

Before the Queenstown Lakes District Council

In the Matter of the Resource Management Act 1991

And

In the Matter of the Queenstown Lakes Proposed District Plan

**Chapter 3 (Strategic Direction) and Chapter 6
(Landscape)**

**Legal Submissions for Trojan Helmet
Limited (Submitter 443, 452 and 1157)**

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Introduction

1. These legal submissions are filed on behalf of Trojan Helmet Limited (**Trojan Helmet**) in respect of its submissions on Chapter 3 (Strategic Direction) and Chapter 6 (Landscape) of the Queenstown Lakes Proposed District Plan (**Proposed Plan**).
2. Trojan Helmet owns approximately 190ha of land located directly southwest of Arrowtown, which extends between Arrowtown-Lake Hayes Road in the west to McDonnell Road in the east, and Hogans Gully Road in the south. The land includes approximately 162ha of golf course; an approximately 8.4ha block which fronts McDonnell Road and currently contains a driving range associated with the golf course, and an approximately 20ha block adjacent to the intersection of Hogans Gully and the Arrowtown Lakes Hayes Roads, which is currently grazed.
3. The zoning of the land is Rural General in the Operative District Plan and Rural Landscape (RLC) in the Proposed Plan.
4. Trojan Helmet has made submissions on the Proposed Plan seeking its land be rezoned as follows:
 - (a) For the land comprising the golf course it seeks a bespoke resort style zoning (the Hills Resort Zone) which recognises and provides for the existing golf course and its associated activities, including world class golfing events and tournaments; and for related commercial activities and workers' accommodation, along with the establishment of a limited number of well designed and sensitively located dwellings, subject to compliance with a Structure Plan which addresses activity and building location, and landscaping, amongst other things.
 - (b) For the McDonnell and Hogan's Gully land it seeks Rural-Lifestyle zonings, which generally adopt the provisions of that zone as contained in the Proposed Plan, subject a number of bespoke additional requirements in relation to the location of lot boundaries, landscaping, setbacks and building design.
5. These rezoning requests will be addressed at later hearings.

6. Separate to its rezoning requests, through its submissions on Chapters 3 (Strategic Direction) and 6 (Landscape), Trojan Helmet is concerned to ensure that the Proposed Plan strikes an appropriate balance maintaining landscape values, while accepting the inevitability of growth within the District.
7. In addition, that the Proposed Plan appropriately recognises and provides for activities other than traditional farming uses, which may require and be appropriate for a rural location (for example golf courses and rural lifestyle living).
8. Trojan Helmet considers the Proposed Plan is currently weighted too far in the direction of protecting all landscapes, which may frustrate legitimate development proposals, and fails to recognise that lawfully established activities currently exist and operate within these landscapes.
9. Further, it over emphasises the importance of traditional farming activities, when there are very few farmers within the Wakatipu Basin who derive their incomes solely from farming, and when there are other activities that require a rural location (e.g. golf courses and rural lifestyle uses) which may better provide for the economic wellbeing of landowners and the wider community.

The Hills – An Overview

10. Formerly a deer farm, the Hills Golf has been developed over the past decade into a course of international acclaim. The championship 18 hole golf course comprises varied terrain with clusters of exotic and native trees and shrubs, areas of tussock grassland, sand bunkers and small ponds interspersed between the holes. The course also contains an award winning clubhouse and an array of sculptures made by local and international artists.
11. The site has a manicured character of high aesthetic quality and designed and maintained to the highest standards. Numerous earthworks have occurred as part of the establishment of the golf course, and have shaped its landscape character. However the overall appearance of the property is appropriate for and complements the rural/semi-rural landscape within which it is located.

12. The golf course was established pursuant to resource consents granted in or around 2005, and opened in 2007 to host the New Zealand Open. Since then it has hosted the New Zealand Open NZ PGA Championship numerous times.
13. These tournaments are large in magnitude and bring a significant number of visitors to the District, as well as generating significant employment opportunities for their duration, particularly in the accommodation, food and beverage and transportation sectors.
14. The hosting of these events therefore brings significant economic benefits to the Queenstown Lakes District for the duration of the tournament, along with national and international media exposure for the District and its tourism offerings.
15. The media coverage of these events and the showcasing of the local environment has contributed to putting New Zealand 'on the map' in terms of golfing tourism.
16. The championship golf course and the architecture of the club house set a benchmark for design and for buildings to be integrated into the landscape.
17. Despite its current and proposed rural zoning, and its sensitive design, the golf course does not exhibit rural landscape values relating to productive agricultural land uses.
18. Notwithstanding, the golf course and its associated activities and buildings demonstrate that sensitively designed and carefully managed development can be appropriate in and enhance the rural landscape, and that appropriate land use within the rural zones is much more diverse than traditional farming and productive uses.
19. Further, it demonstrates that non traditional rural uses can be significantly enabling of people and of communities' economic and social well being.

