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| <b>REPORT OF:</b>        | Head of Health and Wellbeing              |
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| <b>TO</b>                | EXECUTIVE                                 |
| <b>DATE:</b>             | 14 July 2016                              |
| <b>EXECUTIVE MEMBER:</b> | Councillor Rachel Turner                  |

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|-------------------------------|-----|
| <b>KEY DECISION REQUIRED:</b> | Yes |
| <b>WARD (S) AFFECTED:</b>     | All |

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| <b>SUBJECT:</b>   | <b>AUTHORISE THE CREATION OF A LOCAL AUTHORITY WELLBEING AND INTEGRATED SUPPORT SERVICES COMPANY</b> |
| <b>RECOMMENDATIONS:</b>   |  |
| <ul style="list-style-type: none"> <li>(i) The Head of Legal Services be authorised to incorporate a Local Authority Trading Company in accordance with the arrangements described in this report.</li> <li>(ii) The Shareholder function of the Council be delegated to an Executive Sub-Committee to be known as the Health and Wellbeing Executive Sub-Committee.</li> <li>(iii) The remit and terms of reference of the Health and Wellbeing Executive Sub-Committee to be agreed as set out at Annex 1.</li> <li>(iv) The (Executive Sub Committee) be authorised to finalise the following arrangements between the Council and the Company: <ul style="list-style-type: none"> <li>a. An initial letter of comfort to allow the Directors to start to mobilise the business for its start-up phase outlining the financial risk of the Council.</li> <li>b. Shareholder Agreement between the Company and the Council including the first Business Plan;</li> <li>c. Resourcing Agreement for the Company to use Council staff and facilities in furtherance of its business (if any);</li> <li>d. Directors Service Agreements; and</li> <li>e. Loan and draw down facilities to the Company. Loan and Draw Down agreements to be subject to the financial caps set out in the exempt information at Part 2 of this Agenda</li> </ul> </li> <li>(v) That the Chief Executive be given delegated authority in consultation with the Head of Legal Services and the Head of Health and Wellbeing to finalise all necessary arrangements, to include all legal documentation, for the company to begin trading on 1 August 2016.</li> <li>(vi) To note the agreed terms of reference for the Health and Wellbeing Executive Sub</li> </ul> |  |

Committee will be updated in the Constitution by the Monitoring Officer as an administrative update.

**REASONS FOR RECOMMENDATIONS:**

Setting up of a Wellbeing and Integrated Support Service company will enable the Company to undertake an innovative range of health and social care activities in order to improve the health and wellbeing of residents not just within Reigate and Banstead but also the surrounding catchment area. This initiative will also enable the Council to meet the funding challenges set down by Central Government as set out in this report.

**EXECUTIVE SUMMARY:**

This report sets out the business case to create a Wellbeing and Integrated Support Service company in which the Council will take an 80% share-holding. The vision is innovative, with the aim of the company to significantly increase patient experience and outcomes, whilst at the same time generating significant profit which can be used to support our more vulnerable and less well supported residents.

We have delivered substantial savings in recent years. This in turn has led to a reduction in the size and expenditure of the council. The Local Government Spending Review, announced at the end of 2015, confirmed that there would be no let up from the Government. Reigate and Banstead was confirmed as one of 18 local authorities that will receive no revenue support grant by 2017/18.

We are now looking at innovative ways for the Council to develop and grow, In doing this we are looking at ways not only to reduce costs further but also to generate income for the Council and operate in keeping with a more commercial business.

Over the period of our existing Five Year Plan, we will need to find additional savings or new income totalling £3.9m.

Due to the commercial nature of the Business Plan for this new company it is included in the exempt section of the agenda and sets out the direction of travel for service delivery, associated market analysis and also includes detail of required Council investment and projected timeline for return on that investment and profit.

