BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2020] NZEnvC 79

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals under clause 14 of the First Schedule of the Act
BETWEEN	TROJAN HOLDINGS LIMITED
	(ENV-2018-CHC-122)
	SKYLINE ENTERPRISES LIMITED
	(ENV-2018-CHC-123)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan Environment Commissioner J T Baines Environment Commissioner M C G Mabin
Hearing:	at Queenstown on 29 January 2020
Appearances:	G M Todd and B B Gresson for the appellants N Whittington for the respondent
Date of Decision:	16 June 2020
Date of Issue:	16 June 2020

DECISION OF THE ENVIRONMENT COURT

Topic 8 – Queenstown CBD pedestrian link provisions

A: The appeals are allowed and QLDC is directed to update the Plan by deleting references to Links 5 and 6 from Fig 1 in Ch 12.

B: Costs are reserved on the basis that any party seeking costs must file a memorandum proposing a timetable, within ten working days, following which timetable directions will be made.

REASONS

Introduction

[1] This is one of a number of decisions on appeals in relation to the staged review ('Review') of the Queenstown Lakes District Plan ('Plan'). Appeal points are being heard and determined in Topic groupings. This decision concerns the remaining points in appeals by Trojan Holdings Limited ('Trojan') and Skyline Enterprises Limited ('Skyline') on Topic 8. Topic 8 concerns Ch 12 of the Plan concerning the Queenstown Town Centre zone.[1] Trojan and Skyline have appealed r 12.5.7 concerning 'Identified Pedestrian Links'.

Fig 1 as notified

[2] There is a well-established network of pedestrian links across Queenstown CBD. The network has evolved over several decades. It includes some covered walkways through private property that are not secured by any right-of-way or easement. That is the case for the properties owned by the appellants. Various types of regime have been in place in Queenstown district plans since 1998 for the maintenance and enhancement of the pedestrian links' network.[2] The notified version ('NV') proposed such a regime in Ch 12. It included r 12.5.8, the predecessor to r 12.5.7, which is the subject of the appeals. The rule applied to certain properties where there were 'Identified Pedestrian Links' so as to enable provision for such Links to be made in the consenting of building development or redevelopment. The Identified Pedestrian Links were as shown on then Fig 1, as follows:[3]

---

1 Initially, 'Topic 8' concerned a range of appeal points on provisions pertaining to 'the Queenstown and Wanaka Town Centres', as part of Stage One of the Plan Review. However, mediations resulted in settlements in light of which the court issued consent orders determining the appeals and the substance of related Plan provisions. Some other appeals or appeal points have been withdrawn, including the remaining matters appealed by Trojan and Skyline. There are no s274 parties on the remaining issues determined by this decision.

2 Ms Jones, evidence-in-chief for QLDC, at [7.10] – [7.12].

3 QLDC Proposed District Plan [Part Three], August 2015, 12 Queenstown Town Centre, https://www.qldc.govt.nz/media/zcznjg3e/pdp-notified-chapter-12-queenstown-town-centre-2015.pdf.

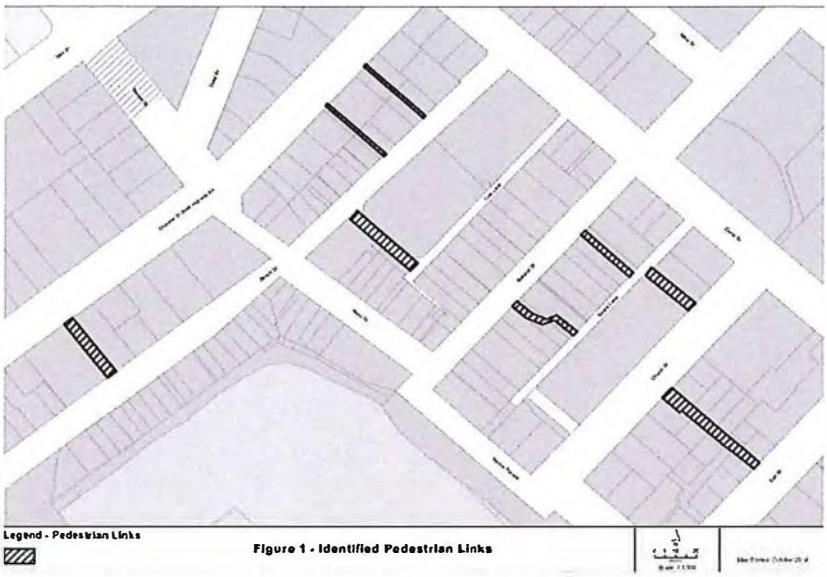
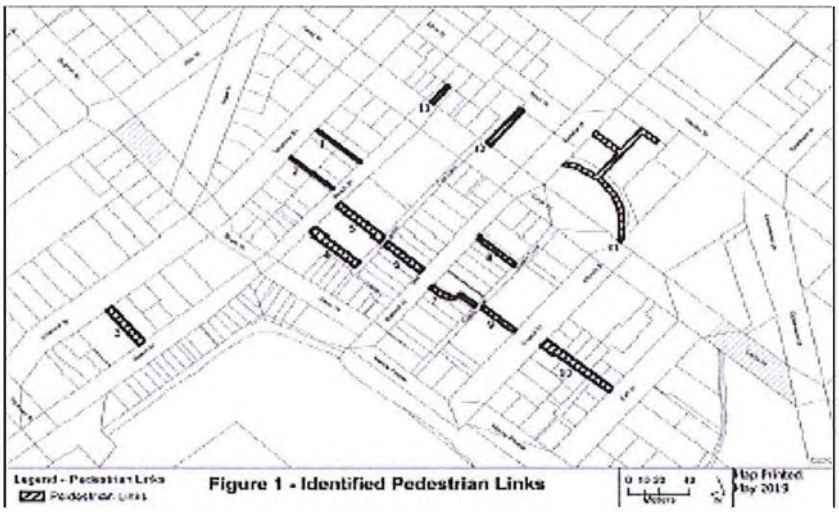


Fig 1 the subject of the appeals

[3] As recommended by the independent commissioners[4] who heard submissions on the NV, QLDC updated Fig 1 in its decisions on Ch 12. Those decisions also made other changes to Ch 12 (including the replacement of r 12.5.6 with an updated r 12.5.7) ('Decision Version', 'DV'). The updated Fig 1 adds further 'Identified Pedestrian Links' 5 and 6 the subject of these appeals. It is as follows:[5]



4 QLDC appointed two highly experienced independent hearings commissioners, resource management consultant Denis Nugent and lawyer Paul Rogers.

5 Figure 1 is from the evidence-in-chief of Ms Jones, for QLDC, at [7.10].

[4] The cross-hatched areas in Fig 1 depict the approximate locations of existing Links on those properties to which r 12.5.7 applies (although we note Links 4 and 5 are separated by some 15-17m, depending on where that is measured, rather than what Fig 1 depicts).

[5] The Trojan appeal primarily concerns Link 5. At present this is a covered walkway that runs through the ground floor of Trojan's 'Stratton House' (or the 'SkyCity Casino') connecting Beach Street and Cow Lane. The Skyline appeal primarily concerns Link 6. At present it is a mostly covered walkway through the 'Skyline Arcade' building connecting Cow Lane and Ballarat Street (commonly called 'the Mall').

Related r 12.5.7

[6] The decision to include Links 5 and 6 was in response to submissions seeking that relief. It was opposed by Trojan and Skyline who attended the hearing. Together with other impacted property owners, they raised concern about the costs and unfairness of rules that target particular properties so that public pedestrian Links could be required. Ms Jones and Mr Church were QLDC's reporting officers. They recommended that Links 5 and 6 be added to Fig 1 as Identified Pedestrian Links. Subject to that, Ms Jones largely supported the NV, subject to some technical refinements. Their recommendations were largely accepted by the Commissioners. The changes to the NV that the Commissioners recommended, in their 'Report 11', were duly accepted by QLDC.[6]

[7] The DV replaced r 12.5.8 with a renumbered r 12.5.7. It is relevantly as follows (underlining and ~~strike-through~~ showing differences from r 12.5.8):