Trojan Helmet's Submission on Proposed Chapter 3 and 6

20. Through its submissions on the Proposed Plan, Trojan Helmet is concerned to ensure:

- (a) That appropriate recognition is afforded to and provision made for non-traditional/farming¹ land use in rural landscapes, noting there are numerous activities (e.g. golf courses) which have been legitimately established in and have shaped these landscapes, and which for functional and other reasons require a rural location;
- (b) That in rural landscapes, subdivision, use and development is not precluded, provided any adverse effects, particularly on landscape character and visual amenity, are appropriately avoided, remedied or mitigated, noting that unlike ONLs and ONFs, *protection* of such landscapes is not mandated by the Act, and there are parts of the rural landscape that can absorb further development;
- (c) That the wording of the Proposed Plan is carefully considered, given words mean what they say;
- (d) That clarification is provided that Chapter 6 only applies to the Rural Zone.

21. These points are further addressed later in these submissions.

Statutory Framework

- 22. When considering Trojan Helmet's and other submissions, and the section 42A Reports, the Panel must do so within the framework of the Act, as detailed below.
- 23. The purpose of the preparation, implementation, and administration of district plans is to assist councils to carry out their functions *in order to achieve the purpose of the Act.*²

Act's Purpose

- 24. The purpose of the RMA is, under section 5 of the Act, to promote the sustainable management³ of natural and physical resources. Under section 6, identified matters of national importance⁴ must be recognised

¹ 'Traditional' uses being farming and agriculture, and other productive uses, for example.

² Section 72 of the Act.

³ As that phrase is defined in s 5(2) of the RMA.

⁴ Relating to the natural character of the coastal environment, the protection of outstanding natural features and landscapes, significant indigenous vegetation and habitats, the

and provided and, under section 7, particular regard is to be had to the 'other matters' listed there which include kaitiakitanga, efficiency, amenity values and ecosystems. Under section 8, the principles of the Treaty of Waitangi are to be taken into account.

25. Section 5 is a guiding principle which is intended to be followed by those performing functions under the RMA, rather than a prescriptive provision subject to literal interpretation.⁵
26. In the sequence of '*avoiding, remedying or mitigating*' under section 5(2)(c):⁶
 - (a) '*avoiding*' means '*not allowing*' or '*preventing the occurrence of*';
 - (b) '*remedying*' and '*mitigating*' indicate that developments which might have adverse effects on particular sites can nonetheless be permitted if those effects are mitigated and/or remedied.
 - (c) The word '*while*' in section 5(2) means 'at the same time as'.
27. Section 5 is to be read as an integrated whole. The wellbeing of people and communities is to be enabled at the same time as the matters in section 5(2) are achieved.⁷

Section 31

28. Section 31 sets out councils' functions for the purpose of giving effect to the RMA. Importantly, these include (*inter alia*):
 - (a) "*the establishment, implementation, and review of objectives, policies and methods, to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district*"⁸; and

maintenance and enhancement of public access to the coastal marine area, lakes and rivers, the relationship of Maori and the culture and traditions with their ancestral lands, waters, sites, waahitapu and other taonga and the protection of historic heritage and customary rights.

⁵ *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 (**King Salmon**).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Section 31(1)(a).

- (b) “the control of any actual or potential effects of the use, development, or protection of land”⁹.

Sections 32 and 32AA

29. Section 32 sets out the legal framework within which a council (and thus the Hearings Panel) must consider the submissions, evidence and reports before it in relation to a proposed plan, in conjunction with the matters specified in section 74.
30. Under section 32, an evaluation report on a proposed plan must examine whether proposed objectives are the most appropriate way to achieve the purpose of the Act, and whether the provisions are the most appropriate way of achieving the objectives. To do that, a council must identify other reasonably practicable options to and assess the efficiency and effectiveness of the proposed provisions through identifying the benefits and costs of the environmental, economic, social and cultural effects, including opportunities for economic growth and employment.
31. Section 32AA requires a further evaluation to be undertaken for any changes made or proposed to a proposed plan since the section 32 evaluation was completed. This further evaluation must either be published as a separate report, or referred to in the decision making record in sufficient detail to demonstrate it was carried out.

District Plan Preparation (Sections 74 and 75)

32. A council’s (and the Hearing Panel’s) decision on a proposed plan must be in accordance with (relevantly):¹⁰
- (a) the council’s functions under section 31; and
 - (b) the provisions of Part 2; and
 - (c) its obligation to prepare and have regard to an evaluation report prepared in accordance with section 32; and
 - (d) any regulations.

⁹ Section 31(1)(b).

¹⁰ Section 74(1) of the Act.

33. Additionally, when preparing or changing a district plan a council *shall have regard* to the instruments listed in section 74, which include any proposed regional policy statement, proposed regional plan and any management plans and strategies prepared under other Acts. It *must take into account* any relevant planning document recognised by an iwi authority. It must also *have particular regard* to an evaluation report prepared under section 32.
34. Under s 75, a council *must give effect to* any national policy statement, any New Zealand coastal policy statement and any regional policy statement, and *must not be inconsistent with* a water conservation order or a regional plan (for any matter specified in subsection 30(1)).
35. Finally, under section 75(1), district plan policies must state the objectives for the district plan; the policies to *implement* the objectives, and the rules (if any) to *implement* the policies.
36. The meaning of the terms 'have regard/particular regard to', 'take into account', 'not be inconsistent with' and 'give effect to' is set out in **Appendix A**.

