

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

CIV-2016-

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

AND

IN THE MATTER An appeal under section 158 of the Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA") and s 299 of the RMA

BETWEEN **Samson Corporation Limited and Sterling Nominees Limited** incorporated companies with their registered office at Geyser, 105/100 Parnell Rd, Auckland

Appellant

AND **Auckland Council** a local authority constituted pursuant to the provisions of the Local Government (Auckland Council) Act 2009 having its principal office at 135 Albert Street, Auckland

Respondent

**NOTICE OF APPEAL BY SAMSON CORPORATION LIMITED AND
STERLING NOMINEES LIMITED**

Dated 16 September 2016

Solicitors for the Appellant

Keegan Alexander
Level 24, 151 Queen Street, Auckland
PO Box 999, Auckland 1140
Ph: (09) 303 1829
Fax: (09) 307 2610

Solicitor: Michael Friedlander

Counsel acting

Jeremy Brabant
jeremy@brabant.co.nz
Ph: 021 494 506
Fax: (09) 309 6667

To: The Registrar of the High Court at Auckland
And To: Respondent

TAKE NOTICE THAT Samson Corporation Limited and Sterling Nominees Limited (“Samson”) will appeal to the High Court against the decision of the Auckland Council (“Council”) notified on 19 August 2016 **UPON THE GROUNDS** that the decision is erroneous in law.

DECISION APPEALED

1. Samson appeals against a decision made by Council on a provision or matter relating to the Proposed Auckland Unitary Plan (“Proposed Plan”). The provision or matter:
 - a. was the subject of submissions made by Samson on the Proposed Plan, specifically the zoning of 57 Patteson Avenue, Mission Bay (“Site”);
 - b. In relation to the above, Council accepted a recommendation of the Auckland Unitary Plan Independent Hearings Panel (“Panel”) which resulted in the Site being zoned Residential – Single House (“SH”) in the Proposed Plan with a “Special Character Overlay - Residential Isthmus B” (“SC”) (“Recommendation”);
 - c. Council accepted the Recommendation of the Panel to zone the Site “Residential - Single House” with a “Special Character Overlay - Residential Isthmus B” (“Decision”). As Council has accepted the recommendations of the Panel, all references to the findings and reasoning of the Panel in this appeal are to be read as references to the Council decision.
 - d. The Recommendation did not refer to the request for a Mixed Housing Urban zoning (“MHU”) to apply to the Site, or whether the building on the Site met the criteria for the Special Character overlay of being constructed before 1944.

ERRORS OF LAW

2. The Panel erred in the Recommendations with respect to the zoning of the Site:
 - a. By failing to provide any reasons for preferring the SH and SC overlay rather than the MHU sought for the Site, contrary to the obligation on the Panel pursuant to section 144(6) of the LGATPA to provide written reasons for accepting or rejecting submissions;
 - b. By failing to undertake an assessment of the costs and benefits of the alternative zonings for the Site, in terms of section 145(1)(d) of the LGATPA and sections 32 AA and section 32 of the RMA;
 - c. By failing to take into account relevant considerations:
 - i. the Site is occupied by a single level apartment building comprising three flats so is not a single dwelling;
 - ii. the building was constructed after 1944 so does not meet an essential criterion for application of the SC overlay.

QUESTIONS OF LAW

3. The questions of law to be decided are:
 - a. Was the Panel required to provide reasons in support of its decision on the zoning of the Site, and application of the SC overlay, and if so did the Panel provide sufficient reasons?
 - b. Was the Panel required to undertake an assessment of the costs and benefits of the SH or alternatively MHU zoning of the Site, and the application of the SC overlay, and if so did the Panel undertake an appropriate assessment?
 - c. Did the Panel err in law by failing to take into account the relevant considerations specified in paragraph 2c above?
 - d. Did the Council err in law by accepting the Panel's recommendation with respect to the zoning and overlay provisions applying to the Site without amendment?

