

Development consent is required for nationally significant infrastructure projects by s.31 of the Planning Act 2008. The intention of the 2008 Act regime is to provide a single consent mechanism for building these large projects. There may be development required which would not on its own be such a project however, it would be undesirable to have a number of ancillary planning applications. Therefore, development consent may also be granted for "associated development" which is development associated with the development for which development consent is required: s.115(1),(2). The demarcation between the nationally-determined Planning Act 2008 projects and other development which would be applied for locally has always been seen as important, particularly to avoid other schemes piggy-backing on the project. Section 115(2)(b) excludes from the meaning of "associated development" the "construction or extension of one or more dwellings".

NNB proposed to construct a "campus" on Innovia's land for construction workers at the proposed Hinkley Point C nuclear power station. They would have en-suite bedrooms, with separate restaurants, bars and other facilities. The proposal was not for self-contained living accommodation in the sense of dwelling recognised in planning law.

Commentary by Richard Harwood.

Hertfordshire CC v (1) The Secretary of State for Communities and Local Government (2) Metal and Waste Recycling Ltd

(High Court of Justice (QBD), Ouseley J. February 1, 2012) [2012] EWHC 277 (Admin)

Mr Matthew Reed (Hertfordshire CC) for the Appellant.

Mr Daniel Kolinsky (Treasury Solicitors) for the first respondent.

Mr Anthony Dinkin QC and *Ms Clare Parry* (Mullis and Peake) for the second respondent.

Industrial processes; Intensification of use; Material change of use; Metals industry; Permitted development; Planning permissions

Scrap metal yard—material change of use—intensification—permitted development

Hertfordshire County Council ("the Council") challenged the decision of the Secretary of State regarding appeals made by Metal and Waste Recycling Ltd ("MWRL") against two enforcement notices served by the Council in respect of an alleged material change of use and operational development made without planning permission on a scrap yard which had operated since the 1970s with the benefit of a planning permission which was not subject to any conditions relevant to the issues in the present case. MWRL replaced an old fragmentiser used for dealing with scrap metal with a new one in 2006, and around that time the throughput of the scrap yard increased notably. Lorries arrived at unsociable hours and dust was created.

Enforcement Notice A alleged a material change of use without planning permission caused by an increase in throughput and its effects. It required the use to return to operations as they had been conducted before 2006, with various controls imposed, rather resembling conditions, through the medium of steps required to be undertaken to remedy the breach of planning control. These were intended to limit the monthly throughput, the days and hours of operation, and the number and hours of heavy goods vehicle use. They required the buildings which were said to be required to service the increased throughput to be demolished. These buildings were also the subject of Enforcement Notice B which alleged that a number of buildings, including the replacement fragmentiser, had been erected without the planning permission they required and should be removed.

On appeal, the Inspector rejected the Council's argument on the material change of use essentially because most of the significant effects of which residents and local businesses had complained were not caused by the increase in throughput. She rejected the Council's argument on operational development

because the buildings were permitted development, not requiring planning permission. She also concluded that the scrap yard use was not unlawful.

The Council contended that the Inspector wrongly excluded from her judgment as to whether a material change of use had taken place by way of intensification those effects attributable to changes related to the scrapyard use other than the increase in throughput. Fundamental to the Council's case was the contention that although the significant increase in throughput was by itself insufficient to constitute a material change of use, the planning consequences of that increase demonstrated a material change of use. The Council also contended that the buildings were not permitted development because the scrap yard use should be regarded as falling outside the scope of an industrial process within the meaning of the Town and Country Planning (General Permitted Development) Order 1990 ("GPDO") and the scrap yard use was not lawful.

