Appendix 17

Westminster City Council v Secretary of State for Communities and Local Government [2015] EWCA Civ 482, [2015] JPL 1276

Westminster City Council v Secretary of State for Communities and Local Government, Oriol Badia v Property Investment (Developments) Limited

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
19 May 2015

Case No: C1/2014/1522

Court of Appeal (Civil Division)

[2015] EWCA Civ 482, 2015 WL 2238758

Before: Lord Justice Longmore Lord Justice Richards and Lady Justice Gloster

Date: Friday 19th May 2015

On Appeal from the High Court of Justice Administrative Court

Mr Justice Supperstone

[2014] EWHC 1248 (Admin)

Hearing date: 29 April 2015

Representation

Saira Kabir Sheikh QC and Isabella Tafur (instructed by Westminster City Council Legal Department) for the Appellant.
Cain Ormondroyd (instructed by The Government Legal Service) for the First Respondent.
Alex Goodman (instructed by Oriol Badia) for the Second Respondent.
Richard Turney (instructed by Public Access Scheme) for the Interested Party, which submitted written representations but did not appear at the hearing of the appeal.

Judgment

Lord Justice Richards:

1. This appeal relates to a planning enforcement notice issued by Westminster City Council in respect of premises at 100-102 Westbourne Terrace, London W2. The breach of planning control alleged in the notice was:

> "Within the last 10 years and without the benefit of planning permission, the material change of use of the Property, from a hotel (class C1) to a mixed use hotel and hostel (sui generis)."

The lessee of the premises, Equity Point Holdings Ltd, through its chief executive, Mr Oriol Badia, appealed under section 174 of the Town and Country Planning Act ("the 1990 Act") against the enforcement notice. By a decision dated 13 January 2013, an inspector appointed by the Secretary of State allowed the appeal under ground (b), namely that the matters alleged in the notice had not occurred, and under ground (c), namely that those matters (if they occurred) did not constitute a breach of planning control. The council then appealed to the High Court under section 289 of the 1990 Act against the inspector's decision. The council's appeal was dismissed by Supperstone J, against whose order the council now brings a further appeal to this court, with permission granted by Laws LJ.

2. At the hearing of the appeal, the council was represented by Ms Saira Kabir Sheikh QC, the Secretary of State by Mr Cain Ormondroyd, and Equity Point by Mr Alex Goodman. The freehold owner of the premises, Property Investment (Developments) Limited, limited itself to written representations in the form of a skeleton argument settled by Mr Richard Turney.

The legal framework

3. It is common ground that the lawful use of the premises was as a hotel falling within class C1, as defined in The Town and Country Planning (Use Classes) Order 1987 , and that there were no planning conditions limiting such use. This means that the premises can be used for any purpose *within* class C1 without a requirement for planning permission, whereas a material change of use to a use falling *outside* class C1 does require planning permission. That is the effect of sections 55 and 57 of the 1990 Act, together with the provisions of the Use Classes Order itself. Thus, article 3(1) of the Order provides:

> "Subject to the provisions of this Order, where a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or that other land for any other purpose of the same class shall not be taken to involve development of the land."

4. At the material time class C1, as specified in the schedule to the Order, comprised "Use as a hotel or as a boarding or guest house where, in each case, no significant element of care is provided". Use as a hostel was formerly included within the class but was taken out of it in 1994 because "it was considered by the then Minister of Planning and Local Government that there was a real threat to the amenity of tourist areas from the establishment of hostels, which had been attracting large numbers of benefit claimants, in traditional hotel areas" (paragraph 8 of the inspector's decision). Article 3(6)(i) of the Order makes clear that *no* class specified in the schedule to the Order now includes use as a hostel. A use falling outside the classes specified is referred to as a *sui generis* use.

5. The distinction between hotel use and hostel use is a fine one. Guidance was given in Circular 03/2005, *Changes of Use of Buildings and Land* , issued by the Office of the Deputy Prime Minister. The circular was in place at the time material to this case but has since been revoked. The guidance it gave was not challenged before us but can be seen to have been expressed in cautious terms:

> **"Class C1: Hotels**
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> 59. The C1: *Hotels* use class remains unchanged from the original 1987 Order (as amended by *SI 1994/724* which removed hostels from this classification). The C1: *Hotels* class includes not only hotels, but also motels, bed and breakfast premises, boarding and guest houses. These are premises

which provide a room as temporary accommodation on a commercial, fee-paying basis, where meals can be provided but where residential care is not provided ….

