Level 2
116 on Cameron
Cnr Cameron Road & Wharf Street
Tauranga
New Zealand

PO Box 13373
Tauranga 3141
New Zealand

Tel: 64 7 571 5511
Fax: 64 7 571 3333
www.boffamiskell.co.nz

8 July 2015

Tracey Lamason
Planners Plus Ltd
PO Box 218
Whitianga 3542

Boffa Miskell

Dear Tracey

RE: Lusby / Silverstream Falls LVIA- Further Clarification of Opinion

On the 17th of December 2014 Boffa Miskell Ltd provided an opinion letter which reviewed the proposed application for a function centre and accommodation chalets. Further clarification has been sought by KTB Planning on behalf of Thames Coromandel District Council on the following matters. Our response to these queries is provided as follows:

1. *On pages 2 and 3 of the Landscape response it is stated that assessing "what may occur or what effect the application may have on future potential applications … is not possible" and that according to case law cumulative assessment is not appropriate. Could you please provide us with the case law that states this for our information?*

Clarification:

We attach a series of case law that discusses the application of a non complying activity in regard to cumulative effects. When assessing the landscape and visual effects, the subtlety of design, building placement and land use all contribute toward the landscape and visual effect. We find it to be difficult to determine what the cumulative effect may be given the many unknown parameters of what other sites *may* do as non-complying activities.

2. *KTB Planning requested artist's impressions and photomontages of the facility from appropriate viewing locations. On page 4 of the report mentioned above it states that these have not been prepared because the viewing points are a considerable distance from the site. As the information has not been provided under Section 95(2) public notification is required. However, if the author of the report can provide a more detailed explanation on why this information has not been provided we may be able to assess that this information is not necessary and withdraw this aspect of the Section 92 request.*

Clarification:

During site investigations the existing vegetation cover was observed and viewing catchment identified. The external views[1] are some 600m to 800m from the chalets from State Highway 25 and 1.0km from the Paul Road viewpoint, at its closest distance.

The bush cover is in a regenerating state and is some 3m – 5m in height. With the chalets sited at 4m in height and the Function Room at 5m max height we are confident that landscape plans provided demonstrate enough information to convey the screening of each of the buildings for these views. Visual simulations of these viewpoints will result in buildings that are near to being completely screened by existing vegetation and within 5 years screened further.

Given the distance of the external viewing audience, the buildings would be largely screened and small in scale making them difficult to discern in a simulation. We did not consider the visual simulations would assist us any further in the evaluation of magnitude of effect for the assessment of visual effects. We remain of the view that the proposed mitigation plans demonstrate the mitigation measures to largely screen the buildings from external views, whilst retaining an outlook for each building.

Yours faithfully
BOFFA MISKELL LTD

Rebecca Ryder
Senior Principal / Landscape Architect

Attachment: Relevant Case Law Extract for Cumulative Effects

[1] Refer to Viewpoints 10 and 11 (Viewpoint Map – Boffa Miskell Ltd, 17/09/2014) and Pages 19 – 26 of Landscape and Visual Assessment, Soul Environments, 17/11/2011

specified areas and to dredge a channel to improve boat access. The Court found that some removal and control would be of benefit if adverse effects could be adequately managed. However, consent to remove mangroves from four sites was declined in order to protect the Mangawhai sandspit and harbour which was a nationally and internationally important bird habitat. Further, the Court concluded that dredging would have serious adverse effects and consent for it was declined. See [1]–[2], [6], [13], [43], [50], [85]–[91], and [153]–[156], *Mangawhai Harbour Restoration Soc Inc v Northland RC* [2012] NZEnvC 232 and note at RM104D.05 below.

s 104D(1)(a) - It is not permissible to substitute a numeric test for the statutory test of "minor". The High Court described s 104D(1)(a) as a "very small eye in the needle" and found that the purpose of the standard "minor" was to allow non-complying activities to gain consent where the adverse effect was so minor that it was not likely to matter. The High Court was satisfied the EC erred when it found that "minor" meant an effect which changed the quantity or quality of a resource by under 20 per cent; to the contrary, the High Court ruled that "minor" in the context of s 104D(1)(a) was at the very much lower end of the scale than 20 per cent. See [1], [12], [50], [82], [85], [92], [95], [101]–[105], [110] and [115], *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 815, and the note on the related decision in *Queenstown Central Ltd v Queenstown Lakes DC* [2013] NZHC 817 at RM104D.05.

