

BROMSGROVE DISTRICT COUNCIL

CABINET

5th November 2008

REDEVELOPMENT OF THE MARKET HALL

Responsible Portfolio Holder	Councillor Del Booth
Responsible Head of Service	Phil Street
Non-Key Decision	

1. SUMMARY

- 1.1 This report provides an update on the situation regarding the market hall and seeks members approval in relation to proposals for redevelopment of the site within the wider town centre regeneration project.

2. RECOMMENDATION

- 2.1 The Cabinet note the current position in relation to the market hall site and that members recommend to Council that:
- 2.1.1 The market hall site be marketed in accordance with the Official Journal of the European Union (OJEU) procurement process under a long lease and that specific conditions are placed on the marketing and development of the site in accordance with the issues and options consultation, spatial report results and wider commercial advice.
- 2.1.2 Members delegate the necessary powers to the Executive Director (Partnerships and Projects) together with the Head of Legal, Equalities and Democratic Services and the Head of Financial Services to undertake the marketing in accordance with 2.1.1
- 2.1.3 Members set a date for closure of the market hall and task officers with developing a programme that will maximise the letting potential of this site during the intervening period, either with the existing tenants and or with a third party lessee under a short term letting arrangement and that an interim report be presented to the Council to review this option in the event that no interim letting arrangements have been achievable.

3. BACKGROUND

- 3.1 Members are aware that as part of the wider Town Centre redevelopment project officers have been pursuing the options available to the Council in relation to the redevelopment of the Market Hall site.

- 3.2 Members will recall that in 2005 a development brief was commissioned in relation to the Market Hall site and that the result of this revealed development opportunities in relation to this site.
- 3.3 Members will further recall that the results of this development brief were used alongside intelligence gathered as a result of work undertaken by CBRE, on behalf of the Council, in 2007 to inform the issues and options consultation exercise carried out earlier this year. The issues and options consultation period has now concluded and the results are currently being analysed.
- 3.4 Running alongside this process members will be aware that officers have been engaging in ongoing discussions with developers and retailers and that more particularly a single retailer expressed an interest in the potential of the site.
- 3.5 Officers have been exploring the extent to which the market hall development could be utilised as a single site in an attempt to increase the development opportunities available in relation to the wider Town Centre redevelopment project.
- 3.6 Members have been advised by officers in relation to the development options available to it in relation to the Market Hall site in an officer's report dated January 2008.
- 3.7 Members are aware that each of the development opportunities detailed in the previous report were governed by different commercial and legal implications.
- 3.8 Members are advised that due to the unforeseen nature and scale of the current economic climate all discussions in relation to the approach pursued described in paragraph 3.4 above have drawn to a close and the property redevelopment market has generally slowed down to the point where the potential to resurrect any such discussions is now remote.
- 3.9 Given that the nature of these discussions would only ever have been able to lead the Council in the direction of a disposal or land deal that would render the Council in a position where it was unable to have much, if any, control over the development of the site. This report asks members to consider whether in the current financial climate that a contract for the disposal of a land interest either by sale or lease is the most appropriate course of action.
- 3.10 If members were to consider a more controlled environment for redevelopment whereby the exact requirements of the Council could be specified and form part of the conditional requirements for development, then members would be more able to safeguard against some of the risks that arise from the sale or lease of land.