6 Trojan notice of appeal, attach. 2(a).

	Standards for activities located in the Queenstown Town Centre Zone	Non-compliance status
12.5.7	Provision of Pedestrian Links and Lanes 12.5.7.1 All new buildings and building redevelopments located on sites which are identified for pedestrian links or lanes in Figure 1 ~~(below)~~ (at the end of this chapter) shall provide a ground level pedestrian link or lane in the general location shown. 12.5.7.2 Where a pedestrian link or lane ~~is~~ required by Rule 12.5.7.1 ~~to be provided and~~ is open to the public during retailing hours the Council will consider off-setting any such area against development levies and car parking requirements. 12.5.7.3 Where an existing lane or link identified in Figure 1 is uncovered then, as part of any new building or redevelopment of the site, it shall remain uncovered and shall be a minimum of 4m wide and where an existing link is covered then it may remain covered and shall be at least 1.8 m wide, with an average minimum width of 2.5m. 12.5.7.4 In all cases, lanes and links shall be open to the public during all retailing hours. ~~Note: Nothing in rules 12.5.8.1 and 12.5.8.2 shall prevent a building or part of a building being constructed at first floor level over a pedestrian link.~~ **Location of Pedestrian Links within the Queenstown Town Centre** ... 4. Cow Lane/Beach Street, Sec 30 Blk I Tn of Queenstown; 5. Cow Lane / Beach Street, Lot 1 DP 25042; 6. Cow Lane / Ballarat Street, Lot 2 DP 19416; Advice Notes a. where an uncovered pedestrian link or lane (i.e. open to the sky) is provided in accordance with this rule, additional building height may be appropriate pursuant to Policies 12.2.2.4 and 12.2.2.5; b. where an alternative link is proposed as part of the application which is not on the development site but achieves the same or a better outcome then this is likely to be considered appropriate.	RD Where the required link is not proposed as part of development, discretion is restricted to: a. the adverse effects on the pedestrian environment, connectivity, legibility, and Town Centre character from not providing the link;

[8] It can be observed that r 12.5.7 specifies a restricted discretionary activity classification for 'provision of pedestrian links and lanes'. Typically, such provision would occur in conjunction with building development or redevelopment (a restricted discretionary activity under r 12.4.6). For those purposes, r 12.5.7 works in tandem with r 12.4.6 which relevantly specifies as a restricted discretionary activity (our emphasis):

> Buildings except temporary 'pop up' buildings that are in place for no longer than 6 months and permanent and temporary outdoor art installations.
>
> Buildings, including verandas, **and any pedestrian link** provided as part of the building/ development.

The issues and options

[9] The issues in the appeal are confined. In essence, they concern which of the following Options for r 12.5.7 is the most appropriate for achieving the Plan objectives for each appellant's site:

(a) retaining reference to Link 5 and/or Link 6 in Fig 1 to r 12.5.7 (i.e. declining relief) (the 'Status Quo Option');
(b) removing reference to Link 5 and/or Link 6 from Fig 1 (i.e. granting relief in full) ('Full Relief Option'); or
(c) amending r 12.5.7 to give greater flexibility for provision of a Link in association with any building development or re-development on an appellant's site (i.e. granting relief in part) ('Partial Relief Option'). As we explain, the Partial Relief Option arises from court-directed planning witness conferencing.

COVID-19 and its potential implications

[10] A few weeks after the hearing concluded, in response to the COVID-19 pandemic, the Government closed New Zealand's borders and imposed 'Level 4 lockdown' restrictions. As at the date of writing this decision, the borders remain closed. This is having a severe impact on Queenstown's tourism economy. We have no evidence on any related impacts on commercial property values and tenancies. However, no party has sought leave to call new evidence on any implications. In any case, we are satisfied we can proceed on the evidence before us.

Findings on matters that are not in dispute

[11] The evidence traversed some matters that are not in dispute but which are of some relevance to our determination of the issues.

The value of the Pedestrian Links Network

[12] Queenstown Town Centre is relatively compact and pedestrian-centric. For instance, Policy 12.2.2.9 refers to it as providing "for pedestrian links and lanes, open spaces, outdoor dining". However, the street network offers relatively limited choices for north-south pedestrian movements. The pedestrian walkways and lanes supplement those choices and contribute to the character of the Town Centre.

[13] After hearing the evidence (and opening submissions), we issued a Minute ('31 January Minute') for the purposes of giving direction for planning witness conferencing on options for amending r 12.5.7. The Minute expressed some preliminary findings (subject to closing submissions) on the evidence, including:[7]

> As a general observation, the site visit confirmed to the court the urban design value of a pedestrian links network. It reinforced the role of this network in giving pedestrians movement options particularly north-south (as opposed to the predominant lakeward focus of the streets' networks).
>
> Walking the relevant section of the route from Church Lane to Shotover Street reinforced to us the importance of having legible north-south connections between Searle Lane and Beach Street.

[14] Those observations as to the overall value of maintaining and enhancing the network of walkways and lanes are well supported by the evidence of QLDC's urban design expert, Mr Timothy Church. On these aspects, his evidence was not challenged by any other expert. Nor is it a matter of contention in legal submissions. We readily confirm those preliminary findings.

---

7 31 January 2020 Minute, at [16], [17].

The general value of Plan provisions for the Pedestrian Links Network

[15] As we have noted, a number of the walkways through private property are not secured by any right-of-way or other easement for public usage. None is subject to any QLDC designation under the Plan.

[16] However, the maintenance and enhancement of this Links' network is expressly provided for in the Plan's objectives and policies. Those provisions are not challenged and are now in legal effect. To achieve and implement those objectives and policies, rules are needed so as to enable or require the imposition of Links.

[17] The appeals challenge r 12.5.7 but only insofar as the rule applies to the appellants' sites.

[18] Hence, the key question is as to which of the noted Options for r 12.5.7 is the most appropriate for achieving the Plan's objectives (and achieving and implementing related policies) for the sites in issue, namely Stratton House and Skyline Arcade.

The statutory framework and related principles

[19] *Darby Planning*,[8] the court's first substantive decision on Topic 1 of the Plan Review appeals, discusses the statutory framework and related principles.[9] The issues in these appeals are significantly more confined. Nevertheless, insofar as relevant, we adopt our findings at [15] – [30] of that decision.

Jurisdiction and powers

[20] The court has the same power, duty and discretion as QLDC had as the decision-maker on the Plan provisions. We may confirm, amend or cancel QLDC's decision to include Links 5 and 6 in r 12.5.7 (s290, RMA). We must have regard to the appealed decision (s290A).

[21] In addition, we are empowered by s293 to direct that changes be made to the

---

8 *Darby Planning Limited Partnership v Queenstown Lakes District Council* [2019] NZEnvC 133.

9 *Darby Planning*, at [15] – [30].

Plan that go beyond the scope of relief in the appeals. That jurisdiction is to be exercised sparingly, however, in the court's judicial capacity (rather than on a basis that assumes any role as a planning authority).[10] We mention that because an issue arising in this case is as to whether the court should make a s293 direction. For the reasons we traverse, we find it would not be appropriate to do so.

Section 32 evaluation as to appropriateness of Options for achieving objectives

[22] We must duly consider s32, RMA. As relevant objectives are beyond challenge, the evaluation under s32(2)(b) is of whether the provisions are the most appropriate way to achieve those objectives.

[23] On these matters, it is convenient to refer to Mr Whittington's opening submissions for QLDC (partial quote):[11]

> The framework for consideration of planned changes is set out in ss 72 – 77D of the RMA, and incorporates by reference, ss 31 and 32. The statutory requirements are summarised in the decision of *Long Bay-Okura [Great] Park Society Incorporated v North Shore City Council,*[12] and *Colonial Vineyard Limited v Marlborough District Council*[13] ...
>
> Essentially, the Court is to assess whether the disputed rules are the most appropriate for achieving the objectives of the PDP and the purpose of the RMA. Additionally, in making a rule, regard must be had to the effects on the environment of activities, particularly adverse effects.
>
> Rules must be the "most appropriate" for achieving the objectives. "Appropriate" means suitable.[14] Section 32 requires a value judgement as to what, on balance, is most appropriate when measured against the relevant objectives.

---

10 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie* District Council [2014] NZHC 2616.

11 Opening submissions for QLDC, dated 29 January 2020, at [2.2] – [2.4]. The only minor qualification we would add to Mr Whittington's succinct analysis concerns his reference to the court's essential task namely "to assess whether the disputed rules are the most appropriate for achieving the objectives of the PDP and the purpose of the RMA". As the Plan Review is to change, rather than fully replace, the operative District Plan, s32(3) directs that we also consider those objectives that would not be replaced in the Review, insofar as they are relevant. as well as those introduced in the Review. However, neither planning witness identifies any such relevant other objectives and we concur in that.

12 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* (EnvC) Auckland A078/08, 16 July 2008, at [34].

13 *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55, at [17].

14 *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298.

[24] We accept those submissions as a succinct summary of how s32 bears upon our consideration of the appeals.

[25] Counsel's submissions describe the court's role as being "to assess whether the disputed rules are the most appropriate for achieving the objectives". The consideration under s32 is of the proposed "provision" and other "reasonably practicable options for achieving the objectives". Hence, given the scope of the appeals, our s32 evaluation compares the Status Quo Option, the Full Relief Option and the Partial Relief Option.

[26] We examine the relative efficiency and effectiveness of those Options for achieving the objectives (s32(1)(b)(ii)). That involves assessment of the "benefits and costs of the environmental, economic, social, and cultural effects" of those Options.

[27] The contribution that the Links' network makes in terms of pedestrian movement choices and Town Centre character are positive effects to be evaluated as benefits. That is on the basis that the Plan seeks that the present Links be maintained and enhanced. In those terms, we evaluate the relative contribution that Links 5 and 6 make to those benefits. However, the fact that a Link is shown in Fig 1 does not necessarily mean that the Plan's objectives and policies are best achieved by retaining it as an Identified Pedestrian Link.