Hostels

60. Hostels were excluded from the Use Classes Order in 1994 … and are therefore *sui generis* .

61. There is no definition of 'hostel' within planning law. A hostel usually provides overnight or short-term accommodation which may be supervised, where people (including sometimes the homeless) can usually stay free or cheaply. Hostels may provide board, although some may provide facilities for self-catering. The element of supervision should not be relied upon as a determining factor but as a factor to take into account in consideration of the use class of the premises ….

62. The question of whether a premises is a hostel or another use is a matter of judgement to be determined on a fact and degree basis. In 1985, in the High Court judgment in the case of Panayi v Secretary of State for the Environment and Hackney LBC [(1985) 50 P&CR 109] …, it was argued that the presence and use of some of the features below combined were sufficient to distinguish the use of the premises as that of a hostel:

• The presence of dormitories and/or communal or shared facilities.

• The use of the premises in accommodating specific categories of people, e.g., the young, or the homeless.

• Whether the premises are serviced and/or supervised.

• Whether payment is made by the local authority.

• Whether payment is on a nightly basis.

• Whether the residents are transient in the sense that they are 'placed' in the accommodation whilst awaiting accommodation elsewhere.

• The requirements of fire or safety certificates indicating the type of usage.

• The display of such notices or other indicators which may indicate the type of usage: e.g., fire certificates, public fire notices of use for staff and guests."

6. In Panayi , to which the circular refers, account was taken of an earlier decision of the High Court in *Commercial and Residential Property Development Company Limited v Secretary of State for the Environment [1982] JPL 513* , in which Glidewell J said this about a "hostel" for the purposes of town and country planning:

"… [In] modern English usage, it meant a building in which people either lived or stayed which provided communal facilities. The sleeping accommodation was often, although not by any means

> always, in dormitories rather than single rooms and provided shared cooking, eating and recreational facilities. It was of the essence of a hostel that its accommodation was relatively basic and inexpensive, but in any sense the word was not a term of art in relation to the duration of the stay. It embraced institutions – if that was a correct categorisation – which covered the whole range from long-term accommodation, as for instance a students' hostel or a nurses' hostel where one normally would have expected that people were staying at least for a term, often for a year at a time or more, to, for instance, a youth hostel which by definition was occupied by transients – people who were staying for a day or two at the most.
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> …[A] hostel used as transient accommodation had many of the characteristics of a hotel, people coming and going, people booking in and checking out, people arriving and leaving."

7. In this case we are concerned with an allegation of *mixed* hotel and hostel use within a single planning unit. If a hostel use were merely incidental or ancillary to a hotel use, it would be treated as the hotel use and would be within class C1. But there is no suggestion of that in this case. The allegation in the enforcement notice, of a mixed use of the premises as hotel and hostel, was an allegation of two separate primary uses. A mixed hotel and hostel use of that kind falls outside class C1 and is *sui generis* .

8. The inspector rejected a contention by Equity Point that the mixed use alleged was unknown to planning law and could not exist. She said that "[in] certain circumstances and depending on the particular facts, part of a building could have a hotel use and part a hostel use, comprising a mixed use as alleged in the notice" (paragraph 6 of her decision). One of the issues in the appeal, as explained later in this judgment, is whether she was focusing mistakenly on the question of exclusive hotel use in one part of the building and exclusive hostel use in another part. So far as the relevant principles are concerned, however, Mr Ormondroyd accepted on behalf of the Secretary of State that a mixed use can subsist where the different elements are *not* associated with particular parts of the premises. In Wipperman v Barking London Borough Council (1966) 17 P&CR 225 , at page 229, Widgery J referred to a "composite" use of land, consisting of use for car-breaking and use for storage, and observed that "it really matters not whether anyone visiting the land at that time could have pointed to one corner which was used for car-breaking and another which was used for storage, or whether in fact the two activities were so mingled together that they occupied the entirety of the site". Intermittent or seasonal use for different purposes may also amount to a mixed use: *Webber v Minister of Housing and Local Government [1968] 1 WLR 29* .

9. A change of use from hotel use to a mixed hotel and hostel use will require planning permission only if it is a *material* change of use. The relevant test for determining whether there has been a material change of use is considered below in the context of the second issue in the appeal.

