

Summary of SkyPath Current Issues for NRA's AGM

June 8th, 2016



Hi,

I'm Kevin Clarke, Chair of the NRA SkyPath Appeal committee. I've been asked to report on our activities this year, regarding NRA's SkyPath appeal. The appeal is of course a complex issue and whereas it's been a huge and exasperating task, this address attempts to distil our position fairly briefly, absent of all the drama that's been involved.

Northcote Residents' Association (NRA) and Herne Bay Residents' Association (HBRA) acted in unison at mediation. That team produced the only success any of the appellants achieved at mediation and since. Without even dreaming of saying that we will prevail, we definitely have our foot on their throat and indeed have some fairly good chance of prevailing.

At mediation and later at the Environment Court, our team was comprised of the usual barrister / expert team required for success at Court. Paul Cavanagh QC, provided legal expertise. I'm an architect and frequently act as an expert in litigated building matters. Both Paul and I needed and had assistance. Paul's legal propositions were presented by Allan Webb, an RMA barrister and I was supported by Henry Toungh, an experienced architect and Ron Mayes, an internationally recognised bridge design expert.

For mediation and thereafter, Paul devised three very elegant legal propositions that characterised and proved that the current resource consent is invalid and that the current appeal is premature.

The Judge immediately agreed with the legal propositions presented to him in early March this year. That resulted in the current hiatus in the appeal hearing, which is not expected to be resolved much before mid-July.

In essence, the legal proposition the Court accepted is that while conditions exist that make SkyPath's implementation impossible, its resource consent cannot be either processed or granted.

There are many such issues regarding the SkyPath application. I produced literally hundreds of pages of rebuttal evidence for the resource consent hearing, which recorded the extensive catalogue of SkyPath's fatal flaws - all of which were ignored by Council's so-called "independent" commissioners. Paul Cavanagh is satisfied that our case is proven by that evidence. However, to establish that at Court, would require that existing evidence to be largely re-drafted and presented by hired specialist experts where necessary. That would entail the expenditure of something similar to the \$1M dollars worth of evidence Council has already expended on its evidence to date. Alternatively, our barrister could gain leave of the Court to have Ron and I recognised as the experts we are – but absent of legal representation as we now are, that can't happen.

There are however two major unresolved issues which, until they are resolved, make SkyPath's implementation impossible and should accordingly stop the appeal, if proven. They are :

1. Firstly, the current uncertainty that the AHB can obtain NZTA's Licence to Occupy. The first part of that test, to establish that the AHB can sustain the live loadings imposed upon it, by having SkyPath affixed to the Bridge. The Judge has already confirmed that if NZTA determines that those loadings cannot be sustained by the Bridge, the appeal is over.
2. Secondly, the current uncertainty that Council will or can continue to fund the SkyPath proposal and the current uncertainty that Council will or can underwrite the proposal. SkyPath cannot be implemented, absent of Council's continued funding and underwrite.

The first item is currently in train, via the Judge's directions I referred to earlier. In the first instance, the Court requires NZTA to confirm that the Bridge can sustain SkyPath's live-loadings. That determination has yet to be made and is still some way off. Its currently scheduled completion date is early to mid July.

If NZTA confirms that the Bridge can sustain SkyPath's transmitted live-loadings, further legal argument is required, to gain the Court's agreement that the real pre-hearing hurdle, is NZTA's granting to Council, of its Licence to Occupy. NZTA has confirmed that its Licence to occupy will not be granted, until the applicant has gained its building consent. That process would require at least another \$1M dollars in costs for both the building consent and NZTA's evaluation costs and would likely take more than one year, but only if the applicant can gain more funding from Council to meet those costs.

The second item arose very recently. That is to say, Council was scheduled to confirm its on-going funding and its underwrite for SkyPath on May 25th. However, we alighted upon the fact that Council's funding to date, and its intended funding henceforth, and its intended underwrite, are all illegal and will remain so, until such time as Council attends to its statutory requirements for such funding. Council's failure in this regard, is not dissimilar to its recent legal failure with the wharf extensions. It is our advice from legal specialists, that it would take approximately one year to remedy this problem - but only if that proves to be possible - which outcome remains uncertain.

Together, these two issues represent a delay of approximately two years and approximately \$1M dollars, exclusive of Council's processing costs. That would put the matter in the hands of the next elected Council and would likely spell SkyPath's demise.