RM104D.03 Permitted baseline

Note: See also annotations at RM104.03(11).

s 104D - For a discussion of the application of the permitted baseline test in considering whether to grant consent to a non-complying activity, see [23]–[24], *Smith Chilcott Ltd v Auckland CC* [2001] 3 NZLR 473, (2001) 7 ELRNZ 126, [2001] NZRMA 503 (CA). Refer also to annotations relating to the permitted baseline concept in ss 95D and 104.

s 104D - On a non-complying activity application for creation of rural-residential allotments, the Court held that the fact that the applicants had obtained resource consents for previous subdivisions of their rural land was not relevant to the application of the permitted baseline test nor to its decision on the application. See [94], *Munro v Manukau CC* A074/01. See also *Henderson v Papakura DC* A019/03.

s 104D - For further discussion relating to permitted baseline comparisons in the case of non-complying activity consent for a subdivision, see [86]–[88], *Marshall v Whangarei DC* A150/02.

RM104D.04 Precedent

s 104D - The Tribunal has reiterated that the grant of a non-complying activity consent cannot be regarded as a precedent for other cases. See *Kemp v Queenstown Lakes DC* C095/94. See also *Baker v Franklin DC* A070/98 at 5, where the Court noted that the potential for others to seek subdivision consent on the same basis as an appellant is a precedent effect rather than a cumulative effect and is not a matter to be considered when assessing effects of a proposal. For further discussion of this issue, see [40], *Dye v Auckland RC* [2002] 1 NZLR 337, (2001) 7 ELRNZ 209, [2001] 11 NZRMA 513 (CA), where the Court of Appeal ruled that assessment of a non-complying activity is directed to the effect of the activity itself and is concerned with the effects of that activity as it impacts on the environment. It cannot reasonably be regarded as involving any precedent effect deriving from the granting of a resource consent as that would involve an unnatural and unintended extension of the concept of environment. For a different perspective, see [53], *Pigeon Bay Aquaculture Ltd v Canterbury RC* [1999] NZRMA 209. The Court considered that the idea that a non-complying activity can never be a precedent might be an overstatement. It held that granting a resource consent even for a non-complying activity may create a substantive precedent and may lead to difficulties in refusing another on the grounds that equals should be treated equally.

s 104D - The precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering a non-complying activity application. Cumulative effects properly understood should be taken into account, but the consent authority is not obliged to conduct an area-wide investigation involving what others may seek to do in the future in unspecified

places and in unspecified ways in reliance on the application before it. See [49], *Dye v Auckland RC* [2002] 1 NZLR 337, (2001) 7 ELRNZ 209, [2001] 11 NZRMA 513 (CA). Refer also *King-Turner v Marlborough DC* W081/01.

s 104D - The Court noted that, following *Dye v Auckland RC* there was strictly no true "precedent" in that each application must be considered on its own merits, and that in the end the concept comes down to treating like cases alike, and whether the integrity of the plan will be harmed. See [24], *Monowai Properties Ltd v Rodney DC* A215/03.

s 104D - The Court considered issues of precedent, integrity of the plan, and "adverse effect on community expectations". It reiterated that precedent is not relevant and rejected a submission that there would be adverse cumulative effects, a submission bound up with "effects on community expectations" and perception that a grant of consent would have the potential effect of causing people to have an altered expectation for the Countryside Living (Rural) environment. Such effects are not cumulative effects contemplated for assessment. By not recognising the difference between a precedent effect and a cumulative effect, the council was placing a hurdle in the way of non-complying activity applications that the Act does not prescribe. The Court declined to consider a non-complying activity proposal as something closer to a prohibited activity. See [56]–[60], *Gould v Rodney DC* A163/03.

s 104D - The Court noted that the RMA did not make reference to the integrity of planning instruments, coherence, public confidence in the administration of the district plan or precedent. The Court acknowledged that these were all concepts that had been supplied by Court decisions. The Court concluded that their absence from the RMA strongly suggested that their application in any given case was not mandatory. However the Court concluded that concerns about precedent, coherence and like cases being treated alike were all legitimate matters to be able to be taken into account. However, if a case was truly exceptional, and could properly be said to be not contrary to the objectives and policies of the district plan, such concerns might be mitigated or might not exist. See [76], [99] and [102], *Rodney DC v Gould* (2004) 11 ELRNZ 165, [2006] NZRMA 217 (HC).

