

**RE: BATA, THE MILL, MAIN STREET,
AMOTHERBY, MALTON, NORTH YORKSHIRE, YO17 6TT**

OPINION

Introduction

1. I am asked to advise Ryedale District Council (“the Council”) in relation to BATA who operate a mill at the Mill, Main Street, Amotherby, Malton North, Yorkshire, YO17 6TT (“the Land”). An application has been received for:

“Erection of extension to existing feed bins to allow installation of additional 12no. bulk outloading bins for animal feed storage, together with integral weighbridge” (“the Application”)

2. In response to the Application a number of representations, most notably from the Parish Council, have been made which allege there has been a change of use at the Land as a result of intensification.
3. The matter has been considered by officers and in the draft report which considers the Application (“the OR”) the conclusion is reached that there has not been a material change of use.
4. I am asked to review the available material and advise on the correct approach that should be taken when considering the question of intensification.

Legal Framework

5. By virtue of s.55 of the Town and Country Planning Act 1990 (“the 1990 Act”) any material change of use of land will constitute development. The concept of a material change of use by intensification does not appear in the 1990 Act, it is instead a judicial concept. It is right

to note at the outset that whilst the concept of intensification is well established in law it is not something that is encountered regularly in practice.

6. Intensification of a use of land is capable of amounting to a material change of use where it results in a change in the character in the use of land. The principle is summarised by Simon Brown J in Lilo Blum v Secretary of State and Anr [1987] JPL 278:

“It was well recognised law that the issue whether or not there had been a material change in use fell to be considered by reference to the character of the use of the land. It was equally well recognised that intensification was capable of being of such a nature and degree as itself to affect the definable character of the land and its use and thus give rise to a material change of use. Mere intensification, if it fell short of changing the character of the use, would not constitute material change of use.”

7. In Brooks and Burton Ltd v Secretary of State for the Environment [1977] 1 W.L.R. 1294 the court considered the interaction between intensification and permitted development rights. The court found that where there was intensification but the use remained within the same use class which was the permitted use of the land then that would be permissible.
8. The decision of the Court of Appeal in Hertfordshire County Council v The Secretary of State for Communities and Local Government, Metal and Waste Recycling Limited [2012] EWCA Civ. 1473 provides a useful practical illustration of the considerations that are relevant to intensification. That concerned a challenge to the decision on an enforcement appeal where the enforcement notice alleged: *“without planning permission the material change of use of the land from a scrap-metal yard with an average yearly material throughput of 74,500 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 181,000 tonnes, the totality of the new use having a different nature and character from the former use.”* The reasons for issuing the Notice included: *“While the land benefits from an extant planning permission, issued by North Herts Districts Council in 1972, for use as a scrap metal-yard, since 2004 the level of operations on the land has increased substantially.”*
9. The Inspector concluded that there had not been a material change of use and allowed the appeal against the notice on ground (c). The Inspector framed the question she had to

consider as follows:

“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 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.”

She ultimately concluded:

“I concur with [M and WR'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).”

10. The Council's challenge to the legality of that decision failed in the High Court and again in the Court of Appeal. The Court of Appeal found that this was an entirely lawful conclusion for the Inspector to reach:

“The increase in tonnage was very substantial but, the test being as to whether the character of the use had changed, the Inspector was entitled to conclude that it had not. On a

consideration of the increase in throughput simpliciter, the Notices failed. The premises were used as a scrap yard, albeit on a larger scale.”

11. The Court of Appeal gave me some useful guidance on how of site impacts are to be considered when considering intensification:

“25... In assessing whether there is a change of character in the use, its impact of the use on other premises is a relevant factor. It is necessary, on the particular facts, to consider both what is happening on the land and its impact off the land when deciding whether the character of the use has changed.

26. When the judge said, at paragraph 41, that: “of itself, an increase in noise impact, however severe, cannot be a material change in the use of the land,” he was, in my view, saying no more than that impact cannot be considered in isolation from what is happening on the land.”

Discussion

12. The starting point for considering whether there has been a material change of use of the Land is to determine what its extant lawful use is. The Land has a lengthy planning history which has been set out in the OR. I have been provided with further explanatory comments on this history from officers. Given the length of the planning history and the nature of the applications that have been made there is not a perfect overlap to all of the permissions that relate to the Land.
13. However, there is no suggestion in my instructions that there is any part of the Land that does not benefit from a lawful use as an industrial use class. Nor is there any suggestion in any of the material I have seen that the use of the Land has changed in any manner other than possibly by way of intensification. If that is correct then there can be no issue of intensification amounting to a change of use on those parts of the Land where the extant permissions relate to a particular use class. In accordance with *Brooks and Burton Ltd* then any intensification would not amount to a material change of use capable of being enforced against if the end use remained within the same use class.

14. If it is the case that the lawful use of the Land as a whole is some form of mixed use or a narrower lawful use than a particular use class then a comparative exercise needs to be undertaken to determine whether there has been a change of use by intensification. In that scenario, and in any event, the Officer Report's conclusion that there has been no change of use by intensification is in my opinion entirely legally sound. The Officers have considered the additional material that has been produced by BATA in connection with the Application and reached a planning judgment that the level of operation on the Land has not resulted in a material change of use. That judgment has been carried out in line with the legal principles I have outlined above and is entirely sound.

Other Matters

15. The OR draws attention to the Council's powers under the Environmental Protection Act 1990. I agree with the observations made there that the existence of planning permission is not a complete defence to a statutory nuisance. The Council have enforcement powers available under regimes beyond the planning framework to take enforcement action against harms that may arise as a result of increased activity at the Land.

16. Furthermore, if there are any breaches of the extant conditions attached to the planning permissions which relate to the Land then the Council could seek to enforce against them.

Conclusion

17. It follows, that in my opinion, the conclusion in the OR that there has been no intensification is legally sound. As a matter of law, even if there has been intensification, but the new use remains in the same use class as the permitted use class of the Land then that would be permissible.

18. If those instructing wish to discuss anything arising from this Opinion they should not hesitate to contact me.

FREDDIE HUMPHREYS

6th July 2021

Kings Chambers

Manchester – Leeds – Birmingham