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## Appeal Decision

Hearing held on 25 May 2017

Site visit carried out on 25 May 2017

**by Zoe Raygen Dip URP MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 28 June 2017**

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### **Appeal Ref: APP/X2410/W/16/3163501**

#### **Land off Cropston Road, Anstey, Leicestershire LE7 7GG**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a grant subject to conditions of consent, agreement or approval to details required by a condition of a planning permission.
  - The appeal is made by Bloor Homes Limited, Cynthia Spence and Nicholas Wells against the decision of Charnwood Borough Council.
  - Application Ref P/16/0302/2, dated 4 February 2016, sought approval of details pursuant to conditions of outline planning permission Ref P/14/0428/2 granted on 9 November 2015.
  - The application was refused by a notice dated 19 September 2016.
  - The development proposed comprises residential development of up to 160 dwellings, public open space and associated works. All matters other than access were reserved for future consideration.
  - The details for which approval is sought relate to reserved matters, namely layout, scale, appearance and landscaping.
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#### **Decision**

1. The appeal is dismissed.

#### **Application for Costs**

2. An application for costs was made by Bloor Homes Limited, Cynthia Spence and Nicholas Wells against Charnwood Borough Council. This application is the subject of a separate Decision.

#### **Procedural matters**

3. The application as originally submitted sought approval of the reserved matters (condition 2) and also sought to discharge conditions 5, 11, 12, 13 and 20 of outline permission No P/14/0428/2. However, I was advised at the Hearing, (as confirmed subsequently in writing), that the appellant had withdrawn the part of the planning application relating to the discharge of conditions 5, 11, 12, 13 and 20 prior to the determination of the application by the Council. That is reflected in the header above and is the basis on which my determination of the appeal is made.
  4. The Council confirmed that, subsequent to determination of the application, it had adopted the Housing Supplementary Planning Document in May 2017 (the SPD). At the Hearing I was given a copy of a pre-action protocol letter regarding a proposed claim for judicial review of the SPD dated 25 May 2017.
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However, at the time of my decision the document stands as adopted and I have given it full weight in my decision.

5. Appeal ref APP/X2410/W/16/ 3166590 which was also due to be heard at the Hearing was withdrawn by the appellant by a letter dated 9 May 2017.

### **Main Issues**

6. The main issues in this case are:

- whether conditions attached to outline planning permission P/14/0428/2 require the agreement of an appropriate mix of housing at the reserved matters stage; and, if so,
- whether the proposed development provides an appropriate mix of housing, having regard to the requirements of the National Planning Policy Framework (the Framework) and the development plan;
- whether the distribution of affordable housing would result in an inclusive and mixed community; and,
- the effect of the proposal on the character and appearance of the area.

### **Reasons**

*Whether conditions attached to outline planning permission P/14/0428/2 require the agreement of an appropriate mix of housing at the reserved matters stage*

7. My attention was drawn to appeal decision APP/T2405/A/14/2227076 (Whetstone) and various case law<sup>1</sup> submitted in relation to that appeal to demonstrate the existence of a series of established legal principles, namely: that in seeking to control or restrict the use of that for which they are granting planning permission, Local Planning Authorities must do so by condition rather than seeking to rely upon the description of development; that a planning permission should be construed within the four corners of the consent itself, including the conditions in it and the reasons for those conditions; that a condition must be explicit in what it seeks to achieve; that there is no room for an implied condition, which seeks to widen the scope of what any reserved matters are; and that if there is any ambiguity in a condition then it should be resolved in a common sense way. Neither party disputed these principles.

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<sup>1</sup> *R (on the application of Murray) v Hampshire CC (No.1)* [2002] EWHC 1401 (Admin), *Slough Borough Council v Secretary of State for the Environment and Oury* [1995] Town and Country Planning.

*Cotswold Grange Country Park LLP v SoSCLG and Tewkesbury BC* [2014] EWHC 1128 (Admin).

**Journal of Planning Law 2014 Case Comment** *R (on the application of Lloyds Pharmacy Ltd) v Leeds CC and Manor Park Surgery* [2013] EWHC 4031 (Admin).