The above two issues effectively encapsulate our approach to prevailing against the SkyPath application. That is to say, we consider that whereas we have very sound grounds for winning a full appeal hearing, the reality is that we are most unlikely to succeed at appeal, because we will be crushed by Council's purse and also because we simply have no purse. We believe we can prevail however, via interlocutory applications to the Court, the time and costs required for which are manageable, although as I'll now explain, are excruciatingly urgent.

We have no chance of matching the millions Council will expend attempting to prevail at appeal and attempting to gain related approvals for SkyPath's many non-compliances, all of which impact upon public safety and all of which fail to comply with Council's own regulations and those of other consenting authorities.

Our proposed methodology, is to have the Court address the basic problems with the appeal, by means of interlocutory applications, as we did with NZTA's necessary structural approval and Licence. If those interlocutory arguments are successful, as we expect them to

be on the basis that they are legally sound, the appeal would not be permitted by the Court to proceed, and the existing resource consent would accordingly be quashed by the Environment Court.

This methodology avoids the need to prove the many falsities upon which the SkyPath proposal is based. Instead, it focuses upon targeted legal issues that make SkyPath's implementation impossible the accordingly, ineligible for resource consent.

Although very close to potential success however, we cannot make it over the line without funding and currently, we simply have none. Our funding failure is a bit of a long story I won't bore you with. However, we now need to make the two presentations I've referred to, early next month. They must be presented by barristers, which means that we need to find funding to do so, by the end of this month.

I invited all of SkyPath's appellants and objectors to a meeting on 7th June, to explain our current position and to request that they assist with funding, to nail this appeal. The financial outcome of that initiative is not yet known, although one of the organisations assisted straight away. I had previously gained the formal support of our legal stance against SkyPath, from all those organisations, which include the RNZYS, WMUA, RYC, PCC, SMBA, HBRA, LSBPS and NRA. In effect, every major and democratically elected Association and organisation directly affected by SkyPath, is aligned with us. That represents far more people than the 11,000 30-second electronic clicks of support gained by Generation Zero, in support of SkyPath.

We have been advised that remaining costs required to get us over the line, will be approximately \$50K. We expect that NRA will need to put its hand on about \$10K within weeks, to keep our efforts alive. To that end, we will need to urgently embark on and succeed with a modest fundraising campaign.

To date, the costs of mounting the appeal have been borne solely by HBRA and Northcote Point's three appellant organisations. Those costs represent more than \$1M to date in evidence preparation and attendance, and more than \$100,000 in direct legal expenses.

We propose that the remaining approximately \$30K - \$40K NRA will need to find, represents a highly cost effective approach that has a high likelihood of success. Compared with that, the prospect of expending a further approximately \$1M to have our existing evidence argued by paid experts at appeal, is plainly unmanageable and accordingly, we would fail at appeal.

The alternative low-cost way of proceeding, is to reduce the scope of appeal topics, at the cost of all others. We see no merit in that, since even were we to argue just one issue at appeal, it would cost little less than the strategy we propose and if completely successful, would leave the primary issues we object to, for Northcote Point to deal with. That is to say, the proposal would proceed, complete with the major detriments of the ramps at the end of the Point, the so-called "*safe cycleway*", carparking bedlam and its associated policing. That would leave all of SkyPath's many other amenity reductions and SkyPath's many safety hazards intact, with the applicant free to re-apply annually for increased patronage - a game we could never keep up with. The very best that such an approach could hope to achieve, is reduced patronage. However, that will be achieved automatically and without cost, by NZTA's patronage restrictions.

The first two hurdles for us to clear, are firstly the legal presentation to Council regarding its alleged funding illegality and secondly, the legal submission to the Environment Court for the appeal to be adjourned, pending resolution of the issues already subject to the Court's directions.

The bad news is that if we fail to raise the remaining funds needed for the presentations, NRA and HBRA will have no option other than to withdraw from the appeal, by about mid July at the latest, to avoid claims of damages from the applicant.

That would leave the applicant with a valid resource consent, complete with all the falsities, gross non-compliances, public safety hazards, significant public debt and wide-ranging detriment to all objectors' interests, embodied by that consent.



Kevin Clarke
Chair, NRA SkyPath Appeal Committee