

IN THE MATTER OF

THE PROPOSED EXTENSION TO THE STAINES CONSERVATION AREA

AND

JUDICIAL REVIEW CLAIM CO/2909/2022

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OPINION

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**INTRODUCTION**

1. Following a substantive judicial review hearing on 21<sup>st</sup> February 2023 the decision by Spelthorne Borough Council (“the Council”) to extend the Staines Conservation Area (“SCA”) so as to include the former Debenhams Building and the Memorial Garden; and the Council’s decision set out in its Supplementary Report dated 31<sup>st</sup> August 2022 were both quashed. Our client is Future High Street Living Ltd (“FHSL”).
2. The Council intends to reconsider its decision to extend the SCA at a meeting of the Environment and Sustainability Committee (“ESC”), which is scheduled for 19<sup>th</sup> April 2023. I have been provided with the Agenda for the ESC meeting, an Officer’s Report (“OR”) dated 19<sup>th</sup> April 2023 together with a number of appendices, most of which accompanied the Council’s original decision in May 2022 to extend the SCA. Additionally, I have read my instructing solicitors’ letter to the Council dated 7<sup>th</sup> April 2023 in which the request to provide various background documents is reiterated.
3. I am asked whether the Council’s proposed confirmation of the extended SCA, if approved by the ESC on 19<sup>th</sup> April, will be lawful. For the reasons that follow I do not consider that the Council can lawfully make this decision without addressing a number of defects in the decision taking process. I do not believe that these errors can be rectified before 19<sup>th</sup> April.

4. **First**, although the legal effect of the order is that the decisions made following the Officer's Report in May 2022 and the attempt to retrospectively justify that decision in August 2022 are quashed, the context for the Court's decision is important. At various points in the Judgment, Lane J expressed concerns about the ability of the Council to address the question of the SCA with an open mind: see *e.g.* §69, 80, 82 and 84. As such, the Council's reconsideration of its decision to extend the SCA should be beyond reproach. It is not, for the reasons that follow.

5. **Second**, the Council has shown itself to be less than forthcoming in the documentation that it has disclosed to our client (and to Members). Indeed, this was laid bare during the judicial review hearing and drew a comment from the Judge as follows at §82:

*“It is a matter of some regret that the information adduced at the hearing was not provided earlier. It remains puzzling what further input Dr Fry may have had in connection with the SR. As matters stand, the conclusion can only be that Dr Fry's input was perfunctory and that, from what this court has been shown, it was very much in the nature of a “defensive” approach.”*

6. Here the Judge was referring to the fact that the Council was unable to provide evidence of any comments that Dr Fry (the Council's external heritage consultant) had made in relation to the Supplementary Report (“SR”) in August 2022. Not only has the Council failed to provide any such exchanges since the Judgment was handed down, there is not a shred of evidence in the April 2023 OR that Dr Fry has since been asked for her opinion on the representations made on behalf of FHSL by Ms Stoten. Given that Dr Fry prepared the original Conservation Area Appraisal, this is a singular failing by the Council quite apart from the fact that there is a continuing failure to disclose documents that one could reasonably expect to exist.

7. This continuing failure is amply demonstrated by the fact that FHSL has been forced through their solicitors to repeat requests for disclosure of documents that are bound to exist. *E.g.* it is simply not tenable to argue that there were no written instructions provided to Dr Fry or that there was no written record (whether in the form of emails or memoranda) in the period before Dr Fry was engaged. As a matter of procedural fairness all of the documents identified in the Eversheds Sutherland letter of 7<sup>th</sup> April 2023 should be provided to both our client and to Members of the ESC before any decision is made. It would be quite impossible to reach a procedurally defensible decision unless (i) these

documents are provided; and (ii) both FHSL and Members are given a reasonable opportunity to consider them.

8. In this regard I remind myself that we await the decision of the Information Commissioner's Office in respect of FHSL's complaint regarding the Council's failure to provide the necessary information to allow a properly informed decision to be made.
9. In light of the above I cannot see how it would be legally possible to make a decision in relation to the proposed expansion of the SCA without (i) providing the documents listed in the Eversheds Sutherland letter of 7<sup>th</sup> April 2023; and (ii) providing our client with the opportunity to make representations on them; and (iii) allowing Members to consider the disclosed documents and FHSL's response.
10. As such, the meeting of the ESC scheduled for 19<sup>th</sup> April 2023 cannot take place.
11. **Third**, the Judge roundly rejected the Council's argument that the tests for including buildings within the Statutory List under the Listed Buildings Act 1990 and for designating a conservation area are "distinct and different". At §71 of the Judgment Lane J held as follows:  
  
*"There is a fundamental problem with this. Section 69 (1)(a) states in terms that what is "desirable to preserve or enhance" by designation as a conservation area are "areas of special architectural or historic interest". It is quite evident from the Appraisal, quoted at length in paragraph 3.3 of the May OR, that great emphasis was placed, with regard to the proposed extension in respect of the Building, upon the architectural interest of the Building (see above). This was emphasised by the fact that the buildings to the north-east were proposed to be included in the extension because they "contribute to the setting of Debenhams". The belated suggestion that these shop buildings may themselves be of architectural relevance is itself problematic. It is a good exemplar of why ex post facto reasoning tends to be viewed with caution, if not suspicion."*
12. At §73 the Judge held that it was "highly relevant that Historic England had declined to list the Building, for the reasons it gave."
13. Unfortunately the OR dated 19<sup>th</sup> April 2023 fails adequately to grapple with the Judge's criticisms or HE's finding that the Building did not possess "special architectural or historic interest". §3.18 of the OR stresses the fact that HE's assessment was given before

the draft Appraisal and “for a different purpose”. By advising Members that HE’s assessment was provided for a ‘different purpose’ the OR implicitly seeks to side-line or reduce the weight to be attached to HE’s expert judgement. This is exactly the mistake which led the Judge to quash the original decision.

14. The April 2023 OR also falls into a number of additional errors:
  - a. §3.18 of the OR is wholly misleading. The OR reports HE’s comments on the preservation of retail heritage as being “*consistent with the view that a building which forms an important part of the retail heritage of Staines Town Centre belongs within the Staines Conservation Area*”. HE’s comments on retail heritage (reproduced under §3.15 OR) make a general point about department stores being “an important part of the country’s retail heritage”, not that the Debenham’s building in Staines is particularly important. Crucially, HE went on to say that “*only those with the greatest claims to interest will merit addition to the statutory list*”. The Building had no such claim. The OR ascribes to HE a view which it did not express;
  - b. At §3.21 the Officer accepts that the Building was not included on the Statutory List but draws attention to its inclusion on the Local List from 30<sup>th</sup> March 2022. The clear implication is that inclusion on the Local List somehow provides justification for extension of the SCA. This advice to Members is misleading since it fails entirely to distinguish between including a building on the Statutory List, which requires historic or architectural interest at national level and a Local List, which has no statutory status.
15. Consequently, if Officers persist in advising Members in a way that is materially misleading there will be strong grounds for a second judicial review claim: see *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314 at §42.
16. It would appear that Officers of the Council are committed to the extension of the SCA. However, in the absence of crucial background documents and in light of additional legal errors in the April 2023 OR the Council is on track to make another legally erroneous decision. In fact, if the Council does not postpone the meeting on 19<sup>th</sup> April 2023 there are strong grounds for a further judicial review claim. Additionally, FHSL will have equally strong grounds for seeking an Order restraining the Council from making any decision

unless and until the deficiencies identified in this Opinion have been addressed satisfactorily.

17. I advise accordingly.

12<sup>th</sup> April 2023

***JONATHAN EASTON KC***  
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