s 104D - The Court concluded that the approach to ss 104 and what is now s 104D as set out in *Dye v Auckland RC* [2002] 1 NZLR 337, (2001) 7 ELRNZ 209, [2001] 11 NZRMA 513 (CA), was intended to be of general application and stated that *Dye* clearly held that a cumulative effect must be one which arises as an effect of the application for which consent is sought, and which is being considered in the particular case before the consent authority. It was not legitimate to consider, as cumulative effects on the environment of one application, effects of possible future applications which may be made. The Court concluded that an effect which may never happen, and which, if it does, will be the result of some activity other than the activity for which consent is sought, cannot be regarded as a cumulative effect. The Court acknowledged that *Dye* held that cumulative effects were things that will occur, not things that may occur. However, the Court stated that *Dye* did not turn on the standard of proof required to establish that an effect will happen. The Court concluded that the appropriate standard of proof would be on the balance of probabilities. The Court concluded that *Wellington RC (Bulk Water) v Wellington RC* W003/98 was in accordance with *Dye* insofar as it related to the assessments of effects on the environment under s 104(1)(a) and s 105(2A)(a) (now s 104D(1)(a)). The Court rejected Baragwanath J's comments about *Wellington RC (Bulk Water)* in *Murphy v Rodney DC* [2004] NZRMA 393. However, the Court stated that the position was different with regard to what are now s 104(1)(b)(vi) and s 104D(1)(b) where precedent impacts could legitimately be considered as stated in *Dye* and *Murphy v Rodney DC*. See [114], [117], [120]–[123], *Rodney DC v Gould* (2004) 11 ELRNZ 165, [2006] NZRMA 217 (HC).

s 104D - The Court adopted the interpretation of cumulative effects in *Dye v Auckland RC* [2002] 1 NZLR 337, (2001) 7 ELRNZ 209, [2001] 11 NZRMA 513 (CA). The Court noted that the effects of possible future applications, which may or may not be made, constitute precedent effects which were different from cumulative effects on the environment which must be ones that arise as an effect of the application. See [63], *Aquita Holdings Ltd v Rodney DC* A094/05.

s 104D - An application for a non-complying residential building which constitutes a true exception may be granted consent, even where the district plan is set strongly against housing within a rural zone. The Court found that the property, which was of irregular shape and bounded by a State Highway and a railway line, and was part of an enclave of

similarly-sized properties, would not establish a precedent. As the effects were no more than minor, and having established that the proposal was a true exception, the Court granted consent. See [1], [7] and [8]–[11], *Hutchings v Western Bay of Plenty DC* [2012] NZEnvC 100.

RM104D.05 Contrary to objectives and policies

s 104D(1)(b) - The term "contrary" contemplates being opposed to in nature, different, opposite to (contrasting with the term "contravene" used in respect of rules). Where a relevant general objective or policy conflicts with a more specific objective or policy the latter should apply. See *NZ Rail Ltd v Marlborough DC* (1993) 2 NZRMA 449. On appeal, the High Court held that the Tribunal correctly accepted that "contrary" should not be restrictively defined and that it contemplated being opposed to in nature, different to, or opposite and also repugnant and antagonistic. "Contrary" therefore means something more than just non-complying. A proposal which is a non-complying activity cannot for that reason alone be said to be contrary. *NZ Rail Ltd v Marlborough DC* [1993] 2 NZLR 641, [1994] NZRMA 70. See also *Shell Oil NZ Ltd v Wellington CC* (1992) 2 NZRMA 80.

s 104D - "Contrary to" implies being opposed to the objectives and policies (but not the rules) of a relevant plan. If not, the proposal passes to be considered under the tests of s 104 that include objectives, policies and rules. Such consideration is subject to Part 2. See *Price v Auckland CC* (1996) 2 ELRNZ 443. See also *Ultra Golf Enterprises Ltd v North Shore CC* W052/97.

