

BROMSGROVE DISTRICT COUNCIL

CABINET

8th September 2010

ARTRIX - RIGHT OF WAY

Relevant Portfolio Holder	Councillor G. N. Denaro
Relevant Head of Service	Claire Felton – Head of Legal, Equalities and Democratic Services
Non-Key Decision	

1. SUMMARY OF PROPOSALS

- 1.1 West Mercia Police and Hereford and Worcester Fire and Rescue Service have approached the Bromsgrove Arts Development Trust for the purposes of this report (known as the Holding Trust) in relation to a proposal for a new purpose built Police and Fire Station to be constructed on land currently owned by New College at Slideslow Drive.
- 1.2 The proposal relates to the construction of an additional access route that would require emergency service vehicles to have passage over land currently forming part of the car park for the Artrix as shown on the drawing attached at appendix 1 to this report. The land in question falls under the control of the Bromsgrove Arts Development Holding Trust with the title ownership registered at the Land Registry in the name of Bromsgrove District Council (who act as the bare trustees). The land is subject to a lease between Bromsgrove District Council (as bare Trustee), the Holding Trust (as Lessor) and the Bromsgrove Arts Centre Trust (referred to as the Operating Trust) (as Lessee) granted in 2003.
- 1.3 As Bare Trustee Cabinet members are being asked to consider the request by the Holding Trust to grant a right of way by way of a legal easement to the Police and Fire and Rescue Service.

2. RECOMMENDATIONS

- 2.1 Cabinet members are being asked to consider and determine, in their capacity as Bare Trustees, whether or not it is appropriate to agree to the request from Bromsgrove Arts Development Trust (known as the Holding Trust) to grant a right of way (by Deed of Easement) to West Mercia Constabulary and Hereford and Worcester Fire and Rescue in perpetuity subject to the following conditions;
 1. That a formal letter of confirmation is received from the Operating Trust confirming that they have no objection to the proposed access;

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2. That the access is restricted to the extent that vehicles will only be able to obtain egress onto School Drive and that the easement will ensure a complete prohibition of the use of the Artrix Car Park as a form of access to the site (the Car Park is demarcated in blue on the drawing attached at appendix 1 to this report);
3. That the easement will be subject to a condition that all appropriate drainage provisions required by the works, or in order to facilitate the works or resulting from the works are enabled across the Artrix Car Park to the satisfaction of the Council and that the cost of this work is met by the Police and Fire and rescue service;
4. That the Police and Fire and Rescue Service agree to maintain and repair the access way over the Artrix Car Park to the satisfaction of the Council;
5. That the Police and Fire and Rescue Service agree to the production and display of appropriate signage restricting the use of the access way in accordance with the above and that they ensure that appropriate mechanisms are in place to ensure that the restrictions are adhered to and that a suitable mechanism is introduced to ensure that all vehicular traffic can only egress from the Artrix car park and there is a complete prohibition of any access from School Drive;
6. That the Police and Fire and Rescue Service agree to engage Civil/Structural engineers to detail the design and specification of the access route in consultation with the Holding Trust to ensure that the route is constructed in a way that will mitigate any vibration that may be caused by the use of fire engines;
7. That the Police and Fire and Rescue Service agree to enter into and complete a separate legal agreement between the West Mercia Police and Hereford and Worcester Fire and Rescue Service (jointly) and with the Holding Trust to ensure the upgrade to the pedestrian access in School Drive as proposed and outlined in section 4.12 of this report) takes place to the reasonable satisfaction of the Holding Trust. This agreement for the avoidance of doubt may also include other matters that cannot be legally covered within a Deed of Easement due to its limit as a right over property;
8. The West Mercia Police and Hereford and Worcester Fire and Rescue Service jointly agree to undertake to pay all the costs reasonably incurred in connection with the preparation, negotiation and completion of all legal documentation.