The Company will be managed by a small board of directors two of whom will be senior officers of the Council to allow for maximum speed of response and flexibility. The board will work within established structures for member / officer liaison. In addition, an Executive Sub-Committee will exercise the Shareholder function of the Council to hold the Directors to account for the performance of the Company.

**Executive has authority to approve the recommendations (i) – (vi) above.**

**STATUTORY POWERS**

1. A local Authority is able to establish a Local Authority Trading Company ('LATC') through the powers in section 95 of the Local Government Act 2003. A Local Authority is permitted to trade in anything that it is authorised to do under its ordinary functions.

2. Under section 1 of the Localism Act 2011 local authorities now have a general power that enables them to do anything that a private individual is entitled to do, as long as it is not expressly prohibited by other legislation. Section 4 of the same Act directs that anything which is done for a purely commercial purpose should be done through a company. As the company operates for purely commercial purposes and may operate outside borough boundaries, this is the relevant power.
3. The Company would be a controlled company as defined in the Local Government and Housing Act 1989 as it is a subsidiary company of a local authority and as such the shareholder (the Council) has ultimate control over the activities and operational matters of the Company.

## ISSUES

### Background

4. Central Government funding for Local Authorities has reduced and is expected to reduce further. To enable the Council to continue to deliver and maintain the level of services our residents currently enjoy, it is essential alternative sources of income are found. The forming of a LATC forms part of the Council's management response to the reductions in Government grant.
5. This report follows on from the direction of travel set out in the 5 Year Plan 2015-20 for the Council to be financially self-sufficient.

### Service Proposal

6. The new company, to be known as Pathway is the brainchild of the Managing Director of one of Surrey' largest Health and Social Care providers and three individuals with extensive experience of the public and private health sectors, assistive technologies and a track record of success.
7. Pathway will be a start-up company which will, in the first instance, primarily target the 55+ year old market across three products: assessments, direct support and electronic monitoring. It will be managed by the aforementioned seasoned professionals who bring in excess of 38 years' experience in the health and social care market, working within the public and independent sectors, supporting a range of patient segments, including older people..
8. The business will operate initially in and around the Surrey and Sussex Hospitals health and social care economy. Its focus will be on selling quick responses, personalised care and reassuring ongoing support to a market of individuals and families with the necessary means and capacity to choose and pay privately,
9. The variety of services offered would be able to address patients with quite complex needs and would in no way be limited to the over 65's. Importantly, the patient would be offered one point of access to all the services they require, thereby avoiding delays in needs being met by having to engage with several providers and associated waiting lists.
10. Market analysis has shown that there is a significant gap in appropriate service provision for the self-funder (private pay) market. Currently 80% of the over 65's in Reigate and Banstead do not access social care funding. That means that out

of a current total population of 22,733 across the borough, 18,186 self-fund care, equipment and home help.

11. At present they must interact with an often confusing array of un-integrated health and social care services, with no single point of access, no single provider, for the services they require. In many instances they are in competition for available resources with NHS funded patients. They often find themselves delayed and frustrated by a system that offers neither genuine choice nor distinguishes those with the means to fund their own support.
12. Pathway seeks to ensure choice and instil confidence to a clear market segment. It offers a range of propositions, up and down a simple product line targeted at people with the necessary means to invest in their own support.
13. Pathway will offer generic assessment, digital assessment, specialist assessment relating to specific needs, a support plan, digital monitoring of health and wellbeing, direct support in a person's home or a designated facility as well as concierge services that includes advice and support to navigate other services available in the health and social care sector.
14. The existing health and social care infrastructure faces some significant and ever increasing problems. The enormous burden on acute hospital provision has been well documented in the national press with "Bed Blocking" or "Delayed Transfer of Care" (DTC) the terms most frequently utilised to describe the situation.
15. Recent research has identified that over 65's account for 63% of hospital bed usage in East Surrey Hospital, with the average length of stay being 4.1 days versus 1.4 days for under 65's. In addition, 33% of over 65's are readmitted to hospital within 60 days of discharge. In a recent acute hospital study, it was identified that 48% of patients could have been cared for elsewhere.
16. The big players in the industry offer long-standing residential care homes that, with lucrative business models dependent upon selling beds, have little incentive to change. Home based care providers are often commissioned very late to manage the most frail and unwell patients who have deteriorated at home and struggle to meet demand.
17. Pathway will seek to respond to and complement the existing market rather than compete against it. Pathway puts in one place a wide range of service provision. It will offer affordable products that help patients retain control of their own care, understand and manage an illness or long-term condition, rehabilitate and convalesce and regain patient confidence. It will also offer products and services that are attractive to Acute Hospitals to alleviate capacity pressures and potentially other health and social care businesses keen on monitoring their existing patients/residents.
18. At present East Surrey Clinical Commissioning Group is currently struggling to manage 500 older people costing £10m per year of which £6.5m is spent on 300 of them who have no medical need.
19. In primary care people struggle to make appointments at GP surgeries and GP's themselves spend a disproportionate amounts of time seeing returnee older people, mostly presenting with loneliness, deteriorations post hospital discharge