s 104D(1)(b) - In considering one of the tests for a non-complying activity, the council must consider whether the non-complying activity applied for is opposed in its nature to the objectives and policies of the plan. This process involves an overall consideration of the purpose and scheme of the plan rather than a checking of whether the non-complying activity fits exactly within the detailed provisions of the plan See *Elderslie Park Ltd v Timaru DC* [1995] NZRMA 433. See also *Monad Leisuretime Ltd v Queenstown Lakes DC* W116/95; *Arrigato Investments Ltd v Auckland RC* [2002] 1 NZLR 323, (2001) 7 ELRNZ 193, [2001] NZRMA 481 (CA); and *Dye v Auckland RC* [2002] 1 NZLR 337, (2001) 7 ELRNZ 209, [2001] 11 NZRMA 513 (CA).

s 104D - For a case where the Court refused a consent to expand a significant produce packaging/storage complex which had developed incrementally on a rural site and where further expansion would be contrary to district plan objectives and policies for the rural zone, see *Edenz Ltd v Hastings DC* W020/02.

s 104D - In finding the proposal to be "contrary" to the objectives and policies, the Court applied the definition of "contrary" as being "repugnant to" or "opposed to", not simply that the proposal does not find support from them. See [35], *Monowai Properties Ltd v Rodney DC* A215/03.

s 104D(1)(b) - Where rural subdivision was a primary concern of the District Council, an application to subdivide rural land with no unusual qualities to make it a true exception would be declined. The Court stated that, after many years of confusion where the Rodney DC lacked any operative plan to provide direction, the position in relation to the plan was now clearer than it had been for a decade, with relevant rural objectives, policies and other provisions almost entirely settled. The plan now gave clear direction that it preferred the retention of larger landholdings for primary production and the stringent restriction of opportunities for rural subdivision. The Court refused consent for a non-complying subdivision of a lot that had a consent notice registered against its title, limiting buildings to an identified area and requiring the balance to be used for rural production. Granting consent would be contrary to the objectives and policies of the plan taken as a whole and would undermine its administration. See [3], [12], [36], [40], [51], [82], [109], [111], [121]–[122] and [132], *Foster v Rodney DC* [2010] NZRMA 159 (EnvC).

s 104D(1)(b) - A proposal to dredge an existing channel in Mangawhai Harbour in order to improve boating access was declined. It was repugnant to relevant planning policies and objectives of the Northland Regional Coastal Plan. However, although complete removal of mangroves in the harbour would be contrary to objective and policies, there was limited planning support for partial removal. See [1], [148]–[150] and [153]–[156], *Mangawhai Harbour Restoration Soc Inc v Northland RC* [2012] NZEnvC 232 and note at RM104D.02 above.

2010. The agreed expert evidence was that the proposed lots and building platforms would be subject to hazard risk from coastal erosion and inundation due to climate change effects within the 100-year period required to be considered under Policy 24 of the NZCPS 2010. Having found that the Peninsula was an integral part of an outstanding natural landscape, the Court concluded that the positive effects of the proposal were more than outweighed by the adverse effects on the natural character of the coastal environment and on the outstanding natural landscape. Further, the proposal was not in accordance with several specified objectives and policies in the NZCPS 2010. Of particular significance were Policy 3, which incorporated a precautionary approach to the use of coastal resources vulnerable to climate change effects, and Policy 25, which sought to avoid risks of harm from coastal hazards. See [1]–[2], [18], [24], [26], [34], [75], [151]–[185], [232]–[233] and [235]–[238], *Carter Holt Harvey HBU Ltd v Tasman DC* [2013] NZEnvC 25, [2013] NZRMA 143.

s 104(1) - In granting consents for a mussel farm located off Stephenson Island, Northland, the Environment Court had regard to provisions in policy 13 of the NZCPS 2010 relating to natural character. The Court noted that the classification of the degree of natural character concerned was important; the policy required the avoidance of adverse effects of activities on natural character in coastal areas with outstanding natural character and outstanding natural landscapes. However, in other areas of the coastal environment the requirement was to avoid significant adverse effects and to avoid, remedy or mitigate other adverse effects on natural character, landscapes and features. In the present case, the Court found that Stephenson Island was not an outstanding natural landscape. Given this finding, there was almost no policy provision which the proposal offended, and any adverse effects were visual rather than ecological and would be appropriately mitigated. The Court found that natural resources and ecosystems near the marine farm would be enriched rather than depleted. Consent to the proposal would bring considerable social and employment benefits to the economically depressed communities of Northland and the proposal, a 50/50 joint venture with the beneficial owners of Stephenson Island, was consistent with national and regional planning policy provisions regarding the recognition of ongoing relationships of tangata whenua with their lands, rohe and resources and the provision of opportunities for the continued exercise of kaitiakitanga. See [1], [11], [26], [31], [37], [60], [65], [76]–[80], [86]–[87], [94], [99]–[106], [123]–[125], [134], [146]–[149], [158], [166]–[167], [172]–[173], [191], [204]–[205] and [210]–[211], *Whangaroa Maritime Recreational Park Steering Group v Northland RC* [2014] NZEnvC 92.