- 3.11 It is necessary for members to consider the benefit of developing the market hall site as a single project or whether in the current economic climate it may be more appropriate to seek a single developer to redevelop the town centre generally with the market hall site included as a prime retail location.
- 3.12 Members are advised that officers have sought independent commercial and legal advice in relation to the development opportunities that would be most appropriate in the economic climate and it is clear from this that it would be more appropriate for the Council to explore the potential of a public works contract for the redevelopment of the market hall as an independent site. It is proposed that in the context of the wider regeneration of the town centre control should be exercised over the nature of the trading activity associated with the site. If the Council were to include the site as part of a wider portfolio of sites it would be more difficult for the levels of control to be retained over the market hall in isolation.
- 3.13 Members are advised that the commercial advice received in relation to the town centre redevelopment together with the wider town centre partnership that includes the interests of other public sector organisations in the town centre locality has advised in favour of a single site redevelopment in relation to the market hall in advance of a wider redevelopment of the town centre as a whole. This will enable the Council to ensure that the redevelopment stages occur in accordance with the needs and requirements identified in the issues and options consultation process and the wider commercial evidence already obtained in relation to all of the town centre sites, together with the needs and requirements already identified within the Town Centre Partnership.
- 3.14 Entering into a public works contract with a third party developer through the European Union Official Journal (OJEU) procurement process will enable the Council to retain the control that it deems to be appropriate in order to ensure that the regeneration is both in line with the needs and requirements identified during the Area Action Plan issues and options consultation process and also to deliver a sustainable future and a vibrant market town.
- 3.15 Members are asked to consider an option seeking offers in relation to a public works contract for the redevelopment of the site in accordance with the commercial intelligence already obtained and the results of the issues and options analysis consultation which will inform the most appropriate redevelopment potential for the site in the context of the wider town centre redevelopment project. The particular nature and content of the proposed OJEU procurement process will be re-presented to Members in a report to be introduced in early 2009 once the commercial advice has been considered and the appropriate invitation to tender documentation has been drafted.
- 3.16 Members are aware that the Council is governed by and subject to the European Union public procurement rules (as implemented in the UK by the Public Contracts Regulations 2006) when seeking offers in relation to a

public works contract and that if members are minded to proceed in this manner that the Council will be governed by this process.

3.17 In determining the most appropriate development opportunities members need to consider the existing market hall and the purpose for which it is currently being used.

3.18 Members are aware that for some years the market hall building has housed a number of stalls on weekly licenses and that it is proposed that the future market provision will be in the form of a street market along the High Street.

3.19 Members are aware that the OJEU procurement process may take some time to achieve and that it is not advisable to close the market hall until this process reaches its conclusion. The reasons for this include the need to ensure that the building is safe and secure and does not become a target for vandalism and the need for the Council to support the traders who currently occupy stalls within these premises during the period of readjustment into the High Street.

3.20 Members also need to consider the need to ensure that activity within the town centre is maximised during the development stages and it may be more beneficial for the current traders to continue to occupy their stalls or a short term leasing arrangement is sought with a third party during the transitional period.

3.21 Much of the uncertainty amongst traders surrounding the market hall site will be removed with a decision to pursue an OJEU procurement process. However, some uncertainty will continue for the traders currently occupying the market hall. This will emanate from their lack of clarity regarding how much longer they can go on trading in the market hall. This affects their decisions about such things as acquiring stock and whether to remain in Bromsgrove market hall. It seems reasonable to set either a date for closure or a date to review closure.

3.23 If a date for closure is set the possibility remains that the market hall will be left empty and will have to be boarded up. There will not be any non-domestic rates advantage to the Council by this action, the insurance costs are likely to increase and security will become a major consideration. However, the indoor market will be closed and the out door market will be initiated and this will signal to residents and high street traders that another stage in the regeneration of the town centre is underway.

3.24 Furthermore, market hall traders will be in a position to make plans; new stalls will be acquired; any discussions with the County Council regarding the movement of the market into the High Street can be undertaken; promotional materials can be produced and other traders may be recruited.

3.25 To avoid the disadvantages associated with an empty building efforts will be made to identify some one to take a short term lease for the market hall so that the building is occupied while the OJEU process is taking its course.

4. FINANCIAL IMPLICATIONS

- 4.1 The costs of carrying out the work associated with the OJEU procurement process is within the town centre regeneration budget.
- 4.2 The costs associated with the closure of the market hall and associated with the transfer of the market on to the high street are detailed in appendix 1.

5. LEGAL IMPLICATIONS

- 5.1 A summary of the legal implications regarding OJEU are contained in appendix 2.

6. COUNCIL OBJECTIVES

- 6.1 A thriving market town centre is one of the Council's priorities. It is recognised that the market hall will be one of the major strands in the town centre's regeneration and the nature of the redevelopment will significantly influence the tone of the town centre's redevelopment.

7. RISK MANAGEMENT

7.1 The main risks associated in this report are:

- Legal action
It is possible that failure to conform to OJEU procurement procedures (ie. appointing a developer or works contractor without advertising and conducting an appropriate award competition) may lead to challenge. However, entering into a short term lease (ie. pure land deal) while the process of procurement is pursued is within the Local Government Act 1972.
- Affect reputation
There is the possibility that the Council's reputation may be adversely affected by the closure of the market hall and in particular if the market hall was to remain empty and boarded up for a prolonged period of time.
- Vandalism
An empty market hall building could become the target of vandalism and would require both additional insurance and security.