8. In respect of the agreement of housing mix, the Council relies on Condition 2 of the outline planning permission P/14/0428/2, particularly the submission of details of scale and appearance. Both terms are defined within Part 1 of the Town and Country Planning (Development Management Procedure) (England) Order 2015. Scale is defined as '*the height, width and length of each building proposed within the development in relation to its surroundings*'. Appearance is defined as '*aspects of a building or place within the development which determines the visual impression the building or place makes, including the external built form of the development, its architecture, materials, decoration, lighting, colour and texture.*'
9. Neither definition makes reference to the mix of uses. Instead, their focus is on what the development would look like and its relationship to its surroundings. I note that the judgement in *Crystal Properties*<sup>2</sup> stated that whilst floorspace and scale were not synonymous, there would necessarily be some relationship between them. It also went on to state that 'there is nothing incompatible between floorspace of a proposed development being identified in an outline application and its scale, including the dimensions of the proposed building –its height, width and length... in relations to its surroundings – being left for future determination as a reserved matter'. I am in no doubt, therefore, that there is some relationship between scale and floorspace whether determined at outline stage or as part of the reserved matters. That is not the same, however as suggesting that those terms are synonymous with housing mix.
10. The Council put the case that what was being applied for at reserved matters stage included the internal appearance of the dwellings as much as the external appearance. I am mindful, in this regard, that plans submitted with the application necessarily included the details of the internal layout of the houses in accordance with case law<sup>3</sup> which states that when an application for planning consent is made for permission for a single operation it is made in respect of the whole of the building operation.
11. In this instance, however, there is an extant permission for up to 160 houses on the site. I appreciate that an observer may be able to hazard a guess as to the number of bedrooms from the appearance and scale of a dwelling, due to its floorspace, size, number of windows, relationship to other buildings etc. It may also be possible to see the internal layout of the dwelling through windows, which may further inform an assessment. However, that does not equate to requirement for any agreement of housing mix. Based on the caselaw that has been brought to my attention, I consider that for the Council to be able to control housing mix it would need to have done so via a specific condition on the outline planning permission. Moreover, there is no condition specifically in respect of the internal layout and I am not persuaded that it could reasonably be included as part and parcel of the details to be submitted pursuant to the appearance and scale reserved matters given the definitions of those terms as set out in the Order.

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<sup>2</sup> Journal of Planning & Environment Law 2017 Case Comment *Crystal Properties (London) Ltd v Secretary of State for Communities and Local Government and Hackney LBC*

<sup>3</sup> *Sage v Secretary of State for the Environment, Transport and Regions and another* [2003] UKHL 22 The Weekly Law Reports

12. The Council also refer to *Saunders*<sup>4</sup> and *Chieveley*<sup>5</sup> in support of its case. In *Chieveley* a floorspace figure given in an outline planning application form was held to be part of the outline permission (albeit not in a condition) and therefore restricted the floorspace at reserved matters to 'development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance'.
13. In *Saunders* the number of dwellings had not been established at outline stage. The judgement found that it was reasonable to take into account a significant material consideration of the proximity of a hazardous installation when considering the layout of the proposal at reserved matters stage, which would necessarily limit the number of houses that could be built on the site.
14. *Crystal Properties* considered both *Chieveley* and *Saunders* and reiterated that a floorspace contained within an application form of an outline planning permission was an integral part of that permission even though all matters were reserved for future consideration.
15. The mix of dwellings on the appeal site was not established at the outline application stage. In this respect, the planning statement submitted with the outline application specifically stated that the housing mix would be considered at reserved matters stage. However, both parties agree that this document does not form part of the submitted documents referred to on the outline consent. Furthermore, there is no condition linking the permission to the planning statement. In this respect therefore there is nothing on the outline consent regarding housing mix that is fixed. Accordingly, the reserved matters details to be submitted are not bound by any particular mix, as was the case in *Chieveley*. The Council therefore considers that *Saunders* is relevant.
16. However, in the scheme before me the number of houses has been agreed. In this respect, it is different from *Saunders*. In *Saunders* the number of dwellings could reasonably be considered under the reserved matters of layout, and to an extent landscaping, taking account of material considerations relevant in that case. I have already found that the housing mix could not be considered under the reserved matters of scale or appearance and thus, in this respect, the consideration is also different from that in *Saunders*.
17. As well as the Whetstone appeal my attention was also drawn to two other appeal decisions - APP/Q3305/W/15/3137574 (Frome) and APP/R6830/A/16/3148873 (St.Asaph) all of which concluded that housing mix was outside of the scope of conditions attached to the relevant outline consent. I have seen nothing in the current submissions which would lead me to a different conclusion. I acknowledge that these decisions were taken without reference to the case law before me now. However, I have already found that such case law involves cases that are not directly comparable with the current appeal proposal.