2.2 If the Cabinet is minded to agree to the above;

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1. That authority is delegated to the Head of Legal, Equalities and Democratic Services in consultation with the Portfolio Holder and the Executive Director of Resources to:-
 - (a) Agree the terms of the easement to the Police and Fire and Rescue Services and that this should incorporate the conditional elements detailed above; and
 - (b) Approve and implement any associated legal documents relating to the establishment of the easement and variation of the lease between BDC, the holding trust and the operating trust.

3. BACKGROUND

- 3.1 In 2003 the Arts Development Trust (known as the Artrix Holding Trust) was created to hold the freehold of the land on which the Artrix sits.
- 3.2 The land was registered in the name of Bromsgrove District Council as Bare Trustee for the Holding Trust
- 3.3 A lease was entered into between Bromsgrove District Council as bare trustee, The Holding Trust (as lessor) and the Bromsgrove Arts Centre Trust (known as the Operating Trust) (as lessee) in 2003 at a peppercorn rent
- 3.4 The Police and Fire and Rescue Service have approached both the Operating Trust and Holding Trust with proposals to build a new purpose built combined police and fire station on land currently owned by New College at Slideslow Drive.

4. KEY ISSUES

- 4.1 In order for this proposal to be viable it will be necessary for an additional egress to be constructed over land that currently forms part of the Artrix car park. The proposals are shown on the drawing attached at appendix 1 to this report. The proposed egress falls within the curtilage of land owned by the Holding Trust which is leased to the Operating Trust (the access way).
- 4.2 The land in question is registered at the Land Registry in the name of Bromsgrove District Council as Bare Trustee.
- 4.3 The Police and Fire and Rescue Services have therefore asked the Holding Trust to grant them a right of way over the land forming part of the Artrix car park (the access way).
- 4.4 The access way is to be for the purpose of enabling emergency vehicles to access School Drive.
- 4.5 More specifically the access way will only exist as an exit for emergency vehicles and any right of way granted over the access way would specifically prohibit the return of vehicles. Any vehicles returning to the proposed development would therefore be required to access via the main A38 entrance to the site.

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- 4.6 The Access way over which the easement would be required would be used by emergency vehicles only and would not be used as an exit/entrance for staff, custody or non emergency traffic.
- 4.7 Granting a right of way over the access way to the Police and Fire and Rescue Service from the Holding Trust would require a variation to the terms of the lease to the Operating Trust and must therefore be subject to the agreement of the Operating Trust. It is therefore a requirement that written agreement be obtained from the Operating Trust.
- 4.8 Both the Operating Trust and the Holding Trust have been advised of the proposals and they have raised various concerns particularly in relation to noise from sirens, loading and unloading, car parking, impact on School Drive, mini roundabout and flooding. These have been discussed at various meetings of both the Holding and Operating Trusts and the Police and Fire and Rescue Services have confirmed that the access way will be of a special low vibration construction and the use of sirens will not take place on the site. Their use in residential areas is strictly limited and not allowed outside of daylight hours.
- 4.9 In addition the proposed egress is for secondary use only and the use will therefore be infrequent.
- 4.10 The School Drive exit would be an exit for emergency vehicles only and there will be no access for in-coming traffic and all vehicles will return via the main A38 entrance. It was agreed by the Police and Fire and Rescue Service that School Drive would not be used as an exit/entrance for staff, custody or non-emergency traffic. The drive would be of a special low vibration construction and the use of sirens will not take place on the site. The use of sirens in residential areas is strictly limited to avoid causing a nuisance. Members are advised that the Fire and Rescue Service have indicated that they will for the avoidance of doubt confirm the egress onto School Drive is purely for a secondary use only. Therefore the use of School Drive will be infrequent.
- 4.11 The Police and Fire and Rescue Services have delivered detailed presentations to both the Holding and Operating Trusts and have put forward mitigation measures to the concerns that have been raised and these have been accepted by the Operating and Holding Trusts subject to the conditions of this proposal set out as part of the recommendations above.
- 4.12 In addition the Police and Fire and Rescue Services have agreed to enter into a separate legal agreement to the extent that they will at their own expense ensure that the pavements in School Drive will be reinstated to adoptable standard to take pedestrians off the main carriageway to ensure the safety of visitors to the Artrix and general public safety will be improved.
- 4.13 The Cabinet is being asked to consider a request by the Holding Trust to grant a right of way (by Deed of Easement) to enable an access to School

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Drive to be afforded to the Police and Fire and Rescue Service over part of the car park of the Artrix.

