

# **BROMSGROVE DISTRICT COUNCIL**

## **CABINET**

**7 APRIL 2010**

### **ARTRIX - INCORPORATION OF OPERATING TRUST**

Responsible Portfolio Holder	Councillor Mike Webb
Responsible Head of Service	John Godwin
Non-Key Decision	

#### **1. SUMMARY**

- 1.1 This report informs Members about the proposal of the Bromsgrove Arts Centre Trust (the Operating Trust) to become a charitable company limited by guarantee. The Incorporation of the Operating Trust will require some consequential amendments to the lease and the various agreements relating to the Artrix and Members' approval to this is sought.

#### **2. RECOMMENDATION**

- 2.1 That Members note the proposed incorporation of the Operating Trust;
- 2.2 That Members note the proposed Licence to Assign to be entered into between the Holding Trust, the Operating Trust and the new company;
- 2.3 That Members authorise the Head of Legal, Equalities & Democratic Services to finalise and sign the Deed of Variation in respect of the lease on behalf of the Council;
- 2.3 That Members authorise the Head of Legal, Equalities & Democratic Services to finalise and sign the Deed of Novation of the Overarching Agreement and the Deed of Novation of the Dual User Agreement;
- 2.4 that the Deputy Head of Streetscene & Community (and from 20 April 2010 the Head of Leisure & Cultural Services) be authorised to revise the Service Level Agreement to reflect the transfer from the Operating Trust to the new company.

#### **3. BACKGROUND**

- 3.1 In 2003 the Council entered into an Agreement ("the Overarching Agreement") with the Trustees of New College, the Trustees of the newly-formed Operating Trust and the Trustees of the newly-formed Bromsgrove Arts Development Trust ("the Holding Trust"). In essence, the Overarching Agreement provides that:
- the Council would be responsible for the construction of the Artrix;

- the freehold of the land would be owned by the Holding Trust (with the Council to hold the land as nominee for the Holding Trust);
- the Holding Trust would lease the land to the Operating Trust by way of the Lease;
- the Holding Trust, the Operating Trust and the College would enter into a Dual User Agreement which determined how the facilities at the Artrix would be used to further the objects of the Operating Trust and the aims of the College for the benefit of the local community.

3.2 The Operating Trust was constituted to have 15 trustees, 5 to be appointed by the Council, 5 by the College and 5 co-opted trustees from the community. To date the Operating Trust has been an unincorporated association acting by its trustees which until recently was the only viable legal vehicle by which it could operate. Following recent changes to charity legislation, the Operating Trust has decided to take advantage of a new option of operating by way of a company limited by guarantee. This will enable the Operating Trust to organise its business in a more efficient manner and, importantly, will remove the personal liability which currently sits with the 15 trustees.

3.3 The new company has been formed under the name of Bromsgrove Arts Centre Trust under company number 05455644 and charity number 1124900 and the Council understands that the Operating Trust intends to transfer its the assets and business to the new company as soon as possible. Officers have given careful consideration to the Memorandum and Articles of the new company, which will have 15 directors, 5 appointed by the Council, 5 by the College and 5 co-opted trustees, and have negotiated at length to ensure that the Council's representation cannot be eroded and to ensure that the Council's interests are preserved.

3.4 Once the transfer takes place the current Operating Trust will be dissolved. Before the transfer to the new company takes place, the trustees of the Operating Trust are personally responsible for any liabilities incurred by the Artrix (ie the Operating Trust) up to the date of transfer (except in respect of the lease – see below). After the date of the transfer, it will be the company which will be responsible for any liabilities incurred by the Artrix (ie the new company).

3.5 In order to effectively substitute the new company for the Operating Trust as lessee and as a party to the various current contractual arrangements it is necessary for the Council to enter into a number of agreements with the parties and authority is sought from Cabinet to authorise the Head of Legal & Democratic services to do so on behalf of the Council. The consent of the Holding Trust will also be required; a meeting of the Holding Trust has been convened and its outcome will be reported at the Cabinet meeting.