7.2 These risks are being managed as follows:

- Legal action
This risk would be reduced very significantly by conformance to OJEU procurement procedures and ensuring appropriate commercial advice is obtained on valuation.
- Affect reputation
This would be mitigated by securing an occupant with a short term lease on the market hall and by communicating to residents that the market hall redevelopment was subject to OJEU tendering procedure. The transfer of the indoor market on to the street would also indicate another stage in town centre regeneration.
- Vandalism
The potential for damage by vandals would be significantly reduced if the building was being occupied and used by a short term leasee. An empty building creates management issues that an occupied building would avoid.

7.3 These risks will be added to the Planning and Environment risk register.

8. CUSTOMER IMPLICATIONS

8.1 The regeneration of the town centre remains a major priority for the residents of Bromsgrove as revealed through both its customer survey and its budget jury.

9. EQUALITIES AND DIVERSITY IMPLICATIONS

9.1 The redevelopment of the market hall will need to take account of access requirements. Furthermore, the movement of the market on to the High

Street will need to consider mobility issues in relation to location and positioning of the market stalls.

10. VALUE FOR MONEY IMPLICATIONS

10.1 It is crucial that the Council can demonstrate best value in relation to redevelopment of the market hall. The Council has instructed specialist commercial advice which will undertake a development appraisal based on a retail scheme consisting of a foodstore and additional retail units. The aim of the appraisal is to understand the potential development value of the site. In addition, as a benchmark, we would also undertake an appraisal of the current use value of the site i.e. Market Hall and car park site, in order to compare the potential value that can be generated from redevelopment of the site for a retail use. As part of this appraisal exercise, we will also set out the potential options that the Council could pursue in respect of achieving a financial return from the scheme i.e. comparing freehold versus leasehold and capital versus revenue. We also set out some of the safeguards we would expect to find in any legal document to protect the Council's financial position going forward in the current market.

10.2 The advice will also detail the potential marketing options which are available to the Council in order to maximise the sale price whilst achieving its regeneration aims and developing the retail offer for Bromsgrove town centre. This will include looking at the site in isolation and also as part of a wider area for consideration and also the pros and cons of the various routes that the Council could potentially pursue.

11. OTHER IMPLICATIONS

Procurement Issues – The report is centred on the pursuit of OJEU procurement. Specialist advice will be obtained in order to ensure that the Council conforms to OJEU regulations regarding procurement.
Personnel Implications – The market hall supervisor and other staff need to remain informed regarding planned developments at the market hall and the move towards an out door market.
Governance/Performance Management – None
Community Safety including Section 17 of Crime and Disorder Act 1998 Closure of the market hall may result in higher incidents of vandalism if the building remains empty for a prolonged period.
Policy – This forms part of the town centre regeneration policy.
Environmental - None

12. OTHERS CONSULTED ON THE REPORT

Portfolio Holder	Yes
Chief Executive	Yes
Executive Director - Partnerships and Projects	Yes
Executive Director - Services	Yes
Assistant Chief Executive	Yes
Head of Service	Yes
Head of Financial Services	Yes
Head of Legal, Equalities & Democratic Services	Yes
Head of Organisational Development & HR	No
Corporate Procurement Team	Yes

13. WARDS AFFECTED

St John's Ward is principally affected, but indirectly it affects all wards

14. APPENDICES

Appendix 1 Short term options for market hall
Appendix 2 Information on OJEU procurement

15. BACKGROUND PAPERS

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Appendix 1

The report examines options for the immediate future of the Market Hall site.

RECOMMENDATION

That the present market should continue to operate, but that a date should be set for closure giving the market hall traders sufficient notice to make arrangements for closure or transfer. In addition every effort should be made to identify an organisation to occupy the market hall on a short term lease. A review date should be set for closure not less than two month before the proposed closure date to finalise closure arrangements or to defer closure if a short term lease has not been negotiated.

BACKGROUND

In 2003 a major town centre consultation was undertaken which recommended that the Market Hall site should be redeveloped to accommodate a leading, up-market food retailer (not a supermarket) as the first step in town centre regeneration. At that time the Economic Development Manger was in preliminary discussions with Marks & Spencer who were very interested in developing the site as a M&S Food Store. However these discussions were suspended by the decision to carry out an Area Action Plan embracing the whole town. In 2007 the EDM was asked to reopen discussions with M&S and a further meeting took place. However, despite numerous attempts to contact the company, they have not responded.