s 104(1)(b)(iv) – The Environment Court held that the site of a proposed mussel farm in Beatrix Bay, Pelorus Sound, was not within an Outstanding Natural Landscape and therefore the provisions of Policies 13 and 15 of the New Zealand Coastal Policy 2010, relating to avoidance of adverse effects in ONLs, which were considered relevant to the Supreme Court decision in *Environmental Defence Soc Inc v New Zealand King Salmon Ltd* [2014] NZSC 38, (2014) 17 ELRNZ 442, were not triggered. See [1], [7], [17]–[19], [24], [30]–[32] and [94]–[97], *Knight Somerville Partnership v Marlborough DC* [2014] NZEnvC 128. See also *KPF Investments Ltd v Marlborough DC* [2014] NZEnvC 152 at [RM104.01].

(2) *Plan integrity and precedent effect*

s 104(1)(b) - The RMA makes no reference to the integrity of planning instruments, precedent, or to the coherence of and public confidence in the District Plan. While these are useful concepts which may be applied in appropriate cases to ensure a principled approach to the consideration of District Plan objectives and policies under s 104(1)(b), the Court has stated that the need for such application is less necessary where the plan objectives, policies and rules are effects-based, and where the proposal does not generate adverse effects which are more than minor. See [122]–[125], *Protect Piha Heritage Soc Inc v Auckland RC* A015/09.

s 104(1) - The Auckland RC ("the RC") appealed the grant of land use consents for a composting facility on the grounds that they were for an urban activity outside the metropolitan urban limits, contrary to the RPS. The RC argued that the Environment Court had erred in not considering the impact on the integrity of the RPS of granting the consents. However, the Court of Appeal held that the relevant provisions of the District Plan gave

effect to the RPS and the Environment Court was not required as a matter of law to have specific and explicit regard to the integrity of the RPS. See [26]–[29] and [40]–[43], *Auckland RC v Living Earth* (2008) 14 ELRNZ 5, [2008] NZRMA 22 (CA).

s 104 - For discussion of the effect of granting consent on public confidence in the consistent administration of a plan see *Batchelor v Tauranga DC* (1992) 1A ELRNZ 100, (1992) 1 NZRMA 266 (PT); *Reith v Ashburton DC* [1994] NZRMA 241 and *Hopper Nominees v Rodney DC* (1996) 2 ELRNZ 73, [1996] NZRMA 179. See also *Monad Leisuretime Ltd v Queenstown Lakes DC* W116/95 where the Court emphasised that the question of precedent or confidence in the administration of the district plan can no longer be used as a reason for refusing consent to an activity. The Court held that confidence will only be jolted if a council ignores its policies and objectives and allows an activity with a major effect which is clearly contrary to those polices and objectives.

s 104 - Assessment of a non-complying activity may require consideration of the integrity of the plan and public confidence in its consistent administration. By comparison, because a discretionary activity is provided for in the plan, an application which meets any applicable terms, conditions or standards prescribed would not involve consideration of those factors. See *Caltex New Zealand Ltd v Auckland CC* (1997) 3 ELRNZ 297.

s 104(1) - The Court upheld refusal of consent to redevelop a residential site for five rest home units adjoining an existing rest home/hospital that had been incrementally extended to nearby residential sites over many years, on the basis that the integrity of the District Plan should be given significant weight. Although the application was consistent with some objectives and policies, the Plan included provisions relating to density in residential areas and the cumulative effect of the exercise of consent to a discretionary activity. Those effects were to be taken into account when considering the consistent administration of the Plan. See [79], [92] and [94], *Main v Rotorua DC* C059/02.