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<sup>4</sup> *R (on the application of Saunders) v Tendring District Council and Barrett Homes Limited* [2003] EWHC 2977 (Admin).

<sup>5</sup> *R v Newbury District Council and Newbury and District Agricultural Society ex Parte Chieveley Parish Council* [1999] P.L.C.R. Part 1

18. I have also been referred to Appeal decision APP/T3725/A/14/2221613 which allows an outline planning application and applies a condition requiring details of the mix of type and size of market dwellings to be submitted prior to the commencement of development. In accordance with paragraph 206 of the Framework, conditions should only be imposed where they are, amongst other things, necessary. If the Secretary of State had considered that the mix could be appropriately considered under the reserved matters which, in that instance, included appearance and scale, then it would not have been necessary for him to apply the housing mix condition. I am aware that I may have been party to information not in front of the Secretary of State at the time of his decision. However, his decision reinforces my view that housing mix cannot reasonably be considered under the condition requiring, amongst other things, the submission of details of scale and appearance at reserved matters stage.
19. For the reasons above, I conclude that the conditions attached to outline planning permission P/14/0428/2 do not require the agreement of an appropriate mix of housing at the reserved matters stage. Consequently, there is no need for me to consider whether the appeal proposal provides an appropriate mix of housing, having regard to the requirements of the Framework and the development plan.

*Whether the distribution of affordable housing would result in an inclusive and mixed community*

20. Policy CS3 of the Charnwood Local Plan 2011-2028 Core Strategy 2015 (CS) seeks to secure the delivery of affordable homes on site, which should be integrated with market housing unless there are exceptional circumstances which contribute to the creation of mixed communities. This is broadly in accordance with paragraph 50 of the Framework which seeks to create sustainable, inclusive and mixed communities. The SPD provides advice on how this could be achieved in respect of affordable homes.
21. There would be a mix of 48 affordable houses (AHs) on site in accordance with the requirements of the S106 agreement that was signed and sealed at the time of the granting of the outline planning permission. These would be delivered in two clusters of 15 dwellings and one cluster of 18 dwellings within the site. In this respect there would be conflict with the guidance within the SPD. While it seeks to distribute AHs in a number of different clusters across the site, the clusters should generally consist of groups of up to 10 dwellings. Factors which might lead to a larger number of houses in a cluster include the size of the site and site constraints.
22. I was informed by the appellant that, due to management requirements, the large clusters were required. A copy of a letter from the appellant's affordable housing (AHing) provider on the scheme was submitted, which stated that the clustering arrangements would be acceptable to themselves and would be preferred for the ongoing management of the dwellings.
23. The appellants recently received planning permission for a revised layout on the appeal site which would incorporate six clusters of AHs across the site (P/17/0314/2). The appellant was not able to advise whether or not the AHing provider had any objection to such provision, but, in accordance with the provider's letter, the houses would still be in clusters which they expressed a preference for. I am therefore not persuaded that unspecified management

