Disability Discrimination Act 1995.

The Court endorsed the approach taken within the Sefton judgment[1]. That is, provided the Council's fee rate was properly determined, then it follows that it has complied with its duties under the DDA. Conversely, however, it does not necessarily follow that a failure to properly set the fee rate will amount to a breach of the DDA. The Council was not held to have breached the DDA in this case.

Commentary

I will assume that the reader of this bulletin is already familiar with the Sefton judgment which has been widely publicised and in respect of which I have previously written a bulletin.

The decision is a highly important decision, endorsing the judgment in Sefton.

The principal ground of challenge in both cases was the respective Councils' failure to pay due regard to the actual costs of care.

The Judge in the EMCARE case repeated (amongst others) the following extract from the Sefton judgment:

"[In the Court's] view, taken as a whole, the statutory Guidance and the Agreement [i.e. Building Capacity and Partnership in Care 2001] do not contemplate that there will be any significant imbalance between the usual cost of care [i.e. the Council's fee rate] and the actual cost. If a local authority consciously fixes the usual cost in a sum significantly less than actual costs, then [the Court does] not see how it could be said to be having 'due regard to the actual costs of providing care' as required by paragraph 2.5.4 of the Guidance. Furthermore, such action by a local authority would in my judgment amount to a breach of the guidance contained in paragraphs 6.2 and 6.7 of the Agreement, namely to take into account in fee setting of the legitimate, current and future costs faced by providers, as well as the factors that affect those costs, and to ensure that appropriate fees are paid. If fee levels are set significantly below actual cost, then, in the words of paragraph 6.2 of the Agreement, there will be 'inevitable reduction in the quality of service provision' which 'may put individuals at risk'.

This extract from Sefton was challenged by Leicestershire Council who claimed that the Judge in Sefton was wrong.

[1] The Queen (on the application of The Sefton Care Association) v Sefton Council [2011] EWHC 2676 (Admin)

Firstly, the Council argued that the Sefton Judge had attached excessive importance to the notion of 'due regard to the actual costs', by giving it overriding importance among the many considerations to which a local authority has to have regard. However, the Judge did not accept Leicestershire Council's argument.

Secondly, Leicestershire Council submitted that the Sefton Judge was wrong to see it as inevitable that a conscious departure from the actual costs would constitute a failure to pay due regard to those costs. The Leicestershire Judge did not overrule Sefton on this point. However, he cautiously observed that there may be something in this argument. The Judge's observation was aimed at a possible scenario whereby a Council looks holistically at the funding it pays to care providers in respect of each resident. If overall providers are <u>actually</u> receiving sufficient funding from a Council to meet assessed care needs (with sufficiency being judged against the actual costs of care), then in those circumstances, a conscious departure from the actual costs in the setting of the basic fee rate, <u>may</u> not necessarily be unlawful. However, the Judge did not make any ruling in this regard.

What the Judge went on to emphasis was the crucial point within the Sefton Judge's comments that "at the very least" it was incumbent on the local authority to seek from providers a detailed assessment of the actual costs of care.

The Leicestershire Judge also observed that once the matter of underfunding had been raised to the Council, it was incumbent upon it to ascertain what the actual costs of care were.

Both the Sefton and Leicestershire judgments make it clear that:

1. Council's must make themselves aware of what the actual costs of care are, whether through their own investigations or by allowing providers to adduce evidence.

2. Council's must pay due regard to the actual costs of care.

3. There should not be any significant imbalance between the actual costs of care and the funding which care providers receive.

4. Council's are required to consult with the care sector. This means that the proposed fee rate must be made know to providers at a formative stage. Further, the Council must provide sufficient reasons for the proposed decision to allow providers to give intelligent consideration and an intelligent response. This requires adequate time to be given for this purpose. Further still, the products of the consultation must be consciously taken into account when the ultimate decision is taken. In other words, the Council must maintain an open mind throughout the consultation process.

5. Benchmarking fees with other local authorities is not acceptable. The fact that one local authority's fee rates may not be out of line with others, does not mean that the fees are adequate, or indeed that the other authorities had paid due regard to the actual cost of care.

Any failures to comply with the above, will render a local authority's decision unlawful.

The Sefton and Leicestershire decisions undoubtedly clarify the legal duties on Councils and highlight the many failures in Council decision making processes. However, the process of engagement with Councils remains complex and I remain cautious in my views as to whether Councils will genuinely embrace a properly balanced working relationship with the private care sector.

With this caution in mind, how providers and their associations approach the fee review process remains both crucial and complex.

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10th April 2012

Mr. Glen Garrod
Assistant Director
Adult Social Care
Lincolnshire County Council
Orchard House
Orchard Street
Lincoln LN1 1BA

Dear Glen,

I thank you for your letter of 22nd March 2012, which has been received by many of our provider units, seeking views prior to you making a presentation to the elected members with regard to the recent process of setting care fees for the forthcoming financial year, please accept this response on behalf of all Prime Life provider units.

Your letter raises 4 questions, I will deal with them in the order that they occur.

1.
This question focuses on the engagement with the independent sector, by your Authority, and our view on same, certainly the consultation has been active, in the sense that myself or key members of our staff have attended a number of meetings over the past few years and we have facilitated here in Leicester a meeting with Steve Hochin and Rachel Wing, offering them full and open access to our accounting systems and the information that we hold, in that sense much effort has gone into the consultation process, however, it effectiveness is perhaps in doubt.

I respect that you are relatively new in post, I assume that you have been fully briefed on the history of the relationship between the Authority and the independent sector, but perhaps you should consider the relationship from the other side of the fence so as to speak, herewith therefore is a summary of some of the key events.

- **2003** – Lincolnshire County Council were instructed by the High Court to issue a contract, using an approved costing model, to provide a fair fee for care. The contract included an inflationary clause to ensure that it remained effective, selected care homes were paid compensation for inadequate fees in the past, and all costs were paid by the Authority. It was disappointing that at that point negotiations found their way to the High Court, but at least it gave the benefit of an acceptable contract to all parties and a clear way forward.

- **2008** – With the appointment of new Officers, in particularly Ken Fairburn and Caroline Cus, all providers were told at regional meetings that the Authority could not afford to maintain the existing contract and a proposal was put forward, be it with few options available, failure to accept the contract would revert in a cancellation of the old contract, to provide reduced fees, but with the benefit of a premium fee, subject to the Authority carrying out a quality monitoring exercise.

Reluctantly therefore, Prime Life, like many other providers accepted the new contract.

- **2010** – With departure of Ken Fairburn and Caroline Cus , and the introduction of Ruth Cumber, and later on Terry Hawkins, we were advised that a further revision of contact had to be made, one that offered lesser benefits, and a reduced fee for new admissions, following further meetings and with the Authority accepting that it had failed in 9 out of 13 instances to access Prime Life provider units for the quality award framework, again reluctantly we accepted a retrospective payment for the missing premium fees, and the introduction of yet a further contract.

- **2011/12** – With departure of Ruth Cumber from the scene, shortly followed by Terry Hawkins, further consultation is taking place, Steve Hochin qualified accountant, and Justin Hackney, who I understand ironically is related to the Officer who lead on the initial legal challenge back in 2003, in that sense we are close to having completed a full circle.

Your question asks our view on the effectiveness of the consultation process, I believe that the above demonstrates that whilst it has been active, it has been hampered by the constant change of personnel, the every changing strategy, and the fundamental refusal to accept that the judgment made in 2003 by the High Court, resolved the issue at the time, but also provided for future inflationary increases, presumably to prevent the need to revisit the situation, the withdrawal of the original contact therefore appears to be at the heart of this issue, and regrettably although we are not members of the local Care Home Association, will be the issue that I understand is now in the hands of lawyers to reintroduce, therefore at the prospect of spending substantial sums on legal fees, I fear that history is about to be repeated.

2.

Your second question refers to the model that you have used to arrive at the proposed costs of care. You should be aware that on 21st March 2012 I wrote to Steve Hochin directly, offering the view of my Financial Director, who is herself a Charted Accountant, previously Steve met with Jay Hairsine and shared with him not only the information that we had available on the operating costs of our homes within the county, but also issues relating to price setting elsewhere, in that sense we have tried to positively contribute to the process.

I can only therefore reaffirm the key points that have been expressed in the past, as are contained in the detailed letter to Steve Hochin, they include the following:

a) In Steve's model, he has taken note of the income of homes in the county, including the income generated from the more lucrative self-funded market and for the lesser number Health funded placements, instead of working on the basis of the fees paid by the Authority. As a result therefore, not only is Steve's financial model flawed, but this would appear to be a direct contravention of the instructions given by the High Court in dealing with the cases in Pembrokeshire, Sefton and Leicestershire.

b) Steve's model offers information that he has gathered either directly from his own communication with providers or through the limited exercise carried out for your Authority by Laing & Buisson, however, having examined his assumptions, against the information that we have offered, some costs are clearly understated, and others have been left out, as such the overall assessment of cost is unrealistic.

c) The assessment for the required return on capital within Steve's model has two key flaws, the first being that it assumes average unit costs of £42,000 per bed, well below market values, and substantially less than the cost of providing a new facility, and the second being his assessment of a reasonable return on capital, he has chosen to offer 6%, which coincidentally is exactly the same value that was rejected by the High Court last December in dealing with the second review of the Pembrokeshire finding, and is less than half the level advocated by Laing & Buisson in their costing model provided for Leicestershire County Council, the combination of the understated unit cost and the return on capital, of course leads to an artificially depressed fee.

3.

Your third question seeks out views on the two options put forward, neither of which are acceptable, but does seek alternative suggestions, our preference would simply be to revert to the original contract, as established in 2003, following the last High Court challenge, but if possible without the need to return to Court and certainly without spending any further monies unnecessarily on lawyers.

If it is of assistance, and we are mindful that in previous judgment the High Court has indicated that bench marking against neighbouring Authorities is not to be encouraged, we would certainly recommend that you make your elected members aware of the outcomes of the negotiations of some of the Authorities who were early entrants into this process, as an example, in Rutland fees have been increased by over 13%, in Warwickshire between 6% and 10%, to the north the East Riding Council, who are now the subject of a High Court challenge offered 4% which was declined by providers and in the next few days we will have an announcement from Leicestershire, following their High Court experience of increases that we expect to be substantial. Other Authorities are on the lawyers radar including Nottinghamshire, Derbyshire and Norfolk, the outcomes are yet unknown, but what is evident is that increases have to be reasonable, and certainly your current offers fall woefully short.

4.

Your financial question refers to your equality impact assessment, a very comprehensive document, our major concern is that 9 of our 13 provider units, provide for clients who have needs other than associated with their age, but as a result of disability, both mental and physical and so far the consultation process has completely failed to address the setting of fair fee rates for the care of such people, important in the sense that all the factors that affect the care of the elderly, also apply to the various other client groups, they too have been equally affected by the withdrawal of the original contract, and in the same way as the elderly clients, their very future and destiny is at risk if a fair fee for their accommodation and care is not provided.

Conclusion

We very much want to work with your Authority to establish a fair and reasonable cost of care, we fully accept the pressures upon your Authority to make savings, your limited budget, the need to be reasonable in our negotiations.

However, the treatment by the independent sector by your Authority, in recent years , has been less than satisfactory, constant changes in both the people responsible and their strategy, has not given us the warm feeling and comfort that we require.

Your Authority quite boldly has closed down many of its internal services that were operating inefficiently, a positive step, but bringing about a greater reliance upon the provision offered through the independent sector and the need above all to created stability within the market place.

To Steve Hochin's credit, he has endeavoured to put the factually based formula together to bring about a fair outcome, there are flaws, which we have highlighted, but more importantly the outcomes, i.e. the fee levels suggested, are in complete contrast to the national trend. We know already that Scotland has declared a national rate with residential care costing virtually £500 per week, a similar finding has arisen from the second Pembrokeshire hearing in the High Court, the Laing & Buisson Survey for Leicestershire, a copy of which I have enclosed, endorses similar outcomes, and in taking note of the price reviews declared in neighbouring Authorities, we see a similar trend. Whilst I accept that there may be minor regional variances, and from our own experience operating across the country, we know that they in the main only relate to property values, it is impossible to believe therefore that a fair price of care in Lincolnshire can be some 20% behind the rest of the market.

I hope our contribution is therefore of value and that you will make it known to the Elected Members, we do not for the sake of our clients wish to be in a position of conflict, but we cannot give them the quality of service that they deserve, unless we receive an appropriate fee.

I would be grateful if you would keep me informed of further developments on this issue.

Yours sincerely,

Peter Van Herrewege
Chairman

From: Shona Noon [mailto:shonanoon@prime-life.co.uk]
Sent: 15 May 2012 16:16
To: CllrA Puttick
Cc: Glen Garrod; Peter Van Herrewege; James Wood; Simon Evans
Subject: Scrutiny Committee 16 May 2012

Dear Cllr Puttick,

I will be attending the Scrutiny Committee meeting on 16th May 2012, and understand that there may be the opportunity to address Councillors directly. As time will be limited I felt that it may be useful to submit comments on behalf of Prime Life Ltd to you in advance.

In summary:

1. Lincolnshire County Council has a history of difficulty in negotiating the setting of weekly fees for the provision of residential care with the independent sector. These difficulties led to an action being taken by the independent care home sector which resulted in a High Court decision in 2003/4 that imposed a core contract with an inflationary link clause. This contract was terminated by the County Council some 3 years ago. Interestingly, had this contract not been terminated it would have addressed the current challenge – perhaps it could be looked at again in light of recent legal precedent?

2. The national climate is one of challenge with legal actions being taken between local authorities and independent sector care home providers. These actions have seen High Court decisions made in favour of the independent sector – the details of these Judicial Reviews are contained within the report to be presented to the Scrutiny Committee on 16th May by Glen Garrod, Assistant Director. In essence the key components of these Judicial Reviews have been:

    - A requirement to conduct fair, transparent and reasonable consultation with care providers
    - The use of a robust and evidenced based formula when arriving at a figure that reflects the fair cost of care

3. Lincolnshire County Council originally instructed the nationally recognised organisation Laing and Buisson to conduct research of the local independent care market. Elsewhere in the country Laing and Buisson have conducted such research and arrived at a well recognised formula with which to calculate a fair weekly rate that reflects the actual cost of care. In Lincolnshire the work conducted by Laing and Buisson did not progress to the identification and confirmation of a local fair cost figure; we have been advised there were various reason why this work did not reach the anticipated conclusion as has occurred elsewhere.

4. Earlier this year 2 Options were presented to the independent sector at "consultation" sessions led by Interim Assistant Director Terry Hawkins; neither of these 2 Options were based upon a robust and evidence-based formula and in fact made highly controversial and discriminatory assumptions. One of these assumptions in particular was the further exploitation and reliance upon those individual's paying their own care costs ("self-funders") to further subsidise the rates paid by the local authority. In effect the 2 Options made available for consultation did not meet the need for the fair cost of care to be established. In addition to representations made by local care home groups, detailed comment/analysis was submitted to Lincolnshire County Council by our Finance Director Jay Hairsine (Chartered Accountant).

5. Last week a 3rd Option was detailed within the Scrutiny Committee papers. This 3rd Option although an improvement in moving closer to a fair cost figure remains approximately 30% behind that recognised nationally and established by Laing and Buisson. In addition, for years 2 and 3 of the Option 3 proposal, the annual increase figure included is linked to an inflationary **target**, not actual rises. Interestingly this target, identified by the Office of Budget Responsibility, has not to date ever been achieved.

6. As we are all very well aware, demographics evidence increased growth in the numbers of older people, living longer with more highly complex care needs. In order for care provision to develop to meet this increased growth in demand (both in terms of numbers and levels of dependency) inward investment is a vital requirement. Continued improvements in the quality of care provided and the physical environment within which it is delivered requires care providers to continue to operate financially viable businesses that will attract funds from financial institutions – the Southern Cross failure caused great distress and a climate of uncertainty for those residents within their care homes and their families/supporters. This type of event is one which we would all wish to avoid, and we are not confident that the current fee proposals will bring about this necessary investment.

7. As a provider of care homes nationally we are well aware of the need for commissioners, such as Lincolnshire County Council, to operate within fiscal constraint and do not suggest that the Laing and Buisson weekly rate for residential care (approx. £500 per week) can necessarily be achieved immediately. However, we would propose a solution somewhere between the Option 3 proposed weekly fee and the Laing and Buisson calculation; with the inclusion of an "inflationary link clause" aligned with the annual Consumer Prices Index (CPI) figure. This proposal may enable Lincolnshire County Council to:

    - avoid further costly legal action being taken
    - confirm a robust 3 year funding programme
    - maintain viable and high quality care provision
    - appropriately plan for projected increased demand

I trust that these 7 paragraphs outline our comments in terms of the current and historical contexts, and a potential solution.