s 104(1) - In a case where an industrial concern set up a factory out of zone, the Tribunal took into account not only the cumulative effect upon the zone in which the operator chose to locate (a rural zone), but also the cumulative effect upon the zones wherein the proposed activity was positively encouraged. See *Manos v Waitakere CC* (1993) 1A ELRNZ 244 (PT). The High Court dismissed an appeal against the decision, but pointed out that the Tribunal's decision was concerned with planning integrity, not with s 3 effect or cumulative effect. See *Manos v Waitakere CC* [1994] NZRMA 353.

s 104(1) - The desire to provide family members with land for a dwelling is not a true exception which would distinguish an application for a non-complying activity from the generality of cases. The Court refused a proposal, which sought to satisfy a family housing need, to subdivide a property into two lots, each of which would be marginally below the minimum allotment size prescribed by the District Plan. The activity had no significant adverse effects. However, the Court found there was a degree of discomfort between the proposal and several objectives and policies concerning rural amenity, density and soils and, taken as a whole, the plan provisions did not favour consent. There were no qualities in the proposal to distinguish it from the generality of applications for non-complying activities. The proposal lacked any evident unusual quality and would undermine public confidence in the consistent administration of the plan and its integrity. See [19], [21], [23], [25], [27]–[28] and [35], *Tait v Hurunui DC* C106/08.

s 104(1)(c) - Plan integrity can be considered as an "other matter" under s 104(1)(c), although the Court considered that the term "precedent" was unhelpful in this context. However, where an activity was given a discretionary status in the district plan, which provided criteria against which applications might be measured, then the Court found that by definition a consent which complied with such criteria could not harm the plan's integrity. See [80]–[87], *Progressive Enterprises Ltd v North Shore CC* [2009] NZRMA 386 (EnvC).

s 104(1) - The Court found that "[o]nly in the clearest of cases, involving an irreconcilable clash with the important plan provisions . . . and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application be declined." In every case, it is a question of assessing effects and of considering the Plan provisions. In a decision where the District Council argued that the applicant's proposal for an industrial activity would threaten the integrity of the Plan

provisions relating to protection of the production capacity of the Heretaunga Plains Zone soils, the Court held that the integrity argument could be discounted because the proposal would not remove productive soil from use, nor fragment ownership of land, and was a reorganisation of an existing business. See [6], [15]–[19], [23]–[25] and [27], *Beacham v Hastings DC* W075/09.

s 104(1)(c) - The Court considered that the situation in which it refused subdivision consent differed from that of the decision in *Rodney DC v Gould* (2004) 11 ELRNZ 165, [2006] NZRMA 217 (HC). The Rodney District Plan had reached an advanced stage with relevant rural objectives, policies and other provisions almost entirely settled. Accordingly, questions of integrity, precedence and coherence were matters to which the Court could appropriately have regard. See [109]–[111], *Foster v Rodney DC* [2010] NZRMA 159 (EnvC).

s 104 - The definition of potential effects is such that any "precedent" effect which may result from the granting of a resource consent is not within the concept of a cumulative effect (that concept is confined to the effect of the activity itself on the environment). If the precedent effect of granting a consent is to fit within the definition at all, it must do so by dint of its potential effect, and it would then have to satisfy the probability and (if applicable) the potential impact criteria. See [38]–[39], *Dye v Auckland RC* [2002] 1 NZLR 337, (2001) 7 ELRNZ 209, [2001] 11 NZRMA 513 (CA). See annotations on potential effect under s 3 and refer also to s 104D for relevant cases and further discussion on precedent effect.

s 104 - The granting of a resource consent has no precedent effect in the strict sense. It is obviously necessary to have consistency in the application of legal principles and all resource consent applications must be decided in accordance with a correct understanding of those principles. In factual terms, however, no two applications are ever likely to be the same albeit one may be similar to another. The most that can be said is that the granting of consent may well have an influence on how another application should be dealt with. The extent of that influence will depend on the extent of the similarities. See [32] and [41]–[42], *Dye v Auckland RC* [2002] 1 NZLR 337, (2001) 7 ELRNZ 209, [2001] 11 NZRMA 513 (CA).

s 104 - Where there were similarities of locations and proposals in marine farm applications, the Court held that granting consent to one would strongly influence what happened to the other and that it was able to legitimately take that into account. See [135]–[142], *King-Turner v Marlborough DC* W081/01.

