

**Item 6.****Development Application: 31A and 5030 Alfred Street, Sydney - D/2023/292**

File No.: D/2023/292

**Summary**

<b>Date of Submission:</b>	17 April 2023
<b>Applicant:</b>	Planning Lab
<b>Architect/Designer:</b>	Stu+FF Architecture
<b>Developer:</b>	Australian Venue Co
<b>Owner:</b>	City of Sydney Council and The State of New South Wales
<b>Planning Consultant:</b>	Planning Lab
<b>Heritage Consultant:</b>	Curio Projects
<b>DAP:</b>	4 May 2023
<b>Cost of Works:</b>	\$1,525,773.70
<b>Zoning:</b>	RE1 Public Recreation. The development is defined as a food and drink premises which is permitted with consent in the zone.
<b>Proposal Summary:</b>	<p>The development application seeks consent for the demolition of the two existing awning structures and erection of two new single-storey pavilions within Customs House Square. The pavilions are proposed to be used as a food and drink premises operated in conjunction with the internal premises located at the ground floor of Customs House (works to the internal premises are subject to separate applications).</p> <p>Proposed outdoor hours of operation are base hours between 9.00am to 12.00 midnight, Mondays to Sundays, with extended trading between 12.00 midnight to 2.00am the following day on Thursdays, Fridays and Saturdays, subject to a 5-year trial period. The premises will be operated by Australian Venue Co.</p>

The application was notified for 28 days between 26 April 2023 and 25 May 2023. A total of 294 properties were notified and one (1) submission was received. The submission raised concerns on the resulting noise associated with the proposed extended trading hours to 2.00am.

The proposal is similar to that proposed under Pre-Development Application (PDA/2022/8).

The Pre-DA proposal was presented to the City's Design Advisory Panel (DAP) on 24 February 2022.

The applicant was advised of numerous design concerns raised by the DAP, including the structures do not exhibit design excellence in accordance with Clause 6.21C of Sydney LEP 2012, they detract from the State and local listed heritage item (Customs House) and are contrary to the relevant objectives of the Sydney DCP 2012, CBD Civic Spaces Plan of Management, City North Public Domain Plan and City of Sydney Outdoor Dining Guideline. These matters remain outstanding in the subject proposal.

On 4 May 2023, the DAP was advised of the revised proposal which is the subject of the current application. The DAP raised similar issues to comments on the PDA/2022/8 and provided long-term and short-term recommendations for redevelopment.

Furthermore, Crown land owners' consent has not been obtained for the application. In the absence of Crown land owners' consent, the application cannot be recommended for approval.

The applicant was advised of the above concerns on 10 July 2023. The applicant responded and advised of their intention not to withdraw the application. An extensive extension of time has since been provided in which time the application has not progressed on any of the raised matters.

The application is referred to the Local Planning Panel for determination due to conflict of interest as Council is the land owner of some of the land to which the development relates.

**Summary Recommendation:** This proposal is recommended for refusal.

**Development Controls:**

- (i) Environmental Planning and Assessment Act, 1979
- (ii) Crown Land Management Act, 2016

- (iii) SEPP (Resilience and Hazards) 2021
- (iv) SEPP (Sustainable Buildings) 2022
- (v) SEPP (Transport and Infrastructure) 2021
- (vi) SEPP (Biodiversity and Conservation) 2021
- (vii) Sydney Local Environmental Plan 2012
- (viii) Sydney Development Control Plan 2012

**Attachments:**

- A. Selected Drawings

## Recommendation

It is resolved that consent be refused for Development Application Number D/2023/292 for the reasons outlined below.

### Reasons for Recommendation

The application is recommended for refusal for the following reasons:

- (A) The proposed development is inconsistent with Sections 23 and 24 of the Environmental Planning and Assessment Regulations 2021 as the application is not accompanied by the written consent of all owners of the land that form part of the subject site. Crown land owners' consent has not and cannot be obtained as the proposal is inconsistent with the CBD Civic Spaces Plan of Management 2022 which governs the site.
- (B) The proposal is inconsistent with Section 3.36 of the Crown Land Management Act 2016 and the aims of the CBD Civic Spaces Plan of Management 2022.
- (C) The proposed development fails to demonstrate design excellence in accordance with Clause 6.21, 6.21B and 6.21C of Sydney LEP 2012, as it:
  - (i) fails to deliver a high standard of architectural and urban design that is appropriate for the location;
  - (ii) has a form and external appearance that will detract from the quality and amenity of the public domain;
  - (iii) fails to respect the heritage significance of Customs House which is listed as a State and local heritage item;
  - (iv) fails to achieve an appropriate interface and relationship with the Customs House and public domain; and
  - (v) fails to present a suitable bulk, massing or modulation of buildings to address the Circular Quay Special Character Area.
- (D) The proposed development is inconsistent with Clause 7.20(2)(a) of the SLEP 2012 as the site area exceeds 1,500sqm and the site has not been subject of a site specific development control plan, nor has the applicant demonstrated that the preparation of a site specific development control plan is unreasonable or unnecessary in the circumstances or demonstrated to the consent authority that all provisions under Clause 7.20(3) of SLEP 2012 are met.
- (E) The proposed development results in significant adverse impacts on the State and local heritage item Customs House and is contrary to Clause 5.10 of Sydney LEP 2012 and Section 3.9 of Sydney DCP 2012 in relation to heritage conservation.
- (F) The proposal does not accord with:

- (i) Section 2.1.4(e), (g) and (h) of Sydney DCP 2012 as it does not reinforce the area as a major focal point for public celebrations and has not been designed to protect the heritage significance, settings or views of Customs House within the Circular Quay Special Character Area;
  - (ii) Sections 3.1 and 3.2.2 of Sydney DCP 2012 as the pavilions do not provide an appropriate response to the public domain;
  - (iii) Section 3.5.3 of Sydney DCP 2012 as the pavilions are located within close proximity to, and encroach within, the existing tree canopies. The proposal has not demonstrated how the health of the existing trees will be protected;
  - (iv) Section 3.15 of Sydney DCP 2012 in relation to the permissible base and extended outdoor hours of operation;
  - (v) the City North Public Domain Plan as the pavilions present as permanent structures which cannot be easily removed to facilitate events or the public use of Customs House Square; and
  - (vi) the City of Sydney Outdoor Dining Policy and Guidelines with respect to permanent and fixed structures, barriers, separation of the space from the public domain, and general outdoor dining furniture.
- (G) In light of the above, approval of the application is not in accordance with the public interest, as required under Section 4.15(1)(e) of the Environmental Planning and Assessment Act, 1979.

## Background

### The Site and Surrounding Development

1. The subject site has a legal description of Lot 7001 DP 93667, known as 5030 and 31A Alfred Street, Sydney. It is also known as Customs House Square or Customs House Forecourt. The site is generally rectangular in shape with area of approximately 1,664sqm situated to the north of Customs House building at 31 Alfred Street, Sydney. It has a primary street frontage to Loftus Street and Young Street to the east. Circular Quay sits to the north of the site, with the light rail terminus to the north-west.
2. The site is identified as a public reserve. The southern portion of the square is identified as Crown land owned by the State of New South Wales (under the care and control of the City of Sydney Council) and the northern portion of the square is Council owned land, as shown in Figure 1 below.
3. Customs House Square is primarily an open-air paved area defined by rows of Chinese Elm trees and two existing awning canopy structures adjacent to the east and western edges of the square. The existing canopy structures comprise a rectangular footprint of approximately 97sqm each. Customs House Square serves as an important public gathering space for cultural and creative events.
4. Customs House is identified as both State and local heritage item (SHR Item No. 00727, Local Item No. I1661). Customs House Square is not a heritage item nor located within a heritage conservation area. The site is located within the Circular Quay Special Character Area.
5. The surrounding area is characterised by a mixture of land uses, primarily being commercial, tourist and visitor accommodation and residential.
6. Photos of the site and surrounds are provided below:



**Figure 1:** Aerial view of site and surrounds. Subject site shown dashed in red, Customs House Square outlined in green, and Crown land shaded in blue.