As noted above Lincolnshire County Council have been subject to successful legal challenge in the past and a return to the High Court would not be of benefit to any party; more open, transparent and meaningful consultation with the wider care sector to achieve a final fair cost figure set between that of the proposed Option 3 and the Laing and Buisson model with a link to actual inflation figures would enable positive and pro-active partnerships to be established.

Please do not hesitate to contact me should you require further information or clarification regarding the brief notes above.

Regards

Shona Noon
Business Relationship Manager/Registered Social Worker
Prime Life Ltd

Mobile: 07827893549For more information about our care centres please visit our website: http://www.prime-life.co.uk

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Residential Fee Meeting
19 March 2012
Notes

Prime Life believe that self-funders are subsidising council residents.
They believe that the figure of £42,000 for the valuation per room is unrealistic and that for new build the figure is closer to £80,000
Prime life believe there are flaws in the calculations and cited recent legal challenges (Pembrokeshire, Sefton & Leicestershire)

Other comments
Don't understand the nursing rate being less than HD1

No dementia rate has been included despite being mentioned at the meeting in January

Providers were informed that we have moved from a position where LCC were removing £4m from the budget, we are now increasing the budget for residential care by up to £2.2m

The new rates do not include:
Head injuries
Young dementia
Mental Health
Learning Disabilities
Physical Disabilities

Providers were concerned that LCC appeared to have cherry-picked information. Taking some information from Liang & Buisson and other information from their own survey.

No mention of 1 to 1 rates

One provider asked what proportion of respondents were above or below the Liang & Buisson average of 50-bedded homes – The average number of beds from LCC survey was 33

What discussions have taken place with LinCA?
There have been meetings with Nick Chambers of LinCA and a further meeting has been arranged.

Two providers asked what would be happening to LD/PD rates. There is not really a private market for these categories of care.

There was a consensus that providers would like to meet to discuss the financial detail on Friday.
Financial concerns included:
Minimum wage
Concern that providers are not getting a fair rate at present
The model assumes that staffing rates will stay the same

Providers were told that they can't be insulated from all budgetary pressures.

A concern was raised about the financial pressures of providing equipment.

Providers were informed that the presentation and full report would be shared with providers by 21st March and feedback would be made available.

Residential Homes Finance Workshop

23 March 2012 at 2.30pm in the Council Chamber, County Offices

Attendees: LCC :

Steve Houchin, Mike Hubbert

Providers:

Chris Sweeney	Syne Hills Care Home
Kevin Gillingham	Grovenor Hall Care Home
Geoff Brown	Executive Care Group
Richard Durance	The Orders of St John Care Trust
Mark Perrin	The Orders of St John Care Trust
Trevor Brock	Wisspington House
Laura Kennedy	Voyage Care
Juliet Smith-Evans	Orchard House Nursing Home
Kevin White	Lace Housing Association
Nick Chambers	Lace Housing Association
Mandy Cheriton-Metcalfe	United Heath
Phil Barton	Abbey Court
Mark Browne	Monson Retirement Home
Janet Dilworth	Monson Retirement Home
Sian Walkingshaw	HC1

1.	**Consultation** This meeting forms part of the consultation on residential rates. Two previous meetings have been held, in January to raise the subject of residential rates and on 19 March to discuss the proposed options. The intention of this meeting was to go through the model in detail to determine where there is agreement and where there is fundamental disagreement. Attendees at the meeting were encouraged to put any concerns in writing to LCC as part of the formal consultation process. Papers were provided by S Houchin and are embedded within this documents.	ACTION
2.	**Basis of LCC proposed rates** The Lincolnshire County Council Survey demonstrated a rate of return of 11% within Lincolnshire. LCC, based on accounts of providers and the 50% or so Council market share and low business risks considers the rate of return should be 6%. This compares with	

	CBRE estates consultancy Prime Healthcare at 6%. Providers made the point that no investor would invest in residential care homes at this rate, it can be as high as a 15% rate of return and certainly no less than 8%. The Joseph Rowntree model has two rates, one for spot at 12% and a discount to 8% if the block contract is guaranteed. Comment was made that clients are now coming in late to the service (i.e. older clients) and that beds have to be kept open for those in hospital for short stays, with no payment after three days which is reducing income even more. Mike Hubbert said he was not aware of this and would investigate. The number of beds was planned to be reduce from 900 to 520 a 42% reduction, in fact only a 22% reduction in placements has been achieved so far this year. Providers felt the strategy was short sighted as Laing and Buisson were recommending reduction in bed spaces to 80% of current level, which would decrease provision and the market would be unable to cope with the future predicted increase.	
	LCC agreed that placements would drop, LCC analysis indicates a reduction to 40% of total beds provided by 2015/16 but that the impact on providers would not be as great as providers fear and that the Laing and Buisson report didn't take into consideration the number of prior year placements in their calculation . De-commitments of LCC clients remain static with little change in the length of stay. Providers believe they are now providing care to a greater number at the end of life stage, but because the care is so good the clients' stay is longer than anticipated.	ACTION
	LCC have been buying less short term care but due to LCC closing their own beds there is now greater demand with additional demand from the NHS procuring 30 day beds and continuing healthcare beds.	
	Providers feel that they are already in a challenging business and that a rate of 6% for the care given will result in an increase in the number of safeguarding issues. Some providers expressed the opinion that nursing homes will move to residential care if the nursing rate is reduced. Providers disagree with the rate of return and with the methodology for accounting for capital assets.	

	Increases in utilities and food, national minimum wage in October 2012 and the costs of nursing staff, equipment and maintenance are not accounted for (e.g. cleaning of 40 en-suite bathrooms on a daily basis) Both nursing and residential homes have to purchase mattresses costing up to £2k. LCC were felt to be out of touch with provider costs and a suggestion was made that LCC should undertake a "back to the floor" exercise. S Houchin reiterated that the rates discussed were derived from data provided by the survey of care providers in Lincolnshire conducted by Laing & Buisson in October 2011.	
	One provider with 72 beds, 9 of which were nursing reported that they had not been contacted by Laing and Buisson. Nick Chambers of LACE pointed out that the Laing and Buisson report was a residential market assessment and not a fair price for care report. In 2010 Laing and Buisson produced a fair price for care report covering the East Midlands, this had been supplied twice to Terry Hawkins, once in April 2011 and again in November 2011 providers believe this has more accurate information supported by the NHS and includes Continuing Health Care. S Houchin to seek out this report which had not been referred to in the model. (Nick Chambers later agreed to forward this document,)	S Houchin
	N Chambers referred to the agreement in 2003 with LCC to use the Joseph Rowntree model which gave a rate of return of 10% on a 94/95% bed occupancy rate. This had been agreed at the Overview and Scrutiny Committee meeting in November 2003 and at the Executive in December 2003. S Houchin to obtain copy of these documents. Occupancy rates are now lower and it was requested that LCC demonstrate how the statistical data was used to arrive at a 6% rate of return without referring to land and building prices. S Houchin referred providers to the recently published draft Executive report which provided information relating to the calculated rate of return.	ACTION S Houchin S Houchin
	Providers were advised to take up their query of the rate for nursing hours per resident of £108.70 with the PCT.	Providers

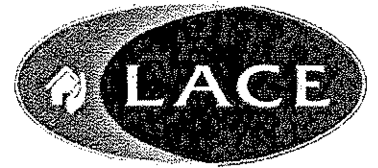
	S Houchin explained how the pension rate calculations had been arrived at of 1.5% and the care assistant hours of 22.5. Providers commented that almost all clients are now HD1 and that social worker assessments can be flawed or inaccurate due to the short amount of time spent with the service users when assessing them. In order for providers to have clients reclassified it was necessary to request 24 hour assessments and take cases to panel.	
	Providers maintain that clients with dementia have challenging behaviour and are so disruptive, ruining décor, carpets and furniture that separate units are required with higher staffing ratios. S Houchin suggested that providers respond formally in the consultation giving evidence in writing to support their assertions.	Providers
3.	**<u>Staffing rates</u>** LCC had calculated a staff rate of £6.23 for an NVQ qualified member of staff which LCC believed was 20% of staff. Providers pointed out that NVQ training began at induction and that NVQ qualified staff were part of the essential standards to remain registered with CQC. The Laing and Buisson East Midlands report, which Lincolnshire was part of showed NVQ rates of £6.32 per hour in 2010. S Houchin to compare LCC model with Laing and Buisson 2010 report for staffing rates. Providers commented that care assistants were not responsible for activities and that homes have an activities co-ordinator paid above the minimum wage level	S Houchin
	S Houchin agreed to look at figures for a co-ordinator and the possibility of incorporating this into the model. Providers felt the fees must represent the care provided and allow for reinvestment in services and that a return on capital s recommended in the Laing and Buission East Midlands report was an acceptable figure.	<u>ACTION</u> S Houchin
4.	**Capital and Revenue** N Chambers believes there is a line missing from the Lincolnshire model. Kevin White of LACE Housing queried on the differential between revenue and capital repairs and maintenance. Providers believed the figures of repairs and maintenance and equipment were	

	too low. S Houchin agreed to investigate this issue. Key areas of disagreement – staffing and return on capital. The rate for a chef of £6.68 was insufficient as homes employ a head chef, chef and relief chef all of whom are paid at different rates. S Houchin agreed to look at these figures for catering staff within the context of Lincolnshire County Councils own model. Providers to provide evidence in their written consultation comments. Providers believe senior care staff should be shown at a higher rate as should handyman/gardener. One provider commented that it was not possible to recruit nurse managers at £31k.	S Houchin Providers
	Providers believe private clients are being used to subsidise LCC clients and that in order to stay viable and keep up essential standards 90% of providers have to charge third party top-ups due to the low fees paid by LCC. Mike Hubbert commented that the % of providers contracting with LCC and charging a third party top up was lower than 90% and some providers will waive the third party top up fee in certain circumstances. Providers said that £60 top ups per week were too great for families of private clients in many cases and this will result in fewer placements being possible. Providers believe that the LCC proposed fees will result in lower standards, activities will cease and that person centred care will reduce, in effect setting the service back 20 years. This proposal will give inadequate funding resulting in an inadequate service and inadequate quality. Providers will have to take these proposals to their banks which will breach covenants.	
	Providers stated that LCC owned homes had greater costs. Private homes wish to pay their staff higher wages and offer good conditions such as pensions but good homes will be lost if a 6% rate of return is imposed and homes have to rely on private clients to subsidise LCC clients.	
	Two representatives from chains pointed out that their Lincolnshire homes make a loss and that it is LD homes and homes in other	

	counties which are subsidising Lincolnshire	
	S Houchin stated that LCC ASC is tasked with making savings and the government allocation has been reduced. LCC wishes to agree a sustainable rate for Providers that LCC can afford that will provide stability in the sector over the next two to three years.	
	Providers stated that personal care cost £435 per week and that it could not be delivered at £392 which is £40 less than the Laing and Buisson East Midland report figures which took into account Lincolnshire provider rates. Providers felt that LCC were only prepared to use benchmarking information in the East Midlands when it suited their aims and that work in Leicestershire would substantiate their claims for 10% return on investment. S Houchin reminded providers that the papers provided included an analysis containing details of the source of data for each line item including the page and table number within the Independent Evaluation of The Residential Care Market in Lincolnshire undertaken by Laing & Buisson (where used) , and where other sources were used these were also identified. S Houchin agreed to ascertain what assumptions Leicestershire County Council were making in order to inform their own work. One provider commented that the QAF had encouraged investment in the sector and the raising of standards but that the decision taken not to pay these rates had damaged the relationship with the sector.	S Houchin
5.	**Non staff items** Providers maintain that the figure of £18 is too low for utilities. The Laing and Buisson East Midlands report and LACE place the figure at around £24 - £25. A provider commented how the model resulted in a fee where the difference between Standard Residential and Nursing was so low it did not reflect reality. S Houchin commented that historically rates paid to providers had a differential of £25 – £30 for nursing/HD1 cases from the standard residential rate. The current differential had risen to £48 as a result of inflation applied equally to all rates. S Houchin asked whether a differential should be linked to the standard residential rate and what this should be. The initial response was muted, but when pressed the feeling of the	Providers

	group was that there should not be a standard residential rate as all clients are now either HD1 or dementia and that a higher rate is needed for this.	
6.	Providers believe the average rate should be higher to reflect the costs of handyman, chef, activities co-ordinator, higher utilities, maintenance, and equipment. An opinion was voiced that LCC had made an error in moving away from the 70/30 increase in average earnings in 2008 which was quire accurate and mirrors provider costs. Providers advised to make these points in writing during the formal consultation and the financial consequences. **Value per Room** The model uses a survey of approx' 70 residential/nursing homes for sale on a freehold basis as a going concerns from three property agents on 14 February 2012 in Lincolnshire and the surrounding area including the East Midlands, West Midlands and Yorkshire, giving a figure of £46k per room. The data included 16 homes within Lincolnshire giving the average value per room of £42k which was used in the model. Providers contended that the value of the homes for sale in Lincolnshire could reflect the fees paid and that the reason for the lack of investment over the past four years could be as a result of a previous Assistant Director in Commissioning stating that LCC would not give contracts to new homes due to over capacity in the market. A provider who had just built a new home asserted that the cost per room was £59k and this was at cost, the actual new build figure being £75k. The figure in the 2010 Laing and Buisson report was £51k. It was agreed that the approach used in the model was liked by the Providers but that they were critical of the figures used. They feel that LCC needs to be more realistic and to find a middle ground.	
	Providers wished to be reassured that the consultation was not a "box ticking exercise" and that issues raised by Prime Life in letter distributed in the meeting be considered. S Houchin assured the group that the contracting team were collating all consultation feedback and that it was intended that this consultation process would be used to inform the rates.	
	S Houchin agreed to provide minutes by Thursday 29 March to attendees which could be discussed at the Care Association Meeting	

	on Friday 30 March. The meeting closed at 4.15pm	



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Our Ref: KAW/Extn.209

2 April 2012

Steve Houchin
Assistant Head of Finance
Resources Directorate
Lincolnshire County Council
Orchard House
Orchard Street
Lincoln, LN1 1BA

Dear Steve,

Re: Residential & Nursing Care Fees Consultation

Further to Glen Garrod's letter of 22 March and the provider consultation events on 19th and 23rd March 2012, I am giving the Association's feedback on the proposals as requested:

Comments on the model used

The Association has a number of concerns at the model used by the Council to calculate a fair fee for the price of care. The following lines in particular do not reflect accurately the true cost of providing the service:

- The return on capital recommended by the 2008 Joseph Rowntree report is 12% to properly reflect the risk to providers where contracting is undertaken on a spot purchase basis. Only where block contracts are offered should the return on capital be reduced from this level, and the model indicates a discount of 4% for this guarantee. The Council has announced a reduction in placements by 44% over the next two years which will substantially increase the risk to providers. Your model has a return on capital figure of 6% which is not acceptable to the Association. The Lincolnshire County Council Executive accepted the Joseph Rowntree model as a means of calculating the true cost of care and agreed the calculations within the model at a 10% return on capital at their meeting in December 2003.
- The occupancy allowance in the model produced by the Council is 90%. The previous model approved by elected members of the Council (See above) on a 10% return on capital was 92.5%. An reduction in the occupancy rate increases the risk and therefore the return on capital required. As above, the Council has announced reductions in placements of 44% over 2 years (900 placements p.a. reducing to 500 placements p.a.) therefore the return on capital percentage should increase to compensate for this additional risk.
- The Council's latest model has two other costs which we do not think reflect the true cost of providing this service. Firstly, Property & Maintenance costs appear to be understated by up to £20 per week. This could be to do with the specialist equipment providers now have to supply from their own resources as the NHS are not funding items such as airflow mattresses. Secondly, energy costs appear to be £6 per week short of the true cost. The reason we believe that your model is flawed is that both the Association's cost model and the East Midlands survey (see below) conducted in 2010 indicate similar figures.

NATIONAL HOUSING FEDERATION

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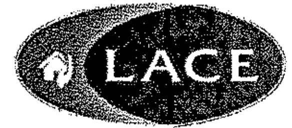

Housing with Care

- The Council's survey reflected responses from only 10% of the sector and was put together at very short notice, as a result the Association believes the survey is flawed. This is borne out by comparisons to the Association's own calculations and the extensive survey conducted for the NHS in the East Midlands during 2010 by William Laing. A copy of this cost model is attached for information.

