Belmont Riding Centre v First Secretary of State, London Borough of Barnet

Case No: CO/1784/2003

High Court of Justice Queens Bench Division Administrative Court

29 July 2003

Neutral Citation No: [2003] EWHC 1895 (Admin)

2003 WL 21729216

Before : The Honourable Mr Justice Richards

Tuesday 29 July 2003

Representation

Mr Rupert Warren (instructed by Reid Minty) for the Claimant.

Mr James Strachan (instructed by The Treasury Solicitor) for the First Defendant.

JUDGMENT

Mr Justice Richards:

1. This case arises out of an application by Belmont Riding Centre ("Belmont") for a lawful development certificate under s.192 of the Town and Country Planning Act 1990 in respect of a site forming part of the Belmont Estate in Mill Hill, London NW7. The basis of the application was that there was an existing riding centre use on the site and that a change to use as a health and fitness centre would not require planning permission since it would fall within the same class, Class D2, of the Town and Country Planning (Use Classes) Order 1987. The local planning authority, London Borough of Barnet, failed to determine the application within the time laid down and Belmont appealed to the First Secretary of State under s.195 of the 1990 Act. By a decision dated 26 February 2003 the Secretary of State's inspector, Mr Currie, dismissed the appeal. Belmont now challenges that decision under s.288 of the 1990 Act.

Legal framework

2. Section 192 enables a person to apply for a certificate that a proposed use of land would be lawful. It provides in material part:

> "(1) If any person wishes to ascertain whether —
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> (a) any proposed use of buildings or other land …
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> …
>
> would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use … in question.
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> (2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use … described in the application would be lawful if instituted … at the time of the application they shall issue a certificate to that effect; and in any other case they shall refuse the application.
>
> (3) A certificate under this section shall —

(a) specify the land to which it relates;

(b) describe the use … (or in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c) give the reasons for determining the use or operations to be lawful; and

(d) specify the date of the application for the certificate

(4) The lawfulness of any use … for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted … in any of the matters relevant to determining such lawfulness."

3. On an appeal under s.195 the Secretary of State enjoys the powers of the local planning authority under s.192.

4. Guidance on such applications is set out in Annex 8 of Circular 10/97, "Enforcing Planning Control: Legislative Provisions and Procedural Requirements". Paragraph 8.26 provides:

> "… The burden of proof is firmly on the applicant. He will have to describe the proposal with sufficient clarity and precision to enable the LPA to understand (from a written description and plans) exactly what is involved in the proposal; and to submit whatever supporting information or legal submission he wishes to make to satisfy the LPA that a LDC should be granted for the proposal. Where a proposed change of use is involved, it will be necessary to describe the present, or last, use of the land; and where the lawfulness of that use is being relied upon to pave the way to implementing the proposed use, provide sufficient information to satisfy the LPA of the lawfulness of the existing use (having regard to the criteria in paragraph 8.16 above for deciding what is lawful)."

5. Section 55(1) of the 1990 Act defines development as including "the making of any material change in the use of any buildings or other land". Section 55(2), however, provides that certain uses of land shall not be taken to involve development. Such uses include at s.55(2)(f):

> "in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class."

6. The relevant class in this case is Class D2 of the 1987 Order, which reads as follows:

> **"Class D2. Assembly and leisure**
>
> Use as—
>
> (a) a cinema,
>
> (b) a concert hall,
>
> (c) a bingo hall or casino,
>
> (d) a dance hall,
>
> (e) a swimming bath, skating rink, gymnasium or area for other indoor or outdoor sports or recreations, not involving motorised vehicles or firearms."

7. Thus a change from one use to another use within Class D2 will not involve development, whereas any material change of use will otherwise do so.

The facts

8. The application for a lawful development certificate was made by application form dated 10 August 2001. It described the existing use as “Existing Class D2 Riding Centre” and the proposed use as “Change of use to uses within Class D2 of the Classes Order 1987”. The application was amended on 16 January 2002 to refer to “Change of use from Riding Centre to Health and Fitness Club (Class D2)”. Additional information provided on 12 February 2002 described the proposed use in this way:

> “The submitted drawings are illustrative, however, it is envisaged that the proposed health and fitness club would include a swimming pool, gym, dance studio and health and beauty facilities, with ancillary changing rooms, creche and members rooms, housed within the shell of the existing indoor riding centre arena.
>
> No elevational alterations are proposed and it is envisaged that the other outbuildings and stables within the site would only be used for ancillary purposes to the proposed club.”