and common conditions associated with vulnerability and living alone e.g. falls, dehydration.

20. It is estimated that 50% of GP visits could be replaced by a phone call if Pathway in-home digital monitoring were installed (or even prescribed) and could also reduce A&E visits by around 30%.

### **Investment Proposal**

21. It is proposed that Reigate and Banstead Borough Council takes 80% of the final share-holding of this company and makes a one off equity investment which would be utilised to get the company up and running. However, this investment would be recouped from profits in the first 24 months, so in reality this initial investment would achieve 80% ownership of the company for free.
22. 4% of the shares will be initially allocated to the management team of Pathway the remaining 16% of shares would be released to the Management of the Company upon completion of key milestones overseen by the Board of Directors.
23. This proposed model would safeguard RBBC's interests, recognises its investment and commit our new partners to the company tying in their conceptual and professional knowledge in the long term, in return for their minority share-holding. RBBC will further protect its interests through the use of Restrictive Covenants within Directors Service contracts and employment contracts.

### **Considerations**

#### **Company Structure and Governance**

24. The purpose of the Company is to concentrate on developing a bespoke health and social care offer to better support self-funding residents and patients both inside the Borough and beyond which will provide a valuable income stream to the Council. Its focus will be on responding more quickly and effectively to market opportunities and working with key health and social care partners in order to facilitate growth of the company and maximise income opportunities.
25. As a company with the majority shareholding owned by the Council it is imperative that an appropriate governance structure is put in place to ensure the sound and robust management of the company alongside protection of the Council's financial and reputational investment in the company.

#### **Shareholder Function**

26. The Council as majority shareholder has ultimate control over the Company. It controls the company in a variety of ways; the appointment of directors, provision of funding and the Articles of Association but operational matters can also be included in a Shareholder's Agreement as described below.
27. It is proposed that the Shareholder function of the Council is primarily executed through a dedicated Sub-Committee of the Executive comprising members appointed by the Leader (expected to be the Leader, Deputy Leader, and Executive Members for Finance and Health). The Shareholder will (through a Shareholder Agreement) set out the performance levels required for the company and the tolerances (e.g. financial and decision making) within which the Company may operate.

28. The Council as Shareholder can change the make-up of the Board of Directors and can change the Company Secretary in the same way.
29. The Articles of Association can make provision for the Shareholder to appoint Directors by serving notice in writing to the Company and to appoint any other person to be a Director in place of a Director who leaves office by whatever means. This can take immediate effect on service to the Company Secretary.
30. The company will be a 'controlled company' as defined by the Local Authority Government and Housing Act 1989 and as a result will be subject to the Local Authorities (Companies) Order 1995. The order sets out regulations that are specific to controlled companies and start from the basis that the public should be aware that the company they are dealing with is controlled by the local authority. The Council must provide information about the affairs of the Company to any Member of the local authority as they shall reasonably require for the proper discharge of the Member's responsibilities, they must also provide information required by the Council's auditors.