Case Law

37. The Environment Court gave a comprehensive summary of the mandatory requirements for the preparation of district plans in *Long Bay-Okura v North Shore City Council*¹¹. Subsequent cases have updated the *Long Bay* summary following amendments to the RMA in 2005 and 2009, one of the more recent and comprehensive being the decision in *Colonial Vineyard Ltd v Marlborough District Council*¹². However, since that decision section 32 has been materially amended again¹³. The 2013 Amendment changed the requirements for and implications of section 32 evaluations, but did not change the statutory relationship between the relevant higher order documents (discussed in the preceding paragraphs).
38. An updated version of the *Long Bay/Colonial Vineyard* test, incorporating the 2013 Amendments, is set out in **Appendix B**.

¹¹ A078/08.

¹² [2014] NZEnvC 55.

¹³ By section 70 of the Resource Management Amendment Act 2013, which came into force in December 2013.

39. Further principles relevant to the implementation of section 32 as set out in the Act and derived from the case law include the following:
- (a) The proposed plan should achieve integrated management of the effects of the use, development and protection of land and associated natural and physical resources of the district.¹⁴
 - (b) The decision maker does not start with any particular presumption as to the appropriate zone, rule, policy or objective.¹⁵
 - (c) No onus lies with a submitter to establish that the subject provisions should be deleted, nor is there a presumption that the provisions of a proposed plan are correct or appropriate. The proceedings are more in the nature of an inquiry into the merits in accordance with the statutory objectives and existing provisions of policy statements and plans;¹⁶
 - (d) The decision maker's task is to seek to obtain the optimum planning solution within the scope of the matters before it based on an evaluation of the totality of the evidence given at the hearing, without imposing a burden of proof on any party.¹⁷
 - (e) The provisions in all plans do not always fit neatly together and where that is the case consideration should be had through the filter of Part 2 of the Act.¹⁸
 - (f) Section 32 requires a value judgment as to what, on balance, is the 'most appropriate' when measured against the relevant objectives. 'Appropriate' means 'suitable'; there is no need to place any gloss upon that word by incorporating that is to be superior.¹⁹

¹⁴ Section 31(1)(a).

¹⁵ *Eldamos Investments Limited v Gisborne District Council* W47/05, affirmed by the High Court in *Gisborne District Council v Eldamos Investments Ltd*, CIV-2005-548-1241, Harrison J, High Court, Gisborne, 26/10/2005. See also *Sloan and Ors v Christchurch City Council* C3/2008; *Briggs v Christchurch City Council* C45/08, and *Land Equity Group v Napier City Council* W25/08.

¹⁶ *Hibbit v Auckland City Council* 39/96, [1996] NZRMA 529 at 533.

¹⁷ *Eldamos* paragraph [129];

¹⁸ *Ibid*, paragraph [30]. This is not inconsistent with *King Salmon*.

¹⁹ *Rational Transport Society Inc v NZTA* [2012] NZRMW 298 (HC) at [45].

- (g) The words ‘most appropriate’ in section 32 allow ample room for the Council (or its officers) to report that it considers one approach ‘appropriate’ and for the decision maker to take an entirely different view, on the basis of the accepted evidence and other information it has received.²⁰
- (h) Section 32 is there primarily to ensure that any restrictions on the complete freedom to develop are justified rather than the converse. To put it more succinctly, it is the ‘noes’ in the plan which must be justified, not the ‘ayes’.²¹ This accords with the Act’s enabling purpose.
40. More generally, the Supreme Court’s decision in *King Salmon*²² reinforces the following general principles in relation to the preparation and change of district plans:
- (a) The hierarchy of planning documents required under the RMA and the importance of the higher level documents in directing those that must follow them;
- (b) That planning documents are intentional documents and mean what they say;
- (c) That language is important, and wording (and differences in wording) does matter;
- (d) The need to be precise and careful with words, to create certainty of meaning;
- (e) That policies, even in higher level documents, can be strong and directive, and then need to be implemented as such;
- (f) That reconciling the potential for conflicts between different provisions of a planning document is important.
41. In respect of Part 2 of the Act, the *King Salmon* case has clarified:

²⁰ See the Independent Hearings Panel’s decision on the Strategic Directions Chapter of Proposed Christchurch Replacement Plan (dated 26 February 2015) at paragraph [67].

²¹ *Hodge v CCC C1A/96*, at page 22.

²² *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38.

- (a) While environmental protection is a core element of sustainable management, no one factor of the '*use development and protection*' of natural and physical resources in section 5 creates a general veto;
 - (b) While environmental bottom lines may be set to protect particular environments from adverse effects, that will depend on a case by case assessment as to what achieves the sustainable management purpose of the Act;
 - (c) Sections 6, 7 and 8 'supplement' section 5 by further elaborating on particular obligations on those administering the Act;
 - (d) 'Inappropriateness' in sections 6(a) and (b) should be assessed by reference to what it is that is sought to be protected or preserved.
42. The more particular implications of the *King Salmon* case for district plan formulation include:
- (a) More directive objectives and policies carry greater weight than those expressed in less direct terms;
 - (b) Directive objectives and policies to avoid adverse effects should usually be accompanied by restrictive activity status, such as non-complying or prohibited, (although minor or transitory effects may be permissible);
 - (c) When considering higher order documents (such as an RPS) do not refer to Part 2 or undertake a 'balancing' or 'in the round' interpretation of its provisions unless the policy statement does not 'cover the field' in relation to the issues being addressed, or its wording is uncertain or conflicting. Put another way, to the extent the policies of a higher order document (e.g. an RPS) are directive they must be given effect to by a district plan, unless there is a conflict in the higher order document, and only then can the decision maker refer to Part 2.

