

**BEFORE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY WAIPA  
DISTRICT COUNCIL**

**IN THE MATTER** of the Resource Management Act 1991 (Act)

**AND**

**IN THE MATTER** of the hearing of applications by BBC Technologies  
Limited for Land Use Consent for a Rural Industry and  
Grass Ventures Limited for a Subdivision Consent at  
Lochiel Road, Rukuhia

**BETWEEN** **BBC TECHNOLOGIES LIMITED & GRASS VENTURES  
LIMITED**

**Applicants**

**AND** **WAIPA DISTRICT COUNCIL**

**Consent Authority**

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**LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT**

**Dated: 9 December 2020**

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## **MAY IT PLEASE THE HEARING COMMISSIONER PANEL**

1. These submissions are made on behalf of BBC Technologies Limited ("BBC Technologies") and Grass Ventures Limited as the Applicants in LU/0154/20 and SP/0082/20 for concurrent land use and subdivision consent applications to establish and operate a rural research facility and rural based industry, including outdoor growing areas ("Application") at 35 Lochiel Road, and 326 Airport Road, Rukuhia ("Application Site").

## **INTRODUCTION**

2. This is an application for a discretionary activity consent to establish and operate a new growing, research, administration, and manufacturing facility for BBC Technologies. The following activities, buildings and development are proposed:
  - (a) A new 6,012m<sup>2</sup> building comprising a manufacturing warehouse (3,300m<sup>2</sup>) and office/research facilities;
  - (b) 258 carparks (within a carparking area of 8,537m<sup>2</sup>);
  - (c) Alterations to the existing access arrangements onsite;
  - (d) A subdivision to create three lots (from two existing titles); and
  - (e) An outdoor area for growing fruit.
3. The Application falls squarely within the definition of "Rural based industry"<sup>1</sup> in the Waipa District Plan ("District Plan") and is to be considered under section 104 of the Resource Management Act 1991 ("RMA"). Both the s 42A report and the evidence of Mr Chrisp for the Applicant, set out the background to its lodgement, including the decision by Waipa District Council ("WDC") to limited notify the Application.

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<sup>1</sup> Statement of evidence of Mr Chrisp for the Applicant, dated 24 November 2020, at paragraphs [13] to [16], together with Mr Chrisp's supplementary statement of 9 December 2020.

- Relevantly, the s42A author recommends granting consent, subject to conditions.
4. Having said that, the s42A report appears to leave open the question of effects on the Clarks and the proposed mitigation to address those effects. I will address that issue later in submissions. Putting aside this question, the remaining issues in contention primarily relate to the detail of the consent conditions.
  5. Mr Chrisp's evidence provides a detailed assessment of the proposal and planning evaluation of the same. Mr Chrisp has prepared an updated set of proposed conditions of consent (refer to Annexure "D") to his statement of evidence dated 24 November 2020 ("Applicant's Proposed Conditions"). Since this evidence was filed, Mr Chrisp has reflected on the proposed draft conditions, including those set out in the supplementary s42A report dated 4 December 2020. In particular, he has considered the proposal to impose a condition regarding works within the Clark property. Mr Chrisp will address these conditions in his evidence at this hearing and I briefly comment on the same in submissions.
  6. BBC Technologies is at the cutting edge of research and development within the horticulture sector, specifically in relation to small fruit, with blueberries as its core focus. The company has remained loyal to its Waipa District roots and this proposal reflects the desire to stay local. As stated by Mr Furniss, BCC Technologies has experienced significant growth and has outgrown its current Ingram Road premises (on the opposite side of the Hamilton Airport) and is seeking to relocate and expand at the Application Site.<sup>2</sup>
  7. If granted, the proposed development and expansion of the BBC Technologies business will generate significant economic benefits to the

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<sup>2</sup> Statement of evidence of Mr Furniss for the Applicant, at [9].

