In the High Court of Justice
Queen's Bench Division
Planning Court

CO Ref: CO/4150/2014

In the matter of an application for Judicial Review

The Queen on the application of

KIM ALEXANDER GOTTLIEB

versus

WINCHESTER CITY COUNCIL and another

Application for permission to apply for Judicial Review
NOTIFICATION of the Judge's decision (CPR Part 54.11, 54.12)

Following consideration of the documents lodged by the Claimant [and the Acknowledgement(s) of service filed by the Defendant and / or Interested Party]

Order by the Honourable Mr Justice DOVE

Permission is hereby refused.

Reasons:

In relation to Ground 1 it is unarguable that the variations the subject of the decision under challenge required a procurement exercise under Directive 2004/18/EC or the Public Contracts Regulations. The provisions of the Development Agreement, in particular in the clauses within 5.1 and 5.3 of it, specifically contemplated variations to the development and controlled those over which the Defendant ("the Council") would have control by way of approval. Thus the process of further variation, including the alteration of the Minimum Requirements specified in clause 5.3.1, was one which was within the scope of the Agreement and the variations were in substance ingredients of the performance of the contract. The variations did not amount to the creation of a new contract but were within the ambit of the existing agreement. This deals with the Claimant's argument in principle, before regard is had to the detailed factual matters set out in paragraph 20 of the Acknowledgment of Service.

Turning to Ground 2 it is clear that in their consideration of the proposed variations the Council obtained professional advice in respect of the requirements of s233 of the Town and Country Planning Act 1990 and that the advice confirmed that those requirements would be met as at the time of the decision. The issues raised by the Claimant related to the absence of explanation in respect of changes to viability subsequent to the grant of CPO powers do not provide any substantive basis to gainsay the professional advice obtained by the Council at the time of the decision. Similarly, in relation to Ground 3, there seems no identified evidential basis to found a conclusion that the variations would amount to State Aid and the Claimant's case amounts to little more than speculation. Both Grounds 2 and 3 are unarguable.

Since I note that there are elements of disclosure which are still being sought I do not propose to certify the application as Totally Without Merit. I note that the Council have not responded to the application to treat the Claimant's Witness Statement and the Core Bundle as confidential and I take it from this that they do not support the making of such an order. I those circumstances I see no need to make one. Clearly if the Council do support the making of such an order they should notify the Court in the event that this application is renewed so the question of a confidentiality order can be considered. I regard the costs claimed by the Council as excessive, in particular since they have had retained legal advisors, who would have been familiar with issues, throughout. I propose to summarily assess costs in the sum of £7500. This claim should clearly be categorised as Significant.

Form PC JRJ 3 v. APRIL 2014 Judicial Review Permission Refused RENEWAL FEE [LA*claim issued on or after 7 October 2013]*

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

CO/4150/2014

Before Mr Justice Lindblom

BETWEEN:

The Queen
on the application of

KIM ALEXANDER GOTTLIEB

Claimant

-and-

WINCHESTER CITY COUNCIL

Defendant

-and-

SILVERHILL WINCHESTER No. 1 LIMITED

Interested Party

ORDER

UPON hearing counsel for the Claimants and counsel for the Defendant

IT IS ORDERED THAT:

1 Permission to apply for judicial review be granted in respect of ground 1.

2 Permission to apply for judicial review be refused in respect of grounds 2 and 3.

3 The Defendant is to file and serve its Detailed Grounds of Defence and any accompanying evidence by 4.00pm on 19 December 2014.

4 The Claimant is to file and serve a Reply and any accompanying evidence by 4.00pm on 8 January 2015.

5 The Claimant is to file and serve hearing bundles by 4.00pm on10 January 2015.

6 The parties are to file an agreed factual narrative and list of issues by 4.00pm on 12 January 2015.

7 The Claimant is to file and serve his skeleton argument by 4.00pm on 14 January 2015.

8 The Defendant is to file and serve its skeleton argument by 4.00pm on 21 January 2015.

9 The hearing is to be set down for two days on 28-29 January 2015.

10 There be permission to all parties to apply.

Date order approved: 24 November 2014

Court order date: 18 November 2014

By the Court

Neutral Citation Number: [2015] EWHC 231 (Admin)

Case No: CO/4150/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2015

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between:

THE QUEEN
on the application of

KIM ALEXANDER GOTTLIEB — **Claimant**

- and -

WINCHESTER CITY COUNCIL — **Defendant**

SILVERHILL WINCHESTER NO 1 LIMITED — **Interested Party**

- -
- -

Robert Palmer (instructed by **Dentons UKMEA LLP**) for the **Claimant**
David Elvin QC and Richard Moules (instructed by **Berwin Leighton Paisner LLP**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing dates: 28 & 29 January 2015

- -

Approved Judgment

Mrs Justice Lang:

1. The Claimant applies for judicial review of the decision of Winchester City Council ("the Council"), dated 6 August 2014, to authorise variations to a contract with a developer ("the Development Agreement") to build a new mixed retail, residential and transport centre in the heart of Winchester city centre. The area is known as "Silver Hill".

2. The Claimant is a resident of Winchester. By profession, he is a chartered surveyor and a director of a small private property investment and development company. He has been an elected Winchester City Councillor for the Itchen Valley ward since May 2011, and was a member of the Council's Silver Hill Reference Group.

3. The Claimant is a leading member of the Winchester Deserves Better Campaign which opposes this scheme and seeks alternative development proposals. He believes it to be poorly designed (in terms of architecture and layout) and the buildings to be over-sized in their setting within the City. He is concerned that, under the terms of the variation, affordable housing and civic amenities have now been removed from the scheme.

4. In contrast, the Council considers the development will achieve the longstanding objective of regenerating an economically weak area of an otherwise thriving city centre. It favours a comprehensive rather than piecemeal development, to provide all the facilities needed to attract retail operators and customers.

5. Permission to apply for judicial review was initially refused by Dove J. but subsequently granted by Lindblom J. at an oral renewal hearing. The grant of permission was limited to ground 1, namely whether the decision was unlawful because, having varied the terms of the Development Agreement, the Council was required to carry out a procurement exercise under Directive 2004/18/EEC of 31 March 2004 ("the 2004 Directive") and the Public Contracts Regulations 2006 ("the 2006 Regulations").

6. The Claimant contends that the variations to the Development Agreement are such as to require a procurement exercise to be undertaken on the ground that they are materially different in character from the original contract and, therefore, are such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract. The variations changed the economic balance of the contract in favour of the developer in a manner which was not provided for in the terms of the initial contract.

7. The Council's response is that the variations are not materially different in character. They were made in accordance with variation clauses in the Development Agreement, and they do not change the overall nature of it. They still fall within the scope of the original brief. Some of the changes were prompted by external causes; others by changes in circumstances since 2004. The Council has taken independent professional advice which states that the changes do not alter the economic balance in favour of the developer. Indeed, the Development Agreement, as varied, is a more favourable arrangement than the Council would be likely to obtain in the market.

Facts

(1) The Development Agreement

8. The Council, as owner of various freehold and leasehold sites in the city centre, entered into a "Development Agreement relating to a site at Broadway/Friarsgate Winchester" with Thornfield Properties (Winchester) Limited (the Developer) on 22 December 2004.

9. The site consists of approximately 2.89 hectares of land within the city centre's conservation area.

10. The Council did not carry out a procurement exercise when it entered into the Agreement. The development opportunity was not advertised in the Official Journal of the European Union and no competition between developers was held.

11. The Development Agreement provided for the comprehensive redevelopment of the Silver Hill area ("the Site") by way of a mixed-use development comprising residential, retail, car parking, a replacement bus station, a civic square, a CCTV office, shop mobility and Dial-a-Ride service, and a market store.

12. The Development Agreement provided that the Council would assemble the land necessary for the scheme and then grant the Developer a long-term lease, while retaining the freehold interest.

13. Clause 3.2 of the Development Agreement provided that the Developer and the Council agree to observe and perform their respective obligations under Schedule 2. Schedule 2 set out a series of "Conditions", as defined in paragraph 2. They included (among others):

    i) at paragraph 2.1, the Planning Condition (requiring the grant of Planning Permission);

    ii) at paragraph 2.8, the Social Housing Condition (requiring the Developer to enter into a legally binding agreement with a registered social landlord for the sale of affordable housing and to let and manage social rented housing);

    iii) at paragraph 2.9, the Financial Viability Condition (requiring the Developer to demonstrate to the reasonable satisfaction of the Council immediately before the date when the last of the other outstanding Conditions is satisfied or (where provided under Schedule 2) waived that the Development is financially viable meaning that the anticipated profit is not less than 10% of anticipated Development Costs).

14. Clause 4.1 of the Development Agreement provided that "the Initial Scheme Drawings represent the base design for the Development as at the date hereof and that these drawings have been prepared in accordance with the Planning Brief". The Initial Scheme Drawings appear at Appendix 4 to the Development Agreement. The Planning Brief had been adopted by the Council (as local planning authority) in July 2003, and was attached to the Development Agreement at Appendix 16.

15. Clause 4.2 provided that the Developer would work up this design to a full design in approved drawings which would constitute the application for planning permission.

16. The Development Agreement specified a number of minimum requirements that must be provided ("the Required Elements"). These are set out at clause 5.3:

> "5.3.1 The Development shall include each of the following and the Council shall not be required to approve the Initial Scheme Design the Application or the Drawings (and any variation thereof) unless they provide for:-
>
> 5.3.1.1 a minimum of 90,000 square feet of Gross Internal Area of Retail Units;
>
> 5.3.1.2 a minimum of 364 residential units 35% of which are Affordable Housing and 15% of the Affordable Housing or if greater 20 such units to be Social Rented Housing;
>
> 5.3.1.3 a minimum of 279 public car parking spaces (unless such number is reduced due to a change in the car parking policy of the Council acting as the local authority);
>
> 5.3.1.4 a civic square in the form of the square approved by the Council in accordance with clause 4.3 of this Agreement and the intended location of which is illustrated on plan A1 and shown with red hatching and shading and labelled as Silver Hill Square;
>
> 5.3.1.5 a bus station incorporating no fewer than 12 bus bays three layover bays public toilets and other facilities as more particularly described in the Stagecoach Agreement and as shown on Plan C2;
>
> 5.3.1.6 premises for and the reprovision of the Council's closed circuit television equipment (including any necessary additional equipment) and parking offices as provided for in the Planning Brief and as shown on the specification attached at Appendix 15;
>
> 5.3.1.7 premises for a new shop mobility and Dial-a-Ride service as provided for in the Planning Brief and as shown on the specification attached at Appendix 15;
>
> 5.3.1.8 an area for the relocation of the daily Middle Brook Street market and the Farmers' Market including re-provision of the market store and waste compactor;
>
> 5.3.1.9 provision of public art in a form agreed with the Council but costing not more than £336,000."

17. Clause 5.1 recognised that, following the approval of the application for planning permission and thereafter throughout the course of the development, variations to the

approved Drawings might be made. Clause 5.1.3 required that certain variations required Council approval. Those variations were:

> "5.1.3.1 any variation to the Required Elements in which case the Council shall have absolute discretion as to whether to it shall approve such variation;
>
> 5.1.3.2 any material variation to any of the following matters (in which case the Council shall have absolute discretion as to whether it shall approve such variation unless such variations arise due to the requirements of the local planning authority in which case the Council shall not unreasonably withhold its approval …):
>
> (a) the cost and standard of construction unless (in the case of cost) the proposed variation is less than 10% of the estimated cost …
>
> (b) changes to the external elevations or massing of the Development Scheme;
>
> (c) the position or extent or layout of the public areas and streets forming part of the Development Scheme;
>
> (d) the servicing and delivery arrangements;
>
> (e) the position number or capacity of vehicular accesses to and from the public highway;"
>
> (f) the number of the shop units as shown on the Approved Plans and provided that none of the units are more than 30,000 square feet …;
>
> (g) the number of public car parking spaces so that there are fewer than 279 in total;
>
> (h) the number and designation of residential units such that less than 35% are Affordable Housing and less than 15% of the Affordable Housing (or if greater 20 such units) is Social Rented Housing;
>
> (i) the total Gross Internal Area of the Retail Units unless the variation is less than 10% of the total;
>
> 5.1.3.3 any other material variation to the Drawings in which case the approval of the Council shall not be unreasonably withheld…."

18. Clause 6.1.2 of the Development Agreement provided that the Developer should invite competitive tenders from at least three of various building contractors listed in Schedule 5 in respect of the Development Works.

19. Clause 21.5 provided that the Developer could, in consultation with the Council on an open book basis and subject to obtaining the previous consent of the Council, such consent not to be unreasonably withheld, enter into a joint venture or appoint a sub-developer in relation to the residential elements of the Development Scheme.

20. Paragraph 15.2 of Schedule 2 to the Development Agreement provided for a right of termination in the event that any of the Schedule 2 conditions had not been discharged (or waived) by a long stop date defined as being 5 years from the date of the Development Agreement (i.e. 22 December 2009).

21. The Development Agreement further provided that:

    i) after taking account of all agreed development costs, the Developer would receive the first 10% profit and the Council would then receive half of the first £2 million profit after the Developer's 10%: paragraph 1.7.1 of Schedule 3;

    ii) beyond the first £1 million share of profit, the Council would then receive a half share of any profit above 15%: paragraph 1.7.2 of Schedule 3;

    iii) in calculating the Developer's return, a deduction would be made for all development costs properly incurred back to (and pre-dating) the entering into the development agreement in 2004, including interest on those costs: paragraphs 1.1, 1.1.1.12 and 4.4 of Schedule 3;

    iv) the Council was guaranteed a minimum rent in relation to the properties that it was then making available for the development by a lease: Clause 11.2 and Appendix 5.

22. Originally, the arrangement provided for:

    i) Payment of a fixed sum of £240,000 per annum payable by the Developer to the Council during the construction period;

    ii) A ground rent payable by the Developer to the Council for the duration of the lease. This ground rent was to be assessed by reference a geared payment based on a percentage (7.56%) of the overall rent of the completed scheme, but subject to a minimum sum of £250,000 per annum. This minimum rent was then subject to periodic review every 20 years.

(2) Grant of planning permission

23. On 9 February 2009, the Council granted planning permission for the redevelopment scheme. The proposals included approximately 95,000 sq ft of retail space (of which 25,000 sq ft was a food store), 287 residential units with 122 car spaces, 20 live work units with car parking, 330 public car parking spaces, a new bus station, a small quantity of office space and extensive proposals for public realm improvements. An accompanying section 106 agreement dated 28 January 2008 secured affordable housing of 35% - 40% of housing units (or an equivalent financial contribution) to be provided.

(3) Acquisition of the site by Henderson

24. In early 2010 Thornfield Properties went into administration and later that year Henderson Global Investors ("Henderson") acquired the developer (Thornfield Properties (Winchester) Limited) from the administrator. Thornfield Properties (Winchester) Limited has been renamed as Silver Hill Winchester No. 1 Limited ("Silver Hill").

(4) The Compulsory Purchase Order

25. In 2011 the Council made the Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 ("CPO") to enable it to acquire all of the outstanding interests in the site. A public inquiry was held.

26. Mr Tilbury, Corporate Director of the Council, gave written evidence to the Inquiry on behalf of the Council explaining that the Development Agreement includes "*a number of Required Elements that must be components of the development*" including the affordable housing and bus station elements detailed above (paragraph 3.2.7, statement dated 30 May 2012). He said that Drivers Jonas Deloitte ("Deloitte") had been appointed to advise on matters relating to the Council's interest in the scheme, including the ability of Henderson to deliver the scheme. Based on the advice received, Mr Tilbury stated that the Council knew of no other reason why the scheme should not proceed in a timely manner (paragraphs 5.3.3-5.3.4).

27. The Inspector recommended that the Secretary of State confirm the CPO, on 17 December 2012. The CPO was confirmed on 20 March 2013.

28. In her report, the Inspector recorded as an important part of the Council's case at the CPO inquiry that the proposal was compliant with planning policy which (with the Planning Brief itself) had been "*the subject of extensive public and stakeholder input*": see paragraphs 4.9-4.12. The Inspector relied upon that evidence in her conclusions at paragraphs 7.3-7.4.

29. The Inspector also recorded the submissions as to the scheme's viability and the Council's conclusion that the Henderson Property Fund had demonstrated to it that "*the Scheme as consented would currently be capable of satisfying the required viability measure as a condition of the development agreement of 10% profit on cost*": see paragraph 4.40. The Inspector relied on that evidence too, at paragraph 7.23.

30. The Council's case (as recorded by the Inspector) concluded:

> "the CPO will enable the site to be developed comprehensively. This approach is a fundamental requirement to ensure that the bus station, car park and public realm are delivered, as these are funded by the more profitable parts of the Scheme, and to ensure a high quality layout which fits in with the historic street pattern. A piecemeal approach over a period of time is highly unlikely to facilitate the multiple benefits that the Scheme will deliver and failure to achieve these would prevent WCC from

meeting various planning and policy requirements" (paragraph 4.48).

(5) Variation of the Development Agreement

31. The Development Agreement has been varied on a number of previous occasions, namely on 22 October 2009, on 10 December 2010 and on 30 January 2014. The variations to the development agreement, inter alia, allowed the Council to request that the affordable housing be provided off-site or by way of a commuted sum. The parties to the Development Agreement had also agreed in an exchange of letters that the Council would not take advantage of its ability to terminate the Agreement.

32. In a letter dated 12 June 2014, Silver Hill sought the Council's consent to vary the form of development approved under the Development Agreement, and to vary the Development Agreement itself. The proposed variations were:

i) A reduction in the number of residential units to 184 residential units only (or such lower number as the local planning authority may require);

ii) The removal from the scheme of a bus station and the provision instead of an on-street bus interchange and facilities (public toilets and a ticket office) on Friarsgate as detailed in the Application;

iii) The deletion of a requirement for a Shop Mobility Centre and Dial A Ride premises in the development;

iv) The deletion of a provision for a market store within the development;

v) The changes to external elevations, massing and servicing arrangements as set out in the Application;

vi) Provision of one shop unit of up to 60,000 sq ft as detailed in the Application;

vii) A reduction in the number of public car parking spaces from 330 to 279;

viii) The amendment of the provision in respect of affordable housing by the substitution of a financial contribution to be assessed on the basis of the future viability of the scheme up to the equivalent of 40% affordable housing provision;

ix) An increase in retail provision from 95,000 sq ft to approximately 148,000 sq ft;

x) The inclusion in the scheme of the Oxfam shop at 153 High Street (subject to appropriate terms being agreed);

xi) Amendments which allowed Silver Hill to be authorised to procure the construction of the whole scheme (retail as well as residential) by a construction company with a house building subsidiary.

