

Item 3.**Development Application: 161 Castlereagh Street, Sydney - D/2019/88****File No.:** D/2019/88**Summary**

Date of Submission:	5 February 2019
Applicant:	Simon Tilley
Architect/Designer:	FJMT and Paul Kelly Design
Developer:	Simon Tilley
Owner:	GPT Funds Management Ltd and The Trust Company (RE Services) Ltd
Cost of Works:	\$7,000,000
Zoning:	The site is located in the B8 Metropolitan Centre zone. The proposal is defined as a " <i>food and drink premise</i> " which is permissible in the subject zone with development consent.
Proposal Summary:	<p>The subject Development Application (DA) seeks consent for the fit out, extension and use of tenancies 6, 7, 8, 9 of Liberty Place for a licensed pub to be known as 'Liberty Place Bar'. The application includes the construction of a pavilion bar below the tower under-croft in the area known as tenancy 10. The pavilion and extension of the existing tenancies will result in the creation of an additional 181.3sqm of floor space.</p> <p>The existing planter bed and tree located within the north-west of the site will be removed and replaced with a new toilet block and 10 benches will be relocated / removed.</p> <p>The private leasable outdoor seating area is proposed to be extended and a continuous awning will be constructed over the outdoor seating areas. The extension of the leasable seating zone will require the modification of the restrictive covenant on title relating to the use of the public plaza which was required under the base consent for the site.</p>

A total of 680 patrons (390 internal and 290 external areas) are proposed with indoor trading between 7.00am to 12.00 midnight Monday to Saturday and 7.00am to 10.00pm Sunday and outdoor trading between 10.00am and 10.00pm Monday to Sunday with a one year trial for external trading between 7.00am and 10.00am Sunday, Monday, Tuesday and Wednesday and 7.00am to 11.00pm Thursday, Fridays and Saturdays.

The application is being referred to the Local Planning Panel (LPP) as it falls within the definition of '*sensitive development*' being a new licensed premise that requires a hotel (general bar) license under the Liquor Act 2007. Further, the application is being referred to the LPP as the proposed Floor Space Ratio (FSR) of the site contravenes the FSR development standard in the Sydney LEP 2012 by over 10%.

The application was notified and advertised for 21 days. Two submissions were received from the Castlereagh Boutique Hotel which raise issues with floor space exceeding the Sydney LEP 2012, excessive patron numbers, inconsistencies with the base consent and restrictive covenants in respect of the use of the public space, acoustic impacts and confusion as a result of multiple applications for the pub (4 applications to Council and 2 court cases).

Development application, D/2017/725 approved the fit out and use of tenancies 6 -9 as Liberty Place Bar and included the assessment of the transfer of the liquor license from the Windsor Hotel which has been demolished following compulsory acquisition by the State Government as part of the Metro project. The transfer of the license was approved by the Liquor and Gaming Authority on 15 August 2018. The subject DA seeks consent to extend both the internal and external bar areas approved under D/2017/725.

The site is subject to a maximum FSR of 12.52:1 (8:1 base FSR and 4.52: bonus accommodation floor space) under the Sydney LEP 2012. The proposal will result in an FSR of 14.86:1, approximately 19% over the maximum.

The base building approved an FSR of 14.2:1 which exceeded the maximum FSR of 12.5:1 by 13.8%. An additional 1,217.9sqm of floor space was approved under modification H resulting in an FSR of 14.5:1. The variation of floor space development standard was supported on the basis that the development would provide public benefits including a public plaza. In order to protect the plaza, restrictions were placed on title including a maximum FSR of 14.5:1 and restriction in the use of the plaza for private outdoor seating.

The applicant's justifies the additional floor space on the basis that voids within the tower allow for additional floor space which will comply with the maximum FSR of 14.5:1 prescribed on the covenant. The applicant's argument that the restrictive covenant takes precedents over the floor space development standard is not supported. Further, outdated gross floor area calculations of the site were provided with the application that exclude areas of floors that were previously exempt under the definition of floor space area in the Central Sydney LEP 1996 but are now to be included in accordance with the definition of gross floor area in the Sydney LEP 2012. A clause 4.6 variation has been submitted and is addressed in the Issues section within this report.

The proposal extension of the leasable seating area is not supported as it will privatise the public space reducing the quantity and quality of the public space which is contrary to the intention of the base consent and the covenant. The pavilion building will negatively impact on views to the existing public art installation and the existing bench seating will be removed.

For the reasons discussed above, the proposal has unacceptable non-compliances with the Sydney DCP 2012 provisions relating to public domain.

**The Summary
Recommendation:**

This proposal is recommended for refusal.

Development Controls:

- (i) Liquor Act 2007
- (ii) City of Sydney Act 1988
- (iii) Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005
- (iv) Sydney Local Environmental Plan 2012 (Gazetted 14 December 2012, as amended)
- (v) Sydney Development Control Plan 2012 (in force on 14 December 2012, as amended)
- (vi) Central Sydney Contributions Plan 2013

Attachments:

- A. Selected Drawings
- B. Clause 4.6 Variation Request

Recommendation

It is resolved that consent be refused for Development Application No. D/2019/88 for the following reasons:

- (A) The proposal will result in an FSR of 14.86:1 which exceeds the 12.52:1 FSR (base 8:1 plus 4.52:1 accommodation floor space) development standard prescribed under Clause 4.4 and Clause 4.6 of the Sydney LEP 2012. The Clause 4.6 variation that has been submitted is not supported as Council is not satisfied that the written request has provided adequate justification that compliance with the Floor Space Ratio control is unreasonable or unnecessary. Further, the application does not provide sufficient environmental planning grounds to justify contravening the standard.
- (B) The proposal reduces the amount and quality of the useable open space available to the public in the plaza. The leasable seating zone, for the exclusive use of pub, is extended with a continuous awning over the outdoor seating area. This will result in a large portion of the plaza being privatised.
- (C) The proposal is contrary to the base consent D/2007/1792/H which permitted additional floor space above the floor space development standard based on public benefits including the plaza. The proposal is contrary to the restrictive covenant which requires a clear demarcation of the "public" and "private/leasable space" space to ensure that the space is not privatised by future uses.
- (D) The new bar known as tenancy 3 will almost entirely encompasses the buildings undercroft and will negatively impact on views and the space around the existing public art installation. The proposal is contrary to the objectives of provision 3.1.5 (public art) of Sydney DCP 2012 which includes a requirement to improve the quality of public artworks in private developments and ensure that public art is an integrated and cohesive part of new development.
- (E) The proposal fails to demonstrate design excellence in accordance with Clause 6.21 of the Sydney LEP 2012. The form and external appearance of the proposed development does not improve the quality and amenity of the public domain and the proposal will impact on views to the existing art installation.
- (F) The proposal fails to comply with provision 3.5.2 of the Sydney DCP 2012. The proposed awning will encroach significantly on the canopy of the semi-mature hills fig tree located in a planter box on the eastern side of the plaza.

- (G) The proposal is inconsistent with the objectives of Section 3.15 (late night trading management) of the Sydney DCP 2012 as the submitted acoustic report presents a number of technical errors and fails to detail the existing acoustic levels of the surrounding site. Further the recommendations in the report have not been reflected in plans or the submitted Plan of Management and a number of claims in the report of acoustic compliance are not supported, thus failing to ensure that the development will not have an adverse amenity impact on surrounding sensitive uses.
- (H) With consideration of the above matters, approval of the development would not be in the public interest and is contrary to Clause 4.15(1) (e) of the Environmental Planning and Assessment Act 1979. The proposal is inconsistent with the relevant planning controls and will have adverse environmental impacts on the locality.

Background

The Site and Surrounding Development

1. A site visit was carried out by staff on 19 February 2019, 23 July 2019 and 20 September 2019.
2. The site is irregular in shape with frontages to Pitt Street and Castlereagh Street. The site comprises an area of approximately 4,400sqm. The site is known as Liberty Place and contains a series of buildings including a commercial office tower fronting Pitt Street and two commercial buildings fronting Castlereagh Street and basement parking. One of the commercial buildings is the 44 storey commercial building known as ANZ Tower with a 2 storey private residence on the topmost floors. A number of retail and food and drink uses currently occupy the ground floors of the three buildings contained within the site. A public plaza is located within the centre of the site and a pedestrian mid-block connection links Pitt Street to Castlereagh Street.
3. "Legion House" forms part of the site which is a commercial building with a ground level licensed restaurant and is identified as a local heritage item number I1698 under Schedule 5 of the Sydney Local Environmental Plan 2012.

4. The subject application relates to tenancies 6, 7, 8, 9 and 10 located within the northern section of the plaza and a portion of the adjacent outdoor plaza, refer to figure 1 below.

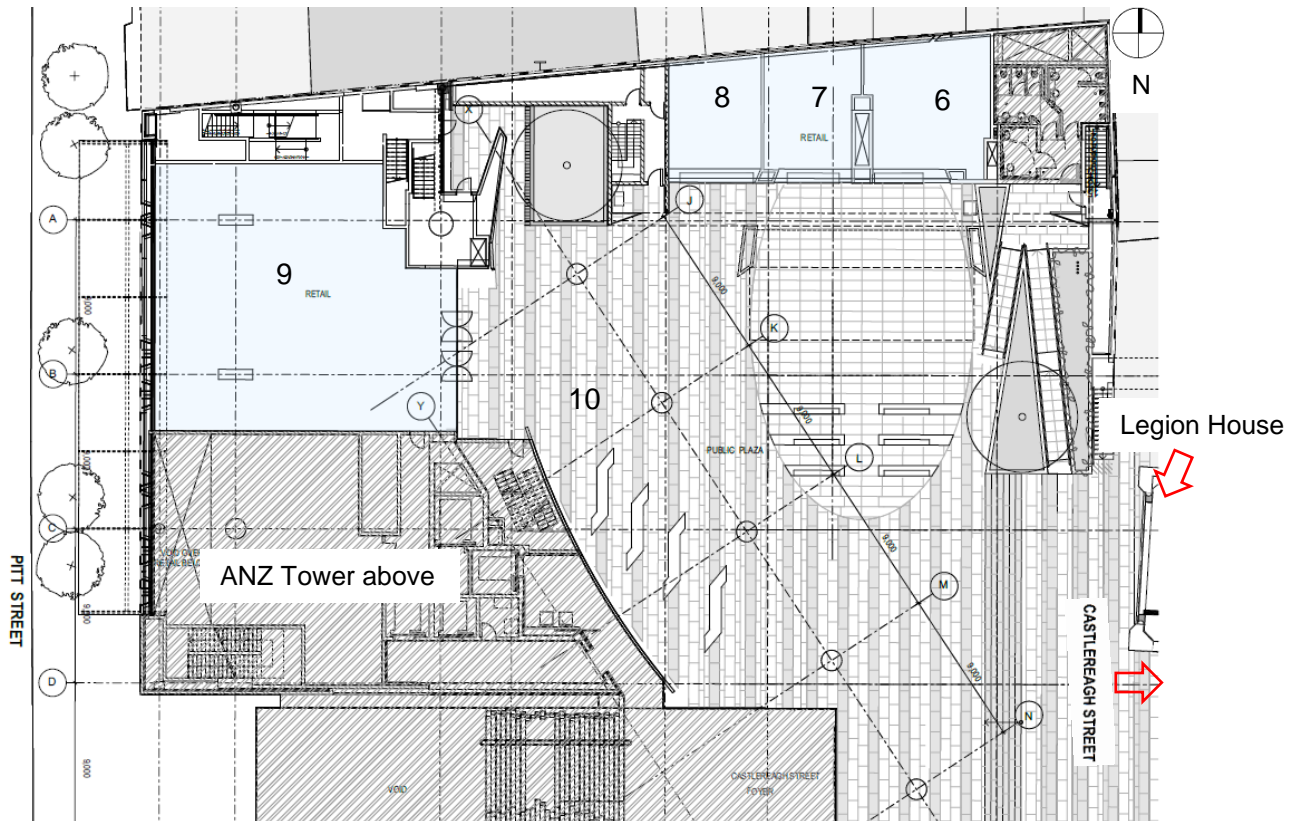


Figure 1: Existing ground floor plan of the plaza showing the existing tenancies.

5. Surrounding land uses are predominately commercial. The Castlereagh Boutique Hotel adjoins the site to the south on the Castlereagh Street frontage. The hotel is separated from Liberty Place plaza by a southern building which also fronts Castlereagh Street and part of the ANZ Tower site. Part of the northern side elevation of the hotel faces Liberty Place plaza. Commercial office buildings abut the site to the north on the Castlereagh and Pitt Street frontages. Retail premises occupy the majority of the ground floor tenancies of the adjacent buildings.
6. The Windsor Hotel was previously located approximately 80m to the south of Liberty Place, on the corner of Castlereagh Street and Park Street at 48-48A Park Street. The four (4) level hotel building has been demolished following the State Government's compulsory acquisition of the site as part of the construction of the Pitt Street (North) Station associated with the proposed underground Sydney Metro Line. The Pitt Street Metro station is currently under construction on part of the former Windsor Hotel site.