[28] Our assessment of the relative costs of the Options primarily centres on costs anticipated to be incurred in any development or redevelopment of the appellants' sites. That includes both the costs of having to provide a Link and of having consent declined because of a refusal to provide a Link.

[29] How benefits and costs are allocated is a relevant aspect of our consideration of the Options. All Options would allocate benefits primarily to the community, in the sense that they each assume any Link is for public usage. A consideration here is as to the relative risks presented by each Option as to whether those benefits would be realised. The Options differ in how they allocate costs. The Status Quo Option imposes costs primarily on any developer of the appellants' land. The Partial Relief Option is similar in those terms. The Full Relief Option, by contrast, would mean the cost of providing a Link could be borne by any developer of land where a Link would be appropriately located.

Section 85

[30] An issue addressed in legal submissions is whether the court has jurisdiction to make a direction under s85, RMA. In essence, a s85 direction is to the effect that a Council must either modify, delete or replace a provision or acquire the affected land. Jurisdiction for such a direction is not available unless the court is satisfied of certain thresholds concerning the effect of the provisions on the land in issue. In essence, these are that the provision "makes any land incapable of reasonable use" and "places an unfair and unreasonable burden on any person who has an interest in the land". Given our determinations, it is sufficient that we record that the evidence does not establish that r 12.5.7 is so restrictive as to render either appellant's land incapable of reasonable use.

The Plan's relevant objectives and policies and the Regional Policy Statement

The Plan's objectives and policies

[31] The planning witnesses differ to some extent on what objectives and policies are relevant to r 12.5.7. Ms Jones identifies Objective 12.2.2, 12.2.3 and 12.2.4 and Policies 12.2.2.1, 12.2.2.2, 12.2.2.6 12.2.3.6, 12.2.4.1 and 12.2.4.2 (and Strategic Objectives 3.2.1 and 3.2.1.2 and Strategic Policy 3.3.2).[15] Mr Freeman also identifies Objective 12.2.1 and Policies 12.2.1.1, 12.2.2.4, 12.2.2.5 and 12.2.2.9.[16]

[32] Rules 12.5.7 and 12.4.6 are part of a set of related Ch 12 rules for the use and development of land in Queenstown Town Centre. As a whole, those rules serve to achieve the related objectives (and achieve and implement related policies) as identified by Ms Jones and Mr Freeman. **Annexure 1** sets out extracts from those objectives and policies we consider have most bearing in our determination of the issues in the appeals.

The Otago Regional Policy statement(s) 1998 and 2019

[33] Section 75(3) RMA requires that a district plan give effect to the relevant regional policy statement ('RPS').[17] As Mr Whittington explained, the relevant regional instruments are a partially operative proposed RPS 2019 and the remainder of the RPS 1998 (the now dated RPS that the RPS 2019 is superseding). No party argues that these

---

15 Ms Jones, evidence-in-chief at [7.18].

16 Mr Freeman, evidence at [7.6] – [7.12].

17 There are no relevant national policy statements bearing on the matters in issue.

regional instruments are determinative of the issues. Having considered them, we find that they are not.

The evidence

The pre-filed evidence

Party calling	Valuation	Urban design	Planning
Trojan/Skyline	Ms Heather Beard[18]	Mr Scott Freeman	Mr Scott Freeman[19]
QLDC	Mr Lance Collings[20] (rebuttal only)	Mr Timothy Church[21] (including rebuttal)	Ms Vicki Jones[22] (including rebuttal)

Valuation evidence

[34] Before we discuss the valuation evidence, there are some preliminary matters that go to how we assess and rely on it.[23]

[35] Each valuer analysed the Status Quo Option but neither undertook a comparative analysis as against the Full Relief Option.[24] Furthermore, both valuers assumed that there is already in place a mandatory Link where Links 5 and 6 are depicted in Fig 1. As we have discussed, r 12.5.7 only goes so far as to enable the imposition of a Link as a condition of a resource consent for development of a site (and on a basis that allows for

---

18 Ms Beard is a qualified Registered Public Valuer, a member of the New Zealand Institute of Valuers, the Property Institute of New Zealand and the Property Council of New Zealand. She is a past chair of the Central Otago Property Council and is a member of the Institute of Directors. She is currently a non-voting board member of Institute of Property Advisors and Consultants. Her valuation experience includes some 5.5 years working in the Queenstown commercial property sector, including in market valuations, rent reviews and insurance assessments.

19 Mr Freeman holds a degree of Bachelor of Planning from the University of Auckland. He has some 22 years' experience in the field of resource management planning and has practised, as a planning consultant, in Queenstown since late 1999.

20 Mr Collings holds a degree in Valuation and Property Management from Massey University, is a qualified Registered Valuer and Senior Member of the Property Institute of New Zealand. He has some 30 years' experience in commercial and industrial and other valuation.

21 Mr Church holds qualifications of Master of Urban Design and Bachelor of Landscape Architecture, and has some 19 years' practice experience as an urban designer.

22 Ms Jones holds qualifications of Bachelor of Resource and Environmental Planning (first class honours), Massey University. She is a full member of the New Zealand Planning Institute and has some 24 years' experience as a planner.

23 In addition to the observations we make at [10] concerning the lack of evidence on the potential implications of the COVID-19 pandemic).

24 Nor for that matter the Partial Relief Option, although that is understandable given that the valuers gave evidence prior to the directed planning conferencing that resulted in the 14 February JWS.

dispensation from this requirement). However, we are satisfied that we can draw necessary inferences on the basis of the valuation evidence. That is because:

(a) we can treat the valuers' estimations of the potential costs to landowners of the Status Quo Option as contingent on the potential that a Link is imposed; and

(b) we can safely assume that, relative to the Status Quo Option, the Full Relief and Partial Relief Options would impose less cost insofar as they would allow for greater development flexibility and certainty.

Overall comparisons

		Rental loss ($/p.a. plus GST)	**Capital value loss range ($, plus GST)**
Stratton House	Ms Beard:	104,000	2.45M – 2.775M
	Mr Collings:	75,224	975,000 – 2M
Skyline Arcade	Ms Beard:	123,180	3.08M – 3.52M
	Mr Collings:	75,795	1.9M – 2.175M

Methodologies

[36] The valuers' methodologies differ to some extent. Ms Beard calculated projected rental loss for the 10 year period 2019 – 2028 to derive her calculation of capital value loss, but Mr Collings did not do so. Mr Collings explicitly applied a 'before' and 'after' methodology to determine the net rental loss effect with or without the imposition of a Link. It is not clear whether Ms Beard did so. However, Mr Collings records that he agrees with much of Ms Beard's methodology. We are satisfied with the overall soundness of each valuer's methodology.

Key differences and our reasons for preferring Mr Collings

[37] As the table reveals, for both Stratton House and Skyline Arcade, Mr Collings concludes there would be less impact on rental returns and capital value than does Ms

Beard. Nevertheless, he agrees that those impacts would be significant.[25] We prefer Mr Collings' more conservative opinion as more realistic for the following reasons.

[38] Mr Collings acknowledges that a Link would reduce the available space for retail frontages. However, he points out that some tenancies would benefit from a Link through, for example, an enhanced corner profile or improved access. We find those assumptions reasonable, although we find the small size and narrow dimensions of the Skyline Arcade site would present greater challenges to retail tenancies.

[39] Stratton House is a comparatively modern building. In view of that, Mr Collings observes that its highest and best use in the medium term (5-10 years) is largely consistent with how it is already configured. As such, he assumes that any re-purposing of the area of Link 5 to retail tenancy space is unlikely in the medium term as the additional rental return would not adequately compensate for conversion costs. We find those assumptions are realistic.

[40] By contrast, Skyline Arcade is a relatively dated and poor quality building on a site with high land value. As such, Mr Collings considers that the highest and best use of the Skyline Arcade is in redevelopment. In addition, given the small size of the site, he assumes the most likely redevelopment prospect would be a multi-storey building. He acknowledges that a Link of the dimensions intended by r 12.5.7 would occupy some 76m^2 of a 337m^2 site, calculating that to be some 24% of the Net Lettable Area of the ground floor. We find those assumptions appropriate.

[41] We return to our overall findings as to the comparative costs of the Options later in this decision.

Evidence on benefits

[42] The evidence as to benefits was primarily from Mr Freeman and Mr Church. Mr Freeman does not hold any formal qualifications in urban design. Mr Church does not hold formal qualifications as a planner. The relevant benefits are primarily matters of urban design and the proper interpretation and application of related objectives and policies. Given their experience, we find both witnesses duly qualified in these related matters.

---

[25] Transcript, p 57, l 5 – 10.

Is retaining Link 5 beneficial?

[43] Mr Freeman considers that Link 5 is superfluous given its very close proximity to the Council-owned Link 4. He says:[26]

> Pedestrian Link 5 that runs through Stratton House is located in close proximity to the Council owned pedestrian link 4 (approximately 8m to 10m away). If the Stratton House pedestrian link was not provided in the future, walking around the lower portion of Stratton House would add only a few seconds walking time for pedestrians. The non-provision of a pedestrian link through Stratton House will not stop the north-south pedestrian flow through central Queenstown. The pedestrian access through Stratton House is very much the same as pedestrian link 4 in terms of location, albeit one access is covered (with obstructions) while the other is open to the air.

