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**REPORT TO:** CORPORATE AUDIT COMMITTEE

**BRIEFING DATE:** 23 AUGUST 2012

**SUBJECT:** PROPOSED CHANGES TO SOMER/CURO

**LEAD OFFICER:** GRAHAM SABOURN, AD (HOUSING)

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## 1 INTRODUCTION

In 1999 the Council undertook a large scale voluntary stock transfer (LSVT) transferring 9,827 council dwellings and 208 council staff to a new social enterprise, Somer Community Housing Trust (Somer). The impetus for stock transfer included securing private finance to improve and maintain the housing stock, escape public expenditure constraint, obtain a net capital receipt to re-invest in affordable housing and other services, improve the outcome for tenants and to create more diversity and choice in the social housing sector. Whilst there are now in excess of 30 social housing landlords operating within our district Somer are still the largest controlling around 80% of the district's social housing.

Since transfer Somer has restructured into Somer Housing Group (SHG), grown in size, geographical coverage and complexity. SHG now own more than 12,000 homes and operates across 8 local authority areas in the West of England.

The transfer has largely been a success with Somer meeting their 10 year transfer investment and improvement targets. Unlike many housing providers they met the Government's Decent Homes target. They have also been successful in securing HCA<sup>1</sup> funding for the 2011-2015 period. However, they have recently had some setbacks. Firstly, a problematic short notice inspection by the Audit Commission in 2010 which concluded that SCHAT had more weaknesses than strengths across the services inspected. Secondly a critical Tenant Services Authority (TSA)<sup>2</sup> Regulatory Judgement which concluded that governance required further action. The judgement, dated August 2010, stated that...

*Failings in governance emerged following disagreements at board level about the future strategic direction and structure of the group, including indications of non-compliance with certain aspects of the group's chosen code of governance. In response to TSA concerns, the group has...made a voluntary undertaking to address these governance failings. We consider the terms of the undertaking to be satisfactory and are now monitoring the group's progress against the commitments it has made to ensure that they are delivered in full, and within an acceptable timescale.*

The voluntary undertaking referred in the TSA statement above included: an overhaul in leadership: appointing three independent board members that would form the majority membership of a governance review panel to oversee improvements in governance arrangements; commissioning an external governance review; and finally adopting the recommendations of the review.

In March 2012, and following the appointment of a new executive team, they completed the final part of the voluntary undertaking and published a new strategic

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<sup>1</sup> Government funding agency for affordable housing

<sup>2</sup> Social Housing regulator at time, as of 1<sup>st</sup> April 2012 a function within the HCA

plan which sets out a vision for the future. The strategic plan is comprehensive and includes six priorities:

- a renowned customer service culture;
- great properties & places;
- ethical care & support services;
- happy, safe, popular neighbourhoods;
- help for people needing work;
- lobbying for positive social change.

These priorities include a number of significant changes including: becoming an Industrial & Provident Society; reducing the total Board membership from 48 to 13; amending the Council's nomination process to Board; amending Council voting rights; group restructure including asset transfer; and changing the name/brand to Curo ( July 2012). Some of these changes diverge from the original stock transfer agreement with the Council, require a change in Articles or relate to the transfer of chargeable properties and so potentially require the Council's formal consent or at least permissive compliance. Curo/SHG state that the reasons for these changes are:

- to harmonise and improve the Group's landlord service offer;
- to reduce complexity, costs and duplication;
- to improve the Group's financial structure; and
- to simplify the regulatory burden.

In February 2012, just before SHG published their Strategic Plan, the TSA issued a Revised Regulatory Judgement which revised upwards their judgement stating that that governance was now satisfactory. The judgement refers to the Strategic Plan, confirms that they have adopted the National Housing Federation's Excellence in Governance Code and concludes with...