Application of Legal Principles to Trojan Helmet's Submissions

Chapter 3 – Non Traditional Rural Land Uses are Recognised and Provided For in Rural Landscapes

43. The Strategic Directions chapter of the Proposed Plan introduces goals, objectives and policies with the purpose of setting an appropriate resource management direction for the District.²³ It '*sets the scene*' for the whole Proposed Plan and seeks to provide a high level policy framework that responds to all the major resource management issues of the District²⁴. It is intended to sit over Chapters 4 and 6, and over the Proposed Plan as a whole,²⁵ and to provide the strategic basis for subsequent chapters and rules.²⁶ Its objectives and policies will be utilised in assessing resource consent applications.²⁷
44. It is therefore of utmost importance that the policy framework adopted in Chapter 3 is robust, sound, and properly addresses the key resource management issues of the District, given it provides the strategic basis for the subsequent (lower order) chapters and rules.
45. Noting the above, Trojan Helmet's submission is that the Proposed Plan overemphasises the importance of farming activities at this strategic level. Farming is one method for utilising rural resources, but there are many examples of non-traditional but legitimately established activities which are based in and require a rural location, for functional and other reasons.²⁸ In some instances, these uses have shaped the rural landscape and are a significant part of its rural character (e.g. golf courses).
46. These activities, many of which are associated with tourism, tend to be significant employers in and/or drawcards for the District, and contribute to its attraction for tourists. They are therefore enabling of people and communities' economic and social well-being, and accordingly, should be

²³ Section 32 Evaluation report, Strategic Direction, page 3.

²⁴ Section 42A Officer's Report, Chapter 3 and 4, 19 February 2015, paragraph 1.1

²⁵ Ibid, para 8.4.

²⁶ Ibid, para 8.5.

²⁷ Ibid.

²⁸ See for example, those listed at paragraph 2.6 of Jeff Brown's evidence dated 29 February 2016.

recognised and provided for the in the higher order objective and policies of the Proposed Pan.

47. The section 42A Reporting Officer addresses Trojan Helmet's submission in part²⁹ at paragraph 12.108 of the Report³⁰ and states that to make broader reference to other non-farming land uses which locate in the rural zone and are part of rural character is potentially a '*slippery slope*,' and that these activities do not have the same fundamental connection (both historic and current) to the landscape and its character that agricultural land uses do.
48. This response misses the point of the submission. It fails to acknowledge that, irrespective of any historic connection, there are, as a fact, numerous non-traditional land uses within rural landscapes (the Wakatipu Basin in particular) which have legitimately established and which should at least be recognised, if not provided for, in the Proposed Plan. By ignoring these land uses (as Proposed Chapter 6 presently does) they will not cease to exist, but people and communities may be disabled, noting that these non-traditional rural land uses sustain many rural landowners' economic wellbeing, and have wider benefits in terms of tourism and employment. These costs have not been assessed or quantified in the Council's evidence or section 42A reports.³¹
49. During the presentation of her evidence, Dr Read was questioned by the Panel as to the extent and location of traditional farming uses within the District. She identified a number of large farms to illustrate that farming remains a predominant land use in the District's rural landscapes, however, all of the farms identified by Dr Read comprised ONLs or ONFs; she did not identify any current farming uses within the Wakatipu Basin's lower lying areas/valleys or the Proposed RLC zone. This demonstrates that the predominance of farming and other traditional land uses within the Wakatipu Basin's rural landscapes (as opposed to its ONLs and ONFs) is overstated.

²⁹Specifically its submission on Proposed Objective 3.2.5.5 and its attendant policies

³⁰Dated 19 February, report addressing Chapter 3 and 4 of the Proposed Pan.

³¹In fact, there appears to be no section 32(2) assessment for any of the Proposed Plan's provisions, which is a significant omission from the section 32 evaluation.

50. In legal submissions Mr Winchester explained³² that the Landscape Chapter applies not only to Wakatipu Basin, but across the entire District, and posited that the circumstances of the local context can be applied through specific development applications (i.e. resource consents), in lieu of specific policy recognition. However, this overlooks or fails to take account of the fact that such applications will likely be assessed against the very objectives and policies that do not recognise or provide for them, but which instead promote farming and other traditional rural land uses. Resource consents non-traditional rural uses will be difficult to obtain against this policy framework. The approach advocated by Mr Winchester may therefore come at significant cost to applicants, and is inefficient. These costs have not been considered or assessed.
51. Trojan Helmet's planning witness, Mr Brown elaborates on these issues, and also addresses and evaluates the changes required to Proposed Chapter 3 to appropriately recognise and provide for non traditional land uses in rural areas.
52. Trojan Helmet's submission is supported by:
- (a) Section 7(b) of the Act which requires particular regard to be had to the efficient use and development of natural and physical resources, and section 5, in that non traditional rural land uses may equally or better provide for the economic wellbeing of landowners and the wider community, particularly given that the long term economic opportunities for farming are uncertain in many parts of the District.³³
 - (b) The Operative and Proposed Regional Policy Statements for Otago (**ORPS** and **PRPS**). Specifically:
 - (i) ORPS, Chapter 5, Land, Policy 5.5.4 which must be given effect to³⁴, and which is "*to promote the diversification and use of Otago's land resource to achieve sustainable land use and management systems for future generations*". The explanation and principal reasons for adopting' the policy

³² At paragraph 6.37.