33. A report was taken to the Council's Cabinet on 10 July 2014 recommending that the Council as landowner agree to the proposed variations to the Development Agreement. The Cabinet resolved to give approval to those variations, subject to consultation of both the Overview and Scrutiny Committee and the full Council for their views. In particular, the Cabinet agreed to "*the amendment of the provision in respect of affordable housing by the substitution of a financial contribution to be assessed on the basis of the future viability of the scheme up to the equivalent of 40% affordable housing provision*". Cabinet also authorised the removal of the requirement to procure the construction works by a competitive tender from at least three named contractors, and authorised the Developer "*to procure the construction of the whole Scheme (residential and retail) by a construction company with a house building subsidiary, rather than as set out in the Development Agreement*."

34. At its meeting on 16 July 2014, the full Council resolved that Cabinet be asked to reconsider its decision in respect of the affordable housing and seek a more beneficial arrangement for Winchester residents.

35. On 5 August 2014, a further letter was received from Silver Hill, following further work on the scheme by the architects. As a consequence, the letter sought approval to further design changes, the major implications of which were a reduction in the total number of residential units from 184 to 177, and a reduction in residential car parking spaces from 181 to 180.

36. A report was taken to Cabinet on 6 August 2014, which set out the position in relation to affordable housing and the opportunity to secure an offsite financial contribution. The request for the further changes set out in the letter of 5 August 2014 was explained to Members. Cabinet decided to reaffirm its resolution of 10 July 2014 permitting the variations to the Development Agreement (taking account of the further changes sought), subject to "*the amendment of the requirement in respect of affordable housing so that the affordable housing provision be that which shall be determined by the Planning Committee based on the current and future viability of the scheme.*"

37. As part of its planning submission, the Developer has since offered, by way of a section 106 agreement, to pay the sum of £1 million towards affordable housing, and a potential addition payment of up to £1 million if the scheme viability produces a return in excess of 15% profit on cost. The local planning authority resolved to grant planning permission for the revised scheme on 11 December 2014.

38. There were also upward adjustments to the rent payable by the Developer, to reflect increased retail space. In August 2014 the Council and the Developer agreed to increase the existing basis of the rents payable to:

    i) Payment of fixed sum of £295,000 per annum payable by the Developer to the Council during the construction period; and

    ii) A ground rent payable by the Developer to the Council for the duration of the lease. This ground rent was to be assessed by reference to a geared payment based on a percentage (8.25%) of the overall rent of the completed scheme, but subject to a minimum rent per annum of either: (i) £305,000; or (ii) £400,000

if 8.25% of the rent at first letting is not less than £400,000. This minimum rent was then subject to periodic review every 20 years.

Conclusions

(1) Required procurement procedures when awarding contracts

39. EU law on public procurement is intended to eliminate barriers to the movement of business, labour, and capital within the EU, in the belief that a common market will improve overall economic welfare and growth. Restrictive procurement practices by public bodies (in particular, entering into contracts only with preferred domestic contractors) does not allow for fair competition between firms from other member states and may result in market distortions.

40. The Development Agreement was initially entered into by the Council on 22 December 2004. At that time, the relevant legislation was Council Directive 93/37/EEC ("the 1993 Directive") and the Public Works Contracts Regulations 1991 ("the 1991 Regulations") which applied to development agreements of this kind (Case C-220-05 *Aroux & Ors v Roanne* [2007] ECR I-00385).

41. "Public works contracts" were defined by Article 1(a) of the 1993 Directive to mean "contracts for pecuniary interest concluded in writing between a contractor and a contracting authority … which have as their object either the execution, or both the execution and design, of works related to one of the activities referred to in Annex II or a work defined in (c) below, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority." (Annex II listed various activities related to building and civil engineering work including demolition, construction of both residential and non-residential buildings, installation of fixtures and fittings, and building completion work).

42. A "public works concession contract" was defined by Article 1(d) of the 1993 Directive as being a contract of the same type as a public works contract "except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment."

43. Similarly, a "public works concession contract" was defined under the 1991 Regulations as "a public works contract under which the consideration given by the contracting authority consists of or includes the grant of a right to exploit the work or works to be carried out under the contract".

44. The Development Agreement could be categorised as a concession contract because it provided for the developer to be paid a majority share of the profits of the development, and to be granted a lease of the site under which tenants occupying the site would then pay rent to the developer.

45. The applicable requirements under the 1993 Directive in relation to a public works concession contract were contained in Articles 3(1), 11(3), 11(6)-(7), 11(9)-(13) and 15. The corresponding requirements under the 1991 Regulations were contained in Regulations 5, 25 and 30.

46. In summary, their effect was that:

    i) The Council was required to publish a notice in the Official Journal of the EU, in accordance with the model in Annex V of the Directive, specifying the following information (among other matters): Article 11(3) and (6) and Annex V of the Directive, and Regulation 25(2):

        a) the contact details of the Council including the address from which further information and documentation concerning the proposed public works concession contract could be obtained, and the address to which candidatures must be sent;

        b) a description of the concession contract to be awarded;

        c) the scope of the contract;

        d) the conditions for participation in the competition to be awarded the contract (including information relating to the bidder's legal position, and as to its economic, financial and technical capacity); and

        e) the award criteria for the contact.

47. The notice could not be published in the contracting authority's home press until it had been dispatched to the Official Journal. Any notice in the home press could not contain information other than that published in the Official Journal: Article 11(11) of the Directive and Regulation 30(4).

48. Contracting authorities had to fix a time limit for receipt of applications for the concession, not less than 52 days from the date of dispatch to the Official Journal: Article 15 of the Directive and Regulation 25(3).

49. Upon receipt of applications, the contracting authority was required to complete a tendering process in accordance with the published information. The detailed procedures under the Directive applicable to ordinary public works contracts did not apply, but the tendering process had to be compatible with Treaty principles of freedom of establishment and freedom to provide services, as well as those of equal treatment, non-discrimination and transparency.

50. The Council ought to have complied with the procurement requirements set out above, but did not do so, in reliance on mistaken legal advice. Instead it entered into an agreement with Thornfield Properties because it had a pre-existing commercial relationship with Stagecoach to redevelop its bus station on the site. No other contractors were considered. It is now too late to challenge the lawfulness of the Development Agreement on this basis.

51. The 1993 Directive was replaced by Directive 2004/18/EC and the 1991 Regulations were replaced by the Public Contracts Regulations 2006. In respect of public works concession contracts, the provisions were not materially different.

52. Under the 2004 Directive:

i) Article 2 requires that contracting authorities must treat economic operators equally and non-discriminatorily and must act in a transparent way.

ii) Article 58 (which also incorporates the requirements of Article 36(2)-(8)) provides for the form and manner of publication of notices in accordance with the requirements of Annex VII.

iii) Article 59 provides for the minimum 52 day time limit for the presentation of applications.

53. These requirements were transposed into domestic law by Regulations 36 and 42 of the 2006 Regulations.

(2) Variation of contracts – principles

54. Neither the 2004 Directive nor the 2006 Regulations made provision for variations to public works contracts. The 2004 Directive has now been replaced by Directive 2014/24/EU (26 February 2014). Article 72, headed "Modification of contracts during their term", sets out in paragraphs (1) and (2) the circumstances in which a new procurement procedure is not required for modifications of the provisions of a public contract, and provides that all other modifications do require a new procurement procedure (paragraph (5)).

55. However, as the 2014 Directive has not yet been implemented in the UK, it is agreed that the question whether or not the variations to the Development Agreement were so substantial as to require a new procurement procedure is to be determined by reference to the case law.

56. The leading textbook, *Arrowsmith: The Law of Public and Utilities Procurement* (3rd ed.), sets out the principles at paragraph 6.267 (footnotes omitted):

> "Another issue to consider is when a proposed extension, renewal or modification to an existing arrangement amounts to a new "contract" under the 2004 Public Sector Directive and Public Contract Regulations 2006. When this is the case a contracting authority may not simply place the work with the existing contracting party, but must award it using a new procedure under the directive/regulations. This issue is not currently dealt with by explicit provisions in the directive/regulations. However, the principle that amendments to an existing contract may be regarded as a new contract needing a new procedure has been established and elaborated in the case law of the CJ, most notably in the case of *Pressetext.*
>
> A key reason for this principle relates to the purpose of the legislation of ensuring that work is awarded in accordance with transparent procedures to prevent discrimination. If the contract awarded is later changed, there is a risk that such changes are made for discriminatory motives (for example, to award the firm more work or allow it to operate under easier terms) and

> that national firms, in collusion with the contracting authority or otherwise, may be able to obtain an advantage in the award procedure by tendering favourable terms in the expectation that they will be changed after conclusion of the contract. Changes to concluded contracts can also potentially undermine any policy that contracts should be undertaken by the best tenderer in order to develop the single market. If this is considered as an objective of the directive, rules to limit changes to concluded contracts are also appropriate from this perspective, on the basis that the existing contracting partner may not be the best firm to perform the revised contract. Changing a contract also potentially violates the equal treatment principle that can support such objectives. From a national perspective, changing a contract without a competition for the revised contract raises value-for-money issues as the change is made without considering whether other economic operators can offer value for money and without the terms being fixed under the pressure of competition."

57. The leading case is Case C-454/06 *Pressetext Nachrichtenagentur GmbH v. Republik Österreich* [2008] ECR I-4401. The CJEU held, at [31] to [38]:

> "31. It is clear from the case-law that the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening–up to undistorted competition in all the Member States (see Case 26/03 *Stadt Halle and RPL Lochau* [2005] ECR-1, paragraph 44). That two-fold objective is expressly set out in the second, sixth and twentieth recitals in the preamble to Directive 92/50.
>
> 32. In order to pursue that two-fold objective, Community law applies inter alia the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom (see, to that effect, Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR 1-8291, paragraph 31; Case C-324/98 *Telaustria and Telefonadress* [2000] ECR 1-10745, paragraphs 60 and 61; and Case C-496/99 *P Commission v CAS Succhi di Frutta* ECR 1-3801, paragraphs 109 and 109).
>
> 33. Directive 92/50 implements those principles and that obligation of transparency in respect of contracts coming within its ambit ….
>
> 34. In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original

> contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, to that effect, Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraphs 44 and 46).
>
> 35. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.
>
> 36. Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. This latter interpretation is confirmed in Article 11(3)(e) and (f) of Directive 92/50, which imposes, in respect of contracts concerning, either solely or for the most part, services listed in Annex I A thereto, restrictions on the extent to which contracting authorities may use the negotiated procedure for awarding services in addition to those covered by an initial contract.
>
> 37. An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.
>
> 38. It is in the light of the aforegoing considerations that the questions referred to the Court are to be answered."

58. Thus, the test to be applied is whether the variations to the contract "*are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract*" (paragraph 34). Any material difference has to be assessed by comparing the contract as originally entered into and the contract after variation.

59. The test in paragraph 34 may be satisfied in the circumstances set out in paragraphs 35 to 37. Paragraphs 35 to 37 provide illustrations of the application of the test set out in paragraph 34, and are not an exhaustive list. As Andrews J. said in *Edenred (UK Group) Ltd v HM Treasury & Ors* [2015] EWHC 90 (QB), at [119], these are "three examples of material variation". Both counsel submitted that they should be broadly interpreted, and not construed as if they were statutory provisions.

60. Both counsel agreed that the likelihood of other economic operators bidding for the contract, had it been advertised as amended, ought to be considered as part of the test in paragraph 34 of *Pressetext*, reflecting its underlying purpose of ensuring equal opportunity for economic operators. Both counsel agreed that the reference in paragraph 35 to "allowing" other tenderers to be admitted or tenders accepted should be broadly construed. It could include a range of possibilities, for example, where operators had been deterred from applying by the less favourable terms but were

interested in applying under the improved terms, or where threshold conditions had been relaxed, enabling more operators to qualify.

61. Contrary to Mr Elvin's submission, I consider that an increase in potential profitability for the economic operator can be a material variation for the purpose of the *Pressetext* test. Although paragraph 37 can be read as limited to the economic balance as between the contracting parties, where (as here) the court is considering a development contract or a concession contract, the commercial value will be judged by the potential profits to be obtained from third parties, not the awarding authority. The financial terms between the parties remain relevant but they are not the only consideration.

62. Mr Elvin submitted that, in order to succeed, the Claimant had to identify other economic operators who would have wished to bid for the contract, and would have had a realistic prospect of success. He pointed to the use of the "would" in paragraph 35 of *Pressetext* rather than "might". He also relied upon the judgment of Andrews J. in *Edenred*, at [128]:

> "There is much to be said for the approach taken by Coulson J. [*in AG Quidnet Hounslow LLP v Hounslow LBC [2012] EWHC 2639 (TCC)*] of requiring evidence that someone beside the original bidders would have bid for the contract, because the EU procurement rules are designed to protect against real, not hypothetical distortion of competition. However, I do not need to decide the point, because even if one approaches the question on the basis that a hypothetical bidder has been shut out of the bidding process by the absence of reference to the subject-matter of the proposed amendment, it seems to me that in principle that must necessarily be a realistic hypothetical bidder – i.e. the evidence must demonstrate that there would be someone else who would have been ready, willing and able to bid and who would have wished to have done so if the opportunity had been made clear, but who did not do so because it was not."

63. Andrews J found, at [17], that there had been "a fair and transparent public procurement process" about which no complaint had been made. She was able to analyse the bids and conclude, on the evidence, that none of the unsuccessful bidders would have been successful if the additional services had been advertised and no other entity would have been attracted to make a bid.

64. Mr Palmer did not object to the requirement of a "realistic hypothetical bidder" but he submitted that *Pressetext* and other CJEU cases on the procurement Directives did not require firm evidence of an alternative potential bidder in order to satisfy the test in paragraph 34 of *Pressetext*. In my view, Mr Palmer's analysis is correct.

65. I also accept Mr Palmer's submission that *Quidnet*, Case C-108/98 *RISAN Srl v Commune di Ishia* [1999] ECR 1-5219 and Case C-245-09 *Omalet* [2010] ECR 1-13771 were addressing a different issue, namely, whether EU law was engaged because of cross-border interest. In the absence of cross-border interest, EU law would not be applicable. In *Omalet*, the CJEU confirmed, at [12]:

> "It is settled case-law that the Treaty provisions relating to the freedom to provide services do not apply to situations where all the relevant facts are confined within a single Member State (see, inter alia, Case C-108/98 RISAN [1999] ECR I-5219, paragraph 23, and Case C-97/98 Jagerskiold [1999] ECR 1-7319, paragraph 42).

66. In those cases, the Court was addressing a jurisdictional question, on which it may well have been appropriate to require proof of actual cross-border interest. In contrast, in this case, no jurisdictional issue arises. EU public procurement law is applicable and the Defendant is under a duty to conduct a fair, open and transparent procurement process if the varied terms are materially different.

67. I agree with Mr Palmer's submission that Andrews J.'s approach to the evidence reflected the particular facts in *Edenred*, where there had recently been a full tendering process and so the unsuccessful bidders and those who had expressed an initial interest could all be identified. The Claimant in this case is in a more difficult position, as no tendering process has ever been carried out, and so he cannot identify any actual or potential bidders who were deterred or disadvantaged. The requirement suggested by Mr Elvin would have the undesirable consequence of placing a Defendant who fails to comply with any procurement requirements in a better position than one who does.

68. In *R (Law Society) v Legal Services Commission* [2007] EWCA Civ 1264, the Court of Appeal was concerned with legal aid contracts which had been awarded by the Legal Services Commission to solicitors without a competitive bidding process. The Court concluded that the contract did not meet the requirements of transparency under the 2004 Directive and the 2006 Regulations. Lord Phillips LC said, at [80]:

> "We consider that the principle of transparency will not be satisfied in the present context if uncertainty as to the nature and effect of the amendments that may be made deters, or is liable to deter, some potential service providers from entering into the contract."

Thus, the court made its assessment, at least in part, on the basis that the amendments deterred or were liable to deter potential service providers.

69. In my judgment, the task of the court is to apply the test in *Pressetext* on the evidence before it. Evidence of actual or potential bidders may assist but it is not a pre-requisite. Here the Claimant relies on evidence of the commercial appeal of this development contract to potential developers, and the significantly more favourable terms offered in 2014, compared with 2004. In my judgment, the Claimant has to satisfy the Court, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract, had it been advertised, but he is not required to identify actual potential bidders.

(3) The variations to this contract

70. The evidence demonstrates that the variations to the Development Agreement contract were made because the Council accepted the Developer's representations that the project was not viable on the original contractual terms, and therefore it would not proceed. It is evident that, in order to save the project, the parties did re-negotiate the terms of the contract. Although I recognise that the subject-matter of the contract remains the same, in my view, the varied contract is materially different in character to the original contract. The most significant difference is that, overall, the varied contract is considered by the contracting parties to be viable for the Developer, whereas they consider the original contract to be unviable.

71. Mr Owen, partner at Deloitte LLP, said in his 1st witness statement at paragraph 17:

> "In common with some other schemes that were being progressed at the time, Thornfield had not reached the point of being able to implement the [Development Agreement] as the global financial crisis emerged in 2007-08. As a consequence of this crisis and the recession that followed in the UK, the market for retail-led developments such as Silver Hill weakened significantly, making it difficult for developers to attract tenants or funding for their schemes. Despite efforts by the Council and Thornfield to progress the scheme, it became clear that Silver Hill was unlikely to be delivered in the prevailing market."

72. Thornfield then went into administration in 2010 and Henderson purchased Thornfield from the administrator.

73. In 2014, Deloitte was instructed by the Council (in its role as party to the Development Agreement and landowner) to consider Henderson's proposals to vary the terms of the Development Agreement. Mr Owen said:

> "24. In order to fully understand these changes we had discussions with Henderson and its team of advisors. As part of these discussions we explored the changes to the scheme and the reasons for them, as well as the proposed changes to the financial terms and the implications of these changes.
>
> 25. From these discussions and our own understanding of the market, we were satisfied that the changes that were proposed in terms of the elements of the development were, in commercial development terms, an appropriate up-dating of what was by that time a scheme that had its design origins some 10 years earlier…..We agreed with the view of the developer that the scheme would not be likely to be viable (i.e. achieve more than the 10% threshold return) without the changes that were proposed and would therefore not proceed."

74. The variation proposals were formally set out in a letter from Henderson dated 12 June 2014 which referred to the negotiations which had already been taking place for

months with Council officers. They were agreed by the Council in a series of decisions which I have set out in the 'Facts' above.