[44] Mr Church considers Links 4 and 5 are "complementary" and that it is important to maintain Link 5. He says:[27]

> ... a reduction to one pedestrian link within this urban block would result in a lack of route options in the network. Furthermore, each route serves different destinations and I consider the extent of offset by relying on Cow Lane would adversely reduce the level of connectivity and alignment with two other lanes opposite Beach Street and the convenience of using the network to access northern destinations. In my view, Cow Lane is also to be more utilitarian with much lower amenity, in its treatment, function and edge condition and this would not be maintaining or enhancing the network.

[45] In his rebuttal, Mr Church adds:[28]

> The staggering of multiple lanes through an urban block allows users to choose an appropriate link to progressively step their way through a series of blocks towards a destination without being funnelled along one alignment. I consider this to be an integral part of the pedestrian link and lane discovery experience. In my opinion, maintaining route choices and diversity, albeit subtle in places, is a key quality of the pedestrian links and lanes network and in support of Policy 12.2.4.2.a.

[46] When cross-examined on the competing interests of commercial tenants, Mr Church noted the importance of keeping covered Links free of "furniture and sandwich boards and those sort of things". In those terms, he agreed there was a need to achieve

---

26 Mr Freeman, statement of evidence, at [3.10].
27 Mr Church, evidence-in-chief, at [2.19].
28 Mr Church, rebuttal evidence, at [2.5].

the right balance between the needs of tenants and for clear space for pedestrian access.[29]

[47] In questioning by the court, Mr Church acknowledged there was some value in flexibility.[30] On the other hand, he defended as appropriate the approach of maintaining Links within the properties identified in Fig 1.[31] That includes Link 5. However, under cross-examination, Mr Church acknowledged that, insofar as he was aware, no foot count was undertaken of the usage of Link 5 although he agreed this "would have been a useful dataset to have".[32]

Is retaining Link 6 beneficial?

[48] As Fig 1 (at [3]) reveals, Link 6 is the only Identified Pedestrian Link between Cow Lane and the Mall. Mr Freeman acknowledges that Skyline Arcade "performs an important connection thoroughfare".[33] The importance of providing an effective mid-block pedestrian link between Cow Lane and the Mall is not a matter of dispute.

[49] The material point of dispute in the evidence is as to whether the more appropriate approach to that issue is the Status Quo Option (i.e. retaining Link 6 in Fig 1 to r 12.5.7) or the Full Relief Option (such that reliance is placed solely on r 12.4.6). As we come to discuss, there is also the Partial Relief Option to consider, albeit not as an Option that either Mr Freeman or Mr Jones would recommend as the most appropriate.

Rules 12.4.6 and 12.5.7 and the scope of restricted discretionary activity discretion

[50] The appellants submit that r 12.4.6 is itself sufficient in that it confers necessary discretion to require provision of a Link where a consent application is made for a building development or redevelopment proposal. By contrast, QLDC submits that where an application is for a building development or re-development on an identified site and would not provide for a Link according to the standards specified in r 12.5.7, r 12.5.7 (not r 12.4.6) is the applicable rule.[34] In closing, Mr Whittington submits that rr 12.4.6 and

---

29 Transcript, p 62, l 27 – p 63, l 9.
30 Transcript, p 96, l 1 – 12.
31 Transcript, p 81, l 15 – p 83, l 28.
32 Transcript, p 60, l 1 – 26.
33 Mr Freeman, statement of evidence, at [3.11].
34 Opening submissions for QLDC, at [1.2].

12.5.7 are intended to achieve "different outcomes" for development consenting that are "further reflected in the distinct matters of discretion".[35]

[51] Those differences of interpretation are also reflected in the planning evidence. Mr Freeman interprets r 12.4.6, in combination with r 12.5.1 and related objectives and policies, as allowing a Link to be imposed even when it is not offered by a consent applicant.[36] Ms Jones disagrees about that. Under cross-examination, she went further in saying r 12.4.6 does not enable a consent application to be declined simply because an applicant does not propose to provide a Link.[37]

[52] The proper interpretation of rr 12.4.6 and 12.5.7 and how they inter-relate is significant for our evaluation of the Options. We interpret the provisions as follows.

[53] The activity classification for new buildings and redevelopment proposals, whether or not these provide for a Link, is restricted discretionary activity. This is as assigned by r 12.4.6. It confers that classification for what it describes as:

(a) "Buildings except temporary 'pop up' buildings that are in place for no longer than 6 months and permanent and temporary outdoor art installations"; and
(b) "Buildings, including verandas, and any pedestrian link provided as part of the building/ development".

[54] 'Buildings' has the same meaning as in the Building Act 2004. Hence, it refers to both a new building and a redevelopment of an existing building.[38] 'Pedestrian link' is not defined. In Ch 12, various other provisions use those words or similar words such as 'pedestrian link or lane' (and, on occasions, 'linkages'). Rule 12.5.7 uses 'Pedestrian Links and Lanes', 'required link', 'existing lane or link' and 'Pedestrian Links'. Fig 1 to r 12.5.7 uses 'Identified Pedestrian Link' to refer to a pedestrian link or lane shown in Fig 1 (including those listed in the schedule of private properties in r 12.5.7). As such, we find that 'pedestrian link' (and similar words) are intended to have their ordinary meaning. They refer to walkways and lanes, including through private property, that are used by pedestrians as movement options between streets or other links or lanes (whether or not

35 Closing submissions for QLDC, at [3.10].
36 Transcript, p 37, l 1 – p 38, l 22.
37 Transcript, p 109, l 14 – p 110, l 3.
38 Leaving aside verandas, also as provided for, and noting that exceptions are specified for some temporary structures.

an Identified Pedestrian Link).

[55] The RMA provides that, for restricted discretionary activities, a consent authority may grant (including on conditions) or decline a consent application. However, the available discretion in determining an application is constrained by what relevant plan provisions prescribe. Section 87A, RMA provides that the power to grant a consent (including subject to conditions) or decline it is "restricted to the matters over which discretion is restricted" by the relevant plan (or national environmental standard). Section 104C specifies a similar restriction on the scope of available discretion in determining an application for consent for a restricted discretionary activity. That is to the effect that a consent authority "must consider only those matters over which … it has restricted the exercise of its discretion in its plan or proposed plan". In addition, if the consent authority decides to grant the consent, it can impose conditions only on matters over which it has restricted its discretion in the plan or proposed plan.

[56] Rules 12.4.6 and 12.5.7 apply in tandem where a building development or redevelopment proposal is in relation to a site that is scheduled in r 12.5.7 and in respect of which Fig 1 shows an Identified Pedestrian Link. In those circumstances:

(a) r 12.4.6 relevantly serves to:
    (i) assign restricted discretionary activity classification to the building proposal; and
    (ii) prescribe matters to which discretion is restricted;
(b) r 12.5.7 relevantly serves to:
    (i) maintain restricted discretionary activity status for the proposal;
    (ii) prescribe related standards; and
    (iii) prescribe a related matter to which discretion is restricted, where a building development or redevelopment proposal does not make provision for an Identified Pedestrian Link.

[57] Neither rule enables a Link to be imposed that is not willingly provided by the consent applicant. However, as the RMA requires for a restricted discretionary activity, both enable consent to be declined. More particularly, both would allow for that outcome by reason of the fact that a building proposal would not make provision for a Link.

[58] Rule r 12.5.7 specifies 'provision of Pedestrian Links and Lanes' as a class of restricted discretionary activity. As such, r 12.5.7 would require consent for the mere

provision of a Link in circumstances where there is no associated building development or redevelopment to which r 12.4.6 applies. However, r 12.5.7 is not triggered unless a consent application is made. Hence, r 12.5.7 does not operate to require Trojan or Skyline to keep Link 5 or 6 open to the public in the meantime.

[59] Rule 12.5.7 adds some important elements to r 12.4.6 in those circumstances where a building development or redevelopment is on a site to which r 12.5.7 applies.

[60] One is its specification of standards 12.5.7.1 – 12.5.7.4. Despite r 12.5.7 specifying that it applies to 'provision of Pedestrian Links and Lanes', it is evident that its standards also apply where the proposal is a building development or redevelopment, whether or not it includes provision for an Identified Pedestrian Link. For example, standard 12.5.7.1 applies to 'All new buildings and building redevelopments located on sites which are identified for pedestrian links or lanes in Figure 1". Curiously, if any of standards 12.5.7.1 – 12.5.7.4 is breached, the activity status remains restricted discretionary activity (or 'RD' as specified in the right-hand column). Furthermore, r 12.5.7 specifies only one matter to which 'discretion is restricted' and that matter appears to be only applicable to circumstances where standard 12.5.7.1 is breached. That is, it specifies:

> discretion is restricted to:
>
> > the adverse effects on the pedestrian environment, connectivity, legibility, and Town Centre character from not providing the link.

