

**INVESTIGATION REPORT
WINCHESTER CITY COUNCIL**

A Perfect Storm

Report on Silver Hill

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**PREPARED FOR SIMON EDEN
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1. Executive Summary

- 1.1 I was appointed to be the external independent reviewer at Winchester City Council (WCC) on 10th March 2015. I was asked to investigate and establish the facts around how the Council came to lose a judicial review brought by one of its elected members, Councillor Kim Gottlieb. That judicial review prevented the Council from agreeing changes to the scheme at Silver Hill to be built out by SilverHill Winchester No1 Limited a subsidiary of Henderson Global Investments (Henderson) under a Development Agreement (DA) dated 22nd December 2004.
- 1.2 It is important to understand at the outset that there are two parallel systems of law operating in England. Firstly the domestic law of contract, by which the Development Agreement (the DA) must be interpreted by the parties to the agreement, and which are likely to be upheld by the UK courts. The DA contains a variations clause that allows changes to be made to the scheme.
- 1.3 The second system of law is EU law, and in particular the EU law of public procurement that has developed rapidly since the inception of the proposed development at Silver Hill. If there is a conflict in application of the two systems of law, EU law will always win.
- 1.4 The Council is keen to understand how it came about that it lost the judicial review (JR), despite legal advice to the effect that it could make the changes required by Henderson, relying on the variation clause in the DA and on Legal advice from Leading Counsel, Paul Nicholls QC.
- 1.5 The truth is more complicated than simply losing a case. There was a general risk to the Council of losing the JR due to a combination of factors:
 - a) The speedy development of the European law of public procurement such that a procurement exercise is always required for a public works contract.
 - b) In addition, the variations to a DA might now trigger a requirement for a further procurement, due to cases decided since the making of the DA.
 - c) The 2004 DA was not subject to competition. The Council entered Exclusivity Agreements with Henderson's predecessor, Thornfields, from mid 2002 onwards. It became and is now settled law that the DA should have been tendered.
 - d) The Silver Hill development is very slow. It was originally thought about in 1996/7, and was originally due to be finished in 2012. A typical and similar development may take 5 years, which

was the timeframe originally anticipated in the DA. Three extensions to the 'long-stop date' have therefore taken place

e) As a result of this slow progress, market circumstances altered the viability of the scheme, and the recession triggered the change of identity of the owner of shares in the development company from Thornfields to Hendersons. Thornfields went into Administration in 2010.

f) Leading Counsel, Nigel Giffin QC advised in November 2010:

“The practical consequence of there not having been a proper procurement in 2004 is, in my view, that there could be some changes material enough to generate new grounds for challenge....In particular, the absence of a procurement in 2004 might make it harder to rely upon contract change mechanisms contained in the original development agreement.”

It is therefore clear that the Council knew from November 2010 that there were substantial risks in making material changes by variations to the DA. Counsel advised that changing the identity of the shareowners of the developer was not such a change. The risk was that the Council would be forced to re-procure the developer. The Council did, however, invoke a standstill period of 6 months at this time to see if such a procurement challenge would materialise. The variation clause in the contract was not considered as a relevant or useful tool by either Giffin in this Advice, or an earlier advice in 2010, nor by James Goudie QC in Advices given in 2008 or 2009.

g) In June 2014 the Council instructed a different barrister from the same Chambers, Paul Nicholls QC, to advise the Council on Henderson's requests for variations to the DA. Some leading members plus Cllr Gottlieb had been meeting in a Reference Group that had been considering the proposed changes for some 12 months. That advice was therefore taken much later than it could have been and was obtained for the purposes of advising the Council, not the Reference Group, meaning that the Council was now committed to the track of accepting the variations due to time constraints.

h) The Council had wanted to instruct Nigel Giffin QC again, but he was unavailable on short notice at that time. Paul Nicholls QC gave advice instead which relied on the variation clause in the DA. He did not seem to think that EU procurement law was as relevant to the variations as the variations clause, and because of this his advice was therefore what those instructing him and what the Council wanted to hear.

i) In addition, the ability of Councillors to maintain their own continuity and stability was and is affected by annual elections. Political changes, and Leadership changes ensued at almost every election. There have been 10 leaders since project inception. It is now impossible to understand if there was a project 'vision' for the Silver Hill development from the Council as landowner in its early days. The initial 2003 Planning brief in contrast is universally accepted as a good document. It is similarly difficult to tell if there is an existing 'vision' for the Silver Hill redevelopment project now. The planning decision which includes the variations made in December 2014 has since been upheld by the Secretary of State.

j) These political leadership uncertainties cast a particular burden on senior officers requiring them to oversee this lengthy project and ensure it was delivered. Arguably, this deflected the officers from considering the level of risk in trying to carry the project into effect and trying to implement the variations. Assurance systems such as risk management, which may have helped on this issue, were either in their infancy or non-existent.

k) A further difficulty that acted against clear and speedy decision-making on Silver Hill, was that everyone associated with the Council maintains that Winchester is a member led authority which requires all decisions to be made at member level. Formal delegation to Officers to progress the project was, therefore, minimal, although, in reality, the key relationships with the contractors were always at officer level, and largely with the same group of officers throughout.

l) There is an absence of internal challenge and debate on Silver Hill, both among members and officers. There is no whip on the issue, and a reliance on cross party support, meaning that there is no challenge from an opposition party, nor has there been challenge from Overview and Scrutiny which is not supported by independent advisers. This resulted in officers feeling obliged to take the position that they had to see the process through to delivery in order to fulfill the Council's original intentions.

m) Finally, there is a Councillor from the majority group with the necessary funds and strength of mind to JR his own authority. Although he argued against the proposal internally, and campaigned against the proposal externally, he lost the argument and the vote in Council meetings. He renewed his opposition in Court.

These factors created a perfect storm.

A 'perfect storm' meaning in this case that a rare combination of circumstances together aggravated the situation drastically in Winchester.

- 1.6 This report examines these events, establishes how the Council came to lose the judicial review, considers whether things could have been done differently, and makes recommendations for the future.
- 1.7 Many of those findings and recommendations are directed towards Councillors having sufficient assurance mechanisms in place to give them confidence in their work, to make their decision-making safe, and to make them as free from successful challenge as possible.

2. Terms of Reference or scope of the review

2.1 The chief executive described the situation in his brief for the review as follows:

“Winchester City Council is seeking an independent review of aspects of the decision-making which guided a major regeneration project in the Centre of Winchester. Specifically, the review is to consider the changes to elements of the scheme and the way in which advice taken on the impact of those changes informed members decision-making.

In the light of the outcome of a Judicial review which found the Council should have sought to re-procure a revised scheme, the Council is being challenged to demonstrate that it took proper advice to support a decision to agree variations to the scheme without initiating a fresh competitive process. It is also being asked whether that advice was properly put before Members, and was taken into account in making the decision to accept the variations.

“In summary, the review is to consider whether:

- Appropriate advice was sought;
- Advice was correctly interpreted and clearly presented in reports put before elected members: and
- The advice given was taken into account in decision-making.”

“Members have specifically requested it (the review) consider:

- The sequence of events which led to departures from the development brief first agreed by Council, and advice taken on those changes;
- The reasons underlying changes to the Council’s approach to the provision of affordable housing and the removal of the bus station from the revised planning application submitted in 2014, both of which were criticised in the Judgement;
- Statements made to the 2012 CPO enquiry relating to the scheme approved by the Council’s Planning Committee in 2009.”

The Chief Executive concludes:

“The brief for the review outlined above is a starting point. It will be for the reviewer to consider any matter they believe relevant to the Cabinet and Council’s decisions which were the subject of the Judicial review.”

2.2 In consultation with the then Leader, Councillor Pearson, and the Chief Executive of the Council, Simon Eden, I suggested that the scope of the Review should include recommendations for the future if the review was to be useful to the Council. This was agreed.

- 2.3 I also made it very clear that my findings would not include making accusations against individuals. The Council has its own disciplinary processes, should it wish to use them.
- 2.4 I was keen to listen to members of the public, and decided that the best way of doing this was to invite written submissions.

The piece set out in **Appendix One** appeared on the Winchester City Council website in March 2015 inviting submissions by 30th April 2015. 65 submissions were received.

The piece also provided clarity about the scope of the review I had determined on:

“The review will look at how the Silver Hill development has reached the current position. This will involve a scrutiny of all relevant documents, interviews with key stakeholders including past and present Councillors, Officers of the Council, specialist advisers and contractors, and written submissions from members of the public.

“The review will address whether appropriate advice was sought, whether that advice was correctly interpreted, whether it was clearly presented in reports to Members, and whether it was taken into account in decision-making. It will address the Judicial Review, departures from the original brief and their reasons, and any relevant matters emerging from the 2012 Compulsory Purchase Order process and any subsequent changes.

“The review will make findings of fact, suggest lessons to be learned and make other recommendations for the future. “

3. Methodology

- 3.1 I asked all who I interviewed to suggest other people who might be relevant for me to interview, and whether they knew of any documents that might be relevant. I followed up the vast majority of those leads. Often those leads led to other relevant information.
- 3.2 **Appendix Three** contains a list of interviews , meetings I attended, and a list of the documents I was given or sent to review. I held 57 interviews and reviewed literally thousands of pages of documents. The Appendix contains a vast amount of relevant information, which has taken me more time than originally anticipated to give careful consideration to and to process. The report would not have been comprehensive if I had arbitrarily imposed a closing date and thereby excluded what might be relevant information. Of course, I had to read everything I was given or sent in order to determine its relevance to the review.
- 3.3 Inevitably, I could not meet everybody suggested, nor could I read all the documents that may in some way have been relevant to the issue of Silver Hill. I had to exercise some discretion to draw the review to a close, which therefore, has limited the number of people I might have met, or the number of documents I might have read. I have tried to concentrate on what was relevant to my brief, and I believe that I have covered all the necessary ground to form a clear and balanced judgement of the issues.
- 3.4 This report has been delivered later than expected due to my having to wait for a number of important pieces of evidence to be submitted. I would not have been able to give careful consideration to them and the report would not be based on all relevant considerations otherwise.
- 3.5 I would like to thank everyone I interviewed who made themselves available, sometimes at very short notice.
- 3.6 I undertook to all who I interviewed that what they told me and our discussion would remain confidential. I have therefore been able to obtain some very candid information about what happened in Winchester. If individuals are quoted in this report it is with their consent, or because what they said is already in the public domain.
- 3.7 I have been given a very large number of documents to read, some of which are confidential. I have read them carefully and have felt able to quote from those documents where the information itself is in the public domain, or where effluction of time and/or events have happened which mean that they can no longer claim to be confidential.
- 3.8 I also attended a number of meetings, which are set out in Appendix 3.1. This enabled me to understand ‘how things happen round here’;

how Councillors interact with Officers, how decisions are reached, and how external advisers are viewed. I also spent time walking around the City, looking at existing roads, and places that will be developed as part of Silver Hill regeneration. I am indebted to Kevin Warren, Head of Estates, for personally taking me on a slightly perilous viewing around the closed part of the Silver Hill site.

- 3.9 I have used my own judgement and experience to reach the conclusions and recommendations in this report, based on the evidence I have collected and the perceptions of the witnesses I have interviewed. Where accounts conflicted about a particular event I have, of necessity, relied on my own judgement and experience to reach a particular conclusion where one was required.
- 3.10 I am grateful to all the staff at Winchester who have given their time to help me with this investigation, and in particular Nina Harper who arranged meetings and acted as a confidential repository for information. She has also been cheerful, responsive, intelligent, and a credit to Winchester at all times.
- 3.11 If I have misunderstood anything, or misrepresented anything, the fault is entirely mine.
- 3.12 Prior to publication, I sent a copy of this report to the Chief Executive, Simon Eden, in confidence, to check for factual inaccuracies. I have corrected those, but changed nothing else.

4. Background and context

4.1 Readers are advised to read the content of the Chronology of Events, which is to be found at **Appendix Two**.

4.2 Winchester the place

Winchester is both a city and the county town of Hampshire. The city lies at the heart of the wider City of Winchester, a local government district, and is located at the western end of the South Downs National Park, along the course of the River Itchen. It is situated 61 miles south-west of London and 13.6 miles from Southampton, its closest city. At the time of the 2011 Census, Winchester had a population of 45,184. The wider City of Winchester district has a population of 116,800. Winchester developed from the Roman town of *Venta Belgarum*, which in turn developed from a fortified Iron Age settlement. Winchester's major landmark is Winchester Cathedral, one of the largest cathedrals in Europe, with the distinction of having the longest nave and overall length of all Gothic cathedrals in Europe. The city is home to the University of Winchester and Winchester College, the oldest public school in the United Kingdom still to be using its original buildings.

In 2013 businesses involved in the housing market were reported by a local paper as saying the city's architectural and historical interest, and its fast links to other towns and cities have led Winchester to become one of the most expensive and desirable areas of the country and ranked Winchester as one of the least deprived areas in England and Wales.