Waipa District and the wider Waikato Region. Furthermore, it will enhance the profile of the Waipa District as an agricultural/horticultural hub and confirm its profile as an "Agri-tech" district. If consent is declined, then the development is likely to be located overseas (along with the jobs associated with the current and proposed BBC Technologies operation).<sup>3</sup>

#### **Functional and compelling need to establish in the Rural Zone**

8. The s 42A report states that the Applicant needs to provide "further discussion" on the nature of their business operation to demonstrate that they have a *functional and compelling need* to establish in the Rural Zone.<sup>4</sup> Mr Chrisp addresses this in detail in his evidence and Mr Furniss does the same. At paragraph [21] of his evidence, Mr Chrisp points out that the (Waipa District Plan) Objective Mr Whittaker relies on to require the Applicant to demonstrate a "functional and compelling need" to locate in the Rural Zone (Objective 4.3.12), is in fact irrelevant on the basis that the activity is defined as "rural based industry".
9. Mr Whittaker has now corrected this, but he continues to opine that the proposal must demonstrate a "functional and compelling" need to locate in the Rural Zone, based on Policy 1.3.1.5(d). This is a general "strategic" policy in the District Plan and is not specific to the Rural Zone – particularly given that Rural Based Industry is exempt from the similar policy wording in the Rural Zone chapter. In a similar vein, Mr Lester suggests that the horticulture component of the business could be in the Rural Zone and the remaining components re-located.<sup>5</sup> Mr Chrisp will address these matters further in his supplementary statement of evidence, having reviewed Mr Whittaker's supplementary s42A report and Mr Lester's evidence.

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<sup>3</sup> Statement of evidence of Mr Furniss for the Applicant, at [20].

<sup>4</sup> Section 42A report, page 37 – referring to Policy 1.3.1.5.

<sup>5</sup> Statement of evidence of Mr Lester at [62].

10. Mr Furniss explains why the BBC Technologies proposal has a functional and compelling need to establish in the Rural Zone. The business involves growing horticultural crops for research purposes. Having the test plot area on the same site as the BBC Technology research facility is an essential bottom line for the new site. Mr Furniss states that:

[...] It would be grossly inefficient to try to operate the business from multiple sites. The vertically integrated nature of the business, and the fact that it is entirely based on servicing the horticultural sector, is why it is suited to be located in the Rural Zone.<sup>6</sup>

11. To suggest that the various components of this vertically integrated business should be somehow “split” across different zones and locations is contrary to the sustainable management purpose of the RMA<sup>7</sup> and integrated planning. If this business cannot locate on the proposed site within the rural zone of the Waipa District, where else should or could it go? The answer is simple, it would not go anywhere else. It is counter-intuitive for the business to be expected to dismantle its inherent integrated model to stay in the Waipa District. The alternative is for the entire business, and its benefits/positive effects, to relocate outside of the Waipa District and outside of the Waikato Region.
12. It is relevant at this juncture to note that the character and amenity of the local area surrounding the Application Site is already heavily modified and influenced by the traffic along State Highway 21, as well as the operation of the Hamilton Airport. This is identified in the Applicant’s Assessment of Environmental Effects (“AEE”) and the evidence for the Applicant. Furthermore, the numerous “lifestyle” block properties, including those of the submitters, are not part of a productive rural unit. In short, the Application Site does not contain, nor does the surrounding

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<sup>6</sup> Statement of evidence of Mr Furniss for the Applicant, dated 24 November 2020, at paragraph [21].

<sup>7</sup> RMA, section 5.

environment possess, typical 'rural zone' characteristics. This is discussed further later in submissions.

### **Submissions**

13. Four submissions were received during the statutory submission period which closed on 22 October 2020. Two late submissions have been received from Mr and Mrs Clark of 8 Lochiel Road on 29 October 2020.

