

# CABINET MEETING

## Agenda Item 136

Brighton & Hove City Council

**Subject:** Open Market Development Proposal  
**Date of Meeting:** 18 December 2008  
**Report of:** Director Cultural Services  
**Contact Officer:** Name: Richard Davies Tel: 29-6825  
E-mail: Richard.davies@brighton-hove.gov.uk  
**Key Decision:** Yes Forward Plan No. CAB 5522  
**Wards Affected:** All

### FOR GENERAL RELEASE

#### 1. SUMMARY AND POLICY CONTEXT:

- 1.1 This report advises of the progress made during the past nine months and of the latest proposals submitted to the council by the Open Market Traders Association and Hyde Martlet (Hyde Housing Association). It also seeks Cabinet approval for land owner consent to continue the project to complete the Development Agreement prior to submitting a planning application.

#### 2. RECOMMENDATIONS:

- (1) That Cabinet note the project progress described in section 7 made since the Stage 2 submission received by the council in September 2007.
- (2) That Cabinet approves the draft Heads of Terms referred to in section 5 and attached to the accompanying part two confidential report as the basis for negotiations of the Development Agreement.
- (3) That Cabinet approves landowner consent for the project to continue, subject to continued engagement between officers and the Open Market Traders Association and Hyde regarding sustainability issues to seek improved sustainability performance, and that the Director of Cultural Services and the Head of Law negotiate a draft Development Agreement.
- (4) That Cabinet approves the delegation of authority to approve the Development Agreement to the Director of Cultural Services and the Head of Law in consultation with the Cabinet Member for Enterprise, Employment and Major Projects.
- (5) That Cabinet delegates authority for approval of the final scheme at RIBA Stage D, and prior to the submission of a planning application, to the Director of Cultural Services in consultation with the Cabinet Member for Enterprise, Employment & Major Projects.
- (6) That Cabinet agrees that the Open Market Traders Association, supported by council officers, proceed to incorporate a Community Interest Company for the

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purpose of taking a long term lease on the new market and managing all aspects of the new market.

(7) That Cabinet support council representation of up to 19% on the Board of the Community Interest Company to be incorporated by the Open Market Traders Association and that the Board should be made up as described in paragraph 7.2, point 6 of the report.

### **3. RELEVANT BACKGROUND INFORMATION/CHRONOLOGY OF KEY EVENTS:**

- 3.1 Since April 2006, the council has supported the Open Market Traders Association (“Association”) to bring forward a redevelopment proposal for the council owned Open Market.
- 3.2 The Association has previously submitted a two stage proposal, in February 2007 and September 2007. These proposals were assessed by the project officer team and reported to Members.
- 3.3 On 3 April 2008, Policy & Resources Committee extended the lock out period to 19 December 2008, to allow the Association and Hyde time to undertake further work to address identified issues and prepare a development proposal with draft Heads of Terms and draft Development Agreement for consideration by the council.
- 3.4 The Association and Hyde Martlet have successfully engaged in partnership working to bring forward the present redevelopment proposal. The most recent proposal comprises a redevelopment overview, Business Plan, Management Plan and designs and plans. This work has been fully supported by the council through Member decisions, the council’s project officer team and the council’s project manager. Hyde demonstrated full commitment to the project when in October 2007, it bought the old City College site on Francis Street. Hyde were supported in this process by the council and the site is now included within the proposed scheme. This amalgamation of this site with council owned land creates the opportunity of improved servicing of the new market from Francis Street and allows gains in terms of market layout, number of stalls and potentially increased housing units. These elements combine to enable an improved and comprehensive scheme when compared to developing the market site alone.
- 3.5 The redevelopment of the Open Market would contribute to the aims identified by the London Road and Lewes Road Regeneration Strategy, including “Improving the retail environment, including revitalising the Open Market”. This strategy has been approved as a background document for the city’s emerging Local Development Framework (“LDF”).