9. Following the local planning authority's failure to determine the application, an appeal was lodged on 5 July 2002. Belmont elected to have the appeal determined by way of written representations.

10. The supporting statements submitted with the appeal stated that “The existing use of the site is as a Riding Centre” and that that had been the use since planning permission was granted in 1963 for an indoor riding school. Following the dismissal of an appeal in 1998–1999 for improvement works, the Riding Centre had ceased trading for financial reasons but, it was said, no alternative use had operated from the site. Reference was made to various materials in support of the proposition that a riding school or riding centre fell within the “sports or recreations” limb of Class D2. They included a reference to *Lilo Blum v. The Secretary of State for the Environment [1986] JPL 278*, in which the court upheld an inspector's decision that use as a riding school and livery stable was a material change from a former permitted use solely for livery stables. As part of his reasoning the inspector had stated that “Livery stables were hired to provide accommodation for horses owned privately and they gave a strictly limited range of service which required few staff. A riding school provided horses, staff and facilities in connection with the business of teaching horse-riding for payment”.

11. The local planning authority's statement cited from evidence given by Belmont's planning consultant, Mr Cooper, to a different inspector, Mr Baldock, at a public inquiry relating to a proposal to create a manège (a horse exercise area) on another part of the Belmont Estate. That inquiry led to a report by Mr Baldock dated 23 October 2002. The evidence given by Mr Cooper to Mr Baldock was that the whole of the Belmont Estate, including the site relevant to the present application, constituted “a single planning unit on which there is a composite use comprising: a residential use, an equestrian use and an agricultural use”. As part of its case to the present inspector, the local planning authority submitted that such a composite use did not fall within a use class at all and that s.55(2)(f) therefore did not apply. Among other points raised, the local planning authority also noted that Belmont Riding Centre Ltd effectively no longer existed and did not own the site.

12. In his comments on that statement, Mr Cooper stated:

> “5.2 The LPA statement appears to confirm that there is agreement between the parties on the conclusion that the existing uses are best described as a composite equestrian, residential and agricultural use across a single planning unit comprising the Belmont Estate …
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> …
>
> 5.4 The proposal under consideration in this appeal would involve the sub-division of the existing planning unit (comprising the entire Belmont Estate) into a smaller separate unit (comprising the land and buildings the subject of the appeal) and it follows that it is necessary to consider whether this sub-division would result in a material change for which planning permission would be required.
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> 5.5 In this regard, it is appropriate to note that a material change in use does not occur automatically upon the sub-division of a planning unit … The question that arises is this:

would the use of the new planning unit constitute a material change of use for which planning permission is required?

5.6 Until 1996, the appeal site was occupied by Belmont Farm Riding School Ltd (an Irish company) and used as a riding school, providing riding lessons for the public. These operations were continued in essentially the same form by a new English company, also called Belmont Riding Centre Limited, after the acquisition by the current owner of the Belmont Estate, but these operations ceased and Belmont Riding Centre Limited terminated its lease of the appeal site and thereafter ceased to trade in May 2000, following the need for refurbishment and the failure to secure planning permission for a major new equestrian centre.

5.7 Although the riding school company ceased to trade the unchallenged evidence given at the other hearings by Mr Reid on oath was that the use of the indoor riding school for riding instruction and related equestrian activities has continued from the date that the company ceased trading to the present day.

5.8 In these circumstances the sub-division of the appeal site and the use of it as a riding school would not constitute a material change of use. It would involve simply a full use of the indoor riding school building, its associated manèges, and car parking for the lawful use for which they were originally permitted and for which they have been used continuously without interruption since 1963.

5.9 Use of the appeal site as a riding school is a use within the same D2 use class as the appeal proposal for a health club and it follows that the provisions of section 55(2)(f) of the Act apply and the change from the riding school to the proposed use would not require planning permission."