**Figure 2:** Customs House Square and subject site viewed from Alfred Street facing south



**Figure 3:** Eastern side of Customs House Square



Figure 4: Westen side of Customs House Square

## History Relevant to the Development Application

### Development Applications

7. The following applications are relevant to the current proposal:

#### Former Quay Bar

- **D/1998/005 and D/1998/0006**

Development consent was granted on 13 February 1998 for the use of two separate areas within Customs House Square for the purpose of outdoor seating facilities in conjunction with the adjoining 'Quay Bar' and 'Cafe Sydney', operating between 6.00am to 12.00 midnight (Mondays to Sundays).

- **D/2006/656 (as modified)**

Development consent was granted on 24 May 2006 for the use of the western part of Customs House Square as outdoor seating area associated with the Quay Bar. The base hours of operation for the outdoor area were restricted to between 9.00am to 12.00 midnight Mondays to Sundays, and extended hours between 12.00 midnight to 2.00am on Thursdays to Saturdays (inclusive) for a 1-year trial period.

This consent was modified four times (Modification Applications A - D) relating to the continuation of the extended hours, maximum patron capacity (112 patrons), noise and operational conditions.



- **D/2017/1430**

Development consent was granted on 9 April 2018 for the continuation of indoor and outdoor trading hours for the licensed Quay Bar. The consent consolidated two previous separate consents for Quay Bar (relevant to the indoor area under D/2016/1689 and outdoor area under D/2006/656 as modified). A maximum capacity of 112 patrons was approved for the outdoor area.

Condition 3 restricted the premise to the following hours of operation:

- Internal hours between 9.00am to 2.00am (the following day), Mondays to Sundays
- Base external hours between 9.00am to 12.00 midnight, Mondays to Sundays
- Extended external hours between 12.00 midnight to 2.00am, Thursdays to Saturdays, subject to a trial period of 5 years (which expired on 3 April 2023).

Condition 17 of D/2017/1430 required all outdoor dining furniture to be removable stackable and stored when not in use (not fixed). This condition also suspended the use of the outdoor dining area to facilitate Council events.

### **Former Young Alfred Restaurant**

- **D/2004/1747**

Development consent was granted on 29 December 2004 for the fit-out and use of the ground floor tenancy in the eastern corner of Customs House as a café/ restaurant with associated outdoor seating within the forecourt of Customs House. Hours of operation were restricted to between 7.00am to 10.00pm, Mondays to Saturdays, and 10.00am to 10.00pm on Sundays. It is noted that there were no conditions on D/2004/1747 which restricted the maximum outdoor capacity of patrons.

### **Customs House Building ground floor tenancies**

- **P/2022/425**

Complying Development Certificate (CDC) No. 70135 relates to the fit-out of the former Young Alfred Restaurant. Council does not have any records to confirm if the CDC has been approved.

- **P/2022/412**

Complying Development Certificate No. 70157 relates to the fit-out of the former Quay Bar. Council does not have any records to confirm if the CDC has been approved.

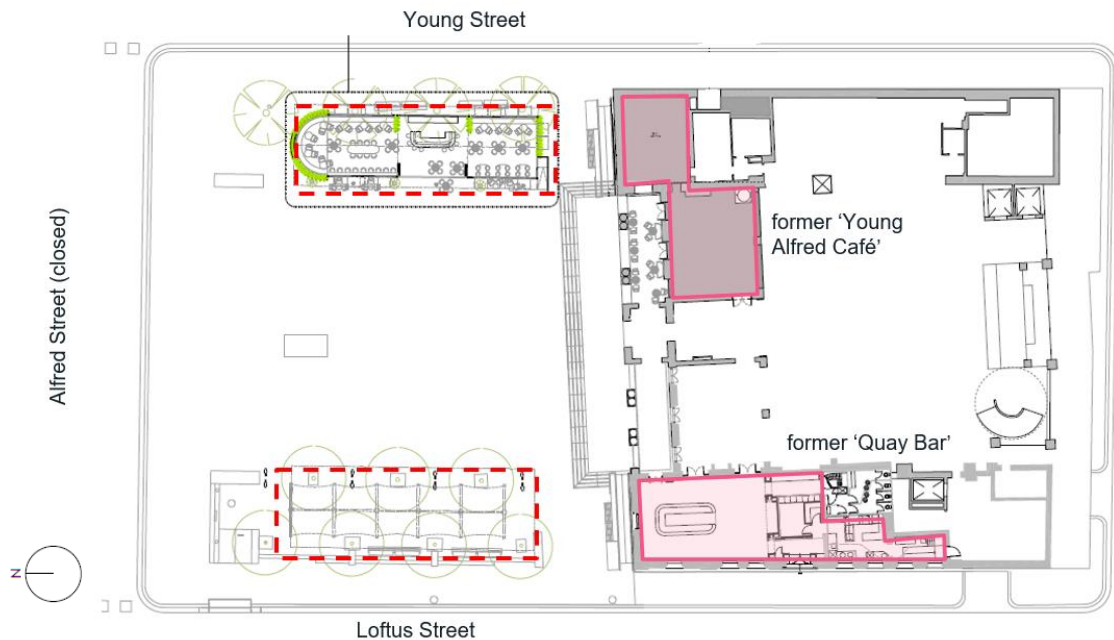
### Customs House Square

- **PDA/2022/8**

A Pre-Development Application (Pre-DA) request for the subject proposal was received on 23 December 2021. The Pre-DA sought advice on the proposed removal of the existing canopy structures and erection of two new prefabricated 'pop-up bars' subject to a 5-year lease period.

- The proposal comprised a two-storey pavilion titled 'The Gazebo' adjacent to Loftus Street and a single-storey pavilion titled 'The Grove' adjacent to Young Street. The associated outdoor dining furniture was proposed to be packed, stored, and secured within the pavilions upon completion of trade each day.

A floor plan of 'The Grove' and photomontages of the Pre-DA scheme are provided below.



**Figure 5:** Pre-DA scheme, Floor Plan



**Figure 6:** Pre-DA scheme, Photomontage of 'The Grove'



**Figure 7:** Pre-DA scheme, Photomontage of 'The Gazebo'

The Pre-DA proposal was presented to the City's Design Advisory Panel (DAP) on 24 February 2022. Whilst the activation of Customs House Square was supported by the DAP, the design of the bars was not supported. The DAP noted the following summarised issues:

- (i) The proposal is at odds with the City's approach to the public domain, the City North Public Domain Plan and Outdoor Dining Policy.
- (ii) The placement of two pavilions which are effectively enclosed is not acceptable.
- (iii) Paving and access should remain contiguous across the square.

- (iv) The scheme poses significant intrusions on the public domain and will inhibit the ability to use Customs House Square for cultural and creative events.
- (v) The proposal's proportions, scale and asymmetry are at odds with the symmetry and scale of Customs House and the square. The proposal is an extremely poor response to the architectural character of its significant neighbour and its urban context and unacceptable given the heritage status of the building.
- (vi) The design quality of proposal is poor. Any proposal on this site must achieve a high level of design excellence.
- (vii) The current proposal will impact existing trees and lighting in the square.
- (viii) The proposed structures and material palette suggest that the proposal is fundamentally a permanent structure.

The above design concerns and DAP comments were relayed to the applicant at a site meeting on 28 April 2022. The applicant was advised that the scheme was not supported as:

- (i) The proposal does not provide a sympathetic or appropriate response to Customs House building, which is listed as a State and local heritage item.
- (ii) The pavilions present as permanent structures which have an adverse bulk and scale. The pavilions do not allow for the use of the Customs House Square for cultural or creative events.
- (iii) The proposal is contrary to the requirements of the CBD Civic Spaces Plan of Management, City's Outdoor dining guidelines and objectives of the City North Public Domain Plan.

The subject proposal is largely the same as the Pre-DA scheme, albeit the previous two-storey height of the western pavilion and reduction in solidity of the building form.