7. Photos of the site and surrounds are provided below:

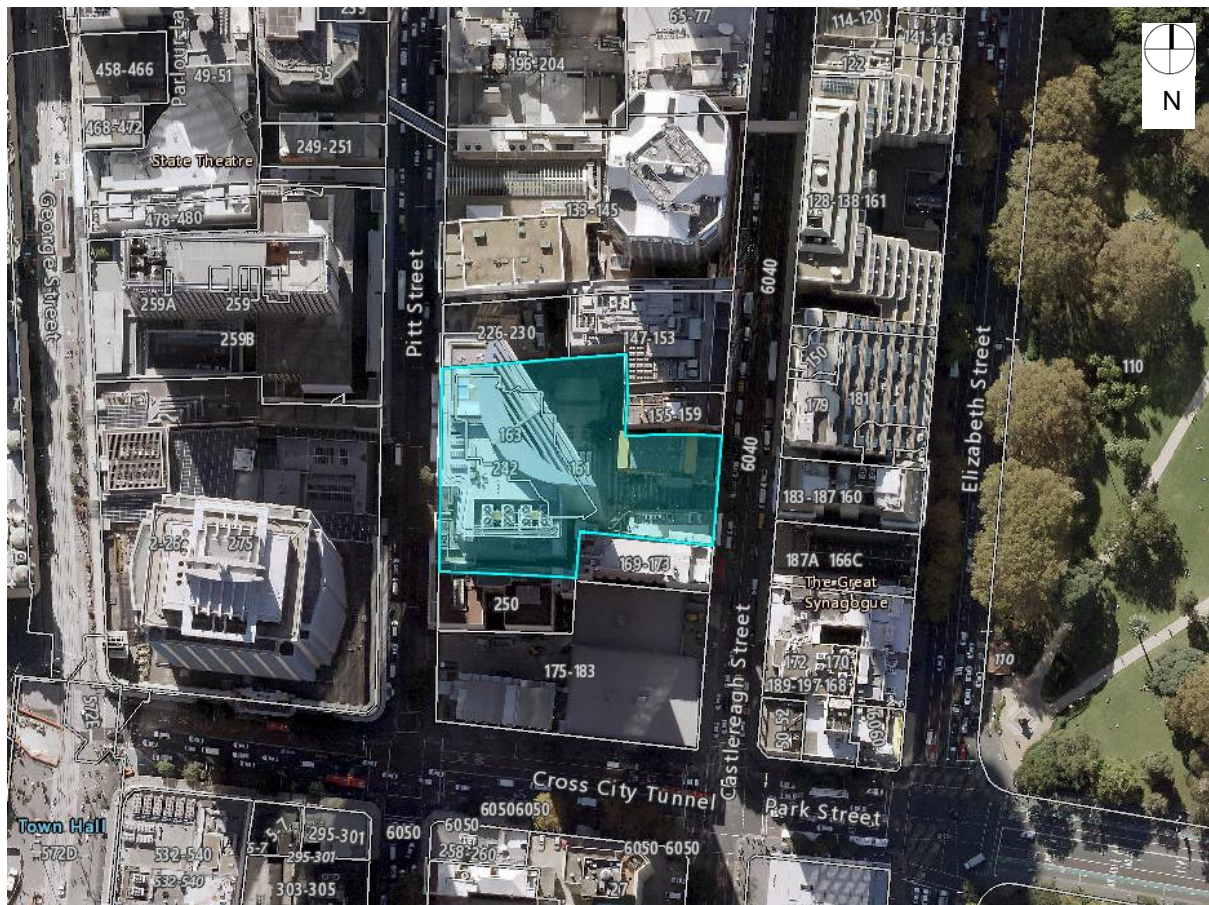


Figure 2: Aerial image of subject site and surrounding area



Figure 3: Liberty Place entrance via Castlereagh Street (looking west).



Figure 4: Liberty Place public right of way looking west towards the ANZ tower and tenancy 10.



Figure 5: Steps to Liberty Place plaza looking generally north-west towards the art installation above tenancy 10.



Figure 6: Liberty Place looking north towards tenancies 6 - 8.



Figure 7: Table tennis tables and public seating in the central plaza with tenancies 6 -8 beyond (looking north-west).



Figure 8: Liberty Place plaza looking south.



Figure 9: Liberty Place plaza looking south from the pedestrian ramp and planter bed. The photo depicts the fig tree that will be affected by the awning.



Figure 10: Looking south-east towards the side elevation of the Castlereagh Boutique Hotel.



Figure 11: Tenancy 9 (looking west).

Proposal

8. The application seeks consent for the use, fit out and extension of tenancies 6, 7, 8 and 9 of Liberty Place Plaza (NW section of the plaza) for a licensed pub to be known as 'Liberty Place Bar'. The proposal includes a 181.3sqm increase in the floor-space including the construction of an 80sqm pavilion structure in the tower under-croft area in the area known as tenancy 10. A detailed description of the application is provided below:

(a) Internal and external bar and dining areas

- (i) Reconfiguration, fit out and extension of tenancies 6, 7 and 8 located at the northern end of the Liberty Place plaza to create a 257.61sqm internal bar area to be known as tenancy 1. Work includes the demolition of the existing internal walls, partitions and glazing to the three existing tenancies and amalgamation into one tenancy. The new tenancy will extend beyond the existing building line;
- (ii) Reconfiguration, fit out and extension of tenancy 9 located at the western end of Liberty Place (to be known as tenancy 2) to create a 280sqm internal bar area including new kitchen and toilet area. Work includes the demolition of the existing glass frontage and door and the extension of the frontage beyond the existing building line;
- (iii) Construction of an enclosed 80sqm pavilion bar structure in the under-croft area known as area 10 with bi-fold doors on its eastern side;

- (iv) Extension of leasable / outdoor seating area adjacent to each internal bar area and a variation to the leasable seating zone plan and restriction on covenant which was required under D/2007/1792/N.
- (v) Demolition of the existing awning adjacent to tenancies 6-8 and construction of a continuous awning over the outdoor seating areas. The awning has a height of 4.24m and extends 6.9m from tenancy 6 - 8 and 6.8m from the south-eastern wall of Liberty Place.
- (vi) Demolition of the existing planter box and removal of the tree located on the northern (side) boundary to be replaced with a new amenities block comprising 2 male, 5 female toilets and 1 accessible toilet. It is noted that the existing toilet block located to the north-east of the site will also be retained.
- (vii) Four timber benches located within the western portion of the plaza will be removed to allow for the new bar (tenancy 10). The 6 benches in the centre of the plaza will be replaced with 4 benches.
- (viii) Materials: Wall cladding - brushed aluminium, slopped soffit - perforated plywood, awning soffit - timber battens, glazing extrusions - powder-coated finfish, structural steel - metallic paint finish.

(b) Operational Restrictions:

- (i) A total of 680 patrons are proposed (390 indoor and 290 outdoor) with internal trading hours between 7.00am to 12 midnight, Monday to Saturday and 7.00am to 10.00pm Sunday. Proposed base external trading hours are between 10.00am and 10.00pm Monday to Sunday and extended external trading from 7.00am to 10.00pm Sunday to Wednesday and 7.00am to 11.00pm Thursdays, Fridays and Saturdays for a one year trial.
 - (ii) Extension of the liquor license boundary.
9. An amended plan was submitted on the 9 April 2019 reducing the extension of the tenancies 6-8.

10. Plans of the proposed development are provided at figures 12 and 20 below and at Attachment A.

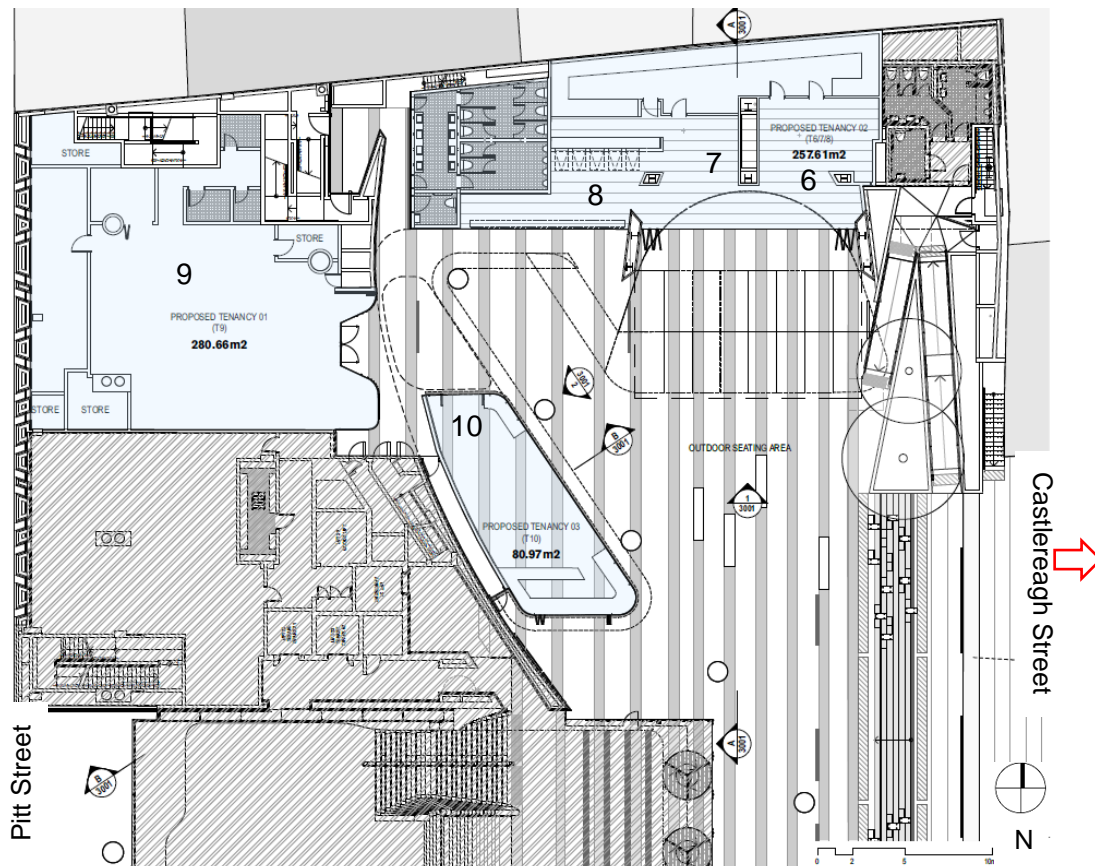


Figure 12: Proposed plan. Tenancy numbers also labelled on plans.

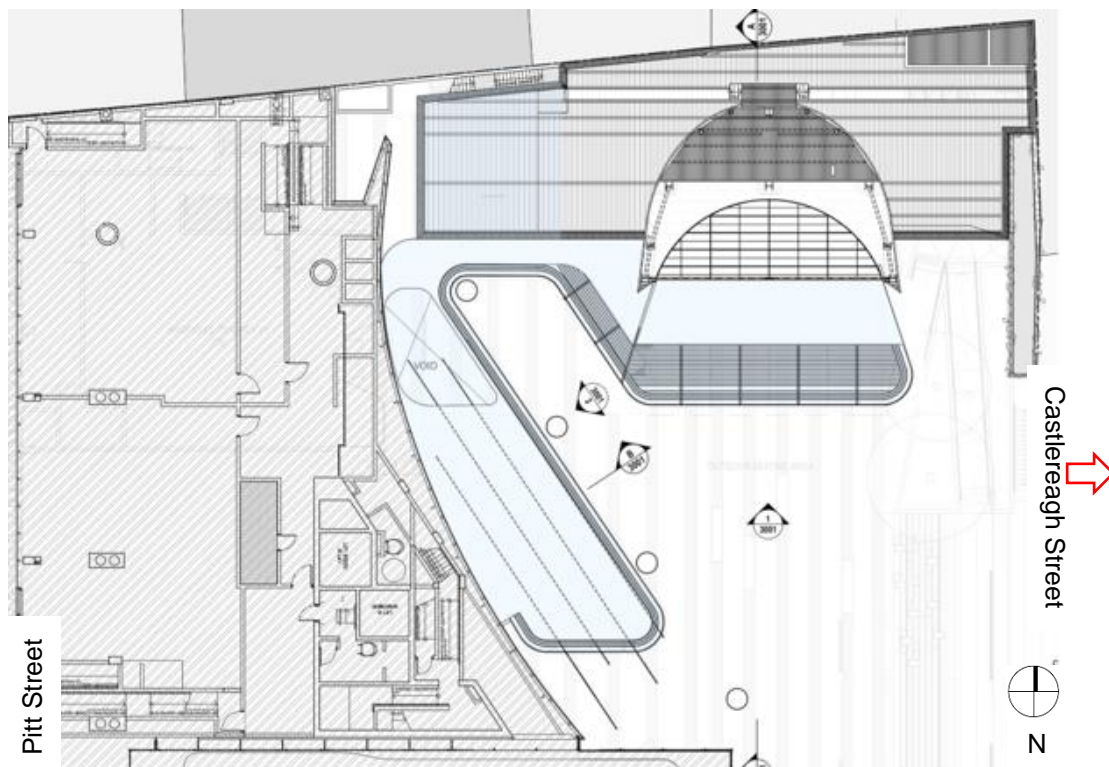


Figure 13: Proposed awning plan.

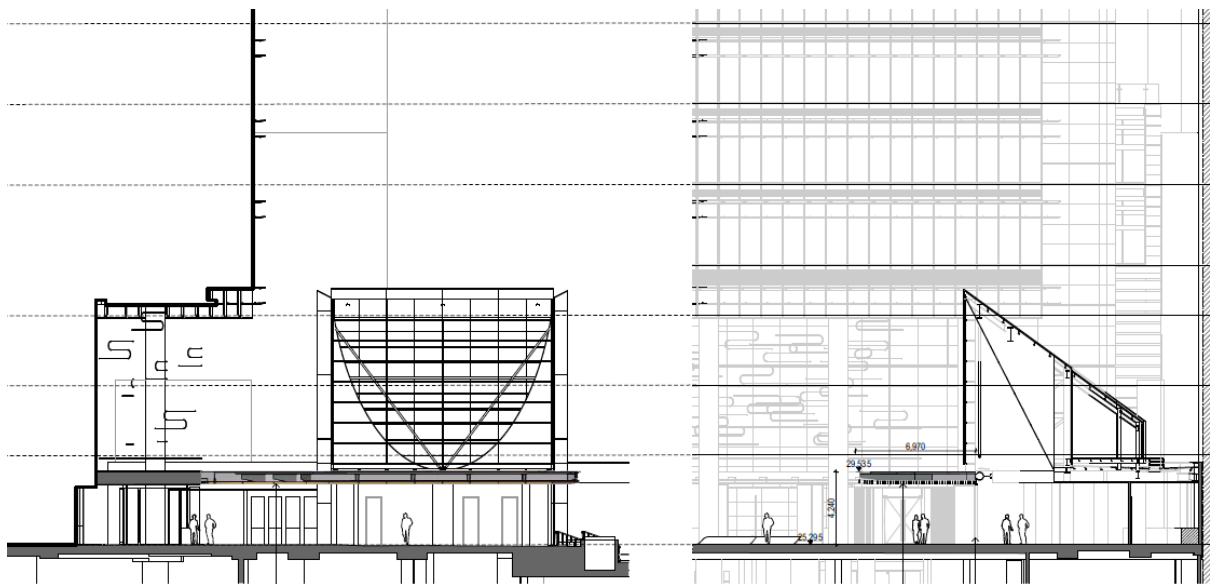


Figure 14: Proposed pavilion section (tenancy 10).