Comments on the Fee Proposal

- The Association believes the Council should pay the true assessed cost of care now and not delay payment over a period. Providers bear increased costs immediately and a number of these, particularly wages (through increases in the National Minimum Wage), energy and food costs, have not properly been reflected in the fee payable since 2008.
- In addition to the proposed delay in paying the true cost of care, the Council is also holding back payments to providers by delaying the production of Individual Forms of Agreement, which is a breach of the Framework Agreement. over the past 6 months the Association has, on average, been owed in excess of £50k and has, therefore, had to divert cash from other services to meet bills pending payments from the Council. If this practice is replicated across the sector we fear that the Council will cause the failure of a provider resulting in bad press for both the sector and the Council.
- Future fee increases should have a mechanism to reflect the true increase in costs and should not be agreed at a level of 1.5% as suggested for the next two to three years. As stated above, some key costs, particularly energy, food and wages, could increase much more than 1.5% and therefore affect the viability of providers.
- The Association believes that the fee review model incorporated within the Framework Agreement dated 2004 (an annual increase being based on 70% average earnings and 30% retail prices index) was quite an accurate model for assessing the true costs of providing this service. On this basis, personal care would be £430 (for 2012/13) compared to the East Midland model of £446 (for 2010 /11). The work done by the Association on returns of capital at 10% reveal that fees in the region of £446 for Personal Care are required.

I hope that the above comments are helpful in assisting the Council to consider realistic fee levels for 2012 and beyond. As mentioned above, please find attached the East Midlands Fee calculation. I will also send an electronic copy of this document.

Yours sincerely,

Kevin White
Director of Finance

E-mail: finance@lacehousing.org

Cost heads	**£ per resident per week, 2011/12**
A) STAFF, INCLUDING EMPLOYERS' ON-COSTS	
Qualified nurse staff cost per resident (excludes supernumerary managers)	£0
Care assistant staff cost per resident (including activities)	£143
Catering, cleaning and laundry staff cost per resident	£47
Management / administration / reception staff cost per resident	£42
Agency staff allowance - nurses	£0
Agency staff allowance - care assistants	£2
Training backfill	£2
Total staff	**£237**
B) REPAIRS AND MAINTENANCE	
Maintenance capital expenditure	21
Repairs and maintenance (revenue costs)	12
Contract maintenance of equipment	3
Total repairs and maintenance	**£36**
C) OTHER NON-STAFF CURRENT COSTS AT HOME LEVEL	
Food	£25
Utilities (gas, oil, electricity, water, telephone)	£24
Handyman and gardening (on contract)	£8
Insurance	£5
Medical supplies (including medical equipment rental)	£3
Domestic and cleaning supplies	£3
Trade and clinical waste	£3
Registration fees (including CRB checks)	£3
Recruitment	£2
Direct training expenses (fees, facilities, travel and materials) net of grants and	£2
Continence products	£0
Other non-staff current expenses	£7
Total non-staff current expenses	**£86**
D) CAPITAL COSTS	
Return on land	£10
Return on buildings and equipment meeting national minimum physical standards for new homes, extensions and 1st registrations since April 2003, including start-up losses	£84
Return on business activity	£75
Total capital costs	**£169**
'Ceiling' fair market price for homes meeting all standards for 'new' homes in National Minimum Standards for Care Homes for Older People, 2nd Edition February 2003	**£528**
Maximum capital cost adjustment factor for homes not meeting physical or other standards for 'new' homes	£78
'Floor' fair market price for homes which do not attain the interim physical or other standards for 'existing' homes in National Minimum Standards for Care Homes for Older People, 2nd Edition February 2003	**£450**

Cost heads	**£ per resident per week, 2011/12**
A) STAFF, INCLUDING EMPLOYERS' ON-COSTS	
Qualified nurse staff cost per resident (excludes supernumerary managers)	£112
Care assistant staff cost per resident (including activities)	£158
Catering, cleaning and laundry staff cost per resident	£47
Management / administration / reception staff cost per resident	£42
Agency staff allowance - nurses	£3
Agency staff allowance - care assistants	£2
Training backfill	£4
Total staff	**£369**
B) REPAIRS AND MAINTENANCE	
Maintenance capital expenditure	21
Repairs and maintenance (revenue costs)	12
Contract maintenance of equipment	3
Total repairs and maintenance	**£36**
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Recruitment	£2
Direct training expenses (fees, facilities, travel and materials) net of grants and	£2
Continence products	£0
Other non-staff current expenses	£7
Total non-staff current expenses	**£86**
D) CAPITAL COSTS	
Return on land	£10
Return on buildings and equipment meeting national minimum physical standards for new homes, extensions and 1st registrations since April 2003, including start-up losses	£84
Return on business activity	£103
Total capital costs	**£197**
'Ceiling' fair market price for homes meeting all standards for 'new' homes in National Minimum Standards for Care Homes for Older People, 2nd Edition February 2003	**£688**
Maximum capital cost adjustment factor for homes not meeting physical or other standards for 'new' homes	£91
'Floor' fair market price for homes which do not attain the interim physical or other standards for 'existing' homes in National Minimum Standards for Care Homes for Older People, 2nd Edition February 2003	**£597**

From:	waverley <waverley.res-home@virgin.net>
Sent:	14 March 2012 20:39
To:	ASC_ContractingTeam
Subject:	amended framework agreement
Follow Up Flag:	Follow up
Flag Status:	Flagged

Dear Joe Horton,

Having now looked through the full 86 pages of the newly amended document, I have to say its the most confusing document I have ever seen. I found the highlighted amendments almost incomprehensible and very hard to follow what had actually been amended and from where.

the different coloured lines & boxes only added to the confusing layout, as these were often over-laid on each other and could not be traced accurately to the point where words had been changed.

Would it not have been much simpler to have copied just the amended pages and highlight the amended wording rather than send out the full 86 pages again with this layout?

Maybe its just me but im sure I would have found it easier on the eye and easier to follow that way.

Regards

Andy Hickin
Manager

From: Andy Hibberd <Andy.Hibberd@homefromhomecare.com>
Sent: 23 March 2012 13:36
To: ASC_ContractingTeam
Cc: Barbara Marchant; Gail Maclachlan-Gray; Paul de Savary
Subject: draft residential framework

Follow Up Flag: Follow up
Flag Status: Flagged

Joe Horton
Thank you for sending out the draft Framework Agreement for the provision of long and short term res/nursing care. I have now had the opportunity to read this and would make the following comments:

- As regards the contract management and monitoring arrangements – will be contacted and notified of when the contract monitoring meetings are to be scheduled? We used to attend quarterly contract monitoring meetings with LCC but these stopped a couple of years ago and despite chasing the Officer concerned HFHC have had no contact with or feedback from LCC Contracts. So while we are happy and willing to participate in such arrangements we would very much appreciate clarification from you about when these meetings will be scheduled, with whom etc.
- I note the contents of monitoring information that you require – as set out in sections 3.8 – 3.10 of schedule 3 (contract management and monitoring arrangements). As a small provider of specialist support services to people with a learning disability the administrative burden these requirements will impose on our organisation seem to vastly outweigh any benefits that will accrue. As you will know HFHC operates 4 homes in Lincolnshire supporting people with learning disabilities. These homes support 35 people on a long term basis. The number of vacancies, people supported etc. varies little year on year, let alone weekly or monthly – so is it strictly necessary to provide all the information you require on such a frequent basis? If a schedule of quarterly, half-yearly or annual contract meetings were agreed, HFHC would be more than happy to supply a summary of the required information in advance of such meetings. It does seem that you are trying to apply a 'one size fits all' approach to contract monitoring where a tailored approach would be more appropriate dependent upon the nature and size of the organisation.
- You refer in several places (section 5.15, sections 5.1 + 5.2 of the service spec for example) to 'the guidance' but seem to make no reference to what guidance you are meaning. Can you clarify what guidance it is that you are referring.
- You still appear not to have resolved the issue regarding what information specialist LD providers such as ourselves should include when completing the price schedule – schedule 2. You will be aware that I raised this issue with your department last year – HFHC as a specialist provider of support to people with complex needs does not have a set cost per bed. The placement fee for all people supported is calculated following a detailed assessment undertaken prior to a placement starting. For people placed by Lincolnshire with HFHC, the weekly placement fee varies from £1,500 - £2,500 per week, which falls well outside the spot rates set within your framework. These costs are individually tailored to reflect the specific needs of the person. When completing the price schedule last year I included the following text within the price schedule – '*The costs of all placements at .... are calculated at the time of the referral as part of the assessment by HFHC's qualified Social Worker. The costs of each placement are based on the person's individual support needs.*' Your section queried this but also acknowledged that this was an issue for other specialist learning disability providers and that you would be back in contact to clarify the matter. I discussed this with your section on 3rd October last year. To date no one has responded to me. Your revised draft framework does not make this any clearer. So before signing the new Framework agreement we will need to have this matter resolved

I look forward to hearing your responses regarding the above points.

Kind regards

Andy Hibberd

Andy Hibberd
Operations Manager, Home From Home Care
1 Langton House, Lindum Business Park
Station Road, North Hykeham LN6 3QX
Tel: 08450 042323 mobile: 07792738804

From:	Anne Philbey <a.philbey@osjct.co.uk>
Sent:	05 April 2012 16:00
To:	ASC_ContractingTeam
Subject:	Draft Report - Response

Email on Behalf of Richard Durance

Dear Glen

Firstly welcome to your new role. I wish you well in what are clearly challenging early days.

I will respond to your letter of the 21/03/2012 in bullet order.

- Frankly I feel the approach to consultation and engagement has been wholly inadequate. There are many occasions when my communications appear to have been ignored, as have communications from LinCA. Engagement has picked up in the last couple of weeks but promises given early in the year appear to me not to have been fulfilled. Indeed some contact has felt duplicitous.

- Regarding the current financing model, it comes across as significantly contrived with supporting numbers having been "cherry picked" from different sources. It feels as if things have been reverse engineered to give a figure to suit LCC rather than reflecting the true cost of care.

  An opportunity might have been to get a complete and current picture from Laing and Buisson but even that has now faltered.

  Headlines of my concerns but in no particular order:-

  - Proposed nursing fees do not reflect nursing care
  - Repairs and maintenance are in our experience at least double the figures that LCC have used.
  - No account has been taken of back office costs and however efficient an organisation is, people still have to be managed and paid etc.
  - Returns in my organisation are significantly less than that required in a sensible business model. Indeed your targeted return is also below that which most businesses would consider reasonable.

I am also concerned that the selective use of figures ignores the big picture, namely that fair residential care fees across the country are very similar at or about £500 per week. I wonder why LCC have not used any figures from running their own care homes?

I cannot answer your question of a preferred option without an increased understanding of:-

- What is your working definition of "high dependency"?
- Can you confirm that people diagnosed with dementia will be in this group?
- How do you expect "essential standards" to be met? It is notable to me that this expression has not been used at all in previous meetings.

As for an alternative? Well, our research and recent court cases all point to a figure for residential care to be approaching £500. There is clearly little difference of actual cost across local boundaries, and frankly it is becoming unacceptable to assume that private funders should subsidise local authority placements. Clearly there is scope for a "volume discount", but I feel that we have to move to a fair fee for the provision of care, whilst recognising that constraints on local authority budgets may well mean fewer placements.

- My view on the Equality Impact Assessment is neutral. It may be helpful internally at LCC, but does not particularly add anything to providers

- Cost of care – given the current economic uncertainty and your notional 1.5% inflation figure I would prefer a one year agreement.

  Staff costs are inevitably a huge part of overheads and with the national minimum wage rising by 1.8% later in 2012, as well as particular pressures on food and fuel, it may be sensible to progress a year at a time until there is a greater confidence in economic projections.

In summary legal action involving Leicestershire, Pembrokeshire, Sefton and others, all indicate a ball park cost of care between £460 and £500.

As with colleagues in LinCA, I hope that payments to lawyers will be avoided but given the wide perception of a lack of genuine consultation, it appears that there is almost inevitability that Lincs will be next.

More importantly communication does not feel two way, it seems to be one way in support of fees that are not fair, and certainly not adequate to provide a good level of care.

I would be happy to come and discuss issues at a greater length.

Yours sincerely

Richard Durance
HR, Training and Lincolnshire Director

Anne Philbey
Senior HR & Training Administrator
The Orders of St John Care Trust
Direct Tel 01522 813119
Fax No 01522 813110

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Charity Registration number: 1048355
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Registered office, Wellingore Hall, Wellingore, Lincoln LN5 0HU

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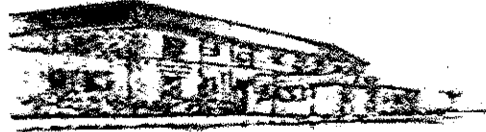

12th April 2012.

Glen Garrod,
Assistant Director,
Adult Social Care,
Lincolnshire County Council,
Orchard House,
Orchard Street,
Lincoln.

Dear Mr Garrod,

Re: Adult Social Care Funding for coming years - Draft Proposals by L.C.C.

Thank you for your letter of 22nd March 2012 & the document of the draft proposals for funding over the next few years by L.C.C. to providers of Care Homes.

I must congratulate you & your team on the wholesale camouflage of this paper exercise to ensure that you have legally covered yourselves from any come back (especially seeing what tripped other Councils up legally) & also to give the providers as little time as possible while blinding them to your proposed payment scales formulas!

Every home is unique & especially us as we are a Charity running a Nursing home and over the years we have always done our best to work within their figures but their constant erosion of the remuneration whilst constantly demanding higher standards and more paperwork is making what should be a partnership to help the most vulnerable into a risky lottery of arbitrary cost cutting.

Neither of your Options 1 or 2 are really suitable in our opinion – we think a more constructive approach [bearing in mind that we had a 1% reduction last year] would have been an increase directly related to an inflation index of some kind & it would have saved you a considerable sum which you are paying Laing & Buisson which would have been better utilised for patient care (but alas not covered your backs legally!)

Also a 3 year set fees of either Option 1 or 2 is totally unacceptable to us – it should be done on an yearly basis – taking inflation into consideration otherwise we will be forced into substantial top up fees ,if not this year certainly next year and being a charity this goes very much against the grain

Yours sincerely

Dr. B. N. Khetani
Chairman

Holbeach and East Elloe Hospital Trust
Holbeach Hospital
Boston Road North
Holbeach
Lincolnshire
PE12 8AQ

Tel: 01406 422283
Fax: 01406 425752

Care and Accommodation Without Compromise

Head Office: 2 Endeavour Park, Boston, Lincolnshire. PE21 7TQ.
Tel: 01205 358888 | Email: enquiries@tanglewoodcarehomes.co.uk
www.TanglewoodCareHomes.co.uk

Please reply to: Head Office

12th April 2012

Ref: TS.AR.0771

Mr. Glen Garrod
Assistant Director
Adult Social Care
Lincolnshire County Council
Orchard House
Orchard Street
Lincoln
LN1 1BA

Dear Mr. Garrod,

Re: Draft Report and Appendices

Further to your correspondence of the 22nd March, our comments are as follows:-

Having attended numerous meetings and provided the financial data requested, the most recent meeting we attended at the Council Chambers left us with a sense that Lincolnshire County Council is simply following a process rather than actively engaging to work in partnership with Providers to achieve adequate and sustainable fee levels. Over the past few years, we have encountered continual and often poorly managed changes in terms of LCC key personnel and policies that impact the independent sector. We hope your appointment will provide Lincolnshire's independent sector with a period of consistency, stability and transparent decision making.

What you think about the approach taken by the Council in consulting and engaging with the sector?

Whilst we have some sympathy for the Council's cost cutting strategy, the consultation process has failed to take into account the true cost of providing a service to clients funded by LCC. There is significant distortion in the cost model applied and whilst we were assured an independent cost review was being undertaken by Laing and Buisson, this failed to materialize.

What you think are the strengths and weaknesses of the model we have used?

Strengths:

- LCC engaged with the Providers of Lincolnshire, unlike the financial period of 2011/12.