The issues in the appeal to this court

10. Given the terms of the enforcement notice, grounds (b) and (c) of Equity Point's appeal under section 174 each gave rise to the same two issues: (1) whether Equity Point's use of the premises was, as a matter of fact, a mixed hotel and hostel use as alleged; and (2) if so, whether this amounted to a *material* change of use.

11. The inspector gave a negative answer to both issues: she was not persuaded that there was, as a matter of fact, a mixed hotel and hostel use, and she held that even if there was a mixed use it did not amount to a material change of use.

12. On the appeal under section 289 , the council challenged each of those findings on the basis of error of law. The challenge was dismissed by Supperstone J but is renewed before this court.

The inspector's decision

13. The inspector dealt with grounds (b) and (c) together. She referred to materials on the meaning of "hotel" and "hostel" and then proceeded to examine in turn each of the factors in Panayi .

14. First, as to the presence of dormitories and/or communal or shared facilities, she found that 5 of the 68 rooms were two-person rooms, 8 were three-person rooms, 23 were four-person rooms, 22 were six-person rooms and 10 were eight-person rooms. The rooms for four, six and eight persons had bunk beds. She continued:

> "14. A dormitory is defined as a sleeping room with several beds, especially in a school or institution On this basis it appears that any room with more than two beds can be a dormitory and given that the majority of the rooms contain bunk beds and can be occupied by 4, 6 or 8 people I take the view that they are dormitories. Therefore 55 of the 68 rooms at the premises can be said to be dormitories.
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> 15. Each room has a shower/bathroom that is shared by the occupants. This means that in the dormitories washing and w.c. facilities are shared by between 4 and 8 people depending on the size of the room and the number of people occupying it. As a matter of fact these facilities are therefore shared.
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> …
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> 17. … There have been and may still therefore be communal laundry and cooking facilities. There is also a common room in the basement and an internal courtyard where occupiers can gather and socialise, albeit within specified times."

15. Secondly, as to the use of the premises in accommodating specific categories of people, she found that the "the majority of people who stay at the premises can be described as 'young'" (paragraph 19). She referred to evidence that "the hotel attracts predominantly young people who are travelling alone or in groups, groups of students, musicians, church groups and very occasionally school groups use the facility".

16. Thirdly, as to servicing and supervision of the premises, she found that some services, including cleaning of the rooms and common parts, were provided; bed linen was provided but there was some evidence that guests had to make up their own beds, and some occupiers had had to provide their own towels or hire them. Continental breakfast was provided. There was a café that sold coffee and soft drinks but there was no bar. There was wi-fi that occupants had to pay for. Computers and tourist information were available. Further:

> "22. The premises are supervised to some extent because there is a doorman, staff patrol at night and the groups of young people have adults with them. There have been a large number of complaints made by nearby residents about noise and disturbance and the Appellant has produced a number of management procedures relating to patrolling the premises during the night, groups, coach arrivals, the doorman and servicing.

> 23 There are a vast number of signs telling occupiers what they can and cannot do, particularly with regard to times they can use the common areas and telling them not to make a noise ….”

17. Fourthly, payment was not made by the local authority.

18. Fifthly, payment was on a nightly basis. The beds in the four-person, six-person and eight-person dormitories could be booked “by the bed”, with the probability that the person who booked it would have to share with someone he or she did not know. The evidence was that these “by the bed” bookings were “infill” for when the dormitories were not taken by groups and they made up about 13% of the people who stayed there.

19. Sixthly, residents were not transient in the sense of being placed in the accommodation while awaiting accommodation elsewhere.

20. Seventhly, the fire-risk assessment described the premises as a hotel but had been carried out before Equity Point's business commenced. The inspector therefore gave very little weight to the document.

21. Eighthly, she referred to what she had said about the display of notices “which may indicate the type of use”.

22. Having engaged in that methodical examination of the factors in Panayi , the inspector continued:

> “29. On the basis of these characteristics and the evidence it seems to me that there are some elements of a hostel use. However, given the manner in which the premises are used, no part of the premises is exclusively used as a hostel and no part is exclusively used as a hotel because the same rooms can be used for both purposes. Indeed on occasions, depending on bookings, any hostel-type use may be minimal compared to the hotel use and vice versa. I am therefore not persuaded that as a matter of fact there is a mixed use of the premises as alleged. But even if there is a mixed use I have to consider whether it results in a breach of planning control, that is, whether there has been a material change in the use of the premises.”