s 104 - The consent authority was fully entitled to consider the precedent effect of granting an application for a discretionary activity. This conclusion was based on *Manos v Waitakere CC* [1994] NZRMA 353 at 356, subsequently confirmed in an obiter statement by the Court of Appeal in *Manos v Waitakere CC* [1996] NZRMA 145 (CA). A grant of consent to a discretionary activity can be a precedent in the sense of creating an expectation that a like application will be treated in a like manner. See [42]–[43], *Scurr v Queenstown Lakes DC* C060/05.

s 104 - This was a decision on an appeal against an application to amend a resource consent granted to Little Vivian Bay — Kawau Island Wharf Ownership and Maintenance Society (Inc). The consent was to occupy a wharf in Little Vivian Bay, Kawau Island, however, it was silent as to the right of members of the public to use the wharf. Following the Court of Appeal's decision in *Hume v Auckland RC* [2002] 3 NZLR 363, (2002) 8 ELRNZ 211, [2002] NZRMA 422 (CA), such silence indicated that the public had the right to use the wharf. The Society sought to amend the consent to exclude certain classes of persons other than in an emergency.

The Court considered that two of the classes of exclusion sought would have an adverse effect on public access to Kawau Island. Although the issue of planning precedent would generally not be considered of great importance, in this case if it allowed exclusions in circumstances which could not readily be distinguished from many others, it would create an unfortunate planning precedent. The Court considered that the purpose of the RMA would be served by reducing the extent of potentially conflicting uses on the wharf by preventing those vessels and aircraft for which it was not structurally suited, from using it.

The purpose of the Act would be served by allowing as many people as was reasonable to use the wharf for access to the coastal marine area. See [46] and [48], *Coleman v Rodney DC* A122/05.

s 104 - The Court considered the question of precedent on the grant of an application for a discretionary activity and said that the essential question was about having due regard to any relevant provisions of a plan or proposed plan pursuant to s 104(1)(b)(vi). Therefore, it was probably not now good law that a discretionary activity was presumed to be appropriate in a zone subject to being approved for a particular site. Instead, it was about what the objectives, policies and other relevant provisions of the district plan provided. See [63], *Campbell v Napier CC* W067/05.

s 104 - The High Court considered whether approving a proposal to build a school outside the Metropolitan Urban Limits, contained in the Regional Policy Statement ("RPS") as part of its policies to contain urban growth, would create an expectation of similar treatment for other applicants or threaten the District Plan's integrity. The Court held that the Environment Court had not erred in finding that the "unusual qualities and substantial benefits" of the proposal meant that giving consent would not be viewed as an assault on the RPS. See [9], [43]–[44], [65]–[69], [88]–[90], [92]–[95], [103]–[104], and [109]–[113], *Auckland RC v Roman Catholic Diocese of Auckland* (2008) 14 ELRNZ 166 (HC).

s 104(1)(b)(vi) - Although precedent effect can be a relevant consideration in the context of a discretionary activity, the outcome of any future application would necessarily depend on the evidence before the Court at that time, measured against the relevant assessment criteria. The appellant argued that the Environment Court had misconstrued the precedent effect when it found that granting consent to a proposal, which might cause a 20 per cent increase in traffic delay, would not mean that a future proposal with a similar increase would be acceptable. The High Court found that this argument was simplistic and an error of approach. The Environment Court had addressed the issue of precedent and had concluded it did not apply, and could not be said to be wrong in reaching that conclusion. See [63]–[71], *Progressive Enterprises v North Shore CC* HC Auckland CIV-2008-485-2584, 25 February 2009.

s 104(1)(b) – "Incremental creep" towards subdivision in a rural zone has the potential for precedent or plan integrity adverse effects. Where resource consent was sought for a pre-existing temporary second residence on a site in the Rural 3 zone in the Wairau Plains, a discretionary activity under the plan, the Court found that doubling the housing density in that part of the rural environment would permanently change the rural character of the area and clearly conflict with the plan objectives and policies, calling into question the integrity of the plan and its treatment of dwellings in the zone. The proposal would raise issues of reverse sensitivity and permanently remove the versatile soil resource from future productive use. Further, the Court held that the temporary residence, required to be eventually removed, was not part of the existing environment, and the case was not in a special category. See [1], [3], [11], [15]–[16], [22], [30]–[32], [38] and [40]–[41], *Smith v Marlborough DC* [2011] NZEnvC 328.