³³ See also, Jeff Brown's evidence, paragraph 2.4.

³⁴ Section 75 RMA.

state: “*While the existing primary productive use of Otago’s land resource is an important component of Otago’s economy, **promoting and encouraging a diversification of use will assist in the development of sustainable systems to ensure that the needs of future generations are met***”; and

- (ii) PRPS, Policy 4.3.1 ‘Managing for rural activities’, to which regard must be had,³⁵ and which seeks to “*manage activities in rural areas, to support the regional’s economy and communities, by ...(e) **Providing for other activities that have a functional need to locate in rural areas, including tourism and recreational activities that are of a nature and scale compatible with rural activities.***” The methods stated to implement the policy include ‘*city and district plans.*’

(emphasis added)

Chapter 6 – Focus on managing effects in rather than protecting rural landscapes

53. Trojan Helmet’s submission does not expressly address, but nor does it challenge, the appropriateness of *protecting* ONLs and ONFs from *inappropriate* subdivision, use and development. Section 6(b) of the Act mandates such protection as a matter of national importance.
54. Lesser landscapes (i.e. landscapes that are not ONLs or ONFs), may exhibit other important characteristics and values which may also warrant recognition in a district plan, by virtue of the fact they are section 7 matters to which particular regard must be had.³⁶
55. Trojan Helmet acknowledges that the District’s rural landscapes that are not ONLs or ONFs may, in some instances, be considered as landscapes to which particular regard is to be had under section 7(b), (c), (d), (f), and/or (g). However, unlike section 6(b), which requires protection, section

³⁵ Section 74 RMA.

³⁶ S7 (b), (c), (d), (f), (g). See *Wakatipu Environmental Soc Inc v QLDC* [2000] NZRMA 59

7 does not direct any particular management approach for these landscapes.

56. Rather, as noted by the Court in *WESI v QLDC*³⁷ an important distinction between section 6 and section 7 landscapes is that for section 7 landscapes the Act does not necessarily protect the status quo. Instead, in such landscapes:

*“There is no automatic preference for introduced grasses over pine forest. **Nor should it be assumed (on landscape grounds) that existing rural uses are preferable in sustainable management terms to subdivision for lifestyle blocks** which could include restoration or indigenous bush, grasses or wetlands, especially if predator controls are introduced. Just to show how careful one has to be not to be inflexible about these issues we raise the questions whether it is possible that **a degree of subdivision into lifestyle blocks might significantly increase the overall naturalness of a landscape** (and incidentally reduce non-point source pollution of waters from faecal coliforms, giardia etc).”³⁸*

(emphasis added)

57. Further:

*“...just because findings are made about the national importance or section 7 importance of some landscapes does not mean that development in those areas is inappropriate”.*³⁹

58. Therefore, while the section 6 concepts of landscape values and section 7 visual amenity values can overlap, the Act addresses them differently and they should not be conflated.⁴⁰

59. In seeking to ‘protect’ all rural landscapes, including those recognised under section 7, from ‘inappropriate’ subdivision and development⁴¹ that is precisely what Chapter 6 of the Proposed Plan does; it conflates section 6 and section 7 landscapes and adopts the same management approach for both, when that is not mandated by the Act or appropriate in the circumstances.

³⁷ [2000] NZRMA 59, paragraph 91.

³⁸ Ibid.

³⁹ Ibid, paragraph 104.

⁴⁰ *Calveley v Kaipara DC* [2014] NZEnvC 182.

⁴¹ See for example Proposed Objective 6.3.1

60. A more appropriate approach to managing the District's landscapes is that stated in *WESI*. Adopting this for Chapter 6 of the Proposed Plan requires:
- (a) Section 6 landscapes (i.e. ONLs and ONFs) to be protected from inappropriate use and development, although that does not mean that all use and development is inappropriate;
 - (b) For landscapes that are not ONLs or ONFs, the focus should be on managing (i.e. by avoiding, remedying or mitigating) the effects of subdivision, use and development, as opposed to protection.
61. Proposed Objectives 3.2.5.2 and 3.2.5.3 which respectively seek to '*Minimise adverse landscape effects of subdivisions, use or development in specified Rural Landscapes*' and to '*Direct new subdivision, use or development to occur in those areas which have potential to absorb change without detracting from landscape and visual amenity values* are consistent with the *WESI* approach.
62. That is, these relevant Chapter 3 objectives seek to *manage* land use, subdivision and development within rural landscapes, rather than *protect* such landscapes from these activities.
63. Conversely, in their current form, many of the Chapter 6 provisions, (Proposed Objective 6.3.1 in particular) conflict and/or are inconsistent with these relevant Chapter 3 provisions.
64. The section 42A Reporting Officer addresses Trojan Helmet's submission in respect of Objective 6.3.1 at paragraphs 9.62 – 9.64 of his report,⁴² and states he does not see any '*tangible difference*' between the objective as notified and the relief sought in the submission, and prefers to retain the reference to '*protecting*' rural landscapes from '*inappropriate subdivision, use and development*', as opposed to providing for '*adverse effects*' from such uses in rural landscapes to be '*appropriately managed*'.
65. The Reporting Officer's approach fails to have regard to the Court's comments in the *WESI* case, or to acknowledge or appreciate that '*protection*' and '*management*' are not synonymous, but will inevitably