4.3 Winchester the Council

Winchester is a local government district in Hampshire, England, with city status. It covers an area of central Hampshire including the city of Winchester itself, and neighbouring towns and villages including New Alresford, Colden Common and Bishops Waltham.

The current city boundaries were set on 1 April 1974 when the City of Winchester merged with Droxford Rural District and part of Winchester Rural District.

Elections to the council are held in three out of every four years, with one third of the seats on the council being elected at each election. From 1995 to the 2004 election the Liberal Democrats had a majority on the council, but after 2 years when no party held a majority the 2006 election saw the Conservative party gain control. The elections on 6 May 2010 saw the Liberal Democrats take control of the council, however the council soon switched to NOC a year later in 2011. In 2012, the Conservative Party made their only Council gain of the entire

English local elections and won a majority in Winchester once again. Subsequently, two Conservative councillors defected to the Liberal Democrat group, placing the council under No Overall Control. Following local elections on 7 May 2015, the Conservatives re-gained majority control of the council.

The council is currently led by a Conservative administration. The make up of the council as of May 2015 is:

Conservatives - 33

Liberal Democrats - 22

Labour - 2

WCC has 57 Councillors representing 26 wards as one two or three Councillors per ward. Elections are held in years one two and three of a four year cycle on the first Thursday in May. 19 Councillors are up for election each year. This means that in the Spring of each year, both Councillors and Officers concentrate on the elections, to the possible detriment of Council business.

With effect from Thursday 5th May 2016 the number of Councillors will reduce to 45 as a result of Boundary Commission proposals. A Governance Review is therefore necessary to review the Council on these new boundaries and to ensure that it efficiently carries out its functions at both Councillor and Senior Officer level. It is vital that all the functions of a modern District Council have a home in the new Council environment. Such a review can also address the new political challenges such as combined authorities facing WCC.

The Boundary Commission proposals also provided the opportunity to reconsider whether annual elections are in the best interests of the Council in efficiently conducting its business. The arguments in favour of moving to elections every four years are that strong councils result. This however would not be the case where there is no overall majority.

As with all Councils that carry a Planning function the Planning Committee is correctly obliged to keep its distance from the rest of the Council. Planning members are advised separately about how to participate at full Council meetings when landlord matters are being discussed and where issues will subsequently appear on Planning Committee Agendas.

Sometimes it is difficult for citizens to understand that both planning and strategic development functions are carried out by the same Authority. However, WCC has not been subject to criticism at any point for this in my Review. The new Council will continue these functions.

The Council is also a Housing authority, and unlike many of its neighbours has retained its stock and has good relationships with Housing Associations within its area. There are about 8,000 social houses in Winchester overall of which about 5,000 are owned by the Council. There has been no house building since the 1980s due to

government policy. This changed in 2012 and so the Council took the opportunity of deciding to build 200 new homes over 5 years on existing landholdings. All parties agree that Housing is an important Council service and extending Council stock is the right thing to do for Winchester.

The Silver Hill development was designed to produce initially 106 new affordable homes on the site but by the time the s106 agreement was signed in 2009 this had reduced to 100 affordable homes on site.

The Council's waiting list is in the region of 2,000 and growing. Private rented accommodation in the City is also increasing and some homeless families are placed outside the Council's boundaries as a result.

The Local Government Association came to carry out a peer review of WCC in April 2013 and made seven key recommendations including conducting a full governance and constitutional review. The questions it hoped they would address are "How can the Council be more flexible, responsive and innovative?" and "How to create more effective corporate governance". These recommendations have yet to be all implemented and are now urgent. Similarly, 4p's have made more recent recommendations concerning Project Management and these need to be adequately reflected in the new constitution.

During my review a number of concerns or criticisms have been raised about the governance of the Council. These will need to be addressed in the Governance and constitutional review:

- Whether the Council is member led and what that means in Winchester for officers (defining roles and responsibilities of both members and officers)
- That the Overview and Scrutiny function does not act independently and is not supported by independent officers,
- That the scheme of delegation to officers is too vague,
- That delegation to officers in job descriptions and in the constitution is also too vague,
- That the role of the opposition is not defined,
- Engagement with the public is poor,
- FOI requests take too long to answer and answers are poor,
- The annual governance statement and strategic risk register is given insufficient prominence

A number of concerns have also been raised about the way the Council works or its culture. These concerns are that the Council is perceived as inward looking, complacent or 'old fashioned'. These concerns arise from what the Council feels like to work with, and whether its values and ethics are understood by all who are elected or work for it to carry out its business. If a negative view is held by some of the Council's citizens or stakeholders, then it is likely that the Council

will suffer reputational damage as a result. The “Winchester Deserves Better” campaign demonstrated the strength of feeling that existed in the community about some of these issues, combined with a feeling that voices opposing the Council’s views were not being heard.

However, these negative comments must be balanced against those who found the Council good to work with, well motivated and with good representatives and good senior staff, working as a team. The latest staff survey showed that Winchester is a good place to work.

The Council had 463.06 staff in 2015, and a net revenue expenditure of £13,919million. The HRA has a budget of £30 million. Capital expenditure will be £113m over the next five years. There will be a £2.2m shortfall within 5 years.

The Council therefore faces budget challenges over the next few years, not as substantial as many larger Local Authorities (who would love WCC’s financial stability), but its small scale and small number of staff can be seen as both an advantage and a problem. Economies of scale will not be present without joint delivery of services with others, nor can the Council be confident of directly employing staff with the right competencies and skills to deliver projects worth many times the size of its annual budget.

The Council’s Community Strategy was amended in 2014, having been adopted originally in 2004.

Our vision for the Winchester District is of diverse and dynamic communities, where people work together to ensure that everyone has the opportunity to lead a fulfilling life now and in the future.

The Community Strategy links to Portfolio holder plans. Silver Hill is to be found in the Leader’s Portfolio plan 2015/6:

Ensure that the Silver Hill redevelopment is delivered in a way which supports existing businesses as well as providing new opportunities for independent and multiple retailers.

4.4 The Beginnings of Silver Hill (Years 1996 - 2004)

The Council held Urban Design workshops in Central Winchester in 1996, and commissioned the Llewelyn-Davies report the following year. It proposed a comprehensive not piecemeal approach to redevelopment in Broadway/Friarsgate.

An Initial approach was made to WCC from M&S and Stagecoach in 1997. The Council’s response was to set up a working party on Broadway/Friarsgate, which became known as Silver Hill. The

initial purpose of the working party was to identify the aims of the project. The area was not attractive, needed improvement and needed to be able to compete with Basingstoke and Southampton's new retail developments. The idea was to prevent a decline in retail activity in Winchester.

The Council was attracted by Stagecoach's Developer Thornfields. Thornfields made a presentation to the Council in 1998 about a proposed new scheme. Discussions continued from 1999 along the lines of a whole area development rather than a piecemeal development.

An initial planning brief was produced in 1999, although Silver Hill as a proposed development did not enter the local plan until 2006.

Decherts and Drivers Jonas were appointed after a competition in 2000 to be the Council's advisers/Consultants on Silver Hill.

Because of this Developer led initiative, WCC entered into exclusivity Agreements in 2002, 2003 and 2004 with Thornfields. The advantage of these Agreements was to ensure a DA would follow between the parties. Such a DA would include the Developer underwriting the Council's and other professional costs through the development agreement thus saving Winchester, a small District Council, a considerable outlay of money at the time.

The Council agreed in 2001 to start negotiating the DA with Thornfields following legal advice.

The final Planning Brief was produced in January 2003 and is still thought by most people I have spoken with to be the best document expressing what the council wanted on the site. I have been asked to look at the issue of why the DA has departed from the 2003 brief. The answer is that the Council itself approved the DA, and all the various amendments to the DA. Each of those decisions has been documented and often Counsel's opinion was sought. The cumulative effect of several changes is bound to be seen as more dramatic in hindsight than each change was viewed as being at the time it was agreed.

The developer brief was produced in April 2003. It was sent only to Thornfields asking for a response by 1st August 2003. The brief itself assumes that it will be sent to more than one developer. There is some evidence to show that Thornfields itself thought that the brief may also have gone to other developers.

Thornfields initial response was rejected by Cabinet in October 2003, but negotiations continued. The exclusivity agreement was extended. The existence of other development partners was raised by members. Revised proposals were accepted by Cabinet in February 2004 and it was agreed that they would form the basis of heads of terms.

The DA did not go to competition nor was the proposal advertised in the Official Journal of the European Union by the Council in accordance with public procurement requirements. OJEU is the publication in which all tenders from the public sector which are valued above a certain financial threshold, according to EU legislation, must be published.

It was argued that the competition route would be more costly and would involve delay. However it has been argued equally that there would be no cost to the Council because Thornfields paid for all the external advice, and that they had dropped the £3m they initially wanted the council to pay.

Some said that the Council was being bought.

However the Council voted by a majority not to go to competition. Legal Advice was given that the Council was safe to go with one developer.

The Council owned various freehold and leasehold sites in the City centre which were put into the Silver Hill DA. The DA was signed on the 22nd December 2004. The site consists of 2.89 hectares of land within the city centre/conservation area.

4.5 The Development Agreement (years 2004- 2010)

The DA provided for the comprehensive redevelopment of the Silver Hill area 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. It was to include a minimum of 90,000 square feet of retail, a minimum 364 residential units, 35% (increased to 40%) affordable housing of which 15% or 20 units would be social housing, and a minimum 279 car parking spaces.

The DA provided that the Council would assemble the land for the scheme then grant the Developer a long term lease, while retaining the freehold interest.

Clause 3.2 of the DA provided that the Developer and the Council agreed to observe and inform their respective obligations.

- i) at paragraph 2.1, the Planning Condition (requiring the grant of Planning Permission);
- ii) at paragraph 2.8, the Financial Housing Condition (requiring the Developer to enter into a legally binding agreement with a registered social landlord for the sale of the affordable housing and to let and manage social rented housing);

- iii) at paragraph 2.9, the Financial Viability Condition (requiring 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).

Other Clauses of note include Clause 4.1 dealing with the initial scheme drawings, Clause 4.2 dealing with the full design and the application for planning permission, Clause 5.3 which deals with the minimum Required Elements, and Clause 5.1.3 which deals with variations to the Required Elements which must be agreed by full Council. Clause 6.1.2 provides that the Developer should invite competitive tenders from at least 3 of various building contractors listed in Schedule 5.

Clause 21.5 provides that the Developer and the Council could enter into a joint venture, Paragraph 15.2 of Schedule 2 provides for a right of termination of the DA in the event that any of the Schedule 2 conditions had not been discharged by a long stop date of the 22nd September 2009.

The DA further provided that:-

- (i) The Developer will receive the first 10% profit and the Council will receive half of the first £2 million profit after the Developer's 10%.
- (ii) Beyond the first £1 million share of profit the Council would then receive a half share above 15%.
- (iii) In calculating the Developer's return, a deduction will be made for all Development costs properly incurred.
- (iv) The Council is guaranteed a minimum rent in relation to all properties made available under the Development

Originally, the arrangement provided for payment of a fixed sum of £240,000 per annum payable by the Developer to the Council during the construction period, and a ground rent payable by the Developer to the Council for the duration of the lease. This was subject to a minimum sum of £250,000 per annum.

The Council should have published a notice in the Official Journal of the EU, as required by public procurement law. The Council was then required to complete a tendering process in order to meet the European Treaty principles of freedom of establishment and freedom to provide services, as well as equal treatment, non discrimination and transparency.

The development of the European law of procurement is such that these legal principles must always be applied to a public works contract.

In addition, the variations to a DA might now trigger a requirement for a further procurement, due to new legal decisions made since the DA was agreed.

The risk that the project would be challenged for breaching public procurement law was, therefore, obvious in 2007 ie before the 2009 planning consent.

The three planning applications were submitted on 1st Feb 2006, the planning decision was made in March 2007, but permission was not issued until after the s 106 agreement was completed in 2009. The planning permission was amended in 2008 to change the number of dwellings to 279, parking spaces to 330 and 96,000 square feet of retail. The DA was amended accordingly and the longstop date was moved back to 31/12/2012. Procurement risk due to the variations to DA was mentioned in the report.

4.6 The Change from Thornfields to Hendersons (Years 2010-2013)

Thornfields was put into administration by HBOS in January 2010.

The acquisition by Henderson of shares in Thornfield properties (Winchester) Limited was taken to Cabinet on 24th November 2010. Advice from Nigel Giffin QC was appended. He advised that the DA should have been openly procured in 2004, that the DA is a public works contract and that a change of developer is a variation. A material variation might cause the DA to need to be re-procured, ie it would trigger the need to commence a procurement exercise which had to meet all the requirements of public procurement law. He advised the Council to avoid further variations and to allow the first half of 2011 to be a challenge period. The Council followed this advice.