75. The terms in Schedule 3, which provided for a division of profits between the Council and the Developer, were unchanged and the minimum rent payable by the Developer was increased to reflect enlargement of the Site. However, the unprofitable elements of the contract were largely removed, and the Developer gained a much improved opportunity to increase its return, and thus its profit. A key point was made by Mr Gillington, a chartered surveyor and valuer instructed by the Claimant, when he said, at paragraph 22 of his witness statement:

> "even if the [percentage] return intended to be achieved by the Developer does not change …, the *actual* profit that would be achieved would be significantly higher in absolute terms as a consequence of the changes."

76. I turn now to compare the original contract terms with the varied terms.

The bus station and additional retail space

77. A significant change in circumstances, leading to re-negotiation of the contract terms, was that Stagecoach, the bus company, decided that it was no longer a justifiable business expense to operate a bus station in the town centre "in the commercial and operating environment which now prevails" (witness statement of Mr Tilbury, paragraph 39).

78. Under the original contract, the existing bus station was to be demolished and replaced with a new bus station (re-labelled as a "bus passenger interchange") in a different location within the Site. Construction of a new bus station by the Developer was a "Required Element" under clause 5.3. A minimum of 12 x 12 metre bus bays and 3 layover bays were required. It had to incorporate high quality passenger facilities, including toilets, waiting space, information and ticketing, public refreshment, weather protection for passengers, disabled access, facilities for drivers and operational staff, clear separation of vehicle and pedestrian areas and set down and pick up facilities for taxis. It also had to provide for scheduled coach services such as National Express.

79. On completion the Developer was required to hand the bus station back to the Council, by transferring the freehold or granting a long lease at peppercorn rent. The Council would manage the facility with the bus company, and receive income from user charges.

80. Under the varied terms, the Developer will still have to demolish the existing bus station but it will no longer have to pay for the construction of a new bus station. Instead it will bear the reduced cost of providing bus stops and bays in the streets, with ticket and mess facilities alongside.

81. The bus station would have been non-profit making for the Developer. Now, that site has become available for profit-making retail use instead. The proposal is for a department store, occupying some 59,741 square feet. The limit in clause 5.1.3.2(f),

limiting the size of any one shop unit to 30,000 square feet, has been amended to allow for one shop of up to 60,000 square feet. This new retail space will result in a total provision of 147,514 square feet – more than 50 percent over what was previously proposed and envisaged to be capable of accommodation on the site. Mr Gillington notes that the rent per square foot for a large store will be less than for a smaller unit, but considers that the net economic benefit for the Developer, after deduction of costs and rental, will be about £7 million. He explains that the inclusion of an 'anchor' store is likely to have a positive economic benefit by increasing the attractiveness of the other retail units to retailers leading to higher retail rents and faster letting. In his second witness statement, Mr Owen disputes Mr Gillington's estimate of the value to the Developer, and concludes that the construction costs and tenant incentives will result in a negative outcome for the Developer. Mr Owen does not provide any alternative figures.

82. In my judgment, a significant increase in the volume of potential retail space is very likely to add value to the contract for the Developer over time. Even if Mr Gillington's figures are too high, I cannot accept that there will be no benefit for the Developer. The Developer has made a commercial decision to develop a large 'anchor' store. If that is not a viable commercial option, then the Developer can, and no doubt will, consider other retail uses which would provide a better return. There is no evidence to suggest that this prime site will not be capable of being let.

83. Overall, I consider that, had this variation been in place in 2004, the contract would have been of significantly greater commercial value to potential bidders. A potential bidder could not have anticipated this change; nor was it anticipated or provided for in the contract. In my view, this is a major change to the contract.

Affordable Housing

84. The Development Brief stated that "a significant residential component is expected to be included in any development". Mr Gillington's evidence is that the overall area of the residential units is 166,866 square feet. In the original contract, it was a "Required Element" that 35% affordable housing should be provided, and not less than 15% of the Affordable Housing (or if greater 20 such units) should be Social Rented Housing. Mr Gillington assesses the 35% affordable housing to equate to 58,403 square feet.

85. The sale or rental price of affordable housing is capped at a percentage of market rate, and so provides a significantly lower return to the developer than housing which can be let or sold at market prices. A potential bidder deciding whether or not to tender for the contract would have factored the lower return in to its calculations assessing its costs, and the likely viability and risks of the scheme.

86. I do not consider that a potential bidder would have assumed that this requirement could be varied at a future date to improve his return. There was no provision in the Development Agreement to that effect; nor was the obligation to provide affordable housing expressed to be subject to any change in planning policy.

87. By its decision of 6 August 2014, the Council decided not to require any affordable housing at all in its capacity as landowner. It amended the requirement in respect of affordable housing "so that the affordable housing provision be that which shall be

determined by the Planning Committee based on the current and future viability of the scheme".

88. Subsequently, the Planning Committee resolved, on 11 December 2014, to grant planning permission, following the offer of the developer (to be contained in a section 106 agreement) to provide:

    i) a "voluntary" offer of the sum of £1 million towards affordable housing off site; and

    ii) the possibility (under a "claw-back review mechanism") of up to a further £1 million of surplus profit generated if the scheme produces a return in excess of 15% profit on cost, i.e. the first £1 million profit after the 15% threshold is passed (if it is).

89. The Council agreed to this substantial variation of the original terms because it accepted the developer's claim that the scheme would not be viable if the obligation to provide affordable housing was maintained. Mr Owen said (1st witness statement, paragraph 29) that the inclusion of the affordable housing requirement "*would reduce the viability of the scheme such that it was unlikely to achieve the 10% threshold return, and would therefore [be] unlikely to be delivered.*"

90. The "voluntary" sum of £1 million offered by the developer was not taken into account by the Planning Committee in its deliberation as to whether to grant planning permission, as it accepted that it was not necessary to provide any affordable housing at the site or require the provision of any affordable housing contribution (see the officer report to committee at paragraphs 20.20, 20.25-26 and 20.36). Instead, only the claw-back review mechanism was taken into account.

91. Deloitte had provided a viability assessment on 3 December 2014 which made clear that the possibility of receipt of the further maximum contribution of £1 million was contingent upon future growth in residential values, above and beyond future growth in costs. There was no guarantee of any further sum being paid.

92. Even taken at its highest (i.e. assuming an ultimate contribution of £2 million), this offer fell substantially below the commuted sum of £6,442,800 which would be payable in respect of a 35% affordable housing requirement (based on Deloitte's calculation that £7,363,200 would be payable were the developer to provide a financial contribution in lieu of 40% affordable housing). However profitable the scheme proves to be, there is now no prospect of the Developer being obliged to provide the equivalent of a 35% affordable housing contribution, even by way of commuted sum.

93. Without the new clawback mechanism, the Council would have received 50% of the first £1 million profit above the 15% threshold in any event. So the Council is, in effect, funding half of the cost of the payment clawback review mechanism in any event, as it has acknowledged.

94. Mr Gillington assesses this variation to represent a net economic benefit of £11 million to the Developer. Mr Owen disputes Mr Gillington's figures, without providing any alternative estimate. I am not able to resolve that difference of view,

but overall, I consider that, had this variation been in place in 2004, the contract would have been of significantly greater commercial value to potential bidders. In my view this is a major change to the contract. The variation is a material one.

95. Mr Elvin submitted that the variation of the affordable housing terms was a result of "requirements" imposed by the planning authority, within the meaning of variation clause 5.1.3.2. I do not accept this submission. It is correct that provision of residential accommodation, including affordable housing, is part of planning policy, at national and local level, and this was reflected in the Council's original requirements for this scheme. However, planning permission was granted for the scheme in 2009, on the basis of the housing provision in the original contract. There was no requirement from the planning authority to vary it in 2014. The reason for varying (i.e. reducing) the level of affordable housing was the wish to make the project more profitable for the Developer. The Council's Cabinet approved this variation but the full Council asked it to re-consider. Cabinet then resolved that the terms relating to affordable housing should be decided by the Planning Committee, having regard to the viability of the scheme. On receiving representations from the Developer, the Planning Committee duly reduced the affordable housing requirement. It was able to do so because, inter alia, the National Planning Policy Framework provides, at paragraph 173, that overly onerous obligations which threaten viability should not be imposed on developers. However, the initiative to vary the housing terms in the contract was not as a result of any "requirements" imposed by the planning authority, as provided for in clause 5.1.3.2. These terms were not varied at the behest of the planning authority. In reality, the position was that the Developer negotiated a reduction in the affordable housing requirements with the Council, both in its capacity as contracting party and as planning authority.

Reduction in provision for civic uses

96. Clause 5.3.1 of the Development Agreement provided that the following civic amenities were "required elements" in the contract. They included:

    i) a civic square;

    ii) premises for and the re-provision of the Council's CCTV equipment;

    iii) premises for shop mobility and Dial-a-Ride service;

    iv) an area for the relocation of the daily Middle Brook Street market and the Farmers' Market including re-provision of the market store and waste compactor.

97. A potential bidder deciding whether or not to tender for the contract would have factored in these costs to its bid. As civil amenities, they would not generate any profit for the developer. As they were "required elements", I do not consider that a potential bidder would have assumed that these requirements could or would be varied.

98. However, in 2014, at the request of the Developer, the requirements to provide premises for shop mobility, Dial-a-Ride and CCTV were deleted from the Development Agreement.

99. As to the market, in an earlier variation to the Development Agreement, in 2009, it was agreed that the market would be relocated off site, on the street Broadway. The revised 2009 plans showed just a small number of stalls still potentially located on site in Silver Hill Square.

100. In 2014, the Developer requested and was granted a further variation to remove the requirement to provide a market store on site. Presumably it would no longer be required as the market had been relocated.

101. The variations of the contract to remove the requirements to fund unprofitable civic amenities, if in place in 2004, would have provided an economic benefit to potential bidders beyond the original contract. In my view, they are material variations to the original terms which could not have been anticipated by potential bidders.

Additional site

102. The site identified in the 2004 contract has been enlarged by the addition of a Council property at 153 High Street. Deloitte (report of 4 July 2014) calculated that the addition of the property to the scheme would justify an increase in the minimum rent payable to the Council from 7.56% to 8.62%. In the event 8.25% was agreed. Mr Gillington observes that the Council was willing to agree to a rental at below the market rate, to benefit the Developer. I do not agree with the Council's submission that, in view of the increased rent, this additional site was of no economic benefit to the Developer. I note that it was Henderson who initiated the negotiations to gain this site, presumably believing it to be advantageous to do so. In my view, the enlargement of the site, providing the commercial opportunity of additional retail space, is a material variation to the original contract which, if in place in 2004, would have provided an economic benefit to potential bidders, beyond the original contract. It could not have been anticipated by potential bidders.

Revised contracting arrangements for construction works

103. Clause 6.1.2 of the Development Agreement provided that the Developer should invite competitive tenders from at least three of various building contractors listed in Schedule 5 in respect of the Development Works.

104. While clause 21.5 also provided that the Developer may (in consultation with the Council on an open book basis and subject to obtaining the previous consent of the Council such consent not to be unreasonably withheld) enter into a joint venture or appoint a sub-developer in relation to the residential elements of the Development Scheme, that freedom did not extend to the remaining elements of the scheme (including retail in particular), which would have to be procured by competitive tender.

105. The varied terms allow the Developer to be authorised to procure the construction of the whole scheme (retail as well as residential) by a construction company with a house building subsidiary, without competitive tender. Mr Gillington explains in his evidence that these more flexible terms would allow the Developer to offset risk by bringing in a joint venture partner to deliver the residential development and take on the construction and sales risk of the scheme.

106. I accept that this is a material variation to the original contract which, if in place in 2004, would have provided an economic benefit to potential bidders, although I consider it is too speculative to quantify.

Extension to long-stop date

107. Paragraph 15.2 of Schedule 2 to the Development Agreement provided for a right of termination in the event that any of the Schedule 2 conditions had not been discharged (or waived) by a long stop date defined as being 5 years from the date of the Development Agreement (i.e. 22 December 2009).

108. A bidder in 2004 would have been aware that the Development Agreement required the development to become "unconditional" within 5 years, failing which the Council would be able to terminate the agreement at its option. That would have been assessed by any bidder as a risk. Substantial costs would be incurred in preparation of such a development, but which would be lost in the event of termination.

109. In 2010, the Council entered into an agreement with the Developer not to exercise the right to terminate prior to August 2014. In January 2014, it entered into a further agreement with the Developer not to exercise the right to terminate prior to June 2015.

110. I accept that these extensions have benefited the Developer, giving it additional time to progress the development, whilst retaining the opportunity to recover the historic costs incurred prior to 2010, which are in excess of £5.4 million. However, these were not variations of the termination clause in the contract, which has not been amended. The Council had an option to terminate under the contract and it was entitled not to exercise that option, on such terms as it saw fit. Although such an option could be abused and used as a device to sidestep a procurement process, there is insufficient evidence on which to conclude that was the Council's motive for the extensions in this case.

(4)Variation clause in the original contract

111. Mr Elvin submitted that the fact that the variations were made in accordance with a variation clause in the Development Agreement was a strong indication that no further procurement process was required.

112. The effect of variation clauses in the contract has been considered by the CJEU.

113. In Case C-91/08 *Wall AG v Stadt Frankfurt am Main* [2010] ECR 1-2815, the City of Frankfurt ("Frankfurt") held a procurement process for a 16 year concession for the construction, operation and maintenance of public lavatories. The contract was

awarded to FES, a company 51 percent owned by Frankfurt. It provided that the lavatories would be provided by an experienced sub-contractor, Wall, and that Wall would market advertising space. After the contract was awarded, Frankfurt consented to FES changing its sub-contractor, under a clause allowing a change of sub-contractor, and Wall was entirely excluded.

114. The CJEU held that the variations were materially different in character and demonstrated the intention of the parties to renegotiate the essential terms. It said:

> "39. A change of sub-contractor, even if the possibility of change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain.
>
> 40. The referring court observes that in the concept annexed to the offer submitted to the City of Frankfurt by FES, FES stated that it would use City-WCs from Wall. According to the referring court, it is likely that in that case the concession was awarded to FES because of the identity of the subcontractor it had introduced."

115. *Wall* demonstrates that, even where a variation is expressly provided for in the original contract, nonetheless a fresh procurement process will be required if the variation goes to a 'decisive factor' in the award of the contract. The Court acknowledged that it was "exceptional" for the identity of the subcontractor to be a decisive factor. The decision in *Wall* also illustrates the more general point made by Arrowsmith at 6-280:

> "a change cannot be permitted merely because it is contemplated in the contract in advance – that would provide *carte blanche* to avoid the constraints of the Directive by amending or extending any contract as soon as it is concluded by including a general clause that provides for adjustment of obligations by mutual agreement."

116. In Case 496/00 *Commission v CAS Succhi di Frutta* [2004] ECR 1-3801, a procurement process, held by the European Commission for the supply of fruit products as food aid, provided for payment in the form of apples and oranges. After the contract was awarded the terms were varied to provide for payment in peaches. The CJEU said:

> "110 Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers

must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions.

111 The principle of transparency which is its corollary is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.

…

116 Although, therefore, any tender which does not comply with the specified conditions must, obviously, be rejected, the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender.

117 Consequently, in a situation such as that arising here, the contracting authority could not, once the contract had been awarded and, moreover, by a decision which derogates in its substance from the provisions of the earlier regulations, amend a significant condition of the invitation to tender such as the condition relating to the arrangements governing payment for the products to be supplied.

118 Should the contracting authority wish, for specific reasons, to be able to amend some conditions of the invitation to tender, after the successful tenderer has been selected, it is required expressly to provide for that possibility, as well as for the relevant detailed rules, in the notice of invitation to tender which has been drawn up by the authority itself and defines the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulation their respective tenders.

119 Furthermore, if such a possibility is not expressly provided for, but the contracting authority intend, after the contract

> has been awarded, to derogate from one of the essential conditions specified, it cannot legitimately continue with the procedure by applying conditions other than those originally specified.
>
> 120 If, when the contract was being performed, the contracting authority was authorised to amend at will the very conditions of the invitation to tender, where there was no express authorisation to that effect in the relevant provisions, the terms governing the award of the contract, as originally laid down, would be distorted.
>
> 121 Furthermore, a practice of that kind would inevitably lead to infringement of the principles of transparency and equal treatment as between tenderers since the uniform application of the conditions of the invitation to tender and the objectivity of the procedure would no loner be guaranteed.
>
> 122 In this case, it is established that, once the contract had been awarded, the Commission replaced the fruit specified in the notice of invitation to tender with other fruit as the means of payment for the fruit to be supplied by the successful tenderer, although no such substitution was provided for either in that notice or in the relevant legislation on which that notice was based.
>
> …
>
> 126 Moreover, as the Court of First Instance expressly held at paragraph 81 of the contested judgment, the Commission could, if necessary, have made provision, in the notice of invitation to tender, for the possibility of amending the conditions for payment of the successful tenderers in certain circumstances by laying down in particular the precise arrangements for any substitution of other fruit for that expressly prescribed as payment for the supplies at issue. In that way, the principles of equal treatment and transparency would have been fully observed."

117. *Pressetext* provides example of variations which were provided for in the original contract. The adjustment to a rebate rate was within the ambit of the original contractual terms (at [81] – [84]) and an updating price index had been specifically provided for in the original contract (at [68]).

118. Similarly, in Case C-337/98 *Commission v France* [2000] ECR I-8377, the CJEU found that the increase in price was a result of the application of the formula for the revision of prices contained in the original contract, indicating a continuation of the contract rather than a re-negotiation of its terms (at [53]).

119. In contrast, the general power of amendment in the legal aid contract considered by the Court of Appeal in *R (Law Society) v Legal Services Commission* [2007] EWCA Civ 1264 did not satisfy the requirement of transparency. Lord Phillips CJ said:

> "29. The Law Society and Dexter Montague accept that the principle of transparency does not prevent a contracting authority from reserving a right to amend the terms of the contract. But if the contracting authority wishes to reserve such a right, not only must all those who may be interested in the contract be informed of that possibility, but they must also be informed of "the detailed rules" governing its exercise (Case 496/00 *Commission v CAS Succhi di Frutta* [2004] ECR 1-3801, at [111], [118]) so that "the subject-matter of [the] contract [is] clearly defined" (Case C-340/02 Commission v France [2004] ECR 1-9845, at [34]).
>
> 30. The obligation of transparency is not satisfied here. The contract contains general and unlimited powers of amendment. It is not sufficient for the LSC to satisfy the obligation of transparency simply by virtue of the fact that the power of amendment is limited by public law limitations …
>
> 31. Nor is it sufficient for the LSC to satisfy the obligation of transparency by reference to the knowledge of solicitors as to the general parameters of reform which may be likely in the future… "

120. The material parts of the variation clause in this case are set out at paragraph 15 above. Variations required the approval of the Council, and applications for variation had to be accompanied by a statement of the effect of the variation on the projected rental income (Clause 5.1.2), indicating that was a relevant factor for the Council to take into account in deciding whether or not to grant approval.