13. Those were the written submissions before the inspector. In his decision he identified the main issue as whether the use of "the Riding Centre" (i.e. the relevant premises) on the application site as a health and fitness club constituted development requiring planning permission (paragraph 1). He next described the site, stating:

> "2. The area of land that is the subject of this appeal is sited on the north side of The Ridgeway to the west of St Vincent's Convent and to the east of Mill Hill School's preparatory school. Its principal feature is the concrete portal framed riding centre constructed in the early 1960's. A battery of twelve loose boxes now occupies the centre of the indoor riding arena and a further six are located at the southern end of the building. In contrast, the stables complex to its east, formerly used in conjunction with the riding centre, is now vacant and disused, although an open sided barn to the north of the stables is still used for the storage of feed. There is a seemingly unused manège to the north of the riding centre and a former manège to its south is now used mainly for the open storage of road planings. Apart from a riding track covered with wood chippings that runs to the east of the riding centre building, most of the rest of the appeal site area is laid out to grass."

14. The inspector went on to refer to the decision of his colleague, Mr Baldock, on the separate appeal, indicating an acceptance of Mr Baldock's findings:

> "3. Belmont Farm has been the subject of recent appeal decisions. In a decision of the First Secretary of State dated 8 January 2003, concerning the formation of a manège to the north of St Vincent's Convent, there was no mention of the precise nature of the present uses of the site. At paragraph 4.1 of his report the Inspector records that there was agreement at the inquiry between the parties that the planning unit included this site and the land to its east as a single unit of occupation. In his Findings of Fact, the Inspector states at paragraph 10.4 that, excluding any residential use, the primary activity on the planning unit is now breeding racehorses and training racehorses and polo ponies. Other activities are the playing of field and arena polo and riding holidays and teaching. The Inspector goes on to say that whereas the latter are secondary in terms of scale, they are not ancillary or incidental to the primary mixed use. This

previous Inspector had the benefit of hearing evidence over a period of three days. In contrast, I only inspected the site over a period of 1½ hours. However, during that time I saw nothing to contradict my colleague's findings".

15. In relation to his own findings on the present appeal the inspector stated as follows:

> "4. Within the area identified on the plan attached to the application for the lawful development certificate, one of those secondary activities, the riding holidays and teaching within the riding centre building, takes place. It is argued on behalf of the appellants that these activities are a continuation of the former riding centre use but I do not agree. The former riding centre was available to a fairly wide cross-section of the public at large to use for commercial equestrian activities for much of the year. The principal use of the riding centre building now seems to be the stabling of horses and riding holidays were not evident during the course of my visit, even though this coincided with a half-term school holiday. An essential pre-requisite for activities defined by Class D2 of the Town and Country Planning (Use Classes) Order 1987 is that they involve assembly and leisure. Access to this part of Belmont Farm, in common with the rest of the complex, can only be gained through a complicated and sophisticated security system. This is sited well to the east, adjoining the main racehorse and training facilities and is designed to keep most members of the public out of the area. Unlike the earlier commercial riding centre operations, there is no longer access to this land for the public at large direct from The Ridgeway.
>
> 5. In overall terms, I find that the area, the subject of the lawful development certificate application, has been artificially carved out of the planning unit based upon historic past activities which no longer take place. The planning unit, agreed at the 1–3 October 2002 inquiry, encompasses a much larger area and a very different range of equestrian activities from those associated with the former riding centre use. Although the building associated with that activity remains intact, I could see no evidence that any of the purposes for which the structure was erected survive in the building and its surroundings. The predominant activity within the building now is the stabling of horses. These may or may not be associated with riding holidays. They are certainly not there for the hiring out to a wide cross-section of the community. The stables associated with that use are empty and feed stored in the barn can presumably be fed to horses kept anywhere within the complex, not just those in the immediate facility.
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> 6. It is argued that both the former riding centre use and the proposed use as a health and fitness club fall within Class D2(e) of the Town and Country Planning (Use Classes) Order 1987, areas for other indoor or outdoor sports or recreations, not involving motorised vehicles or firearms. However, this presupposes that the riding centre use has survived in any shape or form. I could see no visual evidence for this on the ground. Alternatively, if the riding centre activities are still extant, they are diffused across the entire planning unit and not enclosed within the narrow confines of the site identified in the application drawing, which has no physical boundaries between it and the remainder of the single unit of occupation. Consequently, use of this site as a health and fitness club would constitute a material change of use requiring planning permission and a lawful development certificate should not be granted. Therefore, the appeal must fail."

Submissions

16. For the claimant, Mr Warren submits in broad terms that the inspector (1) adopted an erroneous and irrational approach to whether use of the appeal site as a riding centre had ceased and (2) in any event failed to carry out his duty to consider whether the proposed use would involve a material change of use.