Held, dismissing the appeal,

1. The material task of the Inspector with regard to Enforcement Notice A was to decide whether the matters alleged in the notice constituted a breach of planning control. The former use was the scrap yard use with a particular throughput. The new use was the scrap yard use with the higher throughput. That increase was the material change of use. It was perfectly clear from Enforcement Notice A, which referred to the planning reasons behind its issue, that the case was concerned with the effect of the increase in throughput. The issues as recorded and debated before the Inspector, and as judged by her, were whether the effects on or off site relied on by the Council were caused by an increase in throughput. The Council lost before the Inspector because it lost many of the significant arguments of fact and degree as to whether the effects relied on were wholly or significantly attributable to the increase in throughput. The Inspector looked at those impacts which she concluded were attributable to the increase in throughput, but reached her conclusion on that point adverse to the Council. It was not open to the Council to criticise the Inspector for adopting the basis for decision making which had been urged on her, and for failing to adopt a basis which it did not urge on her. She could not be said to have misinterpreted the nature of the allegation in Enforcement Notice A, nor have omitted from consideration material factors to the issue of whether there had been a material change of use as formulated in Enforcement A or as contended for by the Council.
2. In any event, the court was not persuaded that the factors the Inspector excluded were material considerations. The concept of material change of use by intensification required, as a necessary but not sufficient condition, an increase in the scale of all or some of the activities on site, leaving aside how or where that had to manifest itself. It was that increase which had to cause the change of use. To the extent that effects were relevant, it was the effect from that increase which mattered. In judging whether an increase in activity had led to an intensification of such a nature or degree as was necessary to constitute a change of use, the level at which that activity did or could occur without giving rise to a change of use had to be ascertained. It was only what happened above that baseline which could contribute to the change of use. In so far as the change in effects was relied on, the change in effect had to exceed that which could be caused by the permitted use. A combination of intensification and other changes in activities could constitute a material change in use, but what could be done without the need for permission would still have to be ascertained. That was how the Inspector approached it.
3. The change relied on had to result in a material change of the use of the land, and it could only do that by bringing about a definable change in the character of the use made of the land. Significant environmental effects, experienced on or off site, could support the contention that a material change of use of land by intensification had occurred. But those effects, whether on or off site could not themselves constitute a material change of use of the land. An increase in lorries arriving at unsociable hours or an increase in noise or dust experienced off site from activities on site was not capable of itself, whatever the degree of increase, of constituting a material change of use on

a particular site. The relevance of impacts came in evidencing a material change of use of the land, a definable change in character, but one which was defined by a material change in use, not by a change however severe or minimal, in the effects of use. The court rejected the Council's contention that the Inspector should have examined impact alone. She had to examine something else as the starting point for her examination, however much the impacts might have been evidentially relevant.

4. With regard to Enforcement Notice B, the Inspector was right to conclude that the new fragmentiser was development permitted under class B(a) in Pt A to Sch.2 to the GDPO.

The following judgment was given.

Mr Justice Ouseley:

1. Hertfordshire CC challenges the decision of the Secretary of State for Communities and Local Government given by an Inspector on June 7, 2010, dismissing appeals made by Metal and Waste Recycling Ltd against two enforcement notices served by the County Council in respect of an alleged material change of use and operational development made without planning permission on a scrapyard in Wallace Way in Hitchin.

2. Metal and Waste Recycling Ltd has operated a scrapyard at the site since the 1970s with the benefit of a planning permission which was not subject to any conditions relevant to the issues here. It replaced an old fragmentiser used for dealing with scrap metal with a new one in 2006, and around that time its throughput increased notably. Lorries arrived at unsocial hours. Dust was created.

3. The County Council served Enforcement Notice A alleging a material change of use without planning permission caused by an increase in throughput and its effect. It was arguing that the material change of use had been caused by an intensification in the use. It required the use to return to operations as they had been conducted before 2006, with various controls imposed, rather resembling conditions, through the medium of steps required to be undertaken to remedy that breach of planning control.

4. Enforcement Notice B alleged that a number of buildings, including the replacement fragmentiser, had been erected without the planning permission they required and should be removed.

5. After an eight-day inquiry and considering the evidence, the Inspector rejected the County Council's argument on the material change of use essentially because most of the significant effects of which residents and local businesses complained were not caused by the increase in throughput. She rejected the County Council's arguments on operational development because the buildings were permitted development, not requiring specific planning permission, and she also concluded, in the light of her decision on Enforcement Notice A, that the scrapyard use was not unlawful.

6. Hertfordshire CC, with permission, challenges those decisions. Mr Matthew Reed, appearing for the County Council, contends that the Inspector wrongly excluded from her judgment as to whether a material change of use had taken place by way of intensification those effects attributable to changes related to the scrapyard use other than the increase in throughput. The argument on behalf of the second respondent, Metal and Waste Recycling Ltd, has involved some consideration of the concept of material change of use by intensification.

7. The County Council contended that the buildings were not permitted development because the scrapyard use should be regarded as falling outside the scope of an industrial process within the meaning of the Town and Country Planning (General Permitted Development) Order 1990 (SI 1990/418), and the scrapyard use was not lawful.