Meetings also took place with other retailers, but these did not result in any progress. Report circulating in the press created an impression that closure of the Market Hall was imminent and consequentially traders began to leave and those remaining became demoralised. In addition to that, the current recession is affecting all businesses and markets are no exception

The forecast for Market Hall revenues in 08/09 has therefore had to be sharply reduced from £110,000 to £75,000. This is based on a projection of first quarter receipts. It is also feared that more traders plan to leave after Christmas although this cannot be confirmed and we still actually receive enquiries from potential new traders.

FUTURE SHORT TERM OPTIONS

1. The Economic Development Manager has investigated various short term options for the future of the Market Hall. These include :-
2. A short let of market hall to an auctioneer, discount household goods retailer or other retailer and transfer market on to high street.
3. Close the building without an occupant for market hall and transfer the market to the High Street.

4. Continue the Market in the Market Hall, but aim to improve it.

Option 1 – A short let to an auctioneer, discount household goods retailer or other retailer

Until recently, there was a household goods retailer called The Grove Electrical Discount Store operating on a short lease from Clarks site in the Birmingham Road (the former Rover dealership). This operation took up a large area approaching the internal size of the Market Hall. Apparently this retailer was unable to agree terms with the landlord for continuing the business on that site and has ceased trading in Bromsgrove. If a trader such as this could be found then the main central area of the Market Hall could be let to them. The areas to approach might include sales of remaindered or bankrupt stock, leather and pine goods. The EDM is currently seeking the owners of The Grove to put an offer to them. The terms of this would fall within the usual terms for letting Market Hall facilities and therefore no special lease would be required. The attraction of this option is that it would give a boost to the Market (and market revenues) which is now looking very tired.

Option 2 - Close the building without an occupant and transfer the market to the High Street

Previous reports have already recommended that the market be transferred to the High Street, where numerous successful footfall-building events take place, but not before the redevelopment of the Market Hall has been secured.

The problems with closing the building are as follows :-

- Even on the reduced revenue forecast (est £75,000), the market hall revenue will be greater than the street market during its first year of operation (est £50,000) although profitability should build up in the second year. The differential is estimated at £25,000.
- There would be little saving in terms of employment costs since an outdoor market is no less labour intensive: setting up starts at 6.30am and dismantling is after 5pm in the evening, requiring shift patterns and overtime rates. Therefore staffing is required 3 days per week for 12-13 hours per day which is similar to existing staffing levels.
- Even if not in use, the building will still generate costs – insurance, maintenance, recharges, depreciation, security. These costs are estimated at £140,618. Present costs are £164,606.
- Boarding up the building is an ‘admission of failure’ and will further detract from the town centre. It would convey negative messages.
- There would be considerable anger among those traders who do not wish to relocate to the High Street and this might well attract public sympathy. The public will support the redevelopment of the site for *something visibly better*, but just to board it up and thereby destroy several livelihoods would not be accepted. Furthermore, the sight of another prominent empty building would inspire negative press articles.

Option 3 – Continue with the Market Hall operation for the present with agreed improvements

The EDM has been reluctant to spend much on promoting the Market Hall due to the uncertainty of its future and the drop in revenues. However, there is some evidence that advertising in local newspapers does get noticed by customers. If continuation were the preferred (or temporary) option, we would instigate an advertising programme conditional on 50/50 contribution from the traders. It would also be conditional on traders adhering to opening times and not leaving early. Traders unwilling to participate in this programme or the opening times would gradually be replaced.

The promotional programme would cost BDC approx £5,000 and could be covered within the Economic Development budget.

Appendix 2

WHEN IS A LAND DEAL NOT A LAND DEAL – OJEU APPLICATION?

EU procurement rules were not drafted with UK land law or public sector joint venture development arrangements in mind. At their simplest, the EU procurement rules are designed simply to ensure that access to public sector markets for works, supplies and services would be open to all economic operators on a pan-European basis on a non-discriminatory and transparent level. However, the rules specifically exclude application to the pure buying and selling of land. In a typical UK public private partnership (PPP) it can become difficult to separate at what point a public authority is transferring land, and at what point is it commissioning works to order.