Weaknesses:-

- LCC have failed to assess the true cost of care.
- Lincolnshire is the 2nd largest county in the United Kingdom. Whilst there are a few pockets of over capacity in areas of Lincolnshire that has resulted in lower occupancy levels in those specific areas, this is not overall. Despite the suggestion by Terry Hawkins on 18th January for the Authority to consider a fee variation for the location and a price differential for Dementia Care, LCC continues to apply a 'one size fits all' fee model throughout the County, when the average house price in Lincoln (North) is £126,803.00 in contrast to £177,683.00 in Stamford (South). Wages and salaries of care home employees are determined locally they are not consistent throughout this large County.
- LCC have failed to consider the cost of providing care by our neighbouring authorities along with the outcome/s to their legal challenges, despite being provided with this information by LINCA on two occasions.
- LCC have based their own costs to include the premiums received from our self funding clients that are paying the full tariff rate.
- LCC suggest that providing nursing care is disproportionately cheaper than delivering residential care HD1.
- Return on Capital of 6%? A more realistic commercial return is between 12% - 15%. A return of 6% is open to challenge.
- Care Home Beds valued at £42,000:- It would appear that LCC have adopted the EBAY approach to valuing Lincolnshire Care Homes, having reviewed the details of the care homes being offered for sale on the three websites mentioned by Steve Hochin, we find this approach unusual. There is significant credible data available from the sector's reputable valuers; Knight Frank; GVA; Christies to name a few. To value all Lincolnshire care homes at £42,000 a bed space is scandalous. If this were correct, I suspect a significant number of Lincolnshire Care Homes are in breach of their banking covenants. Furthermore, investment in new or existing developments and future sustainable growth in the county will be seriously compromised by the publication of such unreliable data.

What you think of the two options proposed. Do you prefer one option over the other? Do you have an alternative proposal?

- Neither proposal is acceptable to us, the care and wellbeing of LCC residents will be compromised at the proposed fee levels. Furthermore, Tanglewood Care Homes has provision for a substantial number of Nursing Care residents, the reduced fee level will inevitably result in Nursing Beds being used in isolation by self funders and PCT.
- We would welcome an independent review of the true cost of care and agree fee levels that based on accurate data.

What do you think of the Equality Impact Assessment (Appendix E to the report)? Do you think it is sufficiently detailed in its consideration of potential risk and mitigating factors or do you think there are additional risks or mitigating factors that the Council could consider?

It's our belief the E.I. Assessment (Appendix E) is not sufficiently detailed in it's consideration of potential risk to LCC clients in Lincolnshire Care Homes.

- It is unrealistic to expect good quality care can be delivered to residents living in care homes that are well maintained and fit for purpose, when fees are being reduced and not meeting the cost of care.
- 14a & 14b should state 'will impact on the quality of care which is provided' rather than currently stated 'may impact'.
- 14b Providers need the financial resources to comply with the Essential Standards and all regulatory requirements, the proposed fee levels are unrealistic, rather than preparing for home closures, we should be working in partnership in preparation for the increasing demographics of older people.

In the context of the proposed options would you prefer the Council to set a Usual Cost for the next year or the next 3 years?

- We would much prefer an incremental and realistic fee structure for a 3 year period; the current process is very costly in time and financial resources for both LCC and the Providers.

Tanglewood Care Homes remains committed to working with Lincolnshire County Council and providing a very good standard of care to your residents. But in short, we need the financial resources to do this. Over the past 24 years, we have NOT always agreed with the Authorities fee levels and policies, but we've taken a commercial view and managed the situation by means of subsiding your fees levels from our self funding community. But we have now reached the stage where that approach is simply no longer possible and we have no further means to reduce the level of service or staffing without seriously compromising our duty of care.

It now appears to be common practice for the Independent Sector to find themselves communicating with the Local Authority via the judicial system. We sincerely hope that Lincolnshire County Council will re-consider the overwhelming evidence available to you and return to us with a 3 year proposal that will ensure the safety and wellbeing of your residents.

We look forward to hearing from you.

Yours sincerely

p.p. **Tracy A Shelbourn**
Responsible Individual

PRIORY

Mr. Glen Garrod,
Assistant Director, Adult Social Care,
Lincolnshire County Council,
Orchard House,
Orchard Street.
Lincoln.
LN1 1BA.

12th April 2012

By post and e-mail

Dear Mr. Garrod,

Lincolnshire County Council (LCC) Usual Costs for Residential and Nursing Care

Thank you for your letter dated 22nd March 2012 in which you invite comments from care providers in respect of LCC's recommendations on its Usual Costs, and we are pleased to enclose our detailed response.

In summary, we welcome LCC's efforts to seek to consult and engage with the Independent Care Sector and we trust that this process shall be undertaken with care providers being treated as equal partners, and shall ensure that proper account is taken of all relevant and legitimate factors and that over-reliance is not placed upon less relevant factors. We note that so far, LCC's consultation has been restricted to care providers and has not been subject to a wider consultation with other interested parties. It is apparent that the Council has not considered the need to consult with residents and their relatives, even though it is highly likely that the LCC's proposals will result in residents and / or their relatives having to further subsidise shortfalls in LCC's funding by way of increased or new "top-up" contributions. If LCC does not properly consult with all interested parties then the process may well be invalidated.

In our opinion, the scope of LCC's consultation must be widened to consider not only LCC's Usual Prices but also LCC's future commissioning strategy which we note is underpinned by the assumption that future increased demand for care will be met entirely by the increased commissioning of intensive homecare and Extra Care Housing services, such that there is a projected reduction in the number of care home placements commissioned by LCC. Given the *Building Capacity and Partnership in Care Agreement's* expectation that commissioners should work together across agency boundaries (i.e. across social care, healthcare and housing) to determine *Best Value* for the taxpayer, we require further information from LCC regarding its *Best Value* judgement (across agency boundaries) in support of this policy. This should include details of LCC's calculations to compare the projected cost to the taxpayer of the intensive homecare and Extra Care Housing packages against the costs of the Residential and Nursing Care packages that they are intended to replace. We include within our response calculations to demonstrate that even for relatively modest levels of care input, it is very likely that homecare and Extra Care Housing services will be very likely to cost more than Residential Care.

Priory Group Northern Office, Park Hall, Middleton St George, Darlington, County Durham, DL2 1TS
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PG001318/Aug11

We therefore advise that LCC should radically revise its future commissioning strategy. Residential and Nursing Care is likely to be more effective in delivering *Best Value* to the taxpayer and so, rather than planning to reduce care home placements, LCC should be seeking to commission more Residential Care services as the most cost-effective way of meeting increasing demand.

In noting that LCC has taken time to consider its obligations under the Government's *Building Capacity and Partnership in Care Agreement* from October 2001, we advise that LCC takes great care to avoid *using its dominant position to drive down or hold down fees to a level that recognise neither the costs to providers nor the inevitable reduction in the quality of service provision that follows and which is short-sighted and may put individuals at risk.* It is therefore of fundamental importance that LCC ensures that the Residential Care market is able to develop and grow to meet the increased demand.

Although LCC's Consultation Document acknowledges some of the key requirements of the *Building Capacity and Partnership in Care Agreement* (including how contract prices should be set not mechanistically but should have regard to providers' costs and efficiencies and planned outcomes for people using the services), it makes no mention of other key elements including the requirement for commissioners and providers to work as equal partners. As currently drafted, LCC's Framework Agreement does not permit the provider to operate as an equal partner to LCC. Many of its terms and conditions present an unfair and unreasonable level of risk to the provider, and a number of key clauses require substantial redrafting. In October 2011, we provided LCC with a full critique of the Framework Agreement, a copy of which is appended to our detailed response.

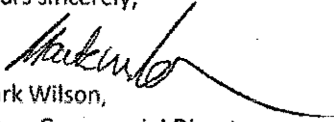
As part of this submission we had requested details of LCC's calculations in support of its Usual Prices, and we acknowledge LCC's creation of a transparent funding model as a positive development. However, as documented within our detailed response there are a number of fundamental deficiencies in LCC's assumptions (particularly in respect of capital values and rates of return) which have resulted in its calculations significantly underestimating actual costs. We have provided details of our calculations to demonstrate where these differences have arisen and it is very clear that that LCC's proposed Usual Prices (in conjunction with its current Framework Agreement) do not adequately cover the actual costs of providing the most basic Residential and Nursing Care service, let alone allowing for a reasonable rate of return to allow providers to reinvest in their facilities. In view of the projected substantial growth in demand for care services, any action by LCC to hold Usual Prices down in the knowledge that this would be likely to reduce capacity and jeopardise quality would be extremely short-sighted. Rather than looking to hold down its Usual Prices, LCC must set Usual Prices at realistic levels which will allow care home providers to invest in quality services. In view of the requirement for LCC's Usual Prices to be responsive to changes in the cost of providing services, and also to changes in the Residential Care market we do not believe it appropriate for LCC to consider setting Usual Prices across a period of anything more than one year.

Although the Draft Initial Equality Analysis identifies that there are concerns that LCC's policy could have a negative impact with regard to age and disability, we believe that the potential negative impact has been grossly underestimated, especially as a consequence of the seriously flawed assumptions upon which LCC has based its calculations of the actual costs of Residential and Nursing Care. Continued chronic underfunding by LCC of Residential and Nursing Care would present a very serious risk that a great deal of capacity would be lost from the market at a time when demand is likely to increase quite significantly. The means that LCC suggests may partially mitigate the impact would not be adequate; for example no amount of what LCC describes as *robust contract management* will be able to deliver consistent quality from loss-making, non-viable services.

PRIORY

We are willing to work in partnership with the Council to revise the assumptions within its cost of care model such that it more realistically reflects the actual costs of Residential and Nursing Care, and also to make the necessary amendments to the Framework Agreement in order to ensure that it is clear, consistent, transparent and equitable, and we should be very pleased to discuss this with you in more detail. We look forward to hearing from you, though in the intervening period, should you require any further clarification please do not hesitate to contact us.

Yours sincerely,



Mark Wilson,
Group Commercial Director

Encs.

PG001317/Jun10

Lincolnshire County Council (LCC): Consultation on Residential Care Fees Priory Group Comments

LCC's Future Commissioning Strategy

Within their report *An Independent Evaluation of the Residential Care Market for People across Lincolnshire* dated 9th January 2012, Laing & Buisson describe how demographic trends (assuming that care patterns in Lincolnshire remain the same as now) indicate that demand for care home places for older people will be 18% higher in 2016 than in 2011. They also estimate that in the same period there will be a 15% growth in the number of people with learning disabilities who will need care and support. Yet despite this growth in demand, LCC estimates that by 2016 it will be commissioning 200 fewer care home placements, with this reduction being achieved by the increased use of alternatives to care homes, particularly Extra Care Housing and intensive homecare. However, Laing & Buisson note that the Extra Care Housing market has stalled recently as a consequence of the Government's withdrawal of funding for new capital projects, and they believe it unlikely that much new Extra Care Housing stock will be developed over the next few years. This means that LCC's policy of reducing care home places will be largely reliant upon it being able to arrange a much larger number of intensive homecare packages.

Given the requirement for *Best Value* judgements to be made as part of a whole systems approach across agency boundaries, it is reasonable to expect that in developing its commissioning strategy, LCC should have carefully considered the relative overall cost to the taxpayer (healthcare, social care and housing combined) of each model of care. It is reasonable to expect that LCC should have undertaken calculations to determine the overall cost impact of its policy of reducing care home placements in favour of intensive homecare packages and / or Extra Care Housing. These calculations should have considered not only LCC's Adult Social Services Department budget in isolation but also the cost to the taxpayer as a whole (i.e. including additional pension credit, attendance allowance payments made by the Department of Work and Pensions to Older People living in their own home, community equipment provided to support older people to live in their own home, community nursing services etc.).

The Department of Health Care Services Improvement Partnership's Technical Brief No.2 "Funding Extra Care Housing" published in July 2005 contains an indicative example of the cost of a high needs Extra Care service. This is reproduced below:

Costs	£	Revenue	£
Rent (including some housing services)	115.00	Housing Benefit	115.00
Council Tax	8.00	Council Tax Benefit	8.00
Heat, Light, Power	15.00	Pension	82.05
Food, Clothes, Household Bills etc	67.05		
Housing Related Support	20.00	Supporting People Grant	20.00
Personal Care and Support	173.50	Pension Credit (Severe Disability Addition)	72.90
		Attendance Allowance (Higher Rate Part)	30.60
		Social Services Contribution	70.00
Help with Housework	30.00	Attendance Allowance (Higher Rate Part)	30.00
Total Expenditure	428.55	Total Revenue	428.55

Based on these figures, we calculate that the average level of personal care and support delivered under this model would have been no more than 13.5 hours per week. Also, taking seven years' inflation into account, we calculate an equivalent service in 2012 will cost at least £520 per week. The same model can apply equally to homecare services and we request from LCC an indication of the point (as measured in care hours per week) at which it believes it will cost the taxpayer more to care for a person in their own home as compared to its proposed basic usual weekly price of £395 for residential care. We expect that this should take into account provisional Department of Health statistics which indicate that in 2010/11 homecare services cost the Council £51.2 million (an average of over 55,000 hours per week at an average cost of £17.74 per hour), including £18.5million spent supporting the Council's own in-house services at an average cost of £42.50 per hour.

In view of the LCC's revision in October 2011 of its criteria under *Fair Access to Care Services* (FACS) such that it will now only support individuals with *Substantial* and *Critical* needs, it is reasonable to expect that the average cost to the taxpayer of individuals' homecare packages will increase quite significantly. Based upon the calculations detailed above, it is evident that an increasingly significant number of homecare packages will prove to be a more expensive option for the taxpayer compared with Residential Care. Therefore, rather than saving the taxpayer money, LCC's policy of applying a large-scale reduction in the number of residential care placements will very likely result in the taxpayer paying significantly more. Although it may be true that many Older People do wish to remain living independently at home for as long as possible, many others prefer to choose to live in residential care (the fact that over 40% of care home residents are self-funding provides clear evidence of this). If the LCC is willing to fund only restricted care packages then it is possible that for many people, independent living may in reality equate to isolated living with inadequate support relative their needs. We believe that LCC's policy could result in generally less effective care and support delivered at an overall higher cost to the taxpayer, a situation which would definitely not represent *Best Value* for the taxpayer.

National Assistance Act 1948 (Choice of Accommodation) Directions 1992 ("the Directions")

Within Paragraphs 1.1 - 1.3 of LCC's Consultation Document LCC makes reference to some of its obligations under the Directions. We expect that LCC fully understands all of its obligations. As detailed in Paragraph 1.3 of LCC's Consultation Document, the Directions require that councils should not set arbitrary ceilings on the amount they expect to pay for an individual's residential care and that residents and third parties should not routinely be required to make up the difference between what the council will pay and the actual fees of a home; Councils have a statutory duty to provide residents with the level of service they could expect if the possibility of resident and third party contributions did not exist. The Directions make it clear that individual residents should not be asked by local authorities to pay more towards their accommodation because of market inadequacies or commissioning failures.

These points are particularly relevant with regard to the calculation of a council's Usual Prices and mean that additional funding paid to care home providers (either from third party contributions or through higher average fees paid by self-funding residents) in order to compensate for the council's underfunding cannot be taken into when the council determines its Usual Prices; the Directions require that a council's Usual Prices must be able to properly cover the legitimate costs of providing the service without any reliance upon subsidies from third parties.

LCC's Usual Costs 2011/12

Paragraph 1.16 of LCC's Consultation Document describes how, with effect from 9th May 2011, LCC revised its Usual Prices such while existing placements continued to be paid at their 2010/11 Usual Prices (albeit with no inflation uplift), it sought to apply a lower set of Usual Prices for new placements during 2011/12. Furthermore, LCC would not apply the "High Dependency Rate 2" for new placements even though it continued to apply this rate for existing placements. Within our correspondence with LCC last year we highlighted that although the table of Usual Prices in LCC's Framework Agreement excluded a sum for new placements at the "Higher Dependency 2" level, the Service Specification still contained a detailed specification for the "Higher Dependency 2" service. We advised LCC that such a discriminatory price structure was unlawful; in accordance with the Directions, councils' Usual Prices must consider individuals' assessed needs regardless of when those needs first arose. This was confirmed in the Local Government Ombudsman's 2004 ruling against Bolton Metropolitan Borough Council (Case ref: 03/C/02451 dated 10th March 2004).

In order to fulfil its statutory obligations, LCC must pay the higher Usual Prices for all residents admitted since 9th May 2011, backdated to the date of their admission, including applying the erstwhile "Higher Dependency 2" Usual Price for new residents who meet the relevant specification.