The issues raised at the time of the Pre-DA have not been adequately addressed by the subject proposal and the application is not accompanied by written consent of all land owners (refer to further discussion in report).

### **History of the subject development application**

8. On 4 May 2023, the DAP was advised of the revised proposal and was presented with a summary of considerations for the development of Customs House Square. The DAP raised similar comments to those provided at the time of the Pre-DA, noting that the previous operator of the former Quay Bar and Young Alfred Restaurant utilised movable servery karts and furniture under the existing awning canopies.
9. The DAP provided long-term and short-term recommendations summarised below:
  - (i) In the short-term:
    - (i) The proposal should adopt similar operations to the former Quay Bar and Young Alfred Restaurant. The existing canopy structures are

recommended to be retained with supplementary weather protection through the use of discrete individual umbrellas (unlinked).

- (ii) Heaters and other amenity items should be coordinated with the canopy structures to reduce clutter. Café or planter box barriers should not be used.
  - (iii) Furniture should be recessive in style and colour.
  - (iv) Consideration needs to be given to the location of the inner lines of trees and coordination with any structures to suit the long-term vision of Customs House Square.
- (ii) In the long-term, recommendations for new well designed, fit-for-purpose canopy structures designed by the City should form part of future plans for Customs House Square.
10. The development application was lodged without the written land owners' consent from all owners of the site (refer to further discussion below under the heading 'Crown Land Management Act 2016'). In absence of Crown land owners' consent and having regard to the above issues raised by the DAP and Council officers, a request for withdrawal of the application was sent to the applicant on 10 July 2023.
  11. On 25 July 2023, the applicant requested an extension of two weeks to respond.
  12. On 21 August 2023, the applicant advised they had arranged a meeting with the City's Properties team to discuss the proposal.
  13. A meeting was held on 20 September 2023 between the applicant and the City's Properties team.
  14. On 28 September 2023, the applicant was advised that matters previously raised in the letter dated 10 July 2023 remained outstanding despite the additional time provided to respond. The proposal has not progressed with respect to design on any matters previously raised at the time of Pre-DA discussions, nor in respect to obtaining Crown land owner's consent. In absence of Crown land owners' consent, the application cannot be recommended for approval.

### **Proposed Development**

15. The development application seeks consent for two new pavilions within Customs House Square. The two pavilions will be associated with a new restaurant and bar that is proposed to occupy the two internal tenancies located on the ground floor of Customs House building (previously occupied by the Quay Bar and Young Alfred restaurant). The subject proposal is limited to the external works within Customs House Square and does not include any works within Customs House building (which are subject to separate applications).
16. Specifically, the proposal seeks consent for the following:

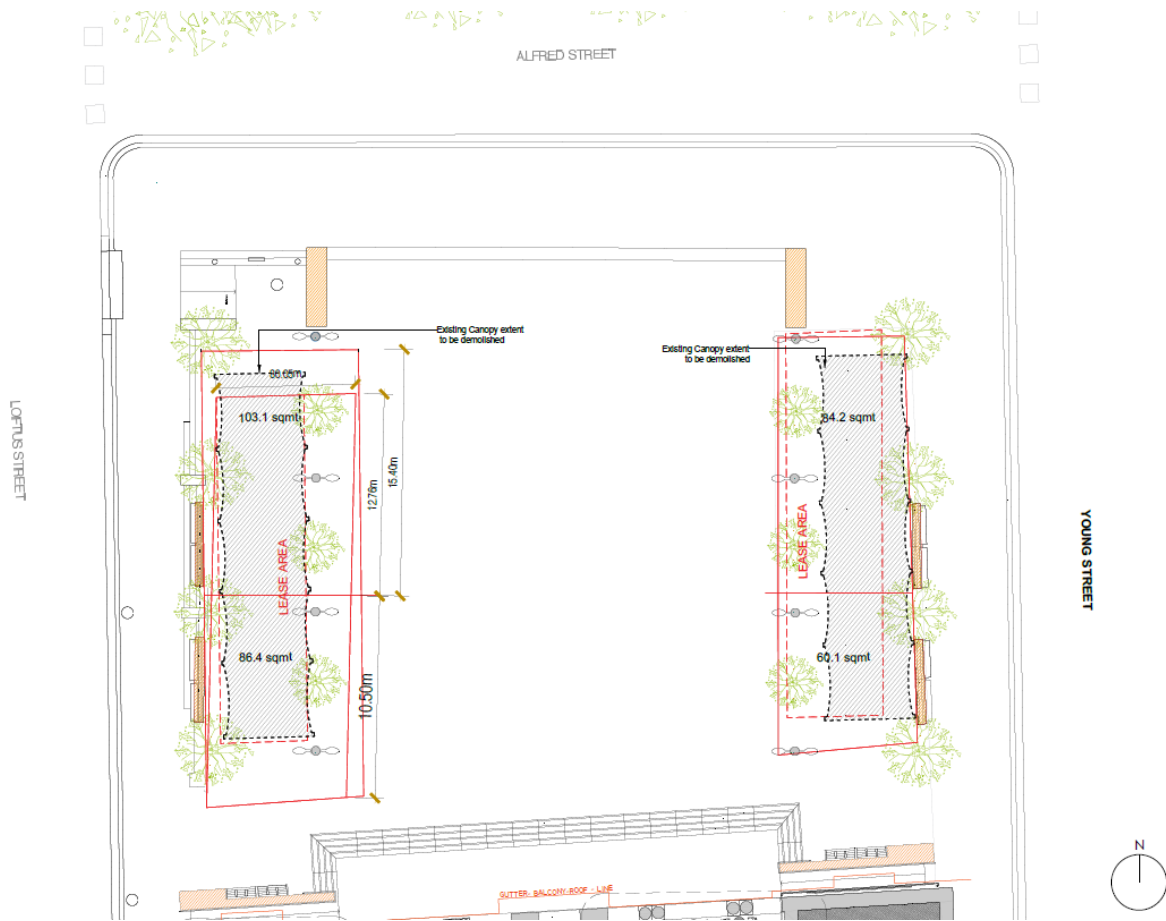
## Pavilions

- Demolition of the existing canopy structures
- Erection of two new single-storey rectangular pavilions measuring:
  - Western pavilion: 20.3m (length) x 5.0m (wide) x 4.745 (high), area of 91sqm
  - Eastern pavilion: 20.3m (length) x 5.4m (wide) x 4.745m (high), area of 103sqm.
- The pavilions each comprise an aluminium and steel framed structure enclosed by operable glazed windows to each elevation. The pavilions are proposed to be placed on top of a 50mm rubber mat to protect existing public domain paving. The structures are raised a total of 250mm above natural ground level.
- Although indicative signage zones are shown on the proposed plans, the applicant notes that details of the signage will be sought under a separate application.

## Operation

- The proposed trading hours for the external area are:
  - Base: 9.00am to 12.00 midnight, Mondays to Sundays.
  - Extended: 12.00 midnight to 2.00am on Thursdays, Fridays, Saturdays, and New Years Eve, subject to a 5-year trial period.
- Proposed maximum capacity of 305 patrons. Breakdown as follows:
  - Western pavilion: 186 seated patrons (102 internal seats, 84 external seats)
  - Eastern pavilion: 119 patrons (81 internal seats, 22 external seats).
- Food preparation is proposed to occur within the two internal kitchens of Customs House. Staff will service food to the two external pavilions.
- Each pavilion is proposed to operate under an on-premises liquor license with Primary Service Authorisation, for use as a restaurant and bar.