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#### **4. CONSULTATION**

- 4.1 The earlier redevelopment proposal was assessed by the internal officer project team and the results reported to the Project Board, Major Projects Sub Committee and Policy & Resources Committee. The internal process for the refined proposal now under consideration has included a presentation by the Association and Hyde to the project officer team and the Open Market Project Board.
- 4.2 The Project Board met to consider the development proposal on 17th and 26th November 2008 and has indicated its support for the project in line with the recommendations in section 2, subject to the condition that there is continued engagement between officers and the Open Market Traders Association and Hyde regarding sustainability issues to seek improved sustainability performance.
- 4.3 The Open Market Traders Association has had a series of meetings for market traders throughout the lifetime of the project. Representatives of the OMTA Steering Group have attended the Project Boards that have considered the scheme at each stage of its preparation.
- 4.4 The preparation of a Health Impact Assessment included meetings in August 2008 with all traders, local businesses and local residents.
- 4.5 The council's Research and Consultation Team has carried out two Open Market customer surveys.

#### **5. FINANCIAL & OTHER IMPLICATIONS:**

##### Financial Implications:

- 5.1 The current Business Plan includes a revised funding appraisal provided by Hyde that includes the total development cost of the revised scheme.
- 5.2 The cost of the housing element has increased from that reported at Stage Two as a direct result of the additional increase in the number of housing units. A detailed cost exercise has been undertaken analysing construction costs and this has resulted in a significant reduction in the construction costs of the market.
- 5.3 Hyde will fund the development cost of the housing element through a combination of Social Housing Grant, shared ownership receipts and internal group loan financing.
- 5.4 Overall this results in a current funding requirement to be provided by the Association that will be met from borrowing. The Association has explored a number of routes to secure loan finance for this project. A reputable bank has been identified and has now expressed a desire to offer a mortgage to the future CIC up to the required limit subject to contract. A letter of support from the bank has been included within the Business Plan.

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## **Business Plan**

- 5.5 The current Business Case includes a reasonable increase to the rates of market stall rental levels with an additional 5% payable for service charge. The revised rent is at the bottom end of current prices for similar markets. The revised rent will assist with the affordability of the project including the ability to service debt and provides greater viability toward the long-term operation of the market.
- 5.6 Additional income is generated through the use of the central market square. This is made up of a variety of events including temporary market stalls, continental markets, a Christmas market, collector's fairs, exhibitions and table top sales. The successful operation of the market is dependent upon this additional income being achieved from day 1, an assumption that requires further clarification. This will be addressed as part of the discussions regarding the Development Agreement.

## **Management Plan**

- 5.7 The practicalities of the Association's Management Plan will become more focussed as the development progresses. The Association has indicated the intended proposed tenant mix and have provided drafts of the sub-tenancies to be granted. Ultimately some management issues will be set out in the headlease to the CIC and detailed discussion on those will be undertaken as part of the negotiations for the Development Agreement.

*Finance Officer Consulted: Rob Allen*

*Date: 12.11.08*

### Legal Implications:

- 5.8 The draft Heads of Terms provide the basis of the understanding of the project as agreed between the council, the Association and Hyde. These will provide the starting point for negotiations of the Development Agreement.
- 5.9 The Heads of Terms propose that a head lease be granted by the council to Hyde for Hyde to carry out the redevelopment before Hyde grants a sub-lease for the completed market and workshops to the newly formed Community Interest Company. It also sets out the general conditions that will have to be observed when negotiating the Development Agreement and carrying out the redevelopment.

## **Section 123/State Aid**

- 5.10 Section 123 of the Local Government Act 1972 requires that the city council does not dispose of land "for a consideration less than can reasonably be obtained" without consent of the Secretary of State. S128 provides that such consent may be general or specific and also that non-compliance with s123 does not invalidate the disposal. The current general consent is the General Disposal Consent 2003 ["the General Consent"] which was issued with Circular 6/2003 ["the Circular"].

