

**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

CLOSING LEGAL SUBMISSIONS ON BEHALF OF THE APPLICANT

Dated: 14th December 2020

TOMPKINS | WAKE

Solicitor: Marianne Mackintosh
marianne.mackintosh@tompinkswake.co.nz

Counsel: Marianne Mackintosh
marianne.mackintosh@tompinkswake.co.nz

Westpac House
430 Victoria Street
PO Box 258
DX GP 20031
Hamilton 3240
New Zealand
Ph: (07) 839 4771
Fax: (07) 839 4913
tompinkswake.co.nz

MAY IT PLEASE THE HEARING COMMISSIONER PANEL

1. These closing 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. Counsel presented opening legal submissions and tabled the full set of written submissions at the hearing on 9 December 2020. The position for the Applicant as set out in opening submissions has not changed following the hearing of evidence. However, as indicated to the Hearing Commissioner Panel (“Panel”), a set of amended proposed conditions of consent have since been discussed between Mr Chrisp and Mr Whittaker with a final set being annexed to these written closing submissions.
3. The final proposed conditions are **attached as Annexure 1**. This does not show tracked changes of previous versions of conditions. Instead, these are in plain format with the only remaining point of difference as between Mr Chrisp and Mr Whittaker being clearly highlighted (noise management plan).
4. The purpose of these closing submissions is to respond to the matters which arose during the hearing, including those matters which the Panel Chairperson expressly sought a response in closing. Accordingly, these submissions:
 - (a) Briefly re-visit the question of activity status and as directed by the Panel, sets out the position should the Panel have a contrary view and consider the activity status to be non-complying.

- (b) Address the question of “alternatives”.
- (c) Address the question of “precedent”.
- (d) Address the submitter presentations, where not already considered in the previous sections. This includes the question of effects on traffic.
- (e) Address the remaining issue in contention as between the Applicant and Council regarding proposed conditions.
- (f) Briefly address the late submissions from the Clarks (noting that this was the subject of submissions during the hearing).
- (g) Conclude with a restatement of the Applicant’s position that the consents should be granted, subject to the conditions **attached** as **Annexure 1**.

ACTIVITY STATUS

5. The opening legal submissions discussed this point in detail. The position as stated in opening has not changed. Both Mr Chrisp for the Applicant and Mr Whittaker for Council agree that the activity falls within the definition of “Rural Based Industry” in the Waipa District Plan. There is no other credible planning evidence to the contrary. Mr Furniss also gave evidence which clearly demonstrated the functional and compelling need to locate in the rural zone. His evidence is not challenged or disputed by others.
6. Mr Lester appeared to “cherry pick” the components of the proposed activity to then suggest that the proposed development is an industrial activity, both in his written evidence in chief and in his presentation at the hearing. At the hearing he cited the National Planning Standards (“NPS”) definition of “industrial activity” as supporting his proposition.¹

¹ Supplementary statement of evidence of Tim Lester, 10 December 2020, paragraph 22, <https://www.waipadc.govt.nz/repository/libraries/id:26zg24o7s1cxbyk7hfo7/hierarchy/our-services/planning-and-resource-consents/Limited%20Notified%20Consent/LU015420%20BBC%20Technologies/HEARING/POST%20HEARING%20-%20Submitter%20-%20Supplementary%20evidence%20-%20Tim%20Lester>.

However, Mr Lester ignored other relevant definitions in the NPS. In that regard, the NPS defines “rural industry” as follows:

rural industry means an industry or business undertaken in a rural environment that directly supports, services, or is dependent on primary production.

primary production means:

- a. any aquaculture, agricultural, pastoral, **horticultural**, mining, quarrying or forestry activities;...
- b. ...

[Emphasis added.]

7. Mr Lester also fails to correctly apply the principles of statutory and plan interpretation in reaching his conclusion that the proposal is for an “Industrial Activity”. As stated in opening submissions, the more specific prevails over the general. Other relevant factors for interpretation include the purpose of the provision and context of the plan. In this case, the more specific definition is that of “Rural Based Industry” and when the Application as a whole is considered in the context of that definition, there is no doubt that the appropriate definition is that of “Rural Based Industry”. This point was also made in the evidence of Mr Chrisp. As Mr Chrisp stated in his supplementary evidence, the definition of Rural Based Industry in the Waipa District Plan includes activities which would also fall within the definition of an Industrial Activity, such as a Meat Processing Plan/Abattoir. However, those activities and the BBC Technologies proposal are more specifically defined as Rural Based Industry because of the connection with rural production activities. It is counter intuitive to suggest that these activities should be considered “Industrial Activities” which reflects an incorrect interpretation of the Waipa District Plan.
8. Mr Lester also appeared to make assumptions or statements about the business model for the proposal.² He cited excerpts from the BBC Technologies website and did not consider the detailed evidence of Mr

² Supplementary statement of evidence of Tim Lester, 10 December 2020, paragraphs 32 to 36.

