

NATIONAL PLANNING POLICY FRAMEWORK 2023
EMERGING CHERWELL LOCAL PLAN REVIEW 2040

FURTHER ADVICE

1. On 30 January 2024, I advised Cherwell District Council (“CDC”) in writing concerning the construction of the NPPF (December 2023), para.226 and its application to the emerging Cherwell Local Plan Review 2040. In so doing, I addressed advice in writing given by Sarah Reid KC and Constanze Bell (dated 11 January 2024). In response to my written advice, Sarah Reid KC has given further advice in writing on 7 February 2024.
2. I have been provided with Ms. Reid’s further advice and been asked to review it. I have done so. Nothing that is set out in Ms. Reid’s further advice leads me to change the advice I gave to the Council on 30 January 2024.
3. I do not intend to respond to each and every point made by Ms. Reid; I doubt the utility of so doing or that to do so will be of any particular assistance to the planning inspector to whom our respective advice is to be forwarded. I will however address the principal points on which we appear to differ.
4. First, Ms. Reid disagrees with my advice as the construction of NPPG para. 226 and, in particular, my advice that the proviso concerning policies maps does not apply to an emerging plan which has reached reg.18 stage. I agree with Ms. Reid that this matter involves an exercise of the construction of the NPPF, that construction of a planning policy is a matter of law, and that the principles set out in *Tesco v Dundee CC* are engaged. As Ms. Reid, rightly, observes, the policy is to be construed objectively and *in context* (my emphasis) (see *Tesco v Dundee*). The context for the second sentence of NPPF, para.226 is the legislation concerning plan making and in particular the TCP (Local Planning) Regulations 2012. As I have advised, those Regulations do not require a “policies map” to be included in or to accompany an emerging plan which has reached reg.18 stage, indeed what is

required at reg.18 (i.e. “the subject of a local plan” which a local planning authority proposes to prepare) is unlikely to, and is not expected to, comprise or contain fully formed policies in a form capable of being reflected in a policies map. This is the context for the relevant part NPPF para.226 and, in my view, suggests a construction whereby the proviso applies to reg.19 plans but not to reg.18 plans.

5. I should add that the drafting of para.226 does not detract from this interpretation; the proviso follows directly, the reference to reg.19. I do not consider that the positioning of the comma within the second sentence of para.226 imports the significance that Ms. Reid attaches to it (see para.6 of her further advice). Indeed, and as I have said, that the proviso follows on from the reference to reg.19 suggests that it does not. If the Secretary of State had intended the proviso to attach to the three different stages of emerging plan referred to in sentence two of para.226, he would have been likely to have expressed the proviso in terms such as “... , including *in all cases* both a policies map and proposed allocations”. More generally however I doubt the value or the appropriateness of fine textual analysis of this sort when the context, as I have advised, provides the clearest indication of the correct interpretation.
6. With regard to the assistance to be gained from examination of consultation drafts and responses to consultation, again I doubt the value of this in an exercise of the construction of the final published policy which is expressed differently to the consultation draft. That said, the Government’s response to consultation (set out in part by Ms. Reid at para.9) does suggest that its intention was that the requirement for a policies map and proposed allocations towards meeting housing need applies to a reg.19 plan and not a reg.18 plan. Indeed, such a conclusion would accord with what the legislation, in the form of the 2012 Regs, intends of a reg.18 plan. I should record that I do not understand the conclusion reached by Ms. Reid at para.11 of the further advice, following on from the citation of the Government’s response to consultation. To my reading, the Government’s response and how, in the published version of the NPPF, para.226 the proviso is attached expressly to the reference to a reg.19 plan points to a directly opposite conclusion.

