



Neutral Citation Number: [2009] EWHC 719 (Admin)

Case No: CO/10442/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2009

Before :

RABINDER SINGH QC
Sitting as a Deputy High Court Judge

Between :

The Queen	
On the application of	
Stamford Chamber of Trade and Commerce	<u>1st Claimant</u>
- and -	
F H Gilman & Co	<u>2nd Claimant</u>
- and -	
The Secretary of State for Communities and Local Government	<u>1st Defendant</u>
-and -	
South Kesteven District Council	<u>2nd Defendant</u>

Mr Michael Bedford (instructed by **Matthew Arnold Baldwin**) for the **Claimants**
Mr John Litton (instructed by **Treasury Solicitor**) for the **1st Defendant**
Ms Nicola Greaney (instructed by **Solicitor, South Kesteven District Council**) for the **2nd Defendant**

Hearing dates: 26 and 27 February 2009

Approved Judgment

Mr Rabinder Singh QC :

INTRODUCTION

1. This claim for judicial review is brought with the permission of Collins J granted on 4 April 2008. In granting permission Collins J said that the delay in bringing the proceedings was “excusable”. The issue of delay was not pursued by the Defendants before me.
2. The First Claimant, Stamford Chamber of Trade and Commerce (“SCOT”) is an unincorporated association which is active within the town of Stamford and has as its objectives the promotion of the status of the town of Stamford as a centre of business and tourism and the making of representations to relevant bodies. SCOT has a membership of approximately 100 local businesses and acts through its Executive Committee. SCOT participates in planning and highway matters affecting its objectives.
3. The Second Claimant, F H Gilman & Co (“FHG”) is a company operating in the Stamford area and occupies premises on the eastern side of the town at Uffington Road. FHG has long been concerned about the traffic problems of Stamford and the difficulties this presents for both businesses and other groups. It too participates in planning and highway matters which affect its interests and objectives.
4. The First Defendant, the Secretary of State, has various statutory responsibilities under the planning system, including specific powers in relation to the statutory Development Plan.
5. The Second Defendant, South Kesteven District Council (“SKDC”) is the local planning authority for the Stamford area and is responsible for producing the South Kesteven Local Plan (“the Local Plan”) and for its replacement by Local Development Documents (“LDDs”).

FACTUAL BACKGROUND

The Area

6. Stamford is the second largest town in SKDC’s administrative area, with a population of approximately 19,500. It has an historic core, which in 1967 was the first Conservation Area in England. It contains about 500 listed buildings. The town straddles the River Welland, with only one crossing point within the town, in the heart of the historic core. This single crossing point accommodates all north/south movement through the town centre and also provides the main east/west route for traffic using the A16/A43 roads.
7. On the eastern side of the town there exists the route of the former Stamford to Essendine railway line (now disused) which runs north/south. This has the potential to function as the route for part of a relief road which could be connected to the A16 to the south and to the A6121 to the north. Such a road could also be of benefit to the development of land in the vicinity of the

disused railway line (including presently undeveloped land to the east of the town) without impacting on the historic core of the town.

The Local Plan

8. SKDC produced the deposit version of the Local Plan in 1992. At that time the Department of Transport was proposing a Stamford Relief Road to the south of the town to connect the A43 at Kettering Road (south west of the town) with the A16 at Uffington Road (south east of the town). At that time both the A43 and the A16 were part of the national trunk road network.
9. In addition Lincolnshire County Council ("LCC"), as the highway authority for all local roads in SKDC's area, was proposing an A16/A6121 Stamford Ryhall Road Link ("Ryhall Road Link"). This would connect the A6121 from the north of Stamford to the A16 at Uffington Road to the south east of the town, utilising the route of the disused railway line and bypassing the whole of the urbanised portion of Ryhall Road.
10. As a consequence the deposit version of the Local Plan provided that the proposed routes of both the Stamford Relief Road and the Ryhall Road Link be safeguarded by, first, showing a protection corridor on the Local Plan Proposals Map and, secondly, by the inclusion of the schemes within a safeguarding policy, Policy T1.
11. In 1994, prior to the adoption of the Local Plan, the Department of Transport announced that, following a review, the Stamford Relief Road had been withdrawn from the national trunk road programme and that safeguarding of this route was no longer required. Consequently, when the Local Plan was adopted in April 1995, there was no reference to the Stamford Relief Road. However, the Ryhall Road Link continued to be protected by Policy T1 in the adopted Local Plan. It stated:

"The District Council will refuse planning permission for development which would prejudice the construction of the following new roads as shown on the Proposals Map:

2. The A16/A6121 Stamford Ryhall Road Link."

12. The reasoned justification for Policy T1 stated at paragraph 9.8:

"This County Council proposal is intended to provide a new avoiding through route to Ryhall Road along the line of the old railway and which may also serve existing and proposed industrial and business development in the locality."

The Structure Plan

13. In 2002 the A43/A16 route in the vicinity of Stamford was detrunked and within SKDC's administrative area became a local road and so the responsibility of LCC.

14. LCC as county planning authority produced the deposit version of the Lincolnshire Structure Plan (“the Structure Plan”) in 2004. Draft Policy M1 identified that all ‘A’ class roads within the County were part of the Strategic Road Network (“SRN”) and identified major schemes for the plan period. No major schemes were proposed in the vicinity of Stamford.
15. SCOT and FHG objected to draft Policy M1 on the ground that it failed to include a Stamford Ring Road as a major scheme. As part of their representations they submitted a detailed transport study prepared by highways consultants showing a route for a Stamford relief road, the route of part of which ran within the Ryhall Road Link protection corridor.
16. As a consequence of the Report of the Examination in Public Panel in September 2005, LCC modified the text supporting Policy M1 and this modification was carried forward into the Structure Plan when it was adopted in September 2006. Paragraph 7.14 stated:

“... the County Council will keep under review the social economic and access needs of communities across Lincolnshire. Hence, where justification can be made through further studies, particularly in respect of the aims set out in Policy 2, then the addition of new relief and access measures to the programme is not precluded e.g. at ... Stamford to protect the historic core ... Likewise, schemes may be deleted or amended if circumstances change.”