17. Selected plans and elevations of the proposed development are provided below.



**Figure 8:** Plan showing the existing canopy structures (dashed black) and proposed new pavilions (dashed red)

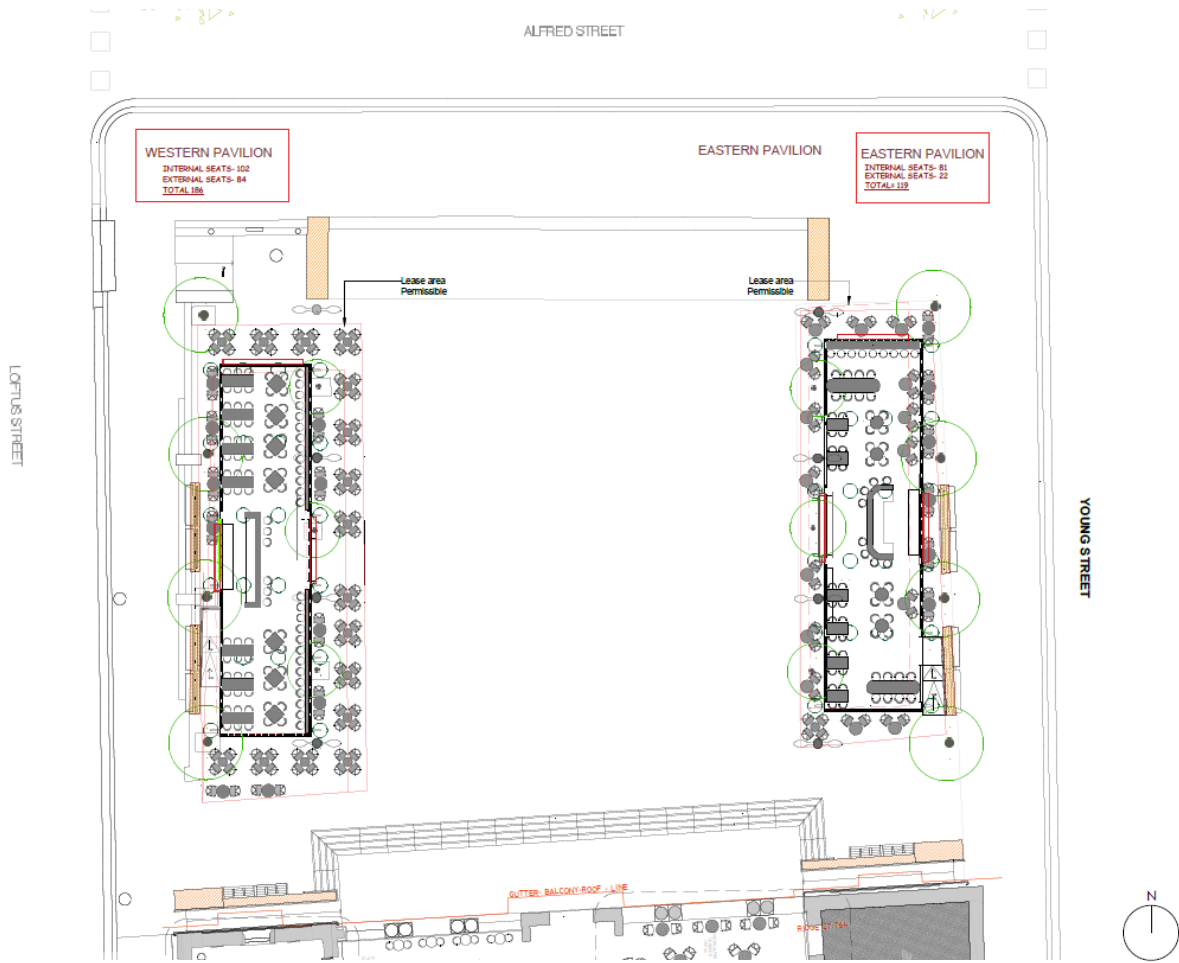


Figure 9: Proposed Floor Plan



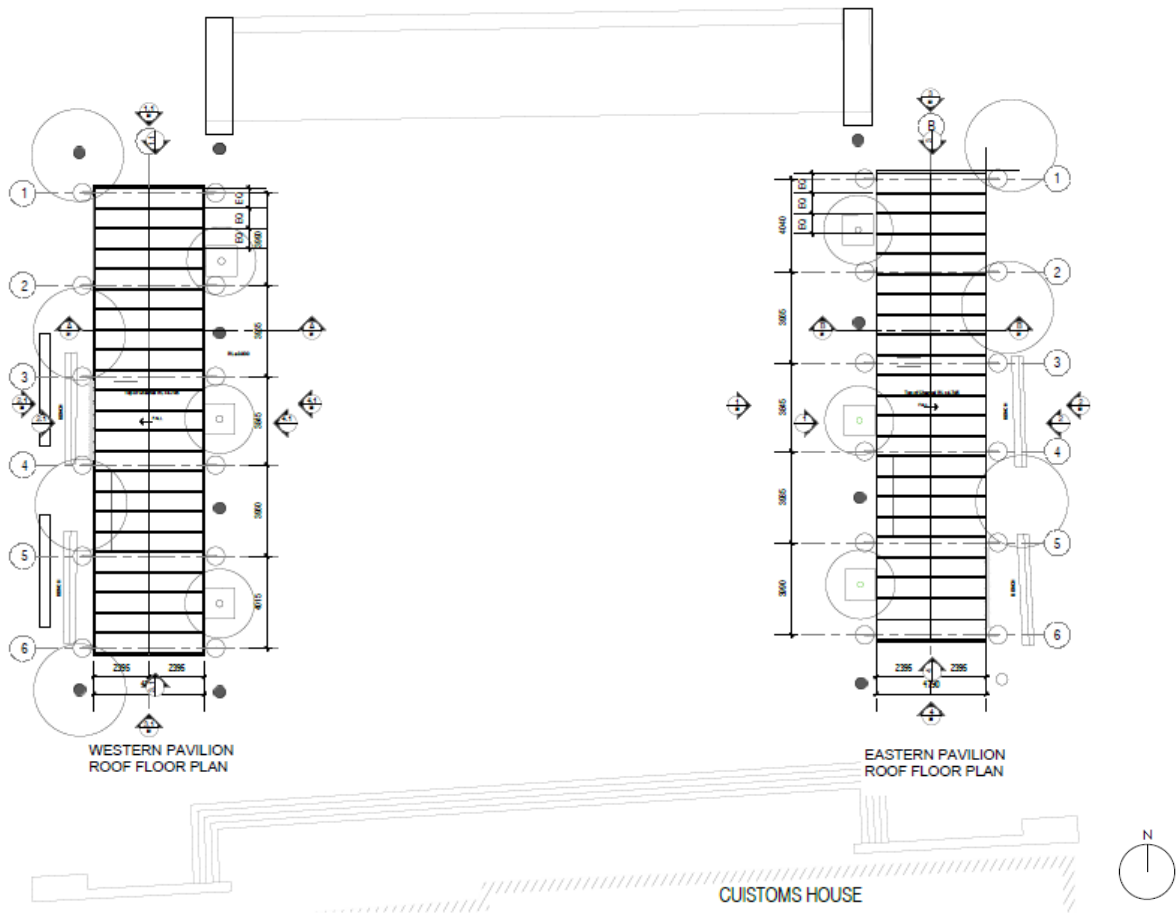
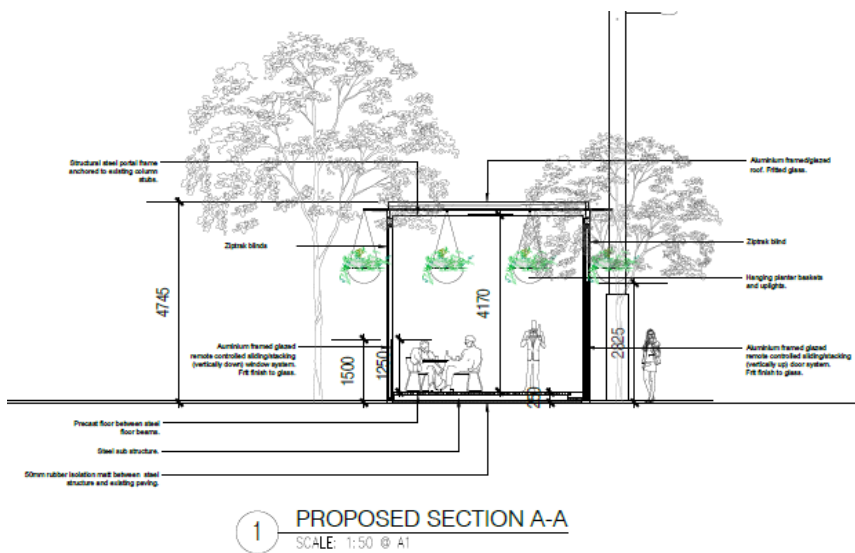