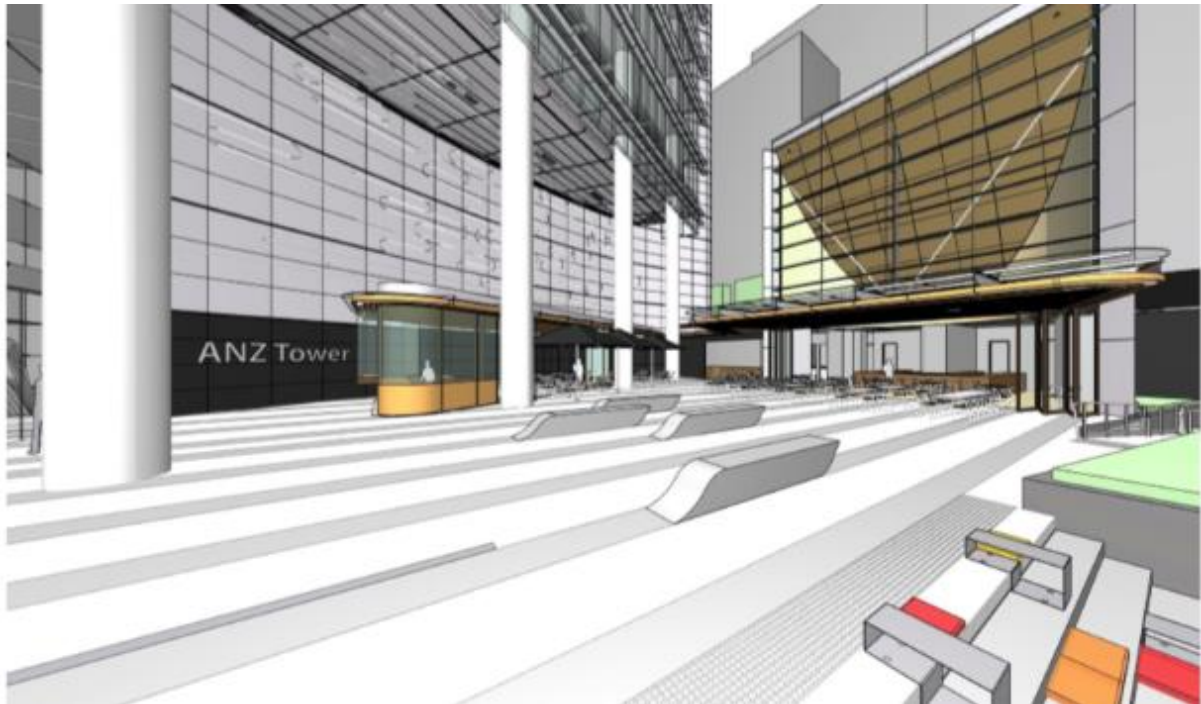


Figure 15: 3D view of the proposal.



Figure 16: 3D birds eye view of the proposal.



Figure 17: 3D view of pavilion (tenancy 10).

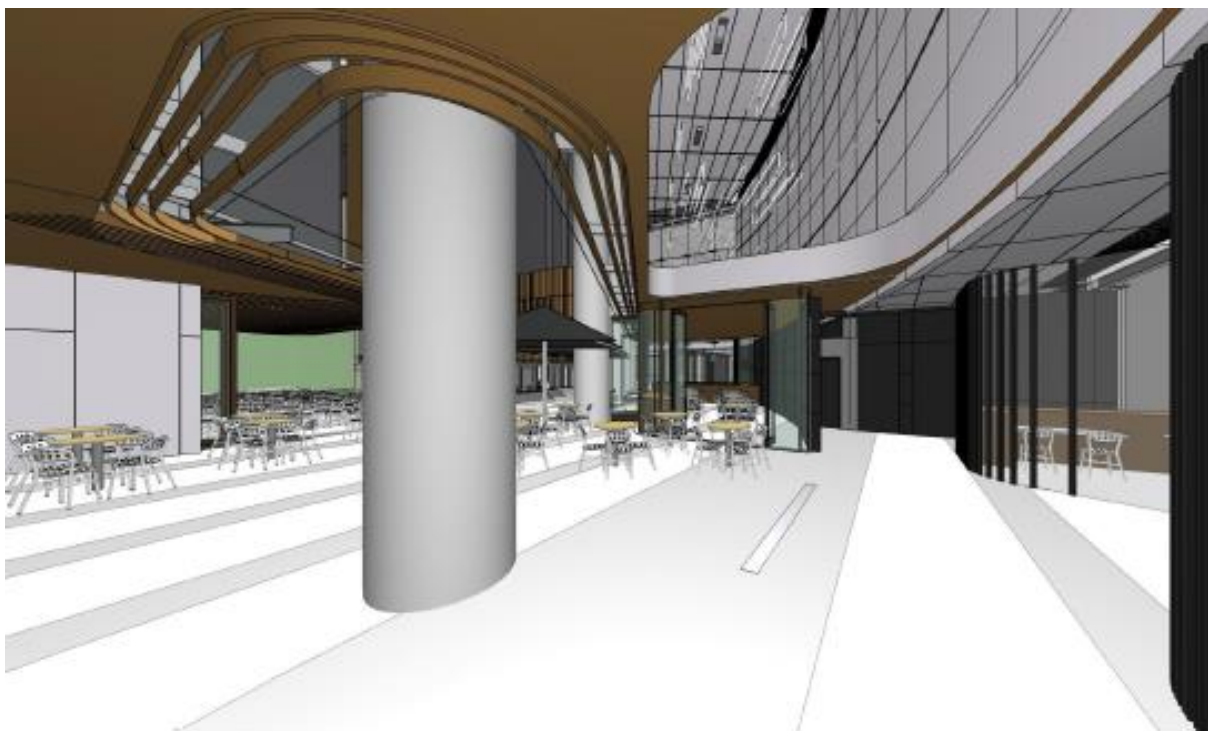


Figure 18: 3D view of the awning looking south towards the pavilion.



Figure 19: 3D view of the outdoor seating next to the pavilion.

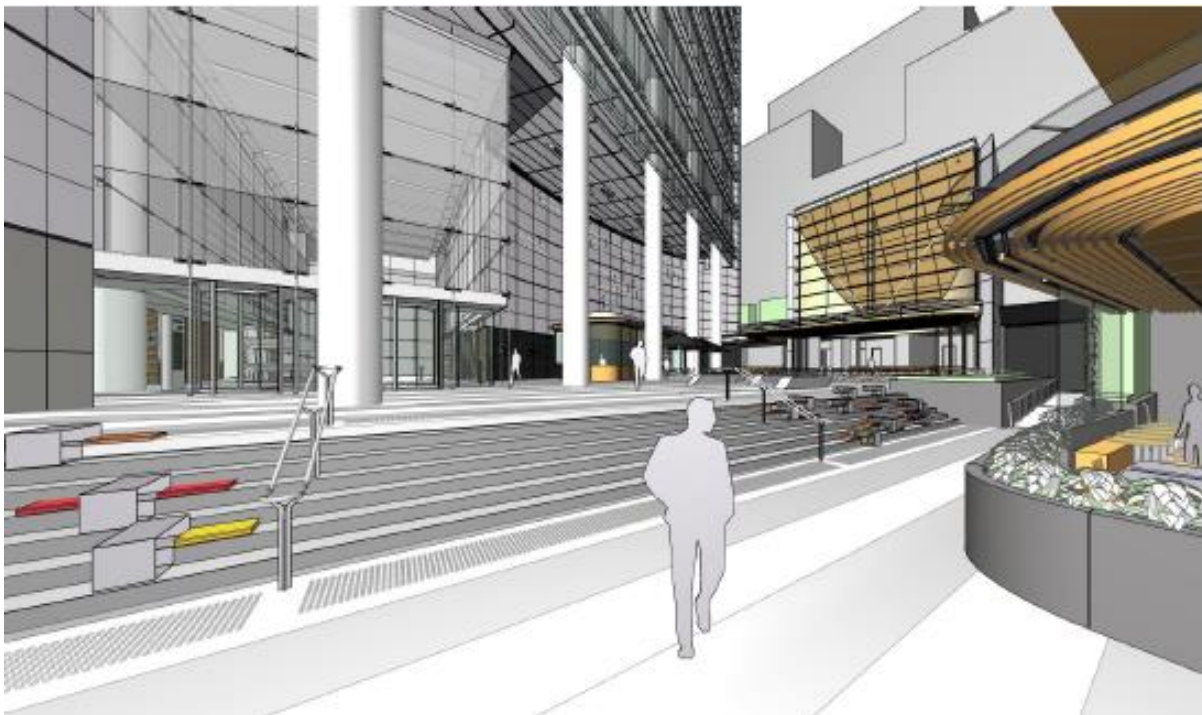


Figure 20: 3D view on approach from the public right of way looking north to the plaza.

History and amendments to the subject Development Application

11. On 19 February 2019, the applicant was requested to submit additional information to address issues with respect to the increase in floor-space.
12. On 23 March 2019 a reminder was sent to the applicant for the outstanding GFA information.
13. On 9 April 2019, the applicant submitted the following
 - (a) A revised plans which reduce the floor space to an additional 202.8sqm;
 - (b) A letter from Veris surveyors providing details of void spaces and floor-space calculations;
 - (c) A plan illustrating a comparison of the publicly accessible space and
 - (d) Construction certificate hydraulic services plans of levels 32-42 of the tower.
14. On 12 April 2019, the applicant was requested to submit an amended acoustic report, Plan of Management and details of mechanical ventilation and cooking.
15. On 13 May 2019, a reminder was sent to the applicant advising that the acoustic and GFA issues remain outstanding and a clause 4.6 variation was requested. The applicant was also advised that changes to the restrictive covenants in relation to right of public access and the leasable seating zones could not be supported. Issues in relation to the impact of the enclosed pavilion on the existing artwork was also raised.
16. On 1 July 2019, the applicant submitted an amended acoustic report. On 12 July 2019, the applicant was advised that the acoustic report was still insufficient.
17. On 18 July 2019, the applicant submitted a further revision to the acoustic report and an amended Plan of Management. The applicant requested that issues relating to mechanical ventilation be addressed by a condition.
18. On 15 August 2019, the applicant submitted GFA plans and a letter from Veris relating to gross floor space.
19. On 23 August 2019, the applicant submitted additional information to address public domain issues.
20. On 28 August 2019, the applicant submitted a Clause 4.6 variation request to vary the floor space ratio control of 12.52:1 (8:1 base and 4.52:1 accommodation floor space bonus) in the Sydney LEP 2012.

History Relevant to the Development Application

ANZ Tower and creation of Liberty Place

21. On 12 December 2002, the CSPC granted consent to a Stage 1 DA (D/2002/748) for a commercial tower to a height of 168m (RL 190.1m) with 4 levels of basement parking for 116 vehicles.
22. Following the approval of the Stage 1 application, a design competition for the development was held. The winning scheme designed by Mitchell/Giurgola and Thorp (now known as FJMT) was praised for its creation of a mid-block public open space and a publicly accessible through-site link.
23. On 27 February 2003, Stage 2 Development Application D/2002/842 was granted consent by the CSPC for a 43 storey commercial tower with ground and basement retail, a mid-block link from Castlereagh Street to Pitt Street and a large open plaza, 3 basement levels for car parking and the retention and restoration of the heritage listed Legion House. Additional floor space was allocated to the site as the development provided a number of public benefits including the provision of a through-site link and mid-block open plaza. Further, the development was granted a discount in the allocation of Heritage Floor Space equal to the area of the plaza and through-site link.
24. On 6 December 2007, the CSPC approved D/2007/1792, a Stage 2 DA to amend the approval granted in 2003 for the erection of a 43 storey commercial tower with ground and basement level retail, a mid-block connection from Castlereagh Street to Pitt Street, three basement levels for 90 car spaces retention and restoration of Legion House and demolition of all other buildings and site amalgamation into one title. The amendments from the previous Stage 2 consent was to remove the Grand United Building (GUB) at 147-153 Castlereagh Street from the development site effectively decreasing the development site areas and increasing the proposed FSR as there were no proposed changes to the proposed tower development. Due to the removal of the GUB site from the development, the proposed FSR sought to vary the compliant FSR of 12.5:1 to 14.2:1, exceeding the LEP maximum.
25. The varied FSR was supported by the CSPC at the time, one of the reasons of support being due to the public benefit provided at the ground floor with the through-site link and public plaza - at the time referred to as Ethics Plaza in association with The Ethics Centre located within Legion House, The approved FSR was 14.2:1 (gross floor area 63,885.5sqm).
26. A notable condition of consent is Condition 6 which sought to protect the mid-block link/open space between Castlereagh Street and Pitt Street and the central open space that Liberty Place was providing for public use. See further discussion under the heading '*Restrictive Covenants*'.
27. Since the approval of the base building a number of Section 4.55 Modifications (A-N) have been approved. The following Section 4.55 Modifications are of relevance to the subject development application.
28. On 13 January 2012, D/2007/1792/I approved modifications to the retail pavilion building and plaza area including awning changes and additional seating in the form of benches.

29. On 1 December 2011, D/2007/1792/H was granted consent for the modifications to Legion House and the neighbouring buildings at 167 Castlereagh Street including an additional 1,217.9sqm of commercial floor-space above Legion House resulting in a GFA of 65,103.4sqm (increased from 63,885.5sqm) and FSR of 14.5:1. In addition, the proposal approved a cogeneration plant to provide a zero energy tower building.