The two companies, Thornfield and Hendersons, are different in ambition. Thornfields would have sold the housing and then sold the whole development releasing an early capital sum. Hendersons in contrast wanted more retail as an investment and would therefore have received more income on an ongoing basis. However, if the 2009 Scheme goes ahead they are more likely to sell and walk away in 2020 once the first housing is sold.

Hendersons appeared at the CPO inquiry which was held in June 2012. The Inspector upheld the CPO decision and the Secretary of State subsequently confirmed the order. The evidence given was that the 2009 scheme could go ahead and was viable ie could deliver a minimum of 10% profit. Objections from Sainsbury's were withdrawn.

London and Henley, a local freeholder, objected. Amongst other reasons they complained that the DA had not been openly publically procured. Their interests in the site were purchased by the Council in November 2013, thus terminating the Judicial Review proceedings of the CPO that they had started.

Hendersons subsequently wanted changes to the DA in order to comply with their business model. This model had always been their business model, even before the CPO. It has been suggested to me that because of this Hendersons wanted more retail than the 2009 scheme would deliver and therefore their evidence to the CPO enquiry was not in accordance with their established business model. I make no finding here.

Variations to the DA which had taken place so far were:

- 12/12/2005 – reduce no of residential units from 364 to 285
- 13/04/2006 – reduce no of residential units to 277
- 18/11/2008 – residential units changed to 279, 330 parking spaces, 96,000 sq ft retail

In addition the long stop date was extended by exchange of letters to 31st December 2012 and then 30th June 2015.

4.7 The legal Advice (2008- 2014)

Decherts were appointed to be the Council's legal advisers at Cabinet 22/09/2000 in relation to Silver Hill. There had been a three firm competition. A Development Agreement (DA) with Thornfields was already being discussed. Decherts were appointed on the basis that their bills were paid by Thornfields. A press release in December 2001 confirms that the council would enter a DA with Thornfields. Exclusivity agreements were signed in January 2003, February 2004, and July 2004. Decherts and Drivers Jonas advised cabinet on the form of the DA in November 2004. The Legal Advice was that no public procurement was required. The DA was signed on 22/12/2004.

The Council appointed BLP to be its legal adviser in relation to Silver Hill in June 2005 from a list held by the City Solicitor. They replaced Decherts. BLP were not shown all relevant reports that went to Members or knew how their advice was put to use by officers.

I asked the Head of Law and Democratic Services to prepare for me a file of all relevant Leading Counsel's Opinions, and subsequently to prepare a schedule of all those opinions stating their origins and destination.

I am indebted to Howard Bone for preparing the schedule which follows in **Appendix 4** and to which I have added a column for ease of reference.

It is to be noted that the Opinions obtained in 2008/9 from James Goudie QC and in 2010 from Nigel Giffin QC were in relation to variations to the DA. None of those Opinions raised the variations clause in the DA as being the savior of the variations issue for the Council. The Opinions reviewed European Public procurement law as set out in the Regulations and as interpreted by case law. There is a legal presumption in favour of public procurement which is why the DA itself is viewed as being outside the Regulations as it was not subject to public procurement.

It has been suggested to me that the earlier advice from Nigel Giffin QC could have been made available to the Reference Group, which started to meet in April 2013, or that further advice could have been taken at this earlier stage to guide the Reference Group in its considerations. I agree with those suggestions.

The fact that the advice from Paul Nicholls QC in 2014 was out of step with the earlier advice should/would have put the Council on alert that perhaps he was not providing the whole answer, and should have been followed up.

The advice from Paul Nicholls QC was also obtained somewhat late in the day. The instructions were sent on 25th May 2014 and the conference with Leading Counsel was held on 9th June 2014. The Committee report was ready for Cabinet on 10th July 2014 and Scrutiny on 7th July 2014. As I indicated earlier, it would have been beneficial for the Council to seek this advice some months before because there would have been sufficient time to stop the process of variation of the DA, and for the work of the Reference Group to be properly informed.

The minutes of the meetings of the Reference Group record that legal Advice was requested from May 2013, and again in January 2014 onwards.

On this occasion Paul Nicholls QC was briefed direct by the Council. BLP were not involved. Nigel Giffin QC was not available. The clerk offered Paul Nicholls QC instead. He had not advised the Council previously on variations to the DA or on European Procurement Law.

The instructions he was sent are full, and do enclose Nigel Giffin QC's previous advice. However, the advice from Paul Nicholls QC does not specifically refer to the view of Nigel Giffin QC and whether and to what extent he agreed or disagreed with him.

It is important to note that obtaining advice from different barristers in the same chambers does not mean that the barrister advising will know

about previous written advices, or agree with them. The Council, as client, may be the only party to know about all the advice given on a long-standing matter such as this.

As the earlier Opinions from Leading Counsel had cautioned against further variations, and legally nothing much had changed, it is forgivable to think that the Council had geared the whole episode to getting the advice it wanted. The Council was under pressure to accept Henderson's changes to the DA on the understanding that otherwise the Silver Hill development would not go ahead. Paul Nicholls would have understood that and would have done what he could to meet the Council's requirements.

However the advice seems to have skated quickly over the European law points and concentrated on the variations clause without considering the two big issues namely transparency and non-discrimination. Importantly, the advice failed to recognize or mention that the validity of the variation clause was, itself, subject to European law and that it might therefore have no legal effect, which is what Mrs Justice Lang ultimately decided in the JR case.

It is interesting to note that in previous advices previous Counsel had raised the issue of variations being in the public domain in order to be transparent, and on a different occasion he advised that there needed to be a six-month stand-off period in order to avoid potential challenge. The procurement and litigation risk had been well spelt out. If someone in the Council had carefully read Paul Nicholl's advice together with the earlier advices, they would have been alerted to the fact that Paul Nicholl's advice was out of line with previous legal opinions and might well be vulnerable to a successful legal challenge, as in fact happened.

It should also be noted that there is a difference between litigation risk and whether a decision is legally right or wrong. If a decision is right, the litigation risk is irrelevant. If the decision is legally wrong or dubious then the litigation risk needs to be assessed, to include a legal challenge, as in this case, not by an economic operator. In other words, the Council should have appreciated that there was a real litigation risk that the scheme would be challenged in Court.

4.8 Committee reports

Winchester's committee reports are not subject to a protocol spelling out which paragraphs are to be written by which specialist officers. It is not immediately obvious to which officer a particular paragraph is attributable. Authors do not appear as signatories to the report. It is also not immediately obvious what options are available to members. Recommendations are often closed rather than open. All reports to Cabinet and council are 'signed off' by the Monitoring Officer and Chief Financial Officer.

If such a protocol were to exist, as well as dealing with the above issues, it would need to identify 'open' and 'closed' elements of reports, origination of reports by members, agenda planning, and sign off by all statutory officers.

Reports drafted in accordance with such a protocol should allow for Members of Cabinet and Scrutiny to author the report where appropriate.

4.9 Leading up to the proposed variations to the DA (Years 2013/2014)

It is unclear to me at what point Hendersons made it known to the Council that it required variations to the 2009 scheme and DA in order that the scheme remain viable. However I have formed the view that such information must have been shared with the Council informally early in 2013. A formal letter was sent by Hendersons on 12th June 2014 but referred to the negotiations which had been taking place for months with Council Officers.

A 'Reference Group' was set up by the then Leader Councillor Keith Wood to consider both Henderson's proposals for change and the objections to the design of the 2009 scheme raised by Councillor Gottlieb and 'Winchester Deserves Better'. The Reference Group was not connected to the formal decision-making machinery of the Council and its minutes and meeting papers were private.

The Reference group was comprised of the Leadership of all political parties and Councillor Gottlieb. It met 12 times between 12/04/2013 and 14/05/2014. Members were told that Legal Advice would be sought at every stage.

Henderson attended the Reference Group on 15/05 2013 to explain the changes they wanted. Members were told that Legal Advice would be sought.

It considered the following changes:

- Removal of the bus station;
- Affordable housing to be off-site;
- More retail to be included and an anchor store;
- Design modifications, 21 in all, as identified by architect Derek Latham in February 2014.

Henderson attended a meeting of the Reference Group on 05/02/2014 and explained that they would apply for small planning permission changes.

An officer based Silver Hill project team, serviced by the Project Office, held 21 meetings between 21/11/2013 and 27/02/2015. Their minutes

are also treated as exempt. There is a reference to legal advice being obtained on 09/05/2014.

Mentions of legal advice being obtained were made by both the Reference group and the Officer group on 12/04/2013, 15/05/2013, 11/09/2013, 15/01/2014 and 09/05/2014.

It is therefore not in accordance with the decisions of, and undertakings given to, either group that it was not obtained until June 2014.

Silver Hill has been identified as a project and therefore has been within the Project Office since February 2013. It therefore was able to cover the setup and working life of the Reference Group. It is unclear whether the PO reported to members or just Officers. I have seen the minutes and therefore have seen the Risk Assessment for Silver Hill associated with the work of the Reference Group. It is made up of a number of factors including legal advice.

However, the risk assessment for legal advice seems to have been underestimated in the Risk Register. Should legal advice say that the variations could not proceed in law, then that would be catastrophic to the project. It would have maximum impact.

In addition the 2010 advice from Nigel Giffen QC was not logged and did not appear as a risk.

It is alleged by some that there is an overreliance by Members on following external advice. External advice is often explained by internal professionals, and not always attached in original form. Most Councillors I spoke to were satisfied with the external advice in relation to the meetings in July and August 2014 as explained by internal officers.

Even where Counsel's opinion is not attached to a report, it is not necessarily wrong. See *R v Durham County Council* 15/01/2015.HCJ. mentioned at entry 66 Appendix 3.2.

The advice obtained from Paul Nicholls QC in July 2014 was unusual. I have seen the instructions written by the Head of Law at WCC and can confirm that he refers to and indeed encloses the advice obtained from Nigel Giffen QC in 2010. The instructions also disclose that the Head of Law at WCC is fully conversant with European law and sees the risk of variations to the DA requiring the DA as a whole to be tendered. However, Paul Nicholls QC advised in accordance with what the Council wanted which is that the variations to the DA could be agreed under the variations clause. His advice was therefore unusual because it appeared to disagree with the advice given by James Goudie QC and more recently by Nigel Giffen QC, and the Council should have appreciated this.

Were members aware of that earlier advice when they decided to accept the variations? From those I have spoken to, the answer is that it is unlikely, and therefore the question arises as to whether or not members would have voted to accept the variations in the full knowledge of the earlier advice.

Deloitte have told me that despite being asked to value all assets within the Silver Hill scheme and to report on the variations, they were not asked to meet Hendersons directly, so all the negotiations were carried out by Officers of the Council directly with Hendersons. I have no evidence that the reason for this was to keep unhelpful information away from Deloitte.

The question is asked as to whether some officers were too close to the contractor. Some interviewees believe this to have been the case. The Council needs to assure itself that it has appropriate control and assurance mechanisms in place to avoid this suspicion.

4.10 The Judicial Review

There is no doubt that most Members and Officers were shocked that Winchester lost the judicial review.

“We were always told procurement is not a problem”, was a common reaction.

It has been suggested that the Council was “sleep walking” into the Judicial Review. It has been alleged that there was insufficient expertise inhouse, and an ineffectiveness in scrutiny. I make recommendations about inhouse skills and scrutiny elsewhere in this Report but there remain unanswered questions:-

- i) Why was David Elvin QC used in court when the case was a European Law matter and not a planning matter, which is the specialist area in which David Elvin practices?
- ii) Why did the Council instruct Paul Nicholls QC direct and did not use BLP (as has happened on every other occasion)?
- iii) Why was Counsel not instructed at/for the first meeting of the Reference Group?
- iv) Was losing the JR avoidable?

In addition, there is a Councillor from the majority group with the necessary funds and strength of mind to JR his own authority, even though he argued against the proposal internally, as well as campaigning against the proposal externally, and lost the argument and the vote.

In brief, the key facts and matters related to the Judicial Review are set out here. All applications were heard in the Queen's Bench Division, Planning Court. Kim Alexander Gottlieb (Claimant) and Winchester City Council (Defendant) and Silverhill Winchester No 1 Limited (Interested Party). The Interested Party did not appear. The Council was represented by David Elvin QC and Richard Moules, and the Defendant was represented by Robert Palmer.

Mr Justice Dove refused permission on the papers to apply for Judicial review on 7th October 2014.

Mr Justice Lindblom granted permission to apply for Judicial review on 18th November 2014. He granted permission in relation to the procurement issue only. Permission was granted by listening to Counsel. The full case was set down for hearing on 28th and 29th January 2015.

Mrs Justice Lang, having heard the case, ordered that the Council's decision of 6th August 2014 to authorize variations to the DA without carrying out any procurement process as required by the Public Contracts Regulations 2006 was unlawful, and the decision was quashed.

The Judgement consists of 154 paragraphs spread over 36 pages. It was delivered on 11th February 2015.

Mrs Justice Lang had listened to Counsel arguing their respective cases and had read the evidence prepared in advance in the form of statements. No oral evidence is given at JR hearings.