Figure 10: Proposed Roof Plan



Figure 11: Proposed Elevations



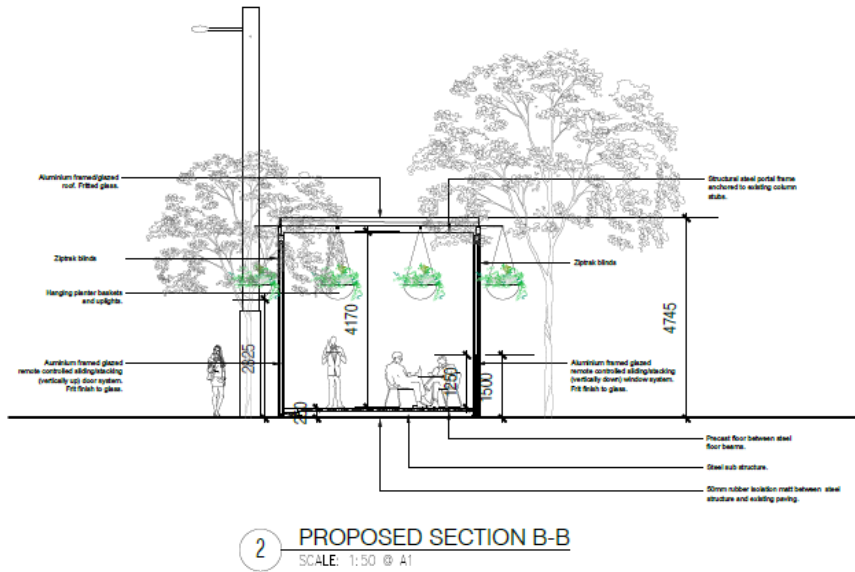
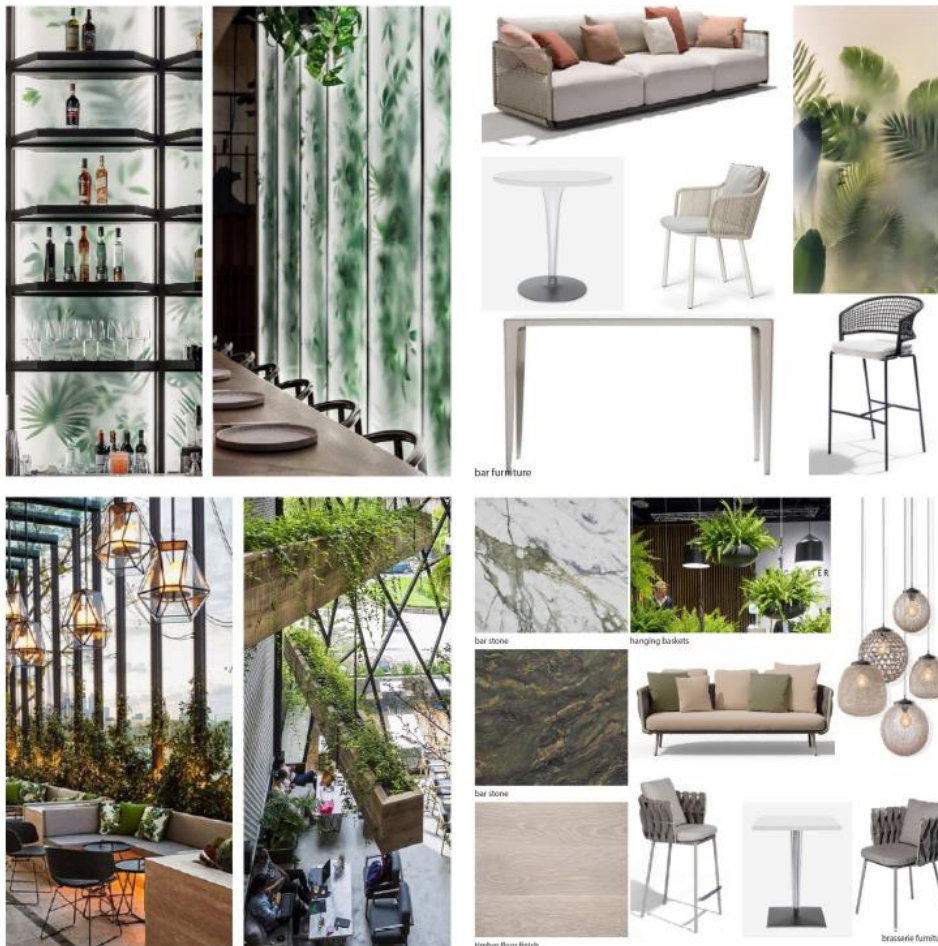


Figure 12: Proposed Sections



Proposed indoor interior and finishes

Proposed furniture and materials, comfortable, practical furniture suitable for indoor and outdoor use

Figure 13: Proposed material finishes



**Figure 14:** Proposed photomontage

## Assessment

18. The proposed development has been assessed under Section 4.15 of the Environmental Planning and Assessment Act 1979 (EP&A Act).

## Crown Land Management Act 2016

19. The southern half of the site is Crown land which is governed by the CBD Civic Spaces Plan of Management, adopted in March 2022. The subject Crown land is under the care and control of the City of Sydney on behalf of the Crown.
20. Section 3.36(3) Adoption of Plan of Management of the Crown Land Management Act 2016, stipulates that if a plan of management is adopted:
  - (a) the applicable Crown land manager concerned must carry out and give effect to it, and
  - (b) no activities may be undertaken on or in relation to the dedicated or reserved Crown land to which it relates unless they are in accordance with the plan, and
  - (c) the applicable Crown land manager must ensure that all leases or licences over the dedicated or reserved Crown land that the manager grants include a provision that requires their holders to comply with the requirements of any plan of management in force for the land from time to time that are relevant to the holders' use or occupation of the land.

21. The applicant declared that the relevant owner's consent had been received at the time of lodgement of this application via the NSW Planning Portal, and the application was accompanied by the written owner's consent for the parcel of land known as 5030 Alfred Street, Sydney from the City of Sydney Council. At the time of lodgement, the application was not accompanied by any written documentation from either the NSW State Government (being the Crown) or from the Crown Land Manager at the City of Sydney (exercising delegation under this Act). To date, the applicant has been unable to demonstrate that Crown land owners' consent has been received for the proposal.
22. Refer to further discussion under the heading 'CBD Civic Spaces Plan of Management' below.

### **State Environmental Planning Policies**

#### **State Environmental Planning Policy (Resilience and Hazards) 2021 – Chapter 4 Remediation of Land**

32. The aim of SEPP (Resilience and Hazards) 2021 – Chapter 4 Remediation of Land is to ensure that a change of land use will not increase the risk to health, particularly in circumstances where a more sensitive land use is proposed.
33. The land has been previously used for public recreation and food and drink premises purposes and the application proposes to continue the use for the same purpose. The proposal does not seek consent for any remediation, excavation, or work that requires removal of soil from the area. Therefore, the proposal is satisfactory when considered against the requirements of Chapter 4 of the SEPP (Resilience and Hazards) 2021.