[61] As noted, the RMA provides that available discretion in determining an application for a restricted discretionary activity is constrained by what relevant plan provisions prescribe. At least for breaches of standards 12.5.7.2 – 12.5.7.4, it is necessary to refer to r 12.4.6 as specifying what discretion is restricted to.

[62] Relevantly, those matters as specified in r 12.4.6 are as follows:

> Discretion is restricted to:
>
> a. consistency with the Queenstown Town Centre Special Character Area Design Guidelines (2015), (noting that the guidelines apply only to the Special Character Area);
>
> ...
>
> e. the impact of the building on the streetscape, heritage values, compatibility with adjoining buildings, the relationship to adjoining verandas;

f. the contribution the building makes to the safety of the Town Centre through adherence to CPTED principles;
g. the contribution the building makes to pedestrian flows and linkages and to enabling the unobstructed kerbside movement of high-sided vehicles where applicable;
h. the provision of active street frontages and, where relevant, outdoor dining/patronage opportunities; ... .

[63] Mr Whittington submits that rr 12.5.7 and 12.4.6 are designed for different purposes reflected in their expression of "distinct matters of discretion". He characterises r 12.4.6 as addressing "urban design outcomes" and r 12.5.7 as serving the purpose "that the existing pedestrian link network is maintained in recognition of the significant contribution ... [those links] make to the town's walkability and character".[39]

[64] That cannot be correct at least insofar as breaches of standards 12.5.7.2 – 12.5.7.4 are concerned. Nor do we accept that is the position for any breach of standard 12.5.7.1. The substance of the matter to which discretion is restricted under r 12.5.7 (i.e, "the adverse effects on the pedestrian environment, connectivity, legibility, and Town Centre character from not providing the link") can be seen to be broadly similar to what is specified in more detail in the matters in r 12.4.6 a, e, f, g and h. On orthodox statutory interpretation principles, if r 12.4.6 applies, all aspects of it apply including its specification of the matters to which discretion is restricted, unless relevant rules state otherwise or that interpretation cannot stand on a purposive reading of the rules. Nothing in either r 12.4.6 or 12.5.7 is to the effect of stating that any aspect of r 12.4.6 does not apply when r 12.5.7 applies. On a purposive reading, both rules can be applied to their fullest extent by being read together. We find the better interpretation is, therefore, that the matter to which discretion is restricted when standard 12.5.7.1 is breached supplements, rather than supplants, the matters specified in r 12.4.6. In essence, even when a proposal is properly consistent with the Queenstown Town Centre Special Character Area Design Guidelines (2015) and with CPTED principles, and makes positive contributions to various other matters listed in 12.4.6 a, e, g and/or h, r 12.5.7 allows for an overall consideration of any adverse effects as may arise, in terms of the "pedestrian environment, connectivity, legibility, and Town Centre character".

[65] Objectives and policies bear on the proper interpretation of rr 12.4.6 and 12.5.7, given that rules serve to achieve related objectives and achieve and implement related policies (ss 75, 76, RMA).

39 Closing submissions for QLDC, at [3.10].

[66] Mr Whittington submits that the objectives and policies support an interpretation that rr 12.4.6 and 12.5.7 fulfil different purposes. He refers to Ms Jones' interpretation to that effect.[40]

[67] We do not agree with that interpretation. Rather, we interpret the relevant objectives and policies as applying to all relevant rules, including rr 12.4.6 and 12.5.7. The rules together serve the related intentions of the objectives and policies. More particularly, r 12.5.7 serves urban design outcomes as well as more specific outcomes for Identified Pedestrian Links and r 12.4.6 serves the maintenance and enhancement of the pedestrian link network (including the Identified Pedestrian Links) as well as broader urban design outcomes.

[68] Rules 12.4.6 and 12.5.7 serve to achieve objectives 12.2.1 – 12.2.4. The objectives do not refer in express terms to pedestrian links. Rather, they emphasise general sound urban design outcomes, such as ease of accessibility and amenity, for residents and visitors, and vibrancy, character, heritage and sense of place.

[69] Rules 12.4.6 and 12.5.7 also serve to implement and achieve related policies. These refer in relatively broad terms to pedestrian links, as part of the public realm. They do not indicate an intention that rr 12.4.6 and 12.5.7 serve distinct and different purposes as QLDC has claimed. For example:

(a) Policies 12.2.2.1, 12.2.2.2, 12.2.2.6, 12.2.2.9, 12.2.3.6, 12.2.4.1, 12.2.4.2.e concern quality public spaces, streets and pedestrian links;
(b) Policy 12.2.4.2.b is as to "requiring new pedestrian linkages in appropriate locations when redevelopment occurs";
(c) Policy 12.2.4.2 refers to the existing pedestrian network as a whole, giving direction as to "maintaining and enhancing the existing network of pedestrian linkages". It also gives direction as to "ensuring these [pedestrian linkages] are of a high quality";
(d) other policies give directions as to the maintenance or enhancement of pedestrian links and lanes, but on a qualified basis, e.g:
    (i) Policy 12.2.1.1 refers to enabling complete site coverage, as part of enabling intensification of the Town Centre, provided that identified

40 Closing submissions for QLDC, at [1.1](b), [3.8] – [3.10].

pedestrian links are retained;

(ii) Policy 12.2.2.4 refers to tolerating minor shading, as a consequence of exceedance in discretionary height standards, in exchange for an offsetting or compensating provision "of additional public space or a pedestrian link within the site".

[70] In each case, the proper exercise of consent authority discretion is one that assists to achieve relevant objectives and implement relevant policies (and promotes the RMA's purpose). The fact that a site for a proposal is scheduled and includes an Identified Pedestrian Link has relevance in the proper exercise of that discretion. That is in the sense that Fig 1 essentially declares that each Identified Pedestrian Link has value as part of the pedestrian links' network, albeit on a basis that allows for that Link to be dispensed with, on a restricted discretionary activity application, according to the specified matter to which discretion is restricted (and the relevant matters in r 12.4.6).

[71] Mr Freeman also points out that r 12.5.1 (as to maximum building coverage in the Town Centre Transition Sub-Zone and comprehensive developments) includes an Advice Note as follows (our **emphasis**):

> Advice Note: While there is no maximum coverage rule elsewhere in the Town Centre, this does not suggest that 100% building coverage is necessarily anticipated on all sites as outdoor storage areas, **and pedestrian linkages might be required.**

[72] Bearing in mind this Advice Note does not reference Fig 1, we agree that it is consistent with the interpretation we have set out. However, our interpretation is on the basis of the plain and ordinary meaning of the various provisions we have discussed.

Is r 12.5.7 atypical of rules for the control of development in a CBD?

[73] The appellants characterise r 12.5.7 as a "de facto Designation" in the sense of "imposing a public accessway and a restriction on the right of the developer to deny access through its property". Messrs Todd and Gresson observe that the more conventional approach would be to secure such arrangements through procurement of an easement or by use of the RMA's designation powers. They characterise QLDC's choice of approach as one that seeks to avoid its compensation responsibility.[41] In the

[41] Opening submissions for the appellants, at [31].

terms so described, counsel submit that r 12.5.7 stands in contrast to rules that may govern building height or coverage or protect viewshafts.[42]

[74] Mr Whittington submits that analysis significantly overstates the true effect of r 12.5.7 and is in any case invalid. He points out that r 12.5.7 only comes into play when a landowner decides to seek consent for a new building or redevelopment. Even then, it allows scope to seek a restricted discretionary activity consent so as to avoid having to provide for an Identified Link. Mr Whittington submits that the position is analogous to *Waitakere City Council v Estate Homes Ltd,*[43] where the Supreme Court rejected an argument that there was a "taking" of land in circumstances where the developer had a choice as to whether to develop its land on the conditions required by the Council.[44] Mr Whittington submits that r 12.5.7 is not materially different from rules on matters such as height limits or setbacks. Rather, it is simply a rule that serves to achieve settled objectives and policies and meet the RMA purpose.[45]

[75] District plan rules for CBDs typically impose a range of significant controls on building development so as to provide for urban design and other public realm values. Common examples include height limits, building set-backs, design controls and viewshaft protection controls. Commonly such rules would target individual properties. That is also the case for rules for the protection of heritage or landscape values.

[76] However, in one key respect r 12.5.7 stands apart from such rules. That is in its specific purpose of imposing controls over private land in order to secure rights of public usage of that land. That is crystallised by its scheduling of identified properties, Fig 1 and standard 12.5.7.4, added by the DV, as follows:

> In all cases, lanes and links shall be open to the public during all retailing hours.

[77] On its face, that performance standard would appear to intrude into statutory and common law on property rights and trespass. As the cross-examination of Mr Church

---

42 Opening submissions for the appellants, at [30] – [34], closing submissions for the appellants, at [7] – [10].

43 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; [2007] 2 NZLR 149.

44 Referring to *Estate Homes*, at [46], and [51] – [52]. Acknowledging that *Estate Homes* was concerned with a resource consent application, not a proposed rule, Mr Whittington refers to observations in the Environment Court decision of *Golf (2012) Ltd v Thames-Coromandel District Council* [2019] NZEnvC 112 at [111] to the effect that *Estate Homes* "sets out fundamental principles applicable also in the comparable case of imposition of controls in a district plan".

