
Appeal Decision

Site visit made on 31 January 2024

by David Smith BA(Hons) DMS MRTPI

an Inspector appointed by the Secretary of State

Decision date: 06 March 2024

Appeal Ref: APP/E2205/W/23/3325884

**Wagamama Ltd, Unit 49, Ashford Designer Outlet, Kimberley Way,
Ashford, TN24 0SD**

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission under section 73 of the Town and Country Planning Act 1990 for the development of land without complying with conditions subject to which a previous planning permission was granted.
 - The appeal is made by Wagamama Ltd against the decision of Ashford Borough Council.
 - The application Ref is PA/2022/3164.
 - The application sought planning permission for demolition of part of the existing Design Outlet Centre and the construction of buildings and structures to provide an extension to the retail designer outlet, comprising retail and restaurants units, tourist information/visitor unit, associated facilities, and office/centre management accommodation, re-configuration of existing car park, new car parking spaces, cycle parking, plant, hard and soft, public realms improvements, landscape works, highway works and other associated works without complying with a condition attached to planning permission Ref 14/01402/AS, dated 9 September 2016.
 - The condition in dispute is No 4(B) which states that:
In respect of any Class A3 occupiers/brands of new floorspace hereby permitted and any new occupiers/brands of retained floorspace after the Relevant Start Date, the following occupancy conditions shall apply;-
(B) Save for the Class A3 floorspace to be constructed adjacent to the relocated play facility within the central car park shown on Drawing No. PL-406 Rev 06, all other newly created and newly converted A3 floorspace pursuant to this planning permission shall only be open to customers between 0900–1930 on any day, with last food orders being served before 1900 and all orders being consumed by 1930.
 - The reason given for the condition is:
The identified level of Class A3 floorspace and the identified opening hours have been considered in terms of impact on the town centre economy and found to have an acceptable impact subject to suitable planning conditions and other controls. Additional floorspace or opening hours have not been considered by the local planning authority.
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Decision

1. The appeal is dismissed.

Background

2. The appeal site comprises one of the units within Ashford Designer Outlet Centre. It is currently operating as Wagamama in conjunction with the adjoining restaurant at Units 47 and 48 which was permitted in 2012.
3. The 2016 permission to extend the Centre includes retail and restaurant units. Condition 4(A) sets a limit on the total floorspace that can be used for purposes within former Class A3 of the Use Classes Order. The appeal premises are

operating in accordance with this permission following the closure of another food and beverage unit. However, by virtue of Condition 4(B), it is required to close by 1930 hours. The proposal is to extend this until 2100 hours to coincide with the closing time of the restaurant at Units 47 and 48 although their opening times are not controlled by any planning conditions.

4. A legal agreement dated 9 September 2016 and a subsequent supplemental deed are linked to the 2016 permission. The agreement includes “complicated” obligations relating to the occupation of the retail and restaurant units including details of permitted retail brands and prohibited food and drink brands.

Main Issues

5. In view of the background, the main issue is the effect of the proposed additional opening hours on the vitality and viability of Ashford town centre. If this is acceptable, then consideration should be given to the implications for the controls contained in the legal agreement.

Reasons

Effect of the proposed additional opening hours

6. Policy EMP9 of the Ashford Local Plan 2030 indicates that proposals outside of the town centre should not, either by itself or in combination with other committed development proposals, have a significant adverse impact on investment or the vitality or viability of the town centre. This reflects the test at paragraph 95 of the National Planning Policy Framework.
7. The Framework establishes that planning decisions should support the role that town centres play at the heart of local communities. The Planning Practice Guidance (PPG) on *Town Centres and Retail* refers to the Government’s ‘town centre first’ policy. The PPG also comments that evening and night-time activities have the potential to increase economic activity and provide additional employment opportunities. Indeed, the Council refers to a non-statutory Town Centre Reset Strategy which has a key objective to increase and improve the night-time and evening economy in Ashford town centre.
8. However, there is no detail about the specific aspirations for the town centre or how they are to be achieved. This omission is particularly notable as the PPG points out that in fostering evening activities, local authorities will also need to consider and address any wider impacts in relation to crime, noise and security. Nevertheless, there are known general difficulties for leisure and retail operators following the pandemic and challenging economic conditions. However, other than referring to vacancies at Elwick Place, there is no evidence about the overall health of Ashford town centre and therefore its vulnerability to changes in local consumer choice.
9. In assessing the consequences of an additional 90 minutes of trading, the Ashford Dining Study, as referred to by the Economic Development Manager, is relevant. It was prepared for another purpose and with fairly small samples. Nevertheless, the Study provides recent data about whether visitors would be likely to alter their eating out choices if the cafes and restaurants at the Outlet Centre opened for an extra hour after 1930 hours. In general terms the survey indicates that this is a very distinct location to the town centre and that they are visited at different times for different purposes.