Restrictive Covenants

30. Condition 6(c)(i) (*Mid-Block Link/Open Space*) of D/2007/1792 (as amended) required a plan to document the clear demarcation of the "public" and "private / leasable" space within the mid-block open space to ensure that this space is not "privatised" by future uses. The plan was approved on 27 July 2012 to satisfy this condition (refer to figure 21 below).



Figure 21: Approved leasable seating zone

31. Condition 6 (c)(ii) requires the above demarcation to be reflected in a restrictive covenant. The plan below is a part of the restrictive covenant, with the area in pink being a right of public access (approximately 6m wide) connecting Pitt Street and Castlereagh Street, and the area in green being the Restriction on the Use of Land in relation to outdoor dining and fitout of tenancies.



Figure 22: Plan showing the restrictions on the use of land on Castlereagh Street level.

32. In particular, the Title of the land contains a Restriction on the Use of Land, created by the registration of DP1184135 which requires: *The Owner of the Lot Burdened must not without the prior consent of the Council grant any tenant of the premises within the Lot Burdened the right to occupy or use any part of the site for the purpose of outdoor seating or fit out associated with any tenancy.*
33. In addition, the Title also contains a floor space Restriction created by the registration of DP1183173. The Restriction states: *The Grantor must limit the sum of the floor space ratio (FSR) of all lots taken together to be no more than 14.51:1, calculated in accordance with the Central Sydney Local Environmental Plan 1996.* This equates to a maximum 64,265.1sqm of commercial floor space and 838sqm of residential floor space which was approved under development modification D/2007/1792/H condition 16(a). It should be noted that the definition of gross floor area and the calculation of FSR has been modified in the Sydney LEP and the actual total existing GFA of the building is higher than that specified in the Restriction. See further discussion regarding floor space ratio under the heading Issues.

Liberty Place tenancies

34. On 15 April 2013, D/2013/335, approved the use and fit out of tenancy 8 as a licensed restaurant with outdoor seating for 16 patrons. The tenancy is currently vacant.
35. On 5 March 2013, D/2013/53, approved the fit out and use of tenancy 6 as a licensed restaurant with outdoor seating for 68 patrons. The tenancy is currently vacant.
36. On 5 March 2013, D/2013/54, approved the fit out and use of tenancy 7 as a food outlet with outdoor seating. The tenancy is currently trading as Stockmarket kitchen.

37. On 26 March 2013, D/2013/172, approved the fit out and use of tenancy 9 as a licensed Japanese restaurant with outdoor seating with a patron capacity of 90 persons. The tenancy is currently vacant.
38. On 14 March 2013, D/2012/1902 approved the fit out and use of tenancy 5 as a licensed espresso bar and cafe known as 'The Local Bar' with approved trading hours 6.30am to 12 midnight Monday to Saturday and between 7.00am and 10.00pm Sunday. Condition 4 limits the patron capacity to 190 persons.
39. On 27 March 2017, D/2017/170 approved alterations to the existing licensed ground floor cafe at 'Legion House' with indoor trading between 6.30am and 10.00pm Monday to Saturday and base outdoor trading between 6.30am and 8.00pm Monday to Saturday and a one year trial of outdoor trading until 10.00pm. Condition 9 limits the patron capacity to 92 persons which includes 38 patrons in the outdoor area.

Liberty Place Bar

40. On 2 June 2017, D/2017/725 was submitted for the use and fit out of tenancies 6, 7, 8 and 9 of 'Liberty Place Bar' and transfer of the liquor license from the (then) Windsor Hotel site to 161 Castlereagh Street. Proposed hours are 7.00am to 12 midnight Monday to Saturday and 7.00am to 10.00pm Sunday. A total of 680 patrons are proposed
41. On 27 October 2017, the applicant lodged a Class 1 appeal with the Land and Environment Court, (proceedings number 2017/364007) against the deemed refusal of D/2017/725 for the use and fit out of tenancies 6,7, 8 and 9 of 'Liberty Place Bar'.
42. On 19 February 2018, D/2017/725 was approved by Council for the use and fit out of tenancies 6, 7, 8 and 9 of 'Liberty Place Bar'. Refer to figure 21 below which illustrates the approved layout.

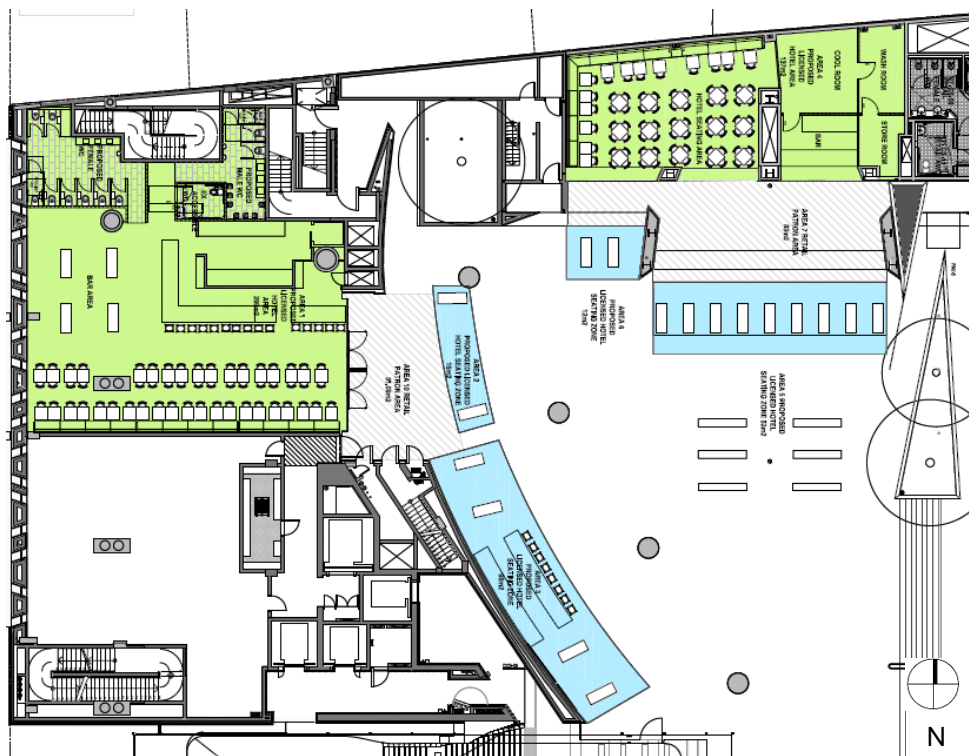


Figure 23: Excerpt of approved plan for Liberty Place Bar under D/2017/725. Note the areas coloured 'blue' are outdoor spaces consistent with the approved outdoor leadable seating zone plan.

43. The following conditions are of relevance:
- (a) Condition 2 restricts the total patron capacity to 680 (390 indoor and 290 outside) with specific internal and external areas having maximum patron capacities.
 - (b) Condition 3 allows indoor trading hours between 7.00am and 12.00 midnight Monday to Saturday and 7.00am to 10.00pm Monday to Sunday.
 - (c) Condition 4 restricts outdoor trading between 10.00am to 10.00pm Monday to Sunday base hours with a one year trial for extended trading between 7.00am and 10.00am Sundays, Mondays, Tuesdays and Wednesdays, and 7.00am to 11.00pm Thursdays, Fridays and Saturdays.
 - (d) Condition 5 requires all doors and windows to the internal bars shall be closed from 10.00pm Monday to Saturday.
 - (e) Condition 6 requires the applicant to submit an Outdoor Patron Capacity Plan for the management and control of the dissemination of the 290 external population at night. The Plan is to be agreed to by a Suitably Qualified Acoustic Consultant and to include an assessment of measures to stagger the departure of the 290 'outdoor' patrons at closing.
 - (f) Condition 7 states that the PCA must not release any Occupation Certificate until notified in writing by the City's Area Planning Manager, that they are satisfied that a number of acoustic and management measures have been adequately completed.
44. To date, no such Outdoor Patron Capacity Plan has been submitted to Council for review to satisfy Condition 6 of the consent.
45. On the 11 April 2018, a Statement of Facts and Contentions in relation to Land and Environment Court, (LEC proceedings number 2017/364007) prepared by the applicant was filed with the Court. The contentions related to various operational conditions including patron capacity, acoustic impacts, outdoor patron capacity management and hours of operation.
46. On the 24 April 2018, the appeal ref 2017/364007 was discontinued.
47. On 22 March 2018, the applicant lodged a Section 4.55(2) modification application referred to as D/2017/725/A. The application sought to modify or delete conditions relating to patron capacity, outdoor trading hours, the closure of windows and doors, the imposed outdoor patron capacity plan condition and the use of speakers outside.
48. On 13 June 2018, the applicant lodged a new Class 1 Appeal, appeal reference 2018/183600, to the Land and Environment Court against the deemed refusal of D/2017/725/A.
49. On 19 November 2018, the appeal ref 2018/183600 was discontinued and the determination of the application reverted back to Council.
50. On 4 December 2018, Section 4.55 (2) Modification D/2017/725/A was withdrawn.

51. On 21 May 2018, Development Application D/2018/534 was lodged with Council proposing the use and fit out of tenancies 6, 7, 8 and 9 of Liberty Place for a new licensed pub with additional outdoor seating. On 3 August 2018, Council issued a letter to the applicant notifying them of the similarities between the proposal and the Court proceedings that were underway (LEC ref. 2018/183600) and requested that the application be withdrawn and possibly resubmitted to Council at a later date, pending the outcome of the Court proceedings. On 3 December 2018, the application was withdrawn.

Other relevant development history

52. On 23 May 2018 the Local Planning Panel granted consent to Development Application D/2018/269 for the removal of a staircase and infill of two voids on Level 29 resulting in an additional 25.82sqm of floor space or a 1% increase of the overall FSR of the site from 14:51:1 to 14.52:1. Reasons for approval for the increase in GFA for the site included the increase in FSR being contained wholly within the internal areas of the tower and that the development will have no adverse impact on the amenity of the locality.
53. On 20 December 2018, Development Application D/2018/1601 was lodged with Council for the construction of new awnings, planter boxes, retractable roller blinds and glass screens for the existing outdoor seating area of Legion House and 167 Castlereagh Street. On 15 March 2019, Council issued a letter highlighting a number of issues with the development including the adverse impact of the proposal on significant heritage fabric, pedestrian permeability and impacts on the approved mid-block connection between Pitt Street and Castlereagh Street. On 11 July 2019, the application was withdrawn noting further discussions are required between the building management and commercial tenants.
54. On 8 July 2019, Development Application D/2019/419 was granted consent for the installation of a double glazing window system to the Castlereagh Boutique Hotel at 169-173 Castlereagh Street.

Economic/Social/Environmental Impacts

55. The application has been assessed under Section 4.15 of the Environmental Planning and Assessment Act 1979, including consideration of the following matters:
- (a) Environmental Planning Instruments and DCPs.

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP)

56. The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of the above SREP.
57. The Sydney Harbour Catchment Planning Principles must be considered in the carrying out of development within the catchment. The key relevant principles include:
- (a) protect and improve hydrological, ecological and geomorphologic processes;
- (b) consider cumulative impacts of development within the catchment;
- (c) improve water quality of urban runoff and reduce quantity and frequency of urban run-off; and

- (d) protect and rehabilitate riparian corridors and remnant vegetation.
58. The site is within the Sydney Harbour Catchment and eventually drains into the Harbour. However, the site is not located in the Foreshores Waterways Area or adjacent to a waterway and therefore, with the exception of the objective of improved water quality, the objectives of the SREP are not applicable to the proposed development. The development is consistent with the controls contained within the deemed SEPP.

Liquor Act 2007

59. The subject site and the former Windsor Hotel (now demolished) are identified on the Sydney CBD Entertainment Precinct Map.
60. The transfer (removal) of the hotel license between premises each located in the same freeze precinct requires consideration under clause 47F(3) of the Liquor Act which requires:
61. *47F (3) Removal of licence between premises in same prescribed precinct.*

During the freeze period, the Authority must not approve the removal of a licence, being a licence to which this subsection applies, to subject premises from other premises situated in the same prescribed precinct in which the subject premises are situated if the Authority is satisfied that the patron capacity of the subject premises will be more than the patron capacity of the premises from which the licence would be removed

62. The assessment of the original DA for the pub, D/2017/725, included a review of population studies for the Windsor Hotel and Liberty Place Bar. The studies were based on a review of the population of both venues against the requirements of the deemed to satisfy provisions of the NCC considering available floor area, aggregate exit widths and sanitary facilities.
63. A site visit to the now demolished Windsor Hotel also confirmed that the additional amenities, approved under a CDC, had been built. Council's Building Unit reviewed studies and floor plans and confirmed that the assessment was acceptable.
64. Pursuant to S47F (3) of the Liquor Act 2007 and as part of the assessment of D/2017/725 it was concluded that the patron capacity of the Liberty Place Bar will be no more than the patron capacity of the Windsor Hotel. Conditions were imposed in the original development consent to ensure this.
65. The proposed patron numbers (total 680 (with a maximum of 290 patrons permitted outside) in the subject DA do not exceed the number approved under the original Development Consent D/2017/725.

66. On the 15 August 2018, the Independent Liquor and Gaming Authority approved the removal of the hotel liquor license ref LIQH400106599 from the New Windsor Hotel at 48-48A Park Street to 161 Castlereagh Street. The conditions of the license include limiting consumption on the premise - indoor area Monday to Saturday 10.00am to 12.00am and Sunday 10.00am to 10.00pm. Consumption in the premise - outdoor area Monday to Wednesday 10.00am to 10.00pm, Thursday to Saturday 10.00am to 11.00pm and Sunday 10.00am to 10.00pm. Conditions also included the requirement to close all doors and windows by 10.00pm. It is noted the transfer approval does not set a maximum limit on patron capacity.
67. While the subject application does not seek to increase the patron capacity of the licensed venue it seeks approval for the extension of the liquor license boundary beyond the leasable seating areas and the approved liquor license boundary plan.
68. As such section 47G (restrictions on changing boundaries of Premises) apply. The existing approved licensed area floor plan is provided below in figure 24 and the proposed licensed area floor plan is provided in figure 25.