*It [SHG] has recently agreed a new corporate strategy and introduced a real focus on key strategic risks. This now leaves the group well placed to deliver its objectives within a more challenging operating environment.*

## **2 CHANGES POTENTIALLY REQUIRING COUNCIL CONSENT**

### **2.1 GROUP RESTRUCTURING & CHANGE IN LEGAL ENTITY**

Curo/SHG are proposing to restructure to ensure that the three asset owning housing associations (SCHAT, Redland, Shape) are rolled into a single housing association (Curo Places) which would hold all property assets. This will be supplemented by Curo Choice, a care & support (essentially Shape minus the stock assets) and Curo Enterprises a subsidiary of Curo Places. This subsidiary would leverage the core skills of Curo to provide financial surpluses to support the charitable aims of Curo Places, for example, small to medium scale private sector development, holiday letting etc. Curo Places and Curo Choice would report to Curo Group, the parent organisation.

As neither Curo Group nor Curo Choice (formerly SHG and Shape respectively) would be asset owning they would not register with the HCA. This would reduce their

regulatory burden, though would mean that neither of these could bid for HCA funding, which would be the preserve of Curo Places.

In addition Curo/Somer are proposing to change from using a Company limited by guarantee form of legal entity to using an Industrial and Provident Society (IPS) model. The IPS model would be used for Curo Group, Curo Places & Curo Choice. Curo Enterprises would be a “for profit” company. The Financial Services Authority<sup>3</sup> defines an IPS as “an organisation conducting an industry, business or trade, either as a co-operative or for the benefit of the community”. Social landlords operate for the benefit of the community hence can secure IPS status through that part. Curo Places and Curo Choice would also register with the HCA and the Care Quality Commission respectively who would take on the regulatory function. These would be charitable organisations. Curo Group whilst being an IPS would not be a charity.

There are many potential options for social enterprises including: community interest companies; companies limited by guarantee; IPS; group structures with charitable status etc. A discussion of the relative merits of these different legal arrangements is outside of the scope of this report. However, legal advice provided by Bevan Britton, confirms that the IPS route is the most common legal status used by social landlords and is required to enable the proposed group structure.

The logic of transferring all property assets into a single housing association is sound. It allows the subsidiaries to concentrate on their core-competences, Curo Choice on provision of support services & Curo Places on property management; reduces administrative burden and the debt gearing of Curo Places. The choice of legal entity will have taken account of a number of factors, not least the aim of minimising tax liabilities.

On a final point the restructuring would require the consent of lenders. The author understands that these discussions have not been concluded and as such there is still the potential that the above proposal could be subject to further amendment.

## 2.2 CHANGES COUNCILLOR/TENANT BOARD “REPRESENTATIVES”

The Council currently has the right to nominate one Councillor “representative” onto the Board. In return Curo/Somer has the right to interview the nominee and either appoint or seek an alternative. Curo/Somer state that the new governing document for the IPS does not allow for the appointment of Board members as formal *representatives* of other organisations or groups. This is due to the legal fact that once becoming a board member the representative has the same fiduciary duty as all other members. As such they are not able to influence on behalf of any external party, cannot divulge sensitive information and most importantly must act in the best interest of Curo/Somer rather than the Council. The Council’s solicitor has confirmed that this is legally correct and so is not disputed.

Following discussions with Curo/Somer a compromise has been suggested whereby they seek to ensure that the Board is made up of at least 2 tenants and a Councillor. This will be achieved by closed advertisement. Hence when the “Council” vacancy arises this will be circulated to Councillors whom can then apply if they so wish. As is the current practice they will then be interviewed and, provided suitable, appointed.

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<sup>3</sup> Senior regulator for Industrial & Provident Societies

The interview would be by existing members of the Board and relates to the broader skills and experience a Ward Councillor can bring to the Board. The key point being that the Council member is not a representative of the Council but a Board member who is a Councillor. In the unlikely event that no Councillor applied, or none were appointed, the post would be advertised openly.

In reality this is a relatively minor change that merely reinforces the reality that Board members are not, and cannot legally be “representatives” of other bodies. It would be prudent to clarify how this would operate in practice, including the situation when the member loses their seat during their term as a Board member.

### **2.3 CLASS VOTING RIGHTS**

At present the Council has class rights giving the Council a 33.3% share of the votes that can be cast when a special resolution is put to the membership of the Board, albeit with the legal caveat detailed below in section 3. Curo/Somer would like to remove these class voting rights and replace with a “one shareholder one vote” arrangement.

This is the logical extension of the acknowledgement that representatives are not effectively permissible on the Board. The Council could not agree with item 2.2 without agreeing to this aspect.