### **Evidence before the Panel**

14. The Panel has received statements and will hear from the following experts in support of the Application:
- (a) Mr Furniss who is the Chief Executive of BBC Technologies, and who has provided an overview of BBC Technologies operations and the reasons for its relocation.
  - (b) Mr Black who has provided expert advice on traffic design and effects and has recommended the proposed traffic mitigation as reflected in the Applicant's Proposed Conditions.
  - (c) Mr Chrisp who is the expert planner for the proposal.
15. Mr Lester has provided a statement of evidence on behalf of Mr Annegarn. I address the flaws in that evidence later in my submissions and explain why the evidence for the Applicant should be preferred in determining the Application. No other technical expert evidence has been filed on behalf of Mr Annegarn.
16. Ms Hunt has provided a statement of evidence on behalf of Waka Kotahi (NZ Transport Agency). This is essentially in support of the Application and I do not comment further other than to reiterate the point that BBC Technologies cannot be required or expected to become a party to a private and historic MOU as a condition of this consent.

## LEGAL FRAMEWORK

17. The Panel will be familiar with the tests under sections 104, 108 and 108AA of the RMA. Under section 104(1)(a) the Panel must assess the actual and potential effects on the environment of allowing the activity, and these matters for assessment under section 104 are reflected in the evidence of Mr Chrisp. The s 42A report also addresses the effects to be considered. The Panel's determination must necessarily be based on evidence which supports the decision.
18. Neither the s 42A Report, nor the Applicant's evidence or Application has identified any invalidity, ambiguity, or incomplete coverage in the relevant planning documents. Accordingly, it is not necessary to revert to Part 2 of the RMA. Nevertheless, in my submission, the Application upholds the purpose of the RMA as set out in section 5 by:
  - (a) Supporting the Applicant and the local community to provide for their social and economic wellbeing by providing a new BCC technologies research facility in the Waipa District; and
  - (b) Appropriately avoiding, remedying, and mitigating effects through the Applicant's Proposed Conditions.
19. For completeness, counsel notes the relevance of section 104B RMA regarding the determination of applications for discretionary or non-complying activities. That is, after considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority:
  - (a) may grant or refuse the application; and
  - (b) if it grants the application, may impose conditions under section 108 RMA.

### **Sections 108 and 108AA**

20. Section 108(1) provides that the Panel may impose any condition it considers appropriate. What is appropriate has been the subject of numerous Environment Court decisions and the principles are well known. In short, the conditions must be reasonable, certain, and enforceable.<sup>8</sup>
21. Furthermore, section 108AA of the RMA inserted new wording against which the discretion to impose conditions must be exercised and provides that a condition must be:
- (a) "directly connected" to an adverse effect of the activity or an applicable rule or environmental standard; or
  - (b) relating to "administrative matters" essential to the efficient implementation of the consent; or
  - (c) agreed to by the Applicant.
22. As discussed below, the key issues in contention are whether the proposed or recommended condition(s) satisfy the requirements of sections 108 and 108AA of the RMA.
23. In my submission, the Applicant's Proposed Conditions, subject to further appropriate amendment, satisfy the requirements of sections 108 and 108AA.

### **Actual and potential effects on the environment**

24. As the Panel will be aware, under section 104(1)(a), it must have regard to the actual and potential effects on the *environment* of allowing the

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<sup>8</sup> *Cookie Munchers Charitable Trust v Christchurch CC* EnvC W090/08; *Newbury DC v Secretary of State for the Environment*; *Newbury DC v International Synthetic Rubber Co Ltd* [1981] AC 578; [1980] 1 All ER 731 (HL).



activity. This does not mean that all effects must be internalised.<sup>9</sup> The Panel must assess whether the effects of the Application are acceptable, taking into account the proposed conditions which will avoid, remedy or mitigate the actual and potential effects on the environment. The RMA is not a “no effects” statute. This is an important point when considering the commentary in the s42A report (and supplementary statement of Mr Whittaker), where the author does not clearly reach a conclusion about some potential effects – primarily in relation to the Clarks.