- 4.14 In determining whether or not to agree to the right of way Cabinet members in their capacity as Bare Trustees must be satisfied that the Holding Trust is acting properly in accordance with the objects of the Trust which are more particularly set out in paragraph 6 below.

5. FINANCIAL IMPLICATIONS

- 5.1 There would be a financial value attached to easement. The value of this would need to be determined by an independent valuer.

6. LEGAL IMPLICATIONS

- 6.1 If the Cabinet, acting as bare trustee, is minded to approve the Police and Fire and Rescue Services proposal this will need to be subject to the grant of planning permission and Planning Committee will need to agree and authorise that. Bromsgrove District Council who is the bare trustee on behalf of the Bromsgrove Arts Development Trust (the Holding Trust) but title owners will need to confer rights over the land to the Police and Fire and Rescue Service by way of Deed of Easement. The existing Lease of the land would have to be varied to confer this additional right over the land in favour of the Police and Fire and Rescue Service. It may be that a Variation or Surrender and Re-grant of the Lease may be appropriate. Further discussions between the various parties will need to take place as to the appropriate mechanism to meet the aims of the Police and Fire and Rescue Service.
- 6.2 There may be other documents that would have to be drafted and signed. The West Mercia Police and the Hereford and Worcestershire Fire and Rescue Service have jointly agreed to pay all reasonable costs implementing the legal changes that are required.
- 6.3 Where there is a bare trust, a trustee has no discretion over the assets held in trust and no active duties to perform. The Trustee must simply follow the instructions of the beneficiary in relation to the assets held in trust. However, they are obliged to act upon the instructions of the trust instrument. Set out below is the relevant extract from the declaration of trust document for the Holding Trust stating what the objects of the trust are.

- 2.1 *To advance education in and increase appreciation and understanding of all forms of the arts amongst members of the public including (without limitation) the arts of drama, dance, music and performance and visual arts generally in particular but without limitation:-*

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- 2.1.1 *by presenting, producing, organising or promoting or procuring to be presented, produced, organised or promoted either alone or with others performances of music, drama, dance or any other form of arts:*
- 2.1.2 *by providing organising or promoting classes and courses in drama, music, painting or any other form of the arts.*
- 2.2 *To provide or assist in the provision of facilities for recreation or other leisure-time occupation with the object of improving the conditions of life for members of the public in the interests of social welfare.*
- 6.4 Although bare trustees have no active duties to perform they must still comply with the fiduciary duties owed by all trustees as well as with the general duty of skill and care owed by trustees.
- 6.5 As bare trustee the Council owe a common law duty of care to the Arts Development Trust, which basically means that they "must take all those reasonable precautions which a prudent man of business would take in managing similar affairs of his own."
- 6.6 Trustees also have fiduciary duties, which can be summarised as follows:
- To act in good faith and with undivided loyalty to their beneficiary;
 - Not to make a profit from their position as a trustee;
 - Not to place themselves in a position where their own interests conflict with their duties as a trustee; and
 - Not to act to their own advantage or to the advantage of a third party without the fully informed consent of the beneficiary.
- 6.7 Of particular relevance in the current situation will be the duty to obtain the fully informed consent of the beneficiary. It is understood that in this case the consent of the Arts Development Trust to the granting of the easement has been obtained and so this duty seems to have been complied with provided that their consent is "fully informed" although it would be necessary for this fact to be ascertained in writing before proceeding to grant the easement.
- 6.8 There is also a restriction on the title document of Bromsgrove Arts Centre which states that no disposition or dealing of the land can be registered against the title unless the instrument giving effect to it contains a certificate complying with section 37(2) of the Charities Act 1993. As an easement is a disposition and would need to be registered against the title, the deed of easement would need to contain the necessary certificate to comply with section 37(2). In order to comply with section 37(2) the certificate would need to state that the trustees have power under the trusts of the charity to