She decided:

- The DA is a public works concession contract and the 1991 Public Works Contracts Regulations and the 1993 Directive applied.
- That the DA was not publically procured and should have been, but the Council relied on mistaken legal advice. It is now too late to challenge the DA on this basis.
- The Leading case of *Presstext* applied to variations during the currency of a contract. Where they are material they may constitute a new contract.
- An increase in potential profitability for the economic operator can be a material variation
- Evidence of actual or potential bidders may assist but it is not a pre-requisite.
- The varied contract is considered to be viable for the Developer, whereas the original contract is considered to be unviable.

- The variations clause in the DA was so broad and unspecific that it did not meet the requirements of the European legal obligation of transparency so that it had no legal effect.
- The changes to the plans for the City's central bus terminus and the proposed loss of 35% affordable housing are major ones....open competition would introduce new bidders and new ideas.

The Council decided not to appeal the decision. The risk of doing so was not worth taking given that the advice received from Leading Counsel gave poor odds in winning.

The interested party, Hendersons, have appealed and have been given permission to appeal to the Court of Appeal against the judgement. This case has not yet been given a hearing date, but I understand the case has been expedited and may be heard in the spring.

As far as the Council is concerned, the judgement was against them, they decided not to appeal and therefore the judgement stands unless or until the position in law changes. The Council cannot act in the hope that the appeal may deliver a different outcome.

4.11 Councillor Kim Gottlieb

Why did Councillor Kim Gottlieb take the Judicial Review?
What was he hoping to achieve?

Councillor Gottlieb used the same lawyers as London & Henley, namely Dentons solicitors, and Barrister Robert Palmer. It is not surprising that his lawyers raised the same points as they had argued when representing London & Henley earlier.

The European law arguments had been raised many times since 2007 and were therefore well known.

It is rare that a Councillor from the majority group takes their own Local Authority to court. Councillor Gottlieb acted alone, was not supported by his political group, and was perceived to be brave in so doing. He funded the legal action from his own resources. Curiously, there has been no political backlash on him.

I understand that even since the Judicial Review further letters before action have been received by the Council. Councillor Gottlieb's opposition to the scheme continues.

I am aware of cases where a Councillor takes legal action against their own Council in order to test the law, and with the consent of the whole Council or the relevant political group. I am also aware of cases where this has been done without consent and which have resulted in the Councillor losing the whip because their group has lost confidence in their ability to be a member of that political group.

Neither of these scenarios apply here.

Councillor Gottlieb remains a full member of the Conservative Party and of the majority Conservative Group on the Council. He has been re-elected to the Council since the outcome of the JR.

Councillor Gottlieb's initial understanding of the judgement was that the Council would be obliged to tender the contract. There is some evidence to show that despite her order, which was limited to quashing the variations decision, the judge may have assumed that this would be the case.

“ He (Councillor Gottlieb) seeks what the procurement process is intended to provide, namely, an open competition to allow Winchester to select the development which best fulfills its needs”.

The Council has continued to move towards implementation of the 2009 Scheme despite hostility from Councillor Gottlieb and some members of the public. The Planning permission and the CPO order are in place for some more months yet and would allow this to happen until the spring of 2016.

Losing the JR has vindicated the views held by some that the Council doesn't listen to its citizens and that Winchester deserves better.

In the JR, Mrs Justice Lang considered Councillor Gottlieb's 'standing' to bring the JR.

“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 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.”

Despite letters from the Chief Executive and the Leader reminding Councillor Gottlieb not to accuse Officers of misconduct and about his obligations under the Code of Conduct and the Officer/member Code, I note that no complaints have been made against him by any Member, Officer or member of the public, and that no complaints against him have been considered by the Standards Committee.

An issue concerning Councillor Gottlieb's potential conflicts of interest has been raised with me. This needs to be investigated.

4.12 Since the JR

The important issue of the potential damage to the Council's reputation is not logged as a risk by the Project Office. However, it is clear to me that the Council's reputation has taken a considerable knock externally as a result of losing the Judicial Review.

Because it is not listed as a risk and therefore received no risk management, the Council's reputation has not been addressed.

The then leader Councillor Humby and his deputy, Councillor Weston, resigned on 17th February 2014 after losing the JR. Councillor Frank Pearson was elected Leader, and Councillor Godfrey became Deputy Leader. Councillor Godfrey became Leader on 20th May 2015 with Councillor Weston as his deputy.

There have been 10 Leaders of the Council since the inception of the Silver Hill Development. This means that an overview may have been lost. Members often have a good understanding of reputational risk because they stand with one foot outside the Council. However, it is up to Officers to draw these matters to Members attention.

The question arises as to whether the Council could see the wood for the trees? Was it looking too hard at the detail, using a worms eye view when a helicopter view was needed?

It has been suggested to me that one of the reasons why the Council wishes to keep the DA alive and therefore stick with Hendersons is that there is a risk of Hendersons suing the Council for breach of the DA. It is argued that Hendersons have spent £5 million on the development and wish to see some return. It is argued that it makes it more likely that Hendersons will sue as a result. Some commentators believe that WCC leans too far in Henderson's favour in order to prevent the possibility of being sued. Henderson would not want to lose the money they had spent on the scheme already and the expectation that the scheme would already be income generating is confounded by the scheme being at least 5 years behind.

I am unaware, however, that anyone has been asked to advise whether Henderson might succeed in suing the Council for breach of the DA or what the consequences might be. If this was a factor in the council's decision making, advice on this possibility should have been obtained.

I note that the Development Account closes when the DA becomes unconditional and not before, meaning that Henderson cannot recover professional costs unless the Council is in the wrong.

It has finally been raised with me that Councillors have not stood back and said do we want the 2009 scheme. Is it an issue to let it die?

5. Findings

- 5.1 All parties have agreed, and still agree, that since the Broadway/Friarsgate project was begun in 1997 the area now known as Silver Hill needs to be redeveloped.
- 5.2 The initial developer, Thornfield, drove the initiative for the development. They were the developer for the bus company, Stagecoach. The council entered into exclusivity agreements with Thornfield from 2002 in anticipation of entering into a Development Agreement. A majority of the Council believed that a) no other developer as generous as Thornfield would be found and, b) that the external legal advice meant that not subjecting the development to competition was a lawful course of action to take.
- 5.3 The DA should have been, and could have been, publically procured in order for it to have been entered into in 2004 in accordance with European law as a public procurement exercise. The Council was advised of that in 2008. It was too late to challenge the lack of public procurement at that stage but it made the DA more 'vulnerable'. The council's difficulty has been not submitting the works to build the development to competition in 2004, but instead entering into a works contract with Thornfields to the exclusion of any other developer in the EU. This has acted as a 'stain' on the DA since the law was clarified in 2007. However the Council voted by a majority not to go to competition. Legal Advice was given that the Council was safe to go with one developer
- 5.4 The DA provided that the developer must anticipate a 10% profit from the development until the agreement became unconditional. This seemed low when other similar DAs anticipate a 20% profit to the developer, thus providing an advantage to the Council. Some said that the Council was being bought.
- 5.5 It was initially anticipated that the development would be finished by 2012, thereby meaning that the DA would become unconditional well before then. A development such as this may take 5 years.
- 5.6 The development has been inordinately slow. This slow rate of progress has caused its own requirements for variations in order that changing economic and market conditions continue to enable the developer to anticipate a 10% profit from the development.
- 5.7 There was no clear vision for Silver Hill recorded in 2004. There is no clear vision for Silver Hill recorded by the Council currently. If there was no clear vision it means that there was no strategic overview, and no group or committee whose task was to maintain the strategic vision.
- 5.8 The Community Strategy links to Portfolio holder plans. Silver Hill is to be found in the Leader's Portfolio plan 2015/6:

Ensure that the Silver Hill redevelopment is delivered in a way which supports existing businesses as well as providing new opportunities for independent and multiple retailers.

- 5.9 The Council's choice, in principle, was to try and make an old and unprocured DA work, or cut its losses. The Council tried to follow the former route when in law the safest course would have been to follow the latter. It is completely understandable that the Council wanted to complete the development at Silver Hill once it had embarked on its chosen course. However the Council did not at any time since 2007 take a view of the risks and benefits of doing so or undertake the necessary risk assessment.
- 5.10 As far as the Council is concerned, the judgement of the Court in the Judicial review was against the Council and therefore the judgement stands unless or until the position in law changes. The Council cannot act in the hope that the appeal may deliver a different outcome.
- 5.11 The 2014 variations were always at the optimistic end of the scale in law. The Council knew this, or should have known this, but Officers only offered to Members the choice of accepting the variations and continuing with the existing DA and scheme.
- 5.12 In addition to the procurement risks from Henderson's proposed changes to the DA, there was growing public concern about the look and feel of the 2009 scheme, culminating in Councillor Gottlieb's Winchester Deserves Better Campaign. The Reference Group was an attempt to incorporate such concerns into demands for changes to the height, massing and other design features of the scheme.
- 5.13 The proposed change to the Silver Hill scheme in relation to affordable housing has generated much criticism. The Council wanted a mixture of public and private housing in the centre of the city. Moving all social/affordable housing off site and out of the city does not achieve this objective. Hendersons decided by June 2014 that all affordable housing must be off site. The reason they cited is that the viability of the scheme would otherwise be affected and not enable them to meet the 10% profit requirement. In December 2014 the Planning Committee agreed to the changes and required that the proposed financial contribution of £1m be secured via a s106 agreement.
- 5.14 Critics of this proposal say that housing grant was available to assist with the build of the additional stock, that the aim of mixed housing was no longer achieved, that the number and location of off-site affordable housing was unknown, therefore putting back the Council's public house building programme at a time of housing need.
- 5.15 In terms of understanding the legal position and the risks the Council was undertaking, it is important to note that there are two parallel

systems of law operating in England. Firstly, the domestic law of contract, by which the Development Agreement (the DA) must be interpreted by the parties to the agreement, and which are likely to be upheld by the UK courts. The DA contains a variations clause that allows changes to be made to the scheme.

- 5.16 The second system of law is EU law, and in particular the EU law of public procurement that has developed rapidly since the inception of the then proposed development. If there is a conflict in application of the two systems of law, EU law will always win.
- 5.17 The initial 2003 Planning brief in contrast is universally accepted as a good document. It is similarly difficult to tell if there is an existing 'vision' for the Silver Hill redevelopment project now. The planning decision which includes the variations made in December 2014 has since been upheld by the Secretary of State.
- 5.18 In June 2014 the Council instructed a different barrister from the same Chambers, Paul Nicholls QC, to advise the Council on Henderson's requests for variations to the DA. The Council had wanted to instruct Nigel Giffin QC again, but he was unavailable on short notice at that time. Paul Nicholls QC gave advice instead which relied on the variation clause in the DA.
- 5.19 He did not seem to think that EU procurement law was as relevant to the variations as the variations clause, and because of this his advice was what those instructing him and what the Council wanted to hear.
- 5.20 Some leading members plus Cllr Gottlieb had been meeting in a Reference Group that had been considering the proposed changes for some 12 months. The Legal Advice was therefore taken much later than it could have been and was obtained for the purposes of advising the Council, not the Reference Group, meaning that the Council was set on the track of moving towards accepting the variations due to time constraints.
- 5.21 Although with hindsight the Council's mistakes are easy to spot, the Council could have avoided the JR:
 - i) By adhering to the 2010 Nigel Giffin QC advice and allowing no further 'material changes', or
 - ii) By taking early advice from Nigel Giffin QC and sharing that with the Reference Group once Henderson required variations to the DA in 2013.

Both of these courses of action would require the Council to confront Henderson with the news that no further changes could be made to the 2009 scheme. Neither the Council, nor its officers, was equipped in skills or experience to have negotiated a successful outcome to this situation.

- 5.22 The planning permission was amended in 2008 to change the number of dwellings to 279, parking spaces to 330 and 96,000 square feet of retail. The DA was amended accordingly and the longstop date was moved back to 31/12/2012. Procurement risk due to the variations to DA was mentioned in the report.
- 5.22 It should also be noted that there is a difference between litigation risk and whether a decision is legally right or wrong. If a decision is right, the litigation risk is irrelevant. If the decision is legally wrong or dubious then the litigation risk needs to be assessed, to include a legal challenge, as in this case, not by an economic operator. No such risk assessment was made.
- 5.23 Political leadership uncertainties caused by annual elections cast a particular burden on senior officers requiring them to oversee this lengthy project and ensure it was delivered. Arguably, this deflected the officers from considering the level of risk in trying to carry the project into effect and trying to implement the variations. Assurance systems such as risk management, which may have helped on this issue, were either in their infancy or non-existent.
- 5.24 A further difficulty that acted against clear and speedy decision-making on Silver Hill, was that everyone associated with the Council maintains that Winchester is a member led authority which requires all decisions to be made at member level. Formal delegation to Officers to progress the project was, therefore, minimal, although, in reality, the key relationships with the contractors were always at officer level, and largely with the same group of officers throughout.
- 5.25 There is an absence of internal challenge and debate on Silver Hill, both among members and officers. There is no whip on the issue, and a reliance on cross party support, meaning that there is no challenge from an opposition party, nor has there been challenge from Overview and Scrutiny. This resulted in officers feeling obliged to take the position that they had to see the process through to delivery in order to fulfill the Council's original intentions.
- 5.26 The Reference Group took place in private, received no public involvement, did not publish its minutes or findings and was not connected to the Council in that it had no delegated authority, or even a duty to report on its activities to a council committee. The impression was given that the future of Silver Hill was being decided in private, 'behind closed doors'. The senior, cross party, mixture of executive and scrutiny make up of the Councillors forming the Group meant that the Leadership of the Council was potentially compromised on the issue.
- 5.27 All relevant decisions were referred to Overview and Scrutiny Committee. I find that O and S were hampered by not having independent officers to advise them and by members receiving

insufficient training. As a consequence, the committee was seen as 'rubber stamping' the decisions of cabinet and Council.