25. The concept of the existing environment is relevant in the assessment of the effects of the proposed development. In reliance on the principles of *Hawthorn*,<sup>10</sup> the existing environment is the environment as it exists at the time of hearing including all operative consents and any consents operating under section 124 of the RMA, overlain by those future activities which are permitted activities and unimplemented consents (where these are likely to be given effect to).
26. In this case, the existing environment includes:
  - (a) The current vehicle movements on State Highway 21, adjacent to the Site, which has a speed limit of 100km;
  - (b) An adjacent Industrial Zone;
  - (c) Hamilton Airport on the opposite side of Airport Road / State Highway 21;
  - (d) Activities which are permitted by the Waipa District Plan; and

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<sup>9</sup> For example, in the series of cases entitled *Winstone Aggregates Limited and Auckland Regional Council v Papakura District Council* the Court considered the issue of reverse sensitivity and the requirement that an activity internalise its adverse effects. (See decision number A96/98 and decision number A49/2002). The essential findings of both these cases were that adverse effects should be internalised to the extent that it is reasonable.

<sup>10</sup> *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424 (CA).

- (e) Unimplemented resource consents which are likely to be given effect to.
27. Considering the above, the existing environment for assessing the Application is characterised by high levels of background noise levels, traffic movements associated with the use of a State Highway, and land use activities which represent a modified Rural Zone.<sup>11</sup> These factors were considered in the AEE evaluation of the proposal. It follows that the Panel must assess the actual and potential effects of allowing the BBC Technologies proposed activities on the environment as it currently exists.
28. The actual and potential effects of the Application are comprehensively addressed in the Applicant's AEE and the evidence of Mr Black and Mr Chrisp. Counsel does not wish to traverse the conclusions reached in the evidence for the Applicant, other than to record the following:
- (a) Mr Black concludes that subject to conditions requiring the construction of a right-turn bay at the SH21/Lochiel Road intersection including provision of appropriate sight distance, upgrading the affected section of Lochiel Road and constructing an appropriate vehicle crossing, the traffic effects on the surrounding environment are expected to be acceptable.<sup>12</sup>
  - (b) Mr Chrisp has considered and relied on the advice of the Applicant's experts to draft the revised proposed conditions (at his Annexure "D") and concludes that:<sup>13</sup>

It is my opinion that the proposed consent conditions presented in Annexure D of my evidence will appropriately avoid, remedy or mitigate any actual or potential adverse effect on the

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<sup>11</sup> Mr Whittaker in the s 42A report states at page 22: *In my opinion, the existing environment is characterised by background noise levels which are very high compared to other rural areas which are not impacted by road corridor and airport noise.*

<sup>12</sup> Statement of evidence of Mr Black for the Applicant, at [65].

<sup>13</sup> Statement of evidence of Mr Chrisp for the Applicant, at [56].

environment, including any effects on the roading network and the Clark's property at 8 Lochiel Road.

**Section 104(1)(b)**

29. As the Panel will be aware, it is also required to assess the Application having regard to any relevant provisions of the District Plan and higher order planning documents. The Panel must consider the relevant objectives and policies in the Rural Zone in the round. The test in section 104(1)(b) does not invoke a requirement that the proposal be consistent with or reconcile all the relevant objectives and policies in the District Plan. Rather, the Panel must *have regard* to the relevant objectives and policies.
30. The words "have regard to" requires the Panel to "give genuine attention and thought to the matters set out by section 104, but they must not necessarily be accepted".<sup>14</sup> The assessment of an application against objectives and policies is not a "numbers game", rather it is "a fair appraisal of the objectives and policies read as a whole".<sup>15</sup> The relevant objectives and policies should be weighted appropriately, in the context of the specific application. Where there are stronger or more directive policies, these may carry more weight than others.
31. The Application sets out the relevant objectives and policies in the District Plan and an evaluation of the Application in relation to the same. The s42A report similarly identifies the relevant objectives and policies, albeit that it misconstrues Objective 4.3.12. This has been corrected in the supplementary statement of evidence of Mr Whittaker.<sup>16</sup>
32. However, in his supplementary statement, Mr Whittaker reiterates his concern about the "functional and compelling" need for the activity to

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<sup>14</sup> *Foodstuffs (South Island) Ltd v Christchurch City Council* (1999) 5 ELRNZ 308; [1999] [1999] NZRMA 481 (HC).