Furniss, the CEO of BBC Technologies in its assessment. With respect, Mr Lester is not qualified to give evidence on that point. To characterise the horticultural component of the Application as “convenient” verges on insulting to BBC Technologies.

9. Mr Lester also erroneously stated in his evidence that the “R&D” component of the proposed development is “ancillary”.³ This is incorrect. As Mr Furniss explained, over 70% of the proposed development (staff numbers), will be part of the R&D component.
10. Mr Lester also stated that “Mr Annegarn will be economically disadvantaged through the loss of value to his land if the proposal were to proceed”.⁴ Such matters are irrelevant in an assessment under section 104.
11. In short, Mr Lester’s understanding of the BBC Technologies proposal is incorrect, and his analysis is flawed. His evidence carries very little weight, if any.
12. Mr Davies for the NZ National Fieldays Society Incorporated (“NZFDS”) made submissions (which were more akin to planning evidence and which I address later in closing), also challenging activity status. In my submission, this material also neglected to consider the components of the activity, its integrated nature, and its direct connection with the rural zone in the analysis. Relevantly, NZFDS did not present any planning evidence for the purposes of the hearing.
13. In any event, these “submissions” were outside the scope of the NZFDS submission. As stated at the hearing, paragraphs 7 to 23 of the submissions should be disregarded by the Panel.

³ Supplementary statement of evidence of Tim Lester, 10 December 2020, paragraph 52.

⁴ Supplementary statement of evidence of Tim Lester, 10 December 2020, paragraph 55.

Alternative interpretation

14. The proposition that the proposed activity should be classed as a non-complying activity is not accepted and, in my submission, is incorrect. Nevertheless, the Chairman of the Panel sought comment on what the alternative analysis would be if the Panel were to conclude that the activity is non-complying.
15. Both Mr Chrisp and Mr Whittaker stated in their respective evidence that if the proposal were considered a non-complying activity that it would pass *both* “gateway” tests under section 104D. As the Panel knows, only one gateway test must be satisfied to pass the “gateway” test and be assessed under section 104.
16. Both Mr Chrisp and Mr Whittaker reiterated their view in response to questioning by the Panel that the proposal would pass both “gateways” and fall to be considered under section 104. Mr Whittaker noted that the range of objectives and policies to be considered may be wider, given that the “industrial activity” definition may require other provisions to be evaluated. Nevertheless, the outcome of the assessment under section 104 would be the same – that consent may be granted, subject to conditions.
17. Turning to the “gateway” of section 104D, the “effects” limb requires an assessment of effects to determine whether these are “more than minor”. Conditions to avoid, remedy, or mitigate effects are relevant in that assessment. Mr Chrisp (and Mr Whittaker) consider the effects of the activity will be minor (or less than minor), in the context of the “gateway” test.
18. The second limb of the “gateway” is whether the activity is contrary to the objectives and policies of the Waipa District Plan. In doing so, the decision maker must have regard to the relevant objectives and policies and consider whether the Application is contrary with the objectives and

policies of the District Plan when they are considered in the round.⁵ Both Mr Chrisp and Mr Whittaker confirmed at the hearing that they consider the application to not be contrary to the objectives and policies. Both planners unequivocally stated that the proposal passed both gateways.

19. Accordingly, even if the Application were to be treated as a non-complying activity, it would fall to be considered under section 104 and may be granted consent subject to conditions. There is no credible planning evidence to the contrary.

ALTERNATIVES

20. Mr Lester and the Clarks imply that the proposal could or should locate on an alternative site in the Industrial Zone. In addition to the comments in opening legal submissions on the question of “splitting” the components of the activity, the question of site selection is not a matter for the Panel in determining the application.
21. It is only in circumstances where there may be significant adverse effects arising from an activity that it is incumbent on an applicant to consider alternatives (Schedule 4, cl 6(1)(a) of the RMA).⁶ Even then, the requirement does not extend to an analysis like that for a designation. Consideration of alternatives is irrelevant in the context of this Application.

PRECEDENT EFFECT AND PLAN INTEGRITY

22. Mr Lester and the Clarks raised concerns about precedent effects and integrity of the district plan if the consent is granted. In my submission, both are irrelevant for determining the Application.

⁵ *Blueskin Bay Forest heights Ltd v Dunedin City Council* [2010] NZEnvC 117 at [22].