#### **State Environmental Planning Policy (Sustainable Buildings) 2022**

34. The State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable Buildings SEPP) commenced on the 1 October 2023 and applies to development applications lodged on or after 1 October 2023.
35. The aims of this Policy are as follows—
  - (a) to encourage the design and delivery of sustainable buildings,
  - (b) to ensure consistent assessment of the sustainability of buildings,
  - (c) to record accurate data about the sustainability of buildings, to enable improvements to be monitored,
  - (d) to monitor the embodied emissions of materials used in construction of buildings,
  - (e) to minimise the consumption of energy,
  - (f) to reduce greenhouse gas emissions,
  - (g) to minimise the consumption of mains-supplied potable water,
  - (h) to ensure good thermal performance of buildings.
36. The proposed development was lodged prior to the commencement of the Sustainable Buildings SEPP and as such the provisions of the SEPP are not applicable.

37. In addition the SEPP would not apply as the proposal does not involve:
- (a) the erection of a new building with a capital investment value of \$5 million or more; or
  - (b) alterations, enlargement or extension of an existing building, if the development has a capital investment value of \$10million or more.

### **State Environmental Planning Policy (Transport and Infrastructure) 2021**

38. The provisions of SEPP (Transport and Infrastructure) 2021 have been considered in the assessment of the development application.

### **Division 5, Subdivision 2: Development likely to affect an electricity transmission or distribution network**

#### **Clause 2.48 Determination of development applications – other development**

39. The application is subject to Clause 2.48 of the SEPP as the development will be carried out immediately adjacent to an easement for electricity purposes. In accordance with the requirements of the Clause, the application was referred to Ausgrid for a period of 21 days. Ausgrid raised no objection to the proposal, subject to recommended conditions.
40. As noted above, Crown land owners' consent has not been obtained for the proposal. Accordingly, the proposal is recommended for refusal.

### **Division 15, Subdivision 2: Development in or adjacent to rail corridors and interim rail corridors**

#### **Clause 2.98 – Development adjacent to rail corridors**

41. The application is adjacent to the Circular Quay light rail and heavy rail corridor and was subsequently referred to Transport for NSW (TfNSW) for comment. TfNSW raised no objection to the proposal, subject to recommended conditions.
42. As noted above, in absence of Crown land owners consent the proposal is recommended for refusal.

### **State Environmental Planning Policy (Biodiversity and Conservation) 2021 – Chapter 2 (Vegetation in Non Rural Areas) 2017**

43. Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 seeks to protect the biodiversity values of trees and other vegetation in non-rural areas of the State, as well as preserve the amenity of non-rural areas of the State through the preservation of trees and other vegetation.
44. The new pavilions are located in between and adjacent to the existing rows of trees which border the subject site. The applicant has not sufficiently demonstrated that proposal will not conflict with the existing tree canopy, nor adversely impact the health of the existing trees. As such, the proposal has not demonstrated it has met requirements of Chapter 2 of the SEPP.

### State Environmental Planning Policy (Biodiversity and Conservation) 2021 – Chapter 6 Water Catchments

45. The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of the above SEPP. The SEPP requires the Sydney Harbour Catchment Planning Principles to be considered in the carrying out of development within the catchment.
46. The site is within the Sydney Harbour Catchment and eventually drains into Sydney 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 SEPP are not applicable to the proposed development.

### Local Environmental Plans

#### Sydney Local Environmental Plan 2012

47. An assessment of the proposed development against the relevant provisions of the Sydney Local Environmental Plan 2012 is provided in the following sections.

#### Part 2 Permitted or prohibited development

Provision	Compliance	Comment
2.3 Zone objectives and Land Use Table	Yes	The site is located in the RE1 Public Recreation zone. The proposed development is defined as a food and drink premise and is permissible with consent in the zone. The proposal generally meets the objectives of zone.

#### Part 4 Principal development standards

Provision	Compliance	Comment
4.3 Height of buildings 6.17 Sun access planes	Yes	The maximum building height is governed by the sun access plane (SAP) for the Royal Botanic Gardens pursuant to Clause 6.17 of Sydney LEP 2012.  The proposal seeks a maximum building height of 4.745m which complies with the provisions of Clause 4.3 and 6.17 of the Sydney LEP 2012.
4.4 Floor space ratio	N/A	There is no maximum floor space ratio development standard for the site under Clause 4.4 of the Sydney LEP 2012.  The pavilions can be enclosed on all sides by sliding windows. As such, it is considered that the proposal seeks a

Provision	Compliance	Comment
		gross floor area of 194sqm (FSR 0.11:1).

#### Part 5 Miscellaneous provisions

Provision	Compliance	Comment
5.3A Development below ground level in Zone RE1	N/A	The proposal does not involve any works below existing ground level on the site which is zoned RE1 Public Recreation.
5.10 Heritage conservation	No	<p>The site is adjacent to the State and local listed heritage item, Customs House. The site is also within the immediate visual curtilage of local heritage items, AMP (Local Item No. I1662) and the Paragon Hotel (Local Item No. I1857).</p> <p>The proposal is accompanied by a Heritage Impact Statement prepared by Curio Projects.</p> <p>Council's Heritage Specialist considers the proposed development will have a detrimental impact on the heritage significance of Customs House and the immediate surrounding heritage items. The Statement of Significance in both the State and local heritage listings for Customs House state 'The Sydney Customs House occupies a unique symbolic and physical position on the site of the First Fleet Landing. Its location is a physical reminder of the importance of Circular Quay as the original maritime centre for the colony.' The proposal presents as permanent structures, are less transparent (given the arrangement of post structure at the perimeter of the pavilions, raised level from the public domain, use of extensive stacked glazing) and visually disrupts the important connection between the harbour and Customs House.</p> <p>Customs House Square provides a significant contribution to the setting and views of Customs House. While</p>



Provision	Compliance	Comment
		<p>activation of the square is supported in-principle, the execution of the proposed development is not supported as it detracts from Customs House and competes with the heritage item. The permanency of the structures and the extensive use of retractable glazing to all elevations restricts east-west pedestrian movement and does not allow the use of the civic space for events.</p> <p>See further details in the 'Discussion' section below.</p>

### Part 6 Local provisions – height and floor space

Provision	Compliance	Comment
Division 4 Design excellence		
6.21 Objective 6.21A Definitions 6.21B Application of Division 6.21C Design excellence 6.21D Competitive design process	No	<p>Clause 6.21C(1) of the Sydney LEP 2012 stipulates development consent must not be granted unless the proposed development exhibits design excellence.</p> <p>Reference is made to the discussion under the heading 'History Relevant to the Development Application' relating to PDA/2022/8 and 'Discussion' section below. Apart from the previously sought two storey height of the western pavilion and reduced solidarity of building form, the subject proposal is largely the same as the Pre-DA scheme which was presented to the DAP. The issues raised by the DAP and Council officers remain relevant to the proposed development.</p> <p>The proposal does not:</p> <ul style="list-style-type: none"> <li>• deliver a high standard of architectural design, materials or detailing appropriate to the significant location of the site.</li> <li>• exhibit a form or external appearance that will improve the quality and amenity of the public domain. The proposal will enclose and restrict east west pedestrian</li> </ul>

Provision	Compliance	Comment
		<p>movement across Customs House Square.</p> <ul style="list-style-type: none"> <li>• appropriately address constraints of the site with respect to the heritage significance of Customs House or Crown land. The proposal is not consistent with the CBD Civic Spaces Plan of Management or City North Public Domain Plan, refer to issues section below.</li> <li>• achieve an acceptable relationship that is sympathetic and does not detract from Customs House.</li> <li>• present suitable bulk, massing or modulation of buildings to address the Circular Quay special character area. The proposal provides semi-permanent structures which have not been designed to protect the heritage significance of Customs House and does not allow for the use of the square to facilitate public events or gatherings.</li> <li>• achieve an appropriate interface at ground level between the pavilions, Customs House building and public domain. The proposal relies on ramps to facilitate accessible entry into the pavilions.</li> </ul> <p>The proposed development does not demonstrate design excellence in accordance with Clause 6.21C of the Sydney LEP 2012.</p> <p>Clause 6.21D stipulates that development consent must not be granted in relation to development for which a development control plan is required to be prepared under Clause 7.20 unless a competitive design competition process has been held. Refer to further discussion under Clause 7.20 below.</p>