<sup>15</sup> *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25].

<sup>16</sup> Supplementary statement of evidence of Todd Whittaker (planning), 4 December 2020, paragraphs [15] and [16].

locate in the Rural Zone, as stated in Policy 1.3.1.5(d). With respect, this is one of a range of objectives and policies which are relevant to the Application. As noted earlier, it is one Policy in the general strategic chapter of the Waipa District Plan and in my submission is not "directive" in the context of a Rural Based Industry activity (which is expressly excluded from the definition of "non-farming activity"). As discussed earlier, the more specific Rural Zone objective which refers to "functional and compelling" does not apply to Rural Based Industry. Policy 1.3.1.5(d) is not a "threshold" which must be overcome for the consent to be granted, nor is it an "environmental bottom line" which warrants greater weight to be applied to it. Mr Chrisp will provide his opinion on the application of this Policy when he presents his evidence, having considered Mr Whittaker's supplementary statement.

33. Considering the objectives and policies in the round does not lead to the conclusion that the Application is inconsistent with the objectives and policies of in the Rural Zone in the District Plan, such that would justify a decline of consent. As Mr Chrisp will say, little weight should be placed on Policy 1.3.1.5(d), given the specific provision for Rural based industry in the Rural Zone.
34. In any event, the evidence for the Applicant clearly demonstrates a functional and compelling need for the activity to locate in the Rural Zone. Mr Whittaker nevertheless reaches the conclusion that consent may be granted, subject to conditions.

#### **SUBMITTER CONCERNS /S 42A AUTHOR CONCERNS**

35. In so far as the submissions raise matters which are within the scope of the Application, all these matters have been comprehensively addressed in the evidence of Mr Black and Mr Chrisp.
36. However, these submissions respond to the following matters raised in submissions, the s 42A report, and in the evidence for Mr Annegarn:

- (a) The activity status of the proposal;
- (b) The precautionary principle;
- (c) Groundwater contamination;
- (d) Traffic concerns;
- (e) Effects on Rural Amenity including effects of traffic headlights and noise.

**Activity status**

- 37. The evidence of Mr Lester for Mr Annegarn challenges the conclusion by Mr Chrisp and the s 42A author that the proposal is a "Rural Based Industry" as defined in the District Plan. In Mr Lester's opinion, placing weight against the proposed land use's research and development components, rather than the substantive Industrial Activity definition, is incorrect.<sup>17</sup>
- 38. With respect, there is no balancing exercise to be undertaken when determining the activity status of a proposal. Case law is clear that where there is a "bundle of uses" and the uses are closely related, an overall assessment of those uses may be appropriate. The question is whether a single classification would or would not represent the reality of the situation.<sup>18</sup> This approach is also reflected in the District Plan at 4.6 which states "*If an activity falls within more than one category the more specific activity listing applies*".
- 39. Mr Chrisp has set out comprehensively in his statement of evidence why the BBC proposal falls within the definition of "Rural Based Industry" in the District Plan.<sup>19</sup> The s42A author has also reached the same

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<sup>17</sup> Statement of Mr Lester for Peter Annegarn at [19].

<sup>18</sup> *Giles v Christchurch City Council* A92/2000.

<sup>19</sup> Statement of evidence of Mr Chrisp for the Applicant, at [13] – [14].

conclusion.<sup>20</sup> I do not wish to repeat the analysis of Mr Chrisp and the s 42A author here, however, in my submission the definition of “Rural Based Industry” represents the reality of the proposed land use and is the more specific activity listing. In my submission there is no reason, nor any evidence before the Panel to require the Applicant or the Panel to revisit the activity status of the Application.