- 5.28 Committee reports need to identify 'open' and 'closed' elements of reports, identify who authors particular paragraphs, be subject to agenda planning, and sign off by all statutory officers. Recommendations should allow options wherever possible, and link to previous reports and advice. Reports drafted in accordance with such a protocol should allow for Members of Cabinet and Scrutiny to author the report where appropriate.
- 5.29 Sometimes it is difficult for citizens to understand that both planning and strategic development functions are carried out by the same Authority. However, WCC has not been subject to criticism at any point for this in my Review.
- 5.30 The local Government Association came to carry out a peer review of WCC in April 2013 and made seven key recommendations. These have all yet to be implemented and are now urgent. Similarly, 4p's have made more recent recommendations concerning Project Management and these need to be adequately reflected in the new Constitution. A governance and constitutional review is now urgently required and will look at many of the issues highlighted in this report.
- 5.31 It is said that if Councillor Gottlieb had not challenged the Council that no-one else would have done, and the Council's actions would have remained lawful. The perception that there would be no challenge does not justify having the wrong advice and doing the wrong thing. That would be unethical.
- 5.32 The Council needs to improve its communications and public engagement strategy. "The city must learn it's a servant of the people' according to one commentator, and "public participation should not be treated as something to be done rather than learned from', according to another.
- 5.33 It is undoubtedly true, or perceived to be true, that there has been insufficient information put into the public domain about Silver Hill, either through the majority of reports remaining confidential, or by Freedom of Information requests being late and not fully answered. The website is difficult to navigate.
- 5.34 A number of concerns have also been raised about the way the Council works or its culture. These concerns are that the council is inward looking, complacent or 'old fashioned". These concerns are about what the Council feels like to work with, and whether its values and ethics are understood by all who are elected or work for it or to carry out its business. If a negative view is held by some of the Council's citizens or stakeholders, then it is likely that the Council will suffer reputational damage as a result. The "Winchester Deserves

Better” campaign demonstrated the strength of feeling that existed in the community about some of these issues, combined with a feeling that voices opposing the Council’s views were not being heard.

- 5.35 I have found no evidence of improper expenditure.
- 5.36 I have found no evidence of corruption or impropriety amongst members and officers. This does not mean that there wasn’t any, merely that the existing declaration regime is not as rigorous as it could be.
- 5.37 There are a number of matters which were raised during the review on which I have been unable to make any conclusive findings:
- Whether there is a blame culture in the Council
 - Why the developer brief was only issued to Thornfields in 2003
 - Whether any other projects are similarly at risk
 - The ‘missing millions’

6. Recommendations

- 6.1 The following recommendations are intended to improve the workings of the Council and thereby to give focus to developing Silver Hill and similar projects through improving its systems and assurance mechanisms:
- 6.1.1 The Council should stand back, and ask the question “do we want this”? The Silver Hill Development (as now proposed) has significantly departed from the 2003 Planning Brief.
- 6.1.2 The Council must express a definite idea of what it wants to be developed at Silver Hill. There must be a vision for Silver Hill as of now, and in the future. A designated and distinct project group of Councillors, as a sub-committee of and reporting to the Cabinet, chaired by the relevant Lead member, should be charged with being the guardian of this vision and ensuring it is maintained throughout the lifetime of the project.
- 6.1.3 The Council must ensure that it has the necessary professional and commercial skills amongst officers to achieve the vision and carry it into effect. This will mean reassessing the skills of those officers involved with the current project. The Council may wish to establish shared services to enable access to the most appropriate skills.
- 6.1.4 The Council must consider whether and, if so, why it has been hostile to competition, both in relation to Silver Hill and with other projects.
- 6.1.5 The Council must not re-procure external advisors without involving internal specialists, and relevant Members. The Council must not use those external advisers without involving internal specialists. This means currently that the Director of Finance and relevant Lead Member should have a say in briefs to Deloitte, and the Monitoring Officer and relevant Lead Member should have a say in the briefs to BLP and external Counsel on Silver Hill.
- 6.1.6 A register should be kept of all external advice obtained which should be available to all Members, and the public unless a particular piece of advice is required to remain confidential. Any information which is said to be commercially confidential should be made available as soon as possible and should not prevent the information from being put into the public domain unless it is strictly necessary to do so.
- 6.1.7 The Council must look at other projects to see whether outcomes are at risk in a similar way to Silver Hill.
- 6.1.8 The Council must take steps designed to re-establish trust with the community and citizens such as putting evidence of the existing scheme’s viability in the public domain, and reviewing its public engagement strategy.

- 6.1.9 The Council must implement in full the LGA and 4p's recommendations.
- 6.1.10 New strategies need to be written on press and PR, project management, and risk management (including a transparent and effective risk register).
- 6.1.11 The Council must consider how it can improve communications, both externally and internally.
- 6.1.12 The Council must carry out a governance review to create a new constitution and ways of working for the new Council from May 2016.

It is vital that all the functions of a modern District Council have a home in the new Council environment. Such a review can also address the new political challenges facing the Council.

The governance review should specifically look at:

- The roles and responsibilities of Members of the Council and senior officers. Is it a Member led authority? Are delegations to officers correct? Are the statutory officers at the right level in the Council in order to exercise their functions properly? How is it best to re-establish trust between members and officers?
- A protocol on the writing of committee reports to include paragraphs identifiably written by internal specialists, open recommendations and options, an emphasis on all reports being in the public domain unless there are specific reasons why any element of the report should remain confidential, and Lead Members seeing and contributing to early drafts.
- A reconsideration of whether annual elections are in the best interests of the Council in efficiently conducting its business.
- Spelling out the role of the opposition and its place in the Council.
- Developing the overview and scrutiny function to be supported in the future by dedicated staff and specialist training. Involving the Centre for Public Scrutiny in order to ensure best practice.
- Improving the gifts and hospitality register so that it applies equally to Members and senior officers and ensuring regular reports in relation to it are submitted to Audit Committee.
- Establishing a transparent and effective system to police conflicts of interest.

- Ensuring that appropriate control and assurance mechanisms are in place.

6.1.13 The Council must ensure sufficient Member training on the new Constitution

7. Conclusion

- 7.1 Winchester City Council was ridiculed in the local press and suffered reputational damage amongst members of the public for losing the Judicial Review case taken against it by one of its own Members in January 2015.
- 7.2 The case concerned proposed variations to the Silver Hill Development Agreement which were struck down by the Court. The facts leading up to these events demonstrate that most Councillors were dumbstruck by the Court's judgement believing they were safe because legal cover to make the amendments was provided by Leading Counsel and because they were assured by their internal lawyers that they could do so.
- 7.3 However, the risk of losing the Judicial Review was high, given that Leading Counsel in 2010, and earlier in 2008, had given the Council advice alerting them to the potential effects of making any substantial amendments to the Development Agreement. But the Council had not recorded the 2010 legal advice as a risk in a corporate risk register, nor had any of their senior officers reminded them of this risk. Nor had it recorded as a risk the seriousness and implications of the reputational damage that would be caused.
- 7.4 The high reputational risk to the Council was multiplied by a perception, through the "Winchester deserves better" campaign, that the Council was 'ploughing on regardless'; releasing little information to the public through reports or through its website. Some Councillors, not on the Reference Group that considered the proposed amendments, nor in the Cabinet, considered they had also received insufficient or possibly misleading information.
- 7.5 The Silver Hill project has been abnormally slow, perhaps causing it to be 'out of date' before a single brick has been laid. The issue has been further aggravated by Annual elections causing frequent changes of Leader, and many hung Councils leading to reliance on cross party support. Silver Hill decisions were not whipped. Officers therefore held the corporate memory of Silver Hill. Officers believed it to be a member led authority and that all decisions should be taken by members, despite them being the least informed part of the Council and most dependent on officer advice.
- 7.6 Mitigation of this risk would have necessitated early consideration of the correct legal principles, close and careful attention being paid to the compilation of reports in draft by both officers and relevant portfolio holders or Chairs, and also close scrutiny by statutory officers when those reports are submitted to Cabinet and Full Council for decision.
- 7.7 On the basis of the 2010 Nigel Giffin QC advice, all parties involved, including all senior officers and senior members to whom the advice had been distributed, were capable of spotting that something was

wrong, but no-one did. Following the loss of the Judicial Review, the perception of many Councillors was that no-one was in charge of the Council and ensuring the competency of its decision-making.

- 7.8 The question is asked- what did the Council do wrong?
- 7.9 In summary, the Council failed to provide itself with adequate assurance systems in order to make safe and legally correct decisions. The recommendations in this report should go some way towards rectifying this situation.

Appendix One

The Winchester Silver Hill Independent Review



The Winchester Silver Hill Independent Review has now started. The Reviewer is Claer Lloyd-Jones LLB Solicitor. She has carried out similar reviews previously, has spent many years working in senior positions in Local and Central Government, and is presently a part-time Judge and Legal Consultant.

The review will look at how the Silver Hill development has reached the current position. This will involve a scrutiny of all relevant documents, interviews with key stakeholders including past and present Councillors, Officers of the Council, specialist advisers and contractors, and written submissions from members of the public.

The review will address whether appropriate advice was sought, whether that advice was correctly interpreted, whether it was clearly presented in reports to Members, and whether it was taken into account in decision-making. It will address the Judicial Review, departures from the original brief and their reasons, and any relevant matters emerging from the 2012 Compulsory Purchase Order process and any subsequent changes.

The review will make findings of fact, suggest lessons to be learned and make other recommendations for the future. The reviewer aims to present the report to Winchester Council before the summer recess.

Written submissions closed on 30 April 2015.

Appendix Two

CHRONOLOGY OF EVENTS

Date	Event	Relevance	Comment
March and June 1996	Central Winchester Urban Design Workshops Final Report WCC , RIBA Central Hampshire Branch Winchester Preservation Trust	Included Bus Station and Post Office	
Nov 1997	Llewelyn- Davis report, with King Sturgis Central Winchester Study	Proposed comprehensive not piecemeal approach	Identified red line of current plan Silver Hill not in local plan until 2006 review
May 1998	Cllr John Steel (Lib Dem) elected Leader to May 2001		
15/09/1998	Broadway/Friarsgate Planning and Transportation Study working-group	Report by Chief Planning Officer that Thornfields were acting as development partners for Stagecoach. Presentation by Thornfields about a new scheme- 50% refurbishment and 50% new build. No new bus station. Thornfields will continue to negotiate with landlords.	Exempt business Developer lead.
08/12/1998	Broadway/Friarsgate Planning and Transportation Study working-group	Feedback on public consultation. Prepare development package "preventing leakage of shoppers to other	Exempt business

		parts of Hampshire'	
24/02/1999	Broadway/Friarsgate Planning and Transportation Study working-group	Progress report	Exempt business
15/06/1999	Policy and Finance (Assets Property and Investments) Sub committee	Update on Broadway/Friarsgate. Willingness to continue to negotiate with Thornfields.	Exempt report No mention of procurement
17/06/1999	Planning Committee	Broadway/Friarsgate Planning Brief	Does not specify who it was sent to or responses.
21/03/2000	Policy and Finance (Assets Property and Investments) Sub committee	Update on Broadway/Friarsgate Development Agreement with Thornfields be prepared by officers	Exempt report
22/09/2000	Cabinet Appointment of Consultants for Broadway/Friarsgate	Decherts and Drivers Jonas appointed after competition for both posts	Thornfield to pay costs incurred
May 2001	Cllr Rodney Sabine elected leader (Lib Dem) to May 2002		
19/12/2001	Cabinet	Council to negotiate Development Agreement with Thornfields following legal advice	Exempt report
May 2002	Cllr Sheila Campbell elected Leader (Lib Dem) to May 2006		
24/07/2002	Cabinet	Council enters 6 month lock out agreement with Thornfields	Exempt report First exclusivity agreement
15/01/2003	Cabinet	Broadway/Friarsgate Planning brief adopted	Includes 35% affordable housing Not in conformity

			with local plan Bus station included
15/01/2003	Cabinet	Exclusivity Agreement and timetable- DA to be in place by 31/10/2003	Exempt report
02/04/2003	Cabinet	Developer brief approved. To be sent only to Thornfields to respond by 1 st August 2003. The brief itself assumes it will be sent to more than one developer.	Exempt report
01/10/2003	Cabinet	Thornfield's response. Cabinet rejects it but continues to negotiate. Exclusivity agreement extended to 29/02/2004. Questions raised by members as to the existence of other development partners.	Exempt report
11/02/2004	Cabinet	Revised proposals by Thornfield now to form basis of Heads of terms in DA	Exempt report
25/05/2004 - 15/12/2004	6 x Cabinet meetings	Approval of heads of terms, extension of Exclusivity Agreement, Approval of Draft DA. DA, and not going to competition, approved by	All exempt reports

