

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKURAU ROHE**

**CIV-2016-404-002309
[2018] NZHC 97**

UNDER

the Local Government (Auckland Transitional Provisions) Act 2010 and the Resource Management Act 1991 ("RMA")

AND

IN THE MATTER

of an appeal under s 158 of the Local Government (Auckland Transitional Provisions) Act 2010 and s 299 of the RMA

BETWEEN

SAMSON CORPORATION LIMITED
AND STERLING NOMINEES LIMITED
Appellant

AND

AUCKLAND COUNCIL
Respondent

HOUSING NEW ZEALAND
CORPORATION
Section 301 Party

Hearing: 13 November 2017

Appearances: R B Brabant and Ms S T Darroch for the Appellant
M G Wakefield for the Respondent
Ms C E Kirman and Ms A K Devine for the s 301 Party

Judgment: 9 February 2018

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by Justice van Bohemen
on 9 February 2018 at 3.30 pm pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

Introduction

[1] Samson Corporation Ltd and Sterling Nominees Ltd (Samson) own a residential property at 57 Patteson Avenue in Mission Bay, Auckland, at the corner of Patteson Avenue and Codrington Crescent. The single building on the site is an Art Deco or “style moderne” building comprising three apartments or flats and has been on the site in that configuration since the 1940s. Samson has appealed the decision of the Auckland Council (Council) to include the property in a Residential – Single House Zone in the Auckland Unitary Plan as recommended by the Auckland Unitary Plan Independent Panel (Panel).

[2] Samson does not challenge the Panel’s recommendation and the Council’s decision to apply to Samson’s property the Special Character Overlay – Residential Isthmus B that also applies to all other properties zoned Residential – Single House in the vicinity of the Samson site. Samson contends, however, that applying the Residential – Single House Zone to its property amounts to an error of law because, on the evidence available to the Panel and thus to the Council, such a conclusion was not open to them. Samson contends that the appropriate zoning for the site is Residential – Mixed Housing Urban Zone, the zoning applied to other properties north and immediately adjacent to the property.

[3] The Council rejects Samson’s contentions and says Samson is using the appeal process to revisit the merits of the Panel’s recommendation and the Council’s decision.

[4] The original appeal challenged the Council’s decision on a number of other grounds. However, following High Court decisions on other appeals concerning the Auckland Unitary Plan, Samson and the Council agreed that the appeal should be narrowed to the single question of whether the Panel’s recommendation and the Council’s decision that the site should be zoned Residential – Single House amounted to an error of law.

[5] Related to that question are three further questions posed in the Amended Agreed Statement of issues and facts dated 3 November 2017:

- (a) Did the Panel, and thus the Council, fail to take account of relevant considerations when determining the appropriate residential zoning – namely that the property comprises a single apartment building with three flats so is not a single dwelling?
- (b) Was the Panel’s recommendation in relation to the zoning of the property reached without evidence or was it one to which it could not reasonably have come?
- (c) Was the Panel’s finding on the zoning in conflict with the Panel’s decision that the setting aside of an overlay for the purposes of establishing a zoning is the correct approach?

[6] Housing New Zealand Corporation (Housing New Zealand) joined the appeal in accordance with s 301 of the Resource Management Act 1991 (RMA) and filed submissions on the points of appeal of interest to it when the case had been set down for hearing in May 2017. However, when the hearing was rescheduled for later in the year and Samson had decided not to pursue the points that had been of direct interest to Housing New Zealand, Housing New Zealand attended the hearing on a watching brief and did not make oral submissions.

Background

[7] Fuller descriptions of the background to the Auckland Unitary Plan are set out in the decisions of Whata J in *Albany North Landowners v Auckland Council*¹ and *Ancona Properties Ltd v Auckland Council*,² Wylie J in *Transpower New Zealand Ltd v Auckland Council*,³ and Heath J in *Hollander v Auckland Council*,⁴ which were also appeals against decisions of the Council on the Auckland Unitary Plan following recommendations of the Panel. For present purposes, it is sufficient to record the fact of the establishment of the Council and the key steps leading to the Auckland Unitary Plan.

¹ *Albany North Landowners v Auckland Council* [2017] NZHC 138.

² *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594.

³ *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281.

⁴ *Hollander v Auckland Council* [2017] NZHC 2487.

[8] The Council was established on 1 November 2010 in accordance with the Local Government (Auckland Council) Act 2009 which established the Council as the unitary authority for Auckland, replacing the regional council and territorial authorities that had previously functioned in the Auckland region. Prior to the Council's final establishment, Parliament enacted the Local Government (Auckland Transitional Provisions) Act 2010 (Transitional Provisions Act), which among other things, provided:⁵

... a process for the development of the first combined planning document for Auckland Council under the Resource Management Act 1991.

[9] That process, as set out in Part 4 of the Transitional Provisions Act, was considerably more streamlined and subject to tighter timeframes than provided for in the RMA for the usual preparation and adoption of plans. The intention was to ensure that the first Auckland Unitary Plan would become operative as soon as possible, preferably within three years of the Council notifying the proposed plan.

[10] Elements of that process relevant to this appeal and set out in overview in s 115 of the Transitional Provisions Act were:

- (a) The Council was to prepare a proposed plan for Auckland that met the requirements of a regional policy statement, a regional plan, including a regional coastal plan, and district plan under the RMA;
- (b) The Council was to prepare reports under ss 32 and 165(H) of the RMA to explain and evaluate the proposals in the proposed plan;
- (c) The Council was to notify the proposed plan and call for submissions;
- (d) The Council was to notify a summary of submissions and call for further submissions;

⁵ Local Government (Auckland Transitional Provisions) Act 2010, s 3(1)(d).