17. The existing mixed use, it is submitted, included a riding centre use. Unchallenged evidence had been given at the public inquiry before Mr Baldock that the use of the indoor riding school for riding instruction and related equestrian activities had continued. Mr Baldock's decision letter referred to the indoor riding school without any suggestion that its use had ceased. It also referred to evidence that,

in addition to use for breeding race horses and training race horses and polo ponies, the facilities of the estate had been made available to a children's charity for riding holidays and that there had been some day use. His conclusion, at paragraph 10.4 of his report, was that “Excluding any residential use and agriculture, the primary activity on the planning unit is now breeding racehorses and training racehorses and polo ponies. Other activities are the playing of field and arena polo and riding holidays and teaching. Whereas the latter are secondary in terms of scale, they are not ancillary or incidental to the primary mixed use.”

18. Mr Warren submits that the inspector was irrational to set aside such evidence of a riding centre use and to do so on the basis of a 1½ hour site view. I think it fair to summarise the submission as involving the following elements: (i) the inspector found that the principal use was now stabling. But the stabling of horses in the riding centre building in circumstances where, as the inspector knew, the separate stable block had collapsed was fully consistent with the continuation of the riding centre use. (ii) Riding holidays were not evident during his visit. But the fact that they were not evident during such a short period was not something on which he could reasonably place any weight. Indeed, it appears from paragraph 5 of the decision (“may or may not”) that he accepted the possibility that riding holidays might take place. (iii) The inspector relied on the fact that public access was restricted, in particular by the use of a complicated and sophisticated security system and by the lack of access for the public at large direct from the Ridgeway. Uncontrolled access, however, forms no part of the definitions in Class D2 and the existence of a security system was irrelevant. The inspector was led astray by the notion that a riding centre use needs to have features that he did not find on the site. He also erred in fact by failing to take into account the presence of a direct public access that had been temporarily blocked up.

19. In the context of those submissions I should mention that Mr Warren sought permission to rely on a late witness statement of Mr Andrew Reid, the owner of the Belmont Estate, in which he takes issue with the inspector's conclusion that the riding centre use has ceased to exist and refers to various points of fact, such as the existence of a special riding surface and special lighting in the indoor arena, which he says the inspector seems to have missed or misunderstood. Although I looked at the witness statement de bene esse, I accept the submissions of Mr Strachan for the Secretary of State that it is strictly inadmissible and irrelevant and that permission to rely on it should be refused in any event as a matter of discretion since it was filed too late for Mr Strachan to have an opportunity to take instructions on it from the inspector. Nevertheless, in fairness to Mr Reid, I have noted the strength of the concerns expressed by him. The photographs exhibited to his witness statement are also of some broad assistance in understanding the issues raised in relation to the inspector's report.

20. A further submission by Mr Warren is that the inspector erred in his alternative analysis in paragraph 6. Even if there was a mixed use across the planning unit, there would be no material change of use if that mixed use included a riding centre use (a Class D2 use) and another Class D2 use was substituted for the riding centre use. It therefore does not follow, as the inspector appears to have thought, that a change to use as a health and fitness club would necessarily constitute a material change of use. Mr Warren cites *Beach v. The Secretary of State for the Environment, Transport and the Regions [2002] JPL 185, [2001] EWHC Admin 381*, where Ouseley J was considering inter alia the affect of other uses developing alongside established uses:

> “18. In my judgment the law is as follows: where in respect of one planning unit a use comprising uses A, B, and C together is joined by use D, there is a change of use, which may or may not be a material change of use, to uses A, B, C, and D. But whether there is a material change of use or not involves a comparison of uses A, B and C with uses A, B, C and D. If the change does involve a material change of use, it is to a new use which comprises both the old and the new uses, whether they are separate uses within the one planning unit or mixed or composite uses within the one planning unit. If, as time goes on, another use is added so that the use being carried on is A, B, C, D, plus now E the same issues arise. Whether a material change of use has occurred is to be judged by whether the uses A, B, C, D and E are materially different in planning terms from the use A, B, C and D. If it is it is a new use again comprising old and new uses. Uses A, B, and C are not treated as distinct uses unaffected by the additional uses unless they are carried out in a distinct planning unit. That is not an issue that arises here”.