45 Closing submissions for QLDC, at [3.1] – [3.5].

reveals, there may be related implications for how competing interests of retail tenants (e.g. advertising and/or selling stock) and of unobstructed pedestrian thoroughfare are managed. It would at least be necessary for a consent authority to exercise due caution in applying r 12.5.7.4 in the imposition of related consent conditions to ensure they were intra vires.

The Status Quo and Full Relief Options

Mr Freeman

[78] Mr Freeman considers the Full Relief Option is the most appropriate for achieving related objectives.

[79] He considers that the additional prescription of r 12.5.7 would not be effective in ensuring that a Link is vibrant and attractive and, hence, successful. He comments that r 12.5.7 "does not provide … control over the internal activation of a pedestrian link". Rather, he says such matters are driven by the choices that the building owner would make as to tenancies. While those choices could achieve an interesting varied experience, they could not be forced by a rule.[46]

[80] Mr Freeman considers that r 12.5.7 imposes inequitable and unwarranted restrictions on targeted properties, in order to secure public benefits, and on a basis that does not provide fair compensation to the landowner. By 'compensation', he means suitable compensatory planning incentives for the imposition of a Link. He criticises the fact that r 12.5.7 provides an additional building height incentive only for uncovered Links. He characterises the incentives that are potentially available for covered links (off-setting development contributions and car parking requirements) as providing "little or no incentives".[47]

Ms Jones

[81] Ms Jones considers the Status Quo Option is the most appropriate. She considers that the inclusion of Link 5 in Fig 1:[48]

46 Mr Freeman, statement of evidence, at [7.49].
47 Mr Freeman, statement of evidence, at [3.8].
48 Ms Jones, rebuttal evidence, at [3.7].

> … does not add significantly to the scale, cost, or uncertainty of the consent process that will need to be undertaken for any redevelopment.

[82] By way of example, Ms Jones referred to the Skyline Arcade site. She pointed out that a number of consents would be required for its redevelopment (beyond internal alterations). She noted that this would be "regardless of the identification of the pedestrian link" (i.e. in Fig 1 to r 12.5.7). That is by reason of the site's "sensitive nature … (being within the Special Character Area, a heritage precinct, and on the north side a pedestrianised mall)".

The Partial Relief Option

[83] As we have noted, the 14 February JWS was filed in response to the court's 31 January Minute and prior to closing submissions. The Minute sought further assistance on how to reframe r 12.5.7 to give flexibility, offering a preliminary view that this should be "generally along the following lines":

> (a) r 12.5.7.1 would be amended to not apply to the appellants' properties in issue in the appeal and not refer to Links 5 or 6;
>
> (b) the new RDA rule (say 12.5.7.1A) would apply to the appellants' properties (and, potentially, other relevant properties subject to scope considerations);
>
> (c) for the Mall – Cow Lane sector, the new rule would be to the effect that for any consent for a development or redevelopment of the specified properties (including Skyline and any others considered relevant), in the event that a ground level pedestrian link is not proposed or provided within a band to be shown on a new related Ch 12 Figure, then the adverse effects of not providing that link on the pedestrian environment, legibility, and Town Centre character are to be matters of discretion for RDA consideration;
>
> (d) for the Cow Lane – Beach Street sector, the new rule would be to the effect that for any consent for a development or redevelopment of the specified properties (including Stratton House and any others considered relevant), in the event that a ground level pedestrian link, that is suitable in traffic and urban design terms, is not proposed or provided within a band to be shown on a new related Ch 12 Figure, then the adverse effects of not providing that link on the pedestrian environment, legibility, and Town Centre character are to be matters of discretion for RDA consideration.

[84] The planners agreed on some elements of how any revision to r 12.5.7 could be approached, namely:

> (a) a bespoke set of standards would be added so as to specify the regimes for the appellants' sites;

(b) these would confer more flexibility as to where Link 5 and Link 6 could be located than is presently provided under r 12.5.7. Maps would be added to this end, indicating the area of and beyond each appellant's site where a Link might be suitably located. However, a rider to that flexibility would be a specification limiting how far any replacement Link could be offset from a related existing one (e.g. from Link 4). Although the planners express this in slightly different ways, both generally agree that it should be a maximum offset of 15m (centre to centre).

[85] For the Stratton House site, the planners contemplate a broadly similar regime for a scenario where present Link 5 is sought to be relinquished:

(a) Mr Freeman would allow for removal of the existing pedestrian thoroughfare through the Stratton House site provided that a public access easement in favour of QLDC is offered "for the undeveloped portion of the site that adjoins" Link 4;

(b) Ms Jones would also specify provision of a public access easement in favour of QLDC. However, she would also require "a streetscape upgrade plan for Pedestrian Link 4 and the adjoining easement area", "redesign of the building façade fronting ... Link 4 including the removal of the fire exit and external stairwell and the provision of an active frontage", and "an assessment of the effects on the safety and efficiency of traffic movements on Cow Lane and the safety of pedestrians using a widened ... Link 4".

[86] For the Skyline site and identified neighbouring sites (together referred to as 'South Cow Lane'):

(a) Mr Freeman would recommend use of s293 to require any new building or redevelopment to "provide at a minimum a ground level covered pedestrian link or lane" in accordance with the dimensions contained in r 12.5.7.3(b) and on the basis that the "covered pedestrian link or lane shall not be offset by more than 15m (centre to centre) from the Pedestrian Link 4 as contained in Figure 1";

(b) Ms Jones would recommend an approach that avoided s293 by leaving it to Skyline to make its own arrangements in order to secure an outcome that would reposition Link 5 to a site other than Skyline Arcade.

[87] We accept that the planners approached this assigned task as independent expert witnesses, to assist the court as directed, and on a basis that does not represent any change of opinion on their part. Furthermore, the 14 February JWS sits independently from the positions of the respective parties.

Other matters raised in submissions

[88] We have already traversed submissions on various matters. We now discuss the remainder.

Appellants

[89] Messrs Todd and Gresson submit that there would be substantial costs for each appellant with the Status Quo Option and no guarantee that QLDC would provide any "financial relief". In particular, they note Ms Jones' answers in cross-examination to the effect that she did not consider the appellants would "receive any compensation in terms of either a credit against Development Contributions or through the provisions of the Plan in terms of additional height". They also report that subsequent inquiries of counsel for QLDC did not provide any confirmation that QLDC would provide such "compensation".[49]

[90] Messrs Todd and Gresson refer to observations by Mr Church as to the importance of Links being "invested in and well-managed" and "strongly curated". Counsel submit that "if a landowner is not willing to invest in" these Links, and QLDC is not willing to compensate for them "the Council cannot seek to force the hand of the developer through the imposition of District Plan rules".[50] In any case, counsel submit that r 12.5.7 does not serve any valid purpose in terms of securing benefits.

[91] The appellants do not support Mr Freeman's Partial Relief Option (i.e. particularly its use of s293 to amend r 12.5.7). Rather, counsel submit that a use of s293 would be to clarify that r 12.4.6 confers discretion to impose a link "where appropriate over any property in the zone".[51]

49 Closing submissions for the appellants, at [11] – [15].
50 Opening submissions for the appellants, at [30] – [34].
51 Closing submissions for the appellants, at [33].

QLDC

[92] In support of the Status Quo Option, Mr Whittington submits that Mr Church's opinion on the benefits of Links 5 and 6 should be preferred. In particular, counsel notes Mr Church's firm opinion that Link 4 and 5 are complementary, rather than duplicative. As for Link 6, Mr Whittington points out the lack of other present options for the Cow Lane/the Mall section of the network.[52]

[93] Mr Whittington records that QLDC "accepts that providing a pedestrian link on the Appellants' properties on redevelopment will result in an economic cost to the owners". However, he submits that this is "outweighed by the significant wider environmental, social and economic benefits that will arise from the provision of pedestrian links on the sites". In addition, counsel submits that it is relevant that both Links 5 and 6 were, at some stage, voluntarily provided. In that sense, Mr Whittington submits that r 12.5.7 simply allows the existing environment to be maintained.[53]

[94] Counsel also clarifies how QLDC exercises its discretion in regard to any development contributions credits, as follows:[54]

> As noted in the Appellants' closing submissions as well as in the Court's Minute there was uncertainty about whether or not a development contribution credit is available where a pedestrian link (either covered or uncovered) is provided over private land and an easement in favour of the Council granted. Counsel has discussed this issue with the Council's Senior Development Contributions Officer. Public walkways with right of way easements in favour of the Council do not attract a development contribution credit. This is set out at footnote 3 on page 210 of the Council's Development Contribution Policy.[55]
>
> The Council of course accepts that the Council's particular development contributions policy may be considered by the Court as part of the overall picture of what is the most appropriate provision. However, given the purpose of development contributions in s 197AA of the Local Government Act is to enable territorial authorities to recover a fair, equitable, and proportionate portion of the total cost of capital expenditure necessary to service growth over the long term, the lack of relief for internal walkways open to the public is not particularly significant within the overall assessment the Court needs to undertake. And if it is considered significant, then so too must be the other relief in the form of incentives contained in the PDP for providing pedestrian links – namely exceedances of discretionary height limits available

---

52 Opening submissions for QLDC, at [4.4] – [4.9].
53 Opening submissions for QLDC, at [3.8], [3.9].
54 Closing submissions for QLDC, at [3.6], [3.7].
55 Closing submissions attaching extracts from QLDC's development contributions policy.

to both of the Appellants.[56] In this respect, the Appellants' closing submissions at paragraph 12 are incorrect. At no point under cross-examination did Ms Jones suggest that the Appellants would not be able to utilise the provisions of the PDP in terms of additional height.[57] Of course, whether or not relief in respect of additional height is appropriate will depend upon the particular development (ie, it is not guaranteed).

