

**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

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

**Dated 16 September 2016**

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**Solicitors for the Appellant**

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**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 an Additional Zone Height Control increase to apply to the centre part of the block of Pollen Street, Mackelvie Street and Ponsonby Road, Ponsonby (“Block”);
  - b. In relation to the above, Council accepted a recommendation of the Auckland Unitary Plan Independent Hearings Panel (“Panel”) which resulted in a matter being excluded from the Proposed Plan;
  - c. Council accepted the recommendation of the Panel to zone the Block partly Town Centre and partly Mixed Use (“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 Decision did not include an Additional Zone Height Control over the centre part of the Block. Such an additional height overlay was agreed between Samson and Council and was the subject of Joint Memorandum of Counsel for the Council and Samson dated 15 April 2016 (“Joint Memorandum”) lodged with the Panel (**Appendix 1**).

## **ERRORS OF LAW**

2. The Council erred in its Decision (the Decision having adopted the Panel recommendation) with respect to the omission of the additional height overlay in the following respects:
  - a. the Panel failed to provide any 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 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 Additional Zone Height Control increase for the central portion of the Block, 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, including:
    - i. the evidence and legal submissions presented to the Panel hearing on Topic 050 – 054 on behalf of Samson in support of the Additional Zone Height Control.
    - ii. The Joint Memorandum.

## **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 to omit the Additional Zone Height Control increase for the central portion of the Block, 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 Additional Zone Height Control increase for the central portion of the Block, and if so did the Panel undertake an appropriate assessment of such costs and benefits?
  - c. Did the Panel err in law by failing to take into account relevant considerations including as specified in paragraph 3c above?

- d. Did the Council err in law by accepting the Panel's recommendation with respect to the zoning provisions applying to the Block without amendment, thereby incorporating and repeating the errors of law identified in paragraphs 3 a, b and c above?

## **GROUND OF APPEAL**

4. The specific grounds are:
  - 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 050 – 054, provision for an Additional Zone Height Control increase for the central portion of the Block to accommodate an additional level (up to 16 m total height) while retaining the Council's proposed 13 m height at the Ponsonby Road frontage (to a depth of 15 m).
  - c. Samson presented evidence and legal submissions before the Panel in support of the Additional Zone Height Control increase for the central portion of the Block.
  - d. A Joint Memorandum was lodged with the Panel which (inter-alia):
    - i. requested an agreed increase to the Additional Zone Height Control for the central portion of the part of the block zoned Town Centre to 18 m;
    - ii. confirmed the increase to the Additional Zone Height Control was supported by the Council's Heritage Unit;
    - iii. Specifically recorded that the agreed position as between Council and Samson detailed in the Memorandum was reached following delivery of Council's closing remarks on both Topic 051 – 054 and Topic 078 Additional Height Control.
  - e. Reasons for the rezoning recommendation with respect to the Block are provided in the Panel's Report to Council: IHP Report to AC "City Centre and business zones".
  - f. The Panel recommendations in its Report:

- i. Contain no written reasons for accepting or rejecting the relief sought (being Additional Zone Height Control increase for the central portion of the Block);
  - ii. Record in section 1.2 on page 6 a range of recommendations the Panel put forward which are stated as being "... further to amendments agreed between the Council and submitters...". It is unclear whether this is intended to record that the Panel recommended amendments which were agreed between the Council and submitters – including that recorded in the Joint Memorandum.
  - iii. Groups recommendations under identified subject headings (for example "Westhaven", "Ports of Auckland"). None of the identified groups address or encompass the Additional Zone Height Control increase for the central portion of the Block.
  - iv. 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)". The date in the reference is incorrect, because the hyperlink is to the Joint Memorandum. However as identified above there is no reasoning or explanation of any Panel consideration and/or conclusions with respect to the Joint Memorandum.
- g. Samson wrote to Council on 8 August 2016:
  - i. identifying that the Panel recommendation failed to make an explicit decision with respect to the agreed Additional Zone Height Control increase for the central portion of the Block; and
  - ii. requested Council make a decision to impose the agreed additional height allowance on the Unitary Plan zoning map as agreed in the joint memorandum.
- h. The Council determined to accept the zoning recommendation of the Panel with respect to the Block, and made a decision accordingly. No provision was made for the Additional Zone Height Control increase for the central portion of the Block.

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. As identified above, no reasons were provided in the recommendation report for the decision to omit the Additional Zone Height Control increase for the central portion of the Block.
- c. The Council decision adopted the Panels reasons, and contains no additional reasons with respect to the Council's acceptance of the recommendation to omit the Additional Zone Height Control increase for the central portion of the Block. As a result, the Council decision is subject to the same error of law as the Panel recommendation.
- d. The Additional Zone Height Control increase for the central portion of the Block is a provision and matter that was the subject of submissions, and respect which the Panel was required pursuant to section 144 to provide reasons.

6. *Failure to undertake assessments 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 Additional Zone Height Control increase for the central portion of the Block.
- c. The Council decision adopted the reasons set out in the Panel report in respect of provision/matters on which the Council accepted the Panel's recommendations, including the decision to omit the Additional Zone Height Control increase for the Block. The Council decision contains no evaluation in

accordance with sections 32 AA and 32 (1) – (4) of the RMA with respect to the decision to omit the Additional Height Control Increase.

*7. Failure to take account of relevant considerations*

- a. As detailed above, the decision takes no account of, or even refers to, the following relevant considerations:
  - i. The evidence and submissions presented by Sansom to the Panel on Topic 050-054;
  - ii. The Joint Memorandum.

**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 show an Additional Zone Height Control increase for the central portion of the Block as sought in the Joint Memorandum of Counsel dated 15 April 2016 (Appendix 1);
  - c. In the alternative, that this Court makes an order directing the Panel to re-visit its recommendation on an Additional Zone Height Control increase for the central portion of the Block;
  - d. Consequential relief; and
  - e. Costs

## ATTACHMENTS

9. A copy of the Joint Memorandum of Counsel for the Council and Samson dated 15 April 2016 (**Appendix 1**).

Dated 16 September 2016

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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](mailto:jeremy@brabant.co.nz)



## **Appendix 1**

Joint Memorandum of Counsel for the Council and Samson dated 15  
April 2016