		Council Legal Advice that OK to go with single developer	
22/12/2004	Development Agreement with Thornfields signed	Initial scheme design to include: Minimum 90,000 sq feet of retail, Minimum 364 residential units, 35% (increased to 40%) affordable housing of which 15% or 20 units to be social housing, Minimum 279 car parking spaces, Civic Square, Bus Station, CCTV, ShopMobility and Dial a ride, market relocation space	
01/06/2005	Cabinet Silver Hill Consultants	BLP appointed, Drivers Jonas continue	
12/12/2005	Cabinet	CPO resolution and submission of planning application by Thornfields Reduce number of residential units from 364 to 285	Exempt report
13/04/2006	Cabinet	Variation to DA- residential units reduced to 277	
May 2006	Cllr George Beckett elected Leader (Con) to May 2010		
27/03/2007	Planning Development Control	Thornfield applications x 3	Granted + conditions
18/05/2007	Planning Development Control	London & Henley application Middle Brook	Refused
21/10/2008	Planning Development Control	Amendments to planning permission: 279 dwellings, 330 parking	

		spaces, bus station, 96,000 retail	
18/11/2008	Cabinet Silver Hill update	DA amended accordingly, Long stop date moved to 31.12.2012 Leading Counsel Tim Corner QC report recommendations appropriate	BLP write risk register at Appendix 1. Procurement risk due to variations not mentioned
February 2009	Planning consent issued		
January 2010	Thornfield put into Administration by HBOS		
May 2010	Cllr Kelsey Learney elected Leader (Lib Dem) to May 2011		
24/11/2010	Cabinet Silver Hill Regeneration Project	Henderson acquisition of shares in Thornfield Properties (Winchester) Ltd noted Nigel Giffin QC Advice appended	Exempt report NG's advice- 2004 DA should have been openly procured, was a public works contract, change of developer is a variation. Avoid future variations. Institute challenge period- first half of 2011
May 2011	Cllr George Beckett elected Leader (Cons) to May 2012		
May 2012	Cllr Keith Wood (Cons) elected Leader to May 2014		
26/06/2012 – 06/07/2012	CPO inquiry	Objections from Sainsbury's – withdrawn, Sainsbury's freeholder, London and Henley, 'concerned citizens' Procurement,	Confirmed by S of S

		design, viability all specifically raised	
(CLJ awaiting info)	Request from Henderson for variations to DA (on viability grounds)	(CLJ awaiting info)	
04/11/2013	Cabinet	Long stop date moved to 30 th June 2015. To note: London & Henley prepared Judicial Review following CPO. Terms of purchase of their interests agreed with Council/Henderson	
12/04/2013 to 14/05/2014	Reference Group meetings- (Treated as though exempt)	All party working group including Cllr Kim Gottlieb. Informal. 12 meetings in total. Consideration of Henderson changes <ul style="list-style-type: none"> - Bus station to be deleted - Affordable Housing to be off-site - More retail and anchor store - Design modifications - Derek Latham's 21 changes 	Initial meeting 12/04/2013. Legal Advice to be sought at every stage.
15/05/2013	Henderson attended Reference Group to explain changes		Members told legal advice will be sought
11/09/2013	Cabinet	Outcome of Council's LGA Peer Challenge. How can the Council be more flexible, responsive and innovative? How	Have they been implemented? Are they all still relevant? Corporate Governance review is still outstanding. Now

		to create more effective corporate governance. 7 suggestions for consideration. Action plan to implement them agreed.	more important due to Boundary Commission reducing the number of Councillors to 45. What will the new Council look like? How will it operate? How can it be ready for "Combined Councils" in future?
15/01/2014	Reference group meeting	Noted that Council should ensure that legal advice is obtained in respect to whether the scheme changes do not contravene the Development Agreement and/or procurement law.	
05/02/2014	Reference Group meeting	Derek Latham presents 21 points for change to 2009 planning permission. Henderson explain they will apply to Planning Committee for small changes.	No legal advice. No reference to risk.
19/03/2014	Reference Group	Outstanding Actions listed- from 15/01/2014 – Council to obtain legal advice. No legal advice was given to the Reference Group.	
09/04/2014	Reference Group	Howard Bone attended. Legal Advice was being obtained.	No mention of Risk Register. No mention of earlier advice.
21/11/2013 to	Silver Hill Project Team Minutes	09/05/2014- mention that HB	

27/02/2015 (21 meetings)	(Treated as exempt)	will get legal advice from Nigel Giffin QC to include Roanne and best consideration. 10/06/2014- reported took advice day before from Paul Nicholls QC- relying on DA variation clause.	
May 2014	Cllr Rob Humby (Con) elected Leader to February 2015	Resigned after Judicial review result	
07/07/2014	Overview and Scrutiny Committee	Report from Cllr Kim Gottlieb 21 pages. Revisions produce new scheme, missing money, development appraisal same before as after, planning cannot assist, procedure flawed so bad scheme and fails on best consideration	
10/07/2014	Cabinet	To approve variations: Reduction in no of residential units from from 287 to 182, Removal of bus station, Deletion of shop mobility and dial a ride, Deletion of market store, Changes to external elevations, One shop unit of up to 60,000 sq ft, Reduced car	

		parking from 330 to 279, Substitution of money for Affordable Housing, Increased retail from 95,000 square foot to 148,000 sq ft, Include 153 High Street. Reasonable assurance on majority of development account costs. Note of conference with Paul Nicholls QC. Legal issues and risk management issues do not include procurement	
16/07/2014	Council	Resolution passed on Affordable Housing	
06/08/2014	Cabinet	Affordable Housing referred to Planning Committee to resolve Henderson require further changes- reduce residential from 184 to 177, car parking from 181 to 180	
/08/2014	Letter before action from Dentons to BLP	Response 01/09/2014 to Dentons from BLP	
07/10/2014	Written application for permission for JR before Dove J refused	Case in Planning Court	
24/11/2014	Oral renewal of	Council	Advice taken from

	application for permission for JR before Lindblom J given on procurement ground alone	represented by David Elvin QC- although not a planning issue?	Nigel Giffin QC by BLP- didn't take standing point and changes not compliant with procurement law
11/12/2014	Planning Committee	4 planning Applications from Hendersons. Covering report states that all 4 taken together will ensure that necessary consents are given to the revised scheme. PER to all recommended. Permission granted. Subsequently sent to Secretary of State. Buses on Friarsgate with supporting facilities, retail space 148,500 sq ft, 173 dwellings.	Objections on architectural grounds from Cllr Kim Gottlieb. Many objections. Letter of objection also sent to Eric Pickles.
28/01/2015 , 29/01/2015	KA Gottlieb v Winchester City Council, QBD Planning Court		Cabinet decision of 6 th August 2014 to authorize variations in DA is in issue.
11/02/2015	Judgement of Mrs Justice Lang	"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	Decision of 6 th August 2014 is quashed.

		the contract". "I conclude that the Council's decision to authorize variations to the DA, without carrying out a procurement process....was unlawful".	
19/02/2015	Councillor Humby and Councillor Weston resigned as Leader and Deputy Leader on 17 th February 2015. Councillor Frank Pearson elected as Leader. Cllr Godfrey became Deputy Leader.		
03/03/2015	Cabinet	Recommended by Nigel Giffin QC and David Elvin QC not to appeal.	Henderson, interested party only at first instance, did appeal.
07/05/2015	Election Day	19 Councillor seats up for election plus one by-election. Conservative majority returned.	
20/05/2015	Annual Meeting of the Council	Election of Councillor Godfrey as Leader and Councillor Weston as Deputy Leader	

Appendix Three Evidence

Appendix 3.1 SCHEDULE OF INTERVIEWS AND MEETINGS

Name	Date	Time
Cllr Frank Pearson Leader of WCC to May 2015	18/03/2015	9am
Simon Eden CEO WCC	18/03/2015	9.45am and 3pm
Steve Tilbury Corporate Director WCC	18/03/2015	12noon

Attended Cabinet Meeting- Appointment as Independent Reviewer announced by Leader Reports on SH options and reducing Cllrs to 45 from 57- Boundary review	18/03/2015	10:00am
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Steve Tilbury Corporate Director WCC	25/03/2015	9am
Stephen Whetnall Chief Operations Officer	25/03/2015	12pm
Simon Eden CEO Winchester CC	25/03/2015	3pm

Cllr Chris Pines Leader of labour Group	27/03/2015	9:30am
Howard Bone Head of Legal Services	27/03/2015	11:30am
Cllr Rob Humby Former Leader to Nov 2014	27/03/2015	3:30pm

Cllr Kim Gottlieb Took Judicial Review	02/04/2015	10am
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Cllr Frank Pearson	07/04/2015	9:00am
George Beckett Former Councillor and Leader 2006- 2010, 2011-2012	07/04/2015	11:30am
Lorna Hutchings	07/04/2015	1:30pm

Principal Planning Officer		
Cllr Kelsie Learney Leader of Lib Dem opposition to May 2015, Leader of Council 2010- 2011	07/04/2015	3:00pm

Simon Eden CEO	08/04/2015	9:00am
Cllr Vicky Weston DL to Rob Humby, DL since May 2015	08/04/2015	11:30am
Prof Chris Turner BID	08/04/2015	1:30pm
Kevin Warren Head of Estates	08/04/2015	3:00pm

Cllr Steve Miller PH Housing	10/04/2015	9:00am
Cllr Stephen Godfrey PH Finance and Organisational Development Leader from May 2015	10/04/2015	10:30am
Cllr Ernie Jeffs Chair of Planning 2006- 13 and member of planning 2014	10/04/2015	12:00pm
Michael Carden City of Winchester Trust Was Chairman for 5 years	10/04/2015	3:30pm

Mike Capocci (Henderson)	16/04/2015	11:30am
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Presentation by Steve Tilbury to CLJ, Cllrs Gottlieb, Pearson, Miller and HB, SW	20/04/2015	4:00pm
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Lesley-Ann Avis and Rosalind Nuttal Berwin Leighton Paisner	21/04/2015	9:30am
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Jim Scopes Local partnerships	22/04/2015	Telephone call 11:00am
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Robin Atkins (Public) Chair of Alresford Town Trust	23/04/2015	9:00am
Dave Dimon Former Planning Officer	23/04/2015	10:00am
Cllr Neil Cutler Chair of Audit Cttee since June 2014	23/04/2015	11:30am
Cllr Mike Southgate	23/04/2015	1:30pm
Kate Handy Ernst and Young Internal Auditors	23/04/2015	3:00pm

Andy Hickman AD Policy and Planning	29/04/2015	9:00am
Cllr Laurence Ruffell Chair Planning Cttee 2014	29/04/2015	11:30am
Stephen Gates Hampshire Chamber of Commerce	29/04/2015	1:30pm
Alexis Garlick Chief Finance Officer	29/04/2015	3:00pm

Cllr Therese Evans LibDem Leader May 2006/7	30/04/2015	9:30am
Keith Wood Leder 2010 - 2012	30/04/2015	11:30am
Howard Bone Head of Legal Services	30/04/2015	2:00pm
Stephen Whetnall MO and COO	30/04/2015	3:00pm

Frank Pearson Leader	06/05/2015	9:30am
John Steele Leader 1998-2001	06/05/2015	11:30am
Alexis Garlick CFO	06/05/2015	1.00pm
Robert Hutchison Lb Dem opposition Public	06/05/2015	2:30pm
Richard Botham Head of Housing	06/05/2015	3:00pm

Stephen Ashworth Dentons	07/05/2015	11:00am
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Nigel Giffin QC 11 KBW	11/05/2015	9:30am
Richard Owen Deloittes	11/05/2015	12 noon
Paul Nicholls QC 11 KBW	11/05/2015	3:00pm
Martin Perry Hendersons Director of Development	12/05/2015	2.00pm

Judith Martin Former Councillor Member of Winchester Trust	21/05/15	Telephone call
Simon Eden CEO	05/06/15	10:00am

Cllr Stephen Godfrey Leader of the Council	18/06/15	3.30pm and 5.15 pm
Presentation by Hendersons- Martin Perry and Mike Capocci	18/06/15	4pm and 6pm