#### **Variation and Assignment of the Lease**

3.6 The parties to the Lease are the Council (as nominee for the Holding Trust), the Operating Trust (as lessee) and the Holding Trust (as lessor). It is

proposed that the new company takes the place of the Operating Trust as lessee; there are a number of mechanisms by which this can be done, but it is now proposed that it should be by way of assignment of the Lease from the Operating Trust to the new company, as this has no Stamp Duty Land Tax or VAT implications for the Council or the Holding Trust. The Lease does not prohibit assignment but it does provide that the Lease can be forfeited if the Operating Trust is dissolved. Therefore the Lease needs to be varied by way of a Deed of Variation to enable the Lease to be assigned to the new company and for the Operating Trust then to be dissolved without the right of forfeiture arising. The Council will be a party to the Deed of Variation as it was a party to the original lease. Officers and solicitors representing the Artrix have spent some considerable time negotiating and by the date of this meeting it is anticipated that a draft Deed of Variation will have been agreed, subject to the approval of Cabinet and the Holding Trust. Approval is sought from Cabinet to authorise the Head of Legal, Equalities & Democratic Services to finalise and sign this document.

- 3.7 A Licence to Assign the Lease needs to be entered into between the Holding Trust, the Operating Trust and the new company. The effect of this will be to absolve the trustees of the Operating Trust from any subsisting non-compliance with the requirements of the lease but instead the new company will become liable not only for any breaches of the Lease subsisting at the date of transfer but also for compliance with the obligations of the Lease after the date of transfer. The Council is not a party to this document.

#### **Overarching Agreement and Dual User Agreement**

- 3.8 The parties to the Overarching Agreement were the Council, the College, the Operating Trust and the Holding Trust. In order that the new company can effectively take the place of the Operating Trust, the parties will need to enter into a Deed of Novation. The effect of this will be that the position of the Council and the College remains unaffected, but any liabilities arising from the date of transfer will attach to the new company. Officers do not think that there are any significant rights or liabilities which continue under this agreement and this Deed is required more for the sake of completeness. Approval is sought from Cabinet to authorise the Head of Legal, Equalities & Democratic Services to finalise and sign the Deed of Variation.
- 3.9 The parties to the Dual User Agreement were the Operating Trust, the Holding Trust and the College. Again it is proposed that a Deed of Novation should be signed effectively to substitute the new company for the current Operating Trust. A draft Deed of Novation has been agreed subject to the approval of Cabinet and the Holding Trust. Approval is sought from Cabinet to authorise the Head of Legal, Equalities & Democratic Services to finalise and sign this document.

#### **Service Level Agreement**

- 3.10 Assuming the transfer proceeds, the Service Level Agreement will need to reflect that the business of the Operating Trust has been transferred to the new company. For the sake of clarity, authority is sought from Cabinet to enable officers to effect the appropriate revisions required to the documentation.

#### **Council Appointments**

- 3.11 The Council has not formally appointed directors to the new company. The Council appointees to the Operating Trust have been treated as the Council appointments to the new company for the time being; Council will be requested to make formal appointments in the new municipal year.

#### **4. FINANCIAL IMPLICATIONS**

- 4.1 There are no financial implications for the Council. Those members who sit as trustees will no longer be personally liable for the debts of the Operating Trust.

#### **5. LEGAL IMPLICATIONS**

- 5.1 The legal implications are set out in the report.

#### **6. COUNCIL OBJECTIVES**

- 6.1 CO3 – Sense of Community and Well-Being, Priority – Community Events

#### **7. RISK MANAGEMENT INCLUDING HEALTH & SAFETY CONSIDERATIONS**

There are no risks associated with this report.

#### **8. CUSTOMER IMPLICATIONS**

- 8.1 The recommendations will only impact upon the Operating Trust and its trustees.

#### **9. EQUALITIES AND DIVERSITY IMPLICATIONS**

- 9.1 None

#### **10. VALUE FOR MONEY IMPLICATIONS**

- 10.1 None

#### **11. CLIMATE CHANGE AND CARBON IMPLICATIONS**

- 11.1 None

#### **12. OTHER IMPLICATIONS**

Procurement Issues	None
Personnel	None
Governance/Performance Management	None
Community Safety including Section 17 of Crime and Disorder Act 1998	None
Policy	None
Biodiversity	None

**13. OTHERS CONSULTED ON THE REPORT**

Portfolio Holder	Yes
Chief Executive	No
Executive Director - Partnerships and Projects	
Executive Director - Services	
Assistant Chief Executive	
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	No

**14. WARDS AFFECTED**

All wards

**15. APPENDICES**

None

**16. BACKGROUND PAPERS**

None

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