21. Alternatively, even if the inspector was right to reject Belmont's case about a substituted Class D2

use, Mr Warren submits he was under a duty to carry on to consider as a matter of general planning judgment whether the proposed use would involve a material change of use having regard to noise, the number of people coming on to the site and the range of other factors affecting the land use character of the site. In support he cites *Secretary of State for Transport, Local Government and the Regions v. Waltham Forest London Borough Council [2002] JPL 1093*, a case in which the inspector, having rejected a contention that a proposed use fell within the same use class as the existing use, had gone on to decide whether as a matter of fact and degree the character and nature of the proposed use would be materially different from the existing use.

22. For the Secretary of State, Mr. Strachan submits that the application for a certificate in this case was bound to fail. It was accepted that the existing use was a mixed use. A mixed use does not fall within the Use Classes Order and cannot therefore benefit from the exception in s.55(2)(f): in particular, the specific mixed use does not fall within Class D2 and Class D2 does not bite on the question whether a change in the activities comprised in the mixed use causes a material change of use. Further, if there is a change from the mixed use to a single use for a health and fitness club on the application site, it will necessarily create a new planning unit and will amount to a material change of use. The creation of a new planning unit is one of the ways in which an existing lawful use can be lost: see *Panton and Farmer v. Secretary of State for the Environment, Transport and the Regions [1999] JPL 461* at 467–8. A change of the kind proposed by Belmont in this case involves a change from the second to the third of the categories described by Bridge J in *Burdle v. Secretary of State for the Environment [1972] 3 All ER 240* at 244:

> "What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use?
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> …
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> But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.
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> Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit".

23. As to the actual way in which the inspector approached the matter in his report, Mr. Strachan submits first that the inspector's rejection of the contention that there was an existing riding centre use was entirely rational. The inspector took into account Mr Baldock's report, which was, however, concerned with the wider planning unit rather than the specific application area and which contained nothing to show that the application area was still in riding centre use. The inspector carried out his own site visit but took into account the limitations of that visit. He was entitled to conclude that the principal use or predominant activity was the stabling of horses. He dealt with the possibility that riding holidays might take place but found that that was not the principal use. He was entitled to look at public access as a material consideration in the context of Class D2 ("assembly and leisure") and the extent and means of public access to the site were plainly material in considering whether the historic riding centre activities continued to take place.

24. As to the inspector's alternative analysis in paragraph 6, his conclusion is plainly right if one accepts the Secretary of State's argument that a mixed use cannot fall within a use class. Belmont did not seek to advance any wider case than one based on the Use Classes Order and in the circumstances the inspector did not have to go any further. But in any event it is obvious that a change to use as a health and fitness club will involve a material change of use. Although questions of material change of use are primarily questions of fact for the inspector, it is open to the court to find that there would be a material change of use if there is only one rational answer to the question: see *Westminster City Council v. British Waterways Board [1985] AC 676* and, by way of example the approach of the court in *Cynon Valley Borough Council v. Secretary of State for Wales [1986] JPL 760*.

Conclusions

25. On the first main issue I reject Belmont's challenge to the inspector's finding that the former riding centre use was not the existing use of the application site.

26. First, the premise upon which the case is advanced, namely that the inspector was faced with unchallenged evidence of a continuing riding centre use on the application site, is in my judgment mistaken. The position was not nearly as straightforward as that. True it is that Mr. Cooper's response to the local planning authority's statement had referred to evidence before Mr Baldock that “the use of the indoor riding school for riding instruction and related equestrian activities” had continued after Belmont Riding Centre Limited had ceased trading. What Mr. Baldock had found, however, was a mixed use across the whole planning unit of the Belmont Estate, which included riding holidays and teaching among a number of other equestrian and non-equestrian activities. He did not find a specific riding centre use on the application site. The present Inspector had careful regard to Mr. Baldock's report, as paragraph 3 of his decision letter shows. He said in terms that he saw nothing on his visit to contradict Mr. Baldock's findings. Plainly he accepted those findings and saw no inconsistency between them and his own findings on the present application. Neither can I.

27. So it was not a matter of setting aside a body of evidence on the basis of a 11/2 hour visit. The inspector had due regard to the material before him and recognised the limitations of his visit, but was entitled to place weight on that visit in forming an overall judgment on the existing use of the application site. As to the judgment he reached, I do not think that his conclusion can possibly be said to have been irrational.