The Local Transport Plan

17. In March 2006 LCC as highway authority published its second Local Transport Plan (“LTP2”). This included LCC’s proposals for major transport schemes for which funding would be sought. It also identified the programme of feasibility studies that LCC intended to undertake in the LTP2 period (2006/07 to 2010/11) into future major schemes that in due course would be put forward for funding.
18. Paragraph 17.30 of LTP2 stated:

“As in most authorities, there is no shortage of potential major schemes in Lincolnshire with considerable lobbying from District, Town and Parish Councils, local action groups and organisations such as Chambers of Trade and Commerce. Obviously, it would not be feasible or affordable to commit large amounts of funding to the detailed investigation of all of these in the full knowledge that funding constraints mean that very few will come to fruition in the medium to long term. Conversely, it is important that the Council does have some schemes sufficiently well advanced to take advantage of any future funding that may become available for major schemes in the next 15 years or so.”

19. Within this context only seven schemes within Lincolnshire were identified in LTP2 for feasibility work to be undertaken in the LTP2 period. One of those schemes was “*Stamford Bypass/Relief Road*”.
20. Under section 109(3)(b) of the Transport Act 2000 LCC was required to send LTP2 to the Secretary of State for Transport and to any other persons specified in guidance issued under section 112(1) Transport Act 2000 as soon as practicable after its preparation.
21. The evidence confirms that the LTP2 was before the Secretary of State when the decision not to save Policy T1 of the Local Plan was made (witness statement of Graeme Foster, para 11).

The Local Development Framework

22. In April 2005 SKDC published its Local Development Scheme (“LDS”) setting out its programme for the production of Local Development Documents (“LDDs”) which would constitute its Local Development Framework (“LDF”).
23. Paragraph 3.3 stated:

*“As the LDF is not a single document, it can develop and change over time as new documents are added, replaced or reviewed. Individual timetables for the preparation and adoption of each document in the LDF are proposed. These timetables will ensure that a complete policy framework for the district is in place by 2009. However additional documents may be added to the LDF and existing documents may be reviewed after this time. **To maintain planning policy coverage for the District in the meantime policies in the Adopted South Kesteven Local Plan (1995) will be saved and replaced on a rolling programme as LDDs are adopted.** A combination of saved policies and newly adopted LDDs will ensure that a full spatial planning framework for the District is in place by March 2007. This will mean that a number of policies within the South Kesteven Local Plan (Adopted 1995) will be saved for more than the automatic three years allowed by the Act.”*
(Emphasis added)

24. Paragraph 6.1 stated:

*“Until the new LDDs (in particular the Core Strategy and the Site Specific Policies) are adopted, the existing Local Plan will remain of relevance as a planning framework for making planning decisions, including determining planning applications. **The Council is therefore ‘saving’ the existing Local Plan in its entirety for the period while the DPDs are under preparation ...**”* (Emphasis added)

25. Paragraph 6.2 stated:

*"... Appendix A shows which saved policies will be replaced by each DPD. **If preparation of one or more of the DPDs is delayed the Council will need to consider whether it is necessary to formally extend the 'saved' period for policies beyond the initial 3 year period.**"* (Emphasis added)

26. Appendix A of the LDS showed that Policy T1 of the Local Plan would (in relation to Stamford) be replaced by the Core Strategy DPD (proposed for adoption in August 2007) and by the Stamford Town Centre Action Area Plan (proposed for adoption in June 2008). In relation to the Proposals Map of the Local Plan, Appendix A indicated that it was *"To be updated when each new LDD is adopted to ensure it remains in conformity and shows all area based adopted policies"*.

27. The evidence confirms that the LDS was before the Secretary of State when the decision was made not to save Policy T1 of the Local Plan but (submit the Claimants) appears to concede that it was not taken into account (witness statement of Graeme Foster, paras 17 and 20).

28. Notwithstanding the timetable for the adoption of the Core Strategy and the Stamford Town Centre Action Area Plan ("the AAP") in the LDS, only limited progress has been made. The Core Strategy has not been adopted and at present is in its preparatory stages only. SKDC published its preferred options in May 2007 and had not (as at the dates that the decisions under challenge were made) produced a submission Core Strategy for independent examination. The AAP has not yet reached the preferred options stage. Despite the delay in producing these LDDs the LDS had not been revised (as at the dates that the decisions under challenge were made), either to substitute a new timetable or to explain the approach that would be taken to the *"saving"* of policies of the Local Plan after the end of the initial three year period on 27 September 2007.

29. In April 2006 SKDC adopted its Statement of Community Involvement ("SCI"). Paragraph 3.1 stated:

"The Statement of Community Involvement (SCI) forms an integral part of the LDF. The statement sets out how, when and who the Council will seek to involve in both of its planning functions. This document therefore sets out the Council's commitment to involving the community in:

- *The preparation, monitoring and review of documents for inclusion in the LDF."*

30. Section 8 of the SCI was entitled *"What will the community be consulted on?"* and paragraph 8.1 stated:

"South Kesteven Local Development Framework.

The aim is to have a complete new planning policy framework in place by 2007. The timetable for preparation of LDDs covers a three year period and is set down in the Local Development Scheme (LDS)."