23. The paragraphs that followed appeared to be directed towards the question whether there had been a material change in the use of the premises (though I will refer later to an argument that the inspector was still addressing, at least in part, the question whether there was a mixed use as a matter of fact). The inspector stated:

> “30. As I have said above, there is a fine line between a hotel and a hostel use and it seems to me that there are features described above that could distinguish a hostel use such as dormitories, bunk

beds, guest laundries and kitchens, but those features could also be found in hotels …, particularly budget hotels which was how Mr Badia described the use of the whole of the premises.

31. All the occupants of the premises, whether in the dormitories or the private rooms, have access to the common room, the courtyard and other common parts of the premises; all occupants have to check-in and check-out; there is a receptionist; breakfast is provided; rooms are cleaned; there is a luggage room. Whether they stay in a private room or a dormitory, the occupants stay on a temporary commercial fee paying basis, predominantly for tourist purposes.

32. … I found the evidence relating to the booking system to be extremely confusing and confused ….

33. But if one person books a dormitory for eight people, or eight individual people book beds in that dormitory, it seems to me that there would be no difference in the character of the use. Each person would be an occupant of the premises; he/she would use the same facilities; and he/she would be staying there on the same basis as the others, probably as a tourist.

34. … The premises are marketed as budget accommodation and as such they attract people who are seeking that type of accommodation which could include students who travel in groups, families on a budget and backpackers.

35. Mr Gareh, the freehold owner of the appeal site, provided evidence that the hotel operated under different managements from about 1966 until its closure in 1993. The hotel had 70 rooms and it had occupancies in excess of 300 guests over the summer and on special occasions such as Christmas and the 1966 World Cup. The hotel specialised in group bookings and family accommodation and made ‘extensive use of z-beds or sliding beds to provide extra bed spaces and we moved these around the rooms according to demand’. Before it closed the hotel was run by Starcrown Hotels and their brochure advertised ‘70 large bedrooms … they range from singles through doubles to the most original luxurious split level suites' and the brochure goes onto describe facilities such as colour televisions and telephones in all rooms, a lounge, a restaurant and a bar.

36. The current facilities are different from those in the past in that the accommodation is basic, the private rooms and dormitories and sparsely furnished and the decoration is minimal. There is, however, a vast range of service and accommodation that falls within the Class C1 use from such places as Claridges to a motel in a service station on a motorway and I find that the premises provide ‘temporary accommodation on a commercial fee paying basis'.

…

38. Although the category of the people who stay at the premises may have changed and their numbers may have increased from when the hotel was previously in operation, as a matter of fact and degree I consider that the current use of the premises has not altered the character of the use to such an extent so as to amount to a material change of use for which planning permission is required ….”

The judgment of Supperstone J

24. I think it unnecessary to summarise the judgment of Supperstone J. The council's case before us was largely a re-run of the case rejected by the judge, and it will suffice to set out and consider the submissions made to this court, with occasional brief reference to the way points were made to, or dealt with by, the judge.

The first issue: Mixed hotel and hostel use?

25. Ms Sheikh's submissions on behalf of the council focus on paragraph 29 of the inspector's decision. At the start of that paragraph the inspector referred to the "characteristics" of use of the premises as found by her in the preceding paragraphs by reference to the factors in Panayi . Nobody takes issue with those findings. On the basis of them, the inspector accepted in paragraph 29 that there were "some elements of a hostel use". She also accepted that the same rooms could be used for hostel purposes and for hotel purposes. She found that on occasions any hostel-type use might be minimal compared to the hotel use "and vice versa", which in Ms Sheikh's submission entails a finding that on occasions any hotel use might be minimal compared to the hostel-type use. It is submitted that those findings could lead to only one rational conclusion, namely that there was a mixed hotel and hostel use as alleged in the enforcement notice. Yet the inspector declined to make such a finding. The reason she gave for doing so was that "no part of the premises is exclusively used as a hostel and no part is exclusively used as a hotel". There is, however, no legal basis for the application of an "exclusive use" test in determining whether a single planning unit is in a mixed use. The inspector's rejection of a mixed use on the basis of such a test was a straightforward legal error.