- (e) The Council was to forward all relevant information to the Panel who were to be appointed by the Minister for the Environment and the Minister of Conservation;
- (f) The Panel was to hold hearings into the submissions, which hearings were to be attended by the Council which was to assist the Panel with the hearings;
- (g) The Panel had to make recommendations to the Council on the proposed plan not later than 50 working days before the expiry of three years from the date the Council notified the proposed plan, unless that period had been extended by the Minister for the Environment for up to one year;
- (h) The Council had to make decisions on the Panel's recommendations within 20 working days, unless that period had been extended by the Minister for the Environment for up to a further 20 working days, and publicly notify the Panel's recommendations and the Council's decisions;
- (i) The proposed Plan was to be amended in accordance with the Council's decisions and was to be deemed approved or adopted, subject to appeal rights of submitters;
- (j) Submitters on the proposed Plan could appeal to the Environment Court on those recommendations of the Panel that the Council rejected;
- (k) However, where the Council accepted the Panel's recommendations, submitters on the proposed Plan could appeal to the High Court only on a point of law.

[11] Section 115 is only a guide to the general scheme and effect of that Part of the Act. More specific provisions on how the above elements were to be carried out

are set out in subsequent sections. No issue is taken on this appeal, however, on the implementation of the above elements.

[12] It is relevant to record, however, elements of s 144 of the Transitional Provisions Act concerning the recommendations of the Panel to the Council:

- (a) Under s 144(2), the Panel could make recommendations by topic;
- (b) Under s 144(8), the Panel could give reasons for accepting or rejecting submissions by grouping the submissions according to the provisions of the proposed plan to which they related or according to the matters to which they related;
- (c) Under s 144(10), it is made clear that the Panel was not required to make recommendations that addressed each submission individually.

[13] There is no debate that these provisions were included to enable the Panel to deal with – within the compressed timeframe it had to complete its work – the large volume of submissions it was expected to receive and did receive.

[14] The proposed Auckland Unitary Plan was publicly notified by the Council on 30 September 2013. In the proposed Plan as notified, the Samson site – which had been zoned Residential 2b in the Isthmus Section of the Auckland District Plan – was included in the Residential – Single House Zone in the Isthmus B area. The Single House Zone was also proposed for the property adjacent to the Samson site on Codrington Crescent (apart from a driveway leading to a rear section zoned Residential – Mixed House Urban) and for the properties facing the site across Codrington Crescent, as well as for the sites directly and diagonally across Patteson Avenue from the Samson site. The proposed Plan also proposed the application of the Special Character Overlay to the Samson site and the other properties in the vicinity proposed to be included in the Residential – Single House Zone.

[15] The Residential – Single House Zone was one of four zones proposed for the residential parts of the central City. The four Zones, in order of envisaged intensity

of use and development, were: Residential – Single House Zone, Residential – Mixed Housing Suburban Zone, Residential – Mixed Housing Urban Zone, and Residential – Terraced Housing and Apartment Buildings Zone. The Proposed Plan also contained two other residential zones: the Large Lot Zone, which was envisaged as applying to the transition between urban and rural areas, and the Rural and Coastal Settlement Zone.

[16] Included in the proposed Plan as notified were the following provisions regarding the Single House Zone:

Zone description

This zone provides for low density suburban housing and is applied in areas throughout Auckland ...

Large amounts of subdivision or multi-unit development is not anticipated within this zone due to the minimum site size requirements. The activities provided for in the zone are limited to maintain the low density suburban residential character and amenity of these areas.

Objectives

1. Development is of a height, bulk and form that maintains and positively responds to the neighbourhood's low density suburban residential character.

...

[17] The Proposed Plan also contained "overlays" aimed at protecting particular values or environmental conditions within the city. The overlays were intended to apply constraints on activities within an overlay – additional to those deriving from a site's zoning – in order to secure the objectives of the particular overlay.

[18] The Proposed Plan as notified contained the following provisions regarding the Special Character Overlay:

Overlay description

This overlay seeks to retain and manage identified special character values of specific residential and business areas. Each overlay is supported by a special character statement identifying the key attributes or qualities of the area for maintenance, retention and enhancement. Assessment of proposals for activities, development and modifications to places within special character areas will be considered against the special character statements.

...

Objectives

All special character areas

1. The special character values of the area, as identified in the special character statement, are maintained and enhanced, including the history, community associations and the overall notable or distinctive aesthetic or physical qualities of the area.
2. The physical attributes that define, contribute to, or support the character of the area are retained including:
 - a. built form, design and architectural values of buildings and their contexts
 - b. streetscape qualities, including historical form, subdivision and pattern of street and roads
 - c. landscape qualities and/or natural features including topography, vegetation and open spaces.
3. Activities and development that detract from or undermine the special character of the area are avoided.

[19] It should be noted that during the hearings process, the Council proposed that the name of the Special Character Overlay be amended to “Historic Character Overlay” and that name was used in some of the documents through that period. However, the Panel later recommended that the original name of the Special Character Overlay should be maintained and that recommendation was accepted by the Council.

[20] Samson lodged submissions, and then further submissions objecting to the proposed Residential – Single House zoning for the Patteson Avenue site. It also sought the removal of the Special Character Overlay from the site. Samson submitted initially that the site should be zoned Residential – Mixed Housing Suburban, the zoning proposed in the proposed Plan as notified for the properties north and adjacent to the Samson site on Patteson Avenue and for the remainder of the sites on both sides of Patteson Avenue between Codrington Crescent and Nihil Crescent. Subsequently, Samson proposed the site be zoned Residential – Mixed Housing Urban following the Council’s recommendation that that zoning should apply to the properties north and adjacent to the Samson site.

[21] Samson also appeared before the Panel and presented evidence, including from a planning expert, Jeffrey Brown, and made legal submissions in support of changes Samson sought to the zoning proposed for 10 sites in the area covered by the Proposed Plan. With respect to the Patteson Avenue site, Mr Brown's evidence was that the Single House zone and the Special Character Overlay were not appropriate for the site which contained three dwellings dating from the 1940s. Mr Brown also stated that the Residential – Mixed Housing Urban zoning would better reflect the current use of Patteson Avenue site and its location close to the key transport routes of Tamaki Drive and Kepa Road.

[22] Because Samson was seeking the removal of the Special Character Overlay from the Patteson Avenue site, Mr Brown's evidence did not address the compatibility of a Residential – Mixed Housing Urban zoning with the Special Character Overlay.

[23] No other submissions were made with respect to the Samson site.