#### **Precautionary principle**

40. Mr Lester also submits that the Panel apply the “precautionary principle” as directed by 4.6 of the District Plan when deliberating on the proposed land use. In my submission, Mr Lester has misinterpreted the precautionary principle in the RMA context. The High Court has summarised the application of the precautionary principle as follows:<sup>21</sup>

[21] It comes into play where there is uncertainty about the likelihood, or possibility, of adverse effects arising from a given activity, and/or the significance of those adverse effects. Where that is so, the principle holds that commensurate caution should be applied to any necessary decision-making.

41. This is not an application where there is any uncertainty about the likelihood, or possibility, of adverse effects arising from the proposal. Neither is the precautionary principle relevant to determining activity status.

#### **Groundwater contamination**

42. Mr Lester at paragraph 28 raises concerns regarding groundwater contamination from the proposal. Groundwater concerns fall within the jurisdiction of the Waikato Regional Council (“WRC”) and are therefore beyond the scope of this hearing. Nonetheless, the Applicant has proposed condition 3 which provides that development shall not become

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<sup>20</sup> Section 42A report, section 5.

<sup>21</sup> *Friends of Nelson Haven and Tasman Bay Inc v Marlborough District Council* [2016] NZEnvC 151.

operational unless and until all relevant WRC consents have been obtained.

### Traffic Concerns

43. The submission by the New Zealand Fieldays Society Inc. and Kaipaki Promotions Limited ("Fieldays") raises concerns about the cumulative effects of traffic generation.

44. Mr Hudson (in Appendix D of the s 42A report) states:

"NZ National Fieldays Society Inc. and Kaipaki Promotions Limited submitter has raised concerns about the cumulative effect of traffic generation which may **adversely affect traffic management and safety**, particularly during Fieldays events. In my view the BBC additional traffic generation is unlikely to impact the temporary traffic management arrangements put in place on event days which have historically been successful in dealing with event and local traffic."

(Emphasis added)

45. Mr Black agrees with Mr Hudson's opinion that the BBC Technologies traffic is unlikely to impact the temporary management arrangements for events.<sup>22</sup>

46. The RMA is not a "no-risk" statute and no road is ever free from risk. The Environment Court in *East Park Development Limited v Auckland Council* observed that:<sup>23</sup>

[15] It has been said often enough that the RMA is not a non-risk statute. **No road, and no intersection, is completely free from risk.** Certainly, there are occasions when the evidence is plain that a certain development of design is highly likely to cause an unacceptable situation...

(Emphasis added.)

47. There is no evidence before the Panel which demonstrates that the proposal is likely to cause an unacceptable situation at for Fieldays' events.

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<sup>22</sup> Statement of evidence of Mr Black for the Applicant, at [49].

<sup>23</sup> *East Park Development Limited v Auckland Council* [2012] NZEnvC 190.

48. Both Mr Lester and the Clarks also raise concerns relating to traffic generated by the proposal. The traffic concerns for the Clarks relate to traffic volumes and the size of some vehicles and safety for right hand turns at the State Highway / Lochiel Road intersection. Neither Mr Lester, nor the Clarks have provided any evidence to support their concerns about traffic effects.
49. Mr Black for the Applicant has recommended that the road width of Lochiel Road be increased from 5.8m wide to 7m carriageway, with 0.75 unsealed shoulders, between SH21 and the proposed vehicle crossing. This recommendation has been accepted and is proposed as part of this Application.
50. Mr Black addresses the safety concerns for right hand turns at the SH21 / Lochiel Road intersection at paragraph 30 of his evidence where he concludes:

Crash prediction modelling is provided in the ITA Addendum. The proportional increase in predicted crash rates is similar to the proportion of traffic added. The Lochiel Road intersection is performing better than predicted and with the Applicant's proposed improvements to sight distance there is no reason to expect a disproportionate increase in adverse safety effects.