8. The terms of Enforcement Notice A are important. The breach of planning control as amended alleged:

"... without planning permission the material change of the use of the Land from a scrap-metal yard with an average yearly material throughput of 121,174 tonnes, to a scrap yard, (including as part of

this use an end of life vehicle recycling facility), with an average yearly material throughput of 231,716 tonnes, the totality of the new use having a different nature and character from the former use."

9. The reasons for the issue of the Enforcement Notice refer to the impact which that breach of planning control has had: new buildings were built, including the new fragmentiser "to service this substantial increase in throughput". The steps which Enforcement Notice A required Metal and Waste Recycling Ltd to take to remedy the breach of planning control read like the imposition of a series of conditions. These were intended to limit the monthly throughput, the days and hours of operation, and the number and hours of heavy goods vehicle use. They required the buildings which were said to be required to service the increased throughput to be demolished. Those buildings were also the subject of Enforcement Notice B.

10. Mr Reed, for the County Council, agreed that para.10 of the Inspector's decision letter accurately summarised his submissions. In view of the arguments, I set them out:

"10. The increase in throughput at the time of the installation of the fragmentiser has been used by the Council to describe the extent of the material change of use. However, it accepts that the significant increase in throughput, itself does not amount to a material change of use. The Council has had regard to the planning consequences of that increased throughput in reaching its conclusion that there has been a material change of use. The essence of the council's case on this ground is that there has been an intensification of use which has had significant effects on the locality. It contends that the proper question to consider is not whether the description of the use remains the same but whether the character of the use falling under that description remains the same. The Council relies upon case law to support its contention that in deciding whether the current use is materially different from the previous use, it is appropriate to have regard to the impacts of the current use in comparison to the former use. The Council's position is that there can be a material change of use by reference only to changes in impacts."

11. Metal and Waste Recycling's submissions in contrast were:

"11. The appellant strongly rejects the Council's submission that there can be a material change of use by reference only to changes in impacts. He accepts that a comparative exercise is necessary based on the effects of the increase in throughput, but submits that the fact that there are more HGVs, general activity, explosions, noise or dust is not sufficient to constitute a material change of use. The question to be asked is whether the effects of that increase in throughput, including effects off-site, are such that there has been a definable change in the character of the use of the land. If off-site effects are being relied upon they must be such as to have caused some fundamental change in the character of the use of the land. Mere intensification, even with adverse side effects, is not enough."

12. Fundamental to the County Council's case is the contention that although the significant increase in throughput was by itself insufficient to constitute a material change of use, the planning consequences of that increase demonstrated a material change of use. Metal and Waste Recycling contended that the adverse impacts from the increase in throughput were not sufficient to demonstrate a material change of use by intensification. A definable change in the character of the use of the land was required.

13. The Inspector's decision letter then considers in sequence the particular impacts relied on by the County Council. In para.68 and following, she set out accurately the effect of a number of authorities cited to her on the scope of intensification. She said:

"In the light of judicial pronouncements, and after considering the approaches of the parties, it seems to me that what must be determined is whether the increase in the scale of the use has reached the

point where it gives rise to such materially different planning circumstances that, as a matter of fact and degree, it has resulted in a such a change in the definable character of the use that it amounts to a material change of use. It is necessary to first look at the effects of what has been done at the site."

14. She then drew together her unchallenged conclusions of fact and degree, and her conclusions as to the cause of the impacts relied on, in paras 69–71. So far as dust was concerned, she said:

"There is no evidence to indicate that any dust created by the site would cause a risk to human health. I have concluded there has been a material increase in dust experienced by local businesses which has emanated from the site since the increase in throughput occurred. However, there is no substantial evidence that the increase in dust identified by local residents at their homes derives specifically from the appeal site or can be directly attributable to the increase in throughput."

15. She then turned to the explosions caused by the quantity of gas bottles in the waste handled at the site. She said:

"The evidence also does not support the conclusion that the increase in throughput has materially changed the level of impact resulting from explosions at the site."

16. There had been a significant increase in the number and size of heavy goods vehicles going to the site. She said about that:

"Nevertheless, the size of vehicles and the use of containers to transport material from the site can be attributed to changes in export markets and practices of the haulage industry, rather than the increase in throughput."