[24] Samson's submissions and evidence were considered under Hearing Topic 081: Rezoning and Precincts (Geographical Areas), together with other submissions in relation to zoning in the Eastern Isthmus Area of Auckland City. Council evidence responding to these submission points was given by:

- (a) John Duguid, General Manager Plans and Places, who explained the Council's approach to zoning;
- (b) Lisa Mein, a Principal and Senior Urban Designer at Boffa Miskell Ltd, who discussed the proposed zoning principles for residential land within what was then termed the Historic Character Overlay; and
- (c) Lee-Ann Lucas and Anna Papaconstantinou who prepared a joint evidence report on behalf of the Council on submissions relating to the Central-Eastern Isthmus Area.

[25] The briefs of evidence of Mr Duguid and of Ms Mein were at a reasonably high level of generality and were framed as explanations of why the Council had taken the approaches it had on various topics and related issues and why changes had been made in some instances in response to submissions. For the most part, their evidence did not address the specifics of individual submissions. Neither Mr Duguid nor Ms Mein referred specifically to the Samson submissions. Rather, their evidence provided the context in which the submissions by Samson and others were considered.

[26] In his evidence, Mr Duguid said:

1.5 In determining the zoning that should be applied in response to submissions on the [proposed Plan] the Council has been guided by the overall strategy to focus growth primarily within the metropolitan urban area. To give effect to the wider objectives of the [Regional Policy Statement], the other overarching considerations that have influenced the Council's proposed application of the zones include:

(a) ...

(b) Ensuring that the methods included within the [Proposed Plan] to manage historic character and areas of ecological significance (e.g. overlays) are complemented by the application of a zone (e.g. the Single House Zone (SHZ)) that minimises the potential for a mis-match between the zone and those other methods.

...

6.3 The objectives and policies of the [Regional Policy Statement] ... are highly interlinked. An integrated approach is therefore required to ensure that the spatial application of zones gives effect to the provisions of the [Regional Policy Statement] *as a whole*.

[27] Mr Duguid's evidence set out the rationale for the proposed residential zones.

On the Single House Zone his evidence stated:

18.10 The purpose of the [Single House Zone] ... was to provide for a different neighbourhood character from the [Mixed House Suburban Zone], by providing for a more open and spacious character.

18.11 The Council carefully considered the purpose of the [Single House Zone] in response to submissions. Consequently, the Council proposed ... a number of amendments to the zone description, objectives and policies of the [Single House Zone] to give effect to

the [Regional Policy Statement] and to clarify that the purpose of the [Single House Zone] is to:

- (a) provide for development that complements identified natural and built heritage values within identified areas;

...

- 18.14 In response to the [Regional Policy Statement] and the amended objectives and policies of the [Single House Zone], the Council has adopted a zoning principles of applying the [Single House Zone] to sites:

...

- (d) within the Special/Historic Character overlay.

...

- 19.15 Chapter B4.2 of the [Regional Policy Statement] as notified contains policies and objectives that seek to retain and enhance areas of Auckland's historic character. The Special/Historic Character overlay was proposed as a mechanism in the [proposed Plan] to give effect to the [Regional Policy Statement] objectives and policies that seek to retain and enhance areas of Auckland's historic character. The approach to zoning within the Special/Historic Character overlay is outlined in detail within the evidence of Lisa Mein for Topics 080 and 081.

...

- 19.19 The Council's principle for zoning under the Special/Historic Character overlay is to apply the [Single House Zone], as it has a density limit of one dwelling per site, which is consistent with the controls of the overlay. In a limited number of instances the [Mixed House Suburban] zone may also be appropriate. Ms Mein discusses this in her evidence for Topics 080 and 081.

[28] In her evidence, Ms Mein explained the Council's view that historic character areas were considered a finite resource that should be retained and enhanced and that the heritage values of such areas needed protection from inappropriate subdivision, use and development. She explained why the Council considered the Single House Zone the appropriate residential zoning for such areas:

- 6.1 As discussed in the evidence of John Duguid about zoning for Topics 080 and 081, the Council approved the following principles to inform the zoning of land that is included in the refined spatial extent of the Historic Character overlay:

- a) The [Single House Zone] is generally the most compatible with the Historic Character Residential overlay areas where

the underlying land use pattern consists of single residential buildings on individual titles;

- b) In very limited circumstances, consider [sic] the application of the [Mixed House Suburban] zone on larger sites contiguous with other land zoned [Mixed House Suburban], where the underlying land use pattern represents two or more residential buildings on one title and the site is in close proximity to centres and public transport.

...

- 6.14 However, I consider that the [Single House Zone] is a better complement to the Historic Character overlay, as the [Mixed House Suburban] may create an expectation of intensification and development that could compromise the identified historic character of an area.

[29] In their evidence, Ms Lucas and Ms Papaconstantinou noted that a total of 3,985 submission points had been received on the proposed Plan in relation to the Eastern Isthmus. In terms of locale, 2,988 of the submission points related to Mission Bay, Kohimarama and Saint Heliers. In terms of subject matter, 1,345 of the submission points concerned proposals to expand or contract the Mixed House Urban, Mixed House Suburban and Single House zones.

[30] Unsurprisingly, the evidence of Ms Lucas and Ms Papaconstantinou did not discuss these submissions individually or in detail. The main body of their evidence described the approach they took to evaluating submissions. The outcome of their evaluation and their recommendations were contained in attachments to their brief of evidence. These attachments included revised maps within the Eastern Isthmus area showing the proposed zoning changes.

[31] The main body of their evidence included the following statements:

- 10.7 Having regard to the requirements of sections 32 and 32AA of the RMA and the other statutory criteria of the RMA outlined in the evidence of Mr Duguid and the matters raised by submitters, we consider the proposed zoning changes are appropriate because:

...

- (c) Where rezoning to a higher or lower residential zone has been sought, consideration has been given to the notified [Proposed Plan] zone/s and the requested alternative zone/s objectives and policies, the [Regional Policy Statement],

along with any environmental constraints to the site and local context. We have supported rezoning proposals where they are the most appropriate way to meet the district level objectives of the [Proposed Plan] and/or give effect to the [Regional Policy Statement], and not supported them where they do not. In some instances, where a submission request and the objectives and policies of the zone do not completely align, a balanced approach that takes into account best planning practice, has been taken.