LCC's Cost Modelling Process

Value of Land & Buildings and Rate of Return

Between them, the LCC model's respective assumptions for the value of Land & Buildings and Rate of Return are responsible for the largest single element of the shortfall between LCC's calculated unit prices and the true "fair price for care". In both cases, we believe these assumptions to be flawed.

Firstly, we contend that LCC's assumption of an average capital cost of £42,000 per care home bed may have been based upon inappropriate data, having been drawn from a sample of just fifteen care homes currently up for sale in Lincolnshire. LCC's Consultation Document provides no further details of these fifteen care homes, and in order that we may reasonably determine the appropriateness of this data we require further details as follows:

- How many of these fifteen homes are purpose-built and fully compliant with the 2002 Environmental Standards, and how many are not fully compliant, including how many are converted properties.
- The total number of registered places within these fifteen homes.
- Of this total, how many registered places are in shared rooms.
- How many of the registered places are in rooms with en-suite bath / shower facilities.

The Laing & Buisson Fair Price Toolkit 2008 incorporated an assumption of a capital cost of £59,500 per care home bed and we see no good reason why the LCC model should assume anything less.

Secondly, LCC's assumption of 6% as representing an adequate Return on Capital for a care home operator has been based upon a fundamentally and very grossly flawed assumption that CBRE figures for Prime Healthcare (6%) and Good Secondary Healthcare (7%) are appropriate. LCC has not appreciated that the returns quoted by CBRE relate to real estate investment in healthcare-related property (i.e. where the investor is leasing the property to an operator and where the investor's risk is limited to its capacity as a landlord). These rates have no relevance whatsoever to the level of returns that should be reasonably required to cover the much higher risk associated with the

provision of 24-hour care to Older People and Vulnerable Adults in addition to the provision of the residential accommodation. Factors that contribute to these added risks include:

- The high level of duty of care required of the care home provider under the Essential Standards of Quality and Safety.
- The high ratio of staff costs: income, in conjunction with the care home provider's obligations under Employment Law and Health & Social Care Law.
- The care home provider's responsibilities in respect of the Safeguarding of Vulnerable Adults.
- High sensitivity of a care home's viability to changes in occupancy levels. This sensitivity will increase as residents' average length of stay continues to reduce.
- Limitations of alternative use for a care home should it no longer be viable.

The risks have been exacerbated by the onerous and one-sided nature of LCC's current Framework Agreement for the Provision of Framework Agreement for the Provision of Long and Short Term Personal Care within a Care Home or Care Home with Nursing.

LCC's own report *Shaping Care for the 21st Century* (July 2011) acknowledges the need to *ensure a level playing field for all suppliers, giving people more choice and a better standard of service and that current arrangements do not sufficiently enable the real choice of options that personalisation should offer for Older People and their families.* However, the mechanism which LCC has sought to apply in its calculation of prices for Residential and Nursing Care (i.e. by seeking to purchase all care, support and ancillary services at cost, or even at less than cost) does not at all represent a level playing field compared with how it funds care and support in other surroundings such as in people's own homes or in Extra Care Housing, as is demonstrated in the following example;

- The LCC Model for Residential Care assumes 22.2 hours of care can be provided at a direct cost of £173.84 (i.e. £7.83 per hour), and even after the apportionment / allocation of indirectly related costs (e.g. allocation of management and administration costs, training etc.) a total cost of less than £210 per week (i.e. less than £9.50 per hour) will be incorporated into the LCC Model.
- This compares to an hourly rate paid by LCC to external providers of homecare services (either in their own home or in Extra Care Housing) averaging between approximately £13.00 and £13.50 per hour (i.e. approximately 40% higher).

LCC cannot reasonably expect homecare services to be provided at cost, nor can it reasonably expect care within a care home to be provided at cost (or even less than cost).

Other Discrepancies within the LCC Model

Hours

Although hours for care staff and non-care staff within LCC' model are drawn from Lincolnshire Laing & Buisson Data, there is inconstant treatment in the model of nurses' hours such that the figure of 7.5 hours has been drawn from the 2008 JRF Toolkit rather than from the Lincolnshire Laing & Buisson Data; for consistency, the LCC model should incorporate a figure of 9.8 nurse hours. The model should therefore recognise that, in accordance with Section 49 of the Health and Social Care Act 2001, the NHS-Funded Nursing Care Contribution (currently £108.70 per week) is merely a contribution towards the extra cost of Nursing Care compared with Residential Care and is intended to cover just the cost of *Nursing Care delivered by a registered nurse* (as defined in the Act) and not the cost of any non-nursing activities undertaken by a registered

nurse. This point was confirmed as being relevant in the case of R (on the application of Forest Care Home Ltd and others) v Pembrokeshire County Council. Notwithstanding the need to incorporate a reasonable margin, the LCC model has understated the cost of nurses' hours by at least £33 per week.

LCC's model has neglected to incorporate allowance for any senior carers' hours – this is especially relevant in the calculations for the cost of Residential and Dementia Residential Care, where Laing & Buisson data indicates that 34% and 28% of respective care staff are senior carers (including Team Leaders). Notwithstanding the need to incorporate a reasonable margin, the LCC model has understated the cost of senior care /care hours by approximately £5 per week.

On-Costs

Rather than applying the most up to date assumptions for on-costs (as contained in the Laing & Buisson Lincolnshire Report), the LCC model has applied old outdated assumptions from the 2008 JRF Toolkit:

- Nurses' NIER (9% applied, rather than 10%)
- Other Staff NIER (8% applied, rather than 9%)

Rates of Pay

Within its model, LCC has chosen to use median rates of pay, rather than weighted average (mean) figures. We believe the mean figures to be more appropriate.

Omission of Other Costs

The LCC model has omitted to consider the cost of home administration etc. which appears in the Laing & Buisson Lincolnshire Report under the heading of *Marketing, PR, Advertising and Communications* – this represents an understatement of approximately £3.50 per week.

The LCC model has considered only revenue repairs and maintenance costs, and has taken no account of maintenance capital expenditure. This represents an understatement of £19 per week.

The Relative Cost of Residential and Nursing Care

Paragraph 2.21 of LCC's Consultation Document remarks that when applying the Lincolnshire data it is striking that there does not seem to be a significant differential between the providers' actual costs in providing the care. There are a number of reasons why LCC has reached this incorrect conclusion:

- As detailed above, LCC's calculations for the cost of Nursing Care have not used the correct number of nurse hours.
- LCC's calculations assume that providers of Nursing Care should be expected to deliver this additional care at cost; this takes no account of the additional risks associated with providing care to residents that are typically much more frail (e.g. shorter average length of stay, more volatile occupancy).
- LCC's calculations do not take into account that in view of the higher complexity of the service, Nursing Care is typically provided in purpose-built care homes, with a higher average Capital Cost than care homes not registered to provide Nursing Care.

LCC's Commissioning Obligations

Paragraph 2.16 of LCC's Consultation Document states that council business is *low / medium risk for providers as LCC will always make substantial placements and will always honour its commitments.* In view of LCC's stated policy to reduce the number of supported residents over the course of the five years to 2016, this is clearly not true. This projected consequence of this policy contradicts the statement elsewhere in LCC's Consultation Document that there is a predicted demand for care home places for Older People increasing by 18% in five years.

Furthermore, LCC does not always honour its commitments as is highlighted by the problems providers have experienced with the deficiencies in LCC's systems of assessment, contracting and payment (as detailed in Paragraph 4.9 of LCC's Consultation Document). This is further evidenced by LCC's failure to uplift its Usual Prices in accordance with the terms of its own Framework Agreement; this required Usual Prices to increase in accordance with a defined mechanism (being a combination of All Items Retail Prices Index and Average Earnings Index) such that in April 2011 these should have been subject to an increase of nearly 3%; instead the Council refused to increase Usual Prices. It is also of relevance that in conjunction with this and in advance of April 2011 LCC served notice to terminate its Framework Agreements with all providers (effective from 9th May 2011), and simultaneously sought to impose new Framework Agreements incorporating less favourable terms for providers, including lower prices. LCC stipulated that no new placements would be referred to care homes of providers which had not accepted the new Framework Agreement. We contend that this is not representative of a low / medium risk business from a provider's point of view.

Within Paragraph 6.4 of its Consultation Document, LCC claims that it does not hold a dominant position in the market where it currently supports about half of the placements within the County, and that providers are free to contract with LCC at its Usual Costs or not. This view is too simplistic and does not consider the wide variation across the county. In less affluent areas where few people have the means to fund their own care and where access to third party subsidy funding is limited, LCC will very much be in a dominant market position. Conversely in the more affluent areas, LCC's ability to dominate the market will be greatly restricted and providers will have more freedom to determine a fair market rate; however individuals who have no access to third party subsidy funding will have a severely restricted choice of residential accommodation available at LCC's Usual Prices. As detailed above, in settings its Usual Prices, LCC must do so on the basis that the opportunity for third party subsidy funding (and higher fees paid by self-funders) did not exist.

Paragraph 3.1 of LCC's Consultation Document states that as the relationship between the provider and LCC is essentially commercial, if providers are unhappy with the rates then they do not have to contract with LCC. Such a "take it or leave it" stance is symptomatic of a purchaser exercising a dominant market position and is very much contrary to the equal partnership approach expected within the *Building Capacity and Partnership in Care Agreement*. Furthermore, given the details contained within Laing & Buisson's survey (i.e. that 44% of care home providers stated that they charged top-ups, 26% stated that they did not charge top-ups and 30% did not answer the question) it is evident that the majority of care home providers are indeed unhappy with the LCC's Usual Prices.

Laing & Buisson also note that self-funders pay a higher fee for their care home places which could be increasing profits for the operators or could be subsidising supported residents and LCC. Self-funding rates were identified as being typically 30%-35% higher than LCC's Usual Prices for Residential Care, and over 50% higher than the Council's usual prices for nursing care. Paragraph 2.16 of LCC's Consultation Document suggests that the higher rate providers charge self-funders may

be a consequence of the self-funding element of their business being of a higher risk than LCC-funded business. This suggestion is not correct; the self-funding element of a provider's business is far less risky and the rates charged to self-funders are reflective of the operation of market that is free from the influence of a dominant party. Rather than being expected to work under an onerous, purchaser-dominated and risk-filled contract (such as that currently operated by LCC), providers are able to apply fair and balanced contracts with self-funders in accordance with Office of Fair Trading guidance.

Proposed Rate to Consult Providers On

Given that LCC's calculated "actual costs" for Residential Care, Nursing Care and Dementia Residential Care have all been determined using seriously flawed assumptions, neither of the proposed Usual Price structures under Options 1 or 2 realistically represent the true cost of providing the service.

Paragraph 7.4 of LCC's Consultation Document notes that *Option 1 does maintain or increase all Usual Costs, although in relation to residential care providers despite LCC's Usual Price increasing year-on-year, it will not meet their actual costs until 2014/15.* Regardless of the fact that LCC's calculated figures by no means represent "actual costs", LCC has given consideration to the effects of three years' inflation that would need to be factored in to the Usual Prices for 2014/15 – for example, we already know that National Minimum Wage will increase by nearly 2% to £6.19/hour in October 2012. Furthermore, in view of

For the reasons detailed above, Option 2 (which Paragraph 7.7 of LCC's Consultation Document describes as *seeing a fall in the nursing Usual Cost as the Council's current nursing Usual Cost is in excess of the nursing actual costs*) has been based upon fundamentally flawed assumptions. This Paragraph also claims that Option 2 *delivers a significant increase of 8% to residential providers, which brings the Usual Price up to actual cost in one year.* Notwithstanding the flaws in the assumptions upon which LCC's calculations have been based, this "significant" increase is no more than should have already been applied by LCC in order to make-up the shortfall in previous years' increases in Usual Prices compared with what was required under the LCC Contract.

LCC's Draft Initial Equality Analysis

The Department of Health has raised its expectations that all commissioned services deliver dignified and personalised outcomes-based care for Older People and Vulnerable Adults, including a renewed focus upon the implementation of the National Dementia Strategy and increased support for carers.

LCC's decision-making process is subject to the Equality Act 2010 under which it is unlawful to discriminate against someone on the grounds of their age; Older People have the same rights as anyone else to receive personalised outcomes-focused services to meet their assessed needs. Although LCC's commissioning of residential care services for younger adults with Learning Disabilities, Physical Disabilities or Mental Health problems is generally based upon individually tailored care packages (with individualised funding levels), LCC is seeking to continue to apply a "one size fits all" approach to the commissioning of Older People's Residential and Nursing Care, typically at a much lower level of funding. Furthermore, it is most unusual for LCC to seek a third party subsidy in respect of a younger adult's placement whereas such subsidies are commonplace for Older People.

Question 6a) within LCC's Draft Initial Equality Analysis asks whether there are any concerns that LCC's policies could have a negative impact with regard to age. The answer to this question is yes,

not only could LCC's policies have a negative impact with regard to age, they will have a negative impact with regard to age.

Question 14b) within LCC's Draft Initial Equality Analysis asks whether the adverse impact can be justified. The draft answer is given as "yes" on the grounds that LCC's Usual Prices have been calculated to ensure that adult social care services can remain financially viable and that LCC have aimed to use a methodology which is clear and transparent so that it is clear to providers how the rate has been worked out. Although the methodology is indeed clear and transparent (for which we are appreciative), a number of key assumptions underpinning the methodology are fundamentally flawed such that the calculated Usual Prices will not ensure that adult social care services can remain financially viable.

Question 14c) within LCC's Draft Initial Equality Analysis asks whether the impact can be mitigated by existing means to which the draft answer of "yes, partially" is given. However, we doubt the relevance or accuracy of some of the reasons given:

- LCC claims that there is robust contract management in place with providers. As detailed elsewhere in these notes, LCC's Framework Agreement is not a robust contract and contains many deficiencies; without a robust contract we cannot see how there can be a robust contract management process.
- LCC claims that people who are placed in residential care have an annual reassessment to ensure that their care needs are being met. Although LCC has a statutory duty to reassess an individual's needs at least annually or more frequently in response to changes in needs, as Paragraph 4.9 of LCC's Consultation Document acknowledges, the standard of LCC's assessment processes has been poor. Indeed, we believe that many individuals have not had their needs reassessed by LCC for over a year.
- LCC notes that it is working to make sure that people with continuing health care needs can access CHC funding to help maintain the viability of the provider. Whilst this may assist LCC (by removing or reducing its financial responsibility for an individual) we do not believe this to be a particularly relevant point with regard to the provider's viability, at least not under current arrangements. Perhaps when there is true joint working between commissioners across the health, social care and housing boundaries this may change.
- LCC claims that as part of their role, the contracts team monitors the viability of care home providers. We very much doubt whether the contracts team have the knowledge or the skills to determine whether a care home is financially viable; the flaws in the assumptions underpinning LCC's cost of care calculations demonstrate this.

Appendix 1: LCC Draft Framework Agreement for the Provision of Long and Short Term Personal Care within a Care Home or Care Home with Nursing Comments (as originally submitted to LCC on 4th October 2011)

Main Framework Agreement

1. Definitions

"Accommodation Cost" is defined in relation to *Existing Residents* placed pursuant to the Framework Agreement 2004 (as amended), as being *the amount constituting the Accommodation Cost applicable to each such Existing User* (where "Existing User" has not been defined) *under the Framework Agreement immediately prior to the Commencement Date* where "Existing Resident" is defined as *any Resident in receipt of accommodation and personal care and or nursing care from the Provider under any contract with the Purchaser immediately prior to the Commencement Date.*

"Accommodation Cost" is defined in relation to all other Residents, as being *the cost or costs specified in respect of the Provider's accommodation in the Price Schedule.*

Given that there is no formal Framework Agreement currently in place for any Residents, then for the purpose of this new Framework Agreement, all Residents shall have to be treated as "all other Residents" under the definition of "Accommodation Cost".

"Expected Cost" is defined as being *the amount specified as such in the Price Schedule being the amount which the Purchaser would usually expect to pay for the provision of Accommodation and personal care Services for the Resident.* We note that within Schedule 2, the Council is seeking to apply lower *Expected Costs* for "New Placements" (where "New Placements" has not been defined) compared with "Existing Placements" (where "Existing Placements" has not been defined). We would have expected the Council to have understood that such a discriminatory price structure is unlawful (as confirmed by the Local Government Ombudsman in its 2004 ruling against Bolton Metropolitan Borough Council) and cannot therefore be incorporated into this Agreement.