⁶ For example, in *Progressive Enterprises Ltd v North Shore CC* [2009] NZRMA 386 (EnvC), the Court found that in the absence of credible evidence of any significant adverse effect on the environment arising from the proposal, the consideration of alternative was irrelevant.

23. There is no express reference in the RMA to integrity of planning documents, precedent, or public confidence in a district plan. (Plan integrity and precedent are generally considered under section 104(1)(c) as these are not effects “on the environment”.⁷)

24. As stated by the Court in *Protect Piha*⁸:

[...] These are all Court-made concepts and their application in any given case is not mandatory.

25. These concepts might be relevant in appropriate cases, to ensure a principled approach to the consideration of objectives and policies (s104(1)(b)), for example, where an activity is classed as non-complying. In *Protect Piha*, the Court stated that the need for such application is less necessary where the plan objectives, policies and rules are effects based and, relevantly in the current context, where the proposal does not generate adverse effects which are more than minor.⁹

26. In this case the Application is for a discretionary activity which is clearly enabled and anticipated in the Waipa District Plan in the Rural Zone. Furthermore, the effects are not “more than minor”. Accordingly, grant of consent cannot harm the plan’s integrity in the context of this Application.¹⁰ In any event, the question of confidence in the administration of the district plan cannot be used as a reason to decline consent.¹¹ In my submission, in the context of this Application, the question of confidence in the administration of a district plan is not in play.

⁷ For example, *Dye v Auckland RC* [2002] 1 NZLR 337 and *McLauchlan v Hutt CC EnvC W062/08*.

⁸ *Protect Piha Heritage Society Inc v Auckland RC* A015/09, at paragraph [122].

⁹ See *Protect Piha Heritage Society Inc v Auckland RC* A015/09, [122] – [125].

¹⁰ For example, *McLauchlan v Hutt CC EnvC W062/08* which concerned a discretionary activity and the Court observed that a discretionary activity will not, of itself, be contrary to or incompatible with the plan, depending on the degree to which it is able to comply with relevant standards.

¹¹ See *Monad Leisuretime Ltd v Queenstown Lakes DC* W116/95 where the Court stated that “Only if a consent authority effectively ignores policies and objectives and allows an activity with a major effect which is clearly contrary to those objectives and policies will the confidence in the plan be “jolted”.” This was a decision on a non-complying activity, which can be contrasted to the current Application.

27. Finally, as the Panel will no doubt be aware, granting a consent does not have a precedent effect in the strict sense. No two applications are ever likely to be the same, particularly in the case of the current Application. It is a unique development with effects which are contemplated in the Waipa District Plan.
28. It follows that both precedent and district plan integrity are not relevant considerations for the Panel when determining the Application.

SUBMITTER PRESENTATIONS

Waka Kotahi NZ Transport Agency

29. Waka Kotahi does not oppose the Applications and is satisfied that the effects on the State Highway will be appropriately mitigated through the imposition of suitable conditions.

Waikato Regional Airport Limited (“WRAL”)

30. Based on its presentation at the hearing, WRAL’s concerns about the Application are part of a broader issue it has in relation to Waka Kotahi and the management of traffic effects on the State Highway network on a wider scale than that of the BBC Technologies proposal. In that regard, BBC Technologies cannot be held responsible for effects which go beyond that which it will generate. As Mr Chrisp reiterated in his summary of evidence at the outset of the hearing, the Applicant will carry out extensive roading upgrades which go beyond mitigating its own effects.

New Zealand Fieldays Society Incorporated (“NZFDS”)

31. Putting aside the out-of-scope submissions made for NZFDS, counsel understands the key issue for NZFDS is the effect the proposed activity may have on its own traffic management for events at Mystery Creek. With respect, NZFDS is not the road controlling authority and it does not have exclusive use of the roading network in the vicinity of the Mystery Creek site. No traffic evidence was presented by NZFDS which disputes

the evidence of Mr Black or Mr Hudson. Again, the underlying issue appears to be concerns about the broader road network and Waka Kotahi's role in managing the same. That is not a matter for the Applicant to resolve, nor is it a matter that the Panel can resolve as part of its determination of this Application.

Mr Annegarn

32. The matters raised by Mr Lester for Mr Annegarn are addressed in earlier submissions. In short, Mr Lester and Mr Annegarn did not present any evidence of adverse effects which challenges the evidence of Mr Chrisp or Mr Whittaker. All potential effects are either avoided, remedied, or mitigated. The economic gains for the Applicant are not a relevant consideration for the Panel in making its determination.