Figure 24: Approved licensed boundary area.

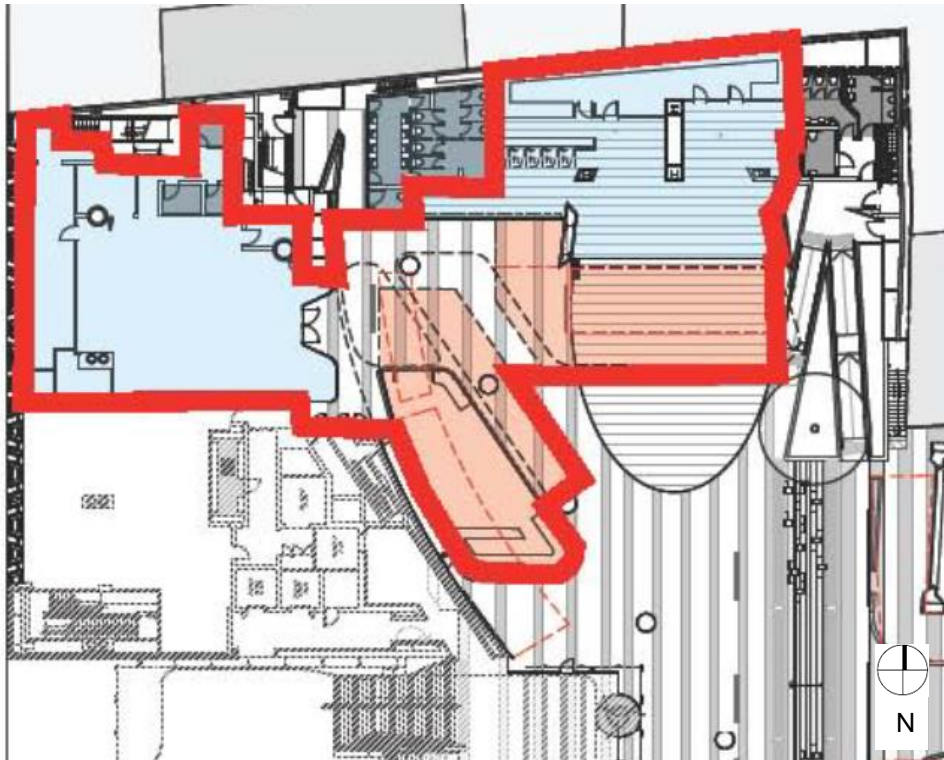


Figure 25: Proposed extended licensed boundary area.

69. Clause 47G (1) states:

During the freeze period, the Authority must not change the specified boundaries (as referred to in section 94) of the subject premises to which this subsection applies if the Authority is satisfied that the change in the boundaries of the premises is likely to result in (a) an increase in the number of people that enter the freeze precinct in which the subject premises are situated principally to consume alcohol, or (b) an increase in the patron capacity of the subject premises.

70. The application does not propose an increase in patron numbers for the Hotel and Council's Licensed Premise Unit confirm that the proposed liquor licensing of the premises will comply with clause 47G of the Liquor Act 2007.

Sydney Local Environmental Plan 2012

71. The site is located within the within the B8 Metropolitan zone. The proposed use is defined as 'pub' and is permissible with development consent.

72. The relevant matters to be considered under Sydney Local Environmental Plan 2012 for the proposed development are outlined below.

Compliance Tables

Development Control	Compliance	Comment
<p>4.4 Floor Space Ratio</p> <p>Part 6 Division 1 Additional Floor space Central Sydney</p>	No	<p>The site has an area of 4,490sqm and a maximum FSR of 12.52:1 is specified for the site under the Sydney LEP 2012.</p> <p>Based on the existing GFA, the proportion of residential floor space to commercial floor space is approximately 1.23% to 98.77% respectively. As accommodation floor space bonuses in 'Area 2' in which the site is located differ between commercial (4.5:1) and residential (6:1), the proportioned bonus of floor space applicable to the site reflecting the existing proportions equates to an accommodation floor space bonus of approximately 4.52:1. As such, in addition to the base FSR control of 8:1, it is considered that the FSR control for the site is 12.52:1.</p> <p>The proposal will result in an additional 181sqm of floor space. The applicant justifies this on the basis that voids within ANZ tower result in 236.2sqm of available floor space which can be used while still maintaining the gross floor area of 65,103.4sqm (FSR 14.5:1) which complies with the restrictive covenant for the site.</p> <p>A desktop survey and GFA plans have been submitted to demonstrate that voids within the ANZ tower allow for additional floor space which will comply with the 14.5:1 FSR covenant on the site. The Applicant's justification that the GFA allowance in the restrictive covenant takes precedent over the FSR controls is not supported and the DA cannot be supported.</p> <p>See discussion under the heading Issues.</p>

Development Control	Compliance	Comment
4.6 Exceptions to development standards	No	The applicant has submitted a 4.6 variation to the FSR development standard. See discussion under the heading Issues.
5.10 Heritage conservation	Yes	Legion House building is located on the Castlereagh Street frontage of the subject site and is listed as Heritage item under Schedule 5 of the LEP. Liberty Place Bar is proposed within ground floor tenancies 6 – 10 of Liberty Place located within the central portion of the site. The fit out of the tenancies and the construction of the pavilion and awning will not impact on the heritage significance of Legion House or any nearby heritage item.

Part 6 Local Provisions - Height and Floor Space	Compliance	Comment
Division 1 Additional floor space in Central Sydney 6.10 Heritage Floor Space	Yes	Should the application have been supported, the development would be required to have Heritage Floor Space allocated to the site.
Division 4 Design excellence	No	The proposed development fails to satisfy clause 6.21 (4)(b), (c), and (d)(v),(ix), (x) and (xii) of the design excellence provisions which relate to public domain. The form and external appearance of the proposed development does not improve the quality and amenity of the public domain. The proposed development impacts on view corridors to the art installation. The proposal will have negative impacts on pedestrian circulation requirements including the permeability of the pedestrian network. See discussion under the heading Issues.

Sydney Development Control Plan 2012

73. The relevant matters to be considered under Sydney Development Control Plan 2012 for the proposed development are outlined below.

3. General Provisions	Compliance	Comment
<p>3.1 Public Domain Elements</p> <p>3.1.2.2 Through site links</p> <p>3.1.5 Public Art</p>	No	<p><i>Through site link and public open space</i></p> <p>The proposed development will result in a 222sqm reduction in publicly accessible open space and a reduction in the quality of useable open space available to the public in the plaza. A large portion of the plaza will effectively be privatised as the leasable seating zone for the exclusive use of the pub is extended and an awning is constructed over the private outdoor dining space. The proposal will also restrict public access to the northern half of the site.</p> <p>The existing public benches will be removed from the sheltered under-croft area at tenancy 10 and the 6 existing benches located in the open will be reduced to 4.</p> <p>It is considered that the public amenity of the provision of a partially outdoor through-site link and entirely outdoor open plaza is significantly diminished with the construction of additional structures sought to enclose the area for private use.</p> <p><i>Public Art</i></p> <p>The proposal will negatively impact on the existing public art installation. The pavilion bar structure and awning will impact on views to the artwork.</p> <p>See discussion under the heading Issues.</p>

3. General Provisions	Compliance	Comment
3.2 Defining the Public Domain	No	<p>The proposed development will not contribute to the quality of the public domain.</p> <p>See discussion under the heading Issues.</p>
3.5 Urban Ecology	No	<p>The awning adjacent to tenancies 6 -7 will encroach on the semi-mature Hills Fig (tree 2) which is in good health. The impact on this tree is unacceptable and a minimum 3m clearance is required between the awning and the tree canopy.</p>
3.9 Heritage	Yes	<p>Refer to LEP table above.</p> <p>The fit out of the tenancies and the construction of the pavilion and awning will not impact on the heritage significance of Legion House or any nearby heritage items.</p>
3.12 Accessible Design	Yes	<p>Accessible access can be provided to the proposed pub.</p>
3.13 Social and Environmental Responsibilities	Yes	<p>The proposed development is capable of providing adequate passive surveillance and is generally designed in accordance with the CPTED principles.</p>
3.15 Late Night Trading Management	Partial compliance	<p>The Category A premise is located within a Late Night Management Area which permits base indoor trading between 6.00am and 12 midnight with extended trading up to 24 hours on a trial period, and base outdoor trading between 10.00am and 10.00pm with trial trading between 9.00am and 1.00am.</p>

3. General Provisions	Compliance	Comment
		<p>The proposal seeks consent for internal trading between 7.00am to 12 midnight Monday to Saturday, 7.00am to 10.00pm on Sundays and outdoor trading between 7.00am to 10.00pm Sunday to Wednesday and 7.00am to 11.00pm Thursday to Saturdays. The proposed trading hours comply with the LNT provisions subject to a one year trial for extended outdoor trading from 7.00am daily and to 11.00pm on Thursday to Sunday. It is noted that the proposed hours are consistent with those approved under D/2017/725.</p> <p>The applicant has submitted a Plan of Management (POM) which has not been updated to reflect the operational restrictions contained in the 18 July 2019 acoustic report.</p> <p>The application was discussed with Council's Health and Building Unit who raised a number of issues regarding acoustic compliance and the possibly adverse amenity impact the development may have on surrounding sensitive uses. See discussion under the heading Issues.</p>

Issues

Floor space

74. A maximum FSR of 12.52:1 is permitted, comprising 8:1 base FSR and 4.52:1 accommodation floor space (based on the proportioning of residential and commercial uses within the site).
75. As discussed above in the history of the development, the redevelopment of the site was granted consent for a floor space ratio of 14.5:1 in accordance with the Central Sydney Local Environmental Plan 1996 and later the Sydney Local Environmental Plan 2005. The process of calculating gross floor area and definition of floor space has since changed and the application is to be assessed in accordance with the definitions of the Sydney Local Environmental Plan 2012.
76. The applicant has submitted a letter from Veris, registered surveyors, noting that as a result of a desktop survey of the current as built floor space, 236.2sqm of floor space is available as a result of voids in the tower. An additional letter from Veris provides a GFA breakdown of the site. The survey adopts the definition of floor space applicable at the time of the original DA under Sydney LEP 1996 and is not an accurate calculation of actual GFA in accordance with current controls.

77. The GFA breakdown letter from Veris further states that they did not attend the site to survey the current as built floor plans and void locations. The desk top review was based on the existing tower drawings that were provided by the owner of the site, GPT Funds Management Limited and provided a note stating the 'Pitt Street Convenience' area and internal through-site link have also been excluded from the GFA total based on calculations completed by FJMT in 2013 (under the 1996 definition of floor space). Furthermore, while GFA plans have been submitted which are annotated to illustrate the location of the voids, no comparison has been made of the approved floor plans by the applicant. As such, there remains some uncertainty as to whether there is available floor space on the site which will render the site compliant with the FSR covenant.
78. The Veris survey calculates an as built GFA of 64,867.1sqm and notes that the proposal will result in a GFA of 65,048.4sqm which complies with the floor space restriction of 65,103.3sqm however, these calculations are made based on an outdated definition of floor space. A number of areas excluded from the calculations now contribute to the overall GFA calculations under the Sydney LEP 2012, including enclosed through-site links, wintergardens associated with the single dwelling within the site and 'convenience' retailing stores. The table below provides a breakdown of the approved GFA in the original consent in accordance with previous definitions, actual existing GFA as per the definition of the Sydney LEP 2012 and the proposed GFA based on the survey plans provided by the applicant.

	Gross Floor Area	FSR
Veris calculations (based on LEP 1996 and LEP 2005 definitions)	64,967.1sqm	14.46:1
Existing equivalent under LEP 2012 definitions	66509.2sqm	14.82:1
Proposed	66,690.5sqm	14.86:1

79. The proposal will increase the floor space by 181sqm as a result of the creation of the pavilion bar (tenancy 10 (T10)) and the extension of tenancies 6-9. The proposal will result in a FSR of 14.86:1 providing a gross floor area of 66,690.5sqm across the site.
80. The base building approved a previous FSR of 14.2:1 (63,885sqm) which exceeded the maximum FSR of 12.5:1 by 13.8%. The variation of the floor space development standard, primarily due to the removal of the Grand United Building site from the development, was supported by the CSPC citing that the development seeks no material changes to the tower development or restoration of Legion House and would provide public benefits including a 1,200sqm "Ethics Plaza". In order to ensure that the public benefits were delivered restrictions were placed on title relating to floor space, out-door seating and public access through the public plaza. These are discussed separately below.
81. The GFA was again increased under modification D/2007/1792/H resulting in a GFA of 65,103.5sqm FSR 14.5:1 under previous definitions of GFA and FSR.
82. Overall, in accordance with the GFA calculations using plans provided by Veris and calculations reflecting the Sydney LEP 2012 definition of floor space, the proposed FSR is 14.86:1, exceeding the FSR control of 12.52:1 by approximately 19%.

Clause 4.6 request to vary a development standard

83. A written request has been submitted to Council in accordance with Clause 4.6(3)(a) and (b) of the Sydney LEP 2012 seeking to justify the contravention of the development standard by demonstrating:
- (a) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and
 - (b) That there are sufficient environmental planning grounds to justify contravening the standard.
84. A copy of the applicant's written request is provided at Attachment B.