26. Supperstone J rejected Ms Sheikh's submissions on this issue, holding that the council's case amounted to no more than a disagreement with the inspector's conclusions on a question of fact and that the inspector was entitled to make the findings she did.

27. I take a different view of the case. I have no doubt that the question the inspector asked herself was whether part of the premises was in exclusive use as a hostel and part was in exclusive use as a hotel. That is clear from the language of paragraph 29 itself. It is also supported by the last sentence of paragraph 6, where, in rejecting Equity Point's submission that a mixed hotel and hostel use was unknown to planning law, she said that "part of a building could have a hotel use and part a hostel use, comprising a mixed use as alleged in the notice"; and by the statement in paragraph 11 that "whether a premises (or in this case part of the premises) is a hostel is a matter of judgment". On the face of it, it was an error of law to address the matter by reference to whether part of the premises was in exclusive use as a hotel and part in exclusive use as a hostel. As I have said, it is accepted on behalf of the Secretary of State that a mixed use can subsist where the different elements are not associated with particular parts of the premises.

28. Mr Ormondroyd submitted, however, that the inspector dealt with the matter in the way she did because she reasonably understood the case advanced by the council as being that part of the premises was used as a hotel and part as a hostel. In his skeleton argument he argued that the council sought to associate the hostel use with the 55 rooms containing four or more beds which could be booked by the bed, and the hotel use with the two-bed and three-bed rooms which could be booked by the room. In his oral submissions he advanced a modified argument, that the council's case on mixed use was unclear and confusing, in particular that it was not clear how the two separate uses alleged were to be distinguished if it was not on the basis of separate areas or times, and that the inspector did her best with the case and cannot properly be criticised if she misunderstood it.

29. I think it unnecessary to detail the passages in the evidence and written submissions before the inspector that were relied on by Mr Ormondroyd in support of these arguments or by Ms Sheikh in her written and oral response to the arguments. It suffices to say that, having considered those passages, I am satisfied that the council was *not* advancing a case to the inspector that part of the premises was in exclusive use as a hotel and part was in exclusive use as a hostel. It is true that the council was pointing to the way the dormitories were used as showing hostel use, and to the use of the two-person and three-person rooms as showing hotel use, but its case was that, taking all the relevant factors together, there was a composite or mixed hotel and hostel use of the premises *as a whole* . Nor was the case so lacking in clarity or so confused as to justify the inspector in thinking that it was a case about exclusive use of parts of the premises for hotel and hostel purposes respectively. The inspector misled herself in treating it as such. (The way the council's case was presented to Supperstone J may not have brought this matter out as clearly as it was brought out in the submissions to us, but I think it right to concentrate on the way the case is now put by reference to the material that was before the inspector.)

30. If the inspector had not fallen into that error, it is difficult to see how, in the light of her findings of fact, she could reasonably have reached any conclusion other than that there was a mixed hotel and hostel use as alleged. I acknowledge that the question whether a mixed use exists is one of planning judgment, based on the facts as a whole, that Panayi does not provide a definitive checklist of relevant factors and that the existence of some such factors pointing in the direction of hostel use is not necessarily determinative. But it seems to me that the first three, in particular, of the factors identified by the inspector pointed strongly towards a finding of mixed hotel and hostel use. Moreover, I accept Ms Sheikh's submission that the inspector found as a fact that on occasions hostel-type use might be minimal as compared with hotel use (the "vice versa"

point), which again pointed strongly towards a finding of mixed use. I do not think that anything turns for this purpose on the inspector's reference to "hostel-type use" rather than to "hostel use".

31. Both Mr Ormondroyd and Mr Goodman sought to rely on paragraphs 30-38 of the decision as supporting the inspector's rejection of mixed hotel and hostel use. For example, in paragraph 30 the inspector said that there were features described earlier in the decision which "could distinguish a hostel use" but that such features "could also be found in hotels"; and in paragraph 31 she said that all the occupants of the premises, whether in the dormitories or the private rooms, had access to common parts, had the same services available to them and "stay on a temporary commercial fee paying basis, predominantly for tourist purposes". She came back to that last point in paragraph 36, when referring to the vast range of service and accommodation that falls within class C1 hotel use. This picked up the observation at paragraph 9 of the decision that "the basic feature of a hotel … is that it contains a transient population because it is there to serve people travelling who require short stays only". Counsel submitted that what the inspector was saying was that, although the features described by her "could distinguish a hostel use", they were also characteristics of some types of hotel use, and that this formed part of her reasons for rejecting the council's case that there was mixed use as a matter of fact.