**Part 7 Local provisions – general**

Provision	Compliance	Comment
Division 4 Miscellaneous		
7.14 Acid Sulfate Soils	Yes	The site is located on land with class 2 Acid Sulfate Soils. The application does not propose works requiring the preparation of an Acid Sulfate Soils Management Plan.
7.20 Development requiring or authorising preparation of a development control plan	No	<p>Clause 7.20 of Sydney LEP 2012 applies to development for the purposes of a new building and development that increases the gross floor area of an existing building. Clause 7.20(2) stipulates that development consent must not be granted to development in Central Sydney unless a development control plan has been prepared if the site area for the development is more than 1,500sqm or if the development will result in a building with a height greater than 55m above ground level (existing).</p> <p>Clause 7.20(3) allows the consent authority to waive the provision of a development control plan if it is satisfied that such a plan would be unreasonable or unnecessary in the circumstances, or if the applicant has demonstrated that all the provisions under Clause 7.20(3) has been met. The applicant has not addressed Clause 7.20, nor demonstrated that the preparation of a site specific development control plan is unreasonable or unnecessary in this circumstance.</p> <p>Notwithstanding, the application is not supported for the reasons discussed throughout this report.</p>

**Development Control Plans****Sydney Development Control Plan 2012**

48. An assessment of the proposed development against the relevant provisions within the Sydney Development Control Plan 2012 is provided in the following sections.

## Section 2 – Locality Statements

49. The site is located within the Circular Quay Special Character Area. Whilst the proposed food and drink use is generally in keeping with the active uses sought within the locality, the proposed design and form of the pavilion structures are not consistent with the unique character and the design principles of the special character area, as it:
- has not been designed or sited to protect the heritage significance of Customs House, nor conserve its setting or views.
  - does not maintain or enhance the visual relationship between the harbour foreshore and heritage items historically associated with the maritime functions of the Quay.
  - does not reinforce the area as a major focal point for public celebrations. Refer to issues section below.

## Section 3 – General Provisions

Provision	Compliance	Comment
3.1 Public Domain Elements	No	The proposed pavilions are not considered to make a positive contribution to the public domain.
3.2. Defining the Public Domain 3.2.3 Active frontages	Partial compliance	<p>The objectives of Section 3.2 of the Sydney DCP 2012 seek to ensure development contributes to the activity, safety, amenity and quality of streets and the public domain. Buildings are required to be characterised by excellence in design to positively address the street.</p> <p>The pavilions are raised and do not provide a seamless ground plane which is inconsistent with Section 3.2.2.</p> <p>While the proposed food and drink premises use is supported in-principle as it contributes to the activation of Customs House Square and the greater Circular Quay Special Character Area; the proposed design of the pavilions do not exhibit design excellence to enhance the amenity of the public domain. The pavilions are semi-permanent and cannot be easily removed or packed away to allow the square to be used in its entirety as a civic space. It is understood that the pavilions are prefabricated pod like structures, which have a pre-determined size.</p>
3.5 Urban Ecology	No	Although the proposed development does not seek the removal of any trees,

Provision	Compliance	Comment
		the footprint of the new pavilions are immediately adjacent to the existing trees. The proposal has not demonstrated that it will not have an adverse impact on the local urban ecology.
3.6 Ecologically Sustainable Development	Yes	Refer to SEPP (Sustainable Buildings) and discussion section.
3.9 Heritage	No	Refer to discussion in Clause 5.10 of the Sydney LEP 2012 and Section 2.1.4 of Sydney DCP 2012 above.
3.12 Accessible Design	Yes	<p>The proposal is accompanied by an Access Report prepared by Ergon Consulting which concludes that the proposal is capable of achieving compliance with the relevant Australian Standards through performance-based solutions and subject to the implementation of recommendations including:</p> <ul style="list-style-type: none"> <li>• the installation of contrasting strips and visual indicators to all glazing on an accessway.</li> <li>• tactile ground surface indicator with locations to be confirmed upon design development stages.</li> </ul> <p>It is noted that a ramp to each pavilion is proposed to address the change in levels between the public domain.</p> <p>The proposal is generally in accordance with the requirements of Section 3.12 of Sydney DCP 2012.</p>
3.13 Social and Environmental Responsibilities	Yes	The proposed development generally provides adequate passive surveillance and is generally designed in accordance with the CPTED principles.
3.14 Waste	Partial compliance	<p>The application is accompanied by a draft Operational Waste Management Plan (OWMP) prepared by Elephants Foot Consulting.</p> <p>Operational waste is proposed to be collected by a private waste contractor</p>

Provision	Compliance	Comment
		<p>from Young and Loftus Street. Bins will be wheeled from the existing bin storage rooms within Customs House that service the existing internal tenancies (former Quay Bar and Young Alfred Restaurant).</p> <p>The proposal adopts similar waste storage and collection arrangements as the historic food and drink premises.</p> <p>However, since Council does not have any records of the Complying Development Certificates relating to the internal tenancies (and if these CDCs include any changes that will be made to the existing waste storage areas) there is insufficient information to confirm if there will be sufficient waste storage areas provided for the proposal.</p>
3.15 Late Night Trading Management	No	<p>The premises is located outside of the late-night trading areas within 'All Other Areas'. The use is defined as a Category B premises. However, having regard to the immediate surrounding late-night trading context of the site, for all intents and purposes the site is considered within a 'Late Night Management Area'.</p> <p>The application seeks the following trading hours:</p> <ul style="list-style-type: none"> <li>• Base hours between 9.00am to 12.00 midnight, Mondays to Sundays.</li> <li>• Extended hours between 12.00 midnight and 2.00am the following day, Thursdays to Saturdays and New Year's Eve, subject to a 5-year trial period.</li> </ul> <p>A total outdoor seated capacity of 305 patrons is proposed.</p> <p>The proposed hours of operation are inconsistent with Section 3.15.4 of Sydney DCP 2012, which permits the following outdoor trading hours for Category B premises within a Late Night Management Area:</p>

Provision	Compliance	Comment
		<ul style="list-style-type: none"> <li>• Base hours between 7.00am to 10.00pm.</li> <li>• Extended hours between 10.00pm to 1.00am the following day.</li> </ul> <p>As outlined under the heading 'History Relevant to the Development Application' above, the former Quay Bar has been subject to numerous trial periods that permitted extended operation until 2.00am (D/2017/1430) with a maximum capacity of 112 patrons. The outdoor area associated with the former Young Alfred Restaurant was restricted to cease trading at 10.00pm (D/2004/1747).</p> <p>It is noted that the above hours were approved prior to the development of the residential units located immediately to the rear of the Customs House (Quay Quarter Lanes precinct). The previously approved hours also pre-date the permissible hours under the current Sydney DCP 2012. The accompanying Acoustic Report prepared by Acoustic Logic does not include an assessment of potential noise impacts to the residential receivers.</p> <p>Notwithstanding, the application is recommended for refusal given the absence of Crown land owners consent and numerous issues relating to the design of the pavilions. The outdoor hours of operation associated with the internal tenancies within Customs House will be subject to future assessment.</p> <p>Refer to further details under the discussion sections below.</p>
3.16 Signage and Advertising 3.16.12.2 Circular Quay signage precinct	N/A	The proposal includes signage zones on the east, western and northern elevations of each pavilion. The dimensions of the six (6) signage zones are:

Provision	Compliance	Comment
		<ul style="list-style-type: none"> <li>• Four (4) signage zones, approximately 5.42m wide and 0.76m high, area of 4.1sqm (west and east elevations); and</li> <li>• Two (2) signage zones, approximately 4.7m wide x 0.76m high, area of 3.5sqm (north elevation).</li> </ul> <p>It is noted that the proposed content of signs will be subject to a separate application. As such, these signs are assessed as indicative only.</p> <p>Notwithstanding, the proposed pavilion structures (to which the indicative signage are attached) are not supported. Refer to further assessment under the discussion headings below relating to the structures.</p>

## Discussion

### CBD Civic Spaces Plan of Management

50. The Crown land portion of the site is governed by the CBD Civic Spaces Plan of Management 2022 (POM). The CBD Civic Spaces POM seeks to ensure that land zoned RE1 Public Recreation is utilised for public open space or recreation purposes, provides links between open space areas and promotes access by members of the public to areas in the public domain. The POM stipulates that the Crown reserve use for Customs House Square is to facilitate events, public gathering, seating and walk through pedestrian and cycling access. The proposal is contrary to this objective as it seeks to enclose the western and eastern edges of the square with semi-permanent structures, restricting east-west pedestrian flow and privatises public open space.
51. The proposal differs from development previously approved on the site (D/2017/1430 and D/2004/1747) which required the outdoor bar servery and associated loose furniture to be packed away within the internal tenancies of Customs House, to facilitate the use of square for public gatherings, cultural and creative events. The proposed new structures cannot be easily removed and results in privatisation of the public reserve.