121. In relation to the "Required Elements" of the contract, Clause 5.1.3.1 gave the Council an absolute discretion whether or not to grant approval. There was no indication of what changes might or might not be accepted or on what basis.

122. In relation to the important matters listed in Clause 5.1.3.2, the Council also had an absolute discretion whether or not to grant approval, without any indication of what changes might or might not be accepted, or on what basis. Save that, where the variations arose due to the requirements of the local planning authority, the Council was not to unreasonably withhold its approval, and a dispute could be referred to independent determination.

123. In relation to any other matters, the approval of the Council was not to be unreasonably withheld or delayed (Clause 5.1.3.3).

124. In my judgment, the variation clause was so broad and unspecific that it did not meet the requirement of transparency, as set out in *CAS Succhi di Frutta* at [111]. It did not provide the information which an economic operator would need in order to assess the potential scope for variations when tendering, contrary to paragraph [118] of *CAS*

Succhi di Frutta. At best, a potential bidder would only know that applications could be made to the Council for variations and that the effect of any variation on rental income would be a relevant factor.

125. The provision for variation, pursuant to the requirements of the planning authority, which are unknown at the time of bidding, cannot be used as "*carte blanche* to avoid the constraints of the Directive", adopting Arrowsmith's phrase. In theory, on an application for planning permission, highly significant changes to the contract might be required. For example, a change to the size and location of the development site, the permissible number of buildings, or further obligations to fund infrastructure and local public services. The *Pressetext* principle would have to be applied in such cases.

126. The opportunity, under Clause 5.1.3.4, to refer any dispute to independent determination, in accordance with Clause 23, does not assist the Defendant. Under Clause 23.2.1, the determination of a dispute as the rights and liabilities of the parties and the terms and conditions of the contract by leading counsel specialising in property law would have little bearing on a clause giving the Council absolute discretion to withhold approval.

(5) The likelihood of realistic bids from other economic operators

127. In my judgment there is evidence upon which the Court can properly conclude that other potential bidders, with a realistic prospect of success, would have bid for this contract, if the opportunity had arisen.

128. The issue is not, as the Defendant suggests in its evidence and its submissions, whether or not any other bidder would offer more favourable terms to the Council. The purpose of the procurement regime is to ensure open competition, not to secure the most favourable terms for the public authority.

129. The commercial appeal of the project was explored in detail at the CPO Inquiry, where a key issue was its viability. In his written evidence to the Inquiry, Mr Tilbury said that Winchester was "*a prosperous and successful small city*" with excellent communication links for commuters. He added that the city was "*an attractive location for investment*" and has focussed on a strong town centre retail and commercial environment, resisting significant out of town retail provision.

130. Mr Perry, Director of Retail Development for Henderson, made a witness statement on 6 June 2012 in which he described Henderson's expertise and experience in a range of large and small retail development projects across the UK. He went on to say:

> "7.1. Henderson are investment managers and act on behalf of their clients as research led property investors in seeking opportunities to achieve returns in excess of the market benchmark. The property investment staff are supported by a dedicated research team which monitor retail and business locations throughout the UK and internationally to advise the investment staff and investors … as to appropriate location and

timing for investment in retail, food retail and business space …

7.2. Henderson were attracted to the retail investment opportunity in Winchester by the strong demographic catchment and the quality and resilience of the city centre offer throughout its recent history. Good access for pedestrians, car and public transport, availability of car parking, strong retailer demand and prominence are all factors that are sought out to ensure a highly desirable investment opportunity. The additional benefit of substantial tourist spend is also a significant factor in the investment selection.

7.3. The opportunity to secure a significant investment opportunity within the centre of an historic cathedral city is rare and often needs to be accessed via a comprehensive property development route….

….

8.3. Henderson produces retail property market forecasts for some 120 sample locations across the UK (including Winchester) with the outlook ranging quite widely to reflect those markets that Henderson believe will prove most robust or fragile…

….

9.1. As a retail destination Winchester benefits from strong local catchment demographics, plus a significant tourist boost to shopping spend. The City dominates its local catchment with very little supply outside of the city centre. Vacancy rates in Winchester are low compared to the national average and reported retailer requirements are high. In terms of requirements as a proportion of existing space, Winchester is one of the most sought after destinations in the UK.

9.2. Henderson's internal research team forecast prime rental growth in Winchester to average 2.9% per annum over the next five years. This compares favourably to the average prime town forecasts of about 0% per annum…. Henderson forecast total returns for prime Winchester shops to average 9% per annum over the next five years, well ahead of the UK retail average.

9.3. Recent independent research by Javelin, released in April 2012 takes a geographical approach to assessing the risk profile of the UK retail market…..Under Javelin's regional town classification, Winchester is reported to be the fourth most robust (after Richmond, St Albans and Putney) supporting the Henderson favourable rental growth outlook for the city.

9.4. Similar research by Colliers in 2011 classified town using a series of risk indicators. Again, Winchester falls into their "Thriving" category, meaning it is likely to be among the best performing retail locations in the UK over the medium term.

….

9.7. Whilst research is always the backbone of investment decision made on behalf of clients of Henderson, it should be supported by evidence of known requirements and transactions for retail space. Henderson … contacted the acquisition teams for national retailers who were absent or under represented within the city, providing them with an understanding of the consented scheme's design and space configuration. The response was overwhelming with significant interest amounting to a requirement for three times the amount of space that could be provided which is quite remarkable considering the challenging retail market in the UK at the current time.

9.8. Recent transactional evidence of a prime shop unit on the High Street which has come to the market as a result of company liquidation attracted rental offers of around 10% above its current rental level.

9.9. Retail demand for space in the city remains consistently strong with many known retailers actively seeking space but with no suitable units available within the core. Most of the retail space within the core is in historic buildings which generally fail to meet modern retailers trading requirements. This has limited the normal retailers in the city … with many known high street brands being completely absent. When these retailers have been approached they state their absence is because the space and configuration is simply not available, leaving them with no choice other than to locate in competing out of town or neighbouring town and city centres. This is clearly detrimental to the trading performance of Winchester as a whole.

….

10.1. Henderson has appointed Savills to advise on the residential market demand for the residential content of the development.

10.2 …Savills Summer 2011 regional update .. shows that the south of England is expected to see the strongest levels of house price growth over the next five years ….

10.3. The Winchester market has proved the most robust in the wider area over the downturn with high demand from the local market and interest from London commuters ..

> 10.4. … The proposed development provides conventional flats, duplex and triplex properties to meet the known market demand for town centre residential.
>
> 10.5. Value growth in Winchester has consistently bettered the national average …"

131. Mr Perry's evidence was accepted by the Defendant and by the Inspector. Once the compulsory purchase order was made, Henderson informed the Defendant that they needed to secure more favourable contractual terms in order to make the project viable for them. The reasons for this change of stance are not clear. I note the Claimant's observation (3rd witness statement paragraph 26) that the Defendant did not want to change any aspect of the scheme prior to the CPO Inquiry, since it was concerned about a potential legal challenge on its failure to comply with the procurement regime by a rival developer, London & Henley, an owner of substantial parts of the site which were the subject of the CPO. A settlement was apparently reached with London & Henley. As I have not heard or seen all the evidence relating to this issue, I am not able to make any firm findings. However, there is no evidence to suggest that Henderson's assessment of Winchester's thriving retail and housing market, as set out in Mr Perry's statement, is either unreliable or has materially changed.

132. The Claimant, in his 3rd witness statement, provides some updating information:

> "16. … As every industry practitioner would confirm, the property market has recovered from the recession and has performed strongly over the last two years. I quote from the Deloitte Property IQ Q4 2014 report which says, *"2014 was an outstanding year for UK commercial property. The latest monthly IPD figures show annual total returns have climbed to 20%, a level not seen over the last 20 years. To date, around £46 billion has been invested in the market this year, one of the highest totals ever."* The residential market is in robust form too, and the common experience of new residential developments in Winchester is that they are often entirely sold prior to completion."

133. I appreciate that this evidence all post-dates 2004, the date at which the original contract was entered into. According to Mr Owen, the terms of the Development Agreement in 2004 were *"fairly typical of the sort of arrangements that were being agreed in the market as it then existed"* though the 10% minimum return to the developer was at the lower end of the likely range (1st witness statement, paragraph 15). In my view, the key features which make Winchester a thriving City, as identified by Mr Tilbury and Mr Perry, have not changed. The varied terms of the contract are considerably more favourable to the developer than the original terms in 2004. On the basis of the evidence before me, I am satisfied that the contract as varied would have been an attractive commercial opportunity for other potential bidders, in 2004.

134. The Claimant cannot point to any other actual bidders because the contract was not advertised nor open to other offers. Mr Tilbury said in his 1st witness statement,

paragraphs 5 and 6, that only Henderson and one other company expressed interest to the administrator in purchasing Thornfield in 2010. However, at that time there had just been a global financial crisis, followed by a recession in the UK and the market for retail-led developments had weakened significantly. Therefore I do not consider that this is an indicator of the likely level of commercial interest in 2004, which was well before the global financial crisis.

135. In my view it is probable that there are other companies with the capacity, funding and expertise to bid for a major development such as this. In 2014, the Claimant made initial enquiries of a number of major companies, although he has not been in a position to provide them with confidential details. However, the Silver Hill scheme is known in the industry and has been the subject of press articles. Persimmon, Crest Nicholson, Kier Property, Helical Bar, Galliard Group, Bride Hall Group, Berkeley Group, Salmon Harvester and Citygrove Securities plc have all expressed positive interest in working with the Council on this development. It seems likely that companies such as these would also have expressed interest in this contract in 2004.

136. I am unable to accept the assertion by the Council that no other bidder would be likely to express an interest, which I consider is contrary to the balance of the evidence, both in relation to the desirability of Winchester as a commercial opportunity and the existence of other developers able to undertake a major city centre development project.

137. In the light of all the evidence, I am satisfied, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract (as varied), had it been advertised.

(6) Application of the *Pressetext* principles to this case

138. For the reasons I have set out above, I consider that the variations to the contract in 2014, taken as a whole, resulted in a contract which was materially different in character, such as to demonstrate the intention of the parties to re-negotiate the essential terms of the contract (applying the test in paragraph 34 of *Pressetext*).

139. There were extensive negotiations between the parties, varying many of the terms. The fundamental change which the parties intended to achieve was to increase the potential profit to the Developer so as to make the scheme viable (i.e. achieve more than the 10% threshold return). Both parties believed that the original contract was no longer viable.

140. The removal of the requirements to provide 35% ‘affordable housing’ and civic amenities reduced the Developer’s costs and increased its potential profit margins. The removal of the requirement to sub-contract to listed building contractors, using competitive tendering, was a commercial benefit. The extension of the Site by the addition of another property, and the 50% plus increase in retail space in place of a bus station, increased the Developer’s potential profits, even taking into account increased rental, construction costs etc. The fact that it was a third party, Stagecoach, which decided that it no longer wanted to incur the running costs of a bus station, has no bearing on the test to be applied under *Pressetext*.

141. Although the subject-matter of the contract has remained the same, the terms have become a significantly more attractive commercial proposition for a potential bidder. As I have already indicated, in a concession contract, economic benefit is not to be assessed just on the basis of the financial terms between the Council and the Developer, but also on potential profits from third party contracts. If there had been a procurement process in 2004, I am satisfied, on the balance of probabilities, that the more favourable terms would have enabled other realistic bidders to bid, because of the reduced costs and increased opportunity for profit.

142. Therefore, I conclude that the Council's decision to authorise variations to the Development Agreement, without carrying out a procurement process as required by Directive 2004/18/EC and the Public Contracts Regulations 2006, was unlawful.

(7) Discretion to refuse relief

143. The Council submits that the court ought to refuse a remedy in the exercise of its discretion because:

i) No useful purpose would be served by quashing the decision given independent expert evidence to the effect that the Development Agreement as varied represents "a good deal" for the Council which would be better than any developer in the market would be likely to offer; and

ii) The Claimant (a non-economic operator) has no interest in the observance of the public procurement regime.

144. Counsel referred me to *Berkeley* [2001] 2 AC 603, *Walton v Scottish Ministers* [2013] PTSR 51, *Edenred* (supra), *R v. Department of Transport, ex p Presvac Engineering Ltd* (1992) 4 Admin L.R. 121 and *R v. Criminal Injuries Compensation Board ex p P* [1995] 1 W.L.R. 845

145. In my judgment, the Council has committed a serious breach of the procurement regime, which is both substantive and procedural in nature. This is the second occasion upon which it has committed such a breach in the lifetime of one contract. It would be an exceptional course to allow its unlawful decision to stand.

146. The Council's failure to follow an open, competitive, transparent and non-discriminatory procurement process for such an important contract, at any stage, casts real doubt on whether the scheme proposed by the Developer is the best scheme on the best terms available.

147. Deloitte negotiated the variations with the Developer and recommended them to the Council in 2014, advising that *"the revised terms represented an attractive financial arrangement for the Council in respect of the delivery of the revised scheme, and not one that was likely to be improved on by marketing the opportunity to be the developer.."* (Mr Owen's 1st witness statement, paragraph 35). Deloitte made this judgment without having the benefit of considering any alternative bids. In their negotiations and advice to the Council, they were subject to the constraints imposed by the Council, namely, that the existing scheme should be preserved, and changes should be limited so far as was possible, in an attempt to avoid triggering a

procurement process. The Council was keen to proceed with the scheme as soon as possible. So Deloitte was not asked to assess the merits of this scheme against the possibility of any alternative scheme with any other developer.

148. Deloitte was, naturally, only considering the financial aspects of the scheme. However, the architecture, design and layout of the scheme are as important as the cost, given its setting in the heart of an historic cathedral city. The Developer had responsibility for presenting the architecture, design and layout of the proposed scheme to the Council. If there was an open competition, other bidders could present alternative, and perhaps improved, proposals. Although the desirability of development on the Site is acknowledged, there has been widespread concern among local people that the appearance, height, bulk and density of the new buildings are out of character with the surrounding buildings and streets.

149. The changes to the plans for the City's central bus terminus and the proposed loss of 35% affordable housing are major ones, which merit a genuine re-consideration of the original scheme, with the benefit of an open competition introducing new bidders with fresh ideas.

150. Whilst delay is always regrettable, there is no pressingly urgent need to develop this Site. The Council does have time to consider the various options available to it.

151. The Claimant, in his capacity as a resident, council tax payer, and City Councillor, has a legitimate interest in seeking to ensure that the elected authority of which he is a member complies with the law, spends public funds wisely, and secures through open competition the most appropriate development scheme for the City of Winchester. He has been closely involved in the consideration of this scheme at different stages, both as a Councillor and as a long-standing proponent of the widely-held view that alternative development schemes should be considered on this site. It is noteworthy that his standing to bring this claim was not disputed at permission stage.

152. It is well-established that a direct financial or legal interest is not required to establish standing to bring a claim for judicial review: *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, at 694B-C; *R v Secretary of State for the Environment ex parte Rose Theatre Trust Co.* [1990] 1 QB 504, at 520D. Although there is a specific remedy for economic operators under the 2006 Regulations, this does not preclude claims for judicial review by those who are not economic operators (e.g. *R (Law Society) v Legal Services Commission* [2007] EWCA Civ 1264).

153. This claim is distinguishable on the facts from *R (Chandler) v Secretary of State for Children, Schools and Families* [2010] LGR 1, where the court held that the claimant lacked standing to bring a judicial review claim because she did not have any interest in the observance of the public procurement regime, being motivated by her political opposition to academy schools. In contrast, the Claimant in this case does not pursue any ulterior motive. He seeks what the procurement process is intended to provide, namely, an open competition to allow Winchester to select the development which best fulfils its needs.

154. I conclude that the Claimant has sufficient interest to bring this claim and to obtain a remedy. In the exercise of my discretion, I do not consider it appropriate, in the circumstances of this case, to withhold relief.

In the High Court of Justice
Queen's Bench Division
Planning Court

Before the Honourable Mrs Justice Lang

On 11th February 2015

THE QUEEN

on the application of

KIM ALEXANDER GOTTLIEB — **Claimant**

-v-

WINCHESTER CITY COUNCIL — **Defendant**

SILVERHILL WINCHESTER NO 1 LIMITED — **Interested Party**

UPON hearing Mr R. Palmer of Counsel on behalf of the Claimant, and Mr D. Elvin QC and Mr R. Moules of Counsel on behalf of the Defendant, and upon the Interested Party not appearing or being represented on 28 & 29 January 2015;

IT IS ORDERED THAT:

1. The Claimant's claim for judicial review is allowed.

2. It is declared that the Defendant's decision dated 6 August 2014 to authorise variations to the Development Agreement dated 22 December 2004 without carrying out any procurement process as required by Directive 2004/18/EC and the Public Contracts Regulations 2006 was unlawful.

3. The decision of the Defendant dated 6 August 2014 to authorise variations to the Development Agreement dated 22 December 2004 be quashed.

4. The Defendant do pay the Claimant's costs, to be subject to detailed assessment (if not agreed within 21 days).

Dated: 11th February 2015

By the Court

Notes of Conference with Leading Counsel 9 June 2014

Silver Hill, Winchester

1. Leading Counsel had been instructed to advise Winchester City Council on changes proposed to the approved scheme for the redevelopment of Silver Hill, Winchester. The changes were being proposed by the developer appointed by the Council pursuant to a development agreement dated 22 December 2004.

2. The changes sought included:-

    a. A reduction in the number of public car parking spaces from 330 to 279 (although this still fulfilled the "Required Elements" provisions in the development agreement which required the development to provide a minimum of 279 spaces)

    b. An increase in retail provision from 95,000 square feet to 148,000 square feet (still meeting the "Required Elements" provisions, which specified at least 90,000 square feet).

    c. The removal from the scheme of the bus station in the form precisely specified in the agreement, and reprovision by on-street bus stops.

    d. A change to the affordable housing requirements, to provide for an off-site financial contribution rather than a specified number of onsite units. The level of contribution was to be assessed based on viability of the scheme, including a provision to reassess the contribution at a later stage in the development in the event that the development is more profitable than expected.

    e. The incorporation into the scheme of another shop unit owned by the Council, which was leased to a tenant but was outside the CPO.