Applicant's Written Request - Clause 4.6(3)(a) and (b)

85. The applicant seeks to justify the contravention of the floor space ratio development standard on the following basis:
- (a) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case:
 - (i) that the need to create additional floor space demonstrates there is insufficient appropriately located floor space to meet the needs for hospitality focussed offerings in the CBD;
 - (ii) that the built form is not affected from outside the development and is not inconsistent with any local character controls;
 - (iii) that the absence of the development at the ground floor would hinder the attainment of the objects of Section 1.3(a) and (c) of the Act, which are to promote the social and economic welfare of the community;
 - (iv) that the additional floor space resulting from the built additions will assist with the activation of the existing commercial premises; and
 - (v) that the proposal meets the objectives of the floor space ratio development standard and the objectives of the B8 Metropolitan Centre zone and strict compliance does not serve any purpose that should outweigh the positive outcomes of the development and thus a better planning outcome.
 - (b) That there are sufficient environmental planning grounds to justify contravening the standard:
 - (i) The variation is minor, making up 0.27% of the existing FSA at the subject site. It is also within the scope of the maximum FSA previously approved.
 - (ii) The additional GFA is primarily sought is to be located within an existing undercroft and so would not add to the overall height or bulk of the development. Notwithstanding, its construction would not impact upon the public domain outside of the redevelopment.

- (iii) The development will ensure activation of Liberty Place. The additional building would be most suited to be used as an early morning café and breakfast spot, reflecting the success of two similar offerings in Liberty Place closer to Castlereagh Street. Due to its underutilisation of the undercroft, there is presently no public benefit being accrued by its existence.
- (iv) The additional building is proposed to act as an attractor to encourage potential patrons from Castlereagh Street, deeper into the development. The fact that 3 out of the 4 businesses in the existing retail tenancies did not survive at the base of ANZ Tower shows demonstrates the underutilisation of this space.
- (v) The FSR variation will not give rise to any significant adverse amenity impacts on surrounding development in terms of overshadowing, loss of solar access or loss of views.
- (vi) The proposed development, including the FSR variation, achieves compliance with the relevant underlying objectives of the standard and the objectives of the zone.

Consideration of Applicant's Written Request - Clause 4.6(4)(a)(i) and (ii)

86. Development consent must not be granted unless the consent authority is satisfied that:
- (a) The applicant's written request has adequately addressed the matters required to be demonstrated by subclause 3 of Clause 4.6 being that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the standard; and
 - (b) The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

Does the written request adequately address those issues at clause 4.6(3)(a)?

87. The applicant has failed to demonstrate that the application meets the objectives of the floor space ratio as the new development does not reflect the desired character of the locality, namely a public plaza, and will not minimise adverse impact on the amenity of the locality. In contrast, the additional floor space will modify the mix of uses on site (being commercial indoor/outdoor space and a publicly accessible open plaza) and have a negative impact on the quantity and quality of the public plaza. The application does not rationalise why the reduction of outdoor public space for the purposes of increasing the area of a commercial tenancy is an adequate intensification of commercial use on site or an appropriate mix of land uses that characterise Central Sydney.
88. The applicant notes that the vacancies of three of the four existing commercial tenancies shows the need to provide additional floor space to support hospitality focussed offerings in the CBD however does not adequately address how additional floor space will provide appropriate amenity to the reduced public plaza area, an aspect of the development that has been praised from its initial design development phase.

89. The applicant's justification is unable to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary nor has it established that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

Does the written request adequately address those issues at Clause 4.6(3)(b)?

90. The applicant has failed to accurately calculate the existing GFA on the site and has relied on calculations from previous application quoting LEP 1996 and LEP 2005 definitions of gross floor area and floor space area. Further, the applicant partly justifies the non-compliance with the FSR control by relying on a covenant stating the maximum FSR of the site is 14.51:1. This covenant notes the 14.51:1 FSR is in accordance with the relevant definition of floor space in the Central Sydney LEP 1996, a definition that is no longer applicable to the development. The notion that the additional floor space is still contained within the scope of the already approved maximum floor space area is not supported.
91. The assertion that exceeding the floor space ratio standard provides improved hospitality activity to the site by remove a large area of dedicated public open space is not considered an environmental planning ground sufficient to justify a variation, as there is already an established outdoor leasable area available to assist the activity of these commercial tenancies.
92. Further, the argument that the proposed development does not add any additional bulk to the development is not supported. The existing public plaza is surrounded by a small pavilion addition and a large undercroft area approximately 13.8m in height that supports a piece of public art. The proposal seeks to add additional pavilions that both add bulk to the otherwise large open plaza and impacts views to the artwork and existing pavilion.
93. The removal of an established public plaza with a component of outdoor seating areas for commercial tenants and the proposed replacement with additional built pavilion spaces that exceeds the floor space ratio development standard has not been adequately justified and the applicant has not adequately provided enough planning grounds to justify contravening the floor space ratio development standard.

Is the development in the public interest?

94. With regard to varying development standards, the public interest is conceived as being protected where a development meets the objectives of the zone and the development standard sought to be varied. As has been discussed already, the exceedance to the floor space ratio standard does not accord with its objectives nor the objectives of the B8 Metropolitan Centre zone in providing diverse and compatible land uses.
95. The additional floor space will reduce the amount of available space in the plaza available to the public and is not in the public interest.

Conclusion

96. For the reasons provided above the requested variation to the Floor Space Ratio development standard is not supported as the applicant's written request has not adequately addressed the matters required to be addressed by cl 4.6(3) of the Sydney Local Environmental Plan 2012. In addition the proposed development is not in the public interest because it is inconsistent with the objectives of the Floor Space Ratio development standard and the B8 Metropolitan Centre Zone.

Impacts on the Public plaza

97. The proposal seeks consent to extend the private leasable seating zone and vary the restrictive covenant in relation to the use of land to allow for a larger outdoor dining area. Figure 26 below illustrate the approved leasable seating areas under the restrictive covenant and the proposed variation to the leasable seating zones. The plan is annotated to reference that the red area (the open space) in the approved plan equates to 971.15sqm - this is reduce to 748.19sqm in the proposed plan (a reduction of 222sqm).

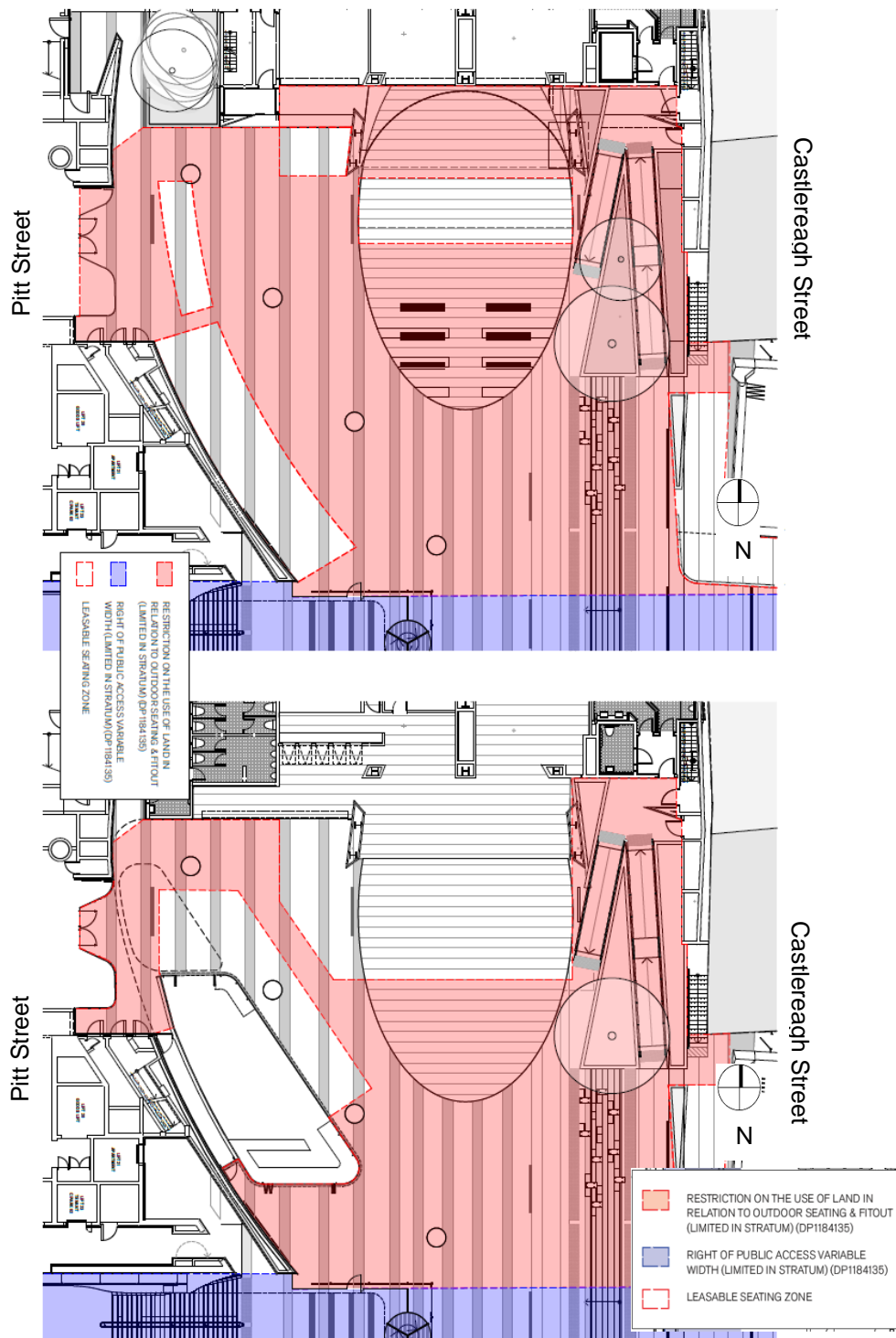


Figure 26: Approved and proposed Restriction on Land Uses Plan.

98. The Applicant justifies the variation to the leasable seating zone on the following grounds:

- (a) The increased leasable seating will not impact on the 6m wide public easement between Pitt and Castlereagh Street and will not result in privatisation of 'public' space.

Response: It is agreed that the increased seating zone will not impact on the 6m wide easement between Pitt and Castlereagh Street which is subject to a separate clause in the restrictive covenant. However, it is not accepted that the extension of private outdoor seating for the exclusive use of the bar will not privatise the 'public' space.

- (b) The plaza was always intended to be used for the benefit of future tenants and workers by being partly used for outdoor seating. The intention for this area to provide outdoor seating and public activation will be furthered by the Application, which is presently underutilised and largely inactive.

Response: The plaza was intended to be used for the benefit of the public with specific seating areas available for lease by tenants in the ground floor units that surround the plaza. Tenancy 7 is occupied which is trading as Market Place and tenancies 6, 8 and 9 are vacant. Site visits confirm that Market Place provides an active frontage with customers using the leasable seating zone.

Members of the public use the additional seating dispersed throughout the plaza. Should the other tenancies be leased this will further activate the plaza. An extension of the leasable seating zone for the exclusive benefit of one commercial business is not a valid reason for activating the space.

The proposed extension of the leasable seating zone to be used solely by Liberty Place Bar would privatise the space reducing the quantity and quality of space available to all members of the public.

- (c) The increase in leasable seating area primarily falls between the internal and existing external leasable seating areas. As an operational consideration, these areas can serve no public purpose and would need to operate as part of any retail food and drink premises approved to occupy the internal areas and external leasable seating areas.

Response: The area between the internal bar area and the outdoor dining areas approved under D/2017/725 are standing areas which allow patrons to walk between the internal bar area and the outdoor seating. The subject application proposes an extension of the internal bar (tenancies 6-7) into the plaza, an extension of the private leasable outdoor seating area and the additional pavilion bar area (T10).

The extension of the internal bars and the leasable seating zone is excessive and diminishes the quantity and quality of the retained public plaza. The space between the tenancies and the outdoor seating is identified as general 'public' space on the original base approval which will be lost as a result of the extension of the pub into these areas.

99. On the 24 August 2019, the Applicant submitted the following additional justification in support of the modification.

"The Owners' intent is that the plaza will remain a highly activated, publicly accessible space with an improved retail offering. While the retail improvements are dependent on revised retail enclosures and adjusted areas of external leasable seating, the final mechanism for approval of these would be subject to review between the Owners and Council. The design response endeavours to ensure the long-term public accessibilities of the space is retained and permits future flexibility and retail trends develop over time"

100. It is accepted that the Owners seek to improve the retail offering at Liberty Place, however, it is not accepted that the extension of the internal and external private bar area will ensure long term public accessibility within the plaza. These areas will be used exclusively for patrons of the bar and not the general public under the subject application.
101. In summary, the extension of the leasable seating zone and the variation of the restrictive covenant are not supported for the following reasons:

Contrary to the base consent and restrictive covenant

102. As noted above, the CSPC approved development consent D/2007/1792 for an FSR which exceeded the maximum FSR by 13.8% on the basis that the proposal will result in public benefits including the creation of a 1,200sqm 'Ethics Plaza'.
103. In order to secure the public benefits of the plaza, condition 6(c)(i) of D/20071792/N required the formalisation of the leasable seating area plan through a restrictive covenant. Conditions 6 (c) (i) of the consent reads as follows:

"The following applies to the mid-block open space and its property ownership:

In order to provide clear demarcation of the "public" and "private / leasable" space within the mid-block open space, to ensure that this space is not "privatised" by future uses, and to assist in the determination of future Development Applications by tenants for the individual use and fit out of adjacent tenancies only that part of the space within a 2-4m perimeter of the respective shopfronts (allowing for adequate public circulation space) is permitted to be leased for outdoor seating only. A plan complying with the requirement of this condition must be approved by the Director of City Planning and regulatory Services prior to the release of the Construction Certificate for Stage 2 of the development".