### **Board of Directors**

31. The Board of Directors will be responsible for delivery of the expected outcomes within the Business Plan. They will have oversight of the performance, financial and operational management of the Company within the parameters agreed with the Shareholder.
32. It is proposed that the Board would comprise three senior officers; the Chief Executive and the Head of Health and Wellbeing will be Directors. A third Director would be appointed from Pathway Management. This Director will be the Managing Director of the Company. All Board decisions will be taken on a consensus or majority decision basis. The Monitoring Officer would act as Company Secretary but would not be a Director. In addition, once operational it may be that the Shareholder may wish to appoint additional independent non-executive directors to add further commercial experience to the board - this will be covered by the Shareholder Agreement.
33. The typical areas for the Directors to consider and approve include:
  - a. Day to day operations of the Company.
  - b. Appointment of service providers – and other professionals as deemed appropriate.
  - c. Reporting – reporting arrangements to the Executive Sub-Committee and Overview and Scrutiny Committee.
34. At the discretion of the Chief Executive, in consultation with the Head of Human Resources, it is proposed that a proportion of the future salary of the Head of Health and Wellbeing could be paid via the company depending on the performance of the Director and the Company. The Chief Executive would not be remunerated as a Director of the company
35. Whilst some of the Council's Senior Officers may be part of the board, this is with a clear understanding of the separation of functions between all officers on the Board of Directors and officers providing advice to the Shareholder on behalf of the Council. At the present it is not envisaged that conflicts will emerge but this

will be kept under review and arrangements modified to accommodate any change in circumstances.

36. The statutory duties for directors of a company are set out in sections 171 – 177 of the Companies Act 2006. The statutory duties are in summary:
  - a. The duty to act within powers
  - b. The duty to promote the success of the company
  - c. The duty to exercise independent judgement
  - d. The duty to exercise reasonable skill and care
  - e. The duty to avoid conflicts of interest
  - f. The duty not to accept benefits from third parties
  - g. The duty to declare an interest in a proposed transaction or arrangement with the company
37. Directors will also be subject to other duties set out elsewhere in law, including a large number of very important legal obligations. In particular, there are very important responsibilities on directors in the event that an insolvency situation seems likely. There are serious consequences for directors (including personal liability) in situations which fall within the statutory definitions of wrongful trading or fraudulent trading.
38. Consideration has been given to ensuring that key expertise, (such as financial and legal advice) are available to advise both the Council as shareholder and the company. From time to time it may be necessary to buy in specialist corporate, property, marketing, legal and financial advice on a normal commercial basis to supplement the experience on the Board. .

#### **Documentation required establishing the company**

39. The following documentation is required to complete the establishment of the LATC and associated governance arrangements.
  - a. Articles of Association – the Company constitution setting out the rules governing the running of the company
  - b. Shareholder Agreement – this will be a key document as it will capture how the Council Shareholder will exercise its control over the Company and the expectations for performance delivery.
  - c. Loan Agreements – these set out the details of the funding arrangements between the Council and the Company.
  - d. Director Appointments – the terms upon which council officers who will be appointed as directors to the Company will need to be agreed.
  - e. Appointment of Company Secretary and an Auditor.
  - f. Business Plan – the business plan will be developed to cover a rolling 3-year period of investment activity (to coincide with the Council's five year plan) and will outline the Company's planned operations. The Business Plan will be reviewed and agreed annually and will cover the following:

- i. Company objectives (as established in the Shareholder Agreement) but these are expected to develop over time.
- ii. Governance arrangements - sufficiency of the arrangements and any planned changes to the Board.
- iii. Operational plans
- iv. Financial model and assumptions
- v. Distribution Policy – is all trading profit to be returned to the shareholder or is any retained for future investment and/or running capital.
- vi. Fees, on-costs and tax
- vii. Funding profile and sensitivity analysis