The relevant question to ask in these situations is whether the project in question amounts to the public authority seeking offers in relation to a public works contract, or is it simply a contract for the disposal of a land interest.

Turning to the text of the rules, a public works contract is a contract in writing for consideration (in cash or in kind): (a) for the carrying out of a work or works on behalf of a contracting authority; or (b) under which a contracting authority engages a person to procure by any means the carrying out for the contracting authority of a work corresponding to particular specified requirements. The important element here is “work corresponding to specified requirements”.

This was recently clarified in a landmark judgement of the European Court of Justice (ECJ) in *Jean Auroux and others v Commune de Roanne*. This case involved a third party developer (SEDL) building a leisure complex including a cinema and commercial premises (to be sold on to a third party) and a car park to be transferred back to the local council together with various other outputs such as access roads and public spaces. The ECJ was asked to determine whether the agreement did in fact constitute a public works contract. The ECJ made it clear that the work involved the leisure complex as a whole including the car park. As the main purpose was to carry out works corresponding to specified requirements, it was a works contract that needed to be advertised and tendered under the OJEU rules. The construction of the leisure centre was to be regarded as corresponding to the requirements of the municipality because taken as a whole the project was intended to reposition and regenerate the local area. This was seen as a warning to local authorities everywhere that if a contract results in the provision of works to order (in excess of the threshold of approximately £3.5m), then, even if other aims are pursued through the project as well, it nevertheless has to be advertised in OJEU notwithstanding.

The above ruling brings certain conflicts with UK land law, especially when dealing with compulsory purchases. The OJEU rules require public authorities to advertise and tender development projects which effectively prevent them from negotiating “off market” with, for example, a developer that owns vital land in precisely the area the authority wishes the development to occur. The OJEU

rules allow public authorities an exemption from the usual requirement to advertise and tender a project if for reasons of technical, artistic or exclusive rights, they can only negotiate with one person (thereby rendering an advertising process futile). It has never been tested whether this would apply to a land development project, for example because a particular landowner held the land deemed necessary for the project to proceed. The immediate counter arguments that would normally be raised are that some other land would suit perfectly well also, and that by failing to go to the market the public authority concerned was closing its mind to other possibilities, that it could never fully appreciate in advance. If this scenario should ever come to the attention of the English courts it will be interesting to see what happens. As this deals with EU law, which normally requires that exemptions from usual rules be subject to strict interpretation, one might reasonably expect that this exemption would only be available in highly specific factual situations, and in any event such a point of EU law would be likely to be referred to the ECJ.

There has been a degree of debate following this as to whether additional planning obligations under UK law flowing from s.106 or s.278 (highways) agreements might also be covered by procurement obligations. While such obligations may in some instances be regarded in the same light as pure planning conditions (for example as terms limiting use or specifying mitigation to be carried out by the developer) in some cases they may go much further and stipulate the carrying out of works (eg. highways or schools) that might otherwise be carried out by the authority. In such a case it is possible that the OJEU rules could be seen to apply to those issues. The Roanne case and a predecessor touching on some similar issues (La Scala), have made it clear that it is the intentions behind the OJEU Directives that matter, and national law (such as planning) will not be allowed to deprive the OJEU rules of their intended effect. Similarly, this has yet to be tested in English courts but presumably will be one day.

In conclusion then, experience suggests that public authorities proceeding in this area now find themselves under a somewhat greater spotlight than was previously the case, and there is likely to be a greater number of projects proceeding via the OJEU route as a result of Roanne than was previously the case. This is essentially because the risk profile of proceeding with such projects without using OJEU has grown post Roanne. It is important to be clear that Roanne has not changed the law per se, it has merely clarified it and given it a lot of public attention, which means that potential challengers and their advisers are now better informed than previously as the possibilities of challenging situations like that which arose in Roanne. However, the rules remain clear that a strict land deal in the sense of the buying, selling or leasing of land is not the procurement of a works, services or supply contract for pecuniary interest and is therefore not a matter for public procurement (OJEU) law.

As a result of the above, in case of doubt as to whether a particular development represents a public works contract as opposed to a land deal, the safe option is always (if possible) to follow an OJEU procurement route, because then the matter is covered either way, and in any event an open competitive process

ought, by definition, secure the best possible solution and value for money in any event.

Cobbetts LLP, August 2008