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## Winchester property development case highlights changeable 'material variations' test under procurement rules

A ruling by the High Court in London highlights the demanding nature of a legal test that is used to determine whether local authorities can make changes to old property development agreements without having to re-procure for the delivery of the revised deal, an expert has said. 16 Feb 2015

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[The High Court case](#) suggests that changes to the economic viability of property development schemes over time could influence whether re-procurements by local authorities are necessary when changes to property development contracts are made to account for the changed economic conditions, said public procurement law expert [Kathrine Eddon](#) of Pinsent Masons, the law firm behind Out-Law.com.

Earlier this month, the High Court ruled that Winchester City Council had acted unlawfully

when it allowed variations to be made to an agreement it had with a property developer.

The Council acted unlawfully because it was under a duty to re-procure for delivery of the new development and failed to do so, Mrs Justice Lang said in her judgment. The obligation to re-procure arose because the changes made to the original property development agreement were 'material', she said.

Winchester City Council signed its property development agreement contract with a developer called Thornfield Properties (Winchester) Limited (Thornfield) in December 2004. The agreement signed was for the "comprehensive redevelopment" of a local area within the boundaries of the Council area called 'Silver Hill'. New houses, retail space, car parking, a replacement bus station and a civic square among other features were all to be included as part of the redeveloped site.

Planning permission for the works was granted in 2009 but Thornfield subsequently went into administration and was bought over. It is now called Silver Hill Winchester No. 1 Limited (SHW).

Last year, SHW asked the Council to accept changes to the 2004 agreement, including the removal of the requirement for a new bus station and other features from the contractual requirements.

The decision to vary the contract was accepted by the Council but one councillor and local resident, Kim Gottlieb, launched a legal challenge against that decision, which the High Court has now upheld.

The High Court found that the Council agreed to the re-negotiation of the property development agreement after accepting SHW's claims that it was not viable for it to deliver on the original agreement. The judge determined that the most significant difference between the revised contract and the original agreement was that the revised contract was one that could viably be delivered.

"This determination was important because the judge went on to consider the increased commercial appeal of the revised contract and found this relevant to the argument of whether or not there had been 'material variations' to the original contract," Eddon said. "It is a particularly stringent application of the 'material variations' test to make a direct link between changing economic circumstances and changes to property development agreements. This approach could have an impact on the stream of redevelopment projects being brought back on-line after stalling during the financial crisis."

Property law expert [Nic Berry](#) of Pinsent Masons said property developers should take note of the High Court's judgment: "The ruling shows that developers cannot expect to renegotiate materially different deals following a procurement exercise without exposing themselves to the risk that they could lose out on the revised contract. One way to address this risk is to build some flexibility into the original property development agreement if at all possible."

Eddon said that the parameters of the 'material variations' test could shift again as early as next month when the Court of Appeal considers an appeal against a High Court ruling made in January, in a case that Mrs Justice Lang referred to in her decision. That dispute is over the UK government's procurement of services to support its tax-free childcare policy. Pinsent Masons is acting for commercial childcare voucher provider Edenred in the case.

Eddon also said that the nature of the legal challenge in this latest case was notable.

"In this case, Winchester City councillor Kim Gottlieb brought his legal challenge in the form of a request for a judicial review," Eddon said. "It highlights that challenges to changes to local authority decisions to agree to changes to property development contracts can be brought by individual stakeholders with a legitimate interest in how those schemes are delivered and not just by property development companies concerned with the process followed by the authorities in coming to that decision under EU and UK public procurement rules."

In her ruling, Mrs Justice Lang said it was "noteworthy" that the Council had not challenged Gottlieb's right to raise a judicial review challenge.

"[Gottlieb], in his capacity as a resident, council tax payer, and city councillor, has a legitimate interest in seeking to ensure that the elected authority of which he is a member complies with the law, spends public funds wisely, and secures through open competition the most appropriate development scheme for the City of Winchester," Mrs Justice Lang said.

"It is well-established that a direct financial or legal interest is not required to establish standing to bring a claim for judicial review... Although there is a specific remedy for economic operators under the 2006 Regulations, this does not preclude claims for judicial review by those who are not economic operators," the judge said.

Mrs Justice Lang said that Gottlieb was not pursuing "an ulterior motive" and just wanted to ensure that there is "an open competition to allow Winchester to select the development which best fulfils its needs".

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