### **Articles of Association**

40. The Articles of Association are to be finally agreed by the Executive Sub-Committee but are anticipated to comprise the following:
- The articles are for a company limited by shares
  - There will be one majority shareholder that being Reigate and Banstead Borough Council (80%) Pathway Management will own the remaining shares.
  - The liability of the Council is limited to the nominal value of its share
  - If a Director ceases to be employed by the Council then he will ordinarily cease to be a Director of the Company and a replacement sought
  - Quorum for a meeting of the Directors and to be able to vote on the decisions of the Company.
  - Some decisions can only be taken at a general meeting by the Council as Shareholder. E.g. to allocate extra shares, to reappoint the directors, to declare a dividend, to change the articles of association, etc.
  - Requirements to sign documents on behalf of the Company
  - The Company is obliged to comply with all the requirements that form part of it being a wholly owned subsidiary of a Local Authority.
  - The Company needs to make arrangements to have the accounts audited.

### **Objects**

41. Since 2009 most companies do not have objects clauses relying on the fact that the objects of the Company are generally unrestricted. The Company can then reflect the wide powers granted to the Council under the Localism Act 2011 to use a company to do anything commercially that individuals may generally do.

### **Shareholder Agreement**

42. A Shareholder Agreement would operate in addition to the Articles of Association. The Shareholder Agreement will regulate the actions of the Company and give rights to the Council that would not be appropriate to be included in the Articles. It represents a finer level of detail and control.
- Approving and / or removing auditors
  - Any matter that the Council shall advise the Company of in writing



### **Tax liability**

43. The Company will be liable to corporation tax in the normal manner on profits, and will need to charge VAT.

### **Staffing Implications**

44. It is proposed the Chief Executive and Head of Health and Wellbeing will be appointed as Directors whilst retained in the employ of RBBC. Other officers as required maybe appointed as Non-Executive Directors. Any re-numeration for such roles would be paid for by the company and delegated to the Chief Executive to determine in the normal way. The Chief Executive would not be remunerated as a Director of the company.

### **State Aid**

45. EU regulations ensure that the Company cannot be subsidised by the Council. This means the Council must recover the costs of any accommodation, goods, services, employees or any other support it supplies to the Company. State Aid will also include loans to the Company and the rate of interest that loans to the Company will need to be charged.

### **Company Loan Facilities**

46. As set out above the Company will seek a loan from the Council that complies with State Aid requirements. This single loan will include draw down provision in order to meet the needs of the business plan.
47. The loan will be sourced from the Council's Corporate Plan Delivery Fund.
48. The financial objectives of the Company are to achieve a significant income return, which will be used to support Council services and residents in other areas.

### **Legal Implications**

49. Section 1 of the Localism Act 2011 provides local authorities with the power to do anything an individual may do, subject to a number of limitations. This is referred to as the 'general power of competence'. A local authority may exercise the general power of competence for its own purpose, for a commercial purpose and/or for the benefit of others i.e. this includes the setting up of a Wellbeing and Integrated Support Service company as described in this report. In exercising this power, a local authority is still subject to its general duties (such as the fiduciary duties it owes to its rate and local tax payers) and to the public law requirements to exercise the general power of competence for a proper purpose.

### **Powers to fund the Company**

50. The Council has the power to borrow under the Local Government Act 2003 for the purposes of the prudent management of their financial affairs, or in connection with any of their functions. The borrowing must be prudent and comply with the Prudential Code.

### **Procurement**

51. The Council is purchasing an 80% share of the company for a commercial purpose. This will be funded by CPDF and longer term potentially by other public money and private funding. It is intended that the company will have a

commercial character so as not to count as “a body governed by public law” for the purposes of the Public Contract Regulations. This means that the requirements of the Regulations would not apply to the company. This position will be kept under review.