GROUNDS OF APPEAL

4. Specific grounds include:
 - a. Samson lodged submissions (Submitter Number 6247) and further submissions (Further Submitter number 3350) on the Proposed Auckland Unitary Plan (“PAUP”).
 - b. Samson sought (inter-alia) in Topic 081, a MHU zoning for the Site.
 - c. Samson presented evidence and legal submissions before the Panel in support of the MHU zoning for the Site, which identified (inter-alia):
 - i. Existing development comprises three flats in one apartment building;
 - ii. The building was constructed after 1944;
 - iii. That the Site adjoins sites which are zoned MHU.
 - d. Reasons for the rezoning recommendation with respect to Topic 081 are theoretically provided in the Panel’s Reports to Council, in particular:
 - i. Report to Auckland Council Overview of recommendations on the proposed Auckland Unitary Plan 22 July 2016.
 - ii. Report to Auckland Council - Changes to the Rural Urban Boundary, rezoning and precincts Hearing topics 016, 017 Rural Urban Boundary, 080 Rezoning and precincts (General) and 081 Rezoning and precincts (Geographic areas) - July 2016.
 - e. The Panel recommendations in its Report:
 - i. Contain no reference to Samson’s submissions or the zoning and overlay issues it had to determine;
 - ii. Record that “The Panel’s report and recommendations do not address individual points of relief sought in submissions”, and suggests the Panel has grouped all of the submissions.
 - iii. The grouping of submissions appears limited to identification of Topics and broad geographic areas.

- iv. None of the identified groups include any reference to the submissions and evidence about the zoning of the Site.
- f. The Council determined to accept the zoning and overlay recommendation of the Panel with respect to the Site, and made a decision accordingly.

5. *Failure to provide reasons*

- a. Pursuant to section 144(8)(c) of the LGATPA, the Panel report and recommendation is required to include the reasons for accepting or rejecting submissions. These submissions may be addressed by grouping them according to:
 - i. the provisions of the Proposed Plan to which they relate; or
 - ii. the matters to which they relate.
- b. The recommendation report makes no reference to the submissions or the evidence about the Site.
- c. The Council decision adopted the Panels reasons, and contains no reference to the Site. As a result, the Council decision is subject to the same error of law as the Panel recommendation.
- d. The zoning of the Site is a matter that was the subject of submissions, and in respect of which the Panel was required to provide reasons.

6. *Failure to undertake an assessment of costs and benefits*

- a. Pursuant to section 145 (1) (d) of the LGATPA, the Panel was required to include in its recommendations a further evaluation of the Proposed Plan in accordance with section 32 AA of the RMA, which must be undertaken in accordance with section 32 (1) – (4) of the RMA.
- b. The Panel failed to include in the recommendation report any evaluation of the zoning options for the Site or address the question of the SC overlay and in particular failed to:
 - i. Address whether a SH zoning and SC overlay for the Site was the most appropriate way to achieve the

relevant objectives of the Proposed Plan by (Section 32(1)(b));

1. identifying other reasonably practicable options for achieving the objectives;
 2. assessing the efficiency and effectiveness of the provisions in achieving the objectives;
 3. summarising the reasons for deciding on the provisions.
- ii. Identify and assess the benefits and costs of the effects that are anticipated from the implementation of MHU zoning for the Site;
 - iii. Quantify the benefits and costs.
- c. The Council decision adopted the Panel report, including therefore the decision (if there was one) to impose a SH zone and a SC overlay. The Council decision contains no evaluation in accordance with sections 32 AA and 32 (1) – (4) of the RMA with respect to the decision.

7. Failure to take account of relevant considerations

- a. The Report had no regard to the following relevant considerations:
 - i. The site is currently occupied by a late 1940s single level apartment building comprising three flats, not a single dwelling;
 - ii. The building was constructed after 1944 so does not meet an essential criterion for application of the SC overlay;
 - iii. The Site adjoins other properties zoned MHU.

RELIEF SOUGHT

8. The Appellant seeks the following relief:
 - a. That this appeal be allowed;
 - b. That this Court makes an order directing the Auckland Council to amend the Auckland Unitary Plan Maps to delete the SH zone and SC overlay and zone the Site MHU;

- c. In the alternative, that this Court makes an order directing the Panel to re-visit its recommendation on the zoning for the Site, and the overlay;
- d. Consequential relief; and
- e. Costs

Dated 16 September 2016

Jeremy Brabant
Counsel for the Appellant

This Notice of Appeal is filed by Michael Friedlander, solicitor for the Appellant, of Keegan Alexander.

The address for service on the Appellant is Level 24, 151 Queen Street, Auckland.

Documents for service on the Appellant may be left at that address for service or may be:

- a. Posted to the solicitor at PO Box 999, Auckland 1140.

And in either case copies to counsel sent by email to jeremy@brabant.co.nz