The definition of "Third Party Fees" as meaning *the amount specified by the Provider in the Price Schedule in the column titled "Top Up Required"* demonstrates a lack of understanding within the Agreement's drafting of the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 ("the Directions"). It is the responsibility of the Purchaser, not the Provider to determine whether to seek Third Party funding to subsidise the prices that it usually expects to pay (the "Expected Costs" as defined under this Agreement). In accordance with these Directions councils have a statutory duty to provide residents with the level of service they could expect if the possibility of resident and third party contributions did not exist.

Official Department of Health Statistics for 2009/10 indicates that the Council's average gross weekly expenditure per person on supporting adults aged 18-64 with a Learning Disability in residential care provided was £972. We should therefore appreciate full details of the Council's decision-making process which determined that an expected cost of £427 per week (i.e. less than half of the average cost for 2009/10) for newly-admitted Learning Disability residents was realistic. These details should include a full detailed breakdown of the calculated weekly cost of the four principal elements of the services that the Council seeks to commission as follows:

- Provision of care and support (including management and supervision, medical supplies, nursing equipment, clinical waste collection etc.)
- Provision of ancillary services to assist daily living (e.g. meals, drinks, laundry service, cleaning service etc.)
- Accommodation (including capital expenditure)
- Housing management & other accommodation-related services (e.g. utilities, trade waste, repairs and maintenance etc.)

The definition of "Working Day" is not correct in that it fails to consider that Bank Holidays and other public holidays should not be treated as *working days*.

3. Commencement Date

Given that the Commencement Date has not been incorporated into this draft clause, we presume that this shall be effective from the date that the Agreement is signed by the parties.

The provision under Clause 3.2 for the Council to have the right to unilaterally extend the Agreement by up to 24 months is not reasonable and is not accepted. This provision should be amended such that any extension to the Agreement should be effective only by express written mutual agreement of the parties.

5. Contract Standards

Clause 5.3 specifies that *save as provided for in this Agreement the Purchaser shall be under no obligation to the Provider to provide extra funding towards the costs of the Services. To that end, the Provider shall use its best endeavours to ensure that the Services are provided within budget and that any opportunities for efficiency gains or savings are brought to the attention of and discussed with the Purchaser.* However, there is no effective provision anywhere within this Agreement requiring the Purchaser to provide extra funding to cover the costs of providing additional services (e.g. if an individual's needs increase), nor is there any consideration of how to protect the Provider from unavoidable increases in the cost of providing the Services.

7. Contract Price and Payment

The clauses contained within Paragraph 7 makes reference to a number of undefined terms (including "prices/charges", "Contract", "Contract Price", "Total Price" etc.). As a consequence, there a degree of ambiguity within many of the clauses that relate to prices to be charged.

Clause 7.1 specifies that *the Purchaser may review the Contract Price in April but this shall not result in any price adjustment unless the Council in its absolute discretion so determines.* We infer that "Contract Price" is intended to refer to "Expected Cost" (as defined), and in view of its obligations under the Directions, the Council cannot reasonably expect to have absolute discretion in determining these "Expected Costs".

In accordance with Office of Fair Trading guidance the Provider shall be required to give at least one month's notice of its intention to vary its prices, the basis of which should be set out openly and transparently. The clauses are silent in respect of how the Provider is to vary its prices (defined as "Accommodation Cost" in this Agreement) and we shall therefore infer that the procedures for such price variations shall be in accordance with Office of Fair Trading guidance.

Contrary to the Directions (under which it is usual for the Council to collect Resident and Third Party Contributions itself, paying the full cost of the accommodation to the Provider) the provisions of Clauses 7.7 – 7.20 automatically presumes that the Provider shall collect the Resident Contribution and Third Party Contribution on behalf of the Council. The Directions make it clear that such an arrangement is only possible where the Council, Provider and Resident all agree. Specifically, in respect of Clause 7.15, it is the statutory responsibility of the Council rather than the Provider to put in place a Third Party Agreement. The Council should note that it is ultimately liable for payment of the full cost of any individual placement.

Clause 7.23 specifies that *the Resident shall not be charged for anything provided to meet an assessed care need* and that *the provision of continence aids to Residents assessed as needing them shall not under any circumstances whatsoever constitute an "Extra"*. For the avoidance of doubt, statute requires that all continence aids needed to meet an individual Resident's assessed needs should be provided free of charge by the NHS in the same manner that would apply in circumstances where that individual were living in their own home.

Clause 7.26 seeks to remove the Provider's statutory right to interest on any late payment made by the Purchaser. This is clearly unreasonable and this clause should be removed; statutory provisions shall apply.

The contents of Paragraph 7 require substantial redrafting in order to ensure that the Framework Agreement can operate properly in accordance with the Law.

8. Services And People Who Use Those Services

Clause 8.8 specifies that *any changes in the Total Price* (where "Total Price" has not been defined) *resulting from a change in the assessed level of Service required by a Resident shall be notified to the Provider in writing by the Purchaser* and that *all assessments shall be carried out in accordance with the Purchaser's assessment procedures*. As a result of the shortcomings of Paragraph 7, together with the structure of Expected Costs contained within Schedule 2, the intention of Clause 8.8 (i.e. to match price with the cost of meeting a Resident's assessed needs) cannot be practically applied under the Framework Agreement.

The terms of Clause 8.10 do not apply; as detailed within our comments regarding Paragraph 1 (Definitions), given that there is currently no formal Framework Agreement in place, there are no Residents that fall under the definition of "Existing Residents". The new terms and conditions that the Council seeks to introduce are substantially different to those under previous Agreements and it is therefore inappropriate for the Council to assume that previous prices shall be acceptable to the Provider. Also, in recent years the Council did not increase its Expected Costs correctly in line with the requirements of its own Framework Agreement and so the Expected Costs specified in Schedule 2 of the new Framework Agreement are not correct.

In any case, Department of Health Guidance makes it clear to commissioners that they should not presume that previous terms and conditions shall be acceptable to the Provider under any new Agreement.

9. Referrals and Placement

This paragraph requires substantial redrafting to recognise that the primary function of the Purchaser is to serve the Resident in arranging for their chosen residential accommodation subject to that accommodation being able to meet the Resident's assessed needs and subject to the

Provider of that accommodation being willing to accept that Resident on agreed terms and conditions. Within this paragraph, there is no mention whatsoever of the Resident's right to choose.

Clause 9.5 states that *there is no obligation upon the Provider to accept any individual Resident following a Trial Period, provided that it can be evidenced that it is unable to meet the needs of any such Resident.* However given the purpose of a Trial Period, the decision by the Provider, Purchaser or Service User not to continue the Service beyond the end of the Trial Period must be unconditional. The condition that this clause seeks to place upon the Provider is unreasonable.

Similarly under Clause 9.3, the decision to extend a Trial Period shall be made with the express agreement of the Purchaser, Resident and Provider.

Given that this Agreement is intended to operate as a call-off Framework Agreement with no obligation upon the Purchaser to guarantee any placements of Residents, it cannot reasonably apply any obligation upon the Provider to accept referrals. The conditions that Clause 9.6 seeks to impose upon the Provider are inappropriate and unreasonable and the implication that the Provider could be penalised for the persistent, unjustified refusal to accept referrals must be removed from this Agreement.

Clause 9.12 seeks to place an obligation upon the PCT (where "PCT" has not been defined) to undertake the relevant Determination prior to the placement of a Resident. However, given that no PCT is party to the Agreement, there is no way of enforcing this obligation under this Agreement.

10. Relationship Between This Agreement And Individual Forms Of Agreement

Clause 10.1 specifies that *each individual Form of Agreement in respect of a Resident shall be a separate contract between the Purchaser and the Provider for the provision by the Provider to the Resident of the Services specified therein on the terms and conditions of this Agreement as the same may be supplemented and/or amended by the Individual Form of Agreement.* This Clause must make it clear that the Resident and / or their Representative shall also be party to such a contract, as shall be any third party funder. We note with great interest the indication within this clause that an Individual Form of Agreement may be amended so as to override the terms of the main Framework Agreement.

Clause 10.2 specifies that *the Individual Form of Agreement shall commence on the date specified therein and notwithstanding the expiry or termination of this Agreement shall remain in force for the period specified therein unless terminated early in accordance with this Agreement or the Individual Form of Agreement.* Given that Individual Forms of Agreement are dependent upon and are linked to the terms of the main Framework Agreement we cannot see how they can continue to operate in isolation after the main Framework Agreement has expired or been terminated.

Temporary Absence Of A Resident

Clause 11.6 is made too complicated by seeking to apply rules to Council Contribution, Resident Contribution and Third Party Contribution. Given the Council's responsibility for the full "Accommodation Cost" then this clause should simply refer to the "Accommodation Cost". Inclusion of the non-defined terms "Total Price" creates uncertainty.

12. Death Or Discharge Of A Resident

Clause 12.5 states that if a Resident is discharged from the Home after 2pm then an additional "half day payment" (where "half day payment" has not been defined but is assumed to mean one fourteenth of the Accommodation Cost) shall be made. However, it is not made clear as to what this "half day payment" is in addition.

This paragraph does not give any consideration to circumstances where a Resident is permanently discharged without proper notice being given to the Provider. In the absence of any specific provision, it is reasonable that the Provider shall be entitled to be paid the Accommodation Cost for the full duration of the notice period.

13. Complaints

This paragraph should be extended to include proper provision for the Resident to complain about the Purchaser's performance in respect of its obligations both under this Framework Agreement and in accordance with the Law.

14. Performance Default

The terms of the clauses within this Paragraph present an unreasonable risk to the Provider, especially the omission within Clause 14.1 of any requirement for the Purchaser to supply evidence to the Provider in support of its allegations that the Provider is in default, together with any procedure to allow the Provider to challenge / defend such allegations.

We note with interest the condition within Clause 14.2.3 the indication that the Purchaser shall reserve the right to procure and charge back the costs reasonably incurred for a range of services:

- Home manager
- Senior carer
- Carer
- Home administrator
- Accommodation

In conjunction with our request for details of the Council's calculations in support of its Expected Costs we should appreciate details of the costs that the Council believes would be reasonably incurred for the above (hourly rates (inclusive of on-costs) for staff and a weekly rate for accommodation).

Clause 14.4 states *that The Purchaser reserves the right to suspend payments and further placements whilst investigating the affairs of the Provider following a serious breach of Agreement and the Provider shall co-operate with such investigation including giving access to the Purchaser to all relevant Service information.* This is contrary to basic principles of natural justice for several reasons:

- Even though investigations may be ongoing, this clause automatically assumes that the Provider is guilty of the alleged serious breach of Agreement even though this may not prove to be the case.
- There is no provision for the Provider to challenge / defend its position nor is there any provision for the Provider to be fully recompensed if it subsequently becomes apparent that there was no serious breach.

- If the Purchaser chooses to leave Residents under the Provider's care during an investigation it cannot reasonably suspend payment for the Services that continue to be provided.

Finally, this paragraph does not consider any remedies for the Provider or Residents in cases where the Purchaser is in default of its obligations under the Agreement.

<u>15. Termination</u>

Clause 15.2 makes provision for the Purchaser to immediately terminate the Agreement where that the Provider is in breach of any of its provisions or any additional provisions contained in an Individual Form of Agreement and the Provider has failed to remedy the breach to the satisfaction of the Purchaser. This is unreasonable on the grounds that:

- No level of materiality of breach is specified (therefore termination could be effected in response to minor indiscretions).
- The remedy is not restricted to the reasonable satisfaction of the Purchaser.
- The provision unrealistically and unreasonably extends to the behaviour of individual members of staff. There may be circumstances when an employee of even the most responsible organisation (including the Council itself) could be convicted of an offence.
- No reciprocal rights are afforded to the Provider in the event that the Purchaser is in breach.

Clauses 15.3-15.7 consider the termination of Individual Forms of Agreement and repeatedly refer to the rights of "either party" (i.e. there is no recognition of the fact that the Resident and /or their Representative must also be a party to the Individual Form of Agreement, together with any relevant Third Party Funders).

Clause 15.8 considers the "consequences of exit provisions" and implies that the Purchaser shall be entitled to deduct from the payment to the Provider any Losses (where "Losses is defined as any liabilities, damages, costs, charges, expenses, losses, claims, demands or proceedings") arising from the termination and that no payments will be made until these "Losses" have been calculated. This is unreasonable and unacceptable for several reasons:

- Uncertainty as to the length of time that the Council shall take to calculate such "Losses"
- Uncertainty as to the potential quantity of the "Losses".
- Failure to recognise that the Agreement may have been terminated by the operation of the "no-fault" termination clause, or possibly where the termination was initiated by the Provider because the Purchaser was at fault.
- No provision for the Provider to account for its own "Losses".

Clause 15.10 states that *the Provider shall immediately return to the Purchaser all Confidential Information, Personal Data in respect of all Residents in its possession or in the possession or under the control of any permitted suppliers which was obtained or produced in the course of providing the Services. If the Provider fails to comply with this clause 15.10, the Purchaser may recover possession thereof and the Purchaser grants a licence to the Purchaser or its appointed agents to enter (for the purposes of such recovery) any premises of the Purchaser or its permitted suppliers or sub-contractors where any such items may be held.* This provision is not acceptable – any information that the Provider has collated in respect of Residents remains the property of the Provider. The Provider remains accountable to the statutory regulator and must keep all information as evidence should the future need arise.

17. Safeguarding Vulnerable Adults

This Framework Agreement should be drafted to ensure consistency with updated Government Policy on Adult Safeguarding (Department of Health Gateway reference: 16072) such that procedures move to less risk-averse ways of working and concentrate on outcomes instead of focusing on compliance with an underlying presumption of person-led decisions and informed consent.

19. Staff

We note the requirement under Clause 19.4 that the Purchaser shall comply with any official guidance issued in relation to safeguarding schemes, and we therefore expect that the Council shall fully adhere to the guidance contained within Gateway reference 16072 (as detailed above), including making a proportionate and least intrusive response appropriate to the risk presented.

Paragraph 19 as currently drafted is overly prescriptive and fails to consider that the Provider's obligations in respect of its staff are already well covered under the Care Quality Commission's Essential Standards of Quality and Safety. In view of the updated Government Policy on Adult Safeguarding, much of this paragraph should be removed, including those clauses that seek to give the Purchaser influence over the Provider's management of its staff.

21. Equality And Diversity

The provisions of Paragraph 21 shall apply equally to the Purchaser. This includes adherence to legislation in respect of the setting of Expected Costs.

22. Protection Of Information

The provisions of Paragraph 22 shall apply equally to the Purchaser.

The Purchaser should note that it shall remain liable to the Provider for any damages arising from its actions to disclose under the Freedom of Information Act any Commercially Sensitive Information relating to the Provider and where there was no requirement to do so.

Given that the Purchaser should have its own records of payments made to the Provider and expenses reimbursed from the Provider, there is no good reason why it should need to request such information from the Provider. Clause 22.5.1 should be removed.

The Purchaser has no right to undertake a detailed financial audit of the Purchaser's records and Clause 22.5.2 should therefore be removed.

23. Human Rights

The provisions of Paragraph 23 shall apply equally to the Purchaser.

24. Indemnity

Equal and reciprocal rights of indemnity should apply to the Provider.

26. Emergencies

Given that the Framework Agreement should reflect equal partnership working between the Parties, Clause 26.1 must be redrafted to indicate that the Purchaser shall *request* (rather than *instruct*) the Provider to procure such additional services as may be necessary. Given the urgency of an emergency situation, it is appropriate that the Provider should decide upon the reasonable and proper costs that will have to be incurred rather than waiting for agreement to be reached. The Purchaser should promptly pay the reasonable and proper costs determined by the Purchaser. If after the emergency has passed, the Purchaser wishes to dispute the amounts it has paid then it may refer the matter to Dispute Resolution.

28. Partnership Working And Best Value

The drafting of this Framework Agreement should be consistent with the Government's expectation that the Purchaser and Provider work as equal partners to deliver the services to those Residents for whom they are jointly responsible.

30. Dispute Resolution

Referral of a dispute to the Courts must be seen as a very last resort. Therefore the dispute resolution provisions should be extended to cover binding arbitration and also binding expert determination (specifically in respect of disputes over price).

33. Environmental Requirements

Whilst the Purchaser's environmental policy is relevant to the Purchaser's own activities it is not necessarily relevant to the Provider. The Provider is already required to fulfil its statutory obligations and restatement of these adds no value to the Framework Agreement. This Paragraph should be removed.