17. The impact, however, of that increase in the number and size of HGVs was more complex. She had previously found that there had also been an increase in HGV movements generally on the road which led to the industrial estate and to the scrapyard. She continued:

"There is additional road traffic noise but the main disturbance caused to residents is by HGV vehicles going to and from the site during the 'night time' period. The available evidence indicates that this relates to drivers' working practices and the need to comply with regulations and is not directly caused by the increase in throughput. There has not been any material change in the impact of noise disturbance caused by HGVs that can be attributed to the intensified scrap yard use. The increase in HGVs going to and from the site as a result of the increase in throughput has not given rise to any material harm to the safety of people using the public highway."

18. In para.70 she turned to on-site noise:

"As regards the noise emanating from the site, it must be recognised that prior to the carrying out of the noise attenuation measures, the new fragmentiser was initially identified as the source of the elevated noise levels giving rise to complaints. However, the situation is obviously very different with the acoustic shield and the other noise attenuation measures in place. There have been no significant alterations in the noise characteristics of the other on-site activities. The evidence does not reveal any significant adverse planning consequences arising from the noise generated by the on-site operations following the increase in throughput. Taking all the various effects as a whole, they cannot be said, as a matter of fact and degree, to have produced a materially different situation in planning terms than previously existed."

19. Her overall conclusions are in para.71:

"I concur with the appellant's general proposition that the primary way a planning authority should control the extent of any use is through the imposition of conditions. This site is a long established scrap metal yard which has been operating under an effectively unrestricted planning permission since the 1970s with no conditions attached to control matters such as the number of lorry movements or hours of operation. The effects of the intensification need to be such as to have caused a material change in the character of the use. There have been changes in the effects of the operation upon the surrounding area and, in some instances, the very substantial increase in throughput has been a contributory factor. However, many of the identified impacts upon local residents and businesses derive from extraneous factors and not the increase in throughput. I conclude that the increase in throughput has not had such materially different planning consequences as to take it, as a matter of fact and degree, beyond the normal fluctuations in activity that could reasonably be expected to be experienced by the business. It has not resulted in a change in planning effects of such magnitude so as to cause a material change in the definable character of the use of the land. I find, on the balance of probabilities, that the material change of use alleged by the corrected notice has not taken place. The appeal succeeds on ground (c)."

20. Mr Reed's challenge to her conclusions in relation to intensification proceeds on a narrow front. He contends that in her judgment as to whether a material change of use by reason of intensification had occurred, the Inspector had focused exclusively on impacts caused by the increase in throughput, with the result that she had ignored impacts caused by changes, whether on or off-site, which were caused other than by that increase in throughput: for example, by changes in the number of gas bottles in the arisings, or changes in the drivers' working hours.

21. The Inspector's detailed conclusions show that there were serious noise problems created initially by the installation of the new fragmentiser, largely resolved by later attenuating measures. This was then, in her view, not materially different from what previously had existed (see para.23). She was unable to conclude that the increase in throughput had caused a change in the impact of explosions; yet, as para.29 shows, she thought it likely that there was some increase, not attributable to the increase in throughput. This aspect of the impact was, said Mr Reed, ignored in her assessment of whether there was a material change of use by intensification.

22. In relation to lorry noise off-site, she appears in paras 39 and 40 to conclude that the increase in heavy goods vehicles entering the site is directly related to the increase in throughput, but that the disturbing impact of their noise was attributable to their arrival at the site at unsociably early hours. At para.45 of the decision letter she attributes this impact not to an increase in throughput, but to changes in drivers' working practices, which would have occurred whether the throughput had increased or not; (these are not drivers employed by Metal and Waste Recycling Ltd).

23. Accordingly, submitted Mr Reed, that aspect of the impact of change was ignored because it was not attributable to the increase in throughput. The same applies to her conclusion about the increase in the annoying use of sleepers. This increase was caused by the turning movements of container lorries, which was not so much a function of the increase in throughput, but of changes in the way in which waste was handled off-site. That impact was accordingly put to one side.

24. The increase in dust, so far as it affected the nearby industrial estate, was caused by the increased throughput. But so far as residents were concerned, she could not conclude that the dust they experienced derived from the site at all or from an increase in throughput.