7. Ms. Reid and I are, unsurprisingly, in agreement that there is no statutory requirement to produce a policies map for plan at reg.18 stage (see Ms. Reid at para.12). There may well, in principle at least, some power for a local planning authority to show in map form elements of what it has set out in the reg.18 plan but given that reg.18 stage comprises notification of “the subject of a local plan which the local planning authority proposes to prepare” it will generally be the case that a reg.18 plan will not have a sufficiently formed strategy or policies to make the inclusion of a “policies map” feasible or practical. However, and importantly, given that there is, we agree, no *requirement* for a reg.18 plan to include a policies map, it would seem highly unlikely – indeed implausible – that the Secretary of State would introduce such a requirement, for the purposes of engaging a statement of policy, such as is contained in NPPF para.226. As I advised in my written advice of 30 January 2024 (see para.4), the term “policy map” is not a term included or defined in the 2012 Regs at all and more particularly there is no reference within the 2012 Regulations to a “policies map” being produced at reg.18 stage of plan preparation.
8. At paras.14-15 of the further advice, Ms. Reid refers to that part of the proviso which refers to “proposed allocations towards meeting housing need”. That policy requirements makes sense in the context of a reg.19 plan which is at a stage which is sufficiently advanced to allow or permit allocations to included. At reg.18 stage, which requires the “subject of a local plan which the local planning authority propose[s] to prepare” to be published, the emerging local plan is not required to, nor is it at a stage to as to be expected to, contain allocations. Again, this too supports a construction of NPPF para.226 which applies the proviso to reg.19 plans and not to reg.18 plans.
9. Moreover, Ms. Reid at no stage offers any practical or plausible reason or rationale why the Secretary of State would require a policies map for a reg.18 plan to fall within the scope of the adjusted housing land supply requirements provided by NPPF para.226. I too am unable to discern any reason for such a requirement and this too tends to support the alternative construction that I advise is correct. The nearest to an explanation which is offered by Ms. Reid is that the Secretary of State was seeking to draw some distinction in NPPF para.226 depending on the

substantive content of a reg.18 plans, whereby some plans at that stage of plan making are deserving of a reduced housing land supply adjustment and others are not. To me, that this was the intention of the Secretary of State seems most unlikely. To introduce such a requirement into policy would generate very considerable uncertainty in the operation of NPPF para.226 and would depend on each local planning authority or other planning decision maker reaching a judgment on whether the content of a particular reg.18 plan is sufficient to attract or to warrant the adjustment provided for by NPPF para.226, including whether there is a sufficiently refined map included in the reg.18 publication and that it includes a sufficient suite of housing allocations. It may very well be the case that, through NPPF, para.226, the Secretary of State was seeking to confer some relaxation in the requirement to demonstrate housing supply for local planning authorities who are actively making progress in plan making; that is achieved, on the terms of the policy when properly construed, by extending the benefit of the policy to those who have reached reg.18 stage and beyond, without the need to import, through what I consider to be an artificial construction of the policy, an additional requirement that only certain reg.18 plans will attract the policy relaxation. In my view, that such an exercise was intended as part of the application of national policy is implausible; were this to have been the intention, then it might be expected to have been set out in the clearest of terms and supported by PPG guidance as to how it is expected to operate.

10. As such, I disagree with Ms. Reid and the interpretation of NPPF para.226 which she advises to be correct. That interpretation is not consistent with context for the policy provided by the statutory provisions for plan making, is not consistent with what a reg.18 plan is required to comprise, lacks any clear rationale and introduces unlikely practical consequences and uncertainty. These outcomes are avoided if, as I consider to be correct, NPPF para.226 is to be construed such that the proviso and the requirement for inclusion of a policies map is limited to a reg.19 plan.
11. At paras.20-29 of the further advice, Ms. Reid restates her advice that a policies map, at reg,18 stage, is required to be a separate document to the emerging plan itself. The justification for Ms. Reid's view appears to be that an adopted policies

map is not a DPD but an LDD and a local plan inspector, when examining an emerging plan for soundness, has no remit over the policies map. That is of course all correct. But it does not follow from that that a local planning authority is constrained as a matter of law in terms of how it deems fit to present its policies map or that a policies map must in all cases be a separate document. I do not resile from the advice I have given, that to construe the legislation in the way advanced by Ms. Reid and Ms. Bell (i.e. unless an LPA produces and publishes the policies map as a separate document it would be acting unlawfully), introduces an unwarranted, unjustified and incorrect level of technicality, which I do not consider that a sensible construction of the 2012 Regulations requires. And I do not consider that a court, if asked to construe the Regs and determine the point, would find Ms. Reid's interpretation to be correct. Notably, of course, the proviso at NPPF para.226 refer to a policies map being "included" in the plan to which the proviso attaches.