[32] In Attachment C to their evidence, Ms Lucas and Ms Papaconstantinou recorded their evaluation and recommendations of specific submissions. Attachment C listed Samson's submission, the proposal to rezone the Samson site from Single House to Mixed Housing Urban, noted that the site was subject to the Special/Historic Character Overlay, and recorded the Report-writers' position that they did not support the change and supported the retention of the notified zone. Attachment C also stated the reasons for that position:

Property is subject to constraint – [Historic Character]. Retention of [Single House] most appropriate way to achieve objectives of zone and give effect to [Regional Policy Statement].

Panel Recommendations

[33] The Amended Agreed Statement of Issues and Facts dated 3 November 2017 filed by counsel for Samson and the Council contains an abbreviated summary of the Panel's recommendations as they applied to the Samson site. That summary made the following points:

- (a) The Panel made no reference to the Samson site or the submissions or evidence presented in relation to the site;
- (b) The zoning outcome for the site was evident only from the relevant map in the Panel's Recommendations Version of the Plan;
- (c) There was a paragraph in one of the relevant reports regarding the approach the Panel took to zoning of sites subject to an overlay to the effect that overlay constraints were not generally taken into account in deciding the zoning of sites;

- (d) Under the Activities Table for the Single House Zone, one dwelling per site was to be a permitted activity but more than one dwelling per site would be a non-complying activity.

While the summary is useful, I consider the determination of this appeal requires me to have regard to the totality of the Panel's recommendations.

[34] As provided for in the Transitional Provisions Act, the Panel issued a series of reports to the Council with its recommendations on the topics it had considered. Relevant in this case are the following, all dated 22 July 2016:

- (a) Overview Report of recommendations on the Proposed Plan (Overview Report);
- (b) Report on Changes to the Rural Urban Boundary, Rezoning and Precincts, which included recommendations on Topic 081 (Urban Boundary and Rezoning Report);
- (c) Report on Residential Zones (Residential Zones Report);
- (d) The Panel's recommended version of the Plan which included:
 - (i) D18: Special Character Areas Overlay Residential and Business (Special Character Overlay Chapter);
 - (ii) H 3: Residential – Single House Zone (Single House Zone Chapter);
 - (iii) Schedule 15: Special Character Zone Schedule, Statement and Maps.

[35] The Overview Report emphasised the need to ensure adequate capacity to deal with the expected growth of the City. As was said in the Executive Summary:

The current resource management issue of greatest significance facing Auckland is its capacity for growth. This means both physically

accommodating more people and also devising planning controls which most appropriately enable growth.

[36] The Executive Summary listed the various recommendations made by the Panel for managing use and development to provide for growth. These included:

- ii Concentrating residential intensification and employment opportunities in and around existing centres, transport nodes and corridors so as to encourage consolidation of them ...
- ...
- vi Supporting the Council's submission to remove density controls as a defining element of residential zones.
- vii Revising a number of the prescriptive bulk and location standards to enable additional capacity while maintaining residential amenity values.

[37] The Urban Boundary and Rezoning Report also made comments about capacity:

3.3.2 Capacity

The capacity modelling (both residential and business) has, as discussed in the [Overview Report], pointed the Panel in the direction of increased enablement of capacity. The Panel's approach has been in line with the Auckland Plan's promotion of a quality compact urban form by focusing capacity in and around centres, transport nodes and corridors. This has resulted in recommending a more focused concentration of increased capacity through rezoning around those identified metropolitan and town centres (in particular) so that their function and role is appropriately strengthened, while recognising the multi-modal efficiencies thereby gained through road, rail and ancillary access linkages. This has also resulted in rezoning a number of business areas from Business – Light Industry Zone to Business – Mixed Use Zone (particularly in the Isthmus at Ellerslie and Morningside, for instance) and supporting centres with higher residential densities through zoning these Residential – Mixed Housing Urban Zone and Residential – Terrace Housing and Apartment Buildings Zone. In doing so the Panel has generally avoided rezoning the inner city special character areas (such as Westmere and Ponsonby), although it has done so in limited defined areas (such as in Mount Albert) where other strategic imperatives dominate.

(emphasis added)

[38] This Urban Boundary and Rezoning Report explained the Panel's approach to the relationship between overlays and zoning:

3.3.3 Constraints

The Panel's approach to land use controls has been to, as far as practicable, establish a clear and distinct descending hierarchy from overlay to zone to precinct (where applicable) based on relevant regional policy statement provisions. ...

...

As noted above, overlay constraints (for example flooding, height-sensitive areas, and volcanic viewshafts) have generally not been taken not consideration as far as establishing the zoning is concerned. That is, the 'appropriate' land use zoning has generally been adopted regardless of overlays. That approach leaves overlays to perform their proper independent function of providing an important secondary consideration, whereby solutions and potential adverse effects can be assessed on their merits. It also avoids the risk of double-counting the overlay issue both at the zone definition and then at the overlay level. In many instances, this has resulted consequential rezoning changes. ...

As a consequence of the approach to zoning noted above, typically the setting aside of an overlay from a residential site for the purpose of establishing a zoning, has resulted in upzoning of that site by an order of typology – commonly from Residential – Single House Zone to Residential – Mixed Housing Suburban Zone for instance (indeed, the Residential – Mixed Housing Suburban Zone has become the new 'normal' across many parts of the city). This residential upzoning has most commonly arisen from uplifting of the flooding overlay, which in no way diminishes the relevance of that, or any other, overlay because of its importance in the hierarchy of controls.

(emphasis added)

[39] Neither the Overview Report nor the Urban Boundary and Rezoning Report made specific comment on the relationship between the Special Character Overlay and the underlying zoning, notably the Single House Zone.