s 104(1)(b) - A proposal to subdivide rural land on which there were already two houses, one of which was used to house seasonal rural workers, was refused consent under s 104(1)(b) because it was contrary to the purpose of the relevant plan provisions relating to the Heretaunga Plains. The non-complying application passed the s 104D threshold (because the adverse effects were less than minor). However, considering the application under s 104, the Court found that the overarching intent of the plan was at least to maintain the availability of land with soils suitable for productive use in order to enable the sustainable utilisation of the finite resource of the productive plains soil. The subdivision would remove a parcel of land from a commercial activity, complementary to the rural zone, and dedicate it to purely residential use. Such a proposal would undermine the effectiveness of the Plains zone provisions. There were no distinguishing or special circumstances to the proposal, and it was clear that there were many other properties where owners might use the mechanism of subdividing around visitor accommodation to circumvent plan provisions which sought to restrict such ad hoc residential development. See [1]–[5], [13], [16], [18]–[19], [33], [35]–[37] and [39], *McHardy v Hastings DC* [2011] NZEnvC 339.

s 104(1)(c) - The Court held that proposals for a rural subdivision, allowed under the plan only if wetland features of sufficient quality and size were set aside, would not create an undesirable precedent. The features either met the plan performance standards or, when modified by conditions, were consistent with the relevant planning instruments. It was relevant that the consent authority had not applied a consistency of approach regarding the plan rules to the applicants when compared with other previous proposals which received subdivision consent for similar wetland features. The Court was satisfied that this inconsistency of approach was an "other matter" that was "relevant and reasonably necessary" to determine the applications under s 104(1)(c), and that the proposal met the purpose of the Act. See [1]–[2], [54], [61]–[62], [68] and [78]–[83], *Clearkin v Auckland Council* [2012] NZEnvC 238.

s 104(1) - The term "precedent" involves more than just grants of consent per se, and extends to consistency of interpretation of planning documents and considerations of plan integrity. The Court interpreted "relevant" plan provisions under s 104(1)(b) to extend beyond the objectives, policies and rules to incorporate plan provisions such as identification of issues, explanations and methods, in order that the council's intention might be discovered. In an appeal against subdivision consent granted for a rural site in Timaru, such plan provisions identified that one of the adverse effects of intensive subdivision in the R 1 zone was loss of rural amenity, and raised concerns about servicing residential development in rural areas. Considered with several other recently approved subdivisions in the area, which flew in the face of the clear recognition in the plan as to the limited capacity for more intensive subdivision in the R 1 zone, the Court found there was an adverse cumulative intensification effect, and the proposal was in conflict with, and undermined the integrity of, the plan. The issue of precedent, to be taken into account under s 104(1)(c), was that approval of the proposal might provide support for further similar applications. See [1], [4], [41], [43], [45], [50], [58], [60], [69], [74], [77]–[78] and [80], *Rawlings v Timaru DC* [2013] NZEnvC 67.

(3) *Weight*

s 104 - For a discussion of the weight to be given to plans prepared under the TCPA 1977 and the RMA, see *KB Furniture Ltd v Tauranga DC* [1993] 1 NZLR 197, (1993) 1A ELRNZ 317, (1993) 2 NZRMA 291. Refer also *Batchelor v Tauranga DC* (1992) 1A ELRNZ 100, (1992) 1 NZRMA 266 (PT) (upheld on appeal - *Batchelor v Tauranga DC (No 2)* [1993] 2 NZLR 84, (1992) 1A ELRNZ 221, (1992) 2 NZRMA 137 (HC)) and [8], *Atkins v Whangarei DC* A006/00.

s 104(1)(b) - It is a council's duty to have regard to the provisions of a Proposed District Plan as if it had been altered by a variation even though the variation is the subject of unresolved reference appeals. See [91], *Peat v Waitakere CC* A082/04. The Court distinguished the *Peat* decision in *Auckland RC v Waitakere CC* A065/08 and *Ashton v Waitakere CC* A100/08. In these later decisions the Court found that the Operative District Plan had more determinative weight than the Proposed Plan. Refer also *Stevens v Tasman DC* W043/92 and *Banks v Nelson CC* W015/93 where the Tribunal held that where a