[95] Finally, subject to noting QLDC's clear first preference for the Status Quo Option, Mr Whittington submits that Ms Jones' Partial Relief Option is superior to that recommended in the 14 February JWS by Mr Freeman. That is particularly in the sense that Ms Jones' Option does not trigger any need for a s293 direction. Furthermore, Mr Whittington submits that it would be inappropriate to take up the appellants' suggestion to use s293 to amend r 12.4.6 to "require pedestrian links for all developments".[58] That is particularly in view of the fact that the proposition is advanced by only two landowners, is not supported by QLDC, and it would result in a substantial change to the intended approach of the review, and it would potentially impact upon all CBD landowners, several of whom are not involved in the appeal proceedings.[59]

Discussion

Is a s293 direction appropriate?

[96] In all the circumstances, we find that it is neither necessary nor appropriate to make a s293 direction. Primarily, that is because we find the Full Relief Option is the most appropriate for each appeal. In any case, we concur with the reasons offered by Mr Whittington in his closing submissions. Furthermore, we note that the appellants closing submissions on this point are not supported by the evidence. Specifically, those submissions advocate for a s293 direction for an amendment to r 12.4.6, whereas Mr Freeman's recommendation was to use s293 to amend r 12.5.7.

[97] Therefore, our evaluation of the Partial Relief Option is that version recommended by Ms Jones in the 14 February JWS (albeit subject to her primary preference for the Status Quo Option).

---

56 Referring to Ms Jones' rebuttal evidence, at [3.21] – [3.32].

57 Recording that the appellants did not provide "a pinpoint as to where this is alleged to have been conceded".

58 Closing submissions for QLDC, at [1.1](b).

59 Closing submissions for QLDC, at [5.1] – [5.6].

Evaluation of Options for Stratton House

[98] For several reasons, we find the most appropriate Option for Stratton House is overwhelmingly the Full Relief Option.

[99] We prefer Mr Freeman's evidence in finding Link 5 does not offer sufficient benefit to warrant being retained in r 12.5.7. Related to that, we find that neither the Status Quo Option nor the Partial Relief Option would assist to achieve the relevant objectives and policies. That is in contrast to the effectiveness of the Full Relief Option in those terms.

[100] We acknowledge Mr Church's experience as an urban design expert. However, on this occasion, we find his opinions on Link 5 somewhat conclusory. Those opinions were not supported by user survey or other data, even though he acknowledged such empirical foundation evidence would have been helpful. We find this gap in underpinning evidence fundamental. Our site visits tended to confirm Mr Freeman's position that Link 5 is unpopular and unattractive. We were left with a strong impression of a sterile thoroughfare, lacking in the vibrancy of adjacent activity and almost devoid of pedestrians. By contrast, our site visits confirmed the soundness of Mr Freeman's opinion that Link 4 presently functions satisfactorily as a pedestrian lane. While it must also cater for vehicles (e.g. accessing the Casino car park), that does not presently disqualify it as an Identified Pedestrian Link. In any case, its pedestrian and traffic design is readily capable of being improved. While it presently has a utilitarian service lane character, it is an open lane with significant potential for enhancement. That includes a cross-section well in excess of what r 12.5.7 specifies. That generous cross-section allows ample potential for a highly successful enlivening of the edge of Link 4, with any significant redevelopment of the Stratton House site.

[101] We agree with Mr Freeman that a covered lane such as Link 5 has far less potential for enlivenment so as to improve its present lack of quality and contribute to enhancement of the network as the policies intend.

[102] Hence, we do not accept Mr Church's opinion that Link 4 is "more utilitarian with much lower amenity".

[103] Furthermore, Link 5 is separated from Link 4 by some 15 – 17 m or a few walking

seconds.[60] As such, we consider any benefit it offers in terms of route choice is marginal at best. We acknowledge that Link 5 offers shelter that Link 4 does not provide. However, uncovered lanes are recognised as appropriate and are indeed encouraged by the objectives and policies and related restricted discretionary matters in r 12.4.6.

[104] For those reasons, we find that retention of Link 5 is not required in order to achieve an outcome that would be in keeping with Objectives 12.2.2 and 12.2.4, Policies 12.2.2.9, 12.2.4.2, 12.2.2.9 and r 12.4.6.h. Furthermore, we find that retaining Link 5 in Fig 1 could impede achievement and implementation of relevant objectives and policies. That is in the sense that, in circumstances where resource consent for a significant redevelopment of the Stratton House site was being considered, having both Links 5 and 6 as Identified Pedestrian Links could unhelpfully divert focus from the value of enhancing Link 4 and achieving an enlivened edge of any new or redeveloped building with Link 4. If Link 5 is removed, there would be ample capacity to achieve those urban design improvements on the status quo so as to better achieve relevant objectives and policies.

[105] In view of those findings, we also find that the Status Quo Option would impose substantial and unreasonable costs and uncertainties. That is by unjustifiably sterilising development potential in the site. Given that Stratton House is a large central commercial site, those costs are both for the landowner and the community at large.

[106] Those findings as to benefits and costs are also applicable to the Partial Relief Option. We add that QLDC's suggestion that a Partial Relief Option should include additional standards pertaining to an easement, streetscape treatment, redesign of the building façade fronting Pedestrian Link 4, and traffic design for the usage of Link 4 are entirely inappropriate. While we were informed that QLDC has no present intention to provide funding for any upgrade to Link 4, that does not in any way justify redirecting the financial burden of an upgrade to an adjacent property owner. In any case, we find that even Mr Freeman's Partial Relief Option would be inappropriate, given the lack of sufficient benefits in Link 5 to justify what would remain a significant cost to a developer of the Stratton House site.

[107] Therefore, we direct that Link 5 be removed from Fig 1 in Ch 12.

[60] We note this is a few metres more than Mr Freeman indicated and presume he would not have measured centre-line to centre-line.

Evaluation of Options for Skyline site

[108] Similarly, we find the most appropriate Option for Skyline Arcade is the Full Relief Option.

[109] An obvious point of difference is that Skyline Arcade currently presents the only mid-block pedestrian link between Cow Lane and the Mall. Given that this is at the commercial and retail heart of the Town Centre, it is clearly important to secure at least one suitable and well-located Link. However, for several reasons, we find that the Full Relief Option is the most appropriate for achieving that.

[110] In our 31 January Minute, we made the following preliminary observations which we find remain pertinent to our consideration of Options:[61]

> ... the positioning of Link 7 would indicate flexibility to go beyond the Skyline site westward and still maintain suitable functionality and legibility for a connection between the Mall and Cow Lane. Looking eastward, there may also be some repositioning flexibility beyond the Skyline site, although acknowledging the importance of a legible relationship of the north-south links between the Mall, Cow Lane and Beach Street.
>
> As a further illustration of these matters, we refer the planners to Fig 19 of Mr Church's evidence.

[111] While Skyline Arcade is a long-established pedestrian thoroughfare between Cow Lane and the Mall, it is not inherently superior in those terms. Rather, the small size and shape of this site mean that provision of a Link would remove some 24% of Net Lettable Area on the ground floor, under any redevelopment scenario. Any Link would likely remain a dominant central presence on the ground floor. That is because options for repositioning a Link on this site would be limited, given the minimum dimension required by r 12.5.7. Additionally, the small size and shape of the site would present significant challenges in securing tenancies that would achieve a vibrant edge to a Link. A lack of vibrancy would detract for the quality of any Link.

[112] Under a scenario where redevelopment of the Skyline Arcade occurs at a time where the only available mid-block Link between Cow Lane and the Mall was Skyline Arcade, there is ample capacity in r 12.4.6 itself to ensure an outcome that maintains that

[61] 31 January Minute, at [21], [22].

Link. That outcome would not have to rely on Skyline Arcade being an Identified Pedestrian Link in Fig 1 to r 12.5.7. That is because r 12.4.6 itself would allow ample discretion to either decline consent to a proposal that would extinguish and not adequately replace the present walkway or to grant consent to a proposal that would provide a suitable replacement walkway.