3. Leading Counsel confirmed that the development agreement envisages changes and alterations to the drawings (which define the approved development), by expressly incorporating variation clauses (Clauses 5.1 and 5.3) into the agreement. It appeared that the contract always envisaged that there would be an initial proposal but then later variations. Clause 4.1 referred to the Initial Scheme Drawings but then clause 5.1.1 said that the developer "will from time to time submit to the Council … revisions to the Drawings". Provision was then made for the Council to give or withhold consent for the proposed changes.

4. The first issue to be considered was whether the changes were such as to constitute a new contract, thus triggering procurement requirements. Caselaw indicates that material changes could constitute a new contract. Leading Counsel advised that one principle to determine whether this was the case was to consider whether at the time of the original procurement, anybody else might have bid for the contract had they known about the change now being

contemplated. He further advised that changes shifting the balance in favour of the contractor (which may be applicable here) might also suggest a material change.

It was noted that in this case, there was no original tender process, and therefore it might be argued that it is impossible to assess the materiality of a change by reference to an analysis of whether other bidders might have bid in the process (either differently, or at all) had the proposed change been included at the start of the process. However, Leading Counsel advised that, whilst there did not appear to be any case dealing with this point, in his view any challenge on this point would effectively be a challenge "through the back door" to the initial failure to request tenders for the development agreement when the time for challenge had long since passed, and therefore a challenge on this basis of the impossibility of the assessment was unlikely to be entertained by the Courts. The Court could still consider whether a change to the contract was such that a hypothetical bidder might have wished to participate in the tender, had there been one.

5. However, caselaw also recognised that where there is a variation clause, and the alteration proposed is within this, approving changes under the variation clause would constitute performance of the contract, rather than a change to the contract which might require reprocurement. It was necessary to consider the scope of the variation clause and whether the proposed changes fell within it.

Car Parking Provision

6. It could be argued that the changes to car parking provision were not changes at all, as the Required Elements require 279 spaces which is now to be provided. However, Clause 4 of the agreement requires the parties to work up initial scheme drawings, and so if the scheme drawings now show 330, the effect might be to make a requirement for 330 spaces a term of the contract. However, the variation clause will then apply. Even if a change from 330 to 279 is a change, it will not be a change to reducing the provision below that in the Required Elements and is not therefore a change in respect of which, under clause 5.1.3.1, the Council has an absolute discretion whether to agree. Nonetheless, the Council's consent to the change is required in order for it to be made, but that is not to be reasonably withheld or delayed (i.e. it is not absolute discretion): clause 5.1.3.3. As a change made in accordance with a variation clause in the contract constitutes performance of the contract, this will not be a change requiring reprocurement.

Retail Provision

7. The Required Element in the contract is a minimum of 90,000 square feet of retail floorspace. The approved scheme is for 95,000, and the proposed change is to provide 148,000 square feet. That change does not fall below the minimum. It could be argued that the hypothetical bidder is not prejudiced, as he would not have been required to provide more than 90,000 square feet, and therefore it can be said that is not a contract change in any event. It would be argued that, had a tender process taken place, it would have been

open to any bidder to propose any volume of retail footage. The comment was made that 90,000 seemed a low figure. Since the revised figure does not fall below the minimum, it could again be argued that there is no contract change: the term as to minimum is the same and is being met. However, as with parking spaces, it could also be said that because of the square footage appearing in the initial drawings, it was a term of the contract that there would be 90,000 square feet of retail space. Even in that case, the variation clause covers the change, and the Council's consent will be required (Clause 5.1.3.2(i) requires the Council's approval to a material variation in the gross internal area of the retail units unless the variation is less than 10% of the total). The Council has absolute discretion as to whether or not to approve this change.

It was noted that at the CPO inquiry, arguments were made that the development as then proposed (95,000 square feet) was inadequate, and this change addresses the concerns raised by objectors at the inquiry.

Bus Station

8. The change in bus provision clearly is a material change. It is a change to one of the clause 5.3 Required Elements. The site of what was to be the new bus station is now to be retail, and the bus stops will now be on-street. However, the development agreement envisaged changes to the Required Elements, including provision of a bus station. The change is as a result of Stagecoach's changing requirements, and their wish to operate from on-street bus stops rather than an off-street bus station. In such cases, arguments have been made in caselaw that call into question whether a change which occurs as a result of third party action (as in this case) can be a material one requiring reprocurement.

9. There is, however, no need to rely on such arguments, as again the contract envisages changes to this requirement, although in this case the Council has absolute discretion over whether or not to agree to it (clause 5.1.3.1). The important point is that the contract specifically envisages that there could be changes to the Required Elements and for that reason includes a term requiring consent and giving the Council absolute discretion. It would clearly be absurd to require the developer to provide something that the end-user did not want, and which would deprive the developer of income which it could achieve by remodelling the scheme to delete the bus station. Moreover, it would reduce the income due to the Council over what could be achieved on the site, and therefore insisting on provision of the bus station in these circumstances would call into question the Council's compliance with its duty to obtain best consideration under Section 233 of the Town and Country Planning Act 1990 and to obtain best value.

Affordable Housing

10. The proposal to move from onsite provision of a set number of on-site units to an off-site contribution geared to viability is a material change. The developer can clearly make more money without onsite affordable housing (although it may well be the case that the development would not go ahead if the existing

requirements were to be insisted upon, as the scheme as a whole would not be viable). As before, Clause 5.1.3.1 permits the variation which is now envisaged.

It was noted that the Council's Supplementary Planning Document on Affordable Housing, issued approximately two years ago, now expressly provided for off-site contributions to be made in place of on-site provision. Had the SPD not been brought in, a change as is now contemplated might have been a material change. In any event, the variation clause can be used to agree the change now proposed.

Massing and External Elevations

11. Changes to these are expressly contemplated in the agreement (Clause 5.1.3.2 (b)) and therefore these can be permitted by the Council under the agreement. The Council has absolute discretion over whether or not to agree these (assuming the changes are not required by the local planning authority).

Oxfam Building

12. The situation concerning the Oxfam shop was discussed. This property is owned by the Council, but was not included in the CPO. The Council was negotiating with Oxfam to secure vacant possession, so that the freehold could then be put into the scheme (the developer paying the Council the market value of the property).

13. This would again be a change to the contract, but one that the Council could consent to. The Council could either seek from the developer either the market value of the property, or an increased overall percentage of the rental income from the scheme.

14. It might be argued that this was not a material change because any bidder could have proposed a scheme which involved the acquisition of the Oxfam shop. It may also be, if the developer pays more rent, that the change was not to the commercial advantage of the developer. If that was right then, even if this was a change, it would not be a material one.

Consideration

15. It was noted that the development was being undertaken using powers contained in Section 233 of the Town and Country Planning Act 1990. This allows the Council to dispose of land acquired or appropriated by it for planning purposes, to such person in such matter and subject to such conditions as appear to the Council to be expedient in order to secure the erection, construction or carrying out of any building or works appearing to them to be needed for the proper planning of the area of the Council.

16. Leading Counsel advised that it was perfectly proper for the Council to continue to proceed on the basis of the development agreement (as varied) and lease the whole site (once it had acquired the remaining properties using its CPO powers) to the developer, in return for the percentage of rental income set out in the development agreement, provided the value of this

consideration complied with the provisions of Section 233 of the Town and Country Planning Act 1990. Leading Counsel noted that Section 233(8) expressly excluded the usual duty under Section 123 of the Local Government Act 1972 to obtain best consideration, although Section 233(3) did require the Secretary of State's consent to a disposal which "a consideration less than the best than can reasonably be obtained". Both s 123 and s 233 require the Council to obtain best consideration. The Council should obtain advice whether the consideration it will receive under these arrangements is the best that could reasonably be obtained.

17. Leading Counsel agreed that Section 233 could only be interpreted as if the best consideration which could reasonably be obtained is assessed by reference to the scheme which is proposed, rather than by reference to a hypothetical scheme (e.g. full residential in this case) which might produce a higher consideration (i.e. as would be the case under the Section 123 duty), but which would not secure the buildings/works which the Council felt were needed for the proper planning of the area. Had Parliament intended this interpretation to apply, it could simply have omitted the exclusion of Section 123 in Section 233(8). The only reason for the Section 233(8) exclusion is to ensure that the consideration is assessed against what is planned, rather than what is theoretically possible on the site.

Amendments to the Agreement re Interest

18. Leading Counsel advised that the agreement could be amended to clarify the interest rates which would apply in certain circumstances. On the basis that this would clarify in the Council's favour, this would not be a material change. To the extent that the Council had absolute discretion to agree various changes proposed by the developer, this opportunity could be used by the Council to secure changes such as clarification of interest charges, subject to the point that this would in reality have to be a negotiation with the developer.

Absolute Discretion

19. Leading Counsel confirmed that to the extent that the Council had absolute discretion under the development agreement to agree to the changes proposed by the developer, it could use the opportunity to secure changes which the Council might wish to see. Clarification of the terms regarding interest (as discussed above) was one example of this. However, Leading Counsel also confirmed that this had to be tempered by the fact that this was in reality a commercial negotiation – the Council had to be commercially realistic in its demands, as otherwise the developer could decide that it could not agree to the Council's requirements, and walk away from the scheme, or the requirements might be such that the scheme became unviable and/or unfundable, and the developer simply could not proceed with it in any event.

20. There was discussion on the proposed inclusion of development costs incurred by Thornfields but effectively written off by the Administrator prior to Henderson becoming the developer. In counsel's view, this was a commercial matter. Henderson would say that it had paid a market price for an asset of low value – as indicated by the absence of other bidders. In fact

£5 million had been spent in connection with the development and, if that could be taken into account in determining profit, there was no obvious legal basis for excluding that sum because it was paid by Thornfield when owned by its former shareholders. The Council would be no worse off than if Thornfield had not been sold. Hence the relevance of Henderson's "windfall" is only that it is a negotiating point.

21. In exercising its powers to make decisions in its absolute discretion, the Council had to comply with public law obligations to act in good faith and for proper purposes and having regard to relevant considerations and its best value duty. Whilst in general decisions about contractual matters were not amenable to judicial review, that was not an absolute rule. Counsel gave the example of the recent case of Trafford – v – Blackpool Borough Council where an authority's decision not to renew a tenancy granted to a solicitor who frequently acted for those bringing claims against the authority was quashed because it was taken for an improper purpose.

22. However, counsel doubted that the contractual obligation to act in good faith added much: what was envisaged was a commercial negotiation in which both sides sought to achieve the best outcome.

State Aid

23. Leading Counsel confirmed that provided appropriate consultants could certify that the scheme continued to provide "best consideration" (in the Section 233 sense) for the Council, there was no issue over state aid.

Building contract

24. Counsel also mentioned the building contracts which the developer would enter with a contractor. Counsel had wondered whether there would need to be a procurement for these. However, since the contract would be between the developer and the builder to which the Council was not party, that was not required.

Paul Nicholls QC

11KBW,

11 King's Bench Walk,

London

CABINET – SPECIAL MEETING

6 August 2014

Attendance:

Councillor Humby -	*Leader* (Chairman) (P)
Councillor Weston -	*Deputy Leader and Portfolio Holder for Built Environment* (P)
Councillor Godfrey -	*Portfolio Holder for Finance & Organisational Development* (P)
Councillor Miller -	*Portfolio Holder for Business Services (P)*
Councillor Southgate -	*Portfolio Holder for Communities & Transport (P)*
Councillor Tait -	*Portfolio Holder for Housing Service (P)*
Councillor Warwick -	*Portfolio Holder for Environment, Health & Wellbeing*

Others in attendance who addressed the meeting:

Councillors J Berry, Gottlieb, Learney and Pines

Others in attendance who did not address the meeting:

Councillors Achwal, Cook, Dibden, Izard, Jeffs, Johnston, Laming, Pearson, Phillips, Read, and Weir

Mr D Chafe - TACT

---

1. **CHAIRMAN'S ANNOUNCEMENT**

The Chairman welcomed to the meeting approximately 150 members of the public, local interest groups business representatives and representatives of Henderson. He explained the procedure that would be followed. Public participation would be allowed at the start of the meeting, after an introduction to the Report. Representations would then be taken from non-Cabinet Members under Council Procedure Rule 35, followed by Cabinet questions of Officers on the open section of the Report. Following consideration of the contents of the information contained within the exempt appendices to CAB2607, Cabinet would return to open session for debate and consideration of the recommendations.

In addition to the Council Officers present, the following professional advisors engaged by the Council also attended: Ms L Avis and Mr T Hellier (BLP LLP Solicitors); Mr R Owen and Ms L Howard (Deloitte Real Estate).

2. **PORTFOLIO HOLDERS' ANNOUNCEMENT**

Councillor Weston announced that Zurich Insurance would not be taking any further legal action regarding their action challenging the Council regarding Local Plan Part 1, following the Court of Appeal's refusal of its application for

leave to appeal. This certainty would assist the Council in its current progression of Local Plan Part 2 and help to ensure the Council had strong policies in place in relation to future possible housing developments.

3. **DISCLOSURE OF INTERESTS**

Councillor Humby declared a disclosable pecuniary interest in respect of agenda items due to his role as a County Councillor. Councillor Godfrey declared a disclosable pecuniary interest in respect of agenda items due to his role as a County Council employee. However, as there was no material conflict of interest, they remained in the room, spoke and voted under the dispensation granted on behalf of the Standards Committee to participate and vote in all matters which might have a County Council involvement.

4. **PUBLIC PARTICIPATION**

Eighteen members of the public addressed the meeting and their comments are summarised under the minute in relation to CAB2607 below.

5. **MINUTES**

RESOLVED:

That the minutes of the previous meeting held on 10 July 2014, less exempt items, be approved and adopted.

6. **SILVER HILL AFFORDABLE HOUSING REVIEW (LESS EXEMPT APPENDICES)**
(Report CAB2607 and Addendum refers)

Under the Council Constitution Access to Information Procedure Rules (Rule 15.1 – General Exception), this was a key decision which was not included in the Forward Plan as the need for decision had only arisen following comments made by Council on 16 July 2014. Under this procedure the Chairman of The Overview and Scrutiny Committee had been informed.

The Chairman emphasised that this was the fourth meeting within a month which had allowed the opportunity for public discussion on the Silver Hill scheme, enabling over sixteen hours so far of challenging and productive debate and scrutiny.

At Council on 16 July 2014, the majority of Members agreed with the recommendations of Cabinet held on 10 July 2014 that the scheme should move forward, with one exception in that Cabinet should be asked to reconsider its decision in respect of affordable housing and seek a more beneficial arrangement for Winchester residents. He reminded those present that although any wider issues raised will continue to be part of the ongoing debate about Silver Hill, the matter in the report before Cabinet related to the issue raised by Council regarding affordable housing.

The Chairman reiterated Cabinet's opinion that the proposed scheme had many benefits for Winchester and would regenerate a run-down area, whilst protecting and enhancing the retail provision. It also represented a good return on the Council's assets and he reminded those present that the Council's external advisors had concluded the deal offered "best consideration".

Report CAB2607 explained in detail why it was not possible for the Council to demand 35% affordable housing and recommended a mechanism for a share of profit above a certain level to be taken to fund affordable housing. However, Cabinet had continued to scrutinise how the best deal could be achieved and were therefore proposing an amendment as set out in italics below (and contained within an Addendum to Report CAB2607, circulated at the meeting):

1. *That Cabinet reaffirm its previous resolution Minute Number 4 from 10 July 2014 (CAB2603 refers) subject to:-*

   (i) the substitution of the following for 1(a) thereof:
   "A reduction in the number of residential units from 287 (plus 20 live/work units) to 177 residential units only (or such lower number as the local planning authority may require)"
   (ii) the substitution of the following for 1(h) thereof:
   "The amendment of the requirement in respect of affordable housing so that the affordable housing provision be that which shall be determined by the Planning Committee based on the current and future viability of the scheme".

2. *That if any further amendments to the Development Agreement are required arising as a consequence of a decision of the Planning Committee, in particular any which are necessary to maintain the financial viability of the scheme, then a further report be brought to Cabinet.*

3. *That the Head of Estates and Head of Legal and Democratic Services be authorised to settle the necessary legal documentation.*

The Chairman explained that the revised recommendations requested the Planning Committee to determine the affordable housing requirement, as it would for other development schemes. This would enable the Planning Committee to challenge viability calculations to test whether there was scope for contribution from the scheme. Cabinet were advised that that this revised approach would also protect the Council by securing "best consideration".

Cabinet would consider whether this approach would mean that any affordable housing requirement would be a cost to the scheme, before any residual profit would be divided between the development partners. He also noted that the Council would be free to allocate any of its share of the profit to affordable housing, over and above what could be secured through the planning process.

Public Participation

Eighteen people spoke during public participation and their comments are summarised below.

Mr P Davies expressed great concern that the Council was not insisting on affordable housing provision, which was contrary to its own stated policies to achieve a mixed development and a balanced community. He considered it was not acceptable for the developer to dictate this approach and the Council should take a tougher stance. Generally, he believed that there had not been proper public scrutiny of the amended Development Agreement because of the Council's use of an Informal Policy Group to discuss the details prior to them being made public. He had requested details of these meetings, but was yet to be provided with this information. The current proposal did not guarantee any affordable housing would be provided and he considered it was a significant change from the case made at the Public Inquiry. He was concerned about the precedent it could make for other developers.

Ms J Howland (a Winchester resident) supported comments made by Mr Davies and highlighted that high house prices and rent exacerbated the current shortage of affordable housing within Winchester and that this type of housing should be provided across all areas, including the city centre. She believed it would set a dangerous precedent if the Council did not insist on affordable housing provision. In general, she also opposed the height and design of the proposed scheme.

Dr J Nordensvard spoke in opposition to the proposed design of the scheme as he did not believe it engaged with existing buildings and was not appropriate within Winchester. He considered that local architects should have been used and there should have been more public involvement in the scheme. He called for more public debate or a referendum on the proposals.

Mr P Marsh (Labour Party member and a former Deputy Chief Executive of the Housing Corporation) spoke against the amended recommendation as he considered the Council was wrong to remove any obligation to provide affordable housing. He believed this particularly as the original agreement, signed during an economic recession, required 100 affordable homes but the amended scheme which removed costs for the developer was now considered to be unviable if it were to provide the affordable housing contribution. He queried whether the Council was receiving correct advice on this matter and whether there was any interest from Registered Providers. In summary, he supported the redevelopment of Silver Hill but believed the Council should insist on 100 affordable homes as before otherwise the scheme could be regarded as being socially exclusive.