51. Similarly, Waikato Regional Airport Limited and Titanium Park Limited raise concerns that the additional traffic from the BBC Technologies proposal will bring forward the timing of upgrades at the State Highway 21 / Raynes Road intersection. Mr Black has concluded that (and, importantly, this conclusion has been accepted by Waka Kotahi):<sup>24</sup>

"...the proposal will increase delay for vehicles turning right out of Raynes Road, with the effect greater in the AM peak. When considering the sensitivity analysis for gap acceptance, we consider the performance acceptable. The additional traffic is equivalent to 3-6 years growth at 2%. However, ..., the current traffic volumes indicate there is 10 years reserve capacity so the risk of the upgrade being required earlier than previous expected appears low."

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<sup>24</sup> Statement of evidence of Mr Black for the Applicant, at [41].



52. As set out above, the RMA is not a “no-risk” statute and case law has established that no intersection is ever free from risk.<sup>25</sup> Accordingly, the Hearing Panel should not impose additional traffic requirements above and beyond those proposed or offered by the Applicant, as no road is completely free from risk. Furthermore, this is not a situation where the evidence shows that a particular design is likely to cause an unacceptable situation.

**Effects on rural amenity including effects of traffic headlights**

53. The Clark Submissions raise concerns relating to the scale and nature of the Application particularly what the submitters describe as a disconnect with the rural environment. Mr Lester also raises concerns over the commercial/industrial nature of the Application.
54. The s 42A report states that the Applicant needs to clearly articulate and provide a mitigation plan in respect of noise, visual effects, and traffic headlights focused on the Lochiel Road frontage and the Clark’s dwelling at 8 Lochiel Road.<sup>26</sup>
55. Section 2 of the RMA defines “amenity values” as:

**Amenity values** means those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

56. The s 42A author correctly observes that “although the site is located in a Rural Zone, the surrounding context of the site including the Airport Road / State Highway 21 corridor, Airport Business Zone immediately to the west, and Hamilton Airport, heavily influences the amenity and character of the area.”<sup>27</sup>

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<sup>25</sup> *East Park Development Limited v Auckland Council* [2012] NZEnvC 190.

<sup>26</sup> S 42A report, page 37.

<sup>27</sup> S 42A report, page 3.

57. The Environment Court has previously observed that where an activity was a discretionary activity in the Rural Zone, submitters "disappointment" at having a slaughterhouse in the middle of their lifestyle properties was not a relevant or reasonably necessary factor to determine the application.<sup>28</sup> By way of comparison, in the context of this Application, the District Plan provides for a "slaughterhouse" as a "Rural Based Industry" (which is the same as the Application). It is a reasonable conclusion to make that the effects of the BBC Technologies proposal will be less than that of a slaughterhouse:
58. Regarding the Clarks' concerns about vehicle head lights, the proposed earth bund along the southern boundary of the Application Site will mitigate lighting effects. Furthermore, in relation to any headlight spill after vehicles have left the Site vehicle head lights will be parallel with the road by the time these pass the dwelling. It is reasonable to assume that curtains/blinds will be drawn by the time of the evening shift change, which is when vehicles will be leaving the Site. The Clarks have provided no evidence to support their complaints, and in my submission, there is no evidence before the Panel to justify the imposition of additional conditions to mitigate vehicle headlights. As discussed later, the Applicant remains willing to plant the inside of the boundary of the Clarks property, regardless of the level of potential effects from car headlights (travelling on a public road).