[113] Under a scenario where, prior to redevelopment of the Skyline Arcade, consent is sought for a new building or redevelopment of a neighbouring site, the Full Relief Option would also be superior. That is, it would best enable an optimal outcome for the Cow Lane / Mall sector. That is in terms of both the location and quality of a mid-block Link. That is because, in circumstances where the existing Skyline Arcade is not an Identified Pedestrian Link in r 12.5.7, it would not be assumed to be a necessarily preferable location for a Cow Lane / Mall sector Link. A consent authority would be left with greater capacity to consider a proposal on the basis of what would best maintain and enhance the pedestrian links' network. Development proponents would need to approach matters similarly.

[114] As such, we find that the Full Relief Option would not add any material risk to the realisation of a suitable mid-block Link between Cow Lane and the Mall, but would materially enhance the prospects of securing a quality Link and overall urban design outcome. As such, it would better achieve the objectives and policies.

[115] We find the Full Relief Option is also the most appropriate from a costs' perspective.

[116] Firstly, that is because of the significant costs (including capital value loss of some $1.9M – 2.175M) and consenting risks it would impose on a developer of the Skyline Arcade. On the evidence, we find that there is no reliable assurance that those costs would be materially offset by development levies and car parking concessions (or, for that matter, any height limit concessions). We agree with Mr Freeman that the Status Quo Option would make it a challenging exercise to consent a redevelopment of the site, unless that redevelopment would retain a Link. That is particularly given that the Status Quo Option would treat Link 5 as the only Identified Pedestrian Link between Cow Lane and the Mall.

[117] While we accept that those costs and risks could still be incurred under the Full Relief Option, there is materially less risk that they would be. Rather, the Full Relief

Option would provide a greater degree of equity in terms of how the costs of providing a Link could be allocated between the owners of potential development sites in the Cow Lane/Mall sector. That is because, without any assumption being made by the Plan of Link 5 being provided through the Skyline site, each such owner would face the prospect that their consent may not be forthcoming unless provision was made for a suitable Link from Cow Lane to the Mall.

[118] We do not accept that there is any sound basis for finding that Skyline ought to bear the risk of providing a Link simply because of the long history of usage of Skyline Arcade. In essence, the evidence on that history is equivocal. It is reasonably safe to infer that the existing thoroughfare was provided and continues willingly. However, that is not backed by provision of any easement or other legal instrument conferring a public right-of-way. Nor did we receive evidence that Skyline is obliged to allow the public to continue to use Skyline Arcade as a walkway under any resource consent condition. We infer that there is no legal constraint at present on Skyline's rights to manage any issues of trespass, insofar as Skyline considered that appropriate. While QLDC has requiring authority status, it has not elected to secure any public access rights via its designation and Public Works Act 1981 powers.

[119] Rather, we find the Status Quo Option is inequitable. That inequity is also inefficient in that it impedes the capacity to cost-effectively achieve the most appropriate Link between Cow Lane and the Mall.

[120] Turning to the Partial Relief Option, it would be somewhat better than the Status Quo Option in the sense that it would widen the area identified for a suitable Link beyond the Skyline site. However, it would nevertheless sheet home to Skyline the responsibility for securing that Link. In those costs and equity terms, the Partial Relief Option is not materially different from the Status Quo Option. In terms of benefits, it is similarly inferior to the Full Relief Option in that it would be significantly biased in favour of retaining the status quo rather than enabling a more optimal outcome.

[121] Therefore, we direct that Link 6 be removed from Fig 1 in Ch 12.

Other matters

[122] We note that the consensus between the planners in the 14 February JWS is that an offset between connecting links should be in the order of 15m. We understand the

planners see this as important for maintaining legibility. We make the observation that QLDC has capacity, as road controlling authority, to further enhance legibility by simple techniques such as signage. We were surprised to find very little such signage on our site visits. Furthermore, we consider there would be capacity for matters such as offsetting and/or signage to be considered by consent authorities considering development or redevelopment proposals without any need for further clarification of the Plan.

[123] Ms Jones recommends some changes to r 12.5.7. One of these is to delete 12.5.7.2. We do not accept that this provision is redundant or that it was carried forward without due consideration. As Report 11 makes clear, the Commissioners made their recommendations having heard submissions. Furthermore, it is apparent from Report 11 that officers recommended that 12.5.7.2 be amended, not deleted. We agree that 12.5.7.2 is not in the nature of a true standard. Rather, on its face, it is more a matter to which discretion is restricted. However, we observe other drafting difficulties with r 12.5.7. We have already recorded our reservations concerning whether 12.5.7.4 (added by the DV) could result in ultra vires resource consent conditions. More broadly, it is questionable whether any of 12.5.7.1 – 12.5.7.4 is a standard (in the sense of something to be complied with) given that r 12.5.7 retains restricted discretionary activity classification for any application seeking to depart from those provisions. Furthermore, leaving aside consideration of the wider merits or otherwise of r 12.5.7, it would seem tidier in drafting terms to address all relevant matters in one restricted discretionary activity rule. For example, it is conceivable that this could be achieved by replacing r 12.5.7 with an amended r 12.4.6. That would be in essence to add 'provision of Pedestrian Links and Lanes' as a further restricted discretionary activity, specify related standards (with drafting corrected), and specify any related supplementary matters to which discretion is restricted where those standards are breached.

[124] However, the focus of the evidence has been on Links 5 and 6. Given that, it would not be appropriate to make any further changes to r 12.5.7 in this decision. Rather, it is for QLDC to consider what, if any, initiative it may take by way of variation.

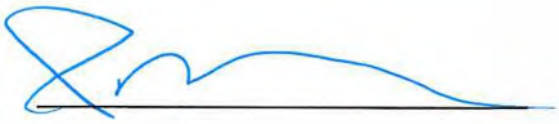
Conclusions

[125] Therefore:

(a) the appeals are allowed and QLDC is directed to update the Plan by deleting references to Links 5 and 6 from Fig 1 in Ch 12;

(b) costs are reserved on the basis that any party seeking costs must file a memorandum proposing a timetable, within ten working days, following which timetable directions will be made.

For the court:



J J M Hassan

Environment Judge

Annexure 1

Relevant Ch 12 objectives and related policies

(some extracts quoted in part)

12.2.1 A Town Centre that remains relevant to residents and visitors alike and continues to be the District's principal mixed use centre of retail, commercial, administrative, entertainment, cultural, and tourism activity.

12.2.2 Development that achieves high quality urban design outcomes and contributes to the town's character, heritage values and sense of place.

12.2.3 An increasingly vibrant Town Centre that continues to prosper while maintaining a reasonable level of residential amenity within and beyond the Town Centre Zone.

12.2.4 A compact Town Centre that is safe and easily accessible for both visitors and residents.

12.2.1.1 Enable intensification within the Town Centre through:

a. enabling sites to be entirely covered with built form other than in the Town Centre Transition Sub-Zone and in relation to comprehensive developments provided identified pedestrian links are retained; and

...

12.2.2.1 Require development in the Special Character Area to be consistent with the design outcomes sought by the Queenstown Town Centre Design Guidelines 2015.

12.2.2.2 Require development to:

...

b. contribute to the quality of streets and other public spaces and people's enjoyment of those places; and

c. positively respond to the Town Centre's character and contribute to the town's 'sense of place'.

12.2.2.4 Allow buildings to exceed the discretionary height standards in situations where:

...

b. the cumulative effect of the additional height does not result in additional shading that will progressively degrade the pedestrian environment or enjoyment of public spaces, while accepting that

individual developments may increase the shading of public pedestrian space to a small extent provided this is offset or compensated for by the provision of additional public space or a pedestrian link within the site; and

...

12.2.2.6 Ensure that development within the Special Character Area reflects the general historic subdivision layout and protects and enhances the historic heritage values that contribute to the scale, proportion, character and image of the Town Centre.

12.2.2.9 Require high quality comprehensive developments within the Town Centre Transition Sub-Zone and on large sites elsewhere in the Town Centre, which provides primarily for pedestrian links and lanes, open spaces, outdoor dining, and well planned storage and loading/ servicing areas within the development.

12.2.3.6 Recognise the important contribution that sunny open spaces, footpaths, and pedestrian spaces makes to the vibrancy and economic prosperity of the Town Centre.

12.2.4.1 Encourage a reduction in the dominance of vehicles within the Town Centre and a shift in priority toward providing for public transport and providing safe and pleasant pedestrian and cycle access to and though the Town Centre.

12.2.4.2 Ensure that the Town Centre remains compact, accessible and easily walkable by avoiding outward expansion of the Town Centre Zone. Encourage walking to and within the Town Centre by improving the quality of the pedestrian experience by:

a. maintaining and enhancing the existing network of pedestrian linkages and ensuring these are of a high quality;

b. requiring new pedestrian linkages in appropriate locations when redevelopment occurs;

...

e. promoting and encouraging the maintenance and creation of uncovered pedestrian links and lanes wherever possible, in recognition that these are a key feature of Queenstown character;

...

g. ensuring the cumulative effect of buildings does not result in additional shading that will progressively degrade the pedestrian environment or enjoyment of public spaces, while accepting that individual developments may increase the shading of public pedestrian space to a small extent provided this is offset or compensated for by the provision of additional public space or a pedestrian link within the site.