Mr M Coker-Davies (a Winchester resident) agreed with comments made previously regarding concern about affordable housing, loss of the bus station and the height of the proposed scheme. He believed that Winchester residents had lost faith in the Council and it would not be possible to resolve fundamental issues with the proposed scheme.

Mr R Pitt (a Winchester resident) questioned why the Council were not insisting on the developer providing affordable housing when Hendersons were a profitable company. He also believed that the scheme would offer good returns for the developer and that the Council should not give in to their demands. In general, he agreed with concerns raised previously regarding the design of the scheme.

Mr T Winfield also emphasised the urgent requirement for affordable housing and expressed concern that by not insisting the developer provide a contribution, it gave the impression the Council were in collusion with the developer and also set a precedent for future developments. He requested that the Council should ascertain whether any other developer could undertake the scheme and provide affordable housing before agreeing the amended development agreement with Hendersons.

Mr T Fell (a Winchester resident) emphasised that many local people objected to the development as out-of-character with Winchester suggesting it was an "off-the-shelf" standard design. He considered that the Silver Hill redevelopment should celebrate the individuality and historic character of Winchester with the inclusion of independent shops and possibly a covered market area. It should include a mix of more prestigious housing and social housing. He believed that local architects should have been used and that the proposals did not have regard to the Planning Brief.

Mr H Petter (Director of Adam Architecture but making representations as a concerned resident) stated that he had spoken at the previous Cabinet meeting on 10 July 2014 to express concern regarding the proposed height, mass and design of the scheme. He disputed that the proposed buildings needed to be so high, as most existing city centre buildings were only three or four storeys high. He considered that without the affordable housing and bus station the redevelopment did not offer any public benefits and referring to his expertise as a member of the Academy of Urbanism, he opposed the scheme. He considered that the developer should try harder as Winchester deserved better. There would be benefit in having different architects for different parts of the scheme.

Mrs K Barratt also raised concerns about the removal of the affordable housing requirement and believed it risked the development only being available to wealthy people whilst those on lower incomes were forced to live out of town. She emphasised that developers always sought to avoid affordable housing requirements on viability grounds and that the Council were being naïve by relying on possible future profits which might not materialise.

Mr A Davidson (a Winchester resident) expressed concern that the membership of both Cabinet and Planning Committee only included one Town Ward Councillor each and were not therefore best placed to make decisions affecting Winchester Town. He highlighted the need for affordable housing within the Town as current house prices were beyond the reach of anyone on the average wage.

Mrs J Porter (Hampshire County Councillor) requested that the Council insist on the provision of 35% affordable housing on site and was concerned that the Council appeared to favour car parking provision above the need for homes. She asked that the Council restart discussions with Hendersons and St John's Winchester Charity regarding the possibility of making use of existing unused Charity buildings for affordable housing.

Ms J Jessop highlighted the special nature of Winchester which should be retained and expressed concern that the proposed redevelopment was out of scale with an out-dated design which did not take account of the impact of the internet on retail businesses. Local residents could go to Hedge End for large retailers. She was also opposed to the removal of the bus station and the affordable housing requirement and requested that the Council go back to the drawing board.

Ms J Young agreed with concerns raised previously and asked that the Council take note of comments made and reconsider accordingly to take account of Winchester's heritage.

Mr J Paessler (a 20 year old Salisbury resident who visited Winchester regularly) agreed with concerns made at this meeting and the previous Cabinet on 10 July regarding height and design of the proposals. He believed that the removal of the bus station in Salisbury had caused confusion for bus users. He queried why the Antiques Market was not listed and in general opposed the scheme, which he considered was being pursued in the interests of large retailers. Portsmouth and Southampton could meet this need better and Winchester's attraction was based upon its heritage.

Mr P Rees (Chairman of Winchester Labour Party) stated that he had previously supported the Silver Hill regeneration but the scheme had been amended to such an extent as to remove all benefits for the wider community. He believed that the scheme would offer Henderson a significant profit and that Cabinet had not negotiated the best deal with the company, particularly regarding the removal of the affordable housing requirement.

Mr Tew (a Winchester resident) opposed the proposals and the removal of the affordable housing requirement. He queried the need for additional retail space within the town centre, including a larger supermarket. The scheme would create pressure on parking capacity and did not comply with the Council's planning policies on affordable housing. In general he opposed the scheme's design as out of keeping and unattractive and requested that the Council reconsider.

Mr W Leadbetter acknowledged the importance of affordable housing which should be provided and he questioned whether it could be protected from private purchasers in the future. He believed that the Council should also have regard to the overall design of the scheme as the current proposals were unattractive and not appropriate within the setting of Winchester. He also believed that the Council was seeking to make a decision with undue haste and acting contrary to public opinion.

Non-Cabinet Members

At the invitation of the Chairman, Councillors Gottlieb, Pines, J Berry and Learney addressed Cabinet and their comments are summarised below.

Councillor Gottlieb stated that he believed the proposed redevelopment would damage Winchester, because of its poor architectural design which did not respect Winchester's heritage, and would adversely affect public confidence in the Council. He had been involved in the work of the Informal Group and raised challenges. The process by which a decision had been reached was flawed, without proper public consultation, and public comments had not been taken into account. He believed that there had not been any professional analysis of the proposal's impact on parking and the scheme failed to recognise a changed retail market, which would lead to the destruction of the High Street. Councillor Gottlieb reiterated comments made at previous meetings regarding his view that monies not being properly accounted for and requested that a full investigation be undertaken, with all financial details disclosed in open meetings. In his view the advice received on best consideration was not correct. He considered it was a very poor deal and that the Council could not be accused of doing it for the money. He also considered that the late circulation of the proposed amendment was not acceptable as it did not give non-Cabinet members time to consider it properly. The changes would mean that no affordable housing would be provided, nor any payments received in lieu. In conclusion, he stated that the Council had failed to follow due process or due diligence and the whole scheme should be reconsidered.

Councillor Pines advised that as a member of the Informal Policy Group he had been involved with the development of revised proposals. However, he raised three issues, as follows:

- He emphasised that the scheme should include access for all sections of the Winchester community. He had concerns that the proposals were for an exclusive community and shopping, with the removal of more budget shops such as Poundland;
- He was disappointed that the County Council were not supporting the retention of a bus station which would have acted as a central hub, although pleased that the amended scheme included some elements, such as public toilets.
- He believed that the inability to insist on the provision of affordable housing was a flaw in the current national planning system. There was a danger that the community benefits of the scheme were being eroded.

In conclusion, although he had some concerns, Councillor Pines supported the proposals, but suggested that the Council could consider putting any future Council profits generated from the scheme (eg for a period of 5 years) towards the provision of affordable housing.

Councillor J Berry highlighted the large amount of correspondence that had been received from local residents in connection with the proposed scheme and believed that many views had not been incorporated. She was also concerned that the amendments would result in an exclusive design, removing the wider community benefit elements such as affordable housing, live-work units and the bus station. She believed that the Council should commit to the inclusion of affordable housing within the Silver Hill site. Some councils had used the New Homes Bonus to help fund affordable housing.

Councillor Learney expressed great regret at the amended proposals which did not guarantee any affordable housing provision and believed that the Cabinet should take a much stronger stance. She emphasised that developers always sought to avoid providing affordable housing wherever possible. She considered that asking Planning Committee to negotiate affordable housing provision was abdicating responsibility and the late availability of the proposed amendment meant that other Councillors had not been given the opportunity to properly scrutinise it. Consequentially, she did not believe it could be agreed at this meeting.

Cabinet Questions and Debate

The Chief Executive confirmed that Council Officers and independent advisers had carefully examined the information provided and, as explained in the Report, it was apparent, on the basis of the current appraisal, that to insist on affordable housing being provided would make the scheme unviable. The proposed amendment to the recommendations whereby Planning Committee determine what level of affordable housing could be provided, was the same process as the Council adopted in other development applications. It should be seen as objective and will consider whether the scheme as a whole can contribute. The Council had obtained expert independent advice that the proposed recommendations would achieve best consideration.

The Chief Executive emphasised that, if the amendment was agreed, there would be a future requirement for further discussions with Hendersons regarding any residual profits, should the Planning Committee require a contribution to affordable housing to be made, and this would be a matter for a future Cabinet meeting. He drew Members' attention to Section 7 of the Report which outlined the wider benefits of the scheme and the necessity of securing a viable development if any affordable housing was to be achieved.

The Head of Legal and Democratic Services advised that since Hendersons submitted their formal application for variations to the approved scheme in July 2014 (which was considered by The Overview and Scrutiny Committee and Cabinet), the architects had been fine-tuning the detailed design. A further request had been received from Hendersons dated 5 August 2014 which sought approval from the Council to these design changes, the major implications of which were a reduction in the total number of residential units from 184 to 177, and a reduction in residential car parking spaces from 181 to 180. The reduction in residential units occurred in Block J (17 units reduced to 10 units); there have been other minor design changes, the net effect of which

was that the overall areas of residential and retail were unchanged. There were no changes to the public parking provision and no material change in the forecast annual income from the scheme. These changes were included within the proposed amendment detailed above.

In response to questions, the Corporate Director advised that the original development agreement incorporated a requirement for 35% affordable housing, but this was not tested in terms of viability at the time. The original Section 106 agreement provided for 100 units, of which 80 were proposed shared equity units and 20 affordable rented units. Of the 20 units, 17 were proposed to be one-bedroomed flats. He confirmed that Officers considered that to request Planning Committee to assess the level of affordable housing was appropriate.

In response to questions, the Chief Executive confirmed that the amended recommendations were the most appropriate way forward. If the scheme was viable then an affordable housing contribution would be met from the scheme costs. In this eventuality there would still be a need for the Council to negotiate with Henderson on the share of residual profits. The Council could also consider whether it wished to use any of its share of those profits for affordable housing if the planning process did not require the scheme itself to make a contribution.

In response to questions, Mr R Owen (Deloitte) confirmed that it was his assessment that at the current time, the scheme did not support the provision of affordable housing. The Development Agreement had been entered into in 2004, when the development market, economic situation and funding process for affordable housing were very different. Today, a more common approach would be for the affordable housing requirement to be resolved through a S106 Agreement as part of the planning process. If it was viable at that point, the scheme could make a contribution. If it was not viable, he advised that it was appropriate for the Council to adopt a review mechanism to assess possible future profits available if values and costs changed and this approach was adopted by some other local authorities. There would be an audit of the figures at appropriate points as the scheme progressed. There was no guarantee that the scheme would be able to make an affordable housing contribution or overage profit for the Council. He also reminded the meeting that Hendersons would be liable for risks as the scheme progressed. If the scheme resulted in a share of profits available for the Council, it would then be for the Council to decide how to allocate this, which could include additional affordable housing provision.

Cabinet asked the Corporate Director and Mr Owen to respond to challenges from Councillor Gottlieb that there had not been proper and thorough analysis of Hendersons accounts to test viability. The Corporate Director stated that the appraisal was a snapshot at a point of time based on estimates and it would be subject to future review. Mr Owen confirmed that the financial appraisal was a commercially sensitive document, and that it had been reviewed by Deloittes. There were some minor aspects on which they had a different view on challenging the figures, but the financial impact was slight

and did not alter the overall assessment that it was not viable for the scheme to make an affordable housing contribution. Henderson's changes to the scheme reflected the current market conditions. Deloittes agreed that these were sensible changes, including the residential content. The Corporate Director highlighted that if approved, the proposed amendment would not mean that the Council was treating Hendersons in a more favourable manner than any other developer and in fact, had access to far more financial information about Hendersons than it would do with a third party developer.

The Chief Executive confirmed that the 35% affordable housing contribution in the 2004 Development Agreement, and the proposed 100 units following the 2009 planning approval, had been based on assessments at the time and had not materialised as they had not proved to be fundable.

With regard to a comment made during public participation, the Corporate Director advised that the wealth of the company Hendersons was not a material planning consideration: the Planning Committee would only assess the viability of the scheme itself. In addition, the proposals would not set a precedent as, essentially, what was proposed was the usual Council procedure anyway.

In response to questions, the Corporate Director explained that it was easier for the Council to secure a 40% affordable housing contribution on large greenfield schemes, such as Barton Farm, Pitt Manor and West of Waterlooville. However, smaller schemes on brownfield sites were more difficult due to a number of reasons, including the increased development costs of such schemes. One Member highlighted that public objections to the numbers of units proposed on some schemes, such as the recent application on the old Fire Station North Walls site, resulted in a smaller, less dense development being approved which consequentially did not support any affordable housing.

As a Board member of St John's Winchester Charities, Councillor Tait confirmed that discussions were ongoing with Hendersons and the YMCA regarding the potential for affordable housing provision.

Mr Owen confirmed the advice given at the Cabinet meeting on 10 July 2014, that the Council would not get a better financial deal if it went out to the market today. The market place had changed fundamentally since the financial crisis. The approach of both developers and funders had changed so that the same deal would not be available. He confirmed that the proposal before Cabinet met the requirements for best consideration under S233 Town and Country Planning Act 1990. This was not the highest price which could be achieved regardless of the proposed use of the site but the best consideration for a particular scheme which the Council wished to deliver for planning purposes. The issue of best consideration would also need to be re-addressed, when any proposals for any consequential changes in the Development Agreement came before Cabinet, after Planning Committee had determined the affordable housing requirements.

In response to points raised during public participation and contributions from other Councillors, Cabinet sought clarification on the matters set out below.

Assistant Director (Policy and Planning) advised that the County Council were not in a position to fund a bus station in Winchester, and that the new station in Andover had been funded through developer's contributions. Stagecoach no longer wanted to be responsible for running a bus station and no other bus operator had expressed an interest in running one. He also confirmed that the 2009 scheme had still required interchange between two locations. It had only provided 12 bus bays in the bus station and that a number of other stops will still be required elsewhere. It will be necessary to work with bus and coach operators to timetable services and locate them according to the need to accommodate onward journeys.

In response to questions, Ms Avis (BLP LLP Solicitors) confirmed that the original Development Agreement always anticipated that residential elements of the scheme could be developed by a specialist residential developer, but any such partner would have to be approved by the Council. Mr Owen confirmed that if Hendersons chose to bring in a partner, any consequential sums of monies would be included within the development receipt. The Agreement also had requirements about any funding partners for the scheme.

The Corporate Director confirmed that as a brownfield site in a sensitive location, Silver Hill was more expensive to develop. The requirements for archaeology, quality building materials, flood risk measures, improvements to the public realm within the scheme and S106 costs for the improvement of The Broadway, had all affected the costs in the viability appraisal. It would not create a precedent if the Planning Committee accepted that it was not viable for the development to provide affordable housing, as each case was dealt with on its own merits. Viability was an issue for the scheme itself and the other financial resources of a developer such as Henderson, were not a material planning consideration. Live/work units had been an innovation several years ago, but had not proved popular in practice at more recent schemes, West of Waterlooville, for example.

The Chief Finance Officer confirmed that the Council had measures in place to ensure that the developer would only be able to charge its costs properly incurred to the Development Account, in accordance with the provisions of the Agreement. The Council would continue to monitor such costs as it would impact on any profit share due to the Council.

In response to comments made by Councillor Gottlieb, the Chief Executive confirmed that he was satisfied that the officers had undertaken due diligence in assessing the information from Henderson. Members also had the opportunity to challenge the proposals and to question the external advisers.

The Chief Executive also said that officers had achieved the best position possible for affordable housing at the moment, after the negotiations with Henderson. The Planning Committee would be able to challenge the position when the planning application was considered. Mr Owen's advice was that

the recommendations before Cabinet today met the requirements for best consideration.

Cabinet then considered moving into closed session to discuss the Exempt Appendices to Report CAB2607. A challenge was raised by two members of the public – Mr P Davies and Mr P Marsh – as to whether it was necessary and in the public interest to move into exempt session. The Chief Operating Officer advised that it was necessary to consider the information contained within the Exempt Appendices in closed session due to the requirement to consider detailed advice and discussion on commercially sensitive matters. In addition, it might be necessary for Cabinet to obtain detailed legal advice in respect of which a claim to legal professional privilege could be maintained in legal proceedings. Cabinet then determined that in all the circumstances, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

Cabinet then moved into closed session to discuss the Exempt Appendices to Report CAB2607.

Cabinet then returned to open session for debate and to make the resolution outlined below.

During his closing remarks, the Chairman emphasised that both Councillors Learney and Pines had been kept informed of ongoing discussions regarding the affordable housing issue. The proposed amendment had resulted from his request for Officers to consider again whether any possible improvements could be made for the Council to what was originally proposed in the Report. Cabinet also recognised that it was not viable for the scheme to provide affordable housing at the moment, and it would only be on outturn that it may be possible to do so, if the scheme made a decent profit. However, if the scheme did not proceed, there was no possibility of any affordable housing being provided.

Cabinet also highlighted that the nature of the affordable housing included within the previously approved scheme would have been of limited benefit in any case, being shared ownership and the social rent element being mainly one-bedroomed flats. Members supported the suggestion made by Councillor Pines that Officers investigate the feasibility of any additional income received as a result of the Silver Hill development being used to fund additional affordable housing in addition to any planning requirement.

Members noted that there had been a great deal of debate and differences of opinion expressed both on affordable housing and the other aspects of the scheme. However, the dire state of the existing area was recognised which emphasised the need for this regeneration scheme. Cabinet had been advised that if the Council were to start again, it would not be able to achieve as good a deal as currently available with Henderson. In addition, it was unlikely that any proposal would satisfy all the different opinions and views expressed. The Chairman reiterated that at its meeting on 16 July 2014, Council had also approved the majority of the proposals for the amended

scheme, with one exception regarding requesting that Cabinet reconsider the affordable housing provision. Allowing the Planning Committee to determine this aspect, as with any other application, was the right way forward.

Following consideration of the exempt information and the discussion above, Cabinet Members considered that the current proposal was the right scheme for Winchester and approved the amended resolution as set out below.

Cabinet agreed to the following for the reasons set out above and outlined in the Report.

RESOLVED:

1. That the previous resolution Minute Number 4 from 10 July 2014 (CAB2603 refers) be reaffirmed, subject to:-

(i) the substitution of the following for 1(a) thereof:
"A reduction in the number of residential units from 287 (plus 20 live/work units) to 177 residential units only (or such lower number as the local planning authority may require)"

(ii) the substitution of the following for 1(h) thereof:
"The amendment of the requirement in respect of affordable housing so that the affordable housing provision be that which shall be determined by the Planning Committee based on the current and future viability of the scheme".