52. As the application was not accompanied by written land owners' consent for the Crown land at the time of lodgement of the application, the proposal was referred to the Crown Land Manager after lodgement by Planning staff noting that Customs House Square is Crown land under the care and control of Council. The Crown Lands Manager advised that Crown land owners' consent cannot and will not be granted as the proposal is inconsistent with the objectives set out within the CBD Civic Spaces Plan of Management 2022, which governs this site. Consistency with the Plan of Management is a requirement of the Crown Lands Management Act as detailed previously in this report. The applicant has been made aware of this issue by Planning staff since July 2023.

### City North Public Domain Plan

53. The City North Public Domain Plan (Plan) adopted in March 2023 outlines the long-term vision for Customs House Square. The Plan seeks to create a cohesive and robust public domain backdrop to one of Sydney's most important historic, cultural and social interchanges.
54. The proposed development is contrary to the following objectives of the Plan:
- (a) Create a singular space with the remainder of Alfred Street.
  - (b) Removal of obstructions to pedestrian movement and consolidate outdoor dining.
  - (c) Improve the quality of outdoor dining infrastructure by creating a Circular Quay Special Precinct in the City's revised Outdoor Dining Guidelines.
  - (d) Long term vision to review and limit permanent outdoor dining structures following completion of existing tenancy leases.
55. The proposal is not supported by Council's City Design and Public Domain Units who have advised that the proposal is inconsistent with the endorsed Plan as:
- (a) The semi-permanent structures enclose and restrict the use of the space.
  - (b) The execution of the design and degree of solidity restricts east west pedestrian movement and views across Customs House Square.
  - (c) The proposal is inconsistent with the CBD Civic Spaces Plan of Management (as discussed above).
56. As such, it was recommended by the DAP, City Design and Public Domain Units that the proposal should retain the existing awning canopies in the short term and adopt similar operations to the former Quay Bar and Young Alfred Restaurant, which includes the use of moveable furniture without any permanent fixings.
57. In light of the above, the proposal is inconsistent with the City North Public Domain Plan.

## City of Sydney Outdoor Dining Guideline

58. The City of Sydney Outdoor Dining Policy and Outdoor Dining Guideline (Guideline) dated March 2023 applies to the site.
59. Part 5 of the Guideline requires all furniture to be removable and stored outside outdoor trading hours with no permanent fixings. Part 5.3 stipulates that the design of the outdoor area is to have an open appearance, minimise clutter and reflect the character of buildings within the area. Barriers which enclose the outdoor dining area, or which separate it from the pedestrian footway, are not permitted pursuant to Part 5.6.
60. The new pavilions are contrary to the design of furniture and provisions of the City of Sydney Outdoor Dining Guideline.

## Consultation

### Internal Referrals

61. The application was discussed with Council's;
  - (a) Crown Land Manager;
  - (b) City Design Unit;
  - (c) Environmental Health Unit;
  - (d) Licensed Premises and Late Night Trading Unit;
  - (e) Heritage and Urban Design Unit; and
  - (f) Public Domain Unit.
62. The proposal is not supported by any of the above Council Units. The raised concerns have been outlined throughout this assessment report.

### External Referrals

#### Ausgrid

63. Pursuant to Section 2.48 of the SEPP (Transport and Infrastructure) 2021, the application was referred to Ausgrid for comment.
64. A response was received raising no objections to the proposed development, subject to recommended conditions.

#### Transport for NSW

65. Pursuant to Section 2.98 of the SEPP (Transport and Infrastructure) 2021, the application was referred to Transport for NSW (TfNSW) for comment.
66. Comments were received from TfNSW raising no objections to the proposal, subject to recommended conditions.

## Advertising and Notification

67. In accordance with the City of Sydney Community Participation Plan 2023, the proposed development was notified for a period of 28 days between 26 April 2023 and 25 May 2023. A total of 294 properties were notified and 1 submission was received.
68. The submission raised the following issues:
- (a) **Issue:** Noise impacts to residents associated with extended trading until 2.00am on Thursdays, Fridays and Saturdays

**Response:** Refer to discussion under Section 3.15 of the Sydney DCP 2012 above. The proposed development is not supported for the reasons discussed in elsewhere this report, and the application is recommended for refusal. The submitted documents are currently inadequate to enable an assessment of the proposed late-night trading hours, however, further information has not been requested due to the matter of owner's consent being unable to be resolved.

## Financial Contributions

### Levy under Section 7.12 of the Environmental Planning and Assessment Regulation 2000

69. The cost of the development is in excess of \$250,000. The development, if recommended for approval, would be subject to a levy under the Central Sydney Development Contributions Plan 2020.

### Contribution under Section 7.13 of the Sydney Local Environmental Plan 2012

70. The site is located within the Central Sydney affordable housing contribution area. The proposed pavilions result in the creation of more than 100sqm of gross floor area, as they are able to be enclosed. If recommended for approval, the proposal may be subject to an affordable housing contribution under the City of Sydney Affordable Housing Program 2020.

## Relevant Legislation

71. Environmental Planning and Assessment Act, 1979.
72. Crown Land Management Act, 2016.

## Conclusion

73. The proposal is not consistent with Section 3.36 of the Crown Land Management Act 2016 and does not accord with the CBD Civic Spaces Plan of Management, 2022.
74. Crown land owners' consent has not been obtained by the applicant. Pursuant to the provisions of Section 23 and 24 of the Environmental Planning and Assessment Regulations 2021, an application must be accompanied by written land owner's consent. As part of the land is Crown land and owners' consent has not, and cannot be provided due to inconsistency of the development with the CBD Civic Spaces Plan of Management 2022, the application cannot be recommended for approval.
75. In addition the proposal fails to demonstrate design excellence to meet Clause 6.21, 6.21B and 6.21C of the Sydney LEP 2012, in that it does not deliver a high standard of architectural and urban design. The proposed built form of the pavilions does not respond to the site context, adversely impacts the heritage significance of Customs House, and impacts the desired character of the Circular Quay Special Character Area.
76. The proposal results in significant heritage impacts and fails to conserve the environmental heritage, in accordance with Clause 5.10 of Sydney LEP 2012 and Section 3.9 of Sydney DCP 2012.
77. The proposal is not in keeping with Section 2.1.4(e), (g) or (h) of Sydney DCP 2012 with respect to reinforcing the area as a major focal point for public celebrations and the conservation of heritage items within the Circular Quay Special Character Area.
78. The proposed outdoor hours of operation are inconsistent with the permissible hours of operation under Section 3.15 of Sydney DCP 2012.
79. The development does not provide an appropriate response to the public domain to meet Sections 3.1, 3.2.2, 3.5.3 of Sydney DCP 2012, or the objectives of the City North Public Domain Plan, or City of Sydney Outdoor Dining Guidelines.
80. Having regard to the above, the development is not in the public interest and is recommended for refusal.

## ANDREW THOMAS

Executive Manager Planning and Development

Jessica Joseph, Specialist Planner