104. The leasable seating zone plan was approved on 27 July 2012 to satisfy this condition (refer to figure 21 above) and a restriction on title to address the condition was created and a leasable seating zone plan was approved (refer to discussion above).
105. The extension of the private leasable space contravenes the development approval for the base building D/2007/1792/N and the restrictive covenant which was created to protect the public benefits of the plaza. Any reduction of the publicly accessible area is contrary to the planning intentions of the original approval in providing a mid-block open space and accessible public plaza.
106. The proposal will result in the following negative impacts on the public plaza contrary to the intent of the base consent:

- (a) A 222.96sqm reduction in the amount of 'public' space in the plaza. This loss is further exacerbated if the relatively narrow spaces leading to Tenancy 9 around the proposed private outdoor spaces (see figure 27 below), which effectively is only usable for circulation purposes, were excluded;
- (b) The privatisation of part of the public square. The proposal will result in the alienation of a large portion of the public plaza to the exclusive benefit of the pub / hotel proposed tenancies (tenancies 6 -10) on the perimeter of the square;
- (c) The proposed outdoor seating area extends well into the plaza significantly reducing the amount of useable open space. In particular, the new pavilion bar T10 will take up most of the building undercroft area which is the only space of the square providing protection from the elements;
- (d) While the current configuration (with the seating area confined at the perimeter of the plaza) encourages the use of the space by employees and visitors from nearby buildings, the envelopment of the square on three sides by large seating areas will effectively "code" the space as private and diminishing its "publicness";

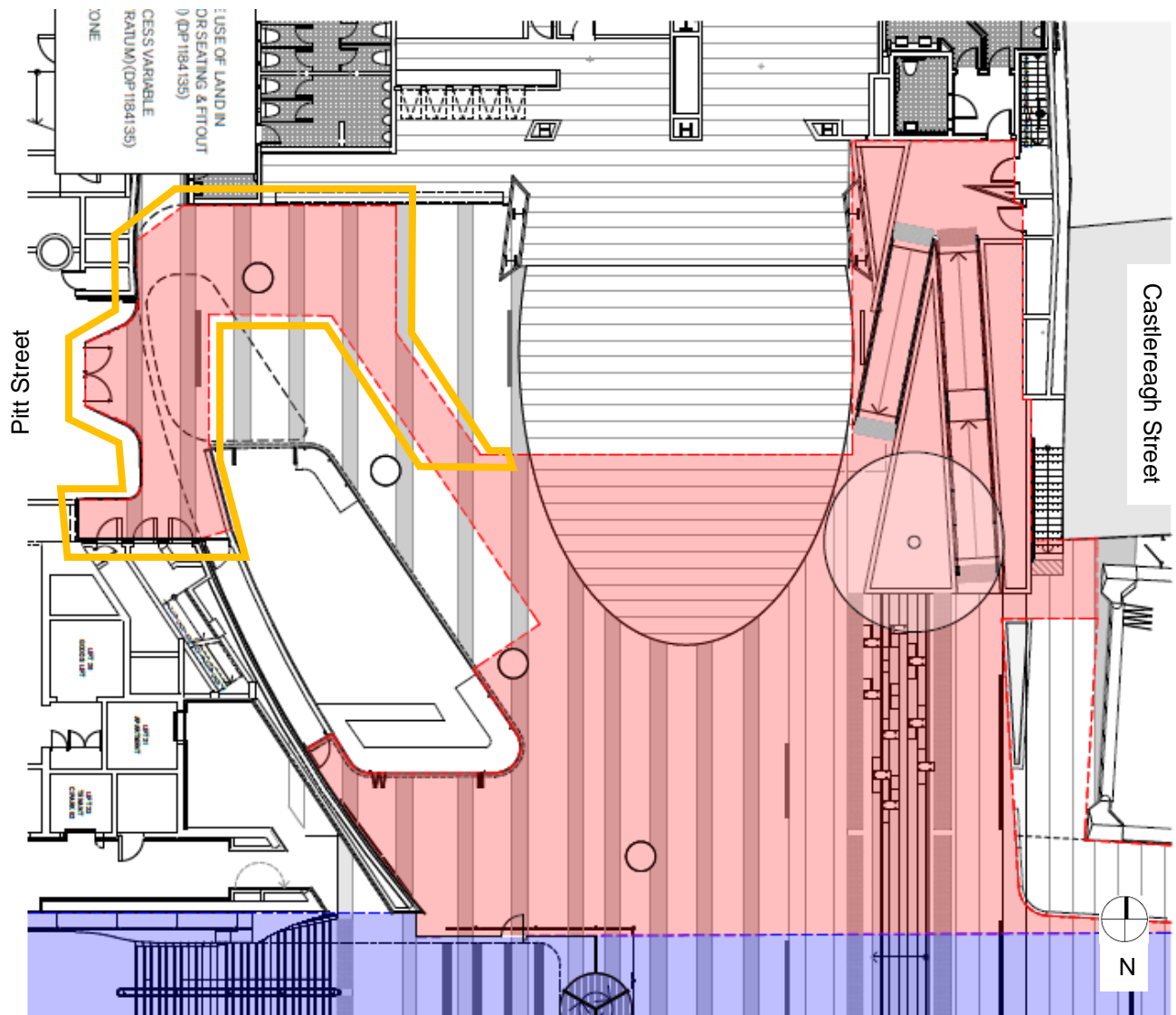


Figure 27: Narrow circulation spaces excluded from proposal outlined in orange

107. A variation to condition 6 (c) (i) has not been submitted and the modification to the restriction on title in relation to outdoor seating in the plaza is not supported.

Design Excellence

108. Clause 6.21 of the Sydney LEP 2012 requires that Council be satisfied that a development must demonstrate design excellence. Clause 6.21 (4) provides for a list of matters to which Council must have regards to. These matters include:
- (a) *whether a high standard of architectural design, material and detailing appropriate to the building type and location will be achieved;*
 - (b) *whether the form and external appearance of the proposed development will improve the quality and amenity of the public domain,*
 - (c) *whether the proposed development detrimentally impacts on view corridors,*
 - (d) *how the proposed development addresses the following matters—*
 - (i) *the suitability of the land for development,*
 - (ii) *the existing and proposed uses and use mix,*
 - (iii) *any heritage issues and streetscape constraints,*
 - (iv) *the location of any tower proposed, having regard to the need to achieve an acceptable relationship with other towers (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,*
 - (v) *the bulk, massing and modulation of buildings,*
 - (vi) *street frontage heights,*
 - (vii) *environmental impacts, such as sustainable design, overshadowing and solar access, visual and acoustic privacy, noise, wind and reflectivity,*
 - (viii) *the achievement of the principles of ecologically sustainable development,*
 - (ix) *pedestrian, cycle, vehicular and service access and circulation requirements, including the permeability of any pedestrian network,*
 - (x) *the impact on, and any proposed improvements to, the public domain,*
 - (xi) *the impact on any special character area,*
 - (xii) *achieving appropriate interfaces at ground level between the building and the public domain,*
 - (xiii) *excellence and integration of landscape design.*
109. The form and external appearance of the proposed development does not improve the quality and amenity of the public domain and the proposal will impact on views to the existing art installation and is contrary to clause 6.21 (4)(b), (c), and (d)(v),(ix), (x) and (xii).

Amenity of the central public plaza

110. The plaza currently provides space for both passive and active uses that respond to the community uses. Dedicated private leasable outdoor seating is available for the ground floor commercial tenancies. In addition, 10 benches are available throughout the plaza for public benefit. Site visits confirm that the benches and public space is used by residents, visitors and workers within the city especially during lunch periods. The space is also used for recreational needs of the community with table tennis tables and events held in the public open space, refer to figure 28 below.



Figure 28: Existing Plaza with passive and active recreational zones.

111. The proposal will remove the 4 benches currently located in the under-croft area to be replaced with the new pavilion bar building (tenancy 3) and associated private outdoor seating with awning above, refer to figure 29 below. The proposal will have the effect of privatising the space and reducing the quality of open space and is not in the public interest.



Figure 29: Tenancy 10 public seating and art work above. The proposed pavilion will replace the benches.

Public Art

112. An art installation was installed within the plaza as part of the consent for the base building. The art comprises a white neon mobile public art installation named "Light Event" created by Cerith Wyn Evans (refer to figure 30 below).



Figure 30: Tenancy 10 in the under-croft area provides public benches and artwork above.

113. The proposed pavilion is located immediately below the under croft and the art installation, refer to figures 31 and 32 below.

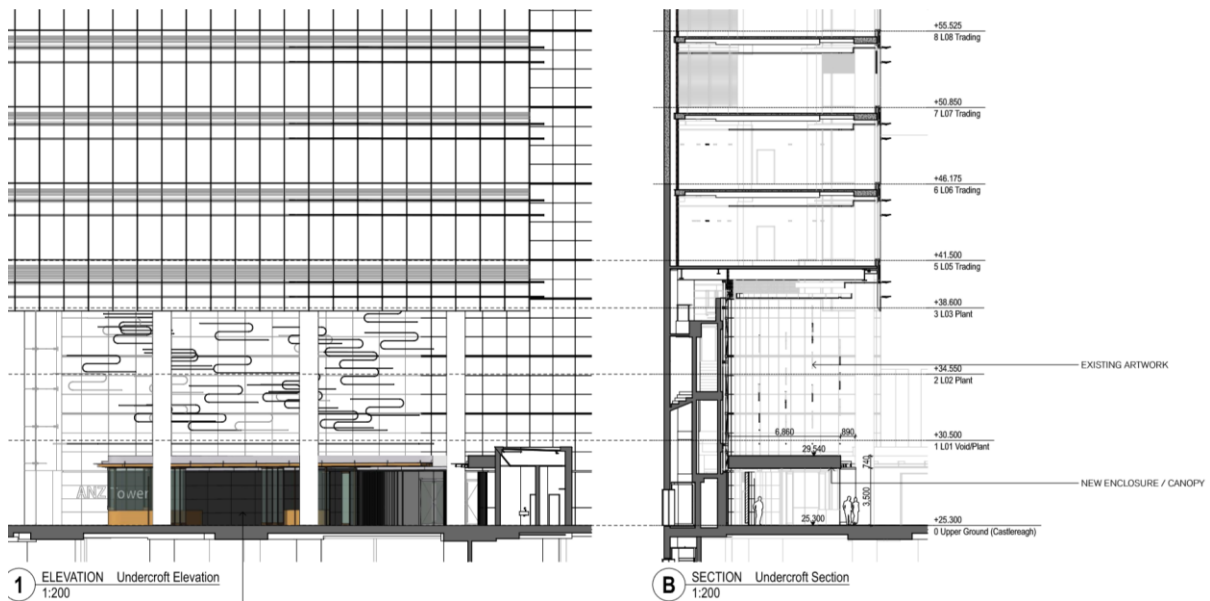


Figure 31: Elevation and section of the proposed pavilion to tenancy 10.

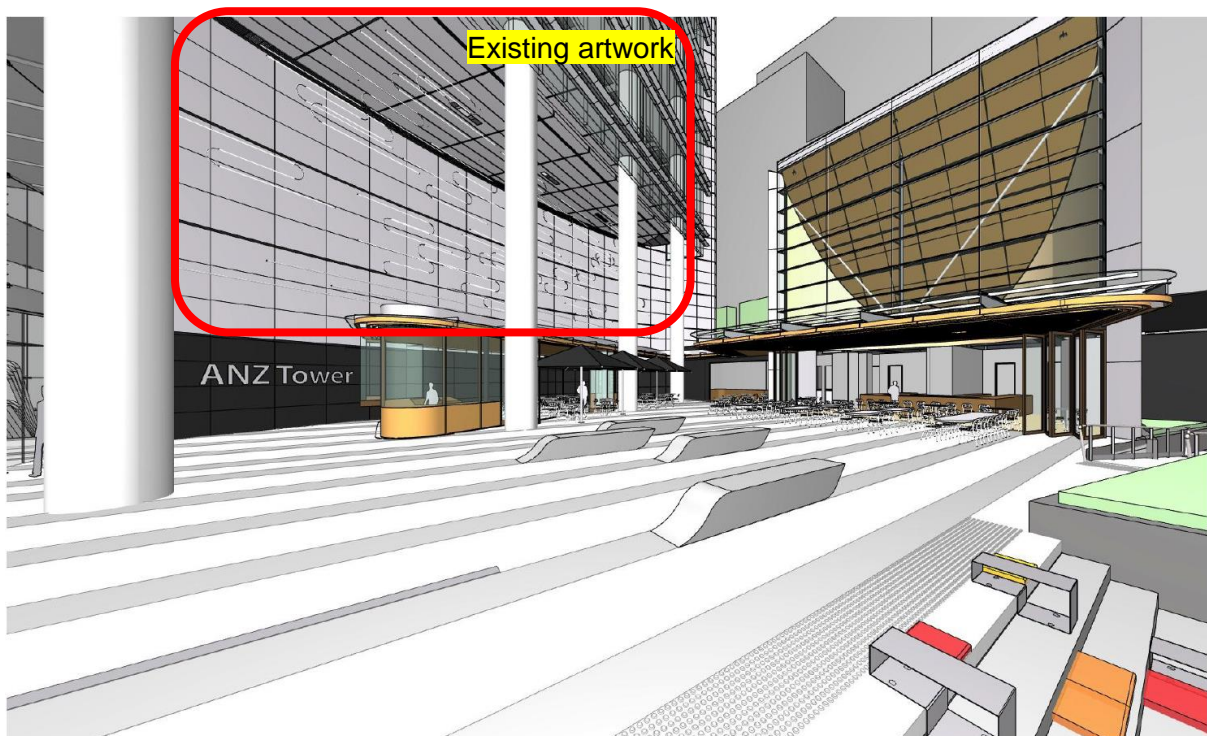


Figure 32: 3D perspective of proposed pavilion addition and artwork directly above (outlined in red).

114. In response to issues raised regarding the negative impacts of the pavilion on the artwork the Applicant provides the following justification:

115. *"The T10 pavilion has been designed as a low-key addition and respectfully to the neighbouring artwork. The proposal will maintain key views to the artwork and ensure that there is a strategy for its ongoing maintenance. The new T10 pavilion adopts its design expression and materiality from the existing elements in the plaza. This ensures a new / competing element is not added to the plaza that would conflict with the artwork".*
116. While it is appreciated that materiality of the pavilion has been considered to express the elements in the plaza, the location of the pavilion and subsequent impacts on the availability and quality of open space (refer to discussion above) and impacts on the existing artwork remains the relevant issue.
117. The location of the pavilion and awning will almost entirely encompass the building under-croft and will negatively impact on public enjoyment of the artwork and public space around it. The location of the bar structure at T10 sits below the existing public art installation "Light Event". The bar structure will restrict visibility to the art and compromise its significance.
118. Council's Public Art Unit, Public Domain Unit and Urban Designer confirm that the pavilion bar will have a negative impact on the artwork and the public space around the artwork. As such, the proposal will not improve the quality of the art installation and is inconsistent with objective (a) of provision 3.1.5 (public art) of Sydney DCP 2012 which seeks to increase the number and improve the quality of public artworks in private developments.