- and maintenance issues provides sufficient justification for the larger clusters as proposed.
24. I acknowledge that the majority of the AHs would be seen within the context of market housing. However, the mix of AHs as agreed within the section 106 agreement has a predominance of smaller units delivered via small terraced and semi-detached properties. Only nine of the AHs would be three bedroom or above, also delivered as semi-detached and terraced dwellings. In stark contrast, the market housing mix would be dominated by four bedroom houses (60.7%) and 3 bedroom houses (34.8%) the majority of which would be delivered as detached houses.
25. As a result, although I acknowledge that clusters of AHs are acceptable in the terms of the SPD, the incorporation of such large clusters of smaller houses, mostly centred around separate private drives/cul-de-sac heads, with their own separate and distinct shared areas, would not only be contrary to the advice but would also be particularly noticeable in comparison to the larger mainly detached market houses. Consequently, there would be a striking visual distinction between market and social housing, which would pose a risk of community segregation and is contrary to national and local policy, as well as to recommendation 4 of Building for Life 12 which recommends designing homes and streets to be tenure blind.
26. The appellant advised that the location of the AHing was also driven by the requirement to deliver a lower density development on the northern edge of the site, which is adjacent to the open countryside. Furthermore, detached dwellings set back from the road were required along the spine road to enable tree planting. In addition bungalows were required to the boundary of properties on Fairhaven Road. As a result, it was argued that opportunities for the location of the AHing were fairly restricted within the site.
27. Whilst I acknowledge these design constraints, they do not, in my view, provide sufficiently robust reason to necessarily result in the clusters as proposed. For example, I see no reason why AHs could not be located north of the spine road. According to the site layout plan, there is only limited planting proposed on the spine road, and I note that some of the market housing in this location is sited close to the road thereby allowing no room for planting. Furthermore, the scheme approved under (P/17/0314/2) proposes AH on both sides of the spine road.
28. The appellants' stated at the hearing that they considered that the revised layout which has planning permission would be less inclusive than the appeal proposal, particularly given the high number of AHs on the spine road. To my mind however the change to the mix of the market housing within the already approved scheme more closely reflects the requirements of the Council's Strategic Housing Market Assessment 2014 which, together with the removal, in the main, of the communal and shared parking areas for the AHing, means that the visual distinction is less apparent creating a more inclusive community.
29. My attention was also drawn to two other schemes that had received planning permission and included AHs that were, in the opinion of the appellants similar to that proposed here (P/16/2090/2, referred to as Queniborough and P16/0963/2 referred to as Jelsons).

30. At the Hearing the Council was unable to advise me of the considerations that had taken place at the time on each application which led to the approved layout. Having seen the Council's application report I note that, on the Jelsons application, the Borough Council Housing Strategy Manager supported both the layout and distribution of the affordable housing on the scheme. Furthermore, the mix of market housing on the Jelsons site is not dominated by four bedroom properties as is the case with the scheme before me now.
31. I acknowledge that on the face of it the contrast between the mix of market and AHing on the Queniborough scheme is quite marked. Nevertheless, I am not aware of whether there were any specific management or site constraints on this scheme and therefore I cannot be sure that the particular circumstances represent a direct parallel to the appeal scheme. Furthermore, reference is made in the Queniborough application report that there had been some amendment to the AHing to achieve more widespread dispersal. Moreover, both decisions were taken prior to the adoption of the SPD. In any case, as is required I have determined the appeal based on its own merits.
32. For the reasons above, I conclude that the distribution of affordable housing within the proposal would not result in an inclusive and mixed community. It would therefore be contrary to the requirements of Policy CS3 of the CS, paragraph 50 of the Framework and advice in the SPD.

*Character and appearance*

33. Although not part of its reasons for refusal, the Council considered at the Hearing that the mix of type of houses was not appropriate particularly with regard to the character of the area, at the southern edge of the development.
34. Fairhaven Road to the south of the site comprises a mix of houses and bungalows. On the north side of Fairhaven Road are predominantly bungalows, single storey in nature, with two houses interspersed along the row. To the rear of the dwellings on Fairhaven Road is a large mature hedge supplemented in places by trees forming the boundary to the appeal site. The buildings are set back from the road and mature planting to the front gardens gives a verdant open character to the street.
35. The proposal involves the provision of two, two-storey buildings to the rear of 31 Fairhaven Road which is a house, and then single and one and a half storey dwellings along the boundary until the south west corner of the development, where two further two-storey buildings are proposed. It is true that this part of the proposed development would be of a higher density than that existing on Fairhaven Road. Furthermore, the majority of the dwellings designated as bungalows would be of one and a half storeys and therefore be higher than the existing bungalows on Fairhaven Road. However, the height differential would not be significant, particularly when considered in the context of the large amount of two storey development on the wider site. Furthermore, although the bungalows on Fairhaven Road have generous gaps between them, the combination of garages, planting and the high hedge to the rear means that views into the appeal site are limited. Moreover, the proposed dwellings would be sited a significant distance from those existing properties. As a result, I am not persuaded that the provision of one and a half storey dwellings here would be materially harmful to the verdant open character.