⁴² Chapter 6, Landscapes, dated 19 February 2016.

require different management approaches to be adopted in the lower order provisions.⁴³

66. Mr Brown discusses these issues further in his evidence. He also addresses and evaluates the amendments Trojan Helmet considers are necessary to ensure that subdivision, use and development in section 7 and other landscapes is appropriately provided for and managed.
67. A different but related issue is the use of the word ‘openness’ in a number of the Chapter 6 provisions relating to rural landscapes.⁴⁴ Trojan Helmet’s submission, and Mr Brown’s evidence, is that the openness of a landscape may be an issues in ONL, but is not an issues in non-outstanding landscapes. This was confirmed by the Court in *WESI v QLDC* (C180/99) where at [153] – [154] the Court stated:

“[153]...While it is correct that large parts of the district are relatively open in that they are not covered by forest or towns it is important to recognize that situation is:

- (a) *not completely natural - there has been considerable human influence first by Maori burning, and latterly and with more impact, by pastoral and other European practices;*
- (b) *dynamic and changing.*

The evidence was that there are many more trees and much more conscious landscaping now than there were in the Wakatipu Basin 100 years ago. We conclude that open character is a quality that needs only be protected if it relates to important matters, otherwise it should be left to individual landowners (subject to not creating “nuisances” or other unacceptable adverse effects to neighbours) to decide whether their land should be open or not. Of course in relation to section 6(b) landscapes which are outstanding simply because they are open, there is little difficulty in establishing need for protection. Similarly section 7(b) landscapes which are important because they give foregrounds to views of outstanding landscapes may also need protection.

⁴³ The ordinary definition of ‘managed’ is ‘to handle, direct, govern, or control in action or use’ whereas, ‘protection’ means ‘preservation from injury or harm’. The word ‘managed’ therefore anticipates effects, whereas ‘protection’ does not. ‘Protection’ is a higher threshold than ‘managed’, and it would therefore be reasonable to expect a more stringent approach to land-use, subdivision and development to be taken where the objective is ‘protection’.

⁴⁴ See for example Proposed Policies 6.3.2.25, 6.3.5.3, and 6.3.5.6

[154] *While the open character of outstanding natural landscapes can be justifiably maintained, we do not see that it is appropriate to maintain the open character of all other landscapes. They may after all be improved:*

- *in an aesthetic sense by the addition of trees and vegetation; and/or*
- *in an ecological sense by the planting of native trees, shrubs, or grasses recreating an endemic habitat.*

We consider that the protection of open character of landscapes should be limited to areas of outstanding natural landscape and features (and rural scenic roads)."

68. While this case concerned references on the now Operative Direct Plan, the passage cited is of general application. Accordingly, references in to 'openness' in Chapter 6's rural landscape objectives and policies should be deleted.

Language of Proposed Plan

69. Chapter 6 of the Proposed Plan contains various 'non-RMA' terms, the use of which is opposed by a number of submitters, including Trojan Helmet.
70. In generally addressing⁴⁵ various recommended amendments to the wording of provisions, the Reporting Officer discusses the use of RMA language and states that in the Landscape Chapter RMA language has been used sparingly and that "*the RMA and its 'tests' are the legislative framework that need to be given local expression in a way that is appropriate to local issues*"⁴⁶.
71. As acknowledged by Mr Winchester,⁴⁷ while there is no requirement in the Act for the language of district plans to mirror or mimic the RMA, the words used should be clear and readily understood by practitioners and the wider public.
72. RMA language is understood by a wide range of professionals and members of the public, and has been judicially tested, scrutinised and interpreted. Introducing new and vague terms will inevitably lead to

⁴⁵ Section 42A Report, paragraphs 9.31 – 9.37

⁴⁶ Ibid, paragraph 9.34

⁴⁷ In opening legal submissions

uncertainty as to meaning and application, and will ultimately result in litigation to clarify that.

73. In light of the Supreme Court's decision in *King Salmon*, the words of District Plans, particularly directive high level objectives and policies, must be carefully chosen as they mean what they say. This is particularly important for the Landscape Chapter, given the typically subjective nature of landscape assessments.
74. The meaning of the word '*degrade*' as used in various Chapter 6 provisions is particularly uncertain and unclear. The section 42A Reporting Officer refers to its ordinary meaning, namely to '*lower the character or quality of*', however this is of little assistance. As Mr Brown explains,⁴⁸ conceivably any development proposal could be considered to lower the character or quality of the landscape, no matter the extent of the lowering. Consequently, where '*degrade*' is used in a provision, land-use, subdivision and development may be disenabled.
75. This is illustrated by considering Proposed Policy 6.2.2.2, which seeks to '*Allow residential subdivisions and development only in locations where the District's landscape character and visual amenity would not be degraded*'. Adopting the Reporting Officer's definition of '*degrade*,' this policy allows residential subdivision and development to occur only where the landscape character and visual amenity of the location is not lowered. This is a very high threshold that most, if not all proposals would have difficulty in meeting. It is also inconsistent with the more enabling, higher order Objective 3.2.5.2, which requires adverse effects to be *minimised*, and Objective 3.2.5.3 which requires new subdivision use and development to occur in areas with potential to absorb change without *detracting* from landscape and visual amenity values.
76. Similarly, the unqualified use of the word '*avoid*' in a number of Chapter 6 provisions is problematic, noting that '*avoid*' means prohibit or not allow, and carries with it an expectation of non-complying or prohibited activity status in the lower order provisions.⁴⁹ The problem is illustrated when considering Proposed Policy 6.3.5.2, which requires adverse effects from

