

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

**CIV-2016-404-2311
[2017] NZHC 1392**

BETWEEN SAMSON CORPORATION LIMITED
AND STERLING NOMINEES LIMITED
Appellants

AND AUCKLAND COUNCIL
Respondent

Hearing: On the papers

Counsel: J Brabant for Appellants
M G Wakefield and C J Brown for Respondent

Judgment: 22 June 2017

JUDGMENT OF WHATA J

*This judgment was delivered by me on 22 June 2017 at 4.00 pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Keegan Alexander, Auckland
Auckland Council, Auckland

Introduction

[1] This decision considers the settlement reached in respect of one of the three challenges brought by Samson Corporation Limited and Sterling Nominees Limited (Samson) against the decision of the Auckland Council (the Council) to accept the recommendations of the Auckland Unitary Plan Independent Hearings Panel (the Panel) in respect of various provisions in the Auckland Unitary Plan..

[2] On 5 April 2017, agreement was reached and a joint memorandum recording settlement and seeking consent orders was filed by the parties:

- (a) the appellants - Samson;
- (b) the respondent – the Council; and
- (c) Housing New Zealand Corporation (HNZC) – a section 301 interested party.

[3] The frame for the resolution of appeals by consent was set out in *Ancona Properties Ltd*,¹ which I adopt.

Background

[4] Helpfully, the parties to agree on the key facts and issues.

[5] Samson owns a property forming part of the Pollen Street, Mackelvie Street and Ponsonby Road block in Ponsonby (the block).

[6] Under the legacy Auckland Council District Plan – Ithmus Section, the block was a combination of Business 2 and Mixed Use zones. It was also subject to specific provisions introduced by Plan Modification 127 (endorsed by way of consent order in the Environment Court) which allowed for increased gross floor area due to the loss of development potential arising from the scheduling of another building on Ponsonby Road.

¹ *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594.

[7] The notified proposed Auckland Unitary Plan (PAUP) applied a combination of Business – Mixed Use and Business – Town Centre zones to the block. The Business – Mixed Use zone is on the Mackelvie Street and Rose Road corner, with the Business – Town Centre zone covering the rest of the block.

[8] Samson made a submission and a further submission on the PAUP supporting the proposed zoning, subject to an amendment which would make provision for additional height. It sought additional height, as outside of the city centre the PAUP did not provide development control provisions requiring floor area ratios or a regime for the transfer of extra floor area, which would have allowed for increased gross floor area (and direct incorporation of Plan Modification 127).

[9] Specifically, it sought a maximum allowable height in the centre of the block of 24.5m, with the Ponsonby Special Character height limit of 12.5m being retained around the periphery of the block on the street frontages. This proposal would allow for the realisation of increased gross floor area provided for by Plan Modification 127.

[10] No further submissions in opposition to the relief sought by Samson were lodged.

[11] The zoning of the block, and Samson's submissions, were addressed as part of Hearing Topics 051-054 – Centre Zones, Business Park and Industry Zones, Business activities and Business controls. Samson and the Council appeared before the Panel and presented opposing legal submissions and evidence. However while the Council opposed the additional height for the block because it sought consistency with the broader area, it did not refer to the specific provisions contained in the earlier plan and provided by Plan Modification 127.

[12] In its closing remarks at the hearings, the Council agreed that an increased gross floor area was not an available method of satisfying the relief Samson sought to give effect to Plan Modification 127. It then indicated that it was considering the question of whether the additional height sought by Samson was an appropriate equivalent. Its closing position was that discussions were ongoing with Samson and

internally within its Heritage Unit, such that it would advise its final position on relief through a separate memorandum or in the course of Hearing Topic 078 (Additional Height Control).

[13] Subsequently, a joint memorandum of counsel dated 15 April 2016 (the Joint Memorandum) was lodged with the Panel. It set out an agreed position reached between Samson and the Council that applied an Additional Zone Height Control for the central portion of the block that was zoned Business – Town Centre. That allowed for building heights of up to 18m, consistent with the maximum height for the Mixed Use portion of the block. Moreover, the 13m height limit would continue to apply allow road frontages subject to the Special Character Overlay.

Panel recommendations and Council decision

[14] The Panel then made its recommendations on the PAUP to Council, comprising reports for each Hearing Topic and a recommended GIS Viewer, presenting recommended planning maps. The additional height controls applying to the block are contained in the recommended GIS Viewer. The recommendations:

- (a) applied a Business – Mixed Use and Business – Town Centre zoning to the block, as was shown in the notified PAUP; but
- (b) did not contain the Additional Height Control sought by Samson in its submission and the Council in the Joint Memorandum.