2. That if any further amendments to the Development Agreement are required arising as a consequence of a decision of the Planning Committee, in particular any which are necessary to maintain the financial viability of the scheme, then a further report be brought to Cabinet.

3. That the Head of Estates and Head of Legal and Democratic Services be authorised to settle the necessary legal documentation.

7. EXEMPT BUSINESS

As it had not been possible to give 28 days notice of the meeting, Cabinet noted that the Chairman of The Overview and Scrutiny Committee had been informed and has confirmed his agreement to part of the meeting being held in private.

RESOLVED:

1. That in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

2. That the public be excluded from the meeting during the consideration of the following items of business because it is likely that, if members of the public were present, there would be disclosure to them of 'exempt information' as defined by Section 100I and Schedule 12A to the Local Government Act 1972.

Minute Number	Item	Description of Exempt Information
##	Exempt minutes of the previous meeting held 10 July 2014	Information relating to the financial or business affairs of any particular person (including the authority holding that information). (Para 3 Schedule 12A refers)
##	Silver Hill Affordable Housing Review – exempt appendices	Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. (Para 5 Schedule 12A refers)

8. **EXEMPT MINUTES**

RESOLVED:

That the exempt minutes of the previous meeting held on 10 July 2014, be approved and adopted.

9. **SILVER HILL AFFORDABLE HOUSING REVIEW (EXEMPT APPENDICES)**
(Report CAB2607 refers)

Cabinet considered the contents of the exempt appendices (detail in exempt minute).

The meeting commenced at 2.00pm and concluded at 5.35pm

CABINET – SPECIAL MEETING

10 July 2014

Attendance:

Councillor Humby -	*Leader* (Chairman) (P)
Councillor Weston -	*Deputy Leader and Portfolio Holder for Built Environment* (P)
Councillor Godfrey -	*Portfolio Holder for Finance & Organisational Development* (P)
Councillor Miller -	*Portfolio Holder for Business Services (P)*
Councillor Southgate -	*Portfolio Holder for Communities & Transport*
Councillor Tait -	*Portfolio Holder for Housing Service(P)*
Councillor Warwick -	*Portfolio Holder for Environment, Health & Wellbeing (P)*

Others in attendance who addressed the meeting:

Councillors Gottlieb, Learney, Tod and Wright

Others in attendance who did not address the meeting:

Councillors Achwal, J Berry, Byrnes, Clear, Dibden, Evans, Gemmell, Hiscock, Izard, Jeffs, Johnston, Laming, Nelmes, Osborne, Read, Ruffell, Sanders, Scott, Thompson and Weir

Mr D Chafe - TACT

---

1. **CHAIRMAN'S ANNOUNCEMENT**

The Chairman welcomed to the meeting approximately 150 members of the public, local interest groups business representatives and representatives of Henderson. He explained the procedure that would be followed. Public participation would be allowed at the start of the meeting, followed by the Officer presentation of the Report and questions from Members, then representations from non-Cabinet Members under Council Procedure Rule 35. Following consideration of the contents of the information contained within the exempt appendices to CAB2603, Cabinet would return to open session for consideration of the recommendations as set out in Report.

In addition to the Council Officers present, the following professional advisors engaged by the Council also attended: Ms L Avis (BLP LLP Solicitors); Mr P Wilks (NLP retail); Mr R Osborne and Ms L Howard (Deloitte Real Estate); and Mr M Hepenstal (Deloitte Audit & Advisory Services).

2. DISCLOSURE OF INTERESTS

Councillor Humby declared a disclosable pecuniary interest in respect of agenda items due to his role as a County Councillor. Councillor Godfrey declared a disclosable pecuniary interest in respect of agenda items due to his role as a County Council employee. However, as there was no material conflict of interest, they remained in the room, spoke and voted under the dispensation granted on behalf of the Standards Committee to participate and vote in all matters which might have a County Council involvement.

3. PUBLIC PARTICIPATION

Twelve members of the public and/or representatives of local interest groups or businesses addressed the meeting and their comments are summarised below. Responses to comments made are summarised under the minute in relation to CAB2603 below.

Mr C Turner (Winchester BID) indicated that some BID members had differing views on the proposals but the general view was that it was time to implement the scheme and improve an area of the Town which was becoming derelict. He spoke in support of the proposals and highlighted that it would enable Winchester to attract more larger-scale retailers and improve the viability of the town overall, which would also benefit existing businesses.

Mrs K Barratt raised concerns about the amended proposals in relation to affordable housing and believed that this could lead to no affordable housing being provided at all. She was also opposed to the removal of the bus station from the scheme as she considered this would have a substantial negative impact on bus users, particularly those with mobility issues.

Mr S Masker (an architect and local resident) spoke in opposition to the scheme as he did not consider its design was suitable for its setting within Winchester. In particular, proposals for buildings of up to six or seven storeys or more were out of keeping. He considered that local architects, with an understanding of Winchester, should have been engaged. He was also concerned that the original wider benefits of the scheme, such as affordable housing and the bus station, had been removed. He believed that it was essential the Council took the scheme back to the drawing board in order to address concerns raised by members of the public at the meeting and as part of the recent “Winchester Deserves Better” campaign.

Mr H Petter (Director of Adam Architecture but making representations as a local resident) was concerned that the design of the scheme, and in particular the proposed height of some buildings and proposals for the individual blocks, would have a very negative impact on the current character of Winchester and its skyline. He did not consider that it was appropriate for such a scheme to be designed by one architect, as the character of a development would be enhanced by using different architects for different parts. He considered that the proposed materials were not good enough and believed it was essential the Council relooked at the scheme.

Mr S Scantlebury stated that he had operated a small business in Winchester for the past 10 years and emphasised the concern expressed by customers about the current proposals. In particular, he believed the removal of the bus station was a mistake and would have a negative impact on bus users, particular the elderly or those with pushchairs.

Mrs J Martin spoke in a personal capacity, although she had some background knowledge as a member of the City of Winchester Trust and as a former City Councillor. She stated that it was not correct to assert the Trust were all supportive of the proposals. She expressed concern about the removal of the affordable housing provision, the bus station and office provision and believed these were significant changes to the approved scheme. She questioned the accuracy of the information contained with the NLP Report (Appendix 2 of CAB2603) as it referred to a number of retailers which had now gone out of business. She also considered that the Council's use of an informal reference group was undemocratic, as discussions were not open to the public.

Mr P Davies reiterated comments he made at The Overview and Scrutiny Committee on 7 July 2014 (as summarised in the minute extract report, CL96 considered below). His concerns primarily related to the removal of the guaranteed affordable housing provision and the Council's use of a reference group which was not open to the public. He considered that the changes were fundamentally different to the original scheme which was relied upon by the Council in its application for the compulsory purchase order. The present proposal was not acceptable and ran the risk that no affordable housing would be provided. He did not believe that the developer would walk away if required to make provision for 35% affordable housing, and even if it did, another developer could be obtained. A mixed development was needed in the City Centre.

Mr R Pitt spoke on behalf of himself and Mr C Gillham (Winchester Friends of the Earth) who was unable to attend the meeting. Mr Gillham had raised concerns that the Silver Hill proposals would further prevent the Council from meeting its obligations in relation to air quality, particularly with regard to the parking provision proposed. He referred to a current challenge to the EU about the UK Government's response on air quality issues and suggested this could also impact on local authorities. Winchester Friends of the Earth was, therefore, asking that the parking provision be reconsidered. Mr Pitt spoke in support of the concerns already expressed in relation to the proposed height and scale of the development. He believed that consultation carried out to date had been inadequate, and in particular, documents provided by Henderson had not clearly indicated the proposed size of buildings proposed.

Mrs J Young, a dealer in the Antiques Market, expressed concern about the lack of small business units proposed within the development which she considered were essential in order to maintain the mix of smaller, independent and interesting retailers which were an attraction to tourists.

Mr A Sindell believed that the numbers of public attending the meeting indicated the wide degree of concern of local residents over the proposals. He urged the Council to review and fundamentally reconsider the scheme.

Mr T Fell believed that the Council should seek to establish Winchester as a place offering independent and different retailers, and not just the standard high street names. He did not believe the current proposals enabled this and a fundamental reassessment should therefore be undertaken. He referred to the success of the Winchester markets and referred to covered market halls that existed in other towns.

Mrs S Robinson (resident of Itchen Abbas) emphasised that it was essential for car parking provision to be retained in the town centre, for example for those wishing to easily access the doctors' surgery and other local services. She also wished to see the mix of smaller independent shops retained. Provision should be made for products produced by students at the local universities to be marketed.

4. **SILVER HILL REGENERATION (LESS EXEMPT APPENDICES)**
(Report CAB2603 refers)
MINUTE EXTRACT FROM THE OVERVIEW AND SCRUTINY COMMITTEE HELD 7 JULY 2014 (LESS EXEMPT APPENDICES)
(Report CL96 refers)

Cabinet noted that Report CL96 (distributed separately with the supplementary Council agenda for 16 July 2014) had not been made available for publication within the statutory deadline. The Chairman agreed to accept the item onto the agenda as a matter requiring urgent consideration, to enable the points that The Overview and Scrutiny Committee had asked to be brought to Cabinet's attention before it made decisions upon Silver Hill Regeneration at this meeting and prior to Council's consideration on 16 July 2014.

The Chief Executive responded to comments made during public participation and by The Overview and Scrutiny Committee and in summary made the following points:

- He confirmed comments from a member of the City of Winchester Trust had been made in a personal capacity and did not necessarily reflect the views of the Trust as a whole;
- The reference group referred to was an informal sounding board and not part of the formal decision-making process. The minutes had been made available to all Councillors and could be made available to others on request. Proposals for Member approval were brought forward for due consideration as a part of the formal decision-making process.
- He did not accept any criticism of the Council's ability to manage such projects, as the Council had a strong management team with a great deal of relevant experience. In addition, it had sought advice from a wide range of professionals, including on the design aspects.

- He also did not agree with any assertion that the public had been misled by the Council as there had been a great deal of consultation with local residents and businesses to date.
- He emphasised that the final decision on the Development Agreement aspects were a matter for Cabinet, and if any material issues were raised following consideration by Council, then Cabinet may need to meet again to consider those points. If approved, it would then be for Planning Committee to determine the subsequent planning application.
- He did not accept that it was inappropriate for either Cabinet Members or himself, to have demonstrated leadership by expressing their current views on the proposals. Consideration would still be given to issues that arose in the meeting. Planning Committee Members could also ask questions but would need to consider any issues which arose through the planning process and keep an open mind before making a decision on the application at the Planning Committee meeting.

The Corporate Director drew attention to various design improvements and modifications proposed to the 2009 consented scheme. He emphasised that the Report contained proposed variations to a consented planning scheme issued in 2009, following consideration at two separate Planning Committees and a great deal of debate and discussion, including at public meetings, prior to that date. These variations had arisen from the opportunity arising from changes to the Bus Station arrangements as well as aspirations to improve design aspects of the scheme. In addition, it provided the majority of the additional town centre retail floorspace as envisaged by Local Plan Part 1 and this was essential if Winchester was to continue to resist out-of-town retail development.

The Head of Estates explained that Deloitte had produced a report which demonstrated that the scheme would provide best consideration for the Council under S233 Town and Country Planning Act 1990 and would enhance the overall value of the Council's estate. He also emphasised the poor condition of many of the existing buildings on the development site and in particular, the condition of Friarsgate car park would require its closure shortly.

The viability of the scheme as currently assessed meant that it was unable to contribute towards affordable housing. However, a formula could be included in the financial arrangements (as well as a Section 106 agreement entered into in respect of the new planning applications to be submitted) so that if residential market conditions in Winchester continued to improve, a significant contribution was likely to be forthcoming towards providing affordable housing off-site. The formula would take account of the Council's standard viability test of permitting a residential developer return of 20% before the affordable housing contribution became payable. One Member asked for an indication to be given as to the potential range which the affordable contribution might fall within. The Head of Estates stated that an upper limit of £6.7m would be applicable if it was agreed that 35% affordable was the appropriate provision for this development. However, as with all issues relating to market conditions, if the economy did not perform as expected, the potential that no contribution would be forthcoming remained.

The Head of Estates advised that the process whereby Henderson had sought to select a contractor by negotiation rather than tender was a common practice where a proposed residential partner had a contractor subsidiary, and should reduce overall costs.

The Head of Legal and Democratic Services advised that the developer was seeking the Council's approval under the Development Agreement to a number of variations to the development, to reflect the changes to the Bus Station arrangements and to ensure viability. The changes also reflected discussions of the informal reference group. In addition, approval to minor changes to the Development Agreement itself were also sought (e.g. negotiation with a single contractor). Section 4 of the Report explained where in considering changes the Council had 'absolute discretion' or where its discretion was subject to caveats. However, in exercising discretion the Council needed to have regard to the commercial viability of the scheme and not act capriciously. He made reference to a letter received from Dentons Legal Practice, sent at the request of Councillor Gottlieb. Its contents had been discussed with the Council's own external legal advisors (BLP) and they were satisfied that its contents did not change the advice given in the Report CAB2603.

The Chief Finance Officer advised that the assessment of the Development Account had been undertaken by Deloitte and its findings were contained within Exempt Appendix 5 of the Report. She confirmed that significant work had been carried out to date on the Development Account, with a proportion of costs already confirmed, and work on this would be continuing.

The Head of Major Projects advised that detailed work was ongoing regarding the transport assessment of the revised proposals which would be tested by the County Council and made available through the planning process. In summary, it was anticipated the changes would not make a dramatic difference to the traffic movements across the day, when compared to the consented scheme, although the removal of office space would reduce journeys at peak times.

The provision of car parking would be line with both the Council's own Parking Strategy and new Government planning policy guidance. The Strategy requires that broadly the same number of car parking spaces should be retained across the City and at the same time, the Council would seek to increase Park and Ride use thus making use of the available capacity.

The Head of Major Projects made reference to a letter from Stagecoach to Henderson where they believed that the proposed bus stop arrangements would enable all required services to be timetabled. Work was ongoing with the aim of grouping services in the best way possible to minimise the distance users were required to travel between bus stop locations.

Cabinet considered Section 3 of Report CAB2603 in detail and relevant officers and advisors responded to questions, with a summary of responses

set out below. Cabinet also had careful regard to the comments that The Overview and Scrutiny Committee had made (ReportCL96 refers), and in particular the eleven questions raised for their consideration.

Block Layout and Design

The Corporate Director advised that the block layout and essential components were broadly the same as the original proposals. Under the new proposals, Block A had some elevations of seven storeys and this was essential to enable elements of retail, residential and three layers of car parking. The Head of Estates advised that the highest part of the existing buildings in the site was 16.77 metres (part of the Friarsgate car park). The highest element of the consented scheme was Block B with a height of 24.5 metres, and Block A at 21.25 metres. Under the new proposals, the highest point of Block A would be 23.1 metres and Block B would be reduced to 18.5 metres. To provide some context, the Cathedral Tower was over 43 metres.

The Corporate Director said that Derek Latham of Lathams Architects had advised the Council on seeking improvements to the consented scheme. The Reference Group had raised 21 issues for consideration. These had led to improvements to the quality of the public realm, rhythm, articulation and massing of the blocks, and quality of the materials when compared to the consented scheme. The water feature and rills had also been improved.

It was noted that a number of properties in the High Street were 4 storeys high. The scheme needed to be of a scale to reflect its own character in a separate quarter of the City. The height of the scheme reflected the functions to be accommodated in the relevant blocks and improvements had been made to the articulation and materials.

With reference to point (viii) raised by The Overview and Scrutiny Committee that the development should carefully integrate with the existing historic town centre, the Corporate Director advised that at the previous Planning Committees it was considered that it was not appropriate for the design to be a pastiche or replica but should add something new to the design of the town. He emphasised that the majority of buildings within the existing site did not merit repair or renovation anyway and a contemporary approach to design had been adopted. The scheme architects had carefully examined the use of materials and variations in height and façade to respect the existing townscape. The scale of the public spaces deliberately did not provide a large new public square, but sought to provide spaces on a similar scale to elsewhere in the town centre.

In response to questions regarding public comments about comparisons with West Quay Southampton or Festival Place Basingstoke, the Corporate Director emphasised the proposals were vastly different in both size and design. It was not an internally facing shopping centre but essentially retail units in a streetscape. The consented scheme permitted 95,000 square feet of retail space and the proposal was for 145,000 square feet (there was

currently approximately 110,000 square feet of retail space on the existing site).

Car Parking

Cabinet had regard to point (iii) raised by The Overview and Scrutiny Committee and the comments made by the Head of Major Projects in his introduction above. Car parking for Silver Hill should be seen within the context of the Council's car parking strategy which was seeking to maintain broadly the same level of car parking spaces in the town centre as was currently available, whilst seeking to maximise use of Park and Ride. The use of parking standards for retail developments was no longer appropriate on their own and regard must be made to the accessibility of the site and other parking in the area. The Corporate Director emphasised the condition of Friarsgate car park which would require its closure shortly, and the consequent reduction in existing car park spaces available.

The Head of Major Projects confirmed that the Council were working with the County Council as highways and transport authority to address air quality issues, which included reconsideration of the current one-way system. This may include an option for changes to the one-way system near Silver Hill which would seek to reduce the amount of unnecessary vehicle trips around the one-way system. Bus services would be located at bus stops locations to minimise buses having to travel unnecessarily around the system. The design of the scheme would not preclude such changes. In addition, the removal of the office provision from the scheme would reduce vehicle trips, particularly at peak times.

Residential Units

In response to questions, the Corporate Director highlighted Paragraphs 3.8 and 3.9 of the Report.

Affordable Housing

Cabinet had regard to point (iv) from The Overview and Scrutiny Committee.

On behalf of Cabinet, Councillor Godfrey shared the concerns that the proposed variations in the Agreement with the Developer would not guarantee new affordable housing provision. Therefore, it was proposed that an additional proposition be moved on behalf of Cabinet at Council to guarantee substantial funds for a minimum amount of affordable housing off-site, underwritten by monies which would be generated by the scheme for the Council. This provision would apply in the event that the formula in the Agreement with the Developer did not secure that number of dwellings because of adverse residential market conditions.

The Head of Estates responded to questions about how this would work in practice and it was agreed that the exact wording for the additional proposition would be refined for consideration at Council on 16 July 2014. It was

expected that the minimum guarantee offered by the Council would enable the provision of 20 affordable homes for social rent, which was what was expected under the approved scheme.