36. I acknowledge that the view of Fairhaven Road both from within the appeal site and Cropston Road when approaching from the north is mainly restricted to glimpses of roofs through the hedge and trees. Nevertheless, views of the proposed buildings along this edge, and their relationship with those existing, once the entire development was developed would be very limited.
37. I heard from a number of residents and the Ward Councillor, that when the outline application was considered at Committee they were advised that there would be bungalows along this boundary. The Design and Access Statement submitted with the outline application states that single storey units or bungalows may be appropriate in some locations. The Council's committee report also states that any development close to the rear of properties on Fairhaven Road should comprise single storey bungalows unless the separation distances are sufficient to maintain the amenity and privacy of these existing single storey properties. However, this consideration is in respect of residents living conditions rather than character of the area. I will return to the former later in my decision. While I therefore note resident's expectations, my attention has not been drawn to anything that effectively restricts the height of the development in this area of the site in terms of character and appearance.
38. One of the materials proposed for the site is black and grey weather boarding. The material is mainly proposed on the properties on the northern edge of the development which would be highly visible from the surrounding area. There are limited uses elsewhere in the site, mainly along the spine road into the site. Both parties agreed that timber boarding is not prevalent in the local area where there is red brick, render and some mock Tudor boarding. In this respect it would not be particularly representative of local materials.
39. Nevertheless, its use on the northern edge of the development, in place of render, would help to soften the edge of the proposed estate on its perimeter with the adjacent open countryside. It would not be used on every property, but sporadically along the row. In this context, I consider that its use would be appropriate to the locality and would not be materially harmful to the character and appearance of the surrounding area which does not have a dominant uniform palette of materials.
40. For the reasons above I conclude that the proposal would not be harmful to the character and appearance of the area. There would be no conflict therefore with Policy EV1 of the Borough of Charnwood Local Plan 1991-2006 adopted 2004 (LP) and Policy CS2 of the CS. These require, amongst other things, that development is of high design quality which respects and enhances the local environment and the character of the area and utilises materials appropriate to the locality.

### **Other Matters**

41. The appeal scheme proposes bungalows to the rear of the majority of the dwellings on Fairhaven Road. In the case of Nos 33, 35 and 37, there would be a single storey bungalow to the rear. In the case of No 39, there would also be a garage close to the boundary. The remaining dwellings on Fairhaven Road would have a one and a half storey bungalow to the rear, with the exception of Nos 31 and 47, which would have a two storey building.
42. The intervening distance between the rear elevation of the existing dwellings and those proposed would be well in excess of that required between two



storey dwellings within the Leading by Design Supplementary Planning Document 2005 (LBDSPD). While the mix here would be between single and one and a half storey development, I consider such a distance would be equally as relevant. Furthermore, the substantial hedge between the properties would be retained. Moreover, dormer windows on the one and a half storey properties would be to their front elevation. This combination of factors would ensure that there would be limited opportunity for overlooking and the proposed houses would not be seen by existing residents as overbearing. This would be the case even taking into account the difference in land levels which would not be significant.

43. There would be the side gable of a one and a half storey bungalow, sited close to the boundary of No 39. In addition there would be an end gable of a two storey building close to the boundary with No 47, which is a bungalow property. Nevertheless, the separation distances would meet the guidance within the LBDSPD, which takes account of differences in land levels, to ensure that the proposed dwellings would not be unacceptably overbearing or create a level of enclosure that would be materially harmful. It was agreed at the Hearing that a condition would be required to ensure that the window in the end gable of the building adjacent to the boundary with No 47 would be obscure glazed to prevent overlooking.
44. No 31 Fairhaven Road is a two storey house presenting a side gable to the appeal site. The proposed two-storey buildings to the rear would be sited in accordance with the required separation distances in the LBDSPD.
45. Fairhaven Farm is a two storey house set in a large plot, mainly laid to garden at the rear. There is a substantial outbuilding located along its western boundary reached via an access road along the northern boundary. There is mostly open boundary treatment to the appeal site.
46. The proposed scheme would result in Fairhaven Farm being surrounded by 22 dwellings. In some cases, the gardens of the dwellings would be adjacent to the boundary whilst in others, there would be a road or car park area. This would be a considerable difference to the outlook and living conditions currently experienced by the occupiers. However, change does not equate necessarily to harm.
47. The separation distances of all the proposed properties meet the guidance contained in the LBDSPD. As a result, levels of privacy would be acceptable and the proposed houses would not be unacceptably overbearing or be inappropriately enclosing.
48. Back to back garden relationships, and associated noise and disturbance, are to be expected within a housing layout. In this instance, there would be a high number of houses proposed on the perimeter of the boundary, together with a road and three parking areas close to the boundary.
49. However, the outbuilding and access road within the garden of Fairhaven Farm would provide some buffer to a number of the proposed gardens and the parking area to the north of the existing dwelling. Furthermore, the proposed road and parking areas to the south would be sited away from the boundary and some space has been left for planting. Moreover, their use would be limited by the low number of cars that would use them. Nevertheless, pursuant to one of the conditions on the outline permission, it would be for the