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- 5.11 The technical annex to the Circular explains that best consideration equates with seeking to maximise the value and is the RICS Red Book market value and the defined unrestricted value. In the Circular a “voluntary condition” is defined “as any term or condition of the proposed transaction which the authority chooses to impose, excluding any term or condition which it is obliged to impose”. In s123 terms, voluntary conditions artificially depress the consideration, although the Circular recognises that that they will frequently produce a direct or indirect benefit to the Council which can be assessed in monetary terms. Thus the overriding consideration in determining what constitutes the best consideration that can reasonably be obtained is assessing what is the commercial value of the Site.
- 5.12 Paragraph 2b) of the General Consent gives consent to disposals where: *“the difference between the unrestricted value of the land to be disposed of and the consideration for the disposal does not exceed £2,000,000”*, provided also that the scheme satisfies well-being requirements. The city council will therefore need to consider any social, environmental and regeneration benefits when considering the proposed scheme, but if the consideration is lower than the strict market value by a figure in excess of £2million express consent will be needed.
- 5.13 It should also be noted that if as is currently envisaged in the Heads of Terms, the land, which is currently held as part of the commercial property portfolio, is appropriated for planning purposes, express consent will be needed under s233 of the Town & Country Planning Act 1990 regardless of the amount foregone i.e. where land is held for planning purposes a different consent regime applies and there is no General Consent provision.
- 5.14 The S123/S233 regimes are independent of the rules relating to State Aid, which in essence prevent unlawful subsidy to businesses. Preliminary state aid advice has been given by counsel and it will be necessary for counsel to further consider the position in that respect once detailed terms of a disposal have been agreed.

*Lawyer Consulted: Bob Bruce, Principal Solicitor*

*Date: 01.12.08*

Equalities Implications:

- 5.15 An Equalities Impact Assessment (EIA) of this project is planned as part of a comprehensive EIA covering the project management function across all Major Projects. The assessment will be undertaken in the New Year with a target date for completion of March 2009.
- 5.16 The proposed scheme has fully considered the requirements of the Disability Discrimination Act (DDA) and addresses these through appropriate design. The proposed covered market will provide a new destination that benefits from excellent public transport links. Two customer surveys carried out by the council found that a quarter of users of the existing market are over 65 years of age and that almost half of all customers walk to the market.

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#### Sustainability Implications:

- 5.17 Sustainability implications are a significant part of the overall assessment of the Open Market proposals including the redevelopment of the proposed site and will continue to influence the evolution of the scheme. This is discussed further in section 7 of the report.

#### Crime & Disorder Implications:

- 5.18 The redevelopment of the Open Market and introduction of residential units on Francis Street will create more activity and passive surveillance. This is likely to have a positive influence on peoples perception of personal safety. The project architects have stated that the design will be developed in accordance with the design principles set out in “Secured By Design” and have carried out consultation in this regard. The proposed market will be gated and locked at night.

#### Risk & Opportunity Management Implications:

- 5.19 The project manager keeps a risk register for the project which is reviewed on a regular basis with the project team. The project Quantity Surveyor engaged by Hyde also keeps a risk register for the development.

#### Corporate / Citywide Implications:

- 5.20 The redevelopment of the Open Market will aid the overall regeneration of the London Road and contribute to achieving the aims of the London Road/ Lewes Road Regeneration Strategy.

### **6. EVALUATION OF ANY ALTERNATIVE OPTION(S):**

- 6.1 The Association and Hyde have developed the design to achieve a viable project that delivers a new covered market and workshops that is fit for purpose. This has been an iterative process with a previous two stage process leading to the final proposal now being considered. The previous stages have been assessed by the council and this has resulted in an improved scheme that is potentially viable and deliverable.
- 6.2 The redevelopment proposal as it stands has continued to be amended to improve the residential amenity on Francis Street, including the reduction of loading bays for the market. This has resulted in a shorter stretch of loading bays, which improves conditions for the housing facing onto Francis Street as it results in fewer units at ground level opposite the loading area.

### **7. REASONS FOR REPORT RECOMMENDATIONS**

- 7.1 Members have previously received the Stage One and Two redevelopment proposals for the Open Market from the Open Market Traders Association and Hyde Housing.

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7.2 The officer assessment of the Association's Stage 2 proposal, submitted to the council in September 2007, identified a number of issues needing to be addressed if the proposal was to progress to the point where landowner consent could be granted. This section lists the previously identified issues (shown in italics) and reports the progress made to resolve them.