28. His finding that the principal use of the riding centre building was now for the stabling of horses was reasonably open on the facts, including in particular the number of loose boxes in the building and the fact that the separate stables complex was disused. He was entitled to form that view even though the building could still be used for riding as well. He accepted the possibility that the stabling might be associated with riding holidays even though they were not evident during his visit; but he was entitled to find that such holiday activities, as well as being secondary to the principal use of the building for stabling, were not the same as the former commercial riding centre activities. There is a link between his comments about limitations on access to the public and his view that the horses were not now there for hiring out to a wide cross-section of the community. It is clear that in his view, whatever holiday and teaching activities still took place, they were secondary to the stabling of horses and in any event did not have the character of the former riding centre use. There was nothing in the evidence that compelled a different view.

29. The Inspector did not deal in terms with the submissions that had been made to him about the characteristics of a riding centre use, including the reference to the case of Lilo Blum. He did not need to do so, the issue before him being one of fact rather than legal definition; but in my judgment the conclusion he reached was entirely consistent with what was said about riding centres and riding schools in the materials before him.

30. What he said about limitations on public access seems to have been directed not only to the difference in character between the present activities on site and the former commercial riding centre activities but also to a more general point concerning the concept of “assembly” underlying Class D2. I would accept Mr. Warren's submission that controls on public access are consistent with a Class D2 use and that it would have been wrong for the inspector to rely on the restrictions on public access as an independent reason for finding that there was no existing Class D2 use on the site. But I do not read the inspector's report as going that far. It seems to me that his observations about public access were bound up in the end with his conclusion that the former riding centre use no longer existed, rather than forming the basis of a different and more difficult proposition concerning the exclusion of uses from Class D2 if public access is restricted. His reasoning on the issue, although not crystal clear, is adequate.

31. Even if the inspector was wrong to reject the contention that the former riding centre use still existed, his alternative basis for dismissing the appeal is in my judgment unassailable. If the riding centre activities existed, they existed as part of a mixed use across the whole planning unit including the application area — a mixed use consisting of residential, equestrian and agricultural uses or activities. That there was a mixed use was found by Mr. Baldock and was common ground before the present inspector. I accept Mr. Strachan's submission that such a mixed use does not fall within the Use Classes Order and cannot therefore benefit from the exception in s.55(2)(f). Belmont's argument

that there is no material change if one component of the mixed use falls within Class D2 and is replaced by another use within Class D2 is unsustainable. In examining use classes the focus must be on the relevant use for the purposes of s.55, which in this case is the mixed use as a whole, rather than on individual components of a mixed use. A change in components will involve a change in the mixed use itself and, subject to the question of materiality, will amount to development. It is that line of reasoning, rather than the mere fact that a new planning unit was to be created, which leads inevitably in my judgment to the rejection of Belmont's application. In truth the case advanced by Belmont in support of the application for a lawful development certificate was doomed from the outset.

32. As to Mr. Warren's alternative contention that the inspector should have gone on to consider as a matter of general planning judgment whether the proposed use would involve a material change of use even if he rejected the case under Class D2, in my view he was under no such duty. Bearing in mind the burden of proof on the applicant for a certificate under s.192 and the detail required to be submitted in support of such an application, I do not think that an inspector can reasonably be expected to deal with issues that have not been raised on the application. The case advanced before him here was based squarely on Class D2. That was the case that he was required to consider and did consider. Having rejected it, he did not have to go any further. The Waltham Forest decision does not help Mr Warren since, although in that case the inspector in fact went on to consider the wider issue, the court did not consider the question whether and in what circumstances he was under a duty to do so.

33. In any event I accept Mr. Strachan's submission that, if the inspector had gone on to consider as a matter of general planning judgment whether use of the application site as a health and fitness club would involve a material change of use from the existing mixed use of the site, or even from such activities within that mixed use as were in fact carried on on the site, then the answer in my view was obvious. Although there was only limited information before him, I cannot see how he could reasonably have reached any other conclusion than that the change would be material.

34. For all those reasons, I have reached the clear view that the challenge to the inspector's decision fails and that the claim must be dismissed.

MR JUSTICE RICHARDS: I am handing down judgment in this case. For the reasons given in that judgment, the claim for judicial review is dismissed.

MR WARD: My Lord, I have two applications to make. The first is to add Mr Andrew Reid as co-claimant for the purposes of costs, and that is agreed to by my learned friend.