Trees

119. The proposed development will impact two trees including the removal of a Hills Fig tree (tree 1) located in a planter box on the north-west side of the courtyard (refer to figure 33 below). The application was referred to Council's Tree Management Officer who supported the removal of the tree considering its age and inappropriate location.
120. The awning will however encroach on the semi-mature Hills Fig (tree 2) which is in good health. The impact on this tree is unacceptable and a minimum 3m clearance is required between the awning and the tree canopy. The proposal is not supported by Council's Tree Management Officer and is inconsistent with provision 3.5.3 of the Sydney DCP 2012 which requires developments to ensure the protection of trees and maximise the quality and quantity of healthy tree canopy coverage.



Figure 33: Plaza looking toward the tree that will be negatively impacted by the canopy.

Acoustic compliance

121. The proposed development has failed to demonstrate that appropriate acoustic levels can be achieved by presenting technical errors in the submitted amended acoustic report and making assumptions on background noise levels and surrounding buildings prior to certain works are carried out, particularly the glazing and façade works that are yet to occur at the Castlereagh Boutique Hotel adjacent to the site.
122. The amended acoustic report and Plan of Management were referred to Council's Health and Building Unit and Acoustic Specialists who identified a number of inconsistencies and technical errors within the report. The main concerns have been summarised below:
 - (a) In relation to impacts on the hotel receiver, the acoustic consultant has assumed that the Castlereagh Boutique Hotel has completed the glazing and façade works, creating an additional acoustic barrier. This barrier, although approved by the City, has not yet been installed and it is unclear when or if these works will be completed. Therefore, the report underestimates the noise impacts on the hotel receiver. If the correction is removed there are large exceedances of the noise criteria in all octave spectra from 125 Hz.
 - (b) In relation to the commercial receivers, the consultant has used an area correction of the ceiling equivalent to 25sqm. However, the submitted plans for Area 1 show a ceiling area of 269sqm. This would alter the area correction and result in an under prediction of noise impacts of up to 10dBA for internal to internal noise transfer within this area.
 - (c) The proposal includes the installation of a 4mm thick PVC drop down curtain placed along the perimeter of the proposed awning to contain noise after a certain time. Testing data for a 4mm PVC curtain and sample calculations from Council's Acoustic Specialist however indicates that the PVC may increase noise levels, rather than reduce them.

- (d) The acoustic report measured noise generation as a single patron sound power rather than assessing maximum patrons in each of the areas of the proposed tenancy (i.e. inside the additional pavilion, under the awning area and other internal areas). The sound power issue has not yet been clarified into sound pressure levels established from multiple people talking outside in the various licensed outdoor areas and the patron number control commitment in the submitted Plan of Management fails to ensure patron numbers will be diligently monitored and maintained.
123. The errors, assumptions and claims of performance of certain materials in the submitted acoustic report are not supported by Council and is likely that the development will have an adverse acoustic impact on surrounding sensitive uses. The proposal is thus inconsistent with objectives (b), (h) and (k) of Section 3.15 of the Sydney DCP 2012 as the level and quality of information provided cannot ensure the development will not have an adverse impact on surrounding sensitive uses or will be managed to adequately monitor any acoustic issues. Inadequate information has been provided to support the application for acoustic compliance and the application cannot be supported from an acoustic amenity perspective.

Access

124. Access for disabled persons can be provided to the premises.

Other Impacts of the Development

125. The proposed development is capable of complying with the BCA. It is a Class 6 building.
126. It is considered that the proposal increase in floor space and the extension of the leasable seating zone will have significant detrimental effect relating to environmental, social or economic impacts on the locality.

Internal Referrals

127. The application was discussed with the Urban Design Specialists; Public Domain; Environmental Health Unit and Tree Management Unit who all raised issues with the proposal. The respective issue of each referee is discussed under the Issue section.
128. The application was also discussed with the Building Unit, Licensed Premises Unit, and the Specialist Surveyor and Heritage Specialist who raised no particular issues with the development.

External Referrals

129. On 12 February 2019, the application was referred to the NSW Police and the Liquor and Gaming Authority. At the time of writing this report no response has been received.

Notification, Advertising and Delegation (Submission(s) Received)

130. In accordance with Schedule 1 the Sydney DCP 2012, the proposed development is required to be notified and advertised. As such the application was notified and advertised for a period of 21 days between 12 February 2019 and 6 March 2019. As a result of this notification a total of 205 properties were notified and two submission were received from the Castlereagh Boutique Hotel (CBH). Both submissions attach a letter of objection prepared by GLN planning on behalf of the Hotel.

- (a) Variation of the maximum FSR control not supported by a Clause 4.6 variation. The proposal exceeds the maximum FSR of 8:1 applied under the SLEP 2012 and argues that the restrictive covenant on floor space imposed on the title of the land takes precedence over the floor space ratio control. Neither the LEP nor the EPA should be disregarded where inconsistent with a land title covenant. The Wang v North City Council decision confirm that a covenant such as this is an "instrument made" under the Conveyancing Act, not the EPA Act. The covenant is treated separately to the requirements under the LEP. A Clause 4.6 variation has not been submitted and the application and as such the DA cannot be approved.

Response: It is agreed that the variation of the restrictive covenant on floor space does not take precedence over the floor space control and the EPA and Sydney LEP 2012 must be considered. The restrictive covenant was placed on title for the base building which exceeded the FSR controls by 13.8% based on the public benefits. The proposal exceeded the maximum 12.52:1 FSR (8:1 FSR base plus 4.52 FSR accommodation floor space) and diminishes the amount of public space available and the quality of the open space. A Clause 4.6 variation request was lodged with Council after the notification of the development however the applicant's justification is not supported.

- (b) Increase to patron number allowances above that approved at the former Windsor Hotel and breach of the Liquor Act and Freeze Provisions. The subject site is within the Freeze Precinct. A search of Council's records confirm that the patron numbers approved under condition 2 of D/2017/725 are in excess of the patron numbers of the Windsor Hotel. D/2017/725 has adopted the maximum numbers indicated on the population study report prepared by the applicant which relied on additional sanitary facilities approved under CDC 17/0317/01. The subject DA seeks the same patron numbers.

Response: The assessment of the original DA for the pub, D/2017/725, included a review of two population study for the Windsor Hotel and Liberty Place Bar. The studies were based on a review of the population of both venues against the requirements of the deemed to satisfy provisions of the National Construction Code considering available floor area, aggregate exit widths and sanitary facilities.

A site visit to the now demolished Windsor Hotel also confirmed that the additional amenities approved under the CDC had been built. Council's Building Unit reviewed studies and floor plans and confirmed that the assessment was acceptable. Pursuant to clause 47 of the Liquor Act and the assessment of the original DA, it was concluded that subject to a condition restricting the patron capacity to 680 that the patron population of the new Liberty Place Bar would be no more than the patron capacity of the Windsor Hotel. The removal (transfer) of the Liquor license was approved by the Liquor and Gaming Authority on 15 August 2018.

The proposed patron numbers (total 680 (with a maximum of 290 patrons permitted outside) in the subject DA do not exceed the number approved under the original Development Consent D/2017/725.

- (c) Inconsistency with development consent D/2007/1792/N, in particular condition 6 (c) which relates to the mid-block public and private open space and leasable seating. The proposal extends the private leasable seating contrary to the condition and the restrictive covenant on the land use. The applicant's argument that the space is needed for the operation of the pub and the activation of the space is not sufficient justification for the variation of the amendment and the proposal will result in the alienation of public space.

Response: It is agreed that the development is inconsistent with the base consent. The SEPP 1 objection for the 13.8% increase in GFA above the FSR was based on the premise that the development would deliver significant public benefits including the 1,200sqm Ethics Plaza. In order to secure the public benefits and protect the plaza from privatisation condition 6 (c) required the creation of a restrictive covenant which defines the private leasable seating areas. The proposal seeks consent to extend the private / leasable seating areas beyond those approved, effectively reducing the amount of "public" space available in the plaza by 222sqm and in effect privatising a large section of the plaza. This loss is further exacerbated if the relatively narrow spaces leading to Tenancy 9 around the proposed private outdoor spaces, which effectively is only usable for circulation purposes, were excluded. The Applicant's argument that the space is underutilised is not sufficient justification.

- (d) Interference with right of public access. The right of public access includes areas 7 and 10. The areas used by the hotel effectively alienate / privatise land that otherwise is required to be kept available for public access. The current application intends to enclose the area as part of the development.

Response: The areas of the plaza adjacent to tenancies 6 - 10 do not form part of the easement for public access pursuant to the restrictive covenant. The covenant requires the consent of Council for any use of the space for outdoor seating with the intent of protecting the space from privatisation.

Condition 6 of D/2007/1792 for the base building requires a clear demarcation of 'public' and 'private leasable' space. In accordance with this condition, a leasable seating zone plan was approved in July 2012 which identifies specific zones. The proposed pub extends beyond these areas which is contrary to the base consent.

- (e) Impacts of noise upon the surrounding locality. The noise impact assessment is inadequate. The applicant relies on the earlier acoustic report despite the amendments to the outdoor areas and the addition of a new tenancy T10 closer to the Castlereagh Boutique Hotel. This is a significant variation of the approved plan. The adequacy of the noise assessment is questioned and it is noted that the changes to the operation of the premise is not included in the report. There is not sufficient certainty that the impacts of noise as a result of the amended design will not negatively on the surrounding locality.

Response: The applicant has amended the acoustic report on 18 July 2019 to consider the worse-case scenario and recommended noise limiters for indoor and outdoor speakers, minimum glazing requirement and the cessation of the outdoor areas and any speakers at specific times. The report indicates that the use of the premises is in accordance with the recommended controls and will comply with Council entertainment noise condition. Council's Health Unit however have raised issues with the submitted acoustic report and highlighted technical issues that result in inaccurate readings that may impact the acoustic compliance of the development. As discussed above, the application is not supported from an acoustic compliance perspective.

- (f) The subject application indicates a number of variations which are confusing resulting in un-certainty as to what is being sought. There have been four applications to Council for the development and two appeals to the Land Environment Court. Both appeals and two of the four development applications to Council have been withdrawn.

The documentation requires a comprehensive review and supporting reports prepared for earlier applications are not sufficient for the current application. Inaccuracies and uncertainties identified in D/2017/725 are exacerbated by the current application.

The subject development should be considered as a fresh application and no weight given to the earlier development consent D/2017/725. Should consent be considered for the subject proposal DA, development consent D/2017/725 should be surrendered in order to avoid ambiguity.

Response: It is agreed that there is a protracted history to the site and to the proposed Liberty Place Bar including four (4) applications to Council and two (2) Court cases. The subject application is not substantially the same as the approved DA, D/2017/725. As such, the application has been assessed as a new DA which includes a review of history relevant to the development history applicable to the proposal.

- (g) The application is a Schedule 3 DA and the proposed development is identified as 'sensitive development' as it is a new licensed premises that will require a liquor license. In accordance with the Section 9.1 Direction the application will be required to be determined by the Local Planning Panel (LPP).

Response: As a sensitive development with a new licensed venue, the application is being reported to the LPP.

- (h) The trading hours should be in accordance with the Late Night Trading Provision of the SDCP 2012 and any trial extension should be applied for following the operation of the premise.

Response: The proposal trading hours complies with the Late Night Trading Provisions subject to a trial for extended outdoor trading.

Public Interest

131. It is considered that the proposal will have a detrimental effect on the public interest.

S61 Contribution

132. The cost of the development is in excess of \$200,000. If the application is recommended for approval, the development would be subject to a levy under the Central Sydney Development Contributions Plan 2013.

Relevant Legislation

133. The Environmental Planning and Assessment Act 1979.
134. Liquor Act 2007.

Conclusion

135. The application proposes the demolition of an existing planter bed and mature tree and public seating elements within the existing outdoor public plaza for the fit out, extension and use of tenancies 6, 7, 8, 9 of Liberty Place for a licensed pub to be known as 'Liberty Place Bar'. The development includes the encroachment of private development into the established public plaza and reduces accessibility to the plaza and views to existing public artworks that will have a negative public amenity impact.
136. The pavilion and extension of the existing tenancies will result in the creation of an additional 181.3sqm of floor space resulting in an overall FSR of 14.86:1, 18% over the Sydney LEP 2012 maximum FSR control for the site. A request to vary the floor space ratio standard does not adequately address the provisions of Clause 4.6(3) and is not in the public interest. As such development consent must not be granted.
137. The proposed extension of the leasable seating area is not supported as it will privatise the public space reducing the quantity and quality of the public space which is contrary to the intention of the base consent and the covenant. The pavilion building will negatively impact on views to the existing public art installation and the existing bench seating will be removed, further reducing the quality of public user experience within the plaza.
138. Further, the application fails to demonstrate design excellence in accordance with Clause 6.21 of the Sydney LEP 2012 as the form and external appearance of the proposed development does not improve the quality and amenity of the public domain and the proposal will impact on views to the existing art installation and has a negative impact on existing mature trees within the site.
139. Inadequate information has been provided to support the application from an acoustic amenity perspective and the application cannot ensure adequate amenity is maintained to surrounding sensitive uses thus failing to meet the objectives for late night trading management in Section 3.15 of the Sydney DCP 2012.

140. The application was notified and advertised for 21 days and received two objections. These concerns are discussed within the report.
141. For the reasons discussed above, the proposal has unacceptable non-compliances with the Sydney LEP 2012 and Sydney DCP 2012 and is recommended for refusal.

GRAHAM JAHN, AM

Director City Planning, Development and Transport

Marie Burge, Planner