## Risks

52. Members will be concerned to ensure that all risks of operating in a new way have been thoroughly considered. The Council is setting up this business in such a way as to ensure that the viability of it under the business plan can be tested quickly and within six months. If the model does not look viable after that time, then further investment can be reviewed and if necessary curtailed.
53. The proposal in this report contains a number of checks and balances to ensure that the company operates within agreed parameters and can assure members that there is no greater financial risk to the Council than outlined:
  - a. The Articles of Association will set out the powers available to Directors.
  - b. The Shareholder Agreement will set out further controls around the development of the business.
  - c. The Executive Sub-Committee will hold the directors accountable for delivery of the business plan. This is no different to the current arrangement whereby officers are held to account by members.
  - d. There will be ongoing liaison (as exists at present) between officers and councillors to ensure there are clear channels of communication and that councillors remain comfortable at all times with performance of the company.
  - e. The Executive Sub-Committee can be scrutinised by the Overview and Scrutiny Committee in the same way as any other Executive function.
  - f. The company will have its own auditors and will be subject to the requirements of company law and filing at Companies House.

## Other considerations

54. The decisions recommended are not considered to have an impact under the Equality Act (Equality Impact Assessment).
55. The decisions recommended are likely to give rise to an impact under the Data Protection Act (Privacy Impact Assessment). It will be for the Company to register with the Information Commissioner and comply with regulatory requirements about the use of personal data.
56. The Management team of Pathways has indicated that it is likely to seek Care Quality Commission accreditation for its services. This should provide an additional layer of oversight and assurance for the Council that the service is being delivered in the most professional way.

## OPTIONS

57. Option 1 – Proceed with establishing the company taking a final 80% share of the Wellbeing and Integrated Support Services Company. This is the recommended option

58. Option 2 – Not to proceed with buying any shareholding in this company. This is not the recommended option.

### **FINANCIAL IMPLICATIONS**

59. Financial information is set out in the Financial Assessment document set out in the exempt information at Part 2 of this Agenda.
60. The recommended option complies with the Council's financial priority to optimise its finances as set out in our Medium Term Financial Plan and 5 Year Plan 2015-20.

### **CONSULTATION**

61. The Leader, Deputy Leader and Executive Members for Health, Finance, Property and Regeneration and Leisure and Wellbeing have been consulted on the proposals.
62. The Monitoring Officer and Chief Finance Officer have been consulted on the contents of this report.

Background Papers: None

## Executive (Wellbeing) Sub Committee

### Background

The Council has established an Executive (Wellbeing) Sub-Committee which is a Sub-Committee of Executive established specifically to discharge the functions of the Council as regards its corporate shareholding in the Health and Social Care Company known as Pathway. The Sub-Committee will meet once a year to receive an annual report and annual accounts from the Company, but otherwise meetings will be called on an “as and when required” basis to deal with company business.

### Membership

To be determined by the Leader of the Council from time to time. Only members of the Executive may sit and vote on the Committee. A minimum number of three Executive Members will be needed to undertake the shareholder function. Substitutes may be permitted at the discretion of the Leader.

### Purpose

To exercise the function of the Council as a shareholder in relation to the Council’s Health and Social Care company.

### Remit

To undertake all functions of the Council as majority shareholder under the Company Act 2006 in relation to the Council’s Health and Social Care company, which may include without limitation:

- To determine the Shareholder Agreement between the Council, other shareholders and the company including the Business Plan
- To appoint and dismiss directors of the company (where power is reserved to the majority shareholder)
- To agree any Directors Service Agreements (if required)
- Appointment and removal of a Company Secretary and Auditor
- To agree any Resourcing Agreement between the Council and company for the use of Council staff and facilities and reimbursement for the same
- To agree any loan agreements or draw-down of Council financing (subject to funds being made available by Council)
- To agree any reserved matters required by the Articles of Association or Shareholder Agreement
- To agree the Articles of Association or any amendment thereof