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effect the disposition and that they have complied with the provisions of section 36(3) of the Charities Act 1993 so far as it is applicable to the disposition.

6.9 In order to comply with section 36(3) the trustees must (before entering into an agreement for the disposition of the charity's land):

- Obtain and consider a written report on the proposed disposition from a qualified surveyor instructed by the Trustees and acting exclusively for the charity;
- Advertise the proposed disposition for such period and in such manner as the surveyor has advised in his report (unless he has there advised that it would not be in the best interests of the charity to advertise the proposed disposition); and
- Decide that they are satisfied, having considered the surveyor's report, that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity.
- A surveyors report would also cover the issue of how much consideration could properly be charged for the granting of the easement

7. POLICY IMPLICATIONS

7.1 There are none directly associated with this report

8. COUNCIL OBJECTIVES

8.1 This section of the report is used to set out the relevant Council Objectives which would apply to the decision being taken. Members are asked to note that in this instance they are taking the decision as bare trustee and accordingly the relevant factors are those set out in paragraph 6.3 of the report. It is these matters that members must have regard to as opposed to the Council objectives.

9. RISK MANAGEMENT INCLUDING HEALTH & SAFETY CONSIDERATIONS

9.1 The risks associated with this report are in relation to the Council in its capacity as Bare Trustee which are set out above in the main body of the report.

10. CUSTOMER IMPLICATIONS

10.1 There are none directly associated with this report e

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11. EQUALITIES AND DIVERSITY IMPLICATIONS

11.1 There are none directly associated with this report

12. VALUE FOR MONEY IMPLICATIONS, PROCUREMENT AND ASSET MANAGEMENT

12.1 There are none directly associated with this report

13. CLIMATE CHANGE, CARBON IMPLICATIONS AND BIODIVERSITY

13.1 Modern buildings are much more efficient to run than old buildings and the rationalisation of 2 stations into one will reduce the ongoing carbon footprint of both services in Bromsgrove

14. HUMAN RESOURCES IMPLICATIONS

14.1 There are none directly associated with this report

15. GOVERNANCE/PERFORMANCE MANAGEMENT IMPLICATIONS

15.1 There are none directly associated with this report

16. COMMUNITY SAFETY IMPLICATIONS INCLUDING SECTION 17 OF CRIME AND DISORDER ACT 1998

16.1 There are none directly associated with this report

17. HEALTH INEQUALITIES IMPLICATIONS

17.1 There are none directly associated with this report

18. LESSONS LEARNT

18.1 There are none directly associated with this report

19. COMMUNITY AND STAKEHOLDER ENGAGEMENT

19.1 There are none directly associated with this report

20. OTHERS CONSULTED ON THE REPORT

Portfolio Holder	yes
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Chief Executive	yes
Executive Director (S151 Officer)	yes
Executive Director – Leisure, Cultural, Environmental and Community Services	yes
Executive Director – Planning & Regeneration, Regulatory and Housing Services	yes
Director of Policy, Performance and Partnerships	no
Head of Service	yes
Head of Resources	no
Head of Legal, Equalities & Democratic Services	yes
Corporate Procurement Team	no

21. WARDS AFFECTED

St Johns

22. APPENDICES

Appendix 1 Plan of proposed egress

Appendix 2 Police and Fire Service responses to questions raised by the Bromsgrove Arts Centre Trust.

23. BACKGROUND PAPERS

Minutes of the Artrix Holding Trust and Operating Trust

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