

**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 [LUC/0154/20 and SP/0082/20]

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

Applicants

AND **WAIPA DISTRICT COUNCIL**

Consent Authority

LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT

(Procedural)

Dated: 9 December 2020

TOMPKINS WAKE

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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 ("Applicant") as the Applicant in LU/0154/20 and SP/0082/20 for concurrent land use and subdivision consent applications to establish and operate a rural based industry, including a rural research facility, and an outdoor growing area, at 35 Lochiel Road and 326 Airport Road, Hamilton.
2. These submissions address the question of whether the late submissions lodged by Mr and Mrs Clark ("Clark Submissions") should be accepted. Separate opening legal submissions on the substantive matters will follow.

INTRODUCTION

3. Counsel refers to the directions of the Hearings Panel on 20 November 2020 regarding the Clark Submissions. The Panel have directed that an opportunity be provided at the outset of the hearing for submissions regarding the status of the Clark Submissions.
4. The Applicant opposes acceptance of the Clark Submissions on the basis that allowing the submissions would be unduly prejudicial to the Applicant. In my submission, for the reasons explained below, the Panel should not grant a waiver under section 37 of the Resource Management Act 1991 ("RMA") to accept the Clark Submissions.

SUBMISSIONS

Timeframe for lodging a submission under the RMA

5. As the Panel will be aware, the closing date for serving submissions on a consent authority that has notified an application is the 20th working day after the date of limited notification.¹

¹ Resource Management Act 1991, s 97(3).

6. Waipa District Council ("WDC") limited notified the Applications on 24 September 2020. The statutory submission period, as prescribed by the RMA closed on 22 October 2020. The Clark Submissions were received by WDC on 29 October 2020, being 5 working days after the close of submissions. The Clarks have given no reason for the submissions being late, despite being on notice from WDC of the submission deadline.
7. In that regard, the Applicant received a letter dated 24 September 2020 from WDC (signed by Mr Whittaker), which stated that:

[...] Submissions have been called for and will be accepted until no later than **Thursday 22 October 2020...**

[Emphasis added in the letter from Waipa District Council.]

8. Similarly, the letter from WDC to those parties who were notified of the applications, dated 24 September 2020 stated:

[...] If you wish to make a submission on this application you may do so by either sending, delivering or emailing a copy to the Waipa District Council (as per the contact details below) no later than **5pm Thursday 22 October 2020...**

[Emphasis added in the letter from Waipa District Council.]

9. Copies of these letters are **attached** to these submissions as Annexure 1 to these submissions.

Discretion to accept late submissions

10. The Panel has the discretion under section 37 of the RMA to waive compliance with the statutory timeframe for receiving submissions. In considering whether to do so, the Panel must consider the matters set out in section 37A of the RMA which requires consideration of:
 - (a) The interests of any person who may be directly affected by the waiver; and
 - (b) The interests of the community in achieving adequate assessment of the effects of the Application; and

- (c) The duty under section 21 of the RMA to avoid unreasonable delay.
11. The Applicant will be directly affected by the waiver as, if granted, a waiver will afford the Clark's a right of appeal under section 120 of the RMA. This may lead to the Applicant being unduly prejudiced by the potential delays to the development which would be caused by an appeal to the Environment Court. Mr Chrisp will be able to describe the Applicant's efforts to engage with the Clarks throughout the application process. He will confirm the Clarks have expressed on more than one occasion a desire for the Applicant (or someone else), to purchase their property. This appears to be the outcome which the Clarks ultimately seek. However, there is no RMA basis for such request, and the request raises the concern that the Clarks may become vexatious objectors and appeal any decision to grant consent made by the Panel.
12. Regarding the interests of the Clarks, the evidence of Mr Chrisp² sets out the measures proposed by the Applicant to ensure that any effects on the Clarks' property at 8 Lochiel Road are appropriately avoided, remedied or mitigated.³ This includes additional off-site measures, offered in good faith, despite those not being necessary to address the effects of the proposal on the Clarks.
13. Regardless of whether the Clark Submissions are accepted, the matters raised in the Clark Submissions will form part of the Panel's consideration of the Application and in my submission the Panel is able to assess the effects of the Application without formally accepting the Clark Submissions. Other submitters have raised similar concerns to the Clark's. Furthermore, the evidence on behalf of the Applicant has

² Statement of evidence of Mr Chrisp for the Applicant at [45].