The Clarks

33. The question of headlight disturbance was raised in the hearing. In any event, there will be no trucks entering or exiting at night¹² and at full operating capacity there will be 67 employees on site leaving at night.¹³ All potential on-site light disturbance will be buffered by the proposed earth bund and landscape planting. The planning evidence supports the conclusion that the effect of any vehicle headlights leaving the Site at night will be transitory and therefore less than minor/negligible.¹⁴
34. When asked by the Panel whether he wanted to take up the offer by the Applicant to carry out landscaping on his property, Mr Craig Clark responded in the negative. He advised that he needed all his land for a farming activity.¹⁵ Regardless, the proposed suite of conditions, including the earth bund and landscaping on the Site, will address all the effects on the Clarks. At the hearing, Mr Whittaker agreed that the proposed

¹² Confirmed by Mr Furniss in response to questions from the Panel.

¹³ Evidence of Mr Furniss, dated 24 November 2020, paragraph [26(c)].

¹⁴ For example, Mr Chrisp's explanation of where the entrance to the Site will be, relative to the Clarks' house and layout of rooms.

¹⁵ As noted by Counsel during the hearing.

conditions, including the earth bund and landscaping on the Site, is appropriate to mitigate the effects of the proposal. However, counsel understands that Mr Whittaker considers that planting on the Clark property would provide additional (albeit unnecessary) mitigation.

35. Accordingly, and as discussed during the hearing, the draft condition which left open the possibility for planting to be carried out on the Clark property should be deleted. This has been deleted in the final set of conditions attached as Annexure 1 to these submissions.
36. The offer to carry out landscape planting on the Clark property remains open to the Clarks for the time being, subject to a written side agreement. However, this offer by the Applicant is not open ended and will be withdrawn if the Clarks have not advised their position to the Applicant by the end of January 2021. These matters are not for the Panel to be concerned with in any event, as any such arrangement will be private as between the Clarks and the Applicant.
37. Finally, counsel for the Clarks made legal submissions on activity status. For completeness, the Clarks' submissions on the Application did not raise the question of activity status. Accordingly, Mr Roger Clarks' submissions address matters outside the scope of the submission on that point.

Other matters

38. The Panel will no doubt be aware of the requirement to base findings of fact on the evidence before it. In that regard, the Applicant's evidence is comprehensive and has responded to all issues raised by both the section 42A author and submitters. There is no traffic or transportation evidence which challenges Mr Black's evidence. Accordingly, his evidence should be accepted.

CONDITIONS

39. Mr Chrisp and Mr Whittaker conferred on draft conditions following the adjournment of the hearing on the 9th of December. The only outstanding issue is the condition supported by Mr Whittaker to require a noise management plan ("NMP"). This is listed as condition 29 in Annexure 1 and highlighted in yellow.
40. In my submission, condition 29 is unnecessary and is disproportionate to the effects which it seeks to address. Furthermore, reference to section 16 of the RMA is irrelevant. There is no evidence to suggest such noise could be generated by the activity. Should the Panel impose a condition requiring a NMP to be prepared, reference to section 16 should be deleted.
41. Condition 28 clearly states the standard which must be met by the consent holder. The Marshall Day report confirms that this standard can be met by the proposed activity. It is up to the consent holder to ensure that it complies with that standard. Condition 29 adds an unnecessary burden on the consent holder which is unjustified in the context of the Application. It should be deleted.
42. For completeness, counsel notes there is no evidence in support of a condition to upgrade the entrance to 326 Airport Road. There is no effect arising from the Application which would trigger this requirement. Accordingly, it would be *ultra vires* to impose a condition to that effect.

CLARK LATE SUBMISSIONS

43. Nothing presented at the hearing has changed the position for the Applicant as stated at the commencement of the hearing.
44. All the concerns raised by the Clarks have been comprehensively addressed in evidence for the Applicant and by Mr Whittaker. All effects will be mitigated through the proposed conditions of consent.

Accordingly, there is no “natural justice” or other benefit to be gained by allowing the submission. Conversely, allowing the submission will create risk to the Applicant of an appeal by the Clarks. Regardless of whether their counsel indicated that such an appeal was unlikely, the risk remains.

45. To date, the Applicant’s offer to enter into a side agreement with the Clarks has not been taken up by the Clarks, despite the Applicant remaining willing to do so. Such works would be additional mitigation and are not necessary to mitigate the effects of the BBC Technologies’ proposed development. In short, the submissions should not be accepted.

CONCLUSION

46. All actual and potential effects of the proposal have been addressed through proposed conditions of consent. It is appropriate and consistent with the purpose of the RMA for the Commissioners to grant consent for the Application subject to those conditions. There is no credible evidence in front of the Panel for it to determine otherwise.

Dated this 14th day of December 2020

A handwritten signature in blue ink, appearing to read 'M. Mackintosh', is written over a horizontal line.

M Mackintosh

Counsel for BBC Technologies Limited and Grass Ventures Limited