32. I cannot accept those submissions. Paragraph 29 of the decision sets out the inspector's rejection of the case that there was mixed use as a matter of fact, together with the reasons for that rejection ("I am therefore not persuaded …"). It ends with the statement that "even if there is a mixed use I have to consider … whether there has been a material change in the use of the premises". It is clear that the following paragraphs are directed to the question whether, if there is a mixed use, it amounts to a material change of use. They cannot sensibly be read as containing reasons why, as a matter of fact, there is no mixed use. They may have been potentially relevant to that issue but they were not part of the inspector's actual reasoning on it. In reaching that conclusion, I have made full allowance for the need to read decisions of this kind benevolently and as a whole.

33. On the first issue in the appeal, therefore, I accept Ms Sheikh's submission that the inspector's rejection of a mixed use was legally flawed.

The second issue: "material" change of use?

34. It is common ground that the test to be addressed in deciding whether there has been a material change of use is whether there has been a change in the character of the use: see, for example, *Hertfordshire County Council v Secretary of State for Communities and Local Government [2012] EWCA Civ 1473, [2013] JPL 560* , at [9] and [11].

35. In assessing whether there was a material change of use, the inspector took into account both the actual previous use of the premises as a hotel (see paragraph 35 of the decision) and the range of permitted uses within class C1 (see, for example, paragraphs 30 and 36) in making a comparison with the present use. There was some discussion at the hearing before us as to what the correct comparator should be. But there is no ground of appeal going to that point and I do not think that any decision on it is called for. I will proceed on the basis that in considering this issue the inspector was entitled to have regard to all the matters to which she did have regard.

36. The one ground of appeal on this issue is that in considering whether there had been a change in the character of the use, the inspector *failed* to have regard to a relevant matter, namely the off-site effects of the current use on residential amenity.

37. In Forest of Dean District Council v Secretary of State for the Environment [1995] JPL 937 one of the questions was whether the change of use of a site from use for holiday caravans to use of caravans as permanent homes was a material change of use. Mr David Widdicombe QC, sitting as a deputy High Court Judge, accepted a submission that the off-site effects of a use, such as traffic generation, were relevant to the question whether a change of use was material, observing *inter alia* that it "made a nonsense of planning if the effects of a use on neighbouring land had to be ignored" (page 943). The Hertfordshire County Council case referred to at [35] above concerned a change of use in the form of intensification of an existing use, but the observations of Pill LJ (with whom the other members of the court agreed) on the relevance of off-site effects seem to me to be of general applicability:

> "25. … M and WR rightly accept that it is permissible to consider off-site effects when assessing whether [a material change of use] has been established. 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."

38. In the present case, concerns about the off-site impacts of the current use on the amenity of local residents, particularly from noise and disturbance, permeated the council's evidence before the inspector. The proof of evidence of Ms Westley, an officer in the council's planning enforcement team, recited a history of complaints since the alleged change of use had occurred. The inspector referred to this evidence when going through the Panayi factors, specifically in relation to the issue of supervision: see paragraph 22 of her decision, quoted at [16] above. She did not mention it, however, when considering whether there had been a material change of use. Ms Sheikh's submission is that the inspector needed to deal with it in that context. The council's case as to the materiality of the change of use was based on the off-site impacts, whereas Equity Point was arguing that off-site impacts were irrelevant. The inspector failed to have regard to it as a material consideration; alternatively, her reasoning was inadequate in failing to address it as a principal controversial issue.

39. Mr Ormondroyd accepted that off-site impacts are to be taken into account in determining whether there has been a material change of use but he submitted that this falls within the overall test of whether or not there has been a change in the character of the use. eHIn his submission, the inspector applied that test, reaching the conclusion at paragraph 38 that the character of the use of the premises had not altered to such an extent as to amount to a material change of use. She was well aware of the alleged off-site impacts and of the factors said to have given rise to them, and she had the point in mind in reaching her conclusion. Her reasoning was not particularly full but was sufficient. The suggestion that off-site impacts were relevant to determining whether there had been a change in the character of use was not a principal controversial issue before her. The enforcement notice relied on the loss of residential amenity as the *result* of the alleged material change of use, not as a reason why the alleged change of use was material. In the council's evidence and submissions before the inspector, off-site impacts were a central part of the case on ground (a) (Equity Point's contention that planning permission should be granted), not on ground (c). It was therefore not necessary for the inspector to deal with the issue under ground (c) more fully than she did.