[40] In the Residential Zones Report, the Panel made clear the importance it attached to the Single House Zone, even if it also made clear its disagreement with aspects of the Council's advice regarding the purpose of the zone. At section 3.2 of this report the Panel said:

The Panel finds that the Residential – Single House Zone is an important zone and contributes to the range of living options and choices available. It should not be constrained in the way proposed by the Council. The Panel has reworded the purpose statement as a zone description to reflect what it considers, based on the evidence, as to the purpose/description of the zone.

...

[41] The Residential Zones Report also took up the issue flagged in the Overview Report of removing density control as a defining element in residential zones and recommended that, at section 5.1, the removal of all density provisions in the Residential – Mixed Housing Suburban, Residential – Mixed Housing Urban, and Residential – Terrace Housing and Apartment Buildings Zone. It recommended that density limits be retained, however, for the Residential – Single House Zone.

[42] In the Special Character Overlay Chapter, the Panel confirmed that the Special Character Overlay – Residential would apply in Mission Bay and set out the Objectives, Policies and Activity Table that would apply in each of the Special Character Areas.

[43] The Single House Zone Chapter set out the Panel's revised Zone description. That description began:

The purpose of the Residential – Single House Zone is to maintain and enhance the amenity values of established residential neighbourhoods in number of locations [sic]. The particular amenity values of a neighbourhood may be based on special character informed by the past, spacious sites with some large trees, a coastal setting or other factors such as established neighbourhood character. ...

[44] The Chapter went on to set out the Policies and Activity Table for the Zone. As already noted, the Activity Table provided that one dwelling per site was a permitted activity in the Zone but that more than one dwelling per site would be a non-complying activity.

[45] Schedule 15 contained an extensive statement on the background to the Special Character Overlay which included a description of various architectural styles that had developed over Auckland's history and which contribute to the character of the areas to which the Overlay was to apply. One of those architectural styles was Art Deco – Style Moderne. The Schedule also contained a description and summary of special character values and the physical and visual qualities, architectural values and urban structure of the Special Character Overlay as it applies in Residential – Isthmus B, the area that includes Mission Bay. Included in that description was the following statement:

The Special Character Areas Overlay – Residential : Isthmus B area reflects a range of residential architectural styles including Victorian and Edwardian villas, transitional villas, Arts and Crafts, English Cottage, Neo-Georgian and Moderne style houses as well as examples of bungalows and State housing from the 1930s and 1940s.

[46] Schedule 15 included a planning map showing the application of the Special Character Overlay in Mission Bay. The map included the Samson site in the Overlay. Other planning maps attached to the Panel's recommended version of the Plan showed the application of the Special Character Overlay and the application of the Residential – Single House Zone in Mission Bay. The application of the Overlay and the Single House Zone were identical, at least in the vicinity of the Samson site. Both applied to that site.

[47] The Council accepted all of the Panel's recommendations that bore on the Samson site in its Decisions Report dated 19 August 2016. These included the application of the Special Character – Residential Overlay to the site, the inclusion of the site in the Residential – Single House Zone, the revised Zone description for the Residential – Single House Zone and the Policies and Activity Table for the Zone as recommended by the Panel and the maps showing the application of the Special Character – Residential Overlay and the Residential – Single House Zone. The Decisions Report contained no additional discussion on the rationale for these decisions.

[48] It is common ground between the parties that if the Panel made an error of law in its recommendations regarding the Samson site, that error of law also applies to the decisions of the Council which accepted the Panel's recommendations unchanged.

Applicable legal principles

[49] Samson's appeal is brought pursuant to s 158 of the Transitional Provisions Act. Section 158 provides:

158 Right of appeal to High Court on question of law

- (1) A person who made a submission on the proposed plan may appeal to the High Court in respect of a provision or matter relating to the proposed plan –

- (a) that the person addressed in a submission; and
 - (b) in relation to which the Council accepted a recommendation of the Hearings Panel, which resulted in –
 - (i) a provision being included in the proposed plan; or
 - (ii) a matter being excluded from the plan.
- ...
- (4) However, an appeal under this section may only be on a question of law.

[50] As noted above, the right to an appeal on a question of law is the only means by which a submitter may challenge a decision of the Council on the Plan where the Council accepted the recommendation of the Panel. In this respect, the rights of submitters under the Transitional Provisions Act are more circumscribed than is the case under the RMA for submitters on proposed plans who have a general right of appeal to the Environment Court against decisions by a territorial authority or regional council on proposed district or regional plan provisions.⁶

[51] Notwithstanding this unusual feature of the Transitional Provisions Act, it has been held in at least three earlier decisions of this Court – by Whata J in *Albany North Landowners v Auckland Council*,⁷ by Wylie J in *Transpower v Auckland Council*⁸ and Heath J in *Hollander v Auckland Council*⁹ – that the approach to appeals on questions of law under s 158 of the Transitional Provisions Act should be the same as that applied to appeals on questions of law under s 299(1) of the RMA. That is, as established by a Full Court of this Court in *Countdown Properties (Northland) Ltd v Dunedin City Council*,¹⁰ the High Court would interfere with the decision under appeal only if it considered that the decision-maker:

- (a) Applied a wrong legal test; or

⁶ Resource Management Act 1991, Schedule 1, cl 14.

⁷ *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [90].

⁸ *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [47].

⁹ *Hollander v Auckland Council* [2017] NZHC 2487 at [44] – [47].

¹⁰ *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153-154.

- (b) Came to a conclusion without evidence, or one to which, on the evidence, it could not reasonably have come; or
- (c) Took into account matters which it should not have taken into account; or
- (d) Failed to take into account matters which it should have taken into account.

[52] I agree with Mr Wakefield for the Council that I should take the same approach in this case. While Mr Brabant for Samson did not address this aspect in detail, his principal submission that the Council came to a decision that was not open to it is effectively an argument that the Panel and thus the Council failed to meet the standards required of decision-makers under paragraph (b) of the *Countdown* test.

[53] As Mr Wakefield noted, in *Transpower* Wylie J also cautioned, in the circumstances of an appeal under s 158 of the Transitional Provisions Act:

It is also trite law that this Court must resist attempts by litigants to use an appeal limited to a question of law as an occasion for revisiting the factual merits of the case under the guise of a question of law. Where it is alleged that the court or tribunal below came to a conclusion without evidence, or one to which, on the evidence it could not reasonably have come, the appellant faces a “very high hurdle”. It does not matter that this Court would almost certainly not have reached the same conclusion as the court or tribunal below. What matters is whether the decision under appeal was a permissible option. The appellate court will almost always have to be able to identify a finding of fact which was unsupported by evidence or a clear misdirection in law by the inferior court or tribunal.