25. So, reading para.71 of the decision letter with that background, Mr Reed is plainly right to submit that the focus of the Inspector's conclusions on whether a material change of use by intensification had occurred, at least so far as impacts were relevant, focused on the impacts caused by the increased throughput and excluded impacts caused by other changes. Those which were excluded from account in particular included part of the impacts of gas bottle explosions, at least part of which were attributable to the increase

in the numbers of such bottles in the arisings anyway, lorry noise in the early hours, which were attributable to the change in drivers' working practices, and the noise of the reversing beepers.

26. The crucial question, however, is whether that approach was an error of law, as Mr Reed submits. He contends that the materiality of a change of use by intensification can, though it may not have to be, judged solely by the change in impacts on or off-site which a use may have, even where the use remains one of the same generic type—here a scrapyard use. The character of the use can be judged and determined by those effects. It is not necessary for them to be attributable to a specific on-site change such as here: the significant increase in throughput which occurred in 2006, at the same time approximately as the new fragmentiser was installed. Hence the Inspector was wrong to exclude those effects which she did exclude from her judgment of whether there had been a material change of use by intensification.

27. Mr Reed submitted that Enforcement Notice A had conveyed the approach he contended for through its use of the words "the totality of the new use having a different nature and character from the former use". He did however accept that that was not how the case was being put to the Inspector.

28. I reject Mr Reed's contentions. I take the last point first because it is significant for both of his arguments in relation to Enforcement Notice A. The material task of the Inspector on this aspect of the Enforcement Notice appeal was to decide whether the matters alleged in the Enforcement Notice constituted a breach of planning control. The allegation in the Enforcement Notice, after argument before me by Mr Reed, may not be as clear as it was to the parties and the Inspector at the inquiry.

29. The former use was the scrapyard use with a particular throughput. The new use was the scrapyard use with the higher throughput. That increase was the material change of use. The significance of the reference to "totality" as encompassing changes unrelated to an increase in throughput, which occurred off-site or which would have occurred on-site anyway to the same or at least to some degree, was simply not raised before the Inspector. Those changes were not understood by the parties to be relevant of themselves to the material change of use by intensification.

30. It is perfectly clear from the second page of the Enforcement Notice, which refers to the planning reasons behind its issue, that the case was concerned with the effect of the increase in throughput. The issues as recorded and debated before the Inspector, and as judged by her, were whether the effects on or off-site relied on by Hertfordshire CC were caused by the increase in throughput. That is clear from the record of the County Council's argument in the third sentence of para.10 of the decision letter above, which Mr Reed accepted faithfully recorded his submissions. He took me to his closing submissions in support of his argument, but it is perfectly clear, as he accepted, that they are structured in the same way in order to focus on the effects caused by the increase in throughput.

31. Metal and Waste Recycling Ltd focused its own submissions to the inquiry within that same framework, a framework selected by the way in which the County Council sought to present its case on the application to the facts of what it saw as the meaning of its Enforcement Notice. Not surprisingly, that is the framework which the Inspector adopted for her consideration of Hertfordshire CC's argument that there had been a material change of use by intensification.

32. Hertfordshire CC lost before her because it lost many of the significant arguments of fact and degree as to whether the effects relied on were wholly or significantly attributable to the increase in throughput. It is perfectly clear that it had thought that the installation of the fragmentiser was the cause of the increase in throughput, and that the amenity impacts which occurred on and off-site were the consequence of that increase in throughput. But it failed on that ground because the evidence of Metal and Waste Recycling Ltd on those matters was preferred.

33. The Inspector looked at those impacts which she concluded were attributable to the increase in throughput, but reached her unassailable and well reasoned conclusion on that point adverse to the County Council.

34. In my judgment, it is not open to the County Council to criticise the Inspector for adopting the basis for decision-making which it had urged upon her, and for failing to adopt a basis which it did not urge upon her. She cannot be said to have misinterpreted the nature of the allegation in the Enforcement Notice, nor to have omitted from consideration material factors to the issue of whether there had been a material change of use as formulated in the Enforcement Notice or as contended for by Hertfordshire CC.

35. In any event, I am not persuaded that the factors she excluded were material considerations, however the case had been presented. The concept of a material change of use by intensification requires, as a necessary but not sufficient condition, an increase in the scale of all or some of the activities on-site, leaving aside how or where that has to manifest itself. It is that increase which has to cause the change of use. To the extent that effects are relevant, it is the effect from that increase which matter. A change in the nature of activities on the site, or a change in the relative proportions of mixed uses on the site may give rise to some material change of use other than by way of intensification. But if such changes themselves do not bring about a material change of use as was the case here, the activities as varied can be carried on as part of the existing or permitted use. Their effects are permitted effects.