36. Severance

Clause 36.1 states that *if any provision of this Agreement is declared by a court or other competent authority to be unlawful, void or unenforceable, it shall be deemed to be deleted from this Agreement and shall be of no force and effect and this Agreement shall remain in full force and effect as if such provision had not originally been contained in it. In the event of any such deletion, the Parties shall negotiate in good faith in order to agree the terms of a mutually acceptable and satisfactory alternative provision in the place of the provision so deleted.* It should be noted that clauses may be unlawful, void or unenforceable even if a court or other competent authority has not yet determined them to be such (although in the case of the Council's discriminatory Expected Costs, this has indeed already been declared unlawful by a *competent authority* (i.e. the Local Government Ombudsman)).

Our comments in respect Paragraph 15 concerning the extent of the Provider's responsibility for the behaviour of individual members of staff apply equally here to Clause 37.3.

38. Cartels

The Council continues to operate its own in-house residential and domiciliary care services in direct competition with independent and voluntary sector care providers, including those "Providers" for whom this Framework Agreement is intended to apply. The Council is therefore an *undertaking* and shall itself be subject to Competition Legislation.

This clause should acknowledge that there is certain information that Providers may legitimately share with each other (in accordance with guidance provided by the Office of Fair Trading for Trade Associations etc.).

Schedule 1: Service Specification

General Comments

The Service Specification in unnecessarily prescriptive and the Framework Agreement would be greatly improved if the Service Specification were to be restricted to listing only those elements that were over and above those required under the Care Quality Commission's Essential Standards of Quality and Safety. As a consequence, the following should be removed:

- Paragraph 3 (Policy and Practice)
- Paragraph 4 (Registration Requirements)
- Paragraph 5 (Quality Statement)
- Paragraph 7 (Values and Care Principles)
- Paragraph 9 (Medical Care)
- Paragraph 11 (Sensory Loss and Impairment)
- Paragraph 12 (Rehabilitation)
- Paragraph 13 (Ethnic and Cultural Needs)
- Most elements of Paragraph 15 (Responsibility of the Provider)
- Paragraph 19 (Accommodation)
- Paragraph 20 (Health and Safety)

Other Comments

2. Criteria

Clauses 2.1, 2.2 and 2.3 provide details of the Criteria for what the Framework Agreement describe as "Standard Residential", "Higher Dependency 1" and "Higher Dependency 2". The Expected Costs detailed on Schedule 2 refer to "Older People Residential", "Older People High Dependency 1" and "Older People High Dependency 2" and it is not totally clear whether these different terminologies are intended to be compatible with each other.

The criteria for "Higher Dependency 2" is indicative of an individual suffering from dementia. It is therefore not clear why the Schedule 2 lists an Expected Cost for newly placed-individuals meeting this criteria as "N/A". It is reasonable to assume that costs for future admissions of Older People with dementia shall be calculated on an individual basis, reflective of the care package required to meet their needs. It follows that the same process should be followed for "Existing Residents" with dementia.

The Service Specification appears to contain no specific criteria in respect of any of the other client groups whom are intended to be covered by this Framework Agreement, including Adults with Learning Disabilities and Adults with Mental Health problems.

8. Specialist Needs Of Resident Groups

Clause 8.7 states that *access to residential and nursing home care services for people with a learning disability will be as a result on an assessed need through the Adults & Children's Directorate care management process as outlined in section 6 of this service specification.* However, section 6 relates to referral arrangements and makes no mention of care management processes.

10. Mobility And Equipment

Clause 10.13 suggests that some equipment may be provided by the Integrated Community Equipment Service (ICES) and that the ICES may charge the care home (rather than the "Provider") for the loan of the equipment. This is not correct; equipment loaned by the ICES is issued to the Resident not the Provider; Residents in care homes have the same rights of access to community equipment as people living in their own home.

17. Monitoring And Evaluation

Clause 17.3 specifies that the Purchaser reserves the right to visit the Home and / or the Resident to monitor compliance against the Framework Agreement at any reasonable time without giving notice. The right to unannounced inspections should be the sole reserve of the statutory regulator. We do not consider there to be a reasonable time when an unannounced monitoring visit by the Council would be appropriate. It is right and proper for all visits to be subject to prior appointment.

Reference is made to "Personal Care Specification" which has not been properly defined.

The requirement under Clause 17.8 that the Provider should submit quarterly monitoring information represents an unnecessary administrative burden on the Provider.

Clause 17.10 specifies that the requirements 17.1 – 17.9 shall not take precedence over regulations with regard to registration and inspection functions of the Care Quality Commission. The Framework Agreement should go further than this and make it clear that the contract monitoring function of the Purchaser should in no way duplicate the statutory duties of CQC.

Schedule 3: Contract Management And Monitoring Arrangements

The proliferation of the use of non-defined terms (e.g. "Service Provider", "service user", LCC etc.) suggests that this schedule was drafted in isolation from the Framework Agreement.

This drafting of this schedule is not consistent with equal partnership working between the Purchaser and the Provider, both of whom have a responsibility to serve the Resident.

At a time when significant efficiencies are to be made, the information requirements set out in Clauses 3.8 – 3.10 are unduly excessive and do not represent Best Value.

Schedule 7: Individual Form Of Agreement

This schedule has omitted any provision to capture the signature of the Resident, Representative and / or Third Party funder. This agreement must include all relevant parties, not just the Purchaser and the Provider.

Schedule 8: Third Party Agreement

This drafting of this schedule demonstrates a lack of understanding of the Directions. Additionally, it also includes terminology that is not consistent with the main Framework Agreement (e.g. use of the term "Council" rather than "Purchaser").

Given that the default payment mechanism under the Directions is for the Council to pay the full gross price to the Provider, a Third Party agreement is most likely to involve only the Purchaser and the Third Party and not the Provider.

The drafting of Clause 3c) is misleading in stating that *the Council does not have to place the Resident in the Accommodation under the Contract because the cost charged for the Accommodation by the Provider is more than the Council would usually expect to pay for accommodation in respect of the Resident's assessed needs.* This statement is not correct and is inconsistent with the Directions. Furthermore, in all cases where the Purchaser chooses more expensive accommodation for a Resident (either in order to meet their assessed needs or in cases where there is no accommodation available at the Expected Cost) then the Purchaser is required to pay the full cost itself and should not seek third party subsidies.

The schedule incorrectly specifies that the Third Party shall make payment to the Provider – this is inconsistent with the Directions under which it is expected that Third Party payments should normally be made to the Purchaser.

Schedule 9: Medication Policy

This schedule is incomplete.

Appendix 2a: Indication of the Deficiencies in the Assumptions used in LCC's Cost Model (Nursing Care, Older People)

Lincolnshire County Council Calculations 2011/12

Nursing Care, Older People	£ Per Resident per Week	Care & Daily Living Services £	Ancillary Support Services £	Nursing Management & Other Accomm. Related Services £	Accommodation £	Total £
Cost heads						
A) STAFF, INCLUDING EMPLOYERS' ON-COSTS						
Qualified nurse staff cost per resident (excludes supernumerary managers)	109.57	109.57				109.57
Care assistant staff cost per resident (including activities)	161.58	161.58				161.58
Catering, cleaning and laundry staff cost per resident	50.98		38.24	12.74		50.98
Management / administration / reception staff cost per resident	34.39	29.00	3.44	1.95		34.39
Agency staff allowance - nurses	2.74	2.74				2.74
Agency staff allowance - care assistants	2.42	2.42				2.42
Training backfill	1.12	1.12				1.12
Total staff	362.80	306.43	41.68	14.69	-	362.80
B) REPAIRS AND MAINTENANCE						
Maintenance capital expenditure						-
Repairs and maintenance (revenue costs)	18.33			18.33		18.33
Contract maintenance of equipment	3.53	3.53				3.53
Total repairs and maintenance	21.86	3.53	-	18.33	-	21.86
C) OTHER NON-STAFF CURRENT COSTS AT HOME LEVEL						
Food	22.79		22.79			22.79
Utilities (gas, oil, electicity, water, telephone)	17.31			17.31		17.31
Handyman and gardening (on contract)	2.00			2.00		2.00
Insurance	2.35			2.35		2.35
Medical supplies (including medical equipment rental)	4.29	4.29				4.29
Domestic and cleaning supplies	7.15		3.58	3.57		7.15
Trade and clinical waste	3.53	2.00		1.53		3.53
Registration fees (including CRB checks)	2.67	2.67				2.67
Recruitment	1.46	1.46				1.46
Direct training expenses (fees, facilities, travel and materials) net of grants and subsidies	1.46	1.46				1.46
Continence products	-	-				-
Other non-staff current expenses	1.21			1.21		1.21
Total non-staff current expenses	66.22	11.88	26.37	27.97	-	66.22
D) CAPITAL COSTS (Return on Capital)						
Land & Buildings	53.70	-	-	-	53.70	53.70
Total capital costs	53.70	-	-	-	53.70	53.70
Total Cost (per Week)	504.58	321.84	68.05	60.99	53.70	504.58
Total Cost (per Day)	72.08	45.98	9.72	8.71	7.67	72.08

Corrected Lincolnshire County Council 2011/12

Nursing Care, Older People	£ Per Resident per Week	Care & Daily Living Services £	Ancillary Support Services £	Nursing Management & Other Accomm. Related Services £	Accommodation £	Total £	Notes
Cost heads							
A) STAFF, INCLUDING EMPLOYERS' ON-COSTS							
Qualified nurse staff cost per resident (excludes supernumerary managers)	144.48	144.48		-		144.48	1.8 hours not 7.8hrs; corrected on-costs for NIER; inclusion of San Care
Care assistant staff cost per resident (including activities)	164.92	164.92				164.92	Corrected on-costs for NIER; Inclusion of San Care
Catering, cleaning and laundry staff cost per resident	51.45		38.59	12.86		51.46	Corrected on-costs for NIER
Management / administration / reception staff cost per resident	34.71	30.00	3.47	1.24		34.71	Corrected on-costs for NIER
Agency staff allowance - nurses	2.74	2.74				2.74	
Agency staff allowance - care assistants	2.42	2.42				2.42	
Training backfill	1.12	1.12				1.12	
Total staff	401.84	345.68	42.06	14.10	-	401.84	
B) REPAIRS AND MAINTENANCE							
Maintenance capital expenditure	19.00			19.00		19.00	Maintenance Capex omitted from LCC Model
Repairs and maintenance (revenue costs)	18.33			18.33		18.33	
Contract maintenance of equipment	3.53	3.53				3.53	
Total repairs and maintenance	40.86	3.53	-	37.33	-	40.86	
C) OTHER NON-STAFF CURRENT COSTS AT HOME LEVEL							
Food	22.79		22.79			22.79	
Utilities (gas, oil, electicity, water, telephone)	17.31			17.31		17.31	
Handyman and gardening (on contract)	2.00			2.00		2.00	
Insurance	2.35			2.35		2.35	
Medical supplies (including medical equipment rental)	4.29	4.29				4.29	
Domestic and cleaning supplies	7.15		3.58	3.57		7.15	
Trade and clinical waste	3.53	2.00		1.53		3.53	
Registration fees (including CRB checks)	2.67	2.67				2.67	
Recruitment	1.46	1.46				1.46	
Direct training expenses (fees, facilities, travel and materials) net of grants and subsidies	1.46	1.46				1.46	
Continence products	-	-				-	
Other non-staff current expenses	3.97			3.97		3.97	Other home admin costs omitted from LCC Model
Total non-staff current expenses	68.98	11.88	26.37	30.73	-	68.98	
D) CAPITAL COSTS (Return on Capital)							
Land & Buildings	153.42	-	-	-	153.42	153.42	Based on 12% Cost of Capital @ £60k per bed @ 90% Occupancy
Total capital costs	153.42	-	-	-	153.42	153.42	
Total Cost (per Week)	665.10	361.09	68.43	82.16	153.42	665.10	
Total Cost (per Day)	95.01	51.58	9.78	11.74	21.92	95.01	

Appendix 2b: Indication of the Deficiencies in the Assumptions used in LCC's Cost Model (Residential Care, Older People)

Lincolnshire County Council Calculations 2011/12

Residential Care, Older People	£ Per Resident per Week	Care & Daily Living Services £	Ancillary Support Services £	Housing Management & Other Accomm. Related Services £	Accommodation £	Total £
Cost heads						
A) STAFF, INCLUDING EMPLOYERS' ON-COSTS						
Qualified nurse staff cost per resident (excludes supernumerary managers)						-
Care assistant staff cost per resident (including activities)	171.27	171.27				171.27
Catering, cleaning and laundry staff cost per resident	46.47		34.85	11.62		46.47
Management / administration / reception staff cost per resident	30.22	26.00	3.02	1.20		30.22
Agency staff allowance - nurses	-					-
Agency staff allowance - care assistants	2.57	2.57				2.57
Training backfill	0.97	0.97				0.97
Total staff	251.50	200.81	37.87	12.82	-	251.50
B) REPAIRS AND MAINTENANCE						
Maintenance capital expenditure	-					-
Repairs and maintenance (revenue costs)	18.33			18.33		18.33
Contract maintenance of equipment	3.17	3.17				3.17
Total repairs and maintenance	21.50	3.17	-	18.33	-	21.50
C) OTHER NON-STAFF CURRENT COSTS AT HOME LEVEL						
Food	22.49		22.49			22.49
Utilities (gas, oil, electicity, water, telephone)	18.46			18.46		18.46
Handyman and gardening (on contract)	4.07			4.07		4.07
Insurance	2.71			2.71		2.71
Medical supplies (including medical equipment rental)	1.52	1.52				1.52
Domestic and cleaning supplies	7.82		3.91	3.91		7.82
Trade and clinical waste	2.39	1.00		1.39		2.39
Registration fees (including CRB checks)	2.67	2.67				2.67
Recruitment	0.81	0.81				0.81
Direct training expenses (fees, facilities, travel and materials) net of grants and subsidies	4.07	4.07				4.07
Continence products		-				-
Other non staff current expenses	0.89			0.89		0.89
Total non-staff current expenses	67.90	10.07	26.40	31.43	-	67.90
D) CAPITAL COSTS (12% Return on Capital)						
Land & Buildings	53.70	-	-	-	53.70	53.70
Total capital costs	53.70	-	-	-	53.70	53.70
Total Cost (per Week)	394.60	214.05	64.27	62.58	53.70	394.60
Total Cost (per Day)	56.37	30.58	9.18	8.94	7.67	56.37

Corrected Lincolnshire County Council 2011/12

Residential Care, Older People	£ Per Resident per Week	Care & Daily Living Services £	Ancillary Support Services £	Housing Management & Other Accomm. Related Services £	Accommodation £	Total £	Notes
Cost heads							
A) STAFF, INCLUDING EMPLOYERS' ON-COSTS							
Qualified nurse staff cost per resident (excludes supernumerary managers)						-	
Care assistant staff cost per resident (including activities)	177.87	177.87				177.87	Corrected on-costs for NIER; Inclusion of San Care
Catering, cleaning and laundry staff cost per resident	46.90		35.18	11.72		46.90	Corrected on-costs for NIER
Management / administration / reception staff cost per resident	30.50	26.00	3.05	1.45		30.50	Corrected on-costs for NIER
Agency staff allowance - nurses	-	-				-	
Agency staff allowance - care assistants	2.67	2.67				2.67	
Training backfill	0.97	0.97				0.97	
Total staff	258.91	207.51	38.23	13.17	-	258.91	
B) REPAIRS AND MAINTENANCE							
Maintenance capital expenditure	19.00			19.00		19.00	Maintenance Capex omitted from LCC Model
Repairs and maintenance (revenue costs)	18.33			18.33		18.33	
Contract maintenance of equipment	3.53	3.53				3.53	
Total repairs and maintenance	40.86	3.53	-	37.33	-	40.86	
C) OTHER NON-STAFF CURRENT COSTS AT HOME LEVEL							
Food	22.49		22.49			22.49	
Utilities (gas, oil, electicity, water, telephone)	18.46			18.46		18.46	
Handyman and gardening (on contract)	4.07			4.07		4.07	
Insurance	2.71			2.71		2.71	
Medical supplies (including medical equipment rental)	1.52	1.52				1.52	
Domestic and cleaning supplies	7.82		3.91	3.91		7.82	
Trade and clinical waste	2.39	1.00		1.39		2.39	
Registration fees (including CRB checks)	2.67	2.67				2.67	
Recruitment	0.81	0.81				0.81	
Direct training expenses (fees, facilities, travel and materials) net of grants and subsidies	4.07	4.07				4.07	
Continence products		-				-	
Other non staff current expenses	4.43			4.43		4.43	Other home admin costs omitted from LCC Model
Total non-staff current expenses	71.44	10.07	26.40	34.97	-	71.44	
D) CAPITAL COSTS (12% Return on Capital)							
Land & Buildings	153.42	-	-	-	153.42	153.42	Based on 12% Cost of Capital @ £90k per bed @ 95% Occupancy
Total capital costs	153.42	-	-	-	153.42	153.42	
Total Cost (per Week)	524.63	221.11	64.63	85.47	153.42	524.63	
Total Cost (per Day)	74.96	31.59	9.23	12.21	21.92	74.96	