[54] I agree the same caution should apply in the present case.

The arguments

[55] Samson asserts that the Council’s decision to include the Samson site in the Residential – Single House Zone was not open to the Council on the evidence before it and was contrary to the Panel’s approach to zoning as set out in the Panel’s reports. In particular, it says the Panel and thus the Council did not address the site-specific characteristics of the Samson site, including the existing use to which the site was

being put, being a use which, in Samson's view, was inconsistent with the purpose of the Zone as recommended by the Panel. As a result, there was uncontested evidence (from Samson) supporting a different zoning outcome and on which this Court can rely to reach a decision that there has been an error of law. In support of these contentions, Mr Brabant cites earlier decisions of this Court which set aside other Council decisions on the Plan, in particular the decisions of Whata J in *Ancona Properties Ltd v Auckland Council*¹¹ and *Bunnings Ltd v Auckland Unitary Plan Independent Hearing Panel*,¹² as well as two other decisions by Whata J: *Auckland Presbyterian Hospital Trustees Inc v Auckland Council*¹³ and *Arena Living Ltd v Auckland Council*.¹⁴

[56] The Council's argument is that the decision to include the Samson site in the Residential – Single House Zone was open to the Panel on the evidence before it, in particular the evidence regarding the rationalising of zones within the city, the objective of giving effect to the Regional Policy Statement as a whole, the desire to preserve areas of historic and special character, and the close relationship between the Single House Zone and the Special Character Overlay. Mr Wakefield submits that the *Ancona Properties* and other decisions cited by Mr Brabant provide assistance to the Court but are distinguishable because they all involved situations where the parties had agreed that errors had been made in Council decisions on the Plan. In support, Mr Wakefield he cites the decision of Heath J in *Hollander v Auckland Council*¹⁵ where His Honour declined to set aside a decision of the Council, made in accordance with the recommendation of the Panel, to zone an area of land at Dairy Flat Mixed Rural rather than Countryside Living, even though the evidence of the Council before the Panel had supported a Countryside Living zoning.

Discussion

[57] Before considering the specifics of this case, it is useful to address the debate between counsel for Samson and for the Council over the relevance and weight to be given to *Ancona Properties* and the other decisions referred to by Mr Brabant.

¹¹ *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594.

¹² *Bunnings Ltd v Auckland Unitary Plan Independent Hearing Panel* [2017] NZHC 2141.

¹³ *Auckland Presbyterian Hospital Trustees Inc v Auckland Council* [2017] NZHC 2158.

¹⁴ *Arena Living Ltd v Auckland Council* [2017] NZHC 2311.

¹⁵ *Hollander v Auckland Council* [2017] NZHC 2487.

[58] The *Ancona Properties* and *Bunnings* decisions involved appeals by various submitters to Council decisions on the Auckland Unitary Plan. The *Auckland Presbyterian Hospital Trustees* and *Arena Living* cases were appeals by providers of retirement villages following Council decisions on the Plan. In each of these decisions, Whata J was asked to make consent orders giving effect to changes the relevant submitters and the Council had agreed should be made to the Plan following Council decisions to accept Panel recommendations which all parties agreed had been in error. Under the Transitional Provisions Act, that could be done only by way of appeals on questions of law.

[59] Whata J was careful to note these unusual circumstances and the importance to his decisions of the Council's acceptance that errors had been made. For example, in *Ancona Properties* he said, with regard to an appeal by Southern Gateway (Manukau) Ltd concerning technical errors said to have occurred over development and construction performance standards in the Plan:¹⁶

[61] In my view the central issues of law raised by the appeal are whether the [Panel] failed to have regard to the agreed position of the parties and supporting evidence, whether the amendments were available to the panel on the evidence, and whether the inclusion of two performance standards was a technical error creating inconsistency. The first two grounds are usually very difficult ground to make out on appeal on a point of law, particularly given the complex evaluative exercise that must be undertaken by a decision-maker to settle the provisions of a District Plan. The acceptance by the Council that the [Panel] erred in these respects is a strong factor in favour of allowing the appeal.

[60] Mr Wakefield submits that these four decisions can be distinguished on the ground that the Council has not accepted or conceded that it or the Panel made an error with regard to the decision to include the Samson site in the Residential – Single House Zone. As Mr Wakefield notes, Heath J in *Hollander* considered *Ancona Properties* distinguishable on that basis.¹⁷

[61] Mr Brabant submits that a decision by this Court cannot be dependent on the party said to have been in error (namely the Council) acknowledging or accepting the error. There is force to that submission, particularly as a general proposition.

¹⁶ *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594.

¹⁷ *Hollander v Auckland Council* [2017] NZHC 2487 at [80].

For that reason, I consider below the relevance of those decisions to the determination in this case. Even so, it needs to be recognised that in the cases he cites the Court was assisting the parties in remedying acknowledged errors in circumstances where a less accommodating application of established principle might have resulted in outcomes that would have left all parties with no means of remedying the acknowledged errors. Considerable care needs to be taken in applying the rationales of those decisions to cases where there is no acknowledged error.

[62] Turning now to the specifics of the Samson appeal, Mr Brabant points to the decisions on another Samson appeal in the *Bunnings* case and on an appeal by Waste Management NZ Ltd in *Ancona Properties* as particularly relevant to the present case. Both involved zoning recommendations by the Panel which the Council adopted but later acknowledged were in error and which the Court accepted were errors of law that could be set aside on appeal.