36. Similarly, in judging whether an increase in activity has led to an intensification of such a nature or degree as is necessary to constitute a material change of use, the level at which that activity did or could occur without giving rise to a change of use has to be ascertained. It is only what happens above that no doubt not very clearly defined baseline which can contribute to the material change of use. In so far as the change in effect is relied on, the change in effect must exceed that which could be caused by the permitted use.

37. I do not doubt that a combination of intensification and other changes in activities can constitute a material change in use; but what could be done without the need for permission would still have to be ascertained. That is how the Inspector approached it. Gas bottle explosions for example would have occurred anyway, as would the use of container lorries and the unsociable hours of the arrival of HGVs outside the site as part of the permitted use. They were not, or largely not, related to the increase in throughput, and so rightly were or largely were excluded from consideration. So even if effects could prove that a material change of use had occurred, they had to be effects generated by activities beyond those which did not require planning permission.

38. Mr Anthony Dinkin QC, for Metal and Waste Recycling Ltd, submitted, in support of the Inspector's conclusions, that in effect there had been a degree of intensification falling short of that which could show a material change of use; a material change of use by intensification could not be shown simply by reason of increased impacts, however grave. He pointed out that the County Council had accepted that the degree of increase by itself did not show that there had been a material change of use, and that its argument as to impact on and off-site was the crucial determinant for its argument. The on-site primary or generic use as a scrapyard was unchanged, as the Council had accepted, and there had been no change in the nature or type of activities undertaken on the site. Mr Dinkin rightly points out that the Inspector so concluded at para.67 of the decision.

39. Mr Reed submitted that a material change of use by intensification could be shown by the effect of on or off-site impacts alone. That had happened here, and was why all impacts had to be considered.

40. Although the concept of a material change of use can be expressed clearly enough as a concept, it is elusive in practice, perhaps even illusory. But one point is clear from all the authorities, and the Inspector expresses it correctly in para.68 of her decision, as I set out above: the change relied on has to result in a material change of the use of the land, and it can only do that by bringing about a definable change in the character of the use made of the land.

41. I have no difficulty in seeing that significant environmental effects, experienced on or off-site, may support the contention that a material change of use of land by intensification has occurred. There are plenty of authorities to that effect. But I do not see how effects, whether on or off-site, can themselves

constitute a material change in the use of the land. The concept focuses on the use made of a particular piece of land. I do not see how an increase in lorries, for example, arriving in the road at unsocial hours, or creating problems at a junction a mile away, or an increase in noise or dust experienced off-site from activities on-site, is capable of itself or themselves, whatever the degree of increase, of constituting a material change of use on a particular site. It may be very relevant to the argument that there has been a material change in the character and use of land. For example, a specialist gas bottle disposal facility might be treated as a materially different use from a general scrapyard because of its noise impacts. But of itself, an increase in noise impact, however severe, cannot be a material change in the use of the land.

42. The relevance of impacts comes in evidencing a material change of use of the land, a definable change in its character, but one which is defined by a material change in use, not by a change however severe or minimal, in the effects of a use.

43. I add these words of caution about attempting to broaden material change of use by intensification as a substitute for proper conditions on planning permissions. Although authorities, in the Court of Appeal for example in *Fidler v First Secretary of State* [2004] EWCA Civ 1295 at [28], and earlier in, for example, *Lilo Blum v Secretary of State for the Environment* [1987] J.P.L. 278 per Simon Brown J., treat the principle of a material change of use by intensification as well established, the fact remains that no decided case has been shown to me in which a material change of use by intensification has been found to have occurred.

44. In *Brooks and Burton Ltd v Secretary of State for the Environment* [1977] 1 W.L.R. 1294, Megaw L.J. pointed out at 1306E-J that experienced planning counsel had found no reported case in which an intensification in existing use had been found to be a material change of use. That remained the position in front of me. Although earlier cases, mentioned in the authorities cited above say that the existence of a material change in use by intensification is well recognised, they do no more themselves than recognise that material change of use by intensification may exist. They have never actually found one.