40. Mr Goodman made similar submissions to those of Mr Ormondroyd, save that he emphasised that in the passage quoted above from Pill LJ's judgment in the Hertfordshire County Council case, reference to off-site impacts was said to be "permissible", not mandatory, and that the necessity to consider them in that specific case arose "on the particular facts". Mr Turney, in his written submissions for the interested party, submitted that unless a change in the way the land is used can be identified, the question of off-site impacts simply does not arise, and that since in this case the inspector found no change in the way the premises were being used it was not necessary for her to consider the impacts of the use outside the premises.

41. I do not think that off-site impacts can be dismissed in this case as something that the inspector was merely permitted to consider but did not need to consider. I note that Pill LJ stated in the Hertfordshire County Council case not only that consideration of off-site effects is "permissible" but also that the impact of the use on other premises is "a relevant factor" in assessing whether there is a change in the character of the use; and I am satisfied that on the particular facts of the present case it was necessary for the inspector to consider it. It seems to me that the point was raised sufficiently clearly by the council as to require it to be dealt with when considering the materiality of the alleged change of use. Although it did not feature specifically in Ms Sheikh's written closing submissions to the inspector in respect of ground (c), I am prepared to accept what she told us to the effect that it was covered in oral submissions. In any event, the complaints about the effect on residential amenity, in particular through noise and disturbance, arising out of the use now being made of the premises were such an important part of the overall case being advanced by the council, in evidence and submissions, that in my view it was incumbent on the inspector to consider the point when assessing whether there had been a change in the character of the use.

42. There is nothing to show that the inspector did consider the off-site impacts in the relevant context. She had indeed mentioned the complaints about noise and disturbance when considering the Panayi factors in the course of her assessment of whether there was a mixed hotel and hostel use as a matter of fact. But she did not mention them at all when considering, at paragraphs 30-38 of the decision, whether, if there was a mixed hotel and hostel use, it involved a sufficient change to the character of the use to amount to a material change of use. Her focus in those paragraphs was on the position inside the premises, not on external effects. I do not accept that her statement in paragraph 38 that "the category of the people who stay at the premises may have changed and their numbers may have increased from when the hotel was previously in operation" included an elliptical reference to the off-site impacts of the change in category and numbers of people staying at the premises. And even if she was entitled to compare the current use both with the actual former use and with the range of permitted uses within class C1, she did not factor the question of off-site impacts into that comparison.

43. I therefore accept Ms Sheikh's submission that the inspector erred in law by failing in this respect to have regard to a material consideration. If that were wrong, then Ms Sheikh would in my view necessarily succeed on her alternative submission that the inspector's failure to explain how she dealt with the point was a serious inadequacy of reasoning.

Conclusion

44. For the reasons given, I would allow the appeal.

45. CPR Practice Direction 52D, paragraph 26.1(15) provides that where, on an appeal under section 289 of the 1990 Act, the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but will remit the matter to the Secretary of State for re-hearing and determination in accordance with the opinion of the court.

46. Mr Goodman sought to advance an argument that Equity Point's appeal against the enforcement notice under section 174 of the 1990 Act must necessarily succeed under ground (f) (that the steps required by the notice to be taken exceed what is necessary to remedy any breach of planning control which may be constituted by the matters alleged). This was because the steps that the council was seeking to require Equity Point to take, including the required reduction of the total number of bed spaces to a maximum of 150 and a requirement that no room should contain more than 4 beds, were inconsistent with its right to revert to unconditional hotel use within class C1. He submitted that if the court allowed the appeal, it would be futile to remit the case to the Secretary of State, alternatively that in remitting the case the court should make reference in its reasons to what he described as “the misconception at the heart of the enforcement notice”. This was not, however, an issue considered in the inspector's decision and is not the subject of a respondent's notice. In my view it would not be appropriate for the court to deal with it on the present appeal.

47. Accordingly, subject to any further submissions counsel may have as to the correct disposal, I would remit the matter to the Secretary of State on the basis set out at [45] above.

Lady Justice Gloster:

48. I agree.

Lord Justice Longmore:

49. I agree also.