HANDOUT #3

Summary of Anderssen Lawyers Advice

Summary of Anderssen Lawyers Advice (the paper) to MBA.

(Quotes from the Anderssen advice are in blue text.)

Key points from the Anderssen Advice paper are:

a. The Main Beach community through the Main Beach Association (MBA) has been severely hamstrung with Monaco retaining code assessable status throughout the assessment process. This is not about the legitimacy of our community's concerns (which are well founded and acknowledged in the paper) but rather the resulting limited access to legal processes designed to rectify poor decision making based on poor information/advice (on the part of Councillors and staff respectively)

b. The flow-on (in a legal sense) from Monaco's code assessable status is not that the MBA can't take the matter to the Land and Environment Court but rather the limitation of the that Court's powers in considering the Monaco case. The Court is limited to declaratory jurisdiction rather than having the capacity to a complete review of the merits of the decision to approve the Monaco development. Declaratory jurisdiction is akin to judicial review of legality of administrative action. This is outlined in in previous case law and summarised well in a previous High Court proceeding as follows:

"Regardless of the supervisory jurisdiction invoked in a particular case, judicial review is said to be limited to reviewing the legality of administrative action. Such review, ordinarily, does not enter upon a consideration of the factual merits of the individual decision. The grounds of judicial review ought not be used as a basis for a complete re-evaluation of findings of fact, a reconsideration of the merits of the case or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power."

c. The Anderssen advice outlines situations under the Judicial Review Act 1991 where declaratory jurisdiction lies and provides a rationale (based on previous case law) as to why any action the MBA might take would get to a situation where the Courts would set aside the Council's decision on the Monaco development as it is limited to using declaratory powers only. It seems to be summed up rather well in the following passage:

"The law on this topic is clear. The opinion of the Council must be accepted unless it can be shown to have been one that no reasonable Council could have formed or that it was based on irrelevant considerations, or that in some other way it was unjustifiable. If it is justifiable it stands whether or not others may disagree with it. See Parramatta City Council v Pestrell (1972) 128 CLR 305 at 323 per Menzies J where he said:"

> *'There is, however, a world of difference between justifiable opinion and sound opinion. The former is one open to a reasonable man; the latter is one that is not merely defensible - it is right. The validity of a local rule does not depend upon the soundness of a Council's opinion; it is sufficient if the opinion expressed be one reasonably open to a Council. Whether it is sound or not is not a question for decision by the Court.' "*

And further

"It is not sufficient to establish that, as a matter of merit, a different decision ought to have been preferred. What must be established is that no decision-maker, acting reasonably, could have made that decision. In applying the standard, a Court must proceed with caution, lest it exceed its supervisory role, by reviewing the decision on the merits. Whilst this Court is often charged with the responsibility of reviewing a planning authorities decision on the merits in the

context of an appeal, that is not its role in proceedings of this kind.", ie one using declaratory powers.

d. In terms of the Council's assessment against the criteria contained in the planning scheme, the performance outcomes and the acceptable outcomes, the paper seems to find a good deal of fault on the part of the Council not the least of which due to the overall lack of clarity as to how these three aspects relate to each other, particularly in the DA assessment process. The paper seems to be indicating that 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. For example, when a very generally drafted performance outcome is being relied upon, there is no express requirement to seek clarification in the relevant acceptable outcomes which are more precise in areas such as setbacks, site coverage and shadowing. The paper points out situations where the developer readily acknowledges that the proposal is non-compliant with certain acceptable outcomes but asserts the DA complies with the relevant performance outcomes.

e. The paper acknowledges that the MBA submission to Council cited a range of ways in which the Monaco DA failed to satisfy a range of acceptable outcomes and performance outcomes. However, the MBA submission did "not give direct consideration to whether or not the application complied with the purpose and overall outcomes of the code, which is the third way in which compliance with the code can be demonstrated." The paper acknowledges that the Council officers Delegates Report (described in the paper as "lengthy and often confusing" dealt at length with the assessment benchmarks under the Light Rail and High Density Codes and addresses such aspects as setbacks, site coverage, site context, local character etc but concludes: "After a detailed assessment, it has been determined the proposal meets the purpose and overall outcomes of the High density residential zone, Light rail urban renewal area overlay code and other applicable overlay and development codes."