45. This reflects what Sullivan J. said in *R. (on the application of Tapp) v Thanet DC* (2001) 81 P. & C.R. 37 at [54]:

"It is easy to state the principle that intensification may be of such a degree or on such a scale as to make a material change in the character of a use, it is far more difficult to apply it in practice. There are very few cases of 'mere intensification'. Usually the increase in activity will have led to some other change: from hobby to business, from part to full-time employment, or an increase in one use at the expense of other uses in a previously mixed use."

46. The precise description of the existing and changed uses is important. Mere generic descriptions may not always be sufficiently precise to reflect material planning differences. The statutory overlay, for example in relation to generic residential and industrial uses, may now qualify what might have been the role which the concept of intensification may have been thought able to play many years ago. But for all that, the cases have all emphasised the need to identify a material change in the definable character of the use of the land. None of them has suggested that this could be done simply by reference to examining impacts alone, relevant though they are to that crucial issue in a material change of use by intensification case.

47. Accordingly, I reject Mr Reed's submission that the Inspector ought to have examined impact alone. She had to examine something else as the starting point for her examination, however much the impacts might have been evidentially relevant.

Enforcement Notice B

48. Mr Reed contended that the fragmentiser constituted operational development for which planning permission was required. The Inspector concluded that it was development permitted under class B(a) in Pt A to Sch.2 to the GPDO 1995. This permits, subject to immaterial exceptions, development consisting of the installation of replacement plant to be carried out on industrial land for the purposes of an industrial

process. "Industrial land" means land used for carrying out an industrial process. "Industrial process" is defined in art.1(2) as a process for or incidental to "(b) the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article". On the face of it, that is applicable here to the fragmentiser, as the Inspector found, and so the fragmentiser was permitted development.

49. Mr Reed repeats here the argument which failed before the Inspector. He points out that the Town and Country Planning (Use Classes) Order 1987 (SI 1987/764), it adopts materially the same definition of "industrial process". The Use Classes Order treats changes of use within the defined use classes as immaterial, including changes within Class B1, light industrial, and within class B2, general industrial. The definition of "industrial process" applies to both of those classes.

50. However, a scrapyard use is explicitly excluded from all schedule classes, including class B1 and class B2 into which it would potentially fall. So a general industrial site cannot become a scrapyard without planning permission. It is illogical then, contends Mr Reed, if a scrapyard is treated as industrial land, or a place where an industrial process is carried on so that it has permitted development rights, but land in a general industrial use cannot change to a scrapyard use without specific planning permission. The same exclusion from the definition of the scope of the Use Classes Order should apply to permitted development so that scrapyards do not have permitted development rights.

51. I cannot accept that argument. First, Parliament has not put into the 1995 order the exclusion which it put into the 1987 order. That must have been a continuing conscious decision. No basis has been shown for interpreting that later instrument as impliedly incorporating the omitted exclusion—and it must have been deliberately omitted, even if there is no obvious reason for that, according to Mr Reed.

52. Secondly, there is, in my judgment, a real and obvious difference between treating a change of use from general industrial land to use as a scrapyard as material so that a new scrapyard needs permission, and giving permitted development rights to those scrapyards which already exist. That is what happened here. I accordingly reject Mr Reed's submission on that point, as did the Inspector.

53. It is not necessary to deal with his arguments on whether the scrapyard is a lawful use in the light of the conclusions I have reached in relation to Enforcement Notice A. Accordingly, this appeal is dismissed.

Commentary by Martin Edwards.

Comment. This case has already been featured in Current Topics at [2012] JPL 522 ("Development by Intensification: The Latest Explanation") where the point is made that the judgment of Ouseley J., one of the most knowledgeable and experienced of planning judges, contains an important passage, admittedly obiter, on the illusory concept of material change of use by intensification. As it is not uncommon for local planning authorities to allege in enforcement notices that a material change of use by intensification has taken place it can only be a matter of time before the courts are called upon to pronounce directly on this. It will be interesting to see what approach is taken given that, as the facts of this case demonstrate, it is easier to allege intensification than it is to identify what its planning consequences are and why, if at all, it can be said that those consequences lead to a material change of use. Anyone faced with appealing an enforcement notice in such circumstances could do no better than to refer to this decision.

St Vincent Housing Assoc v Secretary of State for Communities and Local Government
(Queen's Bench Division, Administrative Court, H. H. Judge Shaun Spencer QC November 3, 2011)
[2011] EWHC 3339 (Admin)

Mr Hardy (Eversheds Solicitors) for the claimant.