31. Section 9 of the SCI was entitled "*Who will be involved?*" and paragraph 9.1 stated that general consultation bodies would include "*Bodies representing the interests of the business community in the area*". Paragraph 9.2 stated that "*The Council is committed to exceeding the minimum requirements and involving other people and groups in its planning process*". Paragraph 9.3 identified "*The key groups*" as including "*Businesses*" and "*Interested parties and local community/voluntary groups*". Paragraph 9.4 referred to "*A long list of specific, general and other consultees*" as set out in Appendix 3 of the SCI. This list included SCOT as a named consultee.
32. The evidence filed on behalf of the Secretary of State does not dispute that the SCI was submitted to the Secretary of State as required but (submit the Claimants) appears to concede that it was not taken into account (witness statement of Graeme Foster, para 20).
33. In December 2006 the Council produced its second Annual Monitoring Report ("the AMR"). Paragraph 1.2 stated that:
 1. *To assess progress made in the preparation of documents that will form the LDF, with particular regard to the milestones set out in the Local Development scheme (April 2005) (LDS), which includes the timetable for preparing the LDF.*
 2. *To monitor the effect and relevance of existing policies contained in the adopted South Kesteven Local Plan (1995)..."*
34. The AMR acknowledged that the timetable for the production of the LDF had slipped and that it would be necessary to revise the LDS (paras 3.20-3.22). Section 6 of the AMR stated:

"Appendices

The following appendices are intended to be included in the first revision of the South Kesteven Local Development Scheme (LDS), to replace the April 2005 Approved LDS. They reflect amendments to the profile and timetable for production of the Local Development Framework, as detailed in section 3 of the AMR.

Appendix A indicates the name of each document, the Local Plan policy it is intended to replace and its chain of conformity. Appendix B provides a time line for the preparation of each LDF document. Note these are

indicative and subject to discussions with Government Office for the East Midlands and the Planning Inspectorate.”

35. Appendix A of the AMR indicated that the Core Strategy DPD and the Stamford Area Action Plan (for the Stamford area) would replace saved Policy T1 of the adopted Local Plan. Appendix B indicated that the Core Strategy would be adopted in “*Summer 2008*” and the AAP would be adopted in “*Summer 2009*”. The Claimants submit that the necessary implication of these revised dates was that SKDC would need to seek the “*saving*” of Policy T1 *if* it were to continue after the end of the initial three year period.
36. The evidence does not dispute that the AMR was submitted to the Secretary of State as required but (submit the Claimants) appears to concede that it was not taken into account (witness statement of Graeme Foster, para 20).

THE SAVING OF LOCAL PLAN POLICIES

37. Section 38 and other relevant provisions of the PCPA 2004 were brought into force on 28 September 2004 by the Planning and Compulsory Purchase Act 2004 (Commencement No.2, Transitional Provisions and Savings) Order 2004 (SI 2004/2202).
38. Schedule 8 to the PCPA 2004 sets out transitional provisions. Paragraph 1 provides:
 - "1(1) During the transitional period a reference in an enactment mentioned in section 38(7) above to the development plan for an area in England is a reference to –*
 - (a) ...*
 - (b) The development plan for the area for the purposes of section 27 or 54 of the principal Act.*
 - (2) The transitional period is the period starting with the commencement of section 38 and ending on whichever is the earlier of –*
 - (a) the end of the period of three years;*
 - (b) the day when in relation to an old policy, a new policy which expressly replaces it is published, adopted or approved.*
 - (3) But the Secretary of State may direct that for the purposes of such policies as are specified in the direction sub-paragraph (2)(a) does not apply.*
 - (4) An old policy is a policy which (immediately before the commencement of section 38) forms part of a development plan for the purposes of section 27 or 54 of the principal Act."*
39. In contrast to LCC’s Structure Plan (which will under the relevant legislation continue for three years after adoption, until September 2009), because the

Local Plan was part of the development plan immediately before 28 September 2004, its policies would remain part of the development plan only for as long as the transitional period defined by paragraph 1 of Schedule 8 continued to apply to them.

40. Since SKDC has not adopted any DPDs to replace any part of the Local Plan, paragraph 1(2)(b) of Schedule 8 has no application.
41. On 11 August 2006 the Secretary of State wrote to SKDC (and to all other local planning authorities in England) enclosing a Protocol for procedures to govern applications to the Secretary of State for a direction to save policies in a development plan beyond 27 September 2007 (the end of the basic three year period from the commencement of section 38 PCPA 2004). The Protocol set out criteria that would be applied by the Secretary of State. Criterion (i) was *“where appropriate, there is a clear central strategy”*. Criterion (vi) was:

“policies are necessary and do not merely repeat national or regional policy.”

42. The Protocol indicated that requests for a direction should be made by submitting a list of saved policies to the relevant Government Office by 1 April 2007. It advised that:

“The list should be in two distinct parts:

- Those saved policies the LPA wishes to extend beyond the 3 years saved period, with reasons and*
- Those saved policies the LPA does not wish to see saved beyond the 3 years saved period, with reasons...*

NB. The Secretary of State may extend a policy which has not been in a list of policies the LPA wishes to save, where she considers that a policy is compliant with the criteria in PPS12 and the extension of the policy is necessary in order to secure the delivery of national planning policy...”

43. It was common ground before me that the Protocol does not impose any requirement of public consultation before a local planning authority decides whether or not to make a request to the Secretary of State to save a policy in a local plan.
44. On 29 March 2007 SKDC wrote to the Government Office for the East Midlands (representing the Secretary of State), enclosing the list of policies in the Local Plan. In relation to the Transport chapter of the Local Plan SKDC included policies T2 and T3 in the list of policies it wished to have extended and Policies T1 and T4 in the list of policies it did not wish to see saved beyond the three year period.
45. For Policy T1 SKDC indicated that the policy satisfied criteria (i) and (vi) in the Protocol but added the comment *“All schemes that are expected to be completed have been, policy can is [sic] therefore no longer needed.”*

46. The list of policies submitted by SKDC to the Government Office was not the subject of any external consultation undertaken prior to its submission. In particular, there was no consultation with LCC, with SCOT or with FHG. LCC has subsequently informed the Claimants (in a letter dated 2 November 2007) that, had it been consulted, it would have requested the saving of Policy T1 at least pending the outcome of its feasibility study.
47. On 21 September 2007 the Secretary of State made a direction under paragraph 1(3) of Schedule 8 to the PCPA 2004 in relation to certain of the policies in the Local Plan. The policies to be saved beyond 27 September 2007 did not include Policy T1.
48. On 24 September 2007 SKDC received the direction. On 27 September 2007 SKDC publicised the direction by referring to it on its website.