[15] Also of note, the recommendations:²

- (a) Contain no written reasons for accepting or rejecting the relief sought by Samson.
- (b) Record at section 1.2 of the Topic 051-054 report a range of recommendations that are stated as being “...further to amendments agreed between the Council and submitters...” Counsel say it is

² Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topics 050-054 City Centre and business zones* (22 July 2016).

unclear from this wording whether the Panel intended to include the amendments agreed between Council and various submitters in the Unitary Plan.

- (c) Group recommendations for certain areas under specific subject headings (for example “Westhaven”), but none of the Panel’s specific groupings address or encompass the requested Additional Zone Height Control for the central portion of the block.
- (d) Refer in section 10 to “reference documents” including “051 – 054 Hrg – Auckland Council – CLOSING Remarks – Supplementary joint memo between AK Cncl and Samson Corporation (29 September 2015)” (which is the incorrect date).

[16] The Council went on to accept all of the recommendations in relation to the block.

Alleged errors of law

[17] Samson alleges that the Council erred in its decision to accept the Panel recommendations, with respect to the omission of the additional height overlay in the following respects (taken from its notice of appeal):

- (a) the Panel failed to provide reasons for omitting the Additional Zone Height Control increase for the central portion of the block, despite having a consent memorandum from Samson and the Council, and thus acted contrary to its obligation pursuant to s 144(6) of the Local Government (Auckland Transitional Provisions) Act 2010 (the Act) to provide written reasons for accepting or rejecting submissions;
- (b) the Council and Panel failed to undertake an assessment of the costs and benefits of the Additional Zone Height Control increase for the central portion of the Block, in terms of s 145(1)(d) of the Act and ss 32AA and 32 of the Resource Management Act 1991; and

- (c) the Council and Panel failed to take into account relevant considerations including:
 - (i) the evidence and legal submissions presented during Topic 051-054 hearings; and
 - (ii) the joint memorandum.

[18] The Council accepts that the recommendations excluded the Additional Zone Height Control in a manner that was inconsistent with the Joint Memorandum and the evidence consequent upon its change of position. As such, the Joint Memorandum was the only position presented to the Panel in relation to the provisions that should apply to the central portion of the block. The Council also acknowledges that neither the recommendations nor the subsequent decisions refer to the position put forward in the Joint Memorandum, or confirm whether it was taken into account as a relevant consideration.

[19] In light of this, it recognises the third alleged error: failure to take into account relevant considerations, which materially affects the Unitary Plan as it relates to the central portion of the block.

[20] HNZN is the only s 301 interested party, and has agreed as to the presence of an error and to the relief sought. No other parties filed a notice of intention to appear, with the period for joining expired on or about 30 September 2016. Moreover, the parties confirm that there were no other parties involved in Topic 051-054 who raised opposition to the agreed outcome set out in the Joint Memorandum.

Orders sought

[21] The parties have agreed to amendments to the GIS Viewer to identify Additional Zone Height Control for the central portion of the block, consistent with Samson's submissions and the Joint Memorandum. They agree that the amendments are an appropriate rectification of the error identified. The proposed amendments are attached as Appendix A.

[22] Counsel for the parties request that the Court approve the proposed amendments under its power to substitute its decision for that of the Council, rather than remit the matter back to the Panel. They submit that such an order is appropriate in the circumstances because:

- (a) Any adverse effects associated with the inclusion of the Additional Zone Height Control on adjacent sites located within the Special Character Overlay will be minor. Council's Heritage Unit continues to support the additional height allowance, and moreover the 18 metre height limit for the central portion of the block (which is zoned Business – Town Centre) would be consistent with the 18 metre height limit for the Business – Mixed Use part of the block (on the Mackelvie Street and Rose Road corner).
- (b) As the Council and Samson filed a Joint Memorandum on 15 April 2016 which set out agreement, and this agreed position was not opposed by any other party to Topics 051-054, the Court is not being asked to determine a live dispute on its merits, but to endorse amendments that better reflect the relief sought by both Samson and the Council.
- (c) The relief sought is of a narrow scope only.
- (d) The reasons listed in *Ancona Properties* apply to this appeal.

Assessment

[23] Given there is no dispute between the parties, and the Panel demonstrably failed to have regard to the agreement reached between Samson and the Council or provide reasons rejecting it, I am satisfied that there is a material error of law.

[24] The only issue is whether the relief sought should be granted. Relevantly:

- (a) there were no further submissions in opposition to Samson's submission;

- (b) there was no opposition at Panel hearing to the relief sought by Samson;
- (c) the relief agreed to is of a relatively discrete nature; and
- (d) the only interested party to the appeal, HNZC, agrees to the relief.

[25] Against this background, referral back for appeal purposes is unnecessary and futile. Final orders can be made as sought by consent.

[26] I emphasise that I arrive at this conclusion because there is agreement on background facts, the nature of the error and its materiality.

Costs

[27] There are no issues as to costs.

APPENDIX A

Amendments to GIS Viewer of Unitary Plan