f. The paper then outlines several issues with the Delegates Report as follows:

   i. Having set out the performance and acceptable outcomes in the High-Density Code, it "records that the assessment was based on the proposed development providing an alternative outcome to achieve compliance with performance outcome PO1".
   ii. "At p.32 the Officer's comment records the acceptable outcomes and then reproduces a table setting out the performance-based alternative outcomes. Whilst identifying the acceptable outcomes, this section provides no analysis or comparison of the acceptable outcome with the performance solution proposed (such as that contained in the association's submission)."
   iii. "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."
   iv. "This is followed by a discussion that considers site context, architectural and landscaping treatments to conclude compliance with each of the performance outcomes in PO1. The discussion is again free of any reference to or comparison with the acceptable outcomes and the consequences of any departure from those acceptable outcomes that the performance outcomes achieved."
   v. "In addition, it is notable that the information request of 23 June 2020 which set out the concerns of Council's officers with respect to setbacks, built form and site cover is not discussed nor is it explained how the modest changes to the proposal effectively resolved those concerns."

g. Performance Outcome #2 is treated in a similar way.

h. The paper outlines some previous case law that suggests that acceptable outcomes have not been regarded as mandatory by Courts and are not the only solutions and performance criteria ought not to be interpreted as requiring the adoption of acceptable outcome or as even requiring an alternative solution to be akin to the acceptable outcome. Further the case law states that "It is not legitimate to regard departure from the acceptable solution as necessarily indicating non-compliance with the code."

i. Further case law indicates "that does not mean that the content of an acceptable solution is irrelevant. It may indicate what the planning scheme desires or prefers as development in the particular area. It takes but a small inference from such a conclusion to find that the intent of the Scheme is to favour such development in that area. I reject WBQH's submission that an express statement of desire is irrelevant in indicating a planning scheme intent. Under the heading 'Planning Intent' this Planning Scheme expressly asserts that the overlay maps articulate the desired outcome. Moreover, **the Scheme makes a development impact assessable if it does not comply with the map. "** (emphasis added). This last sentence is key to an on-going solution to the problems MBA has faced throughout the entire Monaco DA assessment process which is referred to below.

Notwithstanding the above, the paper makes some very significant observations:

a. The performance outcomes in the High-Density Code are drafted in a very general and permissive way in that they are "mere platitudes when read without context" and regard should have been given to acceptable outcomes to provide guidance.

b. Diagrams illustrating setback, site coverage and height which refer to "outcomes" are located in both acceptable and performance outcomes and should have been considered. These diagrams are illustrative of acceptable outcomes but also have a role in setting context for performance outcomes. These diagrams emphasise the need for increasing setbacks with height and therefor larger sites are required to accommodate increasing height.

c. The acceptable outcomes (AO1 and AO2) of the High-Density Code indicate a significant less intensive form than that approved. The paper concludes the Monaco development is an overdevelopment because:

   i "the Council's request for information during the development application process expressed similar views; and

   ii. the very unorthodox car parking solutions adopted which we tend to think indicates potential problems of geometry and cost in building conventional basement car parking solutions."

   However, that is not necessarily in conflict with the generally drafted performance outcomes (PO1 and PO2).

d. While arguable for the developer, compliance with PO1 and PO2 has not been made because the development is uniformly tall and bulky and the perception to which architectural and landscaping treatments has successfully mitigated the bulk and scale of the building is very limited.

e. Disagreement with conclusions that the building either possesses a slender bulk form or promotes an open skyline. Indeed, the building seems "quite the opposite". Similarly, protection of adjacent amenity (shadowing and more general impacts) is "plainly arguable as the Council's own information request makes clear".

In concluding the paper makes some telling points as follows:

a. While there is a general rule in law that performance outcomes do not require the adoption of acceptable outcomes, however, such broadly expressed principles must depend on individual circumstances and in this case (such broadly expressed performance outcomes) "regard can be had to the acceptable outcomes to provide context around the operation of the performance outcome so that a consistent planning intent is achieved as between the two assessment benchmarks." In this context the diagrams referred to above provide planning intent and serve to harmonise performance and acceptable outcomes.

b. 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 available declaratory powers of a Court set the bar too high in Anderssen's view. Even if the Court set aside the Council's decision to approve, there remains other options for the developer to argue, including:

    i. The overall outcomes of High-Density Code are drafted even more generally than the performance outcomes.
    ii. Discretion for Council to approve in relation to site context (surrounding development's setbacks, limited scale of 15 Macarthur Pde and proximity to parks and low-level community facilities
    iii. Financial commitments by buyers, developers, financiers based on Council's approval.

The overall take out on all of this could be summarised as follows:

a. The MBA has a case to oppose the Monaco development but because it is code assessable no access to a process to prosecute our case.
b. 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.
c. 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.
d. Developers, through many face-to-face contacts with Council Officers have had undue influence on tempering Officers' views reflected in the Request for Information and softening Officer's treatment of the Developer's response.
e. Councillors do not receive sufficient frank and fearless advice from their officers.
f. Self- interested developers have an undue influence over the existing Gold Coast planning arrangements.
g. 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.