The Corporate Director emphasised that the Council's priority would be to secure the maximum number of social housing units as a result of this development, but it was acknowledged that these might not be best placed within the site itself. It could be more economically developed by the Council on its own land elsewhere. He indicated that shared ownership was not the highest priority for meeting housing need, as high values in this area would limit the number of potential purchasers and the right to staircase out of shared ownership would limit the availability of such units for onward sale to future shared ownership purchasers. The difficulty of obtaining mortgages for such units above retail schemes was also acknowledged. The Homes and Community Agency (HCA) would be approached regarding the possibility of funding, although this was probably unlikely to be forthcoming, given that S106 affordable housing was not their high priority.

The Corporate Director advised that direct discussions had not yet been held with Registered Providers (RPs) regarding affordable housing provision in connection with the scheme, as the timing meant this was not yet appropriate. However, other locations may better suit their needs, for the reasons outlined above.

Bus Station

Cabinet had regard to point (v) from The Overview and Scrutiny Committee and the concerns expressed during public participation regarding the removal of the bus station.

In response to questions, the Head of Legal and Democratic Services confirmed that the Council could not require Stagecoach (or any other bus operator) to use a bus station if they did not want to. In addition, there would be issues as to how a bus station build could be financed in this situation.

The Corporate Director advised that the detailed design and layout would include public toilets (to be operated by the Council), a ticket office, timetable information, shelter and lighting, and would have CCTV coverage. In addition, the Head of Major Projects emphasised that under the existing approved scheme, buses would still have to depart from two locations so there would still be the need for bus users to move between these two locations to catch connecting buses. He reiterated comments made above about Stagecoach working under the new proposals to position bus services stops so as to minimise the need for distances bus users to walk to make such connections. This would involve placing services that commonly required a connection in adjacent bus stops. In some instances bus users might need to walk between the two bus stop locations and therefore the design and signing of the route will be an important consideration. Cafés would be available nearby in the scheme. It was considered that at night, well-lit shelters adjacent to public

roads would be more visible and safer than an enclosed waiting room in an off-street bus station.

Changes in Retail Provision

Cabinet had regard to Point (vi) and (ix) from The Overview and Scrutiny Committee.

Mr P Wilks (NLP Retail) explained that he had 26 years as a Retail Planning Consultant and had advised other local authorities nationally on town centre strategies, including giving evidence at Public Inquiries.

Mr Wilks advised that the scheme proposed an approximate 14% increase in the amount of floorspace in the town centre, with less than 10% increase in retail units. It was essential that Winchester planned for growth and at the moment, it was not meeting its potential in terms of retail offer. Mr Wilks emphasised the proposal included a total of 20 or so retail units and NLP had seen Henderson's possible tenant list and they were all very feasible and viable retailers. The inclusion of a larger unit for a department store type retailer was shown to be a strong anchor which would attract other retailers, and generate footfall which would benefit the town centre overall, including the smaller independent retailers. The location of the Silver Hill scheme would enable a figure of eight footfall pattern to develop, to link in with the existing retail in the High Street and adjacent areas. This would benefit existing smaller traders. Any movement of larger national traders in the town to the scheme was likely to release smaller older units that were now more suitable for independent retailers. This may also assist traders who provide lower cost products to find suitable alternative premises, but this could not be guaranteed.

In response to questions regarding concerns raised during public participation, Mr Wilks explained that retailers who had ceased trading had been included in the NLP report to illustrate retail trends and had had a minimal impact on Winchester, which had fared well in the recession. The growth in internet shopping had been fully been taken into account, in addition to the growing "click and collect" shopping provision which encouraged people to visit local stores. Mr Wilks emphasised that Winchester would continue to offer an experience that was more than simply shopping, as it also relied on its tourist attractions and the hospitality food and drink sector.

Mr Wilks stated that Winchester fell within the catchment area of Southampton which affected the amount of spending retained within the town. NLP's opinion was that if the right facilities were offered in Winchester, more people would chose to shop locally. Mr Wilks considered that without the Silver Hill development, the Council would find it increasingly difficult to resist out-of-town shopping developments. He considered that the other comparator towns in the NLP study also were affected by their own competing centres.

The Head of Estates indicated that some smaller existing traders affected by the development could also consider the option of applying for a market stall.

The improvements in the market over the last few years showed that quality small traders could benefit from the larger footfall that the market generated.

Oxfam Building (153 High Street)

The Corporate Director confirmed that the replacement of the building would not adversely impact on neighbouring historic buildings, such as the one currently occupied by Maison Blanc.

Shopmobility

The Head of Major Projects confirmed this facility would remain within the Brooks Centre for the current time and that discussion had taken place with Winchester Area Community Action.

Market Store

The Head of Estates confirmed that it was proposed that the Market Store would remain in its current location in the Brooks.

In response to questions, the Head of Estates confirmed it was always proposed that the Broadway would be used in the future for street markets and this was still the case. At the time the Development Agreement was drawn up, it envisaged that the market would relocate to the Lower High Street and the Broadway from Middle Brook Street. The recent success in developing the market would mean that as well as the use of the areas proposed in the Development Agreement, the High Street and Middle Brook Street would also continue to be used. This would aid pedestrian footfall and link the existing retail areas to Silver Hill.

The Head of Estates stated that the market continued to be successful and the trend was likely to continue. Art students utilised some stalls to sell their work already and it was hoped to develop a relationship with the University to encourage students to use the market as an outlet for their works.

Procurement of Construction Contractor

Cabinet had regard to point (x) from The Overview and Scrutiny Committee

The Head of Estates advised that it was a common option for construction contractors for major developments of this nature to be procured in the manner suggested in Paragraphs 3.23 to 3.25 of Report CAB2603. The Council would employ a Cost Consultant to ensure all costs were scrutinised carefully.

The Head of Legal and Democratic Services stated that the Council had obtained external advice confirming that the proposals were lawful.

Sustainability Issues

The Corporate Director advised that Henderson had discussed the sustainability aspects of the project with WinACC who had given very positive feedback on the approach. He also advised that such issues, and the quality of materials, would be covered by appropriate planning conditions.

Implications of Revisions to the Scheme

In addition to Section 4 of Report CAB2603, Cabinet had regard had regard to point (xi) from The Overview and Scrutiny Committee which requested that "Cabinet should negotiate, where possible, on specific elements of revisions in the Development Agreement, as opposed to accepting or rejecting en bloc and consider whether the Council has maximised its negotiating position at this critical point."

The Head of Legal and Democratic Services advised that although the Council broadly had absolute discretion whether to agree the changes, it would not be correct to assume it could therefore make whatever demands it wanted: if the Council made demands which made the scheme unviable, the scheme would not go ahead. The exercise of absolute discretion should therefore be seen as ultimately a commercial negotiation with Henderson, who expected to make a reasonable profit. The changes were being sought by Henderson in order to make the scheme viable, with the converse implication that failing to agree the changes, or imposing additional demands, would make it unviable. Should the scheme stall and be unable to go ahead, the Council would also need to take account of the damage that could cause to its reputation in the market place.

Ms L Avis (BLP LLP Solicitors) advised that the Council's discretion was constrained by a duty not to act perversely. In addition, if a decision was made that was regarded as perverse, the Council might be seen as acting in bad faith, contrary to the "good faith" clause contained within the contract with Henderson. An example of a perverse decision might be demanding a bus station with no company in place prepared to use or lease the facility. Ms Avis stated that the financial deal being offered to the Council would be regarded as a major consideration in deciding whether or not to proceed.

Ms Avis advised that it was open to the Council to decide it did not wish to proceed with the scheme. But, if it wished to agree the scheme with its own new variations or other demands, it should have regard to the risk that this might make the scheme unviable for the developer. If Henderson did not agree to changes proposed, once the longstop date was reached it could walk away from the development. With regard to suggestions during public participation that the Council should "go back to the drawing board", Ms Avis emphasised the length of time which would be needed (considerably more than the two or three years suggested) and the costs involved in repeating the work undertaken to date in reaching the current position, and in a new procurement process and CPO. She said that the Council had already sought to achieve changes through negotiation which had led to the current proposals from the developer to meet the points made by the Council. She pointed out

that the latest proposals gave the Council a good financial return, which needed to be taken into account in the exercise of any discretion.

The Head of Estates emphasised that if the Council were to ask Henderson to start again, the cost of all the work carried out to date would need to be added to the costs of any new scheme, meaning that the base cost was significantly enhanced. Consequentially, the opportunity for viability of any new scheme was diminished. The Corporate Director highlighted that significant delays would create uncertainty and result in the condition of the existing buildings continuing to deteriorate. The Head of Estates said that Coitbury House alone would require works in the order of £500,000 to put it into a lettable condition pending any redevelopment.

The Head of Legal and Democratic Services explained that if the revised development agreement was approved, the next steps would involve a Section 73 planning application to amend the approved scheme in certain areas, together with a full planning application regarding the change of use of Block B (the former bus station). The indication was that Community Infrastructure Levy (CIL) receipts would be approximately £800,000, which could be paid "in kind" through works.

The advice of the Officer Project Team was that the negotiations had reached a point where it was not practicable to change the individual elements further, without compensating changes being agreed to offset the cost elsewhere.

Financial and Valuation Considerations

Cabinet had regard to point (vii) raised by The Overview and Scrutiny Committee.

Mr R Owen (Deloitte) outlined his considerable experience in this area over the past 25 years, including providing advice to a number of other local authorities. The terms of the Council's negotiations with Henderson had been analysed and Deloitte were satisfied that it would meet the requirement for best consideration under S233 Town and Country Planning Act 1990 if the transaction were to take place today. He also advised that as the test of best consideration applied to the date of transaction any subsequent material changes in the terms would have to be taken into account at that point. He explained why S233 was the appropriate test where the Council was proceeding with a scheme for planning purposes in connection with a compulsory purchase order it had promoted under part IX of that Act. It was a different test to that contained in S123 Local Government Act 1972 when a Council was seeking to dispose of a surplus asset – when it would need to get the best price available in the market, regardless of the use proposed by the purchaser.

Mr Owen stated that, in Deloitte's view, Henderson had made significant efforts to adjust the scheme to meet the Council's requirements. The current market conditions would mean that the Council would find it difficult to secure a new partner for such a scheme, especially if it terminated an arrangement

with the existing developer after a long period of seeking to bring a scheme to fruition. He highlighted that nationally, a number of local authorities were finding it difficult to proceed with their developments because of viability issues and that the Council might have to invest its own financial resources in order to bring forward any new scheme.

One Member drew attention to comments made in Councillor Gottlieb's Report to The Overview and Scrutiny Committee (OS104 refers) which appeared to imply there was a significant amount unaccounted for in the Development Account. The Chief Finance Officer advised that the historical accounts had been examined in great detail and consequentially reasonable assurances had been obtained on substantial elements of the costs. The verification work was continuing and nothing had arisen to cause a change in the proposed recommendations in the Report. Further detail was provided in the Exempt Appendices to Report CAB2603 and in the exempt minute below.

Estates Issues

The Head of Estates referred to the need to appropriate 153 High Street to planning purposes, now that it was included within the scheme.

Legal Issues

The Head of Legal and Democratic Services confirmed that appropriate advice had been obtained from BLP and Leading Counsel as the scheme had progressed and on all the matters contained in the Report.

Risk Management Issues

Ms Avis of BLP confirmed that the compulsory purchase order (CPO) remained in force for three years ending in March 2016, after which time its powers ceased. The Council would then have to start the process from the beginning, including providing justification and participating in the Public Inquiry. The Head of Legal and Democratic Services advised that one of the tests for a CPO was a compelling need in the public interest, and this "compelling need" might be challenged in the event of the need for a new CPO application, if an earlier scheme had not been implemented. It was the Council officers' and external advisors' opinion that the variations to the scheme were not fundamental and would not affect implementation of the scheme under the confirmed CPO. BLP said it was still based upon the 2009 planning permission, with adjustments. The Corporate Director confirmed that it had not been known at the time of the CPO Inquiry whether Stagecoach would want to proceed without a traditional bus station. The other changes had all been the subject of negotiations with Henderson in recent months following Stagecoach firming up on its current proposals for bus interchange and the other matters which the Council had raised. Mr Owen highlighted that it was not uncommon for a local authority to be asked to agree to further changes to a scheme after a CPO had been approved, as conditions in the market place changed.

At the conclusion of Cabinet discussion of the Report, at the invitation of the Chairman, Councillors Wright and Gottlieb addressed Cabinet and their comments are summarised below.

Councillor Wright agreed that the Silver Hill area required redevelopment but raised concerns about the parking provision proposed. He also disputed that the extra retail could be supported within the town and believed that the development could damage existing retailers. In conclusion, he emphasised that the development must provide a good deal for local residents and not just the Council.

The Chief Executive responded that the parking provision had been thoroughly discussed above, in addition to the retail provision. However, he suggested that officers could discuss his concerns in detail outside of the meeting.

Councillor Gottlieb considered that because of the significance of the scheme it was essential that the Council ensured the right decisions were made and taxpayers' assets were invested properly. He believed that this could only be achieved if the Council were to undertake a process of due diligence on the whole decision-making process to date. He considered this could be carried out within a three-month time period and was essential to ensure the Council could be confident in the proposed decision.

The Chief Executive advised that Cabinet Members must decide whether they were satisfied with the information they had been provided with to date, or whether they considered further work was required.

During discussion, Cabinet Members emphasised that the considerable amount of work and investigations undertaken by Officers and external advisers to date amounted, in their opinion, to the due diligence being requested by Councillor Gottlieb. Cabinet considered there was no benefit, and potential adverse risks of delay, in additional time and monies being spent on repeating this process.

Cabinet then moved into closed session to discuss the Exempt Appendices to Report CAB2603 and returned to open session to make the resolution outlined below.

Following consideration of the exempt information and the discussion above, Cabinet Members stated that they were content that all potential issues raised had been resolved to their satisfaction.

The Chief Operating Officer advised that although the matter would be considered by full Council on 16 July 2014, decisions on the Development Agreement were an executive matter for Cabinet. Therefore if Council raised any material matters, a further Cabinet meeting would be required to consider them.

Cabinet agreed to the following for the reasons set out above and outlined in the Report.

RESOLVED:

1. That in accordance with the provisions of the Silver Hill Development Agreement dated 22 December 2004 approval be given to the variations to the consented scheme for the regeneration of Silver Hill, as set out in a letter from Silverhill Winchester No. 1 Limited dated 12 June 2014 and the accompanying documents entitled “Volume 1 – Planning Drawings” and “Volume 2 – Strategy in respect of the evolution of the detailed design” enclosed therewith (“the Application”), including in particular:-

a) a reduction in the number of residential units from 287 (plus 20 live/work units) to 184 residential units only (or such lower number as the local planning authority may require);

b) the removal from the scheme of a bus station (in the form set out in the Development Agreement) and the provision in its stead of an on-street bus interchange and facilities (public toilets and a ticket office) on Friarsgate as detailed in the Application;

c) the deletion of a requirement for a Shop Mobility Centre and Dial A Ride premises in the development;

d) The deletion of a provision for a Market Store within the development.

e) the changes to the external elevations, massing and servicing arrangements as set out in the Application;

f) provision of one shop unit of up to 60,000 sq ft as detailed in the Application;

g) a reduction in the number of public car parking spaces from 330 to 279;

h) the amendment of the provision in respect of affordable housing by the substitution of a financial contribution to be assessed on the basis of the future viability of the scheme up to the equivalent of 40% affordable housing provision;

i) an increase in retail provision from 95,000 square feet to 148,000 square feet;

j) the inclusion in the scheme of 153 High Street.

2. That Silverhill Winchester No. 1 Limited be authorised to procure the construction of the whole scheme (residential and retail) by a construction company with a house building subsidiary, rather than as set out in the Development Agreement.

3. That the Head of Legal and Democratic Services be authorised to settle the detailed legal documents to give effect to 1 and 2 above.

4. That the Chief Executive, in consultation with the Leader, be authorised to:-

a) give the Council's consent to any further minor variations which the Head of Development Management advises are required if the Council as local planning authority is to grant planning consent for the scheme;

b) appropriate for planning purposes within the meaning of Part IX of the Town and Country Planning Act 1990 the land owned by the Council which it will put into the scheme;

c) agree the final number of retail units in the scheme.

5. That the principle of including 153 High Street, Winchester in the scheme be approved on terms set out in Exempt Appendix 3 and the Head of Legal and Democratic Services be authorised to settle the detailed legal documents to give effect to the transaction.

6. That a further report be made to Cabinet on options for the increase of the rent payable to the Council to up to 10%, and the purchase of the car park to be provided as part of the scheme.

7. That the further recommendation set out in Exempt Appendix 6 (Legal Advice) be approved.

RECOMMENDED:

THAT THE DECISION OF CABINET BE SUPPORTED.

5. **EXTRACT FROM MINUTES OF THE WINCHESTER TOWN FORUM HELD 25 JUNE 2014**
(Report CAB2604 refers)

Cabinet noted a correction to the minute extract to replace the name Councillor Tod with Councillor Osborne in the fourth paragraph.

The Corporate Director confirmed that the requests made by the Town Forum had already been implemented.

Cabinet agreed to the following for the reasons set out above and outlined in the Report.

RESOLVED:

That the extract from the minutes of the Winchester Town Forum held 25 June 2014 be noted.

6. **EXEMPT BUSINESS**

RESOLVED:

1. That in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

2. That the public be excluded from the meeting during the consideration of the following items of business because it is likely that, if members of the public were present, there would be disclosure to them of 'exempt information' as defined by Section 100I and Schedule 12A to the Local Government Act 1972.

Minute Number	Item	Description of Exempt Information
##	Silver Hill Regeneration – exempt appendices	) Information relating to the financial or business affairs of any particular person (including the authority holding that information). (Para 3 Schedule 12A refers))) Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. (Para 5 Schedule 12A refers)

7. **SILVER HILL REGENERATION (EXEMPT APPENDICES)**
(Report CAB2603 refers)

Cabinet noted that Appendices 3, 5 and 7 had not been made available for publication within the statutory deadline. The Chairman agreed to accept the items onto the agenda as a matter requiring urgent consideration, before it made decisions upon Silver Hill Regeneration at this meeting to enable the contents to be considered and prior to Council's consideration on 16 July 2014.

Cabinet considered the contents of the exempt appendices and made a further recommendation thereon (detail in exempt minute).

The meeting commenced at 6.30pm and was immediately adjourned to be enable proceedings to be moved to a larger room to accommodate the numbers present, recommenced at 7.00pm and concluded at 1.15am.