

# MinterEllison

18 September 2020

**BY EMAIL:** [mburton@scentregroup.com](mailto:mburton@scentregroup.com)

Mark Burton  
Senior Legal Counsel  
Development and Strategic Asset Management  
Scentre Group

Dear Mark

**Westfield Hurstville –  
Characterisation of proposed entertainment and leisure precinct at roof level**

**1. INTRODUCTION**

- 1.1 You have sought our advice in relation to the correct characterisation (from a planning law perspective), of the proposed recreation facility to be located within an entertainment and lifestyle precinct (ELP), to be located in part of Westfield Hurstville following a proposed upgrade of that centre.

**2. SUMMARY**

- 2.1 In summary, it is our view that the whole of the proposed ELP is permissible with consent within the 3(b) City Centre Business Zone under Hurstville Local Environmental Plan 1994 (the '**LEP**') as 'Restaurants' and a 'recreation facility' within the 3(b) zone. This view extends to that part of the ELP shown on the plan described below on which amusement machines are to be located. The basis of this view is that the proposed use of any electronic or computerised games within the ELP as shown on the plan, will be ancillary to the dominant purpose of the 'recreation facility' tenancy within the ELP being that of 'recreation facility'.

**3. BACKGROUND**

- 3.1 Scentre is proposing to lodge a development application for the expansion of the restaurants precinct on the rooftop of Westfield Hurstville..
- 3.2 You have provided copies of plans which are the subject of the proposed DA. These plans include a plan which indicates the layout of the proposed 'recreation facility' tenancy which is described as Hurstville DA\_Entertainment Plan and has the reference C. The Hurstville DA\_Entertainment Plan relevantly shows:
- (a) the 'recreation facility' tenancy to be used for a variety of recreation activities including bowling alleys, function rooms, climbing feature dodgem cartrack areas;
  - (b) an area of approximately 10% of the 'recreation facility' tenancy within the ELP to be used for amusement machines.
- 3.3 You have also provided a copy of a letter from Council following a pre-DA telephone meeting held on 2 July 2020 (**Pre-DA Letter**). The Pre-DA Letter:

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- (a) confirms that the site is zoned 3(b) City Centre Business Zone under Hurstville Local Environmental Plan 1994 (the '**LEP**')
- (b) concludes that the proposed development is permissible with consent within the exception of the 'recreation facility' tenancy, which the Council refers to as an 'amusement centre';
- (c) concludes that the amusement centre component of the development is not permissible within the (3(B) City Centre Business and use zone ... and is only permitted within Zone 4 (Light Industrial Zone)
- (d) recommends that the proposed SEE to be submitted with the formal DA be backed by a site specific legal opinion considering the provisions of the LEP and demonstrate that the proposed amusement centre is permissible;
- (e) recommends that floor plans be provided which indicate the exact area to be used for electronic arcade game which may demonstrate that the area is relatively small portion of the 'recreation facility' tenancy within the ELP

3.4 Our advice is set out below

#### **4. DISCUSSION –THE ENTERTAINMENT AND LIFESTYLE PRECINCT**

4.1 Based on our own views and on the Pre\_DA Letter, the most relevant definitions found in the LEP are:

- (a) 'amusement centre' (which is a use which is prohibited in the 3(b) zone; and
- (b) 'recreation facility' (which is a use which is permissible within the 3(b) zone.

4.2 '*Amusement centre*' is relevantly defined as '*...a building or place used, or adapted for use, for the operation, playing or viewing of:*

- (a) *billiards, pool or other like games (whether or not by use of coin operated tables or equipment) but only if tables or equipment for more than 3 such games is installed in the building or place, or*
- (b) *electronically or mechanically operated amusement devices, such as pinball machines and the like, but only if more than 3 such machines are installed in the building or place, or*
- (c) *electronic appliances which are controlled or partly computer controlled and associated with one or more electronic screens operated by one or more players for amusement or recreation, but only if more than 3 such appliances are installed in the building or place,*

*but does not include a building or place used for the primary purpose of providing general computer office and associated internet services and facilities.'*

4.3 '*Recreation facility*' is relevantly defined as '*...a building or place used exclusively for a sporting activity, or exercise or for a leisure activity, whether operated for the purpose of gain or not, but does not include a building or place elsewhere specifically defined in this clause.*

4.4 When considering whether the use of part of the 'recreation facility' tenancy is ancillary to the dominant use of that proposed area, it is relevant to note that over the years the Courts have considered many cases in which questions of dominant and ancillary uses have been considered. From those cases, the following relevant principles can be gleaned;

- (a) where, as a result of an examination of the categories in the relevant statutory provision (in this case clause 5 of the LEP), it is concluded that the particular development meets more than one of those categories, it is necessary to consider whether:
  - (i) any of the categories of purposes are separate and independent purposes of the development, or

- (ii) any of the categories or purposes are incidental and subordinate to another purpose (*Bonus Pty Ltd v Leichardt Municipal Council* (1954) 19 LGA 375 and *Penrith City Council v Waste Management Authority* (1990) 71LGRA 376);
  - (b) the test of whether a purpose of development is separate and independent from another is whether the two purposes are severable, namely whether the operation of one does not inextricably require the other, although for convenience they sometimes may be carried out associated with each other, but on other occasions may not (*Scott's Provisions Stores Pty Ltd v Sydney City Council* (1958) 3 LGRA 191);
  - (c) the test of whether a purpose of development is incidental and subordinate to another purpose is whether the two purposes are not severable but are inextricably linked, such that they ordinarily occur together, rather than are merely sometimes associated with each other as a matter of convenience, but not always to (see *Scott's Provisions Stores* above);
  - (d) where a purpose of development is incidental and subordinate to another purpose, it is subsumed with that other purpose and is ignored and treated as part of the other purpose for characterisation (*Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157).
- 4.5 In the instant case, and having regard to the principles identified above, and the Hurstville DA\_Entertainment Plan, it is our opinion that the '*amusement centre*' purpose is subordinate and ancillary to the '*recreation facility*' purpose. This conclusion is supported by the fact that the '*recreation facility*' area will be the subject of a single tenancy, that the as with other similar facilities, the whole of the use will be operated and used by patrons as a single development and will be the subject of a single tenancy and the relative area of the '*recreation facility*' on which the amusement machines are to be located.
- 4.6 It follows that the development of that part of the area of the '*recreation facility*' within which the proposed amusement machines are to be located should be considered part of the amusement facility purpose. On this basis it is not necessary to consider the possible effect of the final two lines of the definition of '*recreation facility*' which, in the case of two independent uses, would prevent any the use of any part of the '*recreation facility*' as an '*amusement centre*' being characterised as part of any recreation facility use.

## 5. Conclusion

- 5.1 A summary of this advice is set out at paragraph 2 above. If you have any queries, please contact the writer.

Yours faithfully  
**MinterEllison**



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