MATERIAL LEGISLATION

49. I have already set out the statutory provisions in relation to the saving of development plan policies during the transitional period. It is apparent from those provisions that where a direction is made under paragraph 1(3) of Schedule 8 to the PCPA 2004 then, in relation to the policies specified in that direction, the transitional period will not end until a new policy which expressly replaces the particular old policy has been published, adopted or approved.
50. It is also apparent that these provisions set out no procedural requirements in relation to a saving direction and do not require the Secretary of State to consult with any party prior to a direction being made. This is accepted by the Claimants.
51. Part of the Claimants' argument in this case is based on the suggested relevance of SKDC's LDS, SCI, and AMR which I have already set out, so far as is said to be material by the Claimants. The statutory provisions which relate to these documents therefore need to be mentioned.

Local Development Scheme

52. A local planning authority is under a statutory duty to "*prepare and maintain*" a local development scheme: section 15(1) PCPA 2004.
53. Under section 15(2) PCPA 2004¹ the LDS must specify:
 - "(a) *the documents which are to be local development documents;*
 - ...
 - (c) *which documents are to be development plan documents;*
 - ...

¹ Section 15(2) PCPA 2004 has been amended by section 180 of the Planning Act 2008 but that provision is not yet in force and in any event is not retrospective.

- (f) *the timetable for the preparation and revision of the documents;*
- (g) *such other matters as are prescribed.”*

54. Under section 15(3) PCPA 2004:

- “The local planning authority must –*
- (a) *prepare the scheme in accordance with such other requirements as are prescribed;*
 - (b) *submit the scheme to the Secretary of State at such time as is prescribed or as the Secretary of State (in a particular case) directs;*
 - (c) *...”*

55. Under section 15(7) PCPA 2004 the Secretary of State may make regulations as to:

- “(a) publicity about the scheme;*
- (b) making the scheme available for inspection by the public;*
- (c) ...”*

56. The prescribed requirements for a LDS are set out in the Local Development Regulations 2004.²

57. Regulation 8 of the Local Development Regulations 2004 provides:

“The matters (in addition to those mentioned in section 15(2)) to be specified in a local development scheme or any revision of such a scheme are –

- ...”*
- (c) *in relation to each document to be specified in the scheme or revision as a DPD and the local planning authority’s statement of community involvement, the date on which the local planning authority intends to comply with –*
 - (i) *regulation 26 [i.e. the duty to engage in pre-submission public participation on the content of a DPD];*
 - (ii) *section 20(1) ... [i.e. the duty to submit a DPD to the Secretary of State for independent examination].”*

58. Regulation 12 of the Local Development Regulations 2004 provides:

² The Local Development Regulations 2004 were amended by the Town and Country Planning (Local Development) (England) (Amendment) Regulations 2008 with effect from 27 June 2008 but the amendments post-date the decisions under challenge in this case and are not material. The text set out here is therefore the original text of the Local Development Regulations 2004.

- "(1) Where a local development scheme takes effect in accordance with regulation 11, a local planning authority must –*
- (a) make a copy of the scheme available for inspection at their principal office during normal office hours, and*
 - (b) publish the scheme on their website."*

59. Thus it is apparent that the LDS must specify the timetable for the preparation of all DPDs, including the intended date for submission of the draft DPD to the Secretary of State for independent examination. In addition the LDS must not only be submitted to the Secretary of State, it must also be publicised by being available for public inspection and by being accessible on the local planning authority's website.

Statement of Community Involvement

60. Section 18 PCPA 2004 provides:

- "(1) The local planning authority must prepare a statement of community involvement.*
- (2) The statement of community involvement is a statement of the authority's policy as to the involvement in the exercise of the authority's functions under sections 19[preparation of local development documents], 26 [revision of local development documents] and 28 [joint local development documents] of this Act and Part 3 of the principal Act [consideration and determination of applications for planning permission] of persons who appear to the authority to have an interest in matters relating to development in their area.*
- ...
- (4) Section 20 applies to the statement of community involvement as if it were a development plan document."*³

61. Regulation 50 of the Local Development Regulations 2004 provides:

- "(1) Paragraph (2) applies where a local planning authority adopts, or the Secretary of State approves, an LDD.*
- (2) As soon as reasonably practicable after the document is adopted or approved the authority must –*
- (a) make a copy of the LDD available for inspection at their principal office during normal office hours;*
 - (b) publish the LDD on their website.*

³

This provision, which has the effect of requiring independent examination of a SCI, has been repealed by s.180 Planning Act 1980 but that provision is not yet in force and in any event is not retrospective.

...”

62. For the purposes of Regulation 50, the SCI is treated as a LDD: section 17(1) (b) PCPA 2004.
63. Regulation 36(e) of the Local Development Regulations 2004 requires the SCI to be sent to the Secretary of State as soon as reasonably practicable after its adoption.
64. As is well known, the Development Plan is the key document in the planning system. Section 38(6) PCPA 2004 provides:

“If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

65. LDDs which are DPDs are part of the Development Plan: section 38(3) PCPA 2004. The extant parts of a local plan are also part of the same Development Plan. The Claimants submit that a decision not to request the Secretary of State to save a policy of a local plan therefore has the effect of revising the Development Plan for the local planning authority’s area.