Councillor Lucille Thompson Leader of the Liberal Democrats since May 2015 election	03/07/2015	10:00am
Cllr Stephen Godfrey Leader of the Council	03/07/2015	11:30am
Kevin Warren Head of Estates (Tour of Silver Hill site)	03/07/2015	13:30pm
Simon Eden Chief Executive	03/07/2015	15:00pm
Cllr K Gottlieb and Cllr J Warwick	24/08/2015	15:00pm
Telephone call Kate Handy and Mike Bowers, WCC Internal Audit	16/09/2015	10:00am

Appendix Three Evidence

Appendix 3.2

SCHEDULE OF DOCUMENTS

	Date of Document	Title of Document
1.	Policy and Finance (Assets, Property and Investments) sub 02/12/1997	The Brooks and Post Office Sites
2.	Broadway/Friarsgate Planning and Transportation Study- Working Group 15/09/1998	Exempt business and Minutes
3.	Broadway/Friarsgate Planning and Transportation Study- Working Group 08/12/1998	Feedback on public Consultation
4.	Broadway/Friarsgate Planning and Transportation Study- Working Group 24/02/1999	Exempt business and minutes
5.	Policy and Finance (Assets, Property and Investments) Sub 15/06/1999	Update on Broadway/Friarsgate
6.	Planning Committee 17/06/1999	Broadway/Friarsgate Planning Brief
7.	Policy and Finance (Assets, Property and Investments) Sub 21/03/2000	Update on Broadway/Friarsgate
8.	Cabinet 22/09/2000	Appointment of consultants for Broadway/Friarsgate
9.	Cabinet 30/05/2001	Disposal of part of cattle market for health care development
10.	Cabinet 19/12/2001	Further consideration on disposal of part of the cattle market
11.	Cabinet 19/12/2001	Development Agreement and exempt minutes
12.	Cabinet 24/07/2002	DA update and lock out agreement
13.	Cabinet 15/01/2003	Broadway/Friarsgate Planning brief
14.	Cabinet 15/01/2003	Exclusivity Agreement and timetable
15.	Cabinet 02/04/2003	Developer brief
16.	Cabinet 01/10/2003	Thornfield's response to developer brief, Extension of exclusivity agreement
17.	Cabinet	Thornfield's revised proposals and

	11/02/2004	extension of exclusivity agreement
18.	Cabinet 25/05/2004	Approval of Heads of terms
19.	Cabinet 27/07/2004	Extend Exclusivity Agreement to 30 th November 2004
20.	Cabinet 06/10/2004	Approval of DA
21.	Cabinet 03/11/2004	Further external advice on the DA
22.	Council 03/11/2004	Broadway/Friarsgate DA
23.	Cabinet 15/12/2004	Further extension to exclusivity agreement
24.	Cabinet 08/02/2005	DA- signed 22/12/2004 Joint commitment to continued public consultation
25.	Cabinet 01/06/2005	Silver Hill consultants- BLP and Drivers Jonas appointed
26.	Principal Scrutiny Committee 17/10/2005	Silver Hill Update Planning to be submitted Spring 2006 CPO Autumn 2006 Inquiry complete winter 2007 Works start 2007 Works complete Spring 2012
27.	Cabinet 12/12/2005	CPO resolution And submission of Planning Application by Thornfields
28.	Council 01/02/2006	Silver Hill Landowner approval
29.	Cabinet 13/04/2006	Variation to DA- reduce number of residential units to 277 from 285
30.	Cabinet 13/12/2006	Further variations to planning app- parking Office, parking mess and CCTV control room removed Residential units reduced from 277 to 260
31.	Cabinet 17/01/2007	DA terms
32.	Planning Development Control 27/03/2007	Application by Thornfields x 3- permission granted
33.	Planning Development Control 18/05/2007	London & Henley Application re Middle Brook- permission refused
34.	Cabinet 17/10/2007	Silver Hill Land Matters Proposed use of CPO powers
35.	Case C-454/06 Judgement of the Court 19 th June 2008	Pressetext v Republic of Austria
36.	Cabinet 09/07/2008	Upper Brook Street Car Park

37.	Planning Development Control 21/10/2008	Update on Silver Hill Amendments to Planning Permission, progress on s106
38.	Cabinet 18/11/2008	Silver Hill CPO Long stop date moved to 31/12/2012
39.	Scrutiny 12/11/2008	Silver Hill CPO Corporate Director explained that 'there was a chance that any fundamental changes to the Agreement may result in further potential for legal challenge'.
40.	Cabinet 24/11/2010	Silver Hill regeneration project – Latest Developments- Substitution of Henderson for Thornfields Nigel Giffin QC advice attached- Exempt appendix ' Original DA was likely to have amounted to a public works contract which ought to have been openly procured...there could be some changes material enough to generate new grounds for challenge even if they would not normally call for a new procurement....the absence of a procurement in 2004 might make it harder to rely upon contract change mechanisms..' Standstill for 6 months to see if challenge is attracted
41.	Cabinet 07/12/2011	Silver Hill update CPO made Financial appraisal by Drivers Jonas- in June 2011- 'currently exceeds the necessary return'
42.	Compulsory Purchase Enquiry 26 th June 2012- 6 th July 2012.	Statements made to enquiry by WCC CPO confirmed October 2012
43.	Silver Hill reference group minutes 12/04/2013 – 14/05/2014(12 meetings)	File from Andy Hickman. Exempt. Legal Advice required but not obtained until June 2014. Legal Advice not given to Reference Group.
44.	Cabinet 11/09/2013	Outcome of the Council's corporate Peer Challenge. Action plan for 7 recommendations to be implemented.
45.	Silver Hill project Team minutes, 21/11/2013 – 27/02/2015 (21 meetings)	File from Andy Hickman. Legal advice required at meeting 21/02/2014 Reported as obtained day before on 10/06/2014

46.	Cabinet 04/11/2013	Silver Hill Development -
47.	Communications Strategy 2014-16	Winchester City Council
48.	Development Agreement 30/01/2014	Winchester City Council as Council, Silverhill Winchester No1 Ltd as Developer, BNP Paribas Jersey Trust Corporation Limited and Anley Trustees Limited as the Trustees of the Henderson UK Property Fund as the Guarantor
49.	A report to Overview and Scrutiny Committee 4 th July 2014	Cllr Kim A Gottlieb
50.	O and S 07/07/2014	Silver Hill report by Cllr Kim Gottlieb Revisions do produce new scheme Missing money
51.	Cabinet 10/07/2014	Silver Hill regeneration To approve variations
52.	Council 16/07/2014	Silver Hill Resolution on Affordable housing
53.	Cabinet 06/08/2014	Silver Hill Affordable Housing Review Further changes- reduce residential from 184 to 177 Risk of challenge mentioned without impact or likelihood or mitigation
55.	File of Counsels' Opinions handed to CLJ by Howard Bone 20/04/2015	
56.	File of 'Silver Hill Review' emails Closed 30/04/2015	Total 65 approx
57.	Winchester Silver Hill Scheme 06/06/2014	Volume 1- Planning Drawings Allies and Morrison
58.	Email from Cllr Vicky Weston 24/06/2014	All member briefing on Silver Hill
59.	A note to Winchester City Councillors June 2014	The Silver Hill Development How to ruin a city Cllr Kim A Gottlieb BSc MRICS
60.	Winchester Silver Hill A vibrant City Centre July 2014	18 page booklet produced by Henderson
61.	Planning Committee Agenda 11 th December 2014	14/01912/FUL (section 73 application) 14/01913/FUL (the drop-in application) 14/01915/FUL(the High Street application) 14/01916/LIS (the Listed building Application)
62.	Silver Hill, Winchester Cllr Kim Gottlieb	Objection to the Applications on architectural grounds

	December 2014	
63.	Two large lever arch files of objections to "drop in" application 14/01913/FUL	
64.	A representation to Right Hon Eric Pickles MP by Cllr Kim A Gottlieb 30 th December 2014	Objections to all 4 planning applications
65.	File containing letters to Eric Pickles from 156 objectors 06/01/2015	Asking for decisions on 14/01912 and 3/FUL to be called in by S of S
66.	R v Durham County Council 15/01/2015 EWHC 16 (Admin) In High Court of Justice, QBD, Admin Ct.	Before Mr Justice Cranston Case concerning insufficient information provided to Cabinet. Not a necessary error for report to refer only to officers conclusions.
67.	Gottlieb and WCC and Silverhill W No 1 HCJ, QBD, Planning Court 28 th January 2015	Skeleton Arguments
68.	R on the application of KA Gottlieb v WCC Heard 28 th and 29 th January 2014	Judgement of Mrs Justice Lang issued 11 th February 2015
69.	Cabinet 3 rd March 2015	Silver Hill Judicial Review decision
70.	Letters to Cllr Frank Pearson copied from Steve Brine MP 11/03/2015	Given to CLJ 18/03/2015
71.	Cabinet 18/03/2015	Silver Hill Review of project position
72.	Council 01/04/2015	Questions under Council Procedure Rule 14
73.	Cllr Mike Southgate Email to CLJ 23/04/2015	Encloses email from SE and HB dated 19/11/2014, and 18/11/ 2014
74.	Project Management papers from Andy Hickman 29/04/2015	Silver Hill Regeneration Project Corporate Projects Monitoring reports x 2- July and August 2014
75.	Therese Evans 30/04/2015	Example of letter to Kelsey Learney
76.	File from Berwin Leighton Paisner 06/05/2015	Privileged and Confidential Information
77.	Kevin Warren Further thoughts 06/05/2015	By email
78.	Richard Botham 15/05/2015	Silver Hill Affordable Housing Chronology
79.	File from Hendersons	Confidential to Claer Lloyd-Jones

	21/05/2014	
80.	Public Procurement: Key Issues and Likely pitfalls Richard Clayton QC 07/06/2015	26/02/2015 New Regulations came into force
81.	Extraordinary meeting of the Council 18/06/2015	Termination of the Development Agreement
82.	CP order 2011 and email. Received from K Warren 19/06/2015	
83.	Emails from Lucille Thompson 03/07/2015	
84.	Winchester District Community Strategy 2010-2014 January 2014	Sent to me by Simon Eden- printed 16/07/2015
85.	Solace Enterprises report Printed 16/07/2015	WCC Strategic Finance at Winchester Jim Brook
86.	Silver Hill Independent Review Brief to LGA March 2013	Written by Simon Eden on behalf of the Leader Printed by me 16/07/2015
87.	Cabinet Special meeting 13/07/2015 Council Special meeting 15/07/2015	Silver Hill- submissions by Silverhill Winchester No 1 Ltd and Council's response
88.	Email from Kevin Warren dated 14/08/2015	Enclosing reports from Richard Owen of Deloitte
89.	Submission from Councillor Kim Gottlieb	
90.	Email from Howard Bone 21/08/2015	Enclosing Advice from James Goudie QC – March 2008, 2009 and letter from Hawes 17/11/2008
91.	Further submission from Councillor Kim Gottlieb 01/09/2015	Copied to other members of the Council
92.	Councillor Janet Berry submission 06/09/2015	Submission and 2 enclosures
93.	Email from Simon Eden 07/09/2015	Enclosing letter to Hampshire Chronicle by Councillor Gottlieb
94.	Email from Howard Bone 07/09/2015	Enclosing 10 key documents from the Judicial review
95.	Email from Phil Gagg	Submission on parking issues and 2 enclosures
96.	Email Councillor S Godfrey to Councillor K Gottlieb and reply	Concerning accusations made by KG against WCC officers. Leader states

	both dated 13/09/2015	they are defamatory and incompatible with being a Councillor. Other courses of action were available following Council procedures. Refuted by KG.
97.	Email Simon Eden 15/09/2015	Enclosing initial responses to Councillor Gottlieb accusations against officers.
98.	Cc Email Simon Eden to all members 18/09/2015	Reminding members of code of conduct, member/officer protocol
99.	3 x emails from Councillor K Gottlieb	Enclosing inter alia ICO decision of 17/09/2015 WCC v Judith Martin. Further information to be produced on viability assessments
100.	Email from M Wells at WCC 22/09/2015	Enclosing Confidential Annexe to ICO decision. Cannot be read without spreadsheet which was not attached. Requested it.
101.	Email from M Wells at WCC 01/10/2015	Enclosing Personnel Committee report 29/09/2015- senior management responsibilities
102.	Email from Simon Eden 01/10/2015	Enclosing Council's response to Councillor K Gottlieb paper of 28/08/2015
103.	Letter from Councillor K Gottlieb	Enclosing 24 page document 'Rebuttal of Simon Eden comments of 2 nd October 2015 on Councillor K Gottlieb's submission of 28/08/2015
104.	Email from Una Stevens 13/10/2015	Submission plus enclosure- letter from Una Stevens to Hampshire Chronicle
105.	Email H Bone 19/10/2015	Enclosing copies of information to be disclosed under ICO decision above. Some information is being challenged.