1. *The design and operation of the development must fully address issues of sustainable design and a Health Impact Assessment ("HIA").*

- A HIA is being carried out by external consultants and is close to completing a final draft report. The initial draft of the HIA is broadly positive and makes a number of recommendations to improve the health benefits of the proposed scheme. The final report will be included in the proposed planning application for the scheme and its recommendations will be considered as part of that process.
- Hyde and the project architects have been exploring measures to achieve a Sustainable Homes Code Level 4 for the residential element of the proposal. The submitted Business Plan reports that the proposed housing scheme achieves a Code for Sustainable Homes Level 3 rating for energy use and a Level 4 rating for all other aspects. While this does not reach the level recommended in the council's SPD 08 Sustainable building design, it is acknowledged that through the planning process discussions will seek to improve the scheme where it does not currently reach the recommended standards. SPD 08 says that in assessing the achievement of the recommended sustainability standards the council will consider;
  - i. Site constraints;
  - ii. Technical viability;
  - iii. Financial viability; and
  - iv. Delivery of additional benefits.

2. *Justify the proposal in terms of Local Plan policy, the principles of the Local Development Framework Core Strategy, the Local Transport Plan and the economic benefit for London Road.*

- The project architects have had helpful pre-application discussions with the City Planning Team to address areas of concern and to arrive at an acceptable scheme. These discussions have resulted in positive amendments to the design, particularly regarding height and massing of the north block on Francis Street, which have sought to reduce the interference of the view out of The Level Conservation Area towards St Bartholomew's church. The treatment of Francis Street has also been advanced to reduce the impact of traffic on amenity.
- Additional pre-application meetings were had at the end of November and in early December that covered a range of planning issues including potential S106 financial contributions for open space, transport and education;

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- The Draft Transport Assessment will be considered by Sustainable Transport following previous feedback given to the development team;
- The latest proposal, at a height of 6 storeys, will require a Tall Buildings Statement as part of the planning application.
- Hyde will be informed of the National and Local Requirements for the submission of the full planning application.

3. *Confirmation of the Development Vehicle and partnership arrangements.*

- The latest development proposal indicates that Hyde Martlet will provide the development vehicle for the scheme and has selected a preferred developer using its procurement framework. Hyde's preferred developer is Denne Construction who are currently the contractor for the One Brighton development in the New England Quarter.
- The Association's and Hyde's solicitors have exchanged draft Heads of Terms for the Development Agreement with the council's Principal Solicitor and are continuing discussions to finalise the draft for approval by Cabinet. The draft Heads of Terms includes proposals for lease and other partnership arrangements and progress will be reported at the Project Board. This process will lead into the preparation of the Development Agreement.

4. *Confirmation of development costs and funding package.*

- The Association and Hyde have significantly reduced the funding gap and the relative scheme costs through two main routes: firstly, a redesign of the scheme to increase the number of residential units: and secondly, an examination of the construction options involving Hyde's preferred contractor, who has been able to confirm costs using its established supply chains and discussions with sub-contractors. This route of involving a contractor has brought considerable benefits to the cost plan and resulted in a reduced funding requirement to be borrowed by the newly formed CIC
- Hyde has confirmed it has the funding in place to carry out the housing element of the development.
- The Association has met with the bank who's credit committee has authorised the necessary funding, subject to contract, to lend to the future CIC. This intention to lend and general support of the project has been gained on the back of the present Business Case and Management Plan, which provides a degree of confidence in the robustness of the overall proposal. The bank takes an ethical approach to banking and deals with businesses and charities that value people and planet, as well as profit.
- Ethical Property Company has reconfirmed its commitment to the project and its intention to lease the workshops. It is currently in discussions with the Association and Hyde regarding the specification and contract.