MR JUSTICE RICHARDS: Does that require a late amendment to the title?

MR WARD: Yes, my Lord, it will do.

MR JUSTICE RICHARDS: And that is agreed?

MS BUSCH: My Lord, yes, in so far as relates to costs: Mr Reid was not party to the action for the hearing, but for those purposes only Mr Reid has agreed to be.

MR JUSTICE RICHARDS: Yes. It was clear that he was behind this.

MR WARD: My Lord, the second is an application as to costs.

MR JUSTICE RICHARDS: Yes.

MR WARD: Perhaps I could hand up a copy of our schedule? (handed)

The first set of costs are costs up to and including the date of the hearing on 4th July, and have been agreed: the total sum is £4,927. You will see where I have tabbed the schedule I have handed up a supplementary schedule of additional costs incurred after the hearing, including the costs of today's hearing: that is a total sum of £435. We claim those costs, but those costs are contested.

MR JUSTICE RICHARDS: How have these additional costs been incurred?

MR WARD: My Lord, I can take you through it point by point. Attendances on the client at 0.3 hours: that is for two emails reporting back after the hearing to the client and notification of (inaudible) judgment, and secondly a letter, which I believe is to be sent tomorrow, setting out the substance of your Lordship's judgment. The second matter, 0.4 hours' attendance of counsel, involves two telephone attendances of counsel's clerk, so notification in respect of the judgment and arrangements

for counsel to attend, and two telephone conversations with counsel in respect of the judgment, that is me, my Lord, plus this letter and other (inaudible) not accounted for. Attendance on the phone is 0.3 hours. That involves two fairly lengthy letters concerning the addition of Mr Reid as a claimant, and one telephone conversation. 0.10 hours' attendance on others: that concerns telephone calls with respect of judgment, and getting counsel's details. Then final costs are the costs of attending today's hearing. My brief's fees are not disputed. In my submission, they are entirely reasonable.

MR JUSTICE RICHARDS: Thank you.

MS BUSCH: My Lord, as my learned friend rightly points out, there was an agreement as to costs some two days before the hearing, and that was based on the fact that all costs incurred and claimed for up until the date of the judgment itself would be accepted. That was the understanding of both parties as they address the issue of costs. These costs that have been itemised to your Lordship are costs after that event, and they are contrary to the agreement that was made in a letter form. As a result of that agreement, in my submission, it would not be proper that such costs are claimed on that basis, and the application for those costs is resisted.

MR JUSTICE RICHARDS: I see, because they extend beyond the agreement. Am I not to treat this then as a case where there is no agreement as to costs?

MR WARD: Unfortunately, one might say that in the interests of speeding things along on a summary assessment that the first amount is agreed, and it is only that second amount that is not agreed. That might offer some form of efficiency in the assessment.

MR JUSTICE RICHARDS: I see. Thank you very much.

It seems to me that I should proceed on the basis that there is no actual agreement as to the total amount of costs in this case, albeit there was an agreement as to an amount of costs up to and including the main hearing. The costs that have been incurred by the first defendant since that hearing, including the costs for today, seem to me to have been properly incurred and to be reasonable costs. Accordingly, I think it right to make an order that the claimant pay the first defendant's costs, which I will summarily assess in the total sum of £4,927 plus £435, which is £5,362: that is the figure for costs summarily assessed by me.

MR WARD: Thank you, my Lord.

MR JUSTICE RICHARDS: Thank you very much.

MS BUSCH: My Lord, I am instructed to seek permission to appeal in this matter. The application is made on a single basis and derives from your Lordship's judgment in paragraph 21. It relates to the principle that the inspector should apply when considering a change of use, and albeit that the burden of proof here be on the appellant, it is necessarily right, in my submission, that one must look in this case, when one is considering a B2 use, at the position before and afterwards in order to ascertain whether any change of use has occurred, and therefore whether any planning permission is required. That point of principle, in my submission, is as yet unclear, and I think that the inspectors would benefit from clarity from the court on that matter. That is the basis upon which leave is sought.

MR JUSTICE RICHARDS: Thank you very much. Permission is refused. There is, in my judgment, no real prospect of success. The point in paragraph 21 of the judgment relates to the alternative reasoning. It is not necessary for the decision. In those circumstances, I see no proper basis for allowing the matter to go to the Court of Appeal.