Appendix Four

Advice obtained by the Council from Leading Counsel on Silver Hill

Appendix Four

Advice obtained by the Council from Leading Counsel on Silver Hill

	Counsel	Date of Advice	Summary of Advice (inserted by CLJ)	Reason Advice Obtained	Where Advice Sent once Obtained	Open?	Why Exempt
1.	James Goudie QC	March 2008	Any challenge to DA could rely on time as a defence. “..this is the position without any variations to the DA...creates fresh focus for challenge... (unless) de minimus”. “Counsel noted that when the DA is varied the fact that it has been varied needs to be made available in the public domain...ie an open committee report.”	Instructions not seen by CLJ. Concern from BLP and Council following publicity around “Roanne” case and implications for Silver Hill Scheme, and threats of challenge from London and Henley. Monitoring Officer asked that advice from Leading Counsel be obtained.	Advice given in conference attended by officers (SW, HB, TL, ST) and notes written up by BLP. Advice received by officers, and summarised and taken into account in report to Members (CAB1739 Exempt Appendix C)	No.	N/A – Opinion itself not published, but summarised in CAB1739 Exempt Appendix C. Much of advice in this opinion now largely implemented/superseded and need not remain exempt. Opinion does include advice on Commission involvement, and comment on Upper Brook Street which has not yet been concluded. These parts at least should not be made public.
2.	James Goudie	Oct 2008	“The DA was..probably a	See Instructions to Counsel	Advice received by officers, summarised and taken into	No.	Paras 3 and 5 – Section 5 of Exempt Appendix (Roanne)

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	QC.		Public Works Contract within the procurement regime..the principal question is whether a variation of the DA will constitute a new contract award that will be subject to the procurement regime”. Pressetext reviewed. Looked at report to Cabinet 18/11/2008. Variations suggested by Th should not result in a situation which requires competitive tendering. There is a contrary view.	Section 1. Variations now finalised and ready to report to Cabinet. Follow-up consultation to March 2008 consultation – need to reduce risk of challenge from London and Henley.	account in report to Members (CAB1739 Exempt Appendix C)		probably could be released, as anticipated variations have now taken place. Other advice now largely implemented/superseded and need not remain exempt. Section 4 relates to the arrangements and reasoning behind changes to SDLT – as the leases have not been completed yet, this should not be made public to avoid any possible challenge (from HMRC or public) once the leases are executed.

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3.	James Goudie QC	14 August 2009	Nor provided to CLJ	Instructed by BLP and Thornfield's Solicitors to approve draft documentation on variations following advice in 2008.	Advice confirmed draft documents were appropriate – documentation therefore executed shortly thereafter. Provided to officers. Received by ST and forwarded to KW, HB, SE and BLP. Not taken to Members as was a technical confirmation of legal drafting.	No.	N/A Advice now implemented and reflects current understanding of legal position. Could be made public therefore.
4.	Nigel Giffin QC	16 March 2010	Note taken by BLP. DA is public works contract and should have been procured. Too late to challenge DA or variation in Oct 2009. Cannot be confident that no-one would challenge.	Specific request by Monitoring Officer to obtain advice. Thornfield parent now in administration and administrator looking to dispose of Thornfield Properties (Winchester) Limited. No identified buyer at present. BLP	Advice given in conference attended by officers (ST, HB) and notes written up by BLP. Taken into account by BLP in advising WCC and by officers in dealing with administrator. Referred to in subsequent opinion (CAB2085 Exempt Appendix 2) reported to Members 22 and 24 November 2010 (Cabinet/TOSC).	[Indirectly reported in CAB2085 Exempt Appendix 2 – paras 2 and 3 22/24 November	N/A – and see below. Advice related to transition from Thornfield to Henderson and standstill period of 6 months which was agreed at that time. Challenge period now passed. Unlikely therefore for a need to retain exempt status.

	Counsel	Date of Advice	Summary of Advice (inserted by CLJ)	Reason Advice Obtained	Where Advice Sent once Obtained	Open?	Why Exempt
				advising WCC on its position under DA re a buyer. Advice needed on public procurement issues in various possible scenarios.		2010	
5.	Nigel Giffin QC	15 November 2010	DA should have been procured in 2004. Law has moved on. "practical consequences of ..(no) procurement in 2004..is that there could be some changes material enough to generate new ground for challenge..(and) ..might make it harder to rely upon contract change	Henderson had now been identified as the buyer for the Thornfield companies. BLP still advising WCC as to its position. Follow –up advice now sought to confirm legal position to Members before entering into relevant documentation (continuation of Monitoring	Written opinion provided. Reported to Members as Exempt Appendix 2 CAB2085 Principal Scrutiny 22 November 2010/Cabinet 24 November 2010. Advice summarised in Exempt Appendix 1 to same report.	No.	Advice related to transition from Thornfield to Henderson and standstill period of 6 months which was agreed at that time. As challenge period now passed, no need to retain exempt status.

	Counsel	Date of Advice	Summary of Advice (inserted by CLJ)	Reason Advice Obtained	Where Advice Sent once Obtained	Open?	Why Exempt
			mechanisms .. in the original DA". Proposed variations do not give rise to a new contract nor economic operator to challenge DA. Presetext applied.	Officer request in 4. above).			
6.	David Elvin QC	20 May 2013	Procurement not considered	Advice sought by BLP in response to challenge to confirmation of CPO by Secretary of State issued by London and Henley.	Advice obtained in conference attended by officers (HB/ST). Proceedings primarily being defended by Secretary of State. Not therefore formally reported to Members. Negotiations continued by Henderson with London and Henley, resulting in agreement for Council to acquire properties and proceedings to be settled – settlement terms reported to Cabinet 04.11.13 CAB2526.	No	N/A Largely related to CPO challenge which has now been settled. However, CPO and GVD not yet implemented, so at least of the opinion should not be disclosed to reduce risk of challenge.

	Counsel	Date of Advice	Summary of Advice (inserted by CLJ)	Reason Advice Obtained	Where Advice Sent once Obtained	Open?	Why Exempt
7.	David Elvin QC	13 January 2014	Procurement not considered	No specific request from Monitoring Officer (continuation of previous approach of seeking advice to key decisions). Advice sought by BLP on planning strategy for changes to scheme resulting from changes to bus station arrangements and other changes proposed by Henderson.	Advice obtained by officers (HB/ST) in conference. Minutes of conference prepared by BLP. Advice primarily in respect of type of planning application which could be submitted to achieve changes, so not formally reported to Members.	No.	N/A
8.	Paul Nicholls QC	9 June 2014	Instructions from HB not BLP on 06/06/2014 for	Advice obtained prior to proposed changes (2014	Advice obtained by officers (HB/ST/KW) in conference. Notes of conference written up by Howard Bone,	Originally taken in	Now published as an open document.

	Counsel	Date of Advice	Summary of Advice (inserted by CLJ)	Reason Advice Obtained	Where Advice Sent once Obtained	Open?	Why Exempt
			<p>conference 09/06/2014. Procurement regulations apply, however "caselaw also recognised that where there is a variation clause.. (it) would constitute performance of the contract, rather than a change to the contract which might require procurement. It was necessary to consider the scope of the variation clause and whether the proposed changes fell within it".</p> <p>NB law Society case not</p>	<p>scheme) being reported to Members for approval. Specific requirement by Monitoring Officer to obtain advice.</p> <p>Nigel Giffin QC unavailable, so Paul Nicholls QC used as an alternative, given from same chambers and had previously advised on commercial contract issues. Instructions given by Howard Bone, and BLP copied in with request for any issues they wished to be raised over</p>	<p>circulated, and approved by Paul Nicholls.</p> <p>Note of Conference included as Exempt Appendix 6 to Cab2603 The Overview and Scrutiny Committee 07.07.14 and Cabinet 10.07.14.</p>	<p>exempt session in 2014. Subsequently published in open session as Appendix 5 to CAB2665, Cabinet 03.03.15.</p>	

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			considered	and above what was in instructions.			
9.	David Elvin/Richard Moules	August 2014	Defence in Judicial review	Advice sought by BLP following receipt of pre-action protocol letter. Leading Counsel instructed to draft response to pre-action protocol letter.	Draft response letter provided by Leading Counsel to BLP and served on claimant's solicitors. Procedural advice therefore not reported to Members but referred to (Minute 11 of open session and Minute 16 in Exempt session of Cabinet 10 September 2014 CAB2609. Meeting approved funding of legal costs to be from Major Investment Reserve (Res. 12). Also mentioned in Appendix A to CAB2629 (Risk Assessment) - 3 December 2014:- "The Council considers it has a robust defence to the challenge."	No.	Part of papers for litigation which were sent to Cllr Gottlieb's solicitors following the issuing of proceedings. In view of this, and the fact that the litigation against the Council has now been concluded, there is no reason not to release the final version of the response letter to public.

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10	David Elvin QC	15 October 2014	Procurement issue not discussed	Advice sought by BLP to agree strategy for JR challenge and determination of planning applications which had been submitted. No specific request by Monitoring Officer. Permission for JR had been refused on papers.	Advice sought in joint conference attended by officers (HB/ST) with Henderson. Advice primarily on procedure and tactics so not reported to Members. Advice given re offer on affordable housing made by Henderson. Taken into account by officers and report from Deloitte obtained in respect of 233 best consideration as part of planning application report.		
11	Nigel Giffin QC	5 December 2014/9 January 2015	Article 72 applies. Public Contracts Regulations 2015. Proposed changes are 'substantial' and material in Presstext sense. Further opinion	BLP suggestion to seek advice from Nigel Giffin (as specialist procurement QC). Advice Instructions given by BLP as part of ongoing conduct of JR claim, following grant of permission in	Original opinion issued (to BLP only) 05.12.14. Subsequently revised following discussions between officers (HB) and BLP, and clarification having been given by BLP to Leading Counsel. Opinion suggested finely balanced, but still an arguable case. Opinion sent by email by BLP to HB, and then copied to ST and SW (see emails	No	Although the Council is not appealing against the judgment, Henderson are pursuing an appeal. Disclosure of the December 2014 advice may harm the prospects of that appeal, and it should not therefore be made public. In respect of the January 2015 advice this relates to possible alternative ways of

	Counsel	Date of Advice	Summary of Advice (inserted by CLJ)	Reason Advice Obtained	Where Advice Sent once Obtained	Open?	Why Exempt
			09/01/2015 Consideration of whether a new DA should be procured. Not risk free.	respect of ground 1. Focus of claim now therefore on procurement, rather than including best consideration/state aid. Advice sought with a view to strengthening the procurement aspects case to be put to the Court by David Elvin QC, given Nigel Giffin QC's expertise in that field. Further opinion also sought (issued 09.01.15) on possible alternative ways forward i.e. entering into new agreement constructed to	from BLP 08.12.14 13:58 and ST 10.12.14 08:28 attached). BLP's summary of advice confirms Mr. Giffin considered that the regeneration background should carry considerable weight, and the judge in a planning judge in the Planning Court could be expected to be sympathetic. It was therefore, in his opinion, perfectly proper for the Council to continue to defend the claim. ST and SW briefed by HB, and briefing given to Leader and Chief Executive by Howard Bone explaining context and outlining advice given. Agreed that reasonable to proceed with defending challenge, given stage that had been reached, consequences of consenting to judgment, and potential that could still succeed. David Elvin remained supportive of case, particularly in light of		building out the scheme. As the scheme is ongoing and possibly still will be subjected to challenge, advice on such alternatives should not be made public either.

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				be not a public works contract, or undertaking reprocurement exercise.	Edenred judgment issued shortly before hearing date.		
12	David ElvinQC/ Nigel Giffin QC	18 February 2015	NG viewed prospects on appeal as being 30-40%.	No specific request by Monitoring Officer, but he attended. Instructed by BLP to provide advice on appeal, potential for restructuring deal or reprocuring 2014 development, implications for use of CPO.	Advice given in conference attended by officers (HB, SW, KW and H). Written joint opinion subsequently provided. Reported to Members 03.03.15 CAB2665 Exempt Appendix 8.	No	As opinion goes into legal arguments on merits of appeal, and appeal by Henderson not yet concluded, exempt status should remain.
13	Nigel Giffin QC	15 May 2015	Not seen by CLJ	Further advice sought via BLP at request of HB to deal with potential challenge to proceeding, on	Reported as open item to Cabinet 13 July 2015 (Appendix 5 CAB2700).	Yes	N/A

	Counsel	Date of Advice	Summary of Advice (inserted by CLJ)	Reason Advice Obtained	Where Advice Sent once Obtained	Open?	Why Exempt
				basis that cannot proceed on basis of an "unlawful" agreement.			
14	David Elvin QC/ Richard Moules	17 June 2015.	Not seen by CLJ	Further advice sought via BLP at request of HB to deal with likely challenge to use of CPO powers on basis that original development agreement had not been lawfully procured.	Reported as open item to Cabinet 13 July 2015 (Appendix 4 CAB2700).	Yes	N/A