Annual Monitoring Report

66. Section 35 PCPA 2004 provides:

- “(1) Every local planning authority must make an annual report to the Secretary of State.*
- (2) The annual report must contain such information as is prescribed as to –*
- (a) the implementation of the local development scheme;*
 - (b) the extent to which the policies set out in the local development documents are being achieved.*
- (3) The annual report must –*
- (a) be in respect of such period of 12 months as is prescribed;*
 - (b) be made at such time as is prescribed;*
 - (c) be in such form as is prescribed;*
 - (d) contain such other matter as is prescribed.”*

67. Regulation 48 of the Local Development Regulations 2004 provides:

“Annual monitoring report

48(1) The period prescribed for the purposes of section 35(3)(a) is the period of twelve months commencing on 1st April in each year and ending on 31st March in the following year.

- (2) *The time prescribed for the purposes of section 35(3) (b) is nine months after the end of the period in respect of which the report is made.*
- (3) *An annual report must contain the following information –*
- (a) *the title of the documents specified in the authority's local development scheme;*
 - (b) *in relation to each of those documents –*
 - (i) *the timetable specified in the authority's scheme for the document's preparation,*
 - (ii) *the information referred to in regulation 8(b)(i) and (ii) or (c)(ii) (as the case may be), [being information on the intended dates of achieving key stages, including the date when a DPD is to be submitted to the Secretary of State for independent examination]*
 - (iii) *where, within the period in respect of which the report is made, the first step has been taken in the preparation of the document –*
 - (aa) *the stage that the document has reached in its preparation;*
 - (bb) *if the document's preparation is behind the timetable mentioned in paragraph (i) the reasons for this, and*
 - (cc) *a timetable relating to the further steps that are likely to be taken for the preparation of the document;*
- ...
- (4) *Where an authority are not implementing a policy specified in a DPD or an old policy as defined in paragraph 1(4) of Schedule 8 to the Act, the annual report must identify that policy.*
- (5) *Where an annual report identifies a policy pursuant to paragraph (4) the report must include a statement of –*
- (a) *the reasons why the authority are not implementing the policy;*
 - (b) *the steps (if any) that the authority intend to take to secure that the policy is implemented; and*
 - (c) *whether the authority intend to prepare a DPD or a revision of the DPD (as the case may be) to replace or amend the policy.*
- ...
- (8) *As soon as reasonably practicable after an authority make an annual report to the Secretary of State they must publish the report on their website."*

68. Thus it is apparent that the local planning authority is required to inform the Secretary of State, on an annual basis, as to:
- (i) the progress being made on the production of all LDDs in its LDS;
 - (ii) if any are behind schedule, the reasons for this and a revised timetable for future steps;
 - (iii) if Development Plan policies (including old policies in a local plan) are not being implemented, the reasons for this and the action that is to be taken, either to secure implementation of the particular policy or to replace or amend it.
69. The Claimants submit that there is nothing in the AMR submitted by SKDC to the Secretary of State in December 2006 to suggest that Policy T1 of the Local Plan was a policy that SKDC was not implementing. They further submit that Policy T1 was a safeguarding policy and could be implemented simply by SKDC refusing planning permission for any development which prejudiced that safeguarding. Whilst paragraph 3.4 of the AMR noted that: *“A number of policies included within the adopted Local Plan are now somewhat out of date and have been superseded by changes in national regional and strategic planning”* there was no suggestion that this applied to Policy T1 and it was identified in Appendix A of the AMR as one of the *“saved policies”* which would be replaced by the Core Strategy and Stamford Area Action Plan.

ISSUES

70. There are three main issues which have been raised by this claim for judicial review.
71. The first issue is whether SKDC breached the Claimants’ legitimate expectation that there would be “public consultation by SKDC prior to a decision not to request the saving of Policy T1” by the Secretary of State. This is a ground of challenge which lies against SKDC and not the Secretary of State, although the Secretary of State has understandably had submissions to make about it in addition to those of SKDC.
72. The second issue is whether, if the Claimants succeed on the first issue, the Secretary of State erred in law by failing to take into account the Claimants’ legitimate expectation.
73. The third issue is independent of the first issue and is whether the Secretary of State erred in accepting the decision of SKDC that there was no need to retain Policy T1.

FIRST ISSUE: LEGITIMATE EXPECTATION

74. It was at one time suggested by SKDC that, since it was not the ultimate decision maker under paragraph 1(3) of Schedule 8 to the PCPA 2004, its decision not to request the saving of Policy T1 is not amenable to challenge

by way of judicial review. However, in the skeleton argument on behalf of SKDC it was made clear that this was no longer a live issue before me.

75. The Claimants submit that the circumstances in relation to Policy T1 were unusual in that:
- (i) Whilst that was a policy in SKDC's Local Plan, it was clear from the outset that SKDC would not be the delivery agent for any road scheme. The policy was expressly to safeguard land for a "*County Council proposal*".
 - (ii) SKDC knew from SCOT and FHG's representations on certain recent planning applications that Policy T1 was directly relevant to the acceptability of "*live*" development proposals. Those representations had drawn specific attention to the safeguarded corridor protected by Policy T1.
 - (iii) As already noted, section 38(6) PCPA 2004 requires planning applications to be determined in accordance with the Development Plan unless material considerations indicate otherwise and so the question of whether Policy T1 was or was not to remain part of the Development Plan was a highly material issue in the planning of Stamford.
 - (iv) As I have mentioned earlier, the Claimants place emphasis on the effect of a decision not to request the Secretary of State to save a policy in the Local Plan, which is to change the content of that Plan without any of the normal procedural safeguards associated with the formation of such a plan, including public consultation.
76. In the context of that last submission, the Claimants drew my attention to paragraph 5.5 of the Secretary of State's guidance in Planning Policy Statement 12 "*Local Development Frameworks*", placing particular emphasis on the first sentence:

"It is important that the move to local development frameworks does not lead to any gap in coverage of development plan policies. Where local planning authorities can demonstrate to the Secretary of State that saved policies reflect the principles of local development frameworks, as set out in paragraph 5.15, and that it is not feasible or desirable to replace them within the 3 year period, it will be possible to seek the Secretary of State's approval to extend them. This should be undertaken as part of a review of the local development scheme before the expiry of the three year period". (Emphasis added)

77. However, in my view, the first sentence, about the importance of avoiding any gap in the coverage of development plan policies, needs to be read in the context of the passage as a whole. What that passage makes clear is that, if a local planning authority has reason to make a request to the Secretary of State to save a policy, it will be possible to ask her to do so. This reflects what the PCPA 2004 says and reflects common sense. What the passage

does not assist the Claimants in establishing is that there is any requirement of public consultation before a local planning authority decides whether or not to make such a request.

78. The Claimants submit that the LDS was clear that *“The Council is therefore ‘saving’ the existing Local Plan in its entirety for the period while the DPDs are under preparation...”*. This statement clearly embraced Policy T1 and this was reinforced by the identification of Policy T1 in Appendix A as a *“saved policy”* which would be replaced by identified DPDs. The difficulty with this aspect of the Claimants’ submissions is that it tends to prove too much. As I will mention below, the Claimants do not in fact contend that SKDC created a legitimate expectation that Policy T1 (or any other policy in the Local Plan) would definitely be saved: the Claimants have to make that concession because the power to save the policies was one that SKDC did not possess; it was given by Parliament to the Secretary of State.
79. The Claimants also submit that the AMR indicated how SKDC proposed to revise its LDS to reflect the slippage in the preparation of DPDs. They say that the AMR did not suggest that Policy T1 was a policy which was no longer being implemented. The AMR did suggest, in Appendix A, that Policy T1 would continue to be a *“saved policy”* which would be replaced by identified DPDs. So, the Claimants submit, the revised timetable for the adoption of these DPDs necessarily meant that this could only be achieved if SKDC requested the saving of Policy T1.
80. Accordingly, the Claimants submit, a fair reading of the LDS together with the AMR was that SKDC was intending to achieve its objective of replacing Policy T1 by the identified DPDs by seeking to save that policy beyond 27 September 2007. However, even this tends to prove too much. As I will mention below, the Claimants do not in fact submit that, as a matter of law, SKDC created a legitimate expectation that it would request the saving of Policy T1. Rather, they submit that SKDC was required to engage in consultation with the public before deciding not to make such a request.
81. The Claimants expressly concede that in the context of planning policies, no policy statement can ever be regarded as permanent. However, what they submit is that they had a legitimate expectation that the policy approach to Policy T1 as set out in the LDS and in the AMR would only be changed in a manner which was fair in all the circumstances.
82. It was common ground before me that the law on legitimate expectation is evolving and is to be determined on a case by case basis. All parties relied upon what was said by Laws LJ in R (Nadarajah and Abdi) v Secretary of State for the Home Department [2005] EWCA Civ 1363, at paras. 67-70 in an important passage which should be read in full. However, for present purposes, I hope it will suffice if I note that Laws LJ encapsulated the central principle in this area of law in the following way at para. 68:

“The search for principle surely starts with the theme that is current through the legitimate expectation

cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. ...”

Laws LJ went on, at para. 69, to state that:

“This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration. ...”

83. The Claimants also drew my attention to R (Greenpeace) v Secretary of State for Trade & Industry [2007] Env LR 29, in which Sullivan J, at para. 47, applied the principle enunciated at para. 68 of Nadarajah to the context of public consultation in relation to nuclear energy. He said at para. 48:

“While the decision which is said to have broken the promise of ‘the fullest public consultation’ is fairly described as one which was dealing with a ‘high-level, strategic issue’, the promise itself was given at the highest level: in a Government White Paper. It would be curious, to say the least, if the law was not able to require the Government to honour such a promise, absent any good reason to resile from it.”

84. The Greenpeace case makes it clear that a promise of public consultation (and not merely a promise of consultation with certain individuals or groups) may generate a legitimate expectation that there will be such consultation; that a promise made to the public generally can give rise to a legitimate expectation; and that the law will in appropriate cases enforce such a legitimate expectation even where the context could be said to be one which involves high-level policy issues. However, that case concerned an express promise of consultation, made by the Government in a White Paper. It does not assist the Claimants in establishing that there was a legitimate expectation of public consultation in the present case.
85. It is important to recall, as I have mentioned earlier, that the Claimants do not contend that there was a legitimate expectation that policy T1 would be saved: this is for the sound reason that such a course was not within SKDC’s power under the relevant legislation. It was exclusively within the competence of the Secretary of State. Nor do the Claimants contend that there was a legitimate expectation even that SKDC would make a request to the Secretary of State to save Policy T1. If there had been such a contention, that might have been characterised as an example of a substantive expectation. At

times it appeared that the statements by SKDC in various documents I have set out earlier were said to give rise to precisely such an expectation but that has been disavowed in the Claimants' submissions. What is contended for, rather, is a procedural expectation, that of public consultation.

86. I do not think that the Claimants have made out their primary case, that SKDC created a legitimate expectation that there would be public consultation before it decided not to request the Secretary of State to save Policy T1 of the Local Plan. My reasons are as follows.
87. First, as is accepted by the Claimants, this is not one of those cases where what is relied upon is an established practice of consultation: contrast *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. What has to be contended by the Claimants is that there was a promise of public consultation. However, that contention falls at the first hurdle. There was no such promise. Certainly, as the Claimants accept, there was no express promise of consultation. It is telling that in order to spell out such a promise the Claimants have had to rely on certain passages in a wide range of different documents published at different times. As counsel for the Secretary of State put it at the hearing, they have had to “lever” an implied promise out of such passages. In my view, this is unpromising territory for a promise of consultation to be found. Although nothing in this developing area of law is necessarily cast in stone, the authorities do stress that, in general, a legitimate expectation will need to be founded on a statement which is “clear, unambiguous and devoid of relevant qualification”: R v Inland Revenue Commissioners, ex p. MFK Underwriting Agents Ltd [1990] 1 1545, at p.1569 (Bingham LJ); or “a clear and unequivocal representation”, as it was put in R (Association of British Civilians: Far Eastern Region) v Secretary of State for Defence [2003] QB 1397, at para. 62 (Dyson LJ, giving the judgment of the Court of Appeal). Although those cases were examples of (alleged) substantive legitimate expectations, Nadarajah makes it clear, in a passage at para. 69 which I have already quoted, that there is no distinction in principle between substantive and procedural legitimate expectations, and I note that the Claimants did not base their argument before me on any such distinction.
88. Secondly, it is significant that, in the very context with which this case is concerned, the development of planning policies, a duty of consultation is often required either by virtue of legislation or pursuant to an express statement of policy. Where there is such a duty or express promise, there will often be set out in precise terms such matters as the identity of the consultees (it may or may not be the public generally, for example consultation may be confined to specified representative organisations; or more generally to such persons as appear to the local planning authority to be interested persons); the timetable for consultation; and the manner of publicity to be given to proposals, e.g. (as I have noted earlier) there may be an express requirement of publicity on the authority's website. Where there is no such express duty or promise of public consultation, it seems to me that that is a powerful indicator that no such obligation should be imposed by implication.

89. Thirdly, if the Claimants are correct in their contention, in principle the same duty of consultation should apply to all policies which a local planning authority is minded not to request the Secretary of State to save. Although at one point in the hearing counsel for the Claimants suggested that it would be possible to confine any decision to the facts of a particular claimant, and a particular policy (he understandably wishes to secure a positive outcome from this litigation for his clients and not necessarily for others), it is difficult to see how the logic of the Claimants' argument would allow for that. What a court says is a matter of legal obligation affects not only the particular claimants before it but may well affect others who are not. It is important that local authorities should know what their legal obligations are: many of the Claimants' arguments, and many of the materials upon which they relied, would be equally relevant to other policies in the Local Plan whose saving was not requested by SKDC. That is a wide-reaching and potentially onerous obligation. If the law requires it, so be it. However, it seems to me that the Court should be cautious before regarding such an obligation as being imposed by law when it has not been thought appropriate to impose it either in legislation or in any express policy statement.
90. Fourthly, I am not persuaded by the Claimants that, in the absence of a duty of public consultation, the system would be so unfair that the law should impose such a duty. It is clear that it is open to persons in the Claimants' position to make representations themselves to the Secretary of State as to why a given policy in the development plan should be saved (witness statement of Graeme Foster, paras. 6-8). As the evidence of Mr Foster filed on behalf of the Secretary of State explains, her policy is to forward such third party representations to the relevant local planning authority and invite their response before making a decision whether or not to save a policy. There is some force in the point made by the Claimants that the weight that will be given to representations will be affected by their authorship: that point, which reflects common sense, was made by Collins J in R (Weir) v London Borough of Camden [2005] EWHC 1875 (Admin), at para. 13. However, the procedure that Mr Foster describes will include a response to third party representations from the local planning authority itself. If, on reflection, the authority supports the representations, that will, even on the Claimants' submission, add weight to them. If, on the other hand, the local planning authority opposes the representations, that will also be given appropriate weight by the Secretary of State, but it does not seem to me that that would give rise to any legitimate grievance on the part of the third party which had made the initial representations.
91. In this context I should mention another case upon which the Claimants placed reliance: R (Roberts) v Secretary of State for Communities and Local Government, [2009] JPL 81, the only authority before me which was directly concerned with the relatively new procedure for saving development plan policies in Schedule 8 to the PCPA 2004 (the statutory regime which arises in the present case also). At paras. 2-7 Sullivan J helpfully set out a description of the "wholly new system of development plans" introduced by the PCPA 2004. The specific passage upon which the Claimants rely is to be found at para. 80, where Sullivan J said:

*“Although the principles underlying the doctrine of legitimate expectation apply generally to assurances or promises made by public bodies of all kinds (see per Laws LJ in [Nadarajah] above), in the particular context of Town and Country Planning it is well understood by all of those involved, landowners, developers and local planning authorities, that even the most formally expressed planning policies are always susceptible to change. The catalogue of new and revised policies referred to in this judgment is an illustration of the constant process of change in operation. Thus, the ‘beneficiary’ of a statement of planning policy that is favourable to his interests can have no **legitimate** expectation that the policy will not be changed. At the most, he can have a **legitimate** expectation that the policy will be changed in accordance with the relevant procedure (if one is prescribed by an enactment, or advised in policy guidance); **or if there is no established procedure in a manner that is fair in all the circumstances, for example, after giving interested parties an opportunity to make representations as to the implications of changing the policy.**” (Emphasis added)*

92. The first part of that passage serves to emphasise that, in the planning field, there can be no legitimate expectation that policies will not be changed: far from it, they are “always susceptible to change” and in “the constant process of change.” That part addresses the concept of substantive legitimate expectations. The last part of the passage addresses the concept of procedural fairness. I have no reason to doubt the correctness of the statement which the Claimants emphasise in the passage I have cited. However, judicial statements always need to be read in the context of the cases in which they were uttered and not read as if they were contained in a statute. It should be borne in mind that, in Roberts itself, there was no contention that there had been “procedural unfairness in the manner in which the Secretary of State reached her decision.” (See para. 61) Sullivan J went on in the same paragraph to say that such a submission “would have been doomed to failure” because it was “plain that the procedure adopted by the Secretary of State enabled all parties, including the claimants, to have their say as to whether or not policy H1 [the policy in issue in that case] should be saved for a further period.” On the facts of Roberts the claimant had made representations to the Secretary of State as to why policy H1 should be saved and those representations had been taken into account by her. What the Claimants in the present case are unable to do is extract from Roberts a legal principle which would impose on SKDC in the present case a duty of public consultation in the absence of any express promise that there would be one.

SECOND ISSUE: ALLEGED FAILURE BY SECRETARY OF STATE TO TAKE THE LEGITIMATE EXPECTATION INTO ACCOUNT

93. The Claimants accept that if they had no legitimate expectation of being consulted, the second issue will not arise. In view of my clear conclusion on the first issue, I do not think it fruitful to say more about this issue. Nor do I think it would be helpful for me to address a possible alternative argument that was canvassed at the hearing: that, if the decision of SKDC was vitiated by a legal error, then it might be arguable that the Secretary of State's decision which was based upon it would also be vitiated. Suffice it to say that the Secretary of State would strongly resist such a contention.

THIRD ISSUE: ALLEGED ERROR BY SECRETARY OF STATE IN ACCEPTING REASONS GIVEN BY SKDC FOR NOT REQUESTING THAT POLICY T1 BE SAVED

94. The Claimants submit that the Secretary of State was not entitled to accept SKDC's judgment on whether or not Policy T1 should be saved because this ignored the information already known to her which showed that that judgment was erroneous. They place reliance on the various documents which, as I have mentioned earlier, were before the Secretary of State when the decision was made not to save Policy T1. The Claimants submit that:

(i) The Secretary of State knew that Policy T1 was a safeguarding policy for a LCC highway authority road scheme (not a SKDC scheme): paragraph 9.8 of the Local Plan.

(ii) The Secretary of State knew that the highway authority was committed to a feasibility study within a defined timescale (i.e. the period up to 2010/11) into a Stamford Bypass/Relief Road which could then result in a scheme coming forward under Policy M1 of the Structure Plan: paras 17.30-17.32 of LTP2; para 7.14 of the Structure Plan.

(iii) The Secretary of State knew from the Local Plan Proposals Map that the identified protected corridor was the only available north/south route and so would be bound to be part of any feasibility study.

95. The Claimants therefore submit that SKDC's judgment that "*all schemes expected to be completed have been*" was manifestly inconsistent with the known position of the highway authority and that the Secretary of State was obliged to probe that inconsistency. There was no indication that LCC had abandoned the need to safeguard the Ryhall Road corridor. SKDC offered no timescale for the period within which its expectation that no scheme would be completed applied. Its own SCI recognised that the LDF would provide a policy framework for the next 16 years and those Local Plan policies which were saved would form part of that framework until replaced. There was therefore no good reason to conclude that the Ryhall Road protection corridor would not be needed in that period, particularly given LCC's commitment to a feasibility study by 2010/11.

96. Although it was not entirely clear what standard of review the Claimants contend is applicable in considering this third issue, I accept the Secretary of State's submission that the standard should be the conventional one of rationality. What the Claimants in effect contend is that SKDC came to the wrong view as to whether Policy T1 should be saved and that the Secretary of State was wrong to accept that view. In the absence of any error of law or procedural unfairness, the only ground upon which the Court could interfere with the Secretary of State's decision would be irrationality.
97. I am unable to accept the suggestion that the Secretary of State's decision was irrational, for the following reasons.
98. First, the statutory context is important. As Sullivan J observed in Roberts, at para. 4, Parliament has decided in enacting the PCPA 2004 that the former system of development plans should be replaced by a wholly new one. In doing so, Parliament itself has laid down the three year period at the end of which, in the absence of a positive decision by the Secretary of State to save a given policy, it will come to an end.
99. Secondly, both the local planning authority and the Secretary of State are the relevant bodies, with appropriate expertise and experience in the field of planning policy, to whom Parliament has entrusted these important functions. Although there is room for judicial review in appropriate cases, planning policy is an area in which the Court will rightly be slow to characterise as irrational the decisions of those bodies.
100. Thirdly, the Secretary of State is entitled in general to accept that the local planning authority will have formed its own planning judgment as to which policies should be put forward for saving and those which should not and that it will have reason to do so. The fact that others may disagree with that planning judgment is not a reason to regard the decisions reached as irrational. In this context, it is important to recall that the Claimants did not make third party representations to the Secretary of State as to why Policy T1 should be saved: as I have mentioned earlier and as is illustrated by the case of Roberts, the Secretary of State will take such representations into account.
101. Fourthly, sight should not be lost of the real world in which such decisions have to be taken. It is not only Policy T1 that was not recommended for saving by SKDC; there were many other such policies. Moreover, there were many policies, running into hundreds, not recommended for saving by other planning authorities in the area of the Government Office for the East Midlands' Lincolnshire and Rutland Planning Team (witness statement of Graeme Foster, para. 4). If the Claimants' argument were right, the Secretary of State would have to conduct an extensive exercise of reviewing hundreds of policies, by reference to passages in numerous documents of the kind that have been placed before the Court and analysed during a hearing lasting two days, in order to come to a view as to whether the planning judgment of the local planning authority was correct or not.

102. In all the circumstances, I am persuaded by the Secretary of State that her decision was rational and therefore lawful.

CONCLUSION

103. For the reasons I have set out this claim for judicial review is dismissed.

104. There was an interesting argument before me as to whether, even if the claim for judicial review should otherwise succeed, any practical remedy could be granted. In particular, it was suggested by the Secretary of State that she had no power to save policies now that the three year period laid down in Schedule 8 to the PCPA 2004 has expired. In view of my conclusion that this claim for judicial review should be dismissed, it is unnecessary to explore that interesting argument in this judgment.