### Noise

59. Mr Lester and the Clarks raise concerns about operational noise at the BBC Technologies activities on site. However, neither party has provided evidence to support such concerns. As set out by Mr Chrisp, BBC Technologies is proposing earth bunding and planting along the southern boundary of the Application Site to address noise and visual effects. Mr Chrisp has attached an Annexure C to his evidence a letter from Marshall

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<sup>28</sup> Martin v Far North District Council A097/99 at [24] and [25]

Day confirming that the proposed earth bund will result in the activity complying with the night-time permitted activity noise limits in the District Plan.<sup>29</sup> Furthermore, Mr Chrisp confirms that the BBC proposal will comply with the permitted activity noise limits in the District Plan in relation to Mr Annegarn's property.<sup>30</sup>

60. Under section 104(1)(a), the actual and potential adverse effects of the Application must be assessed against the environment as it exists at the time of assessment. This includes a functioning State Highway and a Domestic Airport. Counsel concurs with the s 42A author at page 22:

In my opinion, the existing environment is characterised by background noise levels which are very high compared to other rural areas which are not impacted by road corridor and airport noise.

61. It follows that when considering the effects of the activity on the Clarks' under section 104(1)(a) the Panel should only consider the effects that exist above what is permitted, and what exists currently. As such, the Hearing Panel should not impose additional noise mitigation requirements above and beyond those already proposed or offered by the Applicant.

#### **Works on Clark property**

62. While the Applicant has offered to carry out certain works on the Clark property, this is not necessary for the purpose of avoiding, remedying, and/or mitigating the effects of the proposal. The requirement to construct a noise bund and carry out landscaping within the Site boundary along Lochiel Road subsequently offered by the Applicant provides this direct mitigation.
63. In his supplementary statement of evidence, Mr Whittaker references the commitment from the Applicant to undertake works on the Clarks'

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<sup>29</sup> Statement of evidence of Mr Chrisp for the Applicant, at [45](b).

<sup>30</sup> Statement of evidence of Mr Chrisp for the Applicant, at [47](b).

property.<sup>31</sup> He goes on to state that he supports both the provision for the works on the Clark property as well as that within the Site.<sup>32</sup> It is not clear whether Mr Whittaker considers the works within the Clark property are necessary to mitigate the effects of the proposal.

64. In my submission, for the reasons explained above, they are not. Nevertheless, in good faith, the Applicant has offered to do the work and Mr Chrisp proposed a condition to that effect. Mr Whittaker characterises this condition as an *Augiers* condition. However, that is not entirely accurate as the draft condition was prepared as a type of condition precedent (albeit that in the absence of an agreement from the Clarks it could not be fulfilled).
65. Regardless, the Clarks have not responded to the Applicant or the s42A report confirming or otherwise whether they will agree to the works. In short, the proposed condition lacks certainty and should be deleted. If the Clarks will agree to the works on their property, that agreement can be reached outside of the RMA consenting process. Such side agreements are not uncommon, and the Applicant has committed to these works, should the Clarks agree.
66. Mr Chrisp will address this in his supplementary evidence during which he will respond to the amended draft conditions set out in Mr Whittaker's supplementary statement of evidence.

## CONCLUSION

67. All actual and potential effects of the Application are either avoided, remedied, or mitigated through the Applicant's Proposed Conditions. This is supported by the evidence of Mr Black and Mr Chrisp in his planning assessment where he concludes at paragraph 56:

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<sup>31</sup> Supplementary statement of evidence of Mr Whittaker (planning), 4 December 2020, paragraph [18].

<sup>32</sup> *Ibid*, paragraph [19].

It is my opinion that the proposed consent conditions presented in **Annexure D** of my evidence will appropriately avoid, remedy or mitigate any actual or potential adverse effect on the environment, including any effects on the roading network and the Clarks' property at 8 Lochiel Road.

68. The actual and potential effects of the Application are of an acceptable level given the rural context of the site and nature and character of the receiving environment. The Application therefore satisfies the tests in section 104 of the RMA.
69. Accordingly, it is appropriate and consistent with the purpose of the RMA for the Commissioners to grant consent for the Application subject to the Applicant's Proposed Conditions, as updated in the version to be tabled through Mr Chrisp at the hearing.

**Dated** this 9<sup>th</sup> day of December 2020



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M Mackintosh

**Counsel for BBC Technologies Limited and Grass Ventures Limited**