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- The three funding elements including finance brought by Hyde, bank borrowing and a lease on the workshops taken by Ethical Property Company, provide the development finance required to meet the development costs for the proposed scheme.
5. *Further detail regarding cash flow and operating costs of the new market to support the Association's ability to repay its debt.*
- A reasonable increase of the present rental levels for stalls has been incorporated into the Business Plan which increases income levels to a point where the anticipated cash flow indicates that the running costs of the market and servicing the required borrowing can be met. Officers will seek further clarification of the assumptions made as part of the on-going negotiations for the draft Heads of Terms and draft Development Agreement to ensure that the cash flow is a realistic projection.
6. *Confirmation of company structure and clarification of other legal matters, including vacant possession.*
- The Association has proposed incorporating a Community Interest Company (“CIC”) to take the leasehold on, and be responsible for the management of, the new market. The Association has submitted proposed Memorandum of Articles for the CIC.
  - A key aspect of the CIC constitution will be membership of the company Board, including council representation. The proposed Board would be made up of representatives of the Open Market Traders Association, council representation, Hyde, The Ethical Property Company and local professional co-optees. No one interest should hold a majority of votes. It is expected that for the council to avoid controlled company issues, council representation should be no more than 19%. For example, this would mean that if there were 11 people on the Board, council representatives should be at the most two of these.
  - The leasing structure between the CIC, Hyde and the council and when those interests will be granted will be a part of the on-going negotiations for the Heads of Terms and Development Agreement.
  - The Association’s Business Plan anticipates that the council will obtain vacant possession of the Open Market. However, the council is expecting the traders to resolve this issue and the Association is discussing the surrender of leases with all leaseholders in the market. The council will only step in where statutory action is necessary and will also be responsible for the tenancies at will, the costs of which are to be underwritten by the CIC.

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7. *Development of a strategy to implement the market 'Vision' and ensure local food is incorporated into the market.*

- A report by consultants into the availability of local produce and how this might be integrated into the new market has been completed and offers strategies for including local producers and products in the new market. The Association has considered the recommendations of the report and supports the incorporation of local produce into the market including reserving stalls for this produce and working with any cooperatives set up to promote the distribution and sale of locally produced goods.

- 7.3 The latest submitted redevelopment proposal has made good progress in responding to the key issues that were previously identified and in putting together a financially viable scheme that delivers a range of benefits for the city in the difficult current economic circumstances.
- 7.4 The Association and Hyde have put in place a funding strategy that includes finance brought by Hyde, bank borrowing and a leasehold of the workshops taken by Ethical Property Company. Agreement with the bank and Ethical Property Company is now being sought and the likelihood of success has been increased by the enthusiasm for the project shown by both organisations.
- 7.5 The project architects have progressed pre-application discussions with the Local Planning Authority which have sought to address key issues such as the building design and the treatment of Francis Street. These discussions are on-going and have resulted in considerable progress towards achieving an acceptable scheme before submitting a planning application.
- 7.6 Arrangements are in place to incorporate the CIC to take forward the proposal and prepare for the management of the new market.
- 7.7 Draft Heads of Terms have been produced and are included in the part two report for approval. The agreed Heads of Terms will be the basis for negotiations to prepare the Development Agreement.
- 7.8 If the council were to agree land owner consent for the proposal and the draft Heads of Terms as the basis for negotiating the Development Agreement, sustainability issues would form part of these negotiations and be part of the normal planning process for any development to ensure the development is acceptable in planning terms. This was confirmed at the Project Board on 26<sup>th</sup> November as a reasonable approach.

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7.9 In consideration of the above, the proposed scheme does offer the opportunity to achieve a viable development, which now offers the potential to deliver a range of benefits that would contribute to the regeneration of London Road Town Centre and include:

- a new covered market with 45 permanent market stalls;
- an internal central market square for temporary stalls, visiting markets and a variety of events;
- 12 arts/crafts workshops;
- 86 affordable housing units, 27 for rental and 59 shared ownership;
- A significant contribution to the regeneration of London Road Town Centre;
- Safeguarding existing, and creating new, employment opportunities by way of an expanded new market and workshops;
- Increased economic activity in London Road Town Centre;
- Reinstating Francis Street within the urban fabric.

7.10 It is considered appropriate to approve land owner consent for the proposed scheme prior to completing the Development Agreement and submitting a planning application.

## **SUPPORTING DOCUMENTATION**

### **Appendices:**

None

### **Documents In Members' Rooms**

None

### **Background Documents**

1. Previous Open Market Cabinet Member Meeting, Major Projects Sub Committee and Policy & Resources Committee reports.
2. London Road & Lewes Road Regeneration Strategy