³ The measures set out in the letter at Annexure "A" to Mr Chrisp's evidence if the Clark's agree to those mitigation measures; An earth bund and planting along the southern boundary of the site along Lochiel Road within the Applicant's site. This will address noise and visual effects; and a reduction in the size of the sign at the entrance of Lochiel Road.

comprehensively assessed the adverse effects of the Application on the Clarks and the proposed mitigation will reduce any effects on the Clarks to a minimum. That is the case regardless of whether additional mitigation works are carried out on the Clark property itself.

14. Other submitters' interests will not be affected by the Panel declining to grant a waiver and not accepting the Clark Submissions.
15. Regarding the second limb of section 37A (achieving an adequate assessment of the effects of the Application), the submissions do not raise material in respect of the effects of the Application that would necessitate or justify a waiver. Indeed, the matters raised are already before the Panel and have been comprehensively addressed by the Applicant in its application, evidence, and proposed conditions of consent.

Case law guidance on exercise of discretion

16. There are no rights of appeal in respect of decisions under sections 37 and 37A RMA, therefore there is little case law to guide the decision-making process. The best analogy is the power of the Environment Court to grant waivers under section 281 RMA. Under section 281, there are two tests for granting a waiver:
 - (a) The threshold of being satisfied that there is no undue prejudice;
and
 - (b) The general discretion as to whether to grant the waiver sought.
17. The two-step test above is equally relevant for the Panel when considering whether to grant a waiver under section 37 to accept the Clark Submissions.

Undue Prejudice

18. Counsel submits that the acceptance of the Clark Submission will unduly prejudice the Applicant due to the risk of an appeal, should consent be granted.⁴
19. There are significant cost implications for the Applicant if the Clark Submissions were allowed and the Clarks pursued an appeal to the Environment Court. While that is contingent on the consents being granted, there is real concern that Mr and Mrs Clark may become vexatious objectors/appellants. Importantly, any appeal would unreasonably delay commencement of the BBC facility, and cause the Applicant significant costs and delay. As such, it is inevitable that prejudice would necessarily follow from the Panel accepting the Clark Submissions.
20. There is a real risk that any delay caused by an appeal will result in the proposed development being relocated out of the district or the country, which will incur further cost, so that operations can commence within a reasonable timeframe.

General discretion as to whether to grant a waiver

21. The Court in *Riverside Residents of Cobden & Blaketown v West Coast Regional Council*⁵ acknowledged the public and participatory nature of the RMA, and that waivers are generally granted. However, it went on to discuss other factors that can affect the Court's general discretion. These were listed as:

⁴ *Baker v Wellington City Council* 1992 2 NZRMA 113, pages 116 to 117 defines undue prejudice as follows: "Undue prejudice" means prejudice greater than that which would necessarily follow in every case from waiving compliance with the time for appealing. Delay in implementing a consent is inevitable when an appeal is lodged. Factors which have contributed towards finding an undue prejudice have included the amount of money involved or at risk; the level of expenditure already committed to a project; and the fact that an applicant has waited longer than the statutory period for appealing before taking steps to exercise the consent.

⁵ *Riverside Residents of Cobden & Blaketown v West Coast Regional Council* C087/2003 at [53].