[63] In *Bunnings*, Samson had appealed another decision by the Council to apply the Residential – Single House Zone and the Special Character Overlay to another Samson site at 1-3 Grosvenor Street, Grey Lynn that was situated one property back from Great North Road. In submissions and further submissions, Samson opposed both the proposed zoning and the application of the Overlay, and sought the inclusion of the site in the Business – Mixed Use Zone, the zoning proposed for the adjacent properties on Great North Road. Samson gave evidence and made submissions in support at a Panel hearing. This included evidence that the site had always been of a commercial nature, that the Council had previously granted resource consent for Samson to demolish the existing building and to construct new commercial premises, and those consents were in the process of being implemented.

[64] At the hearing, the Council had supported retention of the Single House Zone on the basis the Special Character Overlay was a constraint that best accorded with the Single House Zone. However, its evidence did not address the specific features of the property, the resource consent or the existing commercial use.

[65] Whata J was reluctant to accept Samson's submission that the Panel had failed to have regard to relevant considerations, noting that such an assertion "belies the context". He was prepared to allow the appeal, however, on the "more limited" basis that there appeared to be agreement among the parties to the appeal that the Council's decision was not reconcilable with:

- (a) The evidence addressing the specific features of the site;
- (b) The evidence addressing the existing use of the site;
- (c) The evidence detailing the resource consent granted by the Council for the demolition the existing building;
- (d) The guidance provided by the Panel on its approach to zoning in the Council's Best Practice Approach to Rezoning.

[66] Applying that logic to the current case, it is apparent that one important consideration present in the Grosvenor Street appeal but not present here is the existence of a resource consent authorising the demolition of the existing building. Clearly, such a consent would run quite contrary to maintaining the Special Character Overlay because such special character as the site might have had would not continue.

[67] In addition, there was no discussion in the Grosvenor Street decision about the extent to which it might have been open to the Panel to have reached its decision to apply the Single House Zone to the site based on the more general evidence before the Panel about the purpose of the Single House Zone and its relationship to the Special Character Overlay. Presumably, the Council accepted that this general evidence was not apposite in that appeal. In any event, in this appeal the Council has put the relevance and weight of the more general evidence in issue. That in itself is an important difference between the Grosvenor appeal and this one.

[68] For these reasons, I am not persuaded that the decision to allow Samson's appeal with respect to the Grosvenor Street site necessarily leads to the conclusion that the current appeal should succeed.

[69] I take the same view with respect to the Waste Management appeal in the *Ancona Properties* although for different reasons. In that appeal, the Council agreed to a Panel recommendation to zone as Business – General Business a site being used as a waste transfer site, even though the site had been zoned Light Industry in the proposed Plan as notified, and Waste Management had made submissions seeking the site to be zoned Heavy Industry. It appeared from the Panel's report that the Panel considered the site similar to other sites proposed for Light Industry zoning which were in fact not being used for light industry purposes and for which the Panel had also recommended a Business zoning. What I was satisfied that the Panel had proceeded on an error of fact in erroneously assuming the use of the Waste Management site was not industrial activity. In that respect, the Panel had gone wrong in its application of the statutory criteria to the site – which, he was satisfied, was an error of law.

[70] In this appeal, it is not apparent from the evidence or the Panel's reports that the Panel proceeded from any equivalent error of fact. While Mr Brabant invited me to infer such an error, inferring an error from the Panel's decision is different from identifying an error on the face of the record. Moreover, as I discuss below, I am not persuaded that the Panel in the present case made such an error to the extent it could be said to have "gone wrong" in its application of the statutory criteria to the site.

[71] The facts of the *Auckland Presbyterian Hospital Trustees* and *Arena Living* cases are even less proximate to the present case and those decisions do not assist materially in resolving the present case which necessarily turns on its own facts.

[72] The nub of this appeal is whether there was any evidence before the Panel from which it was open to the Panel to conclude that a Residential – Single House zoning was appropriate for 57 Patteson Avenue. Mr Brabant says there was not, essentially for two reasons: first, because the only evidence before the Panel about the use of the site was that put forward by Samson and that evidence demonstrated

that a Single House zoning was not appropriate to the multi-dwelling site, and, secondly, because the Panel had decided to put aside issues about overlays when making zoning decisions – which meant the evidence about the relationship between the Single House Zone and the Special Character Overlay was not relevant to the zoning decision.

[73] I accept that the only specific evidence before the Panel regarding the Samson site was that put forward by Samson and that was to the effect that a Single House zoning was inappropriate for a site that, since the 1940s, had contained a single building with three dwellings. On the basis of that evidence and the Samson submissions, it would have been open to the Panel and thus to the Council to have concluded that a Single House zoning was not appropriate. Had the Panel/Council reached that conclusion, presumably they would have zoned the site Residential – Mixed Housing Urban, the same zoning applied to the properties adjacent to the Samson site to the north. Whether the Panel/Council would still have included the Samson site in the Special Character Overlay is much harder to say. I was not shown any example of the Special Character Overlay applying to a site zoned Residential – Mixed Housing Urban and, with respect to the Samson site, there was no evidence before the Panel as to the compatibility of the Mixed House Urban zoning with the Special Character Overlay.

[74] This brings me to Mr Brabant's second central argument: that the Panel had decided to set aside overlays when making decisions on the underlying zoning of a site and application of the Single House Zone to the Samson site is not consistent with that decision. In my view, this reads too much into the Panel's report and tries to turn what was a description of general approach into a rule to which the Panel must be held. I do not accept that interpretation.

[75] As the underlined words in the extract of the Urban Boundary and Rezoning Report in [38] show, the Panel was careful to qualify its statements on its approach to zoning: overlay constraints were “generally” not taken not into consideration in establishing zoning; the ‘appropriate’ land use zoning was “generally” adopted regardless of overlays; “in many instances” this had resulted in consequential rezoning changes; “typically” the setting aside of an overlay had resulted in

upzoning of a residential site by an order of typology. The Panel also said this residential upzoning “had most commonly arisen from uplifting of the flooding overlay”.

[76] These are statements of general application but admit the possibility of exceptions. They do not justify the conclusion implicit in Mr Brabant’s submission that the Panel had decided that overlay constraints were to be put aside when all zoning decisions were taken. In particular, there is nothing in the Panel’s reports to suggest that the Special Character Overlay constraint was put aside when decisions were made about applying the Residential – Single House Zone. To the contrary, the evidence before the Panel was that there should be a close link between the Overlay and the Single House zoning, and the Panel’s reports and recommendations indicate the Panel accepted that evidence.