10. Only a very small proportion of people visit the Outlet Centre with the sole purpose of eating there in the evening. The majority combine eating with shopping. Amongst town centre respondents, 37% indicated that longer hours would encourage them to eat out at the Outlet Centre in the evenings. This implies that it would make no difference to the remainder. Furthermore, there is no indication that this would lead to them choosing to eat at the Outlet Centre as opposed to the town centre.
11. Drawing this together, the restaurant is already open until 2100 hours. Allowing the appeal would enable it to accommodate up to 46 extra diners until that time but would not create a new evening attraction. The survey data indicates that the most likely consequence is that existing shoppers would have greater opportunity to have a meal at Wagamama and so might linger longer at the Outlet Centre. There is no strong evidence to show that those who would otherwise have eaten out in the town centre would do so at the appeal site instead. Neither is there anything to suggest that inward investment into the town centre would be deterred. All in all, the consequences of this individual proposal for the vitality and viability of the town centre would be insignificant.
12. The Council is concerned that allowing the appeal might encourage similar proposals from other operators and ultimately lead to the Outlet Centre rivalling the town centre as an evening destination. In this way, confidence in the town centre might be dented. The proposal could also be seen as undermining the existing condition that was negotiated at the time of the original permission and as creating an iniquitous position for other operators.
13. However, there is no clear evidence that other operators wish to extend their opening hours into the evenings. Many of those present in the Centre are not 'sit down' restaurants and therefore unlikely to wish to stay open after 1930 hours. The application for the entire Centre was withdrawn but is not conclusive of strong demand for longer trading times. The 'cap' in the 2016 permission on the amount of floorspace that can be used within Class A3 has been taken up so there is no scope for new food and drink uses at the Outlet Centre. Finally, the circumstances here are to harmonise opening hours between existing and adjoining units. Because of the wording of the original permission this could only be repeated by Pizza Express.
14. Of lesser significance are the range of practical management issues arising from one third of the restaurant currently being required to close at 1930 hours whilst the remaining portion stays open. That said, accepting the proposal would overcome these.
15. Overall, there is nothing to indicate that the proposed extension of opening hours at a single unit would draw trade away from the town centre to any meaningful degree. Furthermore, there is no evidence that this would damage the fortunes of the town centre or undermine the Council's aim to further the evening economy there. There are no other committed development proposals that could affect the town centre. Therefore, in conclusion, and even taking account of the potential cumulative effects, the proposal would not have a significant adverse impact on the vitality and viability of Ashford town centre. There would be no conflict with Policy EMP9.

Implications for the controls in the legal agreement

16. The legal agreement relates to the development authorised by the planning permission of 2016. It does not relate to subsequent permissions including any that might be granted under section 73 of the Act. Therefore, having regard to the judgment in *Norfolk Homes Ltd v North Norfolk District Council and another* [2020] EWHC 2265, the terms of the agreement would not cover any permission granted if the appeal were allowed. Any such permission would have the same description of development as the original 2016 permission and would therefore encompass the entirety of the extension to the Centre.
17. No mechanism has been put forward to ensure that the terms of the agreement are 'carried over' to any permission pursuant to the appeal. The consequence is that this part of the Centre would benefit from the permission granted under section 73 but would not be fettered by the obligation. No detailed analysis has been undertaken of the consequences of this. Nevertheless, it is clear that the obligation contains restrictions on the way that the Centre operates and ensures that its identity remains distinct from the town centre. This is to be expected for a major out-of-centre retail development to ensure that it does not undermine the town centre.
18. Therefore, without the controls of the obligation in place, the implication of allowing the appeal would be a significant adverse impact on the vitality and viability of Ashford town centre contrary to Policy EMP9.

Conclusion

19. The proposed extended opening hours for this food and drink establishment at the Outlet Centre are acceptable for the reasons given. However, the consequence of granting permission would be to remove the wider controls over the use of this part of the Centre contained in an existing planning obligation. This would harm the vitality and viability of the town centre and would not accord with the development plan. No material considerations outweigh this finding. Therefore, the appeal should not succeed.

David Smith

INSPECTOR