### **2.4 ASSET TRANSFER**

As part of this restructuring the Council has been asked to agree the transfer from Shape to SCHAT of: 1) Shape’s property which is chargeable to the Council (18, 20, 22 & 24 Wells Road, Bath) and 2) the long leases on 64-76 Dartmouth Avenue and 162 Bloomfield Road, Bath. The Wells Road properties were transferred from Council ownership to Bath Self Help Housing Association in 1988, the forerunner of Shape, when the direct provision of temporary accommodation was effectively outsourced. At the time of transfer the Council placed a charge on the property and therefore Curo now need our explicit consent for the transfer.

The legal charge ensures that the Council has nomination rights to the property through the use of a nominations agreement. However, since agreeing this over 20 years ago the method of nominations to the Wells Road properties has significantly changed and the Council encourages a number of access routes through a system called the Gateway Process. The Supporting People team, commissioners of this scheme, are therefore currently considering whether a nominations agreement is still required or indeed helpful. In addition it should be noted that the corporate finance team has confirmed that there are no outstanding loans by Council on this property.

## **3 LEGAL ADVICE**

Legal advice on the proposals has been sought from David Isaacson of Beven Brittan, an experienced social housing lawyer who has dealt with a number of LSVT agreements. His advice is that Curo/Somer would need to pass a special resolution to move to an IPS. This would require 75% of the membership to vote in favour. As the Council holds 33.3% of the vote it could theoretically veto the resolution.

However the transfer agreement also contains a contractual provision which prevents Curo/Somer changing the Articles of Association without obtaining the Council's written consent. This provision goes on to say that such consent cannot be withheld or delayed by the Council in relation to all reasonable advice issued by the Housing Corporation concerning the governance of all or classes of Registered Social Landlords. His advice on this matter concludes with the statement ...

*...although strictly speaking the Council has the right to veto SCHAT's proposal to convert into an Industrial & Provident Society, I would suggest that regard must be had to the reasonable advice issued by the Housing Corporation's successor in determining whether or not to approve the group structure.*

On the basis that the TSA, the Housing Corporation's successor, was instrumental in initiating the governance changes and has praised the governance changes undertaken so far including revising their Regulatory Judgement in February it is clear that the Council would not have support of the TSA (now part of HCA) to veto these changes.

David Isaacson has also reviewed the transfer agreement to identify if there are any other issues which should be dealt with during the continuing negotiations with Curo/Somer about the proposed changes. His summary stated that...

*The Agreement does not contain any material unusual or onerous provisions which should be dealt with as part of the on-going negotiations with SCHAT about the proposed group structure.*

This satisfies the position that to agree to the governance changes does not mitigate or remove the obligations within the stock transfer agreement upon Curo/SCHAT; these will continue to apply for the remaining term.

#### **4 OTHER CHANGES**

Curo/Somer has stated that they would like to increase the strategic partnership with the Council. They are proposing that we review the current "Strategic Partnership Meeting" to achieve these aims including reviewing the groups Terms of Reference suggesting that membership is restricted to senior members of each political members of each party and Executive team members from the Council and Curo/Somer.

This is sensible and appropriate and will allow the Council to maintain positive relations at a senior level and exert influence at an appropriate level. That said the Council does need to be mindful that Curo/SHG are only one of over 30 social housing providers within the district, albeit they are by far the largest. As such the Council should continue to develop the wider social housing liaison panel and the Housing Delivery Panel to ensure we fully engage with all partners.

#### **5 CONCLUSIONS**

The proposals, as agreed following negotiations, are relatively modest and in reality simply reflect the reality that Curo/Somer is an independent organisation with their own independent regulator, now the HCA. The changes to governance were

instigated by the former TSA and approved by them following the Revised Regulatory Judgement (February 2012). Given the explicit support of the regulator we would be unlikely to succeed in vetoing the changes even if minded to do so.

It is also worth reminding ourselves that we need Curo/Somer to be a successful and viable organisation to ensure that current residents receive an excellent service offer and that they are in a position to secure HCA funding. It is also important that we work with Curo/Somer and other social housing providers in a positive and constructive manner to ensure that where possible funding continues to be invested within our district to contribute to meeting our housing need.

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