- Council to secure appropriate boundary treatment and landscaping to further mitigate the impact of the development on the occupiers of Fairhaven Farm.
50. It was also drawn to my attention that the majority of the housing surrounding Fairhaven Farm would be affordable in nature. However, I was supplied with no evidence to suggest that such a difference in housing tenure would cause material harm to living conditions.
51. On balance therefore while the living conditions experienced by the residents of Fairhaven Farm would be altered, I am not persuaded that there would be any material harm in this regard.
52. A limited number of two and a half storey houses are proposed within the submitted layout. At the site visit I was shown the view up to Bradgate Park, from where the proposed estate would be visible. However, given the distance involved, I am satisfied that the incorporation of the small number of two and a half storey dwellings would be insignificant within the wider layout and would not be materially harmful to long distance views.
53. Some residents spoke about the lack of health facilities and alternatives to accessing the site other than by means of the car. However, these are matters that were considered at the time of the outline planning application. It is not within my remit to revisit them within my assessment of the appeal before me, the principle of development on this site having been established already.

### **Conclusion**

54. I have found that the conditions on outline planning permission P/14/0428/2 do not provide a means to enable the Council to control the mix of market housing at reserved matters stage. However, I have found that there would be material harm in terms of the distribution of the affordable housing within the site, and lack of integration with the market housing. Although I have found no harm, subject to conditions, to the character and appearance of the area and residents' living conditions, that does not weigh in favour of the proposal. On balance therefore, having regard to all other matters raised, I conclude that the appeal should be dismissed.

*Zoe Raygen*

INSPECTOR

## **APPEARANCES**

### FOR THE APPELLANT:

Richard Kimblin of Queen's Counsel Instructed by

Mark Rose Director, Define

Max Whitehead Appellant

### FOR THE LOCAL PLANNING AUTHORITY:

Richard Harwood of Queen's Counsel Instructed by

Karen Brightwood Planning Officer, Charnwood Borough Council

### INTERESTED PARTIES

W. Parker Resident

Councillor Deborah Taylor Ward Councillor

Colin Curson Resident

Derek Smith Resident

Janice Smith Resident

Brian M Holland Resident

Martin Broomhead Anstey Parish Council

### DOCUMENTS SUBMITTED AT THE HEARING

- 1 – Letter confirming notification of withdrawal of one appeal and continuation of the other dated 15 May 2017, submitted by the Council.
- 2 – Secretary of State appeal decision APP/T3725/A/14/2221613, submitted by the appellant
- 3 – Pre-Action Protocol Letter dated 25 May 2017 regarding: Proposed Claim for Judicial Review regarding Decision to adopt the Housing Supplementary Planning Document 2017, submitted by the appellant
- 4 – Letter from Midland Heart dated 24 May 2017, submitted by the appellant
- 5 – Adoption statement: Charnwood Housing Supplementary Planning Document, submitted by the Council
- 6 – Agreed Statement of Common Ground.
- 7 - *Sage v Secretary of State for the Environment, Transport and Regions and another* [2003] UKHL 22 The Weekly Law Reports, submitted by the Council.
- 8 – Costs decision APP/Q3305/W/15/3137574 submitted by the appellant.
- 9 – Extracts from the Planning Policy Guidance Paragraph 028 Ref ID 16-028-20140306 & Paragraph 049 Reference ID: 16-049-20140306 submitted by the appellant.