HANDOUT #2

Does the Monaco Development Pass the Aussie Pub Test?

Does the Monaco Development Pass the Aussie Pub Test?

Introduction

Good evening everyone. My name is Bill Rowe and I am a lot owner in DeVille with a 60-year association with Main Beach. For nearly 12 months I was involved in a group seeking to convince the Gold Coast City Council not to approve the Monaco proposal in its current form. Unfortunately, we failed.

The president of the Main Beach Association (MBA), Sue Donovan, has asked me to tell the Monaco story, as it provides invaluable lessons and insights about how we might go forward in a world, where the Council delivers on the Main Beach community's aspirations rather than trample them.

The site for the Monaco project is at the north end of Main Beach adjacent to the intersection which provides the entrance to the Spit. First, I need to give you a bit of background to put this story into context.

Background

Under the Australian Constitution, local governments including the Gold Coast City Council do not exist. They derive their existence and their powers from State government legislation which requires local governments, among other things, to be transparent and deliver meaningful community engagement. The handout on Governance and Policy Settings (#4) provides more information and references for you to explore in your own time.

So, under State legislation, the Council has established a land planning regime whereby developers submit development applications (or DAs) to the Council for approval. These DAs are subject to what is known as either a code assessable process or an impact assessable process. The Council has deemed certain areas as code assessable and others as impact assessable. In Main Beach, everything to the east of Tedder Avenue has been deemed by the Council to be a code assessable area.

What each process means is outlined in Handout #1 "Understanding Planning Terms" but essentially code assessable applications do not give the community any rights to be informed, or to make submissions which the Council must take into account, or to go to the Planning and Environment Court (the Court) to appeal the merits of a Council decision approving a DA.

On the other hand, impact assessable applications give the community all these rights.

Under the Gold Coast planning arrangements, the code assessable arrangements rely on the integrity of developers to submit code compliant DAs, they are not transparent and it means that approvals cannot be tested in the Court which denies the community a right to be heard.

The Monaco Story

The Monaco story began in November 2019 when a locally based developer, Ignite Projects, lodged a development application with the Gold Coast City Council. After initial consultations with concerned residents and lot owners it was very clear the proposal went far beyond the provisions of the City Plan. So, the MBA established a group to help the Council reach a sensible outcome, based on the requirements of the City Plan, and to keep impacted residents and lot owners informed of progress.

The initial proposal was to build a 23-storey building on a 483sqm block including so called "sky garages". When a block next door was secured by the developer, the proposal was later extended to a 24-level building on a combined block of 813sqm with a higher density of bedrooms. It was clear that expert reports from building engineers and fire engineers and expert legal advice would be required. Over $50,000 in donations were received from the community to cover these costs and to develop illustrative videos and 3D drawings demonstrating the excessive non-compliance of the Monaco proposal. The chief areas of noncompliance were setbacks, site coverage, density shadowing apart from the inherent high fire risks in having sky garages separated by glass from each apartment.

An important step in the Council's planning process is to send what is called a "Request for Information" to developers seeking advice on how the developer will meet any non-compliance with the City Plan or other shortcomings in the development application. Council planning officers clearly had significant issues with both Monaco proposals as their Request for Information identified extensive problems numbering 40 separate items including among many others setbacks and site coverage.

The developer's strategy was to not respond specifically to the non-compliance with the City Plan but to attempt to respond on the basis of other far less measurable provisions of the City Plan, including Performance Outcomes. Not only did the developer rely on the loosely-worded performance outcomes, it did so without reference to those aspects of the City Plan designed to provide precision to support the loosely-worded

outcomes. This included relying on the landscaped areas of adjacent buildings to meet the requirement that buildings be appropriately separated. This enabled developers to ignore the required setbacks from various boundaries. The developer also triggered their right, for code assessable DAs, under the Council's planning regime, to delay Council's decision on the DA until they had had the opportunity to convince the Council planning officers to accept the developer's position that the non-specific performance outcomes should carry more weight than the measurable acceptable outcomes and other requirements listed in the City Plan.

This strategy to respond to broad performance outcomes rather than to the specifics of each of the 40 items listed by the Council planning officers was key to the developer's success. It was clear in subsequent meetings of the Council's Planning Committee and the Council itself that most Councillors simply relied on the Council officers Delegates Report without question or clarification. In fact, during Council's consideration of the Monaco DA, we witnessed Councillors accepting the personal opinion of officers rather than Australasian standards in relation to driveway egress from roads.

Finally, the Council met to consider the Monaco DA and after a couple of hours of discussion, including interventions by our divisional representative Darren Taylor and Councillor Peter Young, both of whom spoke against the proposal, the Council approved the Monaco proposal. To rub salt into the wound, the very afternoon that the Monaco proposal was approved, another grossly non-compliant DA was lodged for the Masthead proposal comprising a 37-level building on an even smaller site than Monaco. Lot owners in Pintari were now facing a 24-level building on their northern boundary and a 37-level building on their southern boundary!

It was clear that one or more of the following influenced the vote of individual Councillors who voted in favour of the Monaco DA:

- A predisposition towards approval regardless of community concerns
- The expert reports provided by the MBA committee had been ignored
- Acceptance through the Delegates report of the developer's position that the vaguely worded performance outcomes were more important than the measurable quantifiable requirements in the City Plan
- A belief by some Councillors that they had no choice but to approve the Monaco DA when clearly the opposite was true

- Many problems raised about the Monaco proposals were dismissed on the basis that these issues were building or construction issues and not to be considered as part of the approval process.