- (a) Economic effects;
 - (b) Whether the appeal is frivolous or vexatious;
 - (c) Whether the failure arose from inadvertent or careless behaviour;
and
 - (d) Questions of overall public interest in ensuring that the consent is
subject to public scrutiny.
22. As stated at the outset, the Clarks have offered no explanation for their late submissions; despite being on notice of the deadline for submission and having ample opportunity to lodge a submission within the statutory timeframe. The Environment Court in *Waste Management NZ Limited v Auckland Council*⁶ found that failure by the applicant for a waiver to file an appeal on time, which was blamed on the overlooking of an email, as at best careless and not a justification for not meeting the statutory time limit. The Court held that there was no real explanation for the failure to file the appeal on time. As such, there was no material on which the Court could explain the failure to file the appeal and the Court declined the waiver.
23. The same point is at issue here. There is no reason for the late submissions and to allow the Clark Submissions undermines the policy reasons for having statutory timeframes.⁷

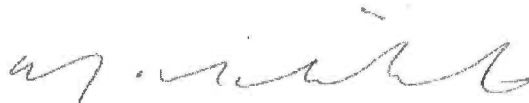
⁶ *Waste Management NZ Ltd v Auckland Council* [2016] NZEnvC 198 at [30].

⁷ *Ibid*, at "[30] ...There was a total failure to read the email or attend to it. At best that is careless, possibly negligent. If the Court granted this waiver, all appeals would be subject to the same argument and effectively mean that the time limit had no particular meaning. In *Day v Ost* the Court quoted from Lord Guest's speech in *Ratnam v Kumarasamy*:⁷ The rules of Court must *prima facie* be obeyed, and in order to justify a Court in extending the time during which a step in procedure requires to be taken there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time, which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation."

CONCLUSION

24. There is nothing raised in the Clark Submissions that justifies the acceptance of the late submissions. No application has been made by the Clarks for a waiver of the time within which they were required to lodge a submission. No reasons are given for the lateness and the submissions do not raise material in respect of the effects of the Application that are not already before the Panel.
25. In contrast, granting a waiver will provide the Clarks a right to appeal a decision to grant consent which will prejudice the Applicant by creating delay in the commencement of the activities on the site. This has significant cost implications and there is a real concern that an appeal will not be based on genuine RMA reasons.
26. It is appropriate for the Panel to decline to accept the Clark Submissions.

Dated this 9th day of December 2020



M Mackintosh
Counsel for BBC Technologies Limited

ANNEXURE 1

24 September 2020

04581/199.00
SP/0082/20
LU/0154/20

BBC Technologies
C/- Mitchell Daysh Limited
PO Box 1307
Waikato Mail Centre
Hamilton 3240
Email: mark.chrisp@mitchelldaysh.co.nz

Digitally Delivered

Dear Mark

RESOURCE CONSENT APPLICATION – LIMITED NOTIFICATION

Application number: LU/0154/20 and SP/0082/20
Applicant: BBC Technologies Limited and Grass Ventures Limited
Address: 35 Lochiel Road and 236 Airport Road, RD 2, Hamilton 3282
Proposed activity(s): Land use application to establish an office and research facility including outdoor growing areas as a rural based industry for BBC Technologies Limited
Subdivision application to establish a new title for the BBC Technologies site and to create a road splay from two existing titles.

Written approval of all persons who in the opinion of Council may be adversely affected by the proposal has not been obtained as part of the abovementioned consent application. Therefore, it has been determined under delegated authority that notice of this application will be served on those persons pursuant to Section 95B of the Resource Management Act 1991.

I acknowledge a deposit has been received of \$4960, the required deposit for a limited notification is \$7165, please arrange a further payment of \$2205.

Notice of your application has been served on the following parties:

- Ngati Haua Iwi Trust
- Waikato Tainui
- Waikato Regional Airport Authority
- NZ Transport Agency

- NZ National Fieldays Society
- Pacific Aerospace
- Meridian 37
- 37A Lochiel Road
- 37 Lochiel Road
- 60 Lochiel Road
- 72 Lochiel Road
- 284 Airport Road
- 8 Lochiel Road
- 326A Airport Road

Submissions have been called for and will be accepted until no later than **Thursday 22 October 2020**. You will be advised whether any submissions have been received. Once submissions have closed, Council is required to decide whether or not a hearing is required.

Should the matter require a formal hearing, it will be heard on a date no later than 45 working days after the closing date for submissions. A planning report will be circulated 15 working days prior to the hearing. You are required to provide Council briefs of evidence that you intend to present to support your application 10 working days prior to the hearing.