Appendix 2c: Indication of the Deficiencies in the Assumptions used in LCC's Cost Model (Dementia Res. Care, Older People)

Lincolnshire County Council Calculations 2011/12

Dementia Residential Care, Older People	£ Per Resident per Week	Care & Daily Living Services £	Ancillary Support Services £	Housing Management & Other Accomm. Related Services £	Accommodation £	Total £
Cost heads						
A) STAFF, INCLUDING EMPLOYERS' ON-COSTS						
Qualified nurse staff cost per resident (excludes supernumerary managers)		-				-
Care assistant staff cost per resident (including activities)	186.57	186.57				186.57
Catering, cleaning and laundry staff cost per resident	50.08		37.56	12.52		50.08
Management / administration / reception staff cost per resident	32.67	28.00	3.27	1.40		32.67
Agency staff allowance - nurses	-	-				-
Agency staff allowance - care assistants	2.80	2.80				2.80
Training backfill	1.02	1.02				1.02
Total staff	273.14	218.39	40.83	13.92	-	273.14
B) REPAIRS AND MAINTENANCE						
Maintenance capital expenditure	18.33			18.33		18.33
Repairs and maintenance (revenue costs)				-		-
Contract maintenance of equipment	3.28	3.28				3.28
Total repairs and maintenance	21.61	3.28	-	18.33	-	21.61
C) OTHER NON-STAFF CURRENT COSTS AT HOME LEVEL						
Food	22.57		22.57			22.57
Utilities (gas, oil, electicity, water, telephone)	18.35			18.35		18.35
Handyman and gardening (on contract)	3.33			3.33		3.33
Insurance	2.69			2.69		2.69
Medical supplies (including medical equipment rental)	2.64	2.64				2.64
Domestic and cleaning supplies	7.59		3.80	3.79		7.59
Trade and clinical waste	2.78	1.00		1.78		2.78
Registration fees (including CRB checks)	2.67	2.67				2.67
Recruitment	1.10	1.10				1.10
Direct training expenses (fees, facilities, travel and materials) net of grants and subsidies	2.71	2.71				2.71
Continence products	-	-				-
Other non-staff current expenses	1.15	1.15		1.15		2.30
Total non-staff current expenses	67.58	11.27	26.37	31.09	-	68.73
D) CAPITAL COSTS (12% Return on Capital)						
Land & Buildings	53.70	-	-	-	53.70	53.70
Total capital costs	53.70	-	-	-	53.70	53.70
Total Cost (per Week)	416.03	232.94	67.20	63.34	53.70	417.18
Total Cost (per Day)	59.43	33.28	9.60	9.05	7.67	59.60

Corrected Lincolnshire County Council 2011/12

Dementia Residential Care, Older People	£ Per Resident per Week	Care & Daily Living Services £	Ancillary Support Services £	Housing Management & Other Accomm. Related Services £	Accommodation £	Total £	Notes
Cost heads							
A) STAFF, INCLUDING EMPLOYERS' ON-COSTS							
Qualified nurse staff cost per resident (excludes supernumerary managers)		-				-	
Care assistant staff cost per resident (including activities)	192.86	192.86				192.86	Corrected on-costs for NMW; inclusion of Sun Care
Catering, cleaning and laundry staff cost per resident	50.54		37.91	12.63		50.54	Corrected on-costs for NMW
Management / administration / reception staff cost per resident	32.97	28.00	3.30	1.67		32.97	Corrected on-costs for NMW
Agency staff allowance - nurses	-	-				-	
Agency staff allowance - care assistants	2.89	2.89				2.89	
Training backfill	1.02	1.02				1.02	
Total staff	280.28	224.77	41.21	14.30	-	280.28	
B) REPAIRS AND MAINTENANCE							
Maintenance capital expenditure	19.00			19.00		19.00	Maintenance Capex omitted from LCC Model
Repairs and maintenance (revenue costs)	18.33			18.33		18.33	
Contract maintenance of equipment	3.53	3.53				3.53	
Total repairs and maintenance	40.86	3.53	-	37.33	-	40.86	
C) OTHER NON-STAFF CURRENT COSTS AT HOME LEVEL							
Food	22.49		22.49			22.49	
Utilities (gas, oil, electicity, water, telephone)	18.46			18.46		18.46	
Handyman and gardening (on contract)	4.07			4.07		4.07	
Insurance	2.71			2.71		2.71	
Medical supplies (including medical equipment rental)	1.52	1.52				1.52	
Domestic and cleaning supplies	7.82		3.91	3.91		7.82	
Trade and clinical waste	2.39	1.00		1.39		2.39	
Registration fees (including CRB checks)	2.67	2.67				2.67	
Recruitment	0.81	0.81				0.81	
Direct training expenses (fees, facilities, travel and materials) net of grants and subsidies	4.07	4.07				4.07	
Continence products		-				-	
Other non-staff current expenses	4.61	-		4.61		4.61	Other home admin costs omitted from LCC Model
Total non-staff current expenses	71.62	10.07	26.40	35.16	-	71.62	
D) CAPITAL COSTS (12% Return on Capital)							
Land & Buildings	153.42	-	-	-	153.42	153.42	Based on 12% Cost of Capital @ £60k per bed @ 90% Occupancy
Total capital costs	153.42	-	-	-	153.42	153.42	
Total Cost (per Week)	546.18	238.37	67.61	86.78	153.42	546.18	
Total Cost (per Day)	78.03	34.05	9.66	12.40	21.92	78.03	

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Glen Garrod
Assistant Director
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Orchard House
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13th April 2012

By post and email: asc contractingteam@lincolnshire.gov.uk

Dear Mr Garrod

RE: FEES PAID FOR RESIDENTIAL AND NURSING CARE TO INDEPENDENT PROVIDERS.

Thank you for your letter dated 26th March 2012 the contents which have been noted.

We understand that correspondence has been sent to care providers in Lincolnshire (letter dated 22nd March 2012 penned by Glen Garrod) to provide feedback on the fee proposals and fee review model outlined by the Council.

As we have placed you on notice that the Fairer Fee Forum (FFF) has interest in this jurisdiction, we would like to make you aware of the FFF's position (after assessment of feedback from members) in respect of those proposals as outlined below:

The approach taken by the Council in consulting and engaging with the sector was criticised as a large proportion of the providers felt that although consultation and engagement has been carried out (very recently) its effectiveness is questionable. Providers have also indicated that on several occasions their communications appear to have been ignored. There was a concern that communication and consultation does not feel reciprocated

Moreover, issues were raised on the number of care providers responding to the Council's review as many providers felt that when the Laing & Buisson report was being prepared a larger percentage of providers (more than the 27% quoted in your publication) presented the data for that process.

Providers felt that when the Laing & Buisson was being commissioned, the Council should have commissioned Laing & Buisson to carry out a true cost for care exercise. A valuable opportunity might have been missed to obtain a complete and accurate reflection from Laing and Buisson. Moreover, it had

even been indicated that Laing & Buisson had been instructed to carry out a "true cost of care exercise " but it materialised that this was not the case. They had simply been commissioned to carry out an assessment of the care market and not the "true cost of care". Please provide further clarification on this aspect.

We would also require clarification on the reasons why the Council felt that Laing & Buisson were not adequately experienced or possessed the appropriate skill set to produce occupancy rates and rate of return on investment. It appears that the model is populated by adopting the Laing & Buisson toolkit but the Council have deemed it fit for itself to calculate the occupancy rates and the rate of return on investment.

The consultation exercise needs to encompass a wider spectrum of service users. The thoughts and concerns of residents and their families are essential for the Council to determine the true impact of any fluctuation in fees. Therefore, should the fees be reduced, any shortfall in fees would have to be made up by third party top ups.

A further bone of contention with providers revolved around the fact that existing contracts were being terminated without consultation and negotiation for a replacing contract. We would require further clarification on this process.

As the current contract is being negotiated, it may be prudent to agree a financial model to annually determine the true cost of care. This model should be incorporated in the contract to ensure that the fees issue can be resolved more efficiently in the future. While this model is being produced the current contract should roll over.

We would like to comment on other aspects of the Council's model which have been highlighted below:-

- Proposed nursing fees do not reflect the true cost of nursing care
- Repairs and maintenance are in their experience at least double the figures that Council have used.
- No account has been taken of back office costs and however efficient an organisation is, people still have to be managed and paid.
- Rate of return has been calculated at 6%, which is much lower than what the industry would expect. Laing & Buisson in their 2010 model have stated that the return on investment is 12%.
- The Council have assessed that the fee values a care home at £42,000 per bed. This is much lower than what it costs to build a new home, which is closer to £60,000 per bed. This value was based on care homes on the market in Lincolnshire but no regard has been given to the quality and compliance of the homes.
- A concern that the amount of data collected from questionnaires was sufficient to make an analysis of the market.
- High Dependency clients previously classified as either HD1 or HD2 were merged.

- Quality payments – equal to 4% of fees – were removed this year, an effective 4% reduction in fees.
- Why the Council have not used any figures from running their own care homes in the exercise
- Staff costs are inevitably a huge part of overheads and with the national minimum wage rising by 1.8% later in 2012, as well as particular pressures on food and fuel and all of these financial data needs to be taken into consideration.

In specific response on the question of a preferred option, providers would require a better understanding of the following points:

- What is the Council's working definition of "high dependency"
- Can the Council confirm that people diagnosed with dementia will be in this group?
- How do the Council expect "essential standards" to be met?

The Equality Impact Assessment report should take into consideration other client groups being cared for by the providers as they will also be directly affected by the fluctuation in fees and the withdrawal of the contract.

Providers have indicated given the current economic uncertainty and the Council's notional 1.5% inflation figure they would prefer a one year agreement coupled with the production of an accepted financial model.

Strikingly, Councillor Graham Marsh stated:

"Adult social care needs to save a huge £39 million over the next four years..........Our over-65s population is expected to double by 2033..."

Taking the above into consideration and in view of the fact that the Council has indicated that they are reducing residential care home placements by 44% over the next two years, our members require reassurance that the Council does not intend to detriment the sector as a result of this approach.

In conclusion, providers require a better understanding of the financial calculations and data undertaken by the Council in their approach to a funding model. More importantly, it is imperative that the Council take into consideration this letter and those of providers in this "consultation exercise" to determine the "true cost of care" to members in Lincolnshire.

We are currently gathering further evidence and will raise any other concerns accordingly

Should you require any further information, please do not hesitate to contact our office.

Yours sincerely

ASTON BROOKE SOLICITORS

Residential Care Funding Consultation
OSJCT Responses – 13 April 2012

The responses to the LCC Residential Care Funding consultation are laid out below.

1. 2011/12 Self funded fee rates charged in our Lincolnshire homes are significantly higher than LCC fee rates, ranging from £504 for basic residential to £743 for high dependency nursing. Therefore self funded residents are subsidising LCC residents.

2. LCC fee rates (paid and proposed) are significantly lower than those paid by other local authorities with whom we have similar contracts, particularly those for nursing, high dependency residential and residents with dementia, all of which see rates in excess of £700 per week

3. Fee rates take no account of the actual dependency of residents (as per 2 above) and in particular no account is taken of Dementia.

4. The fees paid by LCC mean that the 16 homes we operate in Lincolnshire made a net profit in 2010/11 of 3% (excluding central costs), compared with 7% in other counties. When central costs are taken into account, the 16 homes in Lincolnshire made a collective loss in 2010/11.

5. The fees proposed by LCC appear contrived and for both proposed options are very close to the fees currently paid. It seems that the analysis was put together to support the proposed fees rather than the other way around. In particular:
    a. The fee calculations are based on information from differing sources including LCC Survey Data, Laing & Buisson Survey data and 2008 JRF Toolkit data.
    b. The source of each piece of cost information appears to have been "selected" based upon that which best supports the LCC proposed fee

6. The rate of return deemed acceptable by LCC is 6%. At a very base level, this is lower than the 6.95% interest rate at which our organisation is able to borrow money to fund new developments.

7. The assertion that the level of risk involved in providing care is low due to LCC contracting 57% of beds seems incorrect. This takes no account of the fact that LCC placements are on spot rather than block contracts therefore the income stream is by no means guaranteed, the inherent risk involved in managing any business, or of the fact that almost half of our income comes from self funded residents, where a larger risk is inherent.

8. The costs included in the LCC proposal do not account for a large level of cost which we actually incur. In particular:
    a. Hourly rates appear low across all job roles
    b. There appears to be no recognition of rates paid to senior carers or Heads of Care
    c. Activities co-ordinators are not included in the LCC analysis
    d. The costs for repairs & maintenance/handymen appears very low
    e. There is no recognition of central costs to cover the functions carried out centrally, including but not limited to Operations Management, Finance, IT, HR, Marketing and Property Management

9. LCC calculations assume a valuation per room of £42,000. Our experience of the cost of constructing a new home which meets all current regulations is that this is in excess of £80,000 per room.

10. Whilst it is critical to ensure our business is financially sound, as a charity our main aim is to provide high quality care to all of our residents. However the level of fees proposed by LCC

means that staffing levels and investment in our homes have to be very carefully managed in order to maintain the financial viability of each home.

Using the same methodology as in Steve Houchin's calculations and taking into account the information above, the costs per resident per week of providing care calculated for OSJCT (v LCC) are Residential £525 (£395), Nursing £596 (£396) and HD £567 (416). Also attached is a table summarising these costs, both before and after the Unit Cost of Capital is included.

Mark Perrin
Trust Financial Controller
The Orders of St John Care Trust

HALCYON

A team that really cares

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17th April 2012

Steve Houchin
Assistant Head of Finance
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Dear Mr Houchin

Residential & Nursing Fees Consultation

Further to your letter of 22nd March and the consultation events with regard to the above, having considered the proposals further, below are our concerns.

- Consultation: whilst appreciating there have been more consultation meetings than before between the Council and Providers our overall view is that these have not been productive in respect of the information gained and there have been times when documentation to be discussed at the meeting has not been forwarded to the Provider by the date notified which has not enabled adequate preparation for the meeting. Also the duration of the meetings, particularly on one occasion, was less than anticipated, lasting only 30mins. This has cost by way of management time when the information could have been provided electronically for comment. There have been changes in personnel at the Council dealing with the contract and fees which has not aided the consultation process.

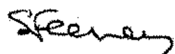
- We feel there has not been an assessment of the true cost of care. The Council have said they would use both the information obtained from the limited Laing & Buisson survey and the Council's own survey. It appears that the figures as prepared relate more to the information from the limited number of responses from the Council's survey. It would appear that there is a reliance on self-funders continuing to subsidise the Local Authority funded residents and this is a declining market. We would need a higher return on capital than indicated given the risk with lower placements and the need for homes to continue to achieve the standards required.

- Overall neither of the two Options is acceptable. In last year's agreement there was a distinction for dementia, learning difficulties and physical disabilities. Is it the Council's intention that these categories now be included within the fee for Higher Dependency? There is little difference of actual costs for providing care that meets the essential standards in surrounding areas to that of Lincolnshire and the outcome of recent court cases have all resulted in a figure nearer to £500 for residential care.

- In respect of the Council setting a usual cost for the next year or the next three years, in a business sense it would be better if an agreement could be reached for more than a year but realistic fees will have to be obtained in order to cover the ever increasing costs in other areas which have an impact on the viability of the Care Homes.

We have been established Care Home Providers for 23 years and are committed to maintaining high standards of care and recognise the need to work jointly and positively with the Council to provide services for the people of Lincolnshire. However, it is essential that to achieve this we achieve realistic financial resources. Whilst in the past we have managed to work with the fee structure from Lincolnshire County Council, which we have not always agreed with, we feel now is the time for the Council to recognise the need for realistic fees to be paid in order that Care Homes continue to operate and maintain acceptable standards.

Yours sincerely



Arif Pradhan & Karim Lalji
For and on behalf of:
Homer Lodge Care Centre
Nightingale House Care Centre
The Fountains Care Centre
Manor Care Centre