Lessons

Much has been learnt about the Gold Coast City Council's planning regime. But key is the status of the development application itself, i.e., whether it is code assessable or impact assessable. The logic of these two categories essentially depends on two things:

- How compliant the proposal is with relevant codes, including the City Plan, and as a result
- How a particular proposal might impact the community.

Some of the conditions of a code assessable application help to illustrate this, such as the short timeframes which apply. For example, the Council has 35 days from the lodgement of a code assessable DA to issue a Request for Information, otherwise the DA is deemed approved. The rationale for this is that a tardy response by Council should not stand in the way of a developer who has lodged a largely compliant DA from getting on with project. Further, if the proposal is mostly compliant, there should be less of a need to inform the community, less of a need to take submissions from the community into account, and less of a need for the community to test the merits of any decision in the Court. In other words, if the DAs that are largely compliant with a City Plan (which the community has already signed off on) these protections should not be needed.

The sad truth is that developers are using these loopholes in the Gold Coast City Council's planning regime to push through grossly non-compliant development applications, with the apparent complicit support of a majority of Councillors. As a consequence, the exiting Gold Coast City Council's planning regime is seriously flawed.

The problem is not so much in the provisions that apply to code assessable DAs but how those provisions are applied. The essence of the problem lies in deeming areas as code assessable rather than the DAs themselves, because going down this route clearly does not and has not persuaded developers to submit DAs that are largely compliant with the City Plan. In the face of such unintended consequences of a code assessable/impact assessable dichotomy, the Council has failed to put in place a circuit breaker to avoid the rush of non- compliant DAs being submitted by developers.

In the aftermath of the Monaco approval by the Council, detailed legal advice was sought from an expert Brisbane legal firm Anderssen Lawyers on what right, if any, the MBA might have to seek a review of the Council's decision either having it set aside or amended to permit a substantially less intense form of development.

Anderssen's advised it was not so much that MBA didn't have access to the Planning and Environment Court (the Court) but rather could not access those particular powers of the Court required to find against the merits of the Council's decision. Essentially, as a code assessable DA, the MBA could only access the Court's powers to test the legality of the decision, not the merits of the decision. To test the merits of the decision, the DA needed to be impact assessable.

There is also a distinct lack of clarity on how planning scheme criteria (in the City Plan) performance outcomes and acceptable outcomes relate to each other. This lack of clarity combined with the very general nature of the language in the performance outcomes allows the developer and the Council to "free-wheel" from one to another to suit a particular outcome.

The planning officers' Development report to Councillors applies a mix of the performance-based outcomes and acceptable outcomes to various levels of the proposed development, generally adopting the acceptable outcome when it supports the proposed development but applying the performance outcome where it does not; and includes a mix of submissions from the developer, Council reports and the Officer's opinion.

Anderssen went on - if the MBA had a right to appeal (if Monaco was deemed impact assessable) it would have "real prospects of success" in a merits-based review. However, the limitation of the Court's powers under code assessable DAs prevents access to this opportunity.

A summary of the Anderssen advice is included in your handouts but the overall takeout can be summarised as follows:

- The MBA has a case to oppose the Monaco development but because it is code assessable no access to a process to prosecute its case
- The existing planning scheme and assessment process is flawed in that it can produce internally conflicted outcomes (with the planning scheme, performance and acceptable outcomes and other overlay codes). This is underpinned by the requirement to either respond to DAs in 35 days or have them deemed to be approved. This is clearly a mechanism not to hold up DAs which are compliant with the City Plan
- On the surface, Council officers have invested a lot of time an effort in preparing a detailed Delegates Report, but it is lengthy, confusing and arguably flawed, losing sight of any "big picture vision" for Main Beach
- Developers, through many face-to-face contacts with Council Officers seem to have had undue influence on tempering Officers' views

reflected in the Request for Information and softening Officer's treatment of the Developer's response

- Councillors do not receive sufficient frank and fearless advice from their officers
- Self- interested developers have an undue influence over the existing Gold Coast planning arrangements
- The intent of State planning legislation (as expressed in these statutes) is being poorly served and in some cases undermined by the existing Gold Coast planning arrangements
- Sadly, there is no one taking a big picture, long term view of what is best for the Gold Coast community generally and the Main Beach community in particular. There is no vision. We are being badly served by the majority of our elected representatives.

A Way Forward

Ironically, the fix is relatively simple. The Council does not need to do anything more than:

- Include a trigger in for code assessable DAs that when they do not comply with the City Code by some prescribed margin, say 5%, then that particular DA will be considered under the DA provisions of the Council's planning regime; and
- Stop relying solely on vaguely worded performance outcomes to approve DAs and ignoring the associated quantifiable requirements of the City Plan.

The adverse community impact of excessive relaxing of the City Plan is not limited to Main Beach. Other areas of the Gold Coast, including Palm Beach, Burleigh Heads, are also being similarly impacted. The Community Alliance is an umbrella group of resident associations (including the MBA) across the Gold Coast. We do not oppose development per se, but we simply want development that is compliant with the City Plan.

In my view we need to work closely with the Community Alliance and other similar organisations and Councillors to achieve planning reform that delivers to Main Beach residents (and the broader Gold Coast community) development which is compliant with a City Plan which the community signed off on and not an avaricious developers' wish list.

We need our Council to recognise and act on these planning anomalies now!

Thank you