If a hearing is not required, a planning report will be prepared and sent to you. This report will include a recommendation and where appropriate, conditions of consent. You will be given the opportunity to determine whether you are in agreement with this recommendation and any conditions imposed. If you are not, you will have the right to request a hearing.

Your attention is particularly drawn to Section 36 of the Resource Management Act, which deals with administrative charges payable for the processing of a resource consent. Council's policy is that all costs incurred in relation to processing an application are to be charged to the applicant. It is not possible to define in advance what these costs may be or may be limited to but they could in any event include:

- i) *The cost of staff time which is charged out as per Council's fees and charges schedule.*
- ii) *The cost payable to Council for any hearing including the costs associated with any independent Hearing Commissioner;*
- iii) *The cost of any Specialist Consultant advice which may be sought by the Council irrespective of whether such consultants give evidence at the hearing;*
- iv) *The cost of Iwi Consultation.*
- v) *The costs of any disbursements which will include postage and photocopying;*
- vi) *The cost of any legal advice which may be sought by the Council whether it be prior to the hearing or for legal representation at the hearing, or in connection with the drafting of Council's decision;*
- vii) *If consent is granted, the cost associated with any supervision and monitoring of the consent.*

An account will be rendered to you once your application is determined. This account will include an itemised breakdown of the costs involved and will include an adjustment for the deposit which you have already paid.

If you have any queries please do not hesitate to contact the writer.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Todd Whittaker', written in a cursive style.

Todd Whittaker
Consultant Planner

24 September 2020

LU/0154/20

SP/0082/20

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Dear Sir or Madam

**RESOURCE MANAGEMENT ACT 1991
LIMITED NOTIFICATION OF AN APPLICATION FOR A RESOURCE CONSENT**

The Waipa District Council has received an application for the following resource consent:

Applicant: BBC Technologies Limited and Grass Ventures Limited

Type of consent: Landuse/Subdivision

Proposed activity: Land use application to establish an office and research facility including outdoor growing areas as a rural based industry for BBC Technologies Limited

Subdivision application to establish a new title for the BBC Technologies site and to create a road splay from two existing titles.

Location of site: 35 Lochiel Road and 236 Airport Road, RD 2, Hamilton 3282

We are notifying the application on a limited basis. Limited notification is required by the Resource Management Act 1991 in this case because, having assessed the applications, we decided that you and other parties may be adversely affected by what the applicant proposes. Limited notification means that you and any other notified person can make a submission on the application.

A copy of the full application and Council's Notification Report is available to view at:
<https://www.waipadc.govt.nz/our-services/planning-and-resource-consents/notified-resource-consents>

Please contact Todd Whittaker (todd@planningworks.co.nz) phone 021 676 377 if you have any questions about the application.

If you wish to make a submission on this application you may do so by either sending, delivering or emailing a copy to the Waipa District Council (as per the contact details below) no later than **5pm Thursday 22 October 2020**. The submission must be dated and include the following information:

1. *Your name, postal address, telephone number and fax number (if applicable);*
2. *Details of the application in respect of which you are making the submission including location;*
3. *Whether you support, oppose or are neutral on the application;*
4. *Your submission, with reasons;*
5. *The decision you wish the consent authority to make; and*
6. *Whether you wish to be heard in support of your submission.*

A standard form (Form 13) which may be used for lodging a submission is attached.


A copy of your submission must be served as soon as reasonably practicable on the applicant whose address for service is :

*BBC Technologies
C/- Mitchell Daysh Limited
PO Box 1307
Waikato Mail Centre
Hamilton 3240
Attention: M Chrisp
Email: mark.chrisp@mitchelldaysh.co.nz*

The contact details for Waipa District Council are:

- Waipa District Council, Private Bag 2402, Te Awamutu
101 Bank Street, Te Awamutu 23 Wilson Street, Cambridge
Ph: 07 872 0030 Fax: 872 0033 Ph: 07 823 3800 Fax: 07 823 3820
Email: submissions@waipadc.govt.nz

Yours faithfully



Todd Whittaker
Consultant Planner