⁴⁸ Evidence, for example, paragraph 6.21.

⁴⁹ As can be inferred from *King Salmon*.

subdivision and development to be avoided where visible from public roads. Conceivably this could capture a significant number of rural development proposals as (at best) non-complying activities, where they are visible from roads. This would be wholly disabling and a disproportionate response to the landscape 'issue', particularly given Proposed Objectives 3.2.5.2 and 3.2.5.3.

77. Accordingly, the language of the Proposed Plan should be considered carefully as the words of a District plan mean what they say. In terms of the two examples discussed above:
- (a) The use of non-RMA language is vague and uncertain and is therefore not efficient or effective. It is inconsistent with the relevant higher order provisions of Chapter 3;
 - (b) The unqualified use of the word 'avoid' may come at significant cost, in that it will necessitate (at best) non-complying resource consent applications for activities in rural landscapes which is a disproportionate response to the landscape 'issue'. Applicants may find it difficult to obtain consent given the absolute language used in the provisions against which their applications will be assessed.
78. Mr Brown's evidence addresses these issues in further detail and proposes alternative wording that better aligns with the language of the Act, and which is more widely understood by practitioners, the public, and the Court.

Chapter 6 Should Only Apply to the Rural Zone (Proposed Rule 6.4.1.2)

79. It is unclear whether Proposed Chapter 6 applies only to the Rural zone, or also the Rural Residential and Lifestyle zones. Trojan Helmet's submission supports the former.
80. The Rural Residential and Rural Lifestyle zones have their own set of objectives and policies that address landscape issues. These zones do not encompass ONLs or ONFs, nor are they comprised of land that will be used for traditional farming or productive uses, once development enabled under the zoning is established.
81. Accordingly, many or most of the Chapter 6 provisions have little or no relevance or application in the Rural Residential and Lifestyle zones. An

additional layer of landscape related objectives and policies⁵⁰ to these zones would add a layer of unnecessary complexity to the administration of the Proposed Plan, and would be inefficient.

82. A simpler and more efficient approach would be to clarify that Chapter 6 only applies to the Rural zone. As acknowledged by Mr Winchester, the desire for and appropriateness of simplicity can be considered embedded in section 32.
83. Accordingly, clarification is required that Chapter 6 only applies to the Rural zone. The Reporting Officer has endeavoured to provide some clarity, however his amended rule is ambiguous. Further clarification is required.
84. Finally on this point, the appropriateness of a rule that purports to direct the interpretation of objectives and policies is questionable, and does not sit well with the hierarchy of district plan provisions, as stated in section 75.

Conclusion

85. The Proposed Plan must, in achieving the purpose of the Act, strike an appropriate balance between all relevant resource management issues relating to the use, development and protection of the District's natural and physical resources. The rapid population growth of the District will continue for the foreseeable future and the Proposed Plan has a fundamental role in accommodating this growth, while protecting the values that contribute to how people and communities appreciate the District.
86. The Proposed Plan does not strike an appropriate balance between accepting the inevitability of growth and how landscape values should be managed in the face of this growth. Rather, the Proposed Plan is weighted too far in the direction of protection of all landscapes, and this will frustrate appropriate development proposals.
87. The Proposed Plan over-emphasises the importance of farming activities. Other activities that require a rural location, such as rural residential and rural lifestyle uses, and golf courses, may better provide for the economic wellbeing of landowners and the wider community in the face of rapid

⁵⁰ i.e. Chapter 6's.

growth, and therefore should also be enabled, depending on location and managing potential adverse effects on landscape and other values.

88. A District Plan regime that balances protection and use and development of *all* resources, taking into account particularly sections 6(b) (the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development); 7(c) (the maintenance and enhancement of amenity values) and 7(f) (the maintenance and enhancement of the quality of the environment) is the most appropriate regime to achieve the purpose of the Act.

List of witnesses

89. QAC will call the following witnesses:
- (a) Jeff Brown – Planner. Mr Brown will elaborate on Trojan Helmet’s submission points and will evaluate the relief sought in terms of sections 32 and 32AA of the Act.

R Wolt
Counsel for Trojan Helmet Limited

APPENDIX A

- “**Have regard to**” means to give genuine attention and thought to the matter, see: *NZ Fishing Industry Assn Inc v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at pp 17, 24, 30 and also the Environment Court decision in *Marlborough Ridge Ltd v Marlborough District Council* (1997) 3 ELRNZ 483 and *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394, at [70] (albeit a resource consent decision, as to s104).
- “**Must take into account**” means the decision maker must address the matter and record it has have done so in its decision; but the weight to be given it is a matter for its judgment in light of the evidence, see: *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at [42].
- “**Have particular regard to**” means to give genuine attention and thought to the matter, on a footing that the legislation has specified it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion, see: *Marlborough District v Southern Ocean Seafoods Ltd* [1995] NZRMA, which concerned a resource consent, however in its decision on the Strategic Directions Chapter of Proposed Christchurch Replacement Plan (dated 26 February 2015) the Independent Hearings Panel accepted as valid the application of the principle to district plan formulation (at paragraph [43]).
- “**Give effect to**” means to implement according to the applicable policy statement’s intentions, see: *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, at [80], and at [152]-[154]. This is a strong directive creating a firm obligation on those subject to it.
- “**Must not be inconsistent with**” - This is usefully tested by asking:
 - Are the provisions of the Proposed Plan compatible with the provisions of these higher order documents?
 - Do the provisions alter the essential nature or character of what the higher order documents allow or provide for?

See *Re Canterbury Cricket Association* [2013] NZEnvC 184, [51]–[52] for the first of the above questions, and *Norwest Community Action Group Inc v Transpower New Zealand EnvC* A113/01 for the second, as applied by the Independent Hearings Panel in its decision on the Strategic Directions Chapter of Proposed Christchurch Replacement Plan (dated 26 February 2015) at paragraph [42].

APPENDIX B

The Long Bay/Colonial Vineyard test incorporating the amendments to Section 32 made by Section 70 of the Resource Management Amendment Act 2013

General Requirements

- A district plan should be designed in accordance with⁵¹, and assist the territorial authority to carry out – its functions⁵² so as to achieve, the purpose of the Act.⁵³
- When preparing its district plan the territorial authority must give effect to a national policy statement, New Zealand coastal policy statement or regional policy statement.⁵⁴
- When preparing its district plan the territorial authority shall have regard to any proposed regional policy statement.⁵⁵
- In relation to regional plans:
 - a. the district plan must not be inconsistent with an operative regional plan for any matter specified in s 30(1) or a water conservation order⁵⁶; and
 - b. shall have regard to any proposed regional plan on any matter of regional significance etc.⁵⁷
- When preparing its district plan the territorial authority:
 - a. shall have regard to any management plans and strategies under any other Acts, and to any relevant entry on the New Zealand Heritage List and to various fisheries regulations (to the extent that they have a

⁵¹ RMA s 74(1).

⁵² As described in s 31 RMA.

⁵³ RMA ss 72 and 74(1)(b).

⁵⁴ RMA s 75(3)(a)-(c).

⁵⁵ RMA s 74(2).

⁵⁶ RMA s 75(4).

⁵⁷ RMA s 74(2)(a).

bearing on resource management issues in the region)⁵⁸, and to consistency with plans and proposed plans of adjacent authorities;⁵⁹

- b. must take into account any relevant planning document recognised by an iwi authority;⁶⁰ and
 - c. must not have regard to trade competition.⁶¹
- The district plan must be prepared in accordance with any regulation.⁶²
 - A district plan must⁶³ also state its objectives, policies and the rules (if any) and may⁶⁴ state other matters.
 - A territorial authority has obligations to prepare an evaluation report in accordance with section 32 and have particular regard to that report.⁶⁵
 - A territorial authority also has obligations to prepare a further evaluation report under section 32AA where changes are made to the proposal since the section 32 report was completed.⁶⁶

Objectives

- The objectives in a district plan are to be evaluated by the extent to which they are the most appropriate way to achieve the purpose of the RMA.⁶⁷

Provisions⁶⁸

- The policies are to implement the objectives, and the rules (if any) are to implement the policies.⁶⁹

⁵⁸ RMA s 74(2)(b).

⁵⁹ RMA s 74(2)(b).

⁶⁰ RMA s 74(2)(b).

⁶¹ RMA s 74(3) .

⁶² RMA s 74(1)(f).

⁶³ RMA s 75(1).

⁶⁴ RMA s 75(2).

⁶⁵ RMA s 74(1)(d) and (e).

⁶⁶ RMA s 32AA

⁶⁷ RMA s 32(1)(a).

⁶⁸ Defined in s32(6), for a proposed plan or change as the policies, rules or other methods that implement or give effect to, the objectives of the proposed plan or change.

⁶⁹ RMA s75(1).

- Each provision is to be examined, as to whether it is the most appropriate method for achieving the objectives of the district plan, by:
 - a. identifying other reasonably practicable options for achieving the objectives;⁷⁰
 - b. assessing the efficiency and effectiveness of the provisions in achieving the objectives, including:⁷¹
 - identifying and assessing the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the provisions, including opportunities for economic growth and employment that are anticipated to be provided or reduced;⁷² and
 - quantifying these benefits and costs where practicable;⁷³ and
 - assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.⁷⁴

Rules

- In making a rule the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.⁷⁵

Other Statutes

- The territorial authority may be required to comply with other statutes.

⁷⁰ RMA s32(1)(b)(i).

⁷¹ RMA s32(1)(b)(ii).

⁷² RMA s32(2)(a).

⁷³ RMA s32(2)(b).

⁷⁴ RMA s32(2)(c).

⁷⁵ RMA s76(3).