12. Thus, I remain of the view that *if* a reg.18 plan is required by the proviso to be include a policies map (which I do not consider to be correct, as a matter of interpretation), that policies map may be included in the plan rather than it being required to be produced and published as a separate document.
13. At paras.30-41, Ms. Reid addresses again why the maps and plans in the reg.18 draft of Cherwell's emerging local plan are not in law a policies map. Without prejudice to what I have set out above and in my earlier advice as to the interpretation of NPPF para.226, *if*, for the purposes of NPPF para.226, the proviso is engaged and a reg.18 plan is to include a policies map in order to fall within the scope of that paragraph, I disagree that what is included in the Cherwell reg.18 plan would not be sufficient in law to meet the policy requirement. Ms. Reid's analysis overlooks (a) the fact that the term "policies map" is not defined in the 2012 Regs (unlike the term "adopted policies map" or "submission policies map") and (b) that at reg.18 stage the strategy and policies of the emerging plan are not required to be and are unlikely to be sufficiently advanced so as to make policies map of the same form or level of detail that is expected at submission and/or adoption stage to be feasible. As such, the detail contained on the maps included in the Cherwell Local Plan Review 2-14 reg.18 draft are adequate and appropriate

to amount, in law, to a policies map for the purposes of a plan at that stage of preparation. Moreover, *if* the proviso within NPPF para.226 is met, it is not said by Ms. Reid that Cherwell's reg.18 plan does not include "proposed allocations to towards meeting housing need" so as to comply with the second element of that proviso; this is unsurprising since Cherwell's emerging reg.18 plan does include proposed housing allocations.

14. I reject the practical difficulties that Ms. Reid seeks to attribute to the approach to have advised to be correct. As I advised, it may well be that the maps included in Cherwell's reg.18 local plan would not in law be sufficient for a "submission policies map", at reg.19 stage or an "adopted policies map", as defined in the 2012 Regs. However, they are, in my view, sufficient for the stage whereby a local planning authority is required to set out "the subject of a plan" that it proposes to prepare. A reg.18 plan is not required to be or intended to include a *comprehensive* suite of policies such as to allow for the generation of a *comprehensive* policies map, such as would be expected at reg.19, submission and adoption stages, albeit Cherwell's reg.18 plan does include maps of some of the emerging policies and policy allocations contained within it. As such, the exercise which Ms. Reid identifies at paras.36 -37 is not the function or purpose of a reg.18 local plan and Ms. Reid's approach overlooks, or ignores, the function, purpose and stage within the statutory plan making framework of a reg.18 plan.
15. With regard to Ms. Reid's further advice at paras.42-47, it is the case that the Cherwell Local Plan Review 2040 includes references to an "Adopted Policies Map". The text of the reg.18 plan, in these respects, is plainly looking forward to the adoption of the Local Plan and the adoption of a policies map alongside that adopted Plan, consistent with the requirement in the 2012 Regs for an adopted policies map to be produced. It does not, plainly, follow from this that the maps included in the reg.18 local plan are not in law sufficient to meet any requirement for a policies map to be published at reg.18 stage. As I have advised in law, they do. I do not consider that the points made by Ms. Reid at paras.42-47 of the further advice add anything to the resolution of the issue between us.
16. I advise accordingly.

DOUGLAS EDWARDS KC

A handwritten signature in black ink, reading "Douglas Edwards KC". The signature is written in a cursive style with a large, prominent 'D' and 'E'.

Francis Taylor Building,

Temple, London. EC4Y 7BY.

27 February 2024.