[77] To illustrate:

- (a) In his evidence, Mr Duguid refers to the linkage between the Special/Historic Character Overlay and the Single House zone (paragraphs 1.5(b); 18.14(c)) and in paragraph 19.19 states that the Council’s “principle for zoning under the Special/Historic Character Overlay is to apply the [Single House Zone]”.
- (b) In her evidence, Ms Mein states that the Single House Zone “is generally the most compatible with the Historic Character Residential overlay areas where the underlying land use pattern consists of single residential buildings on individual titles”. She also said that “in very limited circumstances”, the Residential – Mixed Housing Suburban Zone might be appropriate where certain conditions apply, including “where the underlying land use pattern already represents two or more residential dwelling units on a title” and where the site is contiguous with other land zoned [Mixed House Suburban]”. (Paragraph 6.13).
- (c) The evidence of Ms Lucas and Ms Papaconstantinou proceeded on the basis of the policy articulated by Mr Duguid and Ms Mein – that the

Single House Zone was the appropriate zone for sites in the Special Character Overlay. Their recommendation that the Samson submission not be accepted was based on the existence of the constraint in the Special Character Overlay.

[78] I acknowledge that the Samson site was not “a single residential building” in the sense articulated by Ms Mein. Given that only a single dwelling is a permitted activity in the Single House Zone, when Ms Mein used the phrase “a single residential building” she must be taken as having meant “a single dwelling residential building”. Even so, the fact that the Samson site has three dwellings in a residential building does not mean that the “underlying land use pattern” of that area was not single dwelling residential buildings, even if the Samson site was an outlier. Furthermore, while the Samson site might have more dwellings than envisaged for the Single House zone, it was of a style and provenance (a Moderne building from the 1940s) that the Special Character Overlay sought to protect.

[79] Furthermore, the sites contiguous to the Samson site were not zoned Residential – Mixed Housing Suburban, the only exception to the Single House zone that Ms Mein considered might be acceptable in sites covered by the Special Character Overlay. The contiguous sites to the north were zoned Residential – Mixed Housing Urban. As I have already noted, there was no evidence before the Panel, including none from Samson’s witnesses, as to the compatibility of applying the Special Character Overlay to the Samson site if it were zoned Residential – Mixed Housing Urban.

[80] Accordingly, I am satisfied there was evidence before the Panel from which it could conclude that the Special Character Overlay should apply to the Samson site and therefore that the site should be included in the Residential – Single House Zone.

[81] Moreover, the Panel’s reports and recommendations indicate the Panel accepted and acted on that evidence:

- (a) While the Panel’s reports showed a strong policy orientation to ensure greater capacity for growth in the City as evidenced by the decision to

remove density controls from most residential zones, that decision did not apply to the Single House Zone.

- (b) In paragraph 3.3.2 of the Urban Boundary and Rezoning Report, the Panel specifically noted that it had “generally avoided” rezoning the inner city special character areas. The fact the Panel referred specifically to Ponsonby and Westmere in recording that point does not exclude Mission Bay from being considered an “inner city” area, especially since the sentence goes on to refer to Mount Albert.
- (c) Most compelling, in its recommendations the Panel decided the Single House Zone should apply to all sites in the Mission Bay area to which the Special Character Overlay was to apply.

[82] Accordingly, in these circumstances I consider it was open to the Panel and thus to the Council to include the Samson site in the Residential – Single House Zone even though that site has three dwellings. As Mr Wakefield correctly observed, that zoning does not make the current use of the site a non-complying activity as suggested by Mr Brabant. Section 10 of the RMA ensures that the current residential activities may continue unhindered. I recognise this may be small comfort for Samson who may have had bigger aspirations for the site than maintaining it in its current configuration.

[83] Nonetheless, having regard to the test for an appeal on a point of law as set out in *Countdown Properties (Northland) Ltd v Dunedin City Council*,¹⁸ I cannot conclude that in including the Samson site in the Single House Zone the Panel and thus the Council came to a conclusion that was not open to them. As stated by Wylie J in *Transpower New Zealand Ltd v Auckland Council*,¹⁹ in the context of an appeal on a question of law, it does not matter than this Court might not have reached the same conclusion. It follows that the Panel’s recommendation and the Council’s decision that the site should be zoned Residential – Single House did not amount to an error of law.

¹⁸ *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153-154.

¹⁹ *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [47].

Response to specific questions

[84] My answers to the questions posed in the Amended Agreed Statement of Issues and Facts dated 3 November 2017 are as follows:

- (a) Did the Panel, and thus the Council, fail to take account of relevant considerations when determining the appropriate residential zoning – namely that the property comprises a single apartment building with three flats so is not a single dwelling?

Answer: No. I share Whata J's reluctance in *Ancona Properties* to accept that the Panel failed to have regard to evidence that was before it in the context of the major task the Panel was required to undertake. Moreover, for the reasons given above, I do not accept Samson's contention that there was no evidence before the Panel on the zoning of the site other than that put forward by Samson. I am satisfied there was other relevant evidence to which the Panel could and did have regard.

- (b) Was the Panel's recommendation in relation to the zoning of the property reached without evidence or was it one to which it could not reasonably have come?

Answer: No.

- (c) Was the Panel's finding on the zoning in conflict with the Panel's decision that the setting aside of an overlay for the purposes of establishing a zoning is the correct approach?

Answer: This question assumes wrongly that the Panel had decided to set aside overlays in all cases when it established a zoning. The Panel's Reports do not establish this. The evidence before the Panel was that there was a close relationship between the Special Character Overlay and the Single House Zone and the Panel's recommendations show it accepted that evidence.

Result

[85] The appeal is dismissed.

[86] In the normal course, the Council is entitled to costs consequent upon this judgment. Costs on a 2B basis would seem appropriate. If the parties cannot agree costs, the Council may apply by memorandum of no more than five pages filed and served not later than 9 March 2018. Samson may file and serve any memorandum in reply of no more than five